

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

Sacramento, California

EDWARD MEGUAL WILLIAMS,

Charging Party,

vs.

AT&T MOBILITY SERVICES LLC,

Charged Party.

Case No. 20-CA-215835

RESPONDENT AT&T MOBILITY SERVICES LLC'S
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Michael G. Pedhirney
LITTLER MENDELSON, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
Telephone: (415) 433-1940
Attorneys for AT&T MOBILITY
SERVICES LLC

Dated: November 28, 2018

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. SUMMARY OF FACTUAL BACKGROUND	2
A. Background Information Regarding The Employer.	2
B. The Charging Party.	2
C. The Employer’s Sales Attendance Guidelines.	3
D. The Company’s Discharge Of Williams For Excessive Absenteeism.	5
1. Williams’s Last And Final Written Warning.	5
2. Williams’s Unexcused Absence On November 14, 2017.	7
3. Williams’s Testimony Regarding His November 13 And 14 Discussions With Chopra And Black Is Unbelievable And Contradicted By Credible Record Evidence Presented By Witnesses For Both The Employer And The General Counsel.	9
a. Williams’s Testimony Regarding His Telephone Call With Chopra On November 13 Is Not Credible.	9
b. Williams’s Testimony Regarding His November 14 Discussion With Black Is Not Credible.	12
4. The Company’s Decision To Terminate Williams’s Employment.	14
III. ARGUMENT	16
A. Standard To Establish A Violation of Sections 8(a)(3).	17
B. The General Counsel Did Not Meet Its Burden Of Proving A Causal Link Between Williams’s Attendance Point And The Resulting Discharge And His Protected Activity.	20
1. AT&T Had Legitimate, Non-Discriminatory Reasons For Issuing Williams An Attendance Point For The November 14 Absence And Terminating Williams’s Employment As A Result Thereof.	20
2. The General Counsel’s Proffered Evidence Of Animus Is Insufficient To Meet The Burden Of Proof For Establishing Animus.	23
a. Williams Engaged In The Same Protected Activities As His Co-Workers, Which Did Not Trigger Any Alleged Retaliation Against His Alleged Comparable Co-Workers.	23
b. Williams’s Grievance Regarding His Final Written Warning Stemming From An Incident With His Supervisor Played No Role In The Company’s Issuance Of An Attendance Point And His Termination.	25
c. The General Counsel’s Evidence Of Purported Disparate Treatment Is Unavailing.	28

d. The General Counsel Did Not Provide Sufficient Evidence To Establish That The Employer Reneged On Any Agreement To Excuse Williams’s November 14, 2017 Absence.	31
C. Even Assuming That The General Counsel Could Present A <i>Prima Facie</i> Case, The Employer Has Met Its Burden Of Showing That It Would Have Taken The Same Actions In The Absence Of The Purported Protected Activity.	32
IV. CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Affiliated Hosp. Prods.</i> , 245 NLRB 703 (1979)	19
<i>Asarco, Inc. v. NLRB</i> , 86 F.3d 1401 (5th Cir. 1996)	29
<i>CEC Chardon Electrical</i> , 302 NLRB 106 (1991)	18, 19
<i>Central Valley Meat Co.</i> , 318 NLRB 245 (2006)	28
<i>Consolidated Biscuit Co.</i> , 346 NLRB 1175 (2006)	28
<i>Engineered Comfort Sys., Inc.</i> , 346 NLRB 661 (2006)	28
<i>Green v. Armstrong Rubber Co.</i> , 612 F.2d 967 (5th Cir. 1980), <i>cert. denied</i> , 449 U.S. 879 (1980).....	29
<i>Kitsap Tenant Support Services, Inc.</i> , 366 NLRB No. 98 (May 31, 2018).....	31, 33
<i>Liberty Homes, Inc.</i> , 257 NLRB 1411 (1981)	19, 34
<i>Mitchell v. Toledo Hosp.</i> , 964 F.2d 577 (6th Cir. 1992)	29
<i>NLRB v. Savoy Laundry</i> , 327 F.2d 370 (2d Cir. 1964), <i>enforcing in part</i> 137 NLRB 306 (1962)	19, 34
<i>Ozburn-Hessey Logistics, LLC</i> , 362 NLRB No. 180 (August 26, 2015).....	33
<i>Peter Vitalie Co., Inc.</i> , 310 NLRB 865 (1993)	18
<i>Robert Orr/Sysco Food Services</i> , 343 NLRB 1183 (2004)	18

<i>Ryder Dist'n Resources, Inc.</i> , 311 NLRB 814 (1993)	19, 34
<i>Super Tire Stores</i> , 236 NLRB 877 (1978)	19, 34
<i>Thorgren Tool & Molding, Inc.</i> , 312 NLRB 628 (1993)	28
<i>Upper Great Lakes Pilots, Inc.</i> , 311 NLRB 131 (1993)	18
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enf. by</i> 662 F.2d 899 (1st Cir. 1981).....	17, 18, 19
<i>Yusuf Mohamed Excavation, Inc.</i> , 283 NLRB 961 (1987)	18, 19

Statutes

29 U.S. Code section 158(a)(3).....	17
National Labor Relations Act, Section 7	17
National Labor Relations Act, Section 8(a)(3)	passim

I. INTRODUCTION

Pursuant to the Administrative Law Judge's ("ALJ") direction and section 102.42 of the National Labor Relations Board's ("NLRB" or "the Board") Rules and Regulations, Respondent AT&T Mobility Services LLC ("AT&T," "the Company," or the "Employer") submits this post-hearing brief regarding the Complaint filed by the General Counsel for the NLRB in the above-captioned case. Specifically, the General Counsel alleges that AT&T violated Section 8(a)(3) of the National Labor Relations Act ("NLRA" or "the Act") by issuing an attendance point to Charging Party Edward Megual Williams, who was formerly known as Edward Megual Jackson, for his unexcused absence on November 14, 2017 and terminating his employment as a result thereof. (G.C. Exh. 1(d); G.C. Exh. 1(m).)¹

The instant hearing took place in Room 484 of the United States Post Office and Courthouse in Sacramento, California before Administrative Law Judge Gerald M. Etchingham on October 24, 2018. At the conclusion of the hearing, the ALJ directed the parties to submit post-hearing briefs by November 28, 2018.

As discussed below, the General Counsel's allegations are not at all consistent with the facts, which overwhelmingly demonstrate that the Employer had legitimate, non-discriminatory reasons for issuing Williams an attendance point and consequently terminating his employment. The Employer's actions did not in any way violate Section 8(a)(3) of the Act. For these reasons, the charge must be dismissed.

¹ Transcript pages will be referenced as "Tr.," followed by the page number(s). Joint Exhibits will be referenced as "Jt. Exh.," General Counsel's Exhibits as "G.C. Exh." and AT&T's Exhibits as "R. Exh.," in each case followed by the exhibit number(s) and, if applicable, the exhibit page number(s).

II. SUMMARY OF FACTUAL BACKGROUND

A. Background Information Regarding The Employer.

The Employer sells AT&T products and services in its own retail stores across the United States. (Tr. 23:12-19.) It employs thousands of Retail Sales Consultants (“RSCs”), who are all represented by the Communications Workers of America (“CWA”). (Tr. 72:18-22, 141:18-24.) RSCs are responsible for selling AT&T products and services, as well as assisting customers with technical and service issues. (Tr. 23:12-19.)

In California alone, the CWA represents hundreds of RSCs at AT&T stores. (Tr. 141:25-142:6.) There are nine AT&T stores in the Sacramento area, including the Natomas store where the Charging Party, Edward Williams, worked. (Jt. Exh. 1, ¶ 2.) CWA Local 9421 (“the Union”) represents the RSCs in the Sacramento area. (Tr. 140:16-20.) The Union represents approximately seventy to eighty AT&T employees in or around Sacramento. (*Id.*)

B. The Charging Party.

Williams worked as an RSC for AT&T from August 2013 until December 14, 2017. (Tr. 23:7-11.) He worked at multiple stores, but was staffed at the Natomas store from the Spring of 2015 until the cessation of his employment. (Tr. 23:20-24:23, 99:3-6.) The Natomas store is located at 3591 Truxel Road in Sacramento. (*Id.*)

In the year-plus leading to his termination, Williams was issued multiple disciplinary actions. Specifically, AT&T issued Williams the following discipline within that timeframe:

- a Final Written Warning for attendance on March 24, 2016 (Jt. Exh. 5);
- a Final Written Warning for attendance on May 24, 2016 (Jt. Exh. 5);
- a Counseling for attendance on February 26, 2017 (Jt. Exh. 5);

- a Final Written Warning for attendance on May 9, 2017 (Tr. 198:20-199:15; G.C. Exh. 2; G.C. Exh. 10 at pp. 1-2);
- a continued Final Written Warning for attendance in or around late September 2017 for an unexcused absence on May 11, 2017, which was only two days after he received a Final Written Warning for excessive accrual of attendance points (Jt. Exh. 5; Tr. 79:18-21, 185:1-21, 199:23-200:14, 200:23-204:17; R. Exh. 6; R. Exh. 7);
- a Final Written Warning on October 3, 2017 for violating AT&T’s Code of Business Conduct: Harassment/Hostile Work Environment policy, which the Employer subsequently agreed to reduce to a Written Warning (Tr. 62:18-63:8, 87:23-88:1, 91:4-18; G.C. Exh. 3); and
- a Final Written Warning on November 16, 2017 for violating AT&T’s Code of Business Conduct: Workplace Violence/Threats policy (G.C. Exh. 4).

C. The Employer’s Sales Attendance Guidelines.

For several years, AT&T has maintained “Sales Attendance Guidelines,” which the Company utilizes to establish attendance expectations and define attendance requirements. (Jt. Exh. 1 at ¶ 7; Jt. Exh. 3.) Since its inception, the Sales Attendance Guidelines have applied to RSCs. (*Id.*) Among other things, the Sales Attendance Guidelines include suggested disciplinary actions against employees based on accruals of “points,” which employees accumulate based on unexcused absences, tardies, or early departures. (Jt. Exh. 3 at pp. 2-4.) The Sales Attendance Guidelines provide for the following “point thresholds and timeframes for the levels of progressive discipline”:²

² An employee’s point expires after twelve months of active employment following the

Point Thresholds	Level of Discipline	Discipline Duration
4.00-4.75	Counseling Notice	Discipline step deactivates when current points fall below discipline thresholds
5.00-6.75	Written Warning	Discipline step deactivates when current points fall below discipline thresholds
7.00-7.75	Final Written Warning	Discipline step deactivates when current points fall below discipline thresholds
8.00	Termination	n/a

The Sales Attendance Guidelines expressly vest the Employer with discretion over the application of discipline resulting from attendance point accruals. Specifically, the Guidelines provide, “Exceptions to the above progression guidelines may be made as appropriate at the company’s discretion.” (*Id.* at p. 3.) With that being the case, the Company does not in all circumstances terminate an employee once the employee has accrued eight attendance points. Indeed, the Employer did not terminate Williams on at least three instances when he accrued over eight attendance points – (1) on March 26, 2016, when he accrued 8.75 points but was issued a Final Written Warning in lieu of discharge (Jt. Exh. 5); (2) on or about May 9, 2017, when he accrued 10.75 points and was issued a Final Written Warning instead of discharge (Jt. Exh. 5; Tr. 198:20-199:15; G.C. Exh. 2; G.C. Exh. 10 at pp. 1-2); and (3) in or around late September 2017 after he accrued another attendance point on May 11, 2017, which led to the Company keeping Williams on the Final Written Warning that had issued on May 9, 2017.³ (Jt. Exh. 5; Tr. 78:18-21, 199:23-200:14, 200:23-204:17; R. Exh. 6; R. Exh. 7.)

attendance occurrence. (*Id.*) Points do not accrue for excused absences, such as approved leaves of absence, jury duty, and approved vacations. (*Id.*)

³ Williams testified that he believed he amassed fourteen points once at some unspecified time, but his testimony was not corroborated by any documentation. (Tr. 58:25-59:2.)

If an employee's accrual of attendance points potentially warrants termination, then the proposed termination decision is subject to four layers of review by different persons within the Company. Specifically, the proposed termination decision is subject to review and approval by: (1) the Store Manager; (2) the Area Director; (3) the Director of Sales; and (4) the Company's Corporate Attendance Team ("CAST"), which is a division within the Company's Employee Relations department. (Tr. 192:6-193:12.) CAST is also referred to internally within AT&T as "CAG," which stands for "Centralized Attendance Group." (Tr. 201:13-20; R. Exh. 7.)

AT&T maintains a "Progressive Discipline Policy for AT&T Mobility Non-Management Employees." (Jt. Exh. 4(b).) The Progressive Discipline Policy sets forth four levels on which the Company can act to correct performance or conduct issues – Counseling Notice, Written Warning, Final Written Warning/Suspension, and Termination. (*Id.* at p. 2.) However, the Progressive Discipline Policy expressly states that "based on the seriousness of the offense, steps of discipline may be skipped." (*Id.*) Consequently, the Employer need not issue a disciplinary action at each level prior to terminating an employee for repeated offenses – attendance-related or otherwise.

D. The Company's Discharge Of Williams For Excessive Absenteeism.

1. Williams's Last And Final Written Warning.

As explained above, AT&T issued Williams the Final Written Warning in or around late September 2017 based on an absence on May 11, 2017, which resulted in Williams accruing a total of 10.75 attendance points. (Jt. Exh. 5; Tr. 79:18-21, 199:23-200:14, 200:23-204:17; R. Exh. 6; R. Exh. 7.) Vanessa Khallouf, who was then the Area Manager responsible for oversight of the Natomas store, wished to proceed with termination of his employment based on the May 11 absence. (Tr. 200:15-17; R. Exh. 6; R. Exh. 7.) Khallouf supported termination of

Williams's employment because he had accrued an attendance point only two days after AT&T put him on a Final Written Warning for accruing 10.75 attendance points – which was 2.75 points beyond the suggested termination threshold set forth in the Sales Attendance Guidelines. (Tr. 200:18-22; Jt. Exh. 5.)

However, the Company did not proceed with termination based on Williams's May 11, 2017 absence. (Tr. 200:23-25.) It chose not to do so because the Company delayed making any final decision on the May 11 absence due to Williams having an open workers' compensation case. (Tr. 201:1-9; R. Exh. 6; R. Exh. 7 at pp. 3-8.) Upon the conclusion of the workers' compensation case, several months had passed since Williams's May 9 absence. (Tr. 201:1-9; R. Exh. 6; R. Exh. 7.) Consequently, the CAG team recommended that the Company reinforce Williams's pending Final Written Warning that was issued on May 9, 2017 and remind Williams of the consequences of any future unexcused absences. (*Id.*) Khallouf accepted the CAG team's recommendation. (Tr. 204:18-21; Emp. Exh. 6 at p. 8.)

As a result, on or around October 3, 2017, Sasha Chopra, who was then the Natomas Store Manager, met with Williams and his Chief Shop Steward, Rob Coates. (Tr. 183:19-184:6, 186:12-21; G.C. Exh. 2.) At that meeting, she advised Williams of where he stood with respect to his attendance points, reminded him that he was still on a Final Written Warning, and reiterated that any additional points would result in the next step of disciplinary action – termination. (*Id.*) Williams acknowledged that he understood then that he was on a Final Written Warning. (Tr. 78:18-21.)

2. Williams's Unexcused Absence On November 14, 2017.

Notwithstanding Chopra's message to Williams about maintaining good attendance and not accruing additional points, Williams's attendance issues resurfaced just a little over a month later.

Williams was scheduled to work a regular shift at the Natomas store on Monday, November 13, 2017. (Tr. 53:5-8.) He came into the store during the morning and telephoned Chopra, who was not physically present at the store at that time because it was her day off of work. (Tr. 53:11-23, 186:3-10.) Williams alerted Chopra that his fiancée was in the hospital and that he needed to take the day off to be with her. (Tr. 53:11-23, 186:11-187:14.) He told Chopra then that he understood that if she wanted to terminate his employment for the absence she could do so, but he was going to go to the hospital and miss his shift regardless. (Tr. 186:11-187:14.) Chopra, in an effort to support Williams, suggested that he contact someone with the Employer's Human Resources team to see if there was any way he could be granted approved protected leave, which would spare him the accrual of another unexcused absence and attendance point. (Tr. 53:11-54:1, 186:11-187:14.) Chopra and Williams then ended the call to allow Williams the opportunity to speak with Human Resources. (*Id.*)

After speaking with Human Resources, Williams called Chopra back. (Tr. 54:6-7, 186:11-187:14.) Williams advised Chopra that Human Resources advised him that he could not take protected leave for the day's absence. (Tr. 54:8-15, 186:11-187:14.) Chopra then advised Williams that she would permit him to take that specific day off without any repercussions. (Tr. 54:16-18, 186:11-187:14.) However, she made it clear to him then that if he needed to take off his next scheduled shift – November 14, which was the following day – he would need to swap shifts with one of his colleagues in order for his November 14 absence to be excused.

(Tr. 186:11-187:14.) She then told Williams that she would advise Michel Black, an Assistant Store Manager at the Natomas store who was working at the store that day, of their discussion and to make sure that Black properly inputted Williams's hours for November 13. (*Id.*)

Shortly after speaking with Williams, Chopra called Black and advised him of her call with Williams and that she had excused Williams from working that day. (Tr. 162:24-163:24, 188:13-189:4.) She directed Black to input Williams's hours for November 13 using the appropriate pay code. (Tr. 188:13-189:4.) She also told Black that Williams was only excused from work on November 13 and that Williams needed to swap his November 14 shift in order for the absence on November 14 to be excused. (*Id.*) However, Williams made no effort at all to contact a co-worker about potentially trading his November 14 shift. (Tr. 86:16-87:1.)

The morning of the following day, November 14, Williams called Black on his cell phone before Black's shift had started. (Tr. 164:3-17.) Williams asked Black if Chopra had spoken with Black to advise him of Williams's situation. (Tr. 164:18-24.) Black confirmed that Chopra advised him of her discussion with Williams. (*Id.*) Williams then alerted Black that he was not going to be coming into work. (*Id.*) Black then simply acknowledged that he understood Williams would not be appearing for his scheduled shift. (*Id.*) At no point during the discussion did Black advise Williams that he should not take off that shift or even suggest that he do so. (Tr. 164:25-165:3.)

After that call, Black spoke with Chopra and told her that Williams would not be appearing for his scheduled shift on November 14.⁴ (Tr. 165:4-20, 189:5-24.) Later that day, Chopra approached Coates at the store, reminded him of her discussion with Williams in October

⁴ At no point did Black advise Chopra that he ever excused Williams from his absence on November 14. (Tr. 189:25-190:3.) It would have made no sense to do so given that Black firmly and credibly denied at the hearing ever saying anything intended to excuse Williams from the November 14 shift. (Tr. 164:25-165:3.)

regarding attendance (for which Coates was present) and advised him of the most recent developments. (Tr. 190:11-25.) She told Coates that there was “nothing she could do at this point” given Williams’s history and the most recent unexcused absence. (*Id.*) Coates replied by saying something to the effect of, “Well, that’s the least of his worries right now.” (*Id.*)

That same day, Chopra called her supervisor, Area Manager Vanessa Khallouf, and advised her that Williams had accumulated another unexcused absence. (Tr. 204:25-205:6.)

3. Williams’s Testimony Regarding His November 13 And 14 Discussions With Chopra And Black Is Unbelievable And Contradicted By Credible Record Evidence Presented By Witnesses For Both The Employer And The General Counsel.

a. Williams’s Testimony Regarding His Telephone Call With Chopra On November 13 Is Not Credible.

At the hearing, Williams testified that during his call with Chopra on November 13, 2017, Chopra excused him from working on November 14 by granting him vacation days for both November 13 and 14. (Tr. 50:2-50:17, 54:8-18, 55:18-23.) This testimony is false. Indeed, Williams’s testimony was rebutted by both Chopra and the General Counsel’s own witness, Rob Coates, who was Williams’s Chief Shop Steward.

Williams testified that during the November 13 telephone call with Chopra, she asked whether he could trade his November 14 shift with somebody else. (Tr. 54:19-25.) He further testified that he told Chopra that it would not be possible for him to trade shifts because Company policy prohibited him from swapping shifts within seventy-two hours of the scheduled shift. (Tr. 54:19-55:6.) He then testified that Chopra effectively acknowledged that he could not swap shifts under Company policy by proposing other potential ways in which he could be excused from his shift on November 14. (Tr. 55:7-15.) Even though he asserts that Chopra excused him on November 13 from working his shift on November 14, he testified that he called Black on November 14 to alert him of his absence because he wanted to confirm that Chopra had

advised Black as to Chopra's purported agreement to excuse Black from working on November 14. (Tr. 56:25-57:5.)

Williams's testimony regarding these matters on its face strains credulity. If in fact Chopra excused Williams from working on November 14 (which she did not), it would make no sense for him to call Black – Chopra's subordinate – the following day and advise him of Chopra's purported agreement.⁵ If Chopra excused Williams's absence for November 14 on November 13, there would be no need for Williams to call Chopra's direct report, Black, to advise him of the absence the morning of November 14.⁶

In fact, Williams's testimony regarding the possibility of swapping shifts is directly at odds with Chopra's testimony. Chopra testified that she specifically told Williams on November 13 that needed to find someone with whom he could swap his November 14 shift. (Tr. 186:11-187:14.) Moreover, it is undisputed that she has approved of several shift swaps in which the exchange was made within forty-eight hours of one of the shifts at issue.⁷ (Tr. 188:2-12.) In those circumstances, the employee swapping shifts has not been assessed a point unless the employee fails to appear for his or her shift. (*Id.*) The General Counsel presented no evidence to suggest that Chopra bore any animus towards Williams or had any reason to provide

⁵ Williams's explanation is all the more nonsensical because Chopra worked the opening shift at the Natomas store on November 14. (Tr. 189:5-19.) As Chopra testified, the normal protocol at AT&T when an employee needs to call in absent for a shift is for the employee to contact the opening manager – who was, in this case, Chopra. (Tr. 189:15-19.)

⁶ Indeed, inconsistent with his testimony about his reasons for calling Black in the first place, Williams testified that he only called Black after he learned from the doctors treating his fiancée that his fiancée would need two more surgeries within a few hours. (Tr. 56:9-17.) Given that Williams apparently claims that the surgeries were the impetus for his calls to Black, it is evident that Williams was initially planning on reporting to work on November 14 until the doctors advised him of the additional surgeries required.

⁷ Contrary to Williams's testimony, the Company's general requirement is that employees swap shifts at least forty-eight hours prior to the commencement of one of the shifts being exchanged. (Tr. 187:18-25.) Indeed, Coates acknowledged that manager can approve such swaps within the forty-eight-hour period. (Tr. 122:6-12.)

false testimony. As such, her testimony regarding her discussion with Williams on November 13 should be credited over Williams's account of the conversation.

Beyond that, Coates's testimony also contradicts Williams's testimony regarding the possibility of swapping shifts and the reason he called Black on November 14, 2017. Coates testified that Williams admitted during the termination meeting on December 14 that Chopra only permitted him to use vacation and be excused from his shift on November 13, and not November 14. (Tr. 123:17-124:14.)

Coates took notes of what was said by the parties at the termination meeting. (Tr. 145:23-146:11, 147:21-148:4.) According to Coates's notes, Chopra reminded Williams at the December 14 meeting that during her discussion with Williams on November 13, she told him that he should swap his November 14 shift. (Tr. 154:21-155:2.) Coates then asked Chopra, "How can you do a shift swap within forty-eight hours?" (Tr. 146:23-147:5.) Chopra replied that she was going to permit the shift swap. (Tr. 147:8-10.) According to Coates's own notes, Williams replied, "Nobody wanted to switch with me, so that's why I called on 11/14 at 8 a.m. that [*sic*] I'm still at the hospital because my fiancée is going into surgery. I asked ASM Michel what should I do. He said you need to be with your fiancée." (Tr. 147:11-20) (emphasis added.) As such, Williams admitted on December 14 that:

1. He understood that Chopra required him to find somebody with whom he could trade his November 14 shift.
2. He was not successful finding anyone willing to trade for his November 14 shift, which is contrary to his testimony at the hearing that he never tried to swap shifts with anyone because Chopra had purportedly already excused his November 14 absence. (Tr. 86:16-87:1.)

3. The sole reason he called Black on November 14 is that he had been unsuccessful finding a co-worker with whom he could swap his shift, which is entirely at odds with his hearing testimony regarding his reason for calling Black that day – his inability to find someone to trade for his November 14 shift. (Tr. 56:9-17, 56:25-57:5.)

Coates's testimony regarding what Williams said at the December 14 termination meeting is more credible than Williams's hearing testimony. Indeed, Coates's testimony regarding these matters is bolstered by his contemporaneous notes from the December 14 termination meeting. Coates, as Williams's Chief Shop Steward, had no reason to write false notes or present evidence harmful to Williams at the hearing. Beyond that, Coates's testimony on these issues is consistent with Chopra's testimony.

For these reasons, Williams's testimony regarding Chopra's alleged agreement to excuse his anticipated November 14, 2017 absence is unbelievable and should be disregarded.

b. Williams's Testimony Regarding His November 14 Discussion With Black Is Not Credible.

Williams testified that during his telephonic discussion with Black on November 14, Black told him something to the effect of, "Go and be with your lady." (Tr. 56:9-24.) Even accepting this testimony is credible (which it is not), Black's words – which Williams testified followed Williams's letting Black know that he was not coming to work on November 14 – should not be construed as excusing Williams from his November 14 shift without any consequence. At most, in the context of the discussion, it indicates that Black understood on a personal level why Williams was electing to miss work. In any event, Williams's testimony regarding what Black allegedly told him during the call is not believable.

Williams's account of the discussion is directly rebutted by Black's testimony. Black unequivocally denied making any suggestion to Williams that he should miss work on November 14. (Tr. 164:25-165:3.) Given Williams's false account of his discussion with Chopra detailed above, Williams is not entitled to the benefit of any doubt and his testimony should in no way be credited over Black's testimony. Moreover, it would make no sense for Black to autonomously override the clear instruction Chopra gave him the day before – that Williams needed to swap his November 14 shift in order for the absence on November 14 to be excused. (Tr. 188:13-189:4.)

Beyond that, Williams testified that he called Black on November 14 to make sure that Chopra conveyed to him that she had excused Williams's expected absence that day. As explained above, Williams's testimony on that matter is preposterous and rebutted by other credible witness testimony confirming that he called Black only because he failed to find someone to cover his November 14 shift. (Tr. 56:9-17, 56:25-57:5.) Nevertheless, even if one were to credit Williams's explanation for the reason he called Black in the first place (which the ALJ should not do), he could not possibly have construed Black's purported message of "Go and be with your lady" as a representation that the Employer would excuse Williams's absence on November 14. If Chopra had already excused Williams's absence on November 14, which Williams claims is the case, it would make no sense for Williams to seek the same approval from Black, Chopra's direct report. Why would Williams seek Black's approval for an absence that Black's supervisor, Chopra, already approved?

Moreover, Williams's hearing testimony regarding the discussion is at odds with Coates's contemporaneous notes of what Williams represented to Chopra during the December 14, 2017 termination meeting. Again, Coates's notes show that during the meeting Williams told Chopra,

“Nobody wanted to switch with me, so that’s why I called on 11/14 at 8 a.m. that [*sic*] I’m still at the hospital because my fiancée is going into surgery. I asked ASM Michel what should I do. He said you need to be with your fiancée.”⁸ (Tr. 147:11-20) (emphasis added.) In other words, as of December 14, Williams’s account was that he called Black not because he wanted to confirm that Chopra told Black that Williams’s absence on November 14 would be excused, but rather because he wanted Black’s input as to what Williams should do. Williams’s two dramatically different accounts of the discussion with Black critically undercut his credibility, and thus, the ALJ should resolve the credibility dispute in Black’s favor.

In light of the foregoing, the ALJ should reject Williams’s self-serving hearing testimony regarding Williams’s November 14 discussion with Black.

4. The Company’s Decision To Terminate Williams’s Employment.

Following Williams’s unexcused absence on November 14, the CAG team reviewed the absence to determine whether in fact the absence should trigger an attendance point.⁹ (Tr. 191:4-9, 205:7-13.) CAG confirmed that an attendance point was appropriate and proposed termination in light of the fact that Williams had exceeded the eight-attendance-point mark while on a Final Written Warning. (*Id.*) Chopra, Khallouf, and Director Sales Justin Gerig were then directed to opine whether termination of Williams’s employment was appropriate. (Tr. 191:14-18, 205:14-17, 192:6-14.) All three of them approved of Williams’s termination because of the

⁸ For the reasons set forth above, Williams’s December 14 explanation of his discussion with Black is also not credible. Black’s credible testimony rebuts this account.

⁹ While the potential termination was under review, Khallouf communicated with the CAG team and encouraged CAG to make a timely decision. (R. Exh. 7.) Khallouf did this because she wanted to avoid another incident in which the Company was precluded from discharging Williams notwithstanding his accrual of additional attendance points while under a Final Written Warning due to timeliness issues. (*Id.*)

latest attendance point.¹⁰ (Tr. 191:19-24, 205:18-19.)

Given the time it took for CAG to review the absence and ultimately approve termination, and the number of additional approvals required for termination, it took several days for the decision to terminate Williams's employment to be fully vetted and approved. (Tr. 192:6-14, 192:20-193:10.) After the termination decision was approved, Chopra sought to schedule a termination meeting, in which she and the new Natomas Store Manager, Raj Sharma, would advise Williams of his discharge in the presence of Coates.¹¹ (Tr. 193:13-24.) However, by that time, Williams was on a two-week vacation, which further delayed the scheduling of the termination meeting. (*Id.*) Because of these developments, the termination meeting did not take place until December 14, 2017. (*Id.*)

The termination meeting took place at the manager's office in Natomas on December 14. (Tr. 194:2-4.) Chopra, Sharma, Williams, and Coates attended the meeting. (Tr. 194:5-6.) Chopra advised Williams of the termination decision. (Tr. 194:13-20.) Williams responded by saying something to the effect of, "You finally did it. I can't believe you. They finally got you to do this to me." (*Id.*) Chopra reminded Williams that on November 13, she told him that he should swap the November 14 shift – the unexcused absence that ultimately triggered his discharge. (Tr. 154:21-155:2.) Coates asked how a shift swap could take place within forty-

¹⁰ At the hearing, the General Counsel introduced evidence regarding AT&T's Code of Business Conduct ("COBC"). (Jt. Exh. 4(a).) The COBC is irrelevant to the Williams's termination. The Employer terminated Williams based on his excessive accrual of attendance points while on a Final Written Warning, not because of any COBC violation. While the Employer issued disciplinary actions against Williams for violations of the COBC in 2017 – based on his separate incidents with David Sum and Justin Estrada (Tr. 59:3-8, 62:18-63:8, 87:23-88:1, 91:4-18; G.C. Exh. 3; G.C. Exh. 4) – the General Counsel does not allege that either of those disciplinary actions violated Section 8(a)(3) of the Act.

¹¹ Even though Chopra was not the Store Manager for Natomas following November 30, 2017, she was asked to lead the termination meeting because she was much more knowledgeable than Sharma about the key events leading to the discharge. (Tr. 194:7-16.)

eight hours of the shift. (Tr. 146:23-147:5.) Chopra replied that she was going to permit the shift swap. (Tr. 147:8-10.) Williams confirmed then that he could not find anyone to swap shifts with him for the November 14 shift.¹² (Tr. 147:11:20.)

III. ARGUMENT

The General Counsel alleges that the Company's decision to assess Williams a point for his unexcused absence on November 14 and its decision to terminate Williams's employment for accruing that attendance point while on a Final Written Warning for attendance issues was unlawful. Specifically, the General Counsel alleges that the Employer was motivated to take such action against Williams because he "assisted" the Union and engaged in "Union and protected activities." (G.C. Exh. 1(d), ¶ 5(b); G.C. Exh. 1(m).) At the hearing, the General Counsel clarified that its specific contention is that both allegations were in retaliation for Williams filing a grievance challenging a Final Written Warning issued to him as a result of an incident he had with an Assistant Store Manager – a disciplinary action that the Employer voluntarily proposed to reduce to a Written Warning instead of elevating the grievance to Step 3 of the grievance process set forth in the applicable collective bargaining agreement. (Tr. 15:25-17:8, 142:9-24.)

¹² At the hearing, Williams testified that he questioned Chopra why he was assessed a point on November 14 even though she had purportedly granted his request for vacation for the day during their discussion on November 13. (Tr. 49:16-50:9, 51:18-25.) He claims that Chopra denied granting vacation on November 14 and that they consequently debated whether Chopra required him to swap the November 14 shift and whether it was feasible to do a shift swap. Williams's account of the conversation is not reliable as it was rebutted by Coates's account of the same December 14 discussion. As explained above, Coates's notes demonstrate that Williams admitted on December 14 that he had not found anyone willing to take his November 14 shift, which is why Williams called Black on November 14 to alert Black that he would not be coming to work that day. (Tr. 147:11-20.) For these reasons, the ALJ should reject Williams's account of the December 14 meeting.

There is no merit whatsoever to the General Counsel’s allegations. At the hearing, the General Counsel failed to present any direct evidence supporting the contention. Instead, the General Counsel apparently relies on unreliable, circumstantial evidence with no probative value concerning Final Written Warnings for attendance issued to AT&T employees other than Williams as well as the timing of Williams’s termination. As explained further below, the charge must be dismissed.¹³

A. Standard To Establish A Violation of Sections 8(a)(3).

Section 8(a)(3) prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Because Section 8(a)(3) cases nearly always turn on the question of employer motivation, the Board and the courts employ a causation test to resolve such allegations. *See Wright Line*, 251 NLRB 1083 (1980), *enf. by* 662 F.2d 899 (1st Cir. 1981).

Under the *Wright Line* causation test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that: (1) the employee as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act; (2) the employer knew of the protected conduct; (3) the employer took an adverse employment action against the employees; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. 251 NLRB at 1087.

¹³ The General Counsel submitted testimony from Williams regarding his personal belief that the warnings he received for the incidents involving David Sum and Justin Sum were unfair. However, the General Counsel does not contend that either disciplinary action violated the Act – even though Williams alleged in the charge at issue that the Final Written Warning provided to him on October 3, 2017 as a result of the David Sum incident violated Section 8(a)(3). (G.C. Exh. 1(a) at p. 2.) In any event, because there is no pending allegation that these non-termination disciplinary actions violated the Act, the Employer will not address the merits of the propriety of those past disciplines.

As to the fourth element, absent direct evidence of discrimination, the General Counsel must establish a causal link between the protected activity and the adverse employment action by circumstantial evidence – *i.e.*, by showing that the employer’s decision was inconsistent with its other actions, its treatment of similarly-situated employees, or its past practices, or by establishing some temporal proximity between the employment action and the protected activity. *See, e.g., Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Peter Vitalie Co., Inc.*, 310 NLRB 865, 871 (1993) (explaining that “[t]he classic elements commonly required to make out a *prima facie* case of union discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus”). Moreover, “[i]t is well established that in the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.” *CEC Chardon Electrical*, 302 NLRB 106, 107 (1991). In the absence of any proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of protected activity — the allegation must fail. *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993) (deciding that “[b]ecause we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities”); *Yusuf Mohamed Excavation, Inc.*, 283 NLRB 961, 962-64 (1987) (dismissing Section 8(a)(3) allegations based on the General Counsel’s failure to make out a *prima facie* case).

Only if the General Counsel meets its initial burden does the burden shift to the employer to rebut this showing by demonstrating a legitimate, nondiscriminatory motive for its actions. *See Upper Great Lakes Pilots*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. To satisfy its burden, the employer must show “that the same action would have taken place even in the

absence of the protected conduct.” *See Wright Line*, 251 NLRB at 1089. It is not for the trier of fact to evaluate whether or not the business reasons asserted by the employer make sound business sense. The employer need only show that it was honestly motivated by legitimate, non-discriminatory business reasons. “[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.” *Ryder Dist’n Resources, Inc.*, 311 NLRB 814, 816-17 (1993), citing *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), *enforcing in part* 137 NLRB 306 (1962); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1412, n. 9 (1981) (cautioning the dissent against substituting its own business judgment for the employer’s); *Super Tire Stores*, 236 NLRB 877, 877 n. 1 (1978) (“Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position”) (citation omitted).

Throughout this test, the General Counsel retains the ultimate burden of proving the elements of an unfair labor practice by a preponderance of the evidence. *See Wright Line*, 251 NLRB at 1088 n.11. “[E]ven where the record raises ‘substantial suspicions’ regarding [the employer’s actions], the General Counsel is not relieved of ‘the burden of proving that Respondent acted with an illegal motive.’” *Yusuf Mohamed Excavation*, 283 NLRB 961, 964 (1987), *citing Affiliated Hosp. Prods.*, 245 NLRB 703, 703 n.1 (1979); *see also CEC Chardon Electrical*, 302 NLRB 106, 107 (1991) (explaining that “mere suspicion is insufficient to support a violation of the Act”).

B. The General Counsel Did Not Meet Its Burden Of Proving A Causal Link Between Williams's Attendance Point And The Resulting Discharge And His Protected Activity.

1. AT&T Had Legitimate, Non-Discriminatory Reasons For Issuing Williams An Attendance Point For The November 14 Absence And Terminating Williams's Employment As A Result Thereof.

AT&T does not dispute the notion that Williams engaged in protected concerted activity during the course of his employment. He was just like every other employee in the Natomas store – all of whom went on strike in May 2017, submitted grievances, and voiced complaints about their compensation or the attendance policy.

However, the Employer had only legitimate, non-discriminatory reasons for discharging Williams. There is no evidence that any aspect of either decision was based on animus toward Williams based on his protected activity.

In fact, the opposite is true. Chopra accommodated Williams in an effort to balance his need to be with his fiancée on November 13 and the Company's need to ensure that the Natomas store would be adequately staffed on November 14. Indeed, AT&T was under no obligation to excuse Williams's absence from work on November 13 due to his fiancée's hospitalization and need for surgery. Nevertheless, Chopra exhausted all resources to excuse Williams's November 13 absence. She asked him to contact Human Resources to see if Williams could utilize protected leave to excuse his absence that day. (Tr. 53:11-54:1, 186:11-187:4.) After Williams informed Chopra that Human Resources told him he could not use any protected leave to excuse the absence, she personally decided to excuse his absence on November 13. (Tr. 54:16-18, 186:11-187:14.) Chopra did so purely out of empathy for Williams. Nevertheless, Chopra made it abundantly clear to Williams during that discussion that he needed

to swap shifts in order for any absence on November 14 to be excused.¹⁴ (Tr. 186:11-187:14.) In doing so, she further accommodated Williams, because the Employer's general policy is to require that a shift be swapped no later than forty-eight hours of the start of the scheduled shift. (Tr. 187:18-188:12.)

Notwithstanding Chopra's compassionate efforts to help Williams – which belie the notion that the Employer sought to retaliate against Williams because of his previous grievance – he did not swap shifts with anyone. In fact, according to Williams's hearing testimony, he made no effort at all to contact any co-worker about potentially swapping his November 14 shift.¹⁵ (Tr. 86:16-87:1.) Williams's failure to find someone to swap shifts with him is especially perplexing because he was in the Natomas store when he spoke with Chopra on November 13. (Tr. 53:11-23.)

Williams understood his absence on November 14 would be unexcused unless he swapped shifts because Chopra told him he needed to swap the shift. (Tr. 147:11-20, 186:11-187:17.) He called Black on November 14 knowing that it was expected that he have someone else cover his shift that day.¹⁶ Chopra already provided Williams two accommodations: (1) excusing his absence on November 13; and (2) allowing him to swap his November 14 shift notwithstanding the fact that such a trade was technically untimely under Company policy. The Company could not reasonably be expected to overlook Williams's failure to find a co-worker to

¹⁴ For the reasons explained above, Williams's account of the discussion with Chopra is not credible and should be given little, if any, weight.

¹⁵ Williams stated at the December 14 termination meeting that nobody wanted to trade for his November 14 shift. (Tr.147:11-20.) Regardless of which of Williams's accounts of his efforts to swap shifts the ALJ ultimately accepts, it remains undisputed that Williams did not find a co-worker to take his November 14 shift. Instead, he called Black the morning of November 14 and bluntly told him that he would not be coming to work that day because of his fiancée's health situation. (Tr. 164:18-165:3.)

¹⁶ As explained above, Williams's account of his discussion with Black is unbelievable and discredited. Black's testimony regarding the conversation should be credited over Williams's.

cover his November 14 shift and excuse his absence that day. For that reason, AT&T issued Williams an attendance point for his unexcused absence on November 14.

Upon assessing this additional attendance point, AT&T justifiably terminated Williams's employment because of his excessive accrual of such points. The Company had put Williams on a Final Written Warning on May 9, 2017 because he accrued 10.75 points – well in excess of the eight-point threshold set forth in the Sales Attendance Guidelines. Even though Williams had yet another unexcused absence two days after the issuance of the Final Written Warning, the Employer ultimately elected to keep him on a Final Written Warning in or around late September 2017.

As a result of the additional attendance point incurred as a result of the November 14, 2017 absence, Williams's attendance point total reached 8.75 points – again a total in excess of the termination threshold. AT&T reasonably concluded that further coaching, counseling, and disciplinary action would not deter Williams from excessive absenteeism, and thus, termination was necessary. The Employer's decision to discharge Williams in no way could have reasonably caught him by surprise. Indeed, Williams understood his next unexcused absence could result in his termination given that he was on a Final Written Warning. (Tr. 78:18-21, 86:16-19; Jt. Exh. 5.)

AT&T was under no duty to ignore Williams's latest unexcused absence on November 14 and keep him on a Final Written Warning. The Company's earlier efforts to extend him latitude notwithstanding his accrual of over eight attendance points and his accrual of additional points while on a Final Written Warning did not prove successful. Therefore, the Company had legitimate, non-discriminatory reasons for discharging Williams.

Williams is not the only AT&T employee in the Sacramento area to have been terminated for excessive absenteeism and attendance point accruals. (Tr. 143:4-144:6; G.C. Exh. 27.) Indeed, Coates admitted that he is aware of around three to five RSC terminations relating to excessive attendance point accruals that resulted in grievances.¹⁷ (Tr. 143:4-144:6.) Coates's estimate does not take into consideration such attendance-related terminations that did not trigger a grievance. (*Id.*) Thus, the number of AT&T attendance-related terminations in the Sacramento area in recent years is much higher.

2. The General Counsel's Proffered Evidence Of Animus Is Insufficient To Meet The Burden Of Proof For Establishing Animus.

The General Counsel did not meet its burden of proof to establish that Williams's protected Union-related conduct was a motivating factor in the Employer's decision to terminate his employment. Indeed, the General Counsel did not present any direct evidence of animus against Williams' protected activities. As explained further below, the General Counsel's proffered circumstantial evidence in no way is sufficient to establish a nexus between Williams's protected activities and AT&T's issuance of an attendance point against him and termination of his employment in light thereof.

a. Williams Engaged In The Same Protected Activities As His Co-Workers, Which Did Not Trigger Any Alleged Retaliation Against His Alleged Comparable Co-Workers.

AT&T has a longstanding bargaining relationship with the CWA. Indeed, the Company employs thousands of CWA-represented RSCs – hundreds of which are in California. As such, the notion that the Company would target a single employee in Sacramento because he engaged in Section 7-protected activity is farfetched.

¹⁷ Coates initially stated he recalled around five attendance terminations resulting in grievances. (Tr. 144:4-17.) He later backtracked and claimed that his estimate was "three or less." (Tr. 134:18-144:6.) Given Coates's status of Chief Shop Steward and his inherent bias in favor of Williams and against the Employer, his initial estimate should be credited.

In any event, while Williams participated in Section 7-protected activities, those activities in no way distinguished him from his co-workers. Indeed, Williams was no more active with the Union than his peers at the Natomas store. He was neither a shop steward nor an elected union representative. (Tr. 27:14-16, 78:13-14.) Williams participated in a strike against AT&T – as did all AT&T Mobility RSCs nationwide, including those at Natomas. (Tr. 32:6-11, 71:18-72:1.)

He wore union insignia to work that was visible to customers – which other Natomas RSCs did as well. (Tr. 72:2-6, 72:9-14, 73:17-74:1, 74:4-6, 74:9-10.)

Williams filed grievances challenging disciplinary actions against him. However, it is undisputed that several other employees at Natomas and other AT&T stores in the Sacramento area filed grievances. (Tr. 62:15-21, 75:9-11, 75:21-22, 76:5-13, 77:4-8, 77:12-78:4, 117:8-10, 142:12-17, 183:12-18, 198:2-6.) Indeed, the Union’s Chief Shop Steward Rob Coates admitted that in some years, he submits over one hundred grievances against AT&T; AT&T Sacramento Area Manager Vanessa Khallouf dealt with fifteen to twenty grievances in a typical month; and former Natomas Store Manager Sasha Chopra received five to ten grievances per month during her tenure at Natomas. (Tr. 117:8-13, 142:12-17, 183:12-18, 198:2-6.) As Khallouf testified, “Grievances are a normal part of the business.” (Tr. 209:25-210:3.)

Williams voiced his displeasure to Company management regarding RSC compensation and the attendance policy. (Tr. 40:24-41:11, 45:16-23, 46:15-47:16.) However, as Williams admitted, all of the RSCs conveyed disapproval of the Employer’s compensation plan as evidenced by the strike and by other employee complaints to management regarding RSC pay. (Tr. 46:6-8, 47:17-48:2.) He also complained to management about the Employer’s attendance policy, but he admitted that RSCs “were always talking about the attendance policy” and that other RSCs spoke with management about their issues with the attendance policy. (Tr. 41:20-23,

45:16-46:8.)

Williams claims that he spoke up at meeting that then-Natomas Store Manager Amy Rodriguez held with some RSCs advising them that the Employer expected RSCs to begin making cold calls to potential customers. (Tr. 37:18-38:7.) He contends he voiced his objection to this alleged new expectation. (*Id.*) However, he admits that he is “sure” that his co-workers voiced their objections during the same meeting. When asked whether any of his co-workers spoke during the same meeting, Williams responded, “I’m sure they did. It was a lot of chatter back and forth after [Rodriguez] said that we needed to cold-call businesses. No one was happy about it.” (Tr. 38:13-16.)

Williams also testified that he complained to Assistant Store Manager David Sum about an alleged change implemented by the Company purportedly prohibiting RSCs from sitting during their shifts. (Tr. 34:13-17.) However, at least one other RSC at the store, Tony Scroggins, raised the exact same complaint to management’s attention. (Tr. 34:20-24.)

Given that Williams was one of several employees in the Natomas store and the Sacramento area who engaged in numerous Section 7-protected activities – including strikes, grievances, and protests to management regarding working conditions – the notion that AT&T singled him out for his protected activities is absurd.

b. Williams’s Grievance Regarding His Final Written Warning Stemming From An Incident With His Supervisor Played No Role In The Company’s Issuance Of An Attendance Point And His Termination.

The General Counsel theorizes that AT&T used its Attendance Policy Guidelines and Williams’s absence on November 14 as pretext to “terminate Mr. Williams for having filed and successfully processed” a grievance challenging the issuance of a Final Written Warning to

Williams because of a confrontation he had with Assistant Store Manager David Sum.¹⁸ (Tr. 16:15-20.) This contention is baseless.

As explained above, grievances “are a normal part of the business” at AT&T and its managers, including Khallouf and Chopra, deal with such grievances several times per month. Indeed, the grievance at issue was not even the first grievance filed on Williams’s behalf relating to a Final Written Warning. On May 9, 2017, the Union filed a grievance challenging the Final Written Warning Williams received for attendance that same day. (G.C. Exh. 8 at p. 1.) Two days later, the Union filed another grievance on his behalf alleging an unjust loss of pay and demanding reimbursement of medical expenses.¹⁹ (G.C. Exh. 8 at p. 3.) In any event, the notion that a single grievance relating to a Final Written Warning issued to one employee would trigger AT&T to terminate the employee in retaliation for the grievance is outlandish – particularly under the facts of this case.

On October 5, 2017, the Union filed three grievances on Williams’s behalf regarding the Final Written Warning issued as a result of the Sum incident.²⁰ (G.C. Exh. 2.) It is undisputed that on November 2, while those grievances were pending at Step 2, Khallouf voluntarily proposed resolving those grievances. (Tr. 142:9-20, 208:11-209:9; G.C. Exh. 3.) Specifically, she proposed reducing Williams’s Final Written Warning (which would remain effect for twelve

¹⁸ The General Counsel does not allege that the discipline issued to Williams as a result of the incident with Sum violated the Act. Thus, the facts on which the Company relied to issue that particular discipline are relevant to this case and the Employer will not address them in this brief.

¹⁹ Khallouf denied both grievances at the Step 2 level. (G.C. Exh. 10.) The Union escalated only the grievance regarding loss of pay and the demand for reimbursement of medical expenses to Step 3 of the grievance procedure. (*Id.*)

²⁰ Williams’s charge alleged that the Company’s initial Final Written Warning to him for the David Sum encounter violated Section 8(a)(3) of the Act. (G.C. Exh. 1(a).) The General Counsel’s Complaint does not allege that the Company’s issuance of any disciplinary action against Williams as a result of the Sum interaction violated the Act. (G.C. Exh. 1(d); G.C. Exh. 1(m).)

months) to a Written Warning that would remain in effect for only six months. (*Id.*) Under Khallouf's proposal, the Written Warning would be in effect for three fewer months than the Company's guidelines suggest for such Written Warnings. (*Id.*) Khallouf was under no obligation to offer the compromise; she could have denied the grievances and put the impetus on the Union to escalate the grievances to Step 3 of the grievance process.²¹ (Tr. 142:21-24.) The Union and Jackson, despite having the option to reject the proposal and advance the grievance to Step 3, agreed to accept Khallouf's proposal. (Tr. 142:9-24, 208:11-209:9; G.C. Exh. 3.) As a result, the Company reduced the Final Written Warning to a Written Warning with a reduced, six-month duration. (Tr. 208:11-209:9.)

Far from indicating that the Company took issue with Williams filing a grievance relating to the discipline associated with the Sum incident, the undisputed record evidence shows that the Company handled the grievance professionally. Instead of challenging the grievance further, the Employer voluntarily proposed a compromise favorable to Williams – which both Williams and the Union accepted. Contrary to the General Counsel's assertion, it is unfathomable that the Employer would propose to resolve Williams's grievances amicably and nevertheless proceed to target him for termination out of outrage because he filed the three grievances in the first place.²²

²¹ The General Counsel introduced evidence regarding the grievance discussion for the purpose of contending that the Employer allegedly had "no choice" but to settle the grievance. This assertion is baseless, and it fundamentally misunderstands the grievance process. The Company had options beyond settling the grievance then and there. The Employer could have denied the grievance and put the onus on the Union to escalate the grievance to Step 3 of the grievance procedure and all the way to arbitration had the Union wished to do so. Consequently, any testimony from Coates regarding the grievance discussions – other than the parties' agreement to resolve the grievance according to the terms proposed by the Employer – are entirely irrelevant to the ultimate issue in the case: whether Williams's November 14 attendance point and termination as a result thereof violated Section 8(a)(3) of the Act.

²² Coates also testified that he was concerned that the Final Written Warning issued as a result of the Sum incident was retaliatory. (Tr. 103:25-104:16.) However, there is no evidence indicating that he had any reasonable cause for such concern. Indeed, despite Williams's charge alleging

c. The General Counsel's Evidence Of Purported Disparate Treatment Is Unavailing.

The General Counsel also attempts to support its case by claiming that Williams was a victim of purported disparate enforcement of the Sales Attendance Guidelines. The evidence does not support the General Counsel's contention.

The burden of proving disparate treatment generally requires evidence of comparators who are "similarly situated" to the discriminatee. In *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 628 n.4 (1993), the Board stated, "[a]n essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." This necessarily requires a showing that the comparators engaged in the same offenses as the discriminatee in the same circumstances. See *Central Valley Meat Co.*, 318 NLRB 245, 249 (2006) (in determining whether the employer unlawfully terminated a pro-union employee for engaging in sanitation violations, the NLRB focused on similarly situated employees who also violated the employer's sanitation rules); *Engineered Comfort Sys., Inc.*, 346 NLRB 661, 662 (2006) (comparing employees who committed the "same infraction" as the discriminatee).

In *Consolidated Biscuit Co.*, 346 NLRB 1175, 1177, n.14 (2006), the Board determined that where the complainant had been terminated for both falsification of his employment application and sexual harassment, the disciplinary actions taken against employees who had engaged only in "egregious and repeated sexual harassment" were irrelevant. These proffered comparable employees were not similarly situated to the complainant because they had not allegedly engaged in both falsification of their applications and sexual harassment. *Id.* Thus, the Board did not give any weight to the General Counsel's evidence of disparate treatment.

that the Final Written Warning was retaliatory, the General Counsel elected not to raise this issue in the Complaint. (G.C. Exh 1(a); G.C. Exh. 1(d); G.C. Exh. 1(m).)

In fact, in order to establish disparate treatment, the General Counsel must prove that employees with whom Williams seeks “to compare [his] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without any such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). Indeed, “an inference of union animus based upon disparate treatment can be made if the only difference between two differently treated employees is the illegitimate criteria at issue (i.e., union activity).” *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996), citing *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980), *cert. denied*, 449 U.S. 879 (1980).

Accordingly, it is not enough for the General Counsel to show that other AT&T employees accrued more than eight attendance points and were issued discipline short of termination. The General Counsel must show that other AT&T employees who were supervised by the exact same managers as Williams accrued more than eight attendance points while on a Final Written Warning, yet were not terminated when they accrued yet another attendance point notwithstanding the final warning.

Here, the General Counsel failed to provide evidence of any such similarly situated employee who was not terminated despite: (1) sharing the same supervisors as Williams; (2) being on a Final Written Warning; and (3) accruing eight or more attendance points while still remaining on the Final Written Warning. Instead, the General Counsel offers evidence of fifteen different AT&T RSCs in the Sacramento area who were issued Final Written Warnings despite accruing eight or more attendance points (G.C. Exhibits 11 through 22 and 24 through 26); and one RSC in the Sacramento area whose employment was terminated after he accrued 8.25 points (G.C. Exh. 27).

At most, the General Counsel's evidence establishes that in the Sacramento area, AT&T has not enforced a strict bright-line rule in which an RSC who accrues eight or more points is subject to immediate termination without management having the ability to exercise discretion over the ultimate discipline. The Company does not quarrel with that fact that management maintains flexibility over the ultimate disciplinary actions to be taken in light of excessive absenteeism. The Sales Attendance Policy Guidelines expressly state that "[e]xceptions to the . . . progression guidelines [set forth in the point thresholds] may be made as appropriate at the company's discretion." (Jt. Exh. 3 at p. 3.) In fact, within just the two years predating his termination, Williams was on no less than three prior occasions the beneficiary of receiving a Final Written Warning rather than being terminated even though he accrued eight or more attendance points:

- on March 24, 2016 when he accrued 8.75 points (Jt. Exh. 5);
- on May 9, 2017 when he accrued 10.75 points (Jt. Exh. 5; Tr. 198:20-199:15; G.C. Exh. 2; G.C. Exh. 10 at pp. 1-2); and
- in September 2017 for having 10.75 points accrued as of May 11, 2017 (Tr. 79:18-21, 199:23-200:14, 200:23-204:17; R. Exh 6; R. Exh. 7).

Consequently, the fact that other employees accrued eight or more attendance points, but were issued Final Written Warnings rather than terminations does not in any way establish that Williams was treated worse than similarly situated employees because of his protected Union activities.

Admittedly, some of the employees who the General Counsel contends are comparators to Williams accrued more than the 8.75 points Williams had at the time of his termination. (G.C. Exh. 13 (9 points); G.C. Exh. 15 (9.75 points); G.C. Exh. 18 (48.5 points); G.C. Exh. 21

(13 points); G.C. Exh. 22 (9 points); G.C. Exh. 24 (10.5 points); G.C. Exh. 26 (10.25 points).) In fact, one employee accrued 48.5 points and was placed on a Final Written Warning as a result thereof. (G.C. Exh. 18.) However, there is no evidence that the employee who accrued 48.5 points was ever on a prior Final Written Warning or any initial discipline at all for attendance issues. The same is true of all of the alleged comparators. As such, none of those individuals can reasonably be considered “similarly situated” to Williams. Hence, the General Counsel’s evidence of alleged disparate enforcement of its Sales Attendance Policy Guidelines does not support its premise that the Company terminated Williams in retaliation for his Section 7-protected activity. *See, e.g., Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98 (May 31, 2018), slip op. at pp. 16-17 (finding General Counsel’s evidence of disparate treatment insufficient because the terminated alleged discriminatee, unlike the alleged comparators, had an ongoing pattern of failing to properly complete financial paperwork, for which he received training, coaching, and a lawful written warning).

d. The General Counsel Did Not Provide Sufficient Evidence To Establish That The Employer Reneged On Any Agreement To Excuse Williams’s November 14, 2017 Absence.

The General Counsel presented testimony from Williams in which he claimed that: (1) Chopra assured him on November 13 that his absence on November 14 would be excused; and (2) Black effectively excused his absence on November 14 by telling him that morning something to the effect of, “Go and be with your lady.” As explained above in Section II(D)(3) (pages 9 through 14), Williams’s self-serving testimony regarding his interactions with Chopra and Black regarding the November 14 absence is not at all credible.²³ For these reasons, the

²³ At the hearing, Coates testified that he did not understand why Chopra required Williams to swap shifts instead of just granting him vacation on November 14 and excusing the absence. However, it is undisputed that shift swaps impose far less of a burden on a management as it ensures coverage for the shift at issue and does not place the onus on the Employer to find an

General Counsel's claim that AT&T somehow reneged on a promise or representation that it would excuse Williams's November 14 absence is not supported by the evidence.

In any event, the assertion that Williams was discharged in retaliation for protected activity is unfounded. The record evidence does not establish that animus was a "substantial or motivating" factor in the face of these facts. The General Counsel did not even establish that animus played any part in the decision to discharge Williams. Accordingly, the charge should be dismissed.

C. Even Assuming That The General Counsel Could Present A *Prima Facie* Case, The Employer Has Met Its Burden Of Showing That It Would Have Taken The Same Actions In The Absence Of The Purported Protected Activity.

The Company need only prove that it would have taken the same actions in the absence of the protected activity in the unlikely event the General Counsel is able to meet its burden to prove, by a preponderance of the evidence, that animus was a substantial or motivating factor in its decision to assess Williams a point and terminate his employment as a result thereof.

The General Counsel cannot meet the burden to establish animus as a substantial or motivating factor. Assuming, *arguendo*, that it could, the fact that Williams did not follow his supervisor's direction to swap his November 14 shift and consequently accrued another attendance point even though he was on a Final Written Warning for attendance demonstrates that the Company had compelling, non-retaliatory reasons for discharging Williams.

Williams accrued an attendance point for his unexcused absence on November 14. By that point in time, Williams had twice – on May 11, 2017 and November 14, 2017 – accrued additional attendance points since he was put on a Final Written Warning on May 9, 2017. The Company elected not to terminate his employment for his May 11 absence because by the time

employee to volunteer to take the vacated shift. (Tr. 155:3-8.)

his workers' compensation case was resolved in September 2017, several months had passed. Given Williams's second unexcused absence and his attendance point accrual exceeding the eight-point threshold for termination pursuant to the Sales Attendance Guidelines, the Company would have terminated Williams's employment even in the absence of any protected activity on his part.

As explained above in Section III(B)(2)(c), the General Counsel's contention of disparate treatment is unavailing. There is no evidence that any of the purported comparators identified by the General Counsel exceeded eight attendance points while being on a Final Written Warning. Thus, they are not similarly situated to Williams and the General Counsel's disparate treatment argument fails. *See, e.g., Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180 (August 26, 2015), slip op. at pp. 2-3 (rejecting disparate treatment theory because although other employees had amassed more attendance points than alleged discriminatee before being discharged, the alleged discriminatee was on course to amass more points than the alleged comparable employees); *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at pp. 16-17 (finding evidence of disparate treatment insufficient because the alleged discriminatee, unlike the alleged comparators, had an ongoing pattern of failing to properly complete financial paperwork, for which he received training, coaching, and a lawful written warning). For these reasons, in the event that the Judge believes that General Counsel has met its burden, the Employer has met its burden to show that it would have issued the attendance point for the November 14 absence and terminated Williams's employment regardless of whether he engaged in Section 7-protected activity.

Further, the Employer's decisions to assess Williams an attendance point and terminate his employment were appropriate business decisions necessary to ensure that AT&T maintains a

workforce that reliably appears for work as scheduled so that the employees can service the Employer's customers. It is not for the trier of fact to evaluate whether or not the Employer's business reasons made sound business sense. The Employer need only show that it was honestly motivated by legitimate, nondiscriminatory business reasons. "[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause [for the action taken]." *Ryder Dist'n Resources, Inc.*, 311 NLRB 814, 816-17 (1993), *citing NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), *enforcing in part* 137 NLRB 306 (1962); *see also Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining that the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that "Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position").

Here, AT&T was motivated only by its need to ensure that its employees can reasonably be expected to appear for work when scheduled. Williams's repeated inability to maintain adequate attendance while on a Final Written Warning is completely inconsistent with this basic rule. Accordingly, AT&T's issuance of an attendance point and its decision to terminate Williams were appropriate business decisions under the circumstances of these cases.

For all these reasons, the General Counsel's charge of retaliation must be dismissed.

IV. CONCLUSION

For each of the above reasons, AT&T did not violate Section 8(a)(3) of the Act as alleged, and the Complaint should be dismissed in its entirety.

Dated: November 28, 2018

Respectfully submitted,

MICHAEL G. PEDHIRNEY
LITTLER MENDELSON, P.C.

By


MICHAEL G. PEDHIRNEY

Attorneys for Respondent
AT&T MOBILITY SERVICES LLC

CERTIFICATE OF SERVICE

Case No.: 20-CA-215835

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 333 Bush Street, 34th Floor, San Francisco, California 94104. On November 28, 2018, I served the within document(s):

**RESPONDENT AT&T MOBILITY SERVICES LLC'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

on the interested parties as follows:

1) BY ELECTRONIC MAIL (EMAIL):

I attached a full, virus-free PDF version of the document(s) to electronic correspondence (e-mail) and transmitted the document(s) from my own email address, chgoodman@littler.com, to the person(s) at the address(es) below. There was no report of any error or delay in the transmission of the email.

Carmen Leon
Field Attorney
National Labor Relations Board,
Region 20
Email: Carmen.Leon@nlrb.gov

2) BY FIRST-CLASS MAIL:

I enclosed a true and correct copy of the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) below and placed it for mailing following the firm's ordinary business practice. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

Edward Megual Williams
1133 Los Robles Blvd.
Sacramento, CA 95838-4428

I declare under penalty of perjury under the laws of the United States of America
that the above is true and correct. Executed on November 28, 2018 at San Francisco, California.



Charisse Goodman