UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMPREHENSIVE POST-ACUTE NETWORK, LTD.

and **Case 09–CA–213162**

CHARLETTE VICOLE SMITH, AN INDIVIDUAL

Linda B. Finch, Esq.
for the General Counsel.
David A. Shearer, Esq. and *Joseph J. Carroll, Esq.*
for the Respondent.

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. The hearing in this matter occurred on August 1, 2018, in Cincinnati, Ohio. The amended complaint alleges that Comprehensive Post-Acute Network, Ltd. (Respondent) threatened Charlette Vicole Smith with discharge, suspended her, transferred her to a different position and assigned her tasks not previously required of others in that position, and eventually discharged her, all because she threatened to go to the National Labor Relations Board (Board) over a dispute about her paid time off. Respondent denies the alleged threats and asserts it suspended Smith for impliedly threatening her supervisor and the chief executive officer during a meeting; it then reassigned her to a different job and required her to maintain productivity standards and logs, in part, because she was not completing her assigned work in a timely manner; and it later discharged her for insubordination during a verbal confrontation with her supervisor regarding her attendance.

This case rests primarily on witness credibility, and I conclude that the credible evidence is insufficient to establish the alleged violations. I, therefore, recommend that the complaint be dismissed in its entirety.

II. STATEMENT OF THE CASE

Smith filed the present unfair labor practice charge on January 17, 2018,[2] and later amended the charge on January 24, and again on March 20. On April 25, the General Counsel, through the Regional Director for Region 9 of the Board, issued a complaint alleging Respondent committed the above unfair labor practices, in violation of Sections 8(a)(1) and (4) of the National Labor Relations Act (Act). On May 8, Respondent filed its answer to the

[1] Abbreviations in this decision are: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "G.C. Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibits.
[2] All dates occur in 2018, unless otherwise specified.

complaint. On May 22, the Regional Director issued an amendment to the complaint, and on May 24, issued an erratum to that amendment to the complaint. On July 25, Respondent filed its answer to the amendment to the complaint. Respondent's answer denies the alleged violations and raises various affirmative defenses.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and the General Counsel filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommendations:

III. FINDINGS OF FACT[3]

A. Jurisdiction

Respondent has been a limited liability company, with an office and place of business in West Chester, Ohio, where it has been engaged in the business of providing case management services to nursing facilities. Respondent 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. During the 12-month period ending April 1, 2018, Respondent, in conducting its operations, purchased and received at its place of business, goods valued in excess of $50,000 from points outside the State of Ohio. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I, therefore, find this dispute affects commerce and the Board has jurisdiction, pursuant to Section 10(a) of the Act.

B. Alleged Unfair Labor Practices

1. Background

On March 28, 2016, Charlette Vicole Smith began working for Respondent as a full-time Network Coordinator Assistant/Final Biller. Her primary duties included communicating with nursing care facilities, gathering information for billing, and entering that information into Respondent's electronic patient care information system (referred to as "Patient Care"). She worked Monday through Friday, from 8:30 a.m. to 5 p.m. Smith's immediate supervisor was Director of Network Services Kimberlie Davis.

As a regular full-time employee, Smith received 64 hours of paid time off (PTO) per year. PTO is earned quarterly in 16-hour increments. According to the employee handbook, whenever an employee is tardy or absent from work, except for holidays, vacation, jury duty, or bereavement leave, Respondent will automatically deduct and pay accrued PTO from the

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief.

employee's account for the missed time.[4] An unusual aspect of Respondent's policy is that PTO is deducted and paid out in a minimum of 4-hour increments, regardless of the amount of time the employee is actually tardy or absent from work. (R. Exh. 2, p. 10). To illustrate, if an employee calls in and reports to work 3 hours late for an 8-hour shift, he/she will receive 5 hours of regular pay for the time worked, plus the 4 hours of accrued PTO pay, even though he/she only missed 3 hours. Also, an employee need not request, and cannot decline, PTO pay.

In 2017, Smith was late or absent from work multiple times.[5] On August 30, 2017, Smith left work early because of illness. She called off work entirely on August 31 and September 1, and, on September 5, she called in prior to her shift to report that she was going to be late. Smith was not paid for September 1, because she had no accrued PTO left in her account. Respondent, however, paid Smith 4 hours of PTO for her late arrival on September 5, which was in error because, as stated, Smith had no accrued PTO left in her account at the time.

On October 2, 2017, prior to the start of her shift, Smith called in that she was going to be late to work that day because she was purchasing a car. The purchasing process ran long and Smith did not report for work that day. She also did not notify Respondent that she would not be coming to work. The following day, Respondent issued Smith a verbal warning for her absence. Smith refused to sign the warning. (R. Exh. 1, p. 29). At the hearing, Smith testified she refused to sign the warning because it took longer than expected to purchase the car, and, under those circumstances, she did not think she should be written up for not coming to work and for not calling in to report that she was not coming to work. (Tr. 137–138).

On October 10, 2017, Director of Network Services Kimberlie Davis informed Smith she would not be paid for her October 2 absence, because she had no PTO left in her account. Smith disputed this, claiming she had just earned 16 hours of PTO at the end of September. The following day, Smith again spoke with Davis and again claimed she had accrued PTO to use for her absence. Davis prepared and gave Smith a handwritten list with each of the dates Smith had used PTO during the year. Davis also stated she overpaid Smith 4 hours of PTO when she was late to work on September 5.

While Davis and Smith were talking, Respondent's Chief Executive Officer Carol Ann Turni walked by and asked them what was going on. Davis informed Turni about the dispute. The three spoke briefly. Turni told Smith to check her paystubs and compare them against Davis's list, and then prepare a letter detailing any discrepancies. Smith agreed to do that.

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[4] Under the attendance policy, employees must notify their supervisor at least 1 hour before the start of their shift if they are going to be tardy or absent. An employee is considered tardy under the company's policy when he/she is more than 8 minutes late. The handbook also contains a progressive disciplinary process that applies when there is an absence or tardy. (R. Exh. 2, pgs. 7–8). Respondent need not follow the progressive disciplinary process when an employee is a no call/no show.

[5] In July 2016, Respondent issued Smith a verbal warning for leaving work early and later for failing to follow proper call-off procedures. (R. Exh. 1, pg. 27). Smith then spoke with coworkers. There is no specific evidence about what Smith said in her conversation(s), other than she referred to her PTO. The following day, Respondent issued Smith a written warning for violating Respondent's policies against "discussing inappropriate information," "spreading malicious gossip/rumors with others at work," and "disorderly immoral or indecent conduct including but not limited to dishonesty or providing false information." (R. Exh. 1, pg. 28). There are no allegations regarding this July 2016 discipline, and Counsel for General Counsel concedes in her post-hearing brief that any allegations would be untimely under Section 10(b) of the Act. Absent greater specificity, I do not see the relevance of this prior discipline or the circumstances surrounding it, and I have not considered either in making my decision.

That night, Smith went home and compared Davis's list against her paycheck stubs. Based on her review, Smith believed she had been doubly assessed 8 hours of PTO for January 20, 2017, and was charged 4 hours of PTO for arriving late to work on September 5, 2017, when she had no accrued PTO to use for that day. In total, Smith believed Respondent had incorrectly deducted 12 hours of PTO from her account.

2. October 12, 2017 meetings and alleged threat

On October 12, 2017, Smith, Davis and Turni met in Turni's office to discuss Smith's PTO concerns. Davis and Turni began by going through Smith's PTO usage, explaining the calculations on the handwritten list Davis prepared. Smith then pointed out the alleged discrepancies between the list and her paycheck stubs. The three discussed the matter at length, going through the calculations multiple times, but they could not reach an agreement. Smith then gathered her documents and said, "Well, we are [not] going to resolve this, so what I'm going to do is I'm just going to the labor board with it." (Tr. 55).[6] Turni said, "Charlette, you're entitled to speak with whomever you want to …That's your right…. [W]hat we need to do is just figure out … where you think the discrepancy is, and we will be happy to fix it if there's an error on our part." (Tr. 219). Smith then left and returned to her office.

Turni and Davis remained in Turni's office and spoke for a few minutes. Turni informed Davis that in order to keep the peace—particularly with the company's busy season coming up—she would agree to pay Smith 16 additional hours of PTO, and not seek repayment for the 4 hours Smith was overpaid for being late on September 5, 2017. At the hearing, Turni testified she made this decision to pay Smith the additional PTO after Smith threatened to go to the labor board. (Tr. 281). This exchange lasted a few minutes and then Davis went to get Smith.

Davis went into Smith's office and said, "Charlette, Carol would like to speak with you again." Smith said, "Okay." According to Smith, Davis said, "Well, don't be upset. We don't want you to quit. We're trying to straighten this out." Davis kind of nudged Smith's arm, and she got up and followed Davis back to Turni's office. (Tr. 56–57). When they reconvened in Turni's office, Turni said, "Charlette, even though I do not believe you are owed this money, this is what I'm going to do. I am going to go ahead and pay you for the October 2nd day and then I'm going to give you another PTO day." Smith responded, "You don't owe me two days." Turni said, "No. I'm going to give you the two days." Smith thanked Turni, got up, and returned to work. (Tr. 57–58).

3. November 2017 absence and use of PTO

One day in mid-November, Smith called prior to the start of her shift and left a message for Davis that she was going to be late to work that day. She eventually arrived 2 hours late for her shift. Smith was not disciplined for being late.

On around November 22, Smith received her biweekly paycheck stub and saw she had been paid 4 hours of PTO for the day she arrived 2 hours late in mid-November. For that day, she received 4 hours of PTO, plus 6 hours of regular pay, for a total of 10 hours. Smith later approached Davis and asked why she was paid 4 hours of PTO when she was only 2 hours late. Davis responded that was how the company does it; the company pays PTO in a minimum

[6] The transcript incorrectly states "got" as opposed to "not." That error is hereby corrected.

of 4-hour increments. Smith replied. "Well, Kim, I actually don't want to be paid for that at all, because I have a full PTO day left and I wanted to keep that intact." Davis again said that was how the company does it. That was the end of the conversation. (Tr. 61).

The following week, Smith asked Davis if she could take 2 hours off to make up for the 4 hours deducted from her PTO account when she was 2 hours late in mid-November. Davis told Smith that was not allowed under the company's PTO policy. Davis again informed Smith that 4 hours was the minimum amount of PTO that could be taken. Smith then asked Davis that if she was 15 minutes late for work one day, would she have 4 hours deducted from her PTO bank, and Davis responded that she would. Smith then walked away. There was no mention about going to the labor board. Smith later attempted to speak to Turni about this matter, but Turni was unavailable.

4. December 2017 communications

On December 13, 2017, Smith spoke with Davis about her PTO. Davis told Smith that she had discussed the matter with Turni, and Turni agreed to allow Smith to take the 2 hours off. (Tr. 67). Davis and Smith talked and they eventually agreed that Smith could take the 2 hours off the following day, December 14. On December 14, Smith left work 2 hours early.

On December 15, 2017, Smith went to Davis's office and said, "Well, Kim, I just came in here this morning to make sure that we're on the same page. You did allow me to take the two hours off, and I just wanted to make sure that it doesn't come out of my next paycheck." Davis responded that was not how it works, and that the company had already paid Smith for the time. Smith tried to explain that the day she was late, she worked 2 of the 4 hours she was required to use PTO, so she thought all they were doing was switching. Davis informed Smith that was not correct, and that is not what happened. After that, Smith left and returned to work. There was no mention about going to the labor board.

On December 19, 2017, at around 5 p.m., Smith was standing outside Respondent's facility when one of her coworkers, Karen Colvert, walked outside and saw her. Colvert asked Smith what she was doing since it was after work, and Smith said that she was there waiting for Davis. Smith then stated that, "I know that's your friend [referring to Davis], but I can't stand that bitch!" Smith also said that, "She better be glad that I don't want to lose my job today, because I want to whoop her stupid ass!" Smith added, "[S]he is fucking with my money, and I don't fuck around when it comes to my money." (Tr. 309; 313). The following day, Colvert reported this to Davis, and Davis asked Colvert to prepare a statement about what occurred. That same day, Colvert typed a statement and gave it to Davis. (Tr. 222–223). (R. Exh. 1, pg. 30).

Respondent also did not conduct any additional investigation about what Smith said to Colvert, and it did not take any action against Smith at the time.[7]

[7] Davis explained why she asked Colvert to prepare a statement, but then did not take any action against Smith at the time: "My main reason is because I felt like I needed to talk to Carol about it first …. The second thing was this is hearsay, and I wanted it as a statement if it was actually said to her, and I wanted record of it, that it was made and stated, but there was no particular reason. It was just around Christmas time, and we were busy, and I just wanted to make sure that I had record of this statement." (Tr. 223). Turni learned about Smith's statements to Colvert, but she could not recall when. Turni took no action at that point, because she "thought maybe [Smith] was blowing off steam." She thought Smith was upset and said something to somebody, and at that point, she just thought "it would pass." (Tr. 283).

On around December 20, 2017, Smith received her biweekly paycheck stub and saw that Davis had, in fact, deducted for the 2 hours she left early on December 14, 2017. Smith had worked overtime during the pay period in order to have extra money for the holidays. But, as a result of the deduction, Smith was paid for a total 79.5 hours, at regular pay, and no overtime pay. Smith went and confronted Davis. She said, “Kim, you weren’t supposed to take the two hours. You took my two hours, and that messed up any overtime that I had accrued for the week.” Davis did not respond. Smith then walked away. There was no mention of the labor board during this exchange.

Smith later emailed Turni and asked to speak with her about what happened. (G.C. Exh. 3). There was no reference about going to the labor board. Smith and Turni eventually agreed to discuss the matter after the holidays.

5. January 2, 2018 meetings, alleged threat, and suspension

On the morning of January 2, Smith, Turni, and Davis met in Turni’s office to discuss Smith’s PTO issue. Turni began by saying, "Charlette, we don't have to give PTO. This is something we give our employees, but we do not have to give it." Smith responded that if the company gives employees PTO, they should be able to use it if the company is going to deplete it from their PTO banks. Smith then claimed she was being treated unfairly, and that she never heard of anyone receiving 4 hours of PTO when they only took off 2 hours. Turni replied that this is the way the company does things, and it has to give PTO in 4-hour increments. Smith responded, "I really can't believe that you guys would give someone 4 hours of PTO if they only came in late 15 minutes." Turni and Davis answered, "Well, that's the way we do things." Davis then stood up to leave and grabbed her documents. Her face was red and she yelled, "Well, I don't know, but I know that if I come in late 15 minutes and you give me four hours of PTO, then we're going to see what happens.” (Tr. 286). Smith then left and returned to her own office.

Turni and Davis took Smith’s “we’re going to see what happens” as a threat. Davis, in particular, was concerned for her safety because of Smith’s earlier comments to Colvert about wanting to “whoop [Davis’s] stupid ass.” Turni made the decision at this time to suspend Smith for 3 days. Davis then left to retrieve Smith so Turni could inform her about the suspension.

About 3 to 5 minutes after the end of the first meeting, Davis returned with Smith to Turni’s office, and there was a second meeting. Turni began by telling Smith that she had just threatened them and she was being suspended for 3 days. Smith denied threatening anyone, telling Turni "You know that's not what I meant." (Tr. 299). Turni responded she did not know what someone means when someone says that, but she (Turni) was taking it seriously. (Tr. 300). I credit that during this conversation there was no mention of the labor board or Smith’s earlier threat about going to the labor board. After Smith was informed about her suspension, she left and headed back to her office to gather her belongings.[8] Turni and Davis followed her and then escorted her out of the building. Turni and Davis later deactivated Smith’s key fob [used to access Respondent’s office] through the control panel. At some point, Davis called her husband to have him pick her up after work because she was concerned about what Smith might do. (Tr. 228).

[8] Turni decided to suspend, as opposed to discharge, Smith for her threat in the hopes “[Smith] would go home, compose herself, gather herself, see what she did wrong, and come back to work.” (Tr. 290).

6. Reassignment of Smith's duties during suspension

During Smith's suspension, Davis temporarily reassigned her duties to Clara Eisnaugle. Eisnaugle learned Smith's job quickly and was able to perform all the tasks in short order. At the time Eisnaugle took over Smith's duties, there were stacks of files on the floor in Smith's office that needed to be processed, and some of those files were several months old. It is critical for Respondent's business to timely prepare and submit billing templates and information to insurance companies for payment. Eisnaugle completed all of Smith's work, including those delinquent files on the floor, in about a week.

Based on Eisnaugle's performance, and Respondent's need to have this billing work processed in a timely manner, Davis reassigned Eisnaugle to perform Smith's job permanently. Davis decided to reassign Smith to handle the pre-billing work for the patients covered under Humana insurance.

7. January 8, 2018 conversation, alleged threat, and reassignment of duties

Smith returned from her suspension on Monday, January 8. When she initially attempted to access the building, her key fob would not work. She eventually was able to enter the building, and she alerted Davis about her issue. Smith then went to her office and noticed her files had been moved around. At around 10:15 a.m., Davis came to Smith's office and asked her to come down to Turni's office. Smith accompanied Davis to Turni's office.

In this meeting, Turni warned Smith that if she engaged in any other insubordinate behavior, any yelling, anything inappropriate, she would be terminated. (Tr. 291). There was no mention of the labor board by anyone. Thereafter, Davis informed Smith she was no longer going to be handling billing.[9] She took Smith over to an area in Respondent's facility where the Humana patient files are stored. These files were for those patients who, after being discharged from the hospital, were moved to a nursing care facility. When those patients are later discharged from the nursing care facility, either to return to the hospital, go home, or they have died, Respondent must document the discharge date in order to prepare the documentation needed for billing. Davis explained to Smith that she was now going to be responsible for contacting the nursing care facilities for each of these Humana patients, getting their discharge date, and then logging that information so that the files could then be closed out (which would be handled by someone else). After Davis gave these instructions, Smith started pulling the files and taking them back to her office to begin making calls.[10]

Later that day, Davis sent Smith an email and a blank log form. In the email, Davis instructed Smith to call and log a minimum of 60 Humana patients per day. Smith also was to copy and prepare the files to be scanned, but she was not to print out a billing sheet for these patients. Davis also instructed Smith to ensure she accurately logs the information (on the

[9] There were no other changes to Smith's wages, hours, or terms of employment with this reassignment.

[10] Smith was never disciplined for her job performance, and Smith denied any issues regarding her productivity. Ronda Spears, one of Smith's coworkers, who was called by Counsel for General Counsel, credibly testified on redirect examination that there were several times Smith would refuse to do work. Smith would tell Spears, "I'm only doing this much today because I don't want to do anything else," and Spears told Smith, "You have to do what … Kim tells us to do." (Tr. 192). I have credited Spears' testimony about her personal observations and interactions with Smith, as she was a neutral witness who had a clear recollection of events.

paper log) and enters it into Patient Care, Respondent's electronic recordkeeping system. Davis stated the log would be used for "internal purposes." (G.C. Exh. 4).

The individuals who previously performed this Humana work performed other parts of the file closing/billing process, and they were not required by Respondent to complete and submit productivity logs. Davis decided to have Smith log her work because the discharge date needed to be documented in order to make sure another individual could close out the files, and she also wanted to monitor Smith's production because Davis discovered (after Eisnaugle took over Smith's job duties) that Smith was not meeting the expected productivity and timeliness standards. (Tr. 272–273).

The following day, Smith made 60 calls, but she was only able to verify discharge information for 42 of those patients. For the other 18 patients, Smith called and left messages, but she did not receive return calls from the nursing care facilities. Smith completed and submitted her log to Davis. The next day, Davis sent Smith an email noting that Smith had only completed 42 calls, and that she needed to complete calls and obtain the discharge information for 60 patients per day. She indicated that leaving messages was not enough. (G.C. Exh. 5).

8. January 15, 2018 conversation between Davis and Smith

That week, Smith worked from Monday, January 8 through Thursday, January 11. On Friday, January 12, Smith called off from work because of illness.

On Monday, January 15, when Smith returned to work, Davis went into Smith's office and handed her a written disciplinary warning for her absence the prior Friday. Smith asked Davis why she was receiving the warning, and Davis told her it was because she had called off. Smith asked why she was being disciplined for calling off when she (Smith) had accrued PTO to use to cover the absence. Smith also said she could not schedule being sick. Davis offered to show Smith where in the employee handbook it discussed discipline for absences, and Smith told Davis to go ahead and show her. The two then reviewed the handbook and disagreed about what the handbook said about absences and discipline when an employee had PTO to use. The disagreement escalated into a verbal disagreement. Smith raised her voice, began twisting her head, and pointing her finger at Davis as she continued to contest the discipline. As Smith refused to sign the warning, stating that she had already discussed it with her attorney. Smith did not clarify what she meant by this. Davis then turned and left Smith's office. There was no mention of the labor board.

Margaruitte "Marky" Williams, who shared the office with Smith, was present and partially witnessed this confrontation. She confirmed that as Smith became louder and more confrontational, Davis remained calm.

9. January 16, 2018 discharge

Turni was off on Monday, January 15, and she returned to work on Tuesday, January 16. Davis spoke to Turni regarding her confrontation with Smith. Turni then investigated the matter, including obtaining a statement from Marky Williams about what she observed.

After completing her investigation, Turni called Smith and Davis into her office. Turni reminded Smith that she had been warned that any further insubordinate behavior would result in discharge, and Smith had been rude and insubordinate to Davis the day before, and, as a

result, Respondent was terminating her employment. There was no mention of the labor board at any point during this meeting.

IV. WITNESS CREDIBILITY

Credibility resolutions are paramount to the outcome of this case. In assessing witness credibility, I have relied primarily on demeanor. I also have considered the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, and inherent probabilities and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2nd Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

In general, I find the testimony offered by Respondent's witnesses (Kimberlie Davis, Carol Ann Turni, Karen Colvert, Clara Eisnaugle, and Margaruitte "Marky" Williams) to be more credible than that offered by Smith. Each had an open and honest demeanor and testified in a clear, consistent, and straightforward manner. While there were minor inconsistencies or gaps in testimony, they largely corroborated one another when they addressed the same events or conversations. Most importantly, their testimony was inherently probable, logical, and consistent with admitted or established facts.

Smith, in contrast, had a guarded and defensive demeanor. Her recollection of disputed facts was often selective, uncorroborated, and generally unreliable, and her responses, while more detailed, were contrived and self-serving. Also, she denied, ignored, or was evasive concerning unfavorable evidence, including that from neutral witnesses, which I have credited.

There are certain key conflicts in testimony. The first conflict is over the initial October 12, 2017 conversation in which Smith threatened Turni and Davis about going to the labor board over her PTO issues. According to Smith, Turni responded to her threat by saying, "Charlette, I don't think that it's a good idea that you tell your CEO that you're going to go to the labor board because you could be terminated for that." (Tr. 56). Davis and Turni both deny Turni made this statement, and I credit their denials. In my findings of fact, I have credited Davis that Turni responded to Smith's threat by saying, "Charlette, you're entitled to speak with whomever you want to …That's your right…. [W]hat we need to do is just figure out … where you think the discrepancy is, and we will be happy to fix it if there's an error on our part." (Tr. 219). As stated, I found Davis to be a more credible witness with a more detailed and reliable recollection,[11] and her testimony was more logical and consistent with the overall context of the October 12 meetings and the subsequent actions taken. The purpose of the meeting was for Turni and Davis to listen and respond to Smith's questions and concerns regarding her PTO. Although they disagreed with Smith's calculations, their demonstrated goal was to resolve the conflict amicably. I find that remained the goal even after Smith threatened to go to the labor board. Smith acknowledges when Davis came to her office after the first October 12 meeting, she

[11] Turni corroborated Davis's recollection, stating she told Smith, "That's your decision to take it to the labor board. What we're doing here is talking about paid time off." (Tr. 281).

attempted to calm and reassure Smith, telling her "don't be upset," "[w]e don't want you to quit," and "we are trying to straighten this out." Such statements, which I credit, are inconsistent with Turni's alleged threat of discharge. Also inconsistent with the alleged threat was Turni's offer to pay Smith an extra 16 hours of PTO, which she made *after* Smith threatened to go to the labor board. Not only did Turni offer to pay Smith these additional 16 PTO hours, but she *insisted* on paying them, even though Smith claimed to only be owed 12 hours of PTO. I find it irreconcilable that Turni would threaten Smith that she could be discharged for threatening to go to the labor board, and then, moments later, insist on paying her an extra 16 hours of PTO. For these reasons, I credit that Turni did not tell Smith she could be discharged for threatening to go to the labor board.

The second conflict concerns Smith's interaction with Karen Colvert on around December 19, 2017, in which Smith told Colvert that she wanted to "whoop [Davis's] stupid ass" because '[s]he is fucking with my money, and I don't fuck around when it comes to my money." Smith denies these statements. In my findings of fact, I credit Colvert. She was a neutral witness who appeared honest and forthright. Her recollection was clear, detailed, and consistent with the typed statement she prepared the day after her exchange with Smith. Additionally, her testimony was logical and plausible under the circumstances. As of December 15, 2017, Smith knew Davis was going to reduce her pay for the 2 hours she took off the day before, and Smith was upset because she had worked overtime that pay period to have extra money for the holidays. It was with this backdrop that Colvert found Smith standing outside the facility, waiting for Davis, where Smith vented to Colvert about Davis reducing her paycheck.

Smith contends this December 19 conversation could not have happened because Smith did not obtain a copy of her paycheck stub until December 20. I reject this contention. Colvert never testified that Smith mentioned or referred to her actual paycheck. She simply said Smith complained that Davis was "fucking with [her] money." As stated, Smith knew as early as December 15, 2017 that Davis planned on reducing her pay for when she left two hours early the day before, and Smith strongly disagreed and voiced her opposition to Davis about this decision. Smith, therefore, already knew and was irritated about getting paid less than she thought she was owed. Smith also insinuated Colvert was biased because she and Davis were friends. I also reject this contention. Smith did not explain what she was relying upon to make this assertion, but I find Davis and Colvert credibly denied that they were friends. Regardless, I do not find Colvert would fabricate this entire exchange with Smith to assist Davis.

The third conflict concerns the second January 2 meeting, when Turni confronted Smith about her veiled "we're going to see what happens" threat.[12] Turni accused Smith of threatening

[12] At the hearing, Smith testified about the language she used--and why she deliberately chose not mention the labor board--during the first January 2 meeting. Smith explained, "when I first walked in there, I meant that I was going to call the labor board, because when I first spoke to Carol, when that incident happened back in [ ] October, she had already told me that if I told her … I was going to call the labor board, she was going to terminate me. So I was watching the words that I was actually using, so I didn't want to use Labor Board in that meeting because I was afraid she would terminate me that day." (Tr. 153-154). I do not credit this explanation. It is nonsensical that Smith would be afraid of mentioning the labor board in the first meeting, but then not afraid of mentioning it during the second meeting. Based on the record, I find Smith had no reluctance speaking her mind or fully articulating what her issues were in any of her other conversations with Davis and/or Turni, and I do not credit that changed during this first January 2 meeting. Furthermore, her threat about going to the labor board three months earlier resulted in her getting 16 additional PTO hours, so admittedly Smith had benefited from threatening to go to the labor board. Finally, I find it illogical that Smith chose not mention the labor board because she was

them, and Smith responded that she did not mean it that way. I have credited Turni that she told Smith that she did not know what someone means when someone says that, but she (Turni) was taking it seriously. Smith, in contrast, contends she told Turni, "No, Carol. I never threatened anybody. I just told you that I was going to go to the [labor board]. You and I have already had this discussion that I would go to the labor board." (Tr. 154). According to Smith, Turni then stood up out of her chair and said, "Charlette, I've told you the last time you came in here about coming in here threatening me to go to the labor board. I told you the last time I was going to terminate you. But I'm not going to terminate you. This is what I'm going to do. I'm going to suspend you. You're suspended for three days. Come back on Monday." Smith said, "Okay," and she left the office. (Tr. 81). Turni and Davis both denied these statements. They testified there was no mention of the labor board by anyone during these January 2 meetings, and I credit their testimony. Although Turni needed to review her pre-hearing affidavit in order to recall what was said after Turni accused Smith of threatening them, Turni's affidavit, which she provided closer in time, confirmed that Turni told Smith she did not know what Smith meant by her "see what happens" threat, but she (Turni) was taking it seriously.

Moreover, I credit Turni and Davis that Turni made the decision to suspend Smith at the end of the first January 2 meeting based on her veiled threat—particularly in light of Smith's earlier comments to Colvert about wanting to whoop Davis's ass—and that Turni recalled Smith to her office and advised her of the suspension at the start of the second January 2 meeting. As a result, even if I credited Smith that she attempted to clarify that she was again threatening to go to the labor board, Turni had already made and communicated her decision to suspend Smith. Therefore, there would be no plausible reason for Turni to indicate that the suspension was tied to anything other than Smith's "we're going to see what happens" threat. In short, I do not credit that Turni told Smith that she could be discharged for threatening to go to the labor board, or that Turni indicated she was suspending Smith because she threatened to go to the labor board.[13]

The fourth conflict concerns Smith's statements and conduct on January 15, when Davis presented her with a written warning for her absence the prior week. Smith denied that she raised her voice, made any physical gestures, or was insubordinate in any way during her exchange with Davis. I have credited Davis's testimony, because I find it to be more plausible, logical and reliable under the circumstances. Smith demonstrated in her earlier interactions with Davis that she gets frustrated and defensive in her tone and verbiage, and I find it inherently probable that she exhibited the same traits when Davis handed her the warning. Additionally, Davis's testimony is corroborated by Margaruitte "Marky" Williams. I found Williams to be a reliable neutral witness. Williams and Smith shared an office, and Williams was present during the confrontation between Smith and Davis. Williams was on a telephone call, and she credibly testified that she had to end the call because she could hear Smith's raised voice through her

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concerned that doing so would result in her discharge, but somehow thought vaguely threatening "we're going to see what happens" was a safer alternative.

[13] Although it is not material, there is a dispute about what exactly Turni said to Smith in Turni's office on January 8 when Smith returned to work from her suspension. On direct examination, Smith testified that Turni said, "Charlette, I don't want to hear another word from you. I better not hear another word from you. If you are insubordinate in any way, you will be terminated. This is your final warning. Do you understand me?" And Smith said, "Yes." (Tr. 88). On cross-examination, Smith's recollection changed slightly and she testified Turni said, "If you say anything, and I mean anything, I will terminate you." She said, "If you are insubordinate in any kind of way, I will terminate you. Do you understand?" (Tr. 173–174). I have credited Turni regarding what was said. Her recollection was consistent, corroborated by Davis, and it was more logical in the context and purpose of the meeting. (Tr. 245).

headset. Although Williams admitted she could not recall exactly what Smith and Davis were saying, she testified that Smith spoke with a raised voice, was waving her hands, and continued to argue with Davis, saying that she knew what her PTO time was. Williams observed that Davis remained calm throughout the interaction. In contrast, Williams opined that Smith "was having a temper tantrum like [Williams'] youngest grandson." (Tr. 327).

V. LEGAL ANALYSIS

A. Alleged Threats

Paragraph 4 of the amended complaint alleges that Respondent, through Turni, threatened Smith at various times, in violation of Section 8(a)(1) of the Act. Specifically, paragraph 4(a) alleges that on October 12, 2017, Turni threatened Smith that she could be discharged because she threatened to go to the Board. Paragraph 4(b) alleges that on January 2, Turni again threatened Smith that she could be discharged for threatening to go to the Board, and that Turni informed Smith that she was being suspended for threatening to go to the Board. Paragraph 4(c) alleges that on January 8, Turni threatened Smith in retaliation for her protected Board activity by telling Smith that she would be discharged if she said anything.

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. This includes the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is a violation of Section 8(a)(1) for an employer to threaten an employee with an adverse action because he/she filed or threatens to file charges with the Board. See *Equitable Gas Co*., 303 NLRB 925, 936 (1991) (violation of Sec. 8(a)(1) where threatening statements were premised on filing charges and giving supporting testimony under the Act). See also *Mesker Door*, 357 NLRB 591 (2011); *Postal Service*, 351 NLRB 205 (2007).

In deciding whether an employer has made an unlawful threat, the Board applies an objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp*., 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

The only evidence of the alleged threats is Smith's uncorroborated testimony, which I do not credit. I find the only time Smith mentioned the labor board was during the first October 12, 2017 meeting, and her statement was not met with any hostility or animosity. As stated, I find there was no threat that she could be discharged for going to the Board.

I also find there was no mention of the labor board, or Smith's threat to go to the labor board, by anyone after the first October 12 meeting. I, therefore, find Turni did not threaten Smith during the January 2 meetings that she could be discharged for threatening to go to the Board, and Turni did not tell Smith that she was being suspended for threatening to go to the Board. Finally, I find Turni's January 8 warning that Smith would be discharged for "any other insubordinate behavior, any yelling, anything inappropriate" was tied to Smith's January 2 "see what happens" threat, and not to any statutorily protected activity. Based on the foregoing, I find

the General Counsel has failed to present credible evidence to prove any of the allegations in paragraph 4 of the amended complaint. I, therefore, dismiss those allegations.

B. Alleged Adverse Employment Actions

Paragraph 5 of the amended complaint alleges Respondent unlawfully suspended Smith, transferred her to a different position and required her to perform tasks not previously required of others in that position , and then discharged her, because of her Board activity, in violation of Section 8(a)(4) and (1) of the Act. The General Counsel contends Respondent took each of these adverse actions because Smith threatened to go to the Board regarding her PTO issues.[14] Under Section 8(a)(4), it is unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The Board has held that threats to file Board charges are also protected under Section 8(a)(4). See *First National Bank & Trust Co*., 209 NLRB 95, 95 (1974). To determine whether an employer discriminated against an employee in violation of Section 8(a)(4), the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp*., 462 U.S. 393 (1983). See *Verizon*, 350 NLRB 542, 546–547 (2007); *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2002), *McKessen Drug Co*., 337 NLRB 935, 936 (2002). Under *Wright Line*, the General Counsel bears the burden of showing that the employer's decision to take adverse action against an employee was motivated, at least in part, by considerations prohibited by the Act. The General Counsel may meet this burden by showing that: (1) the employee engaged in statutorily protected activity, (2) the employer knew of such activity, and (3) the employer harbored animosity towards the protected activity at issue. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010). The Board will infer discriminatory motive or animus from circumstantial evidence, such as: (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; (5) employer's shifting or inconsistent reasons for discipline; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Camaco Lorain Mfg. Plant*, 356 NLRB at 1185; *Praxair Distribution, Inc*., 357 NLRB 1048, 1048 fn. 2 (2011). To rebut the presumption established by the General Counsel, the employer bears the burden of showing the same action would have been taken even in the absence of protected conduct. See *Camaco Lorrain*, supra; *ADB Utility*, supra. To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

As stated, Smith's only protected activity was her threat during the first October 12 meeting about going to the labor board to resolve her PTO issues. This reference to going to the labor board, made to her supervisor and the chief executive officer, meets the first two elements. It is well established that an employee need not specifically reference the "National Labor Relations Board" in order for a statement about contacting the Board or the Labor Board to be protected under the Act. *Goeman America, Inc*., 314 NLRB 504, 508 (1994) (such comments are protected because "it is generally known that the Labor Board is the agency to

[14] At the hearing, Counsel for General Counsel confirmed that Smith's only alleged protected activity was her statement(s) about going to the Board regarding her PTO issues. (Tr. 199–200).

which workers take their complaints."). See also *Hi-Craft Clothing Co*., 251 NLRB 1310, 1317 (1980); and *Overseas Motors, Inc.*, 260 NLRB 810, 813–814 (1982).

The sole questions, therefore, are whether Respondent exhibited animus towards Smith's protected activity and whether the animus, if it existed, was a substantial or motivating factor in the adverse employment actions described above. I find the answer to both is no. As previously stated, I do not credit any of the alleged threats the General Counsel relies upon to establish animus. I also do not infer animus from the circumstantial evidence. As for timing, there was an almost 3-month gap between Smith's protected activity on October 12, 2017, and the start of alleged adverse actions on January 2, 2018. I find this gap between the protected activity and the conduct complained of, with no credible evidence of unlawful animus in the interim, militates against a conclusion that Respondent's decisions to suspend, reassign, and discharge Smith were motivated by animus or hostility for her earlier protected activity. See, e.g., *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (2 months between union activity and warning was too remote in time to show animus); *Upper Great Lakes Pilots*, 311 NLRB 131, 137 (1993)(unwilling to infer persistent animus from isolated statements made 3 months before the layoffs)). Any claim of animus is further undermined by Respondent's actions and inactions during this interim period. As stated, Respondent paid Smith an additional 16 hours of PTO on October 12, after she threatened to go to the labor board, even though Smith only claimed to be owed 12 hours of PTO; Respondent did not discipline Smith when she was late for work in mid-November 2017, even though it had issued her a warning for her October 2 absence (10 days prior to her protected activity); Respondent allowed Smith to take the 2 hours off on December 14, even though it was not required to do so under its attendance policy; and Respondent did not discipline Smith for her statements to Colvert about Davis on around December 19, when she wanted to "whoop [Davis's] stupid ass" for "fucking with [her] money." If Respondent harbored any animosity toward Smith for her October 12 threat to go to the labor board, any one of these instances would have provided Respondent with an opportunity to take any action adverse against Smith. Finally, there is no evidence of any departure from established procedures, disparate treatment in discipline, or an inappropriate or excessive penalty.

I, therefore, conclude the General Counsel has failed to establish its burden of proving that Smith's protected Board activity was a substantial or motivating factor in any of the adverse actions taken against her.

As stated, I find Respondent suspended Smith on January 2 because of her "we're going to see what happens" threat. Following that suspension, Respondent reassigned Smith's duties to Eisnaugle, and, in doing so, discovered that Smith had been delinquent in performing her duties in a timely manner. Eisnaugle was able to quickly learn Smith's job and, frankly, do it faster than Smith. Based on Eisnaugle's acumen and productivity, as well as the importance of completing this work in a timely manner, Respondent reassigned the job to her. Smith was reassigned to perform the Humana work, without any change in her wages, hours, or other terms and conditions of employment. The only other difference was that Smith had to close out 60 patients a day and complete daily logs documenting her efforts—tasks not required of others who previously performed this job. Davis credibly testified that this was, in part, for internal recordkeeping purposes, and, in part, because of Smith's recently discovered performance issues. Respondent later discharged Smith because she was insubordinate in her tone, mannerisms, and responses when speaking to Davis about the written warning over her absence on January 12. This insubordination, which was witnessed by another employee, occurred a week after Turni warned Smith that any further insubordination, yelling, or inappropriate behavior would result in discharge.

Based on the overall evidence, I find that there is insufficient credible evidence from which to conclude that Respondent committed any of the alleged violations of the Act.

CONCLUSIONS OF LAW

1. Respondent, Comprehensive Post-Acute Network, Ltd., at its West Chester, Ohio facility, is engaged in commerce within the meaning of § 2(2), (6), and 7 of the Act.

2. Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

ORDER

The amended complaint is dismissed in its entirety.

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

Andrew S. Gollin
Administrative Law Judge

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.