UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

AT&T MOBILITY SERVICES, LLC

and Case 20-CA-215835

EDWARD MEGUAL JACKSON, an Individual

COUNSEL FOR GENERAL COUNSEL'S POST HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

This is a straight-forward case of an employer terminating an employee because he exercised his Section 7 right to file and process a grievance. The Board has long held that filing and processing a grievance under a collectively bargained for grievance and arbitration procedure constitutes protected concerted activity. Here, Edward Williams (the Charging Party), a union proponent and outspoken employee, exercised his right to file and process a grievance disputing an unjust final written warning. Respondent had hastily issued the Charging Party the unsubstantiated discipline for an overblown incident with a supervisor, likely because the Charging Party's protected activity was already grating on Respondent. The Union vigorously advocated against the discipline. When Respondent was faced with the reality that the discipline would not stick, it settled the grievance for lesser discipline. However, eight days later, Respondent issued an unwarranted attendance discipline to the Charging Party and relied on it to justify terminating him. Notwithstanding Respondent's arguments that it would have disciplined and terminated the Charging Party even absent his union and protected concerted activity, the record evidence shows that Respondent's reasons for issuing the final attendance point and termination were pretextual, and the true reason for each was the Charging Party's union and protected concerted activity.

II. FACTS

A. Charging Party Was a Well-Known Union Proponent Who Engaged in Union and Protected Concerted Activity.

The Charging Party was a Retails Sales Consultant (RSC) for AT&T Mobility Services (Respondent) at one of Respondent's stores in Sacramento, California. (Tr. 23)[1] As an RSC, the

[1] All references to the transcript are noted by "Tr." followed by the page number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit

Charging Party assisted customers who came into the store with purchases and troubleshooting phone issues. (Tr. 23) During the four and a half years the Charging Party worked for Respondent, he worked at numerous locations, and was tasked with heightened responsibilities such as opening and closing his assigned store, and was trained to be an assistant store manager in 2016. (Tr. 24) The Charging Party's last work location for Respondent was the Natomas store between March 2015 and his termination on December 14, 2017.

As an RSC for Respondent, the Charging Party was represented by Communications Workers of America Local 9421 (the Union). (Jt. Exh. 2) The Charging Party was not shy about making his Union support known, whether by wearing Union pins in the workplace, participating in a Union strike with his coworkers in May 2017, or regularly relaying information from the Union town hall meetings, which he attended, to the bargaining-unit members at the Natomas store. (Tr. 27-30) This included sharing information during the staff meetings prior to the start of the shift regarding contract ratification in December 2017. (Tr. 28) The Charging Party passed along this information to RSCs in front of Retail Store Managers and Assistant Store Managers. (Tr. 31)

When management at the Natomas store tried to implement impromptu policies impacting RSCs' working conditions, the Charging Party spoke out on behalf of himself and his fellow RSCs. (Tr. 33-34) For example, when management attempted to prohibit RSCs from sitting down during their shifts in May 2017, the Charging Party spoke up, told Assistant Store Manager (ASM) David Sum that Respondent could not do that, and threatened to contact the Union. (Tr. 33-34) On another occasion around the same time, the Charging Party spoke against

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number(s). All references to Respondents' exhibits are noted as "R Exh." followed by the exhibit number(s). All references to joint exhibits are noted as "Jt. Exh." followed by the exhibit number(s). All references to Stipulations are noted as "Stip." followed by the paragraph number(s). All references to the Administrative Law Judge are noted by "ALJ."

a newly-implemented practice of cold calling businesses. (Tr. 38) Retail Store Manager (RSM) Amy Rodriguez announced this new policy during a morning meeting where she told the RSCs that they had to start cold calling businesses. (Tr. 38) The Charging Party explained that that task belonged to business representatives, and the RSCs were responsible for the business that came into the store. (Tr. 38) RSM Rodriguez dismissed the Charging Party's argument. (Tr. 38) During that same conversation, undeterred, the Charging Party also complained that the RSCs were being paid $30 less than they were paid a few months before for the DirecTV product and that this was why the employees had gone on strike. (Tr. 47) In June 2017, the Charging Party raised the same concern regarding compensation with Area Retail Sales Manager (ARSM) Vanessa Khallouf on the sales floor along with RSC Tony Scroggins. (Tr. 38-39) Similar to RSM Rodriguez, ARSM Khallouf dismissed the Charging Party's concerns. (Tr. 39)

The Charging Party also had no qualms about raising RSCs' concerns with Respondent's attendance policy with the then-new Natomas RSM Sasha Chopra in August 2017. (Tr. 40; Jt. Exh. 1, Stip. 4) Having already discussed the numerous issues with his coworkers throughout the summer of 2017, the Charging Party broached the topic with Chopra by stating that the RSCs' concerns included that they were being asked to sell more products, but they were not being paid accordingly and that they could not get sick without being penalized by the attendance point system. (Tr. 41, 42) Similarly, when ARSM Corey Carver came to work with the Natomas store in December 2017, the Charging Party and his coworkers took advantage of the opportunity to address their concerns about the store and the business directly to her. (Tr. 45) The Charging Party stated that the RSCs did not like the compensation plan, as they were being asked to sell more products without any corresponding increase in their pay. (Tr. 45) The Charging Party also told Carver that the attendance policy was a problem because it penalized employees for getting

sick. (Tr. 45) All together, the Charging Party was known for his outspokenness, and by July 2017, management at Natomas referred to the Charging Party as "a handful." (Tr. 161)

Importantly, the Charging Party was no stranger to filing grievances through the Union's and Respondent's grievance and arbitration procedure. (GC Exh. 2, 8) His grievances included an "Unjust Final Written Warning for Attendance" and "Unjust Loss of Pay and Medical Expenses" which he filed to dispute the action Respondent had taken against him after he suffered an insect bite at work on March 11, 2017. (GC Exh. 10, p. 1; Tr. 113, 183, 199) At the time those grievances were reviewed on July 21, 2017, the Charging Party had accumulated 10.75 attendance points and had a workers compensation claim pending. (GC Exh. 10)

B. Charging Party Successfully Grieves Final Written Warning under Code of Business Conduct.

Most relevant here, the Charging Party requested that the Union file a grievance against Respondent for issuing him a final written warning over a June 13, 2017 incident with ASM David Sum (David Sum incident). (Tr. 62) Although Respondent's investigation took place within a couple of weeks of the June incident, the Charging Party did not receive the results of the investigation or any disciplinary action until nearly four months later on October 3, 2017. (Tr. 63, 68) At the Charging Party's request, after his untimely discipline, the Union promptly filed grievances on October 5, 2017, not just for the final written warning, but for unjust management retaliation, failure to cooperate with the Union, and failure to deliver timely discipline. (GC Exh. 2) By mid October 2017, Union chief steward Rob Coates and Union steward Alex Dorado met with RSM Sasha Chopra and ASM Brad Troutfelt or Nora Brambila concerning the grievances. (Tr. 104-105; Jt Exh. 1, Stip 5) During the meeting, Coates pointed out the investigation's deficiencies, including that Respondent only interviewed managers and not RSCs who witnessed the incident. (Tr. 105) With respect to the untimeliness of the

discipline, Chopra admitted that management had dropped the ball and failed to issue the discipline in a timely manner. (Tr. 109) After the first grievance meeting, Chopra offered to reduce the time the final written warning would remain on the Charging Party's record. (Tr. 110) However, the Charging Party rejected this offer and the grievances moved to Step 2 of the parties' grievance and arbitration procedure. (Tr. 110)

On about October 31, 2017, Union chief steward Coates and Union vice president Edgar Macias met with Respondent ARSMs Vanessa Khallouf and Garrett Zipp for Step 2 of the grievance and arbitration procedure. (Tr. 111; GC Exh. 3) Coates again pointed out the deficiencies in the investigation and posited that management was retaliating against the Charging Party for the three grievances he filed earlier in the year following his insect bite at Respondent's site. (Tr. 113) Khallouf admitted that there was no excuse for the untimeliness of the discipline and that the investigation had been lacking as well. (Tr. 112) At this meeting, Khallouf agreed to reduce the final written warning under the Code of Business Conduct, with a 12-month effective period, to a written warning with a six-month effective period. (GC Exh. 3) On November 6, 2017, the Charging Party accepted the reduced discipline. (GC Exh. 3)[2]

C. Charging Party Receives Attendance Point for Emergency Absence a Week after Settling Grievance for Final Written Warning.

On Monday, November 13, 2017, the Charging Party was scheduled to work the opening shift at the Natomas store. (Tr. 53) He arrived at the store prior to his shift to notify the manager on duty, ASM Brad Troutfelt, that his fiancée was having emergency surgery. (Tr. 53) ASM Troutfelt advised the Charging Party to contact RSM Sasha Chopra. (Tr. 53) When the Charging

[2] On November 16, 2017, the Charging Party was placed on another Final Written Warning under the Code of Business Conduct due to an incident with another employee (GC Exh. 4) The Union chose not to grieve this discipline because it would inculpate another bargaining-unit member. (Tr. 116-117)

Party called Chopra, she advised him to contact Respondent's FMLA[3] division. (Tr. 53) The Charging Party then called the FMLA department and was informed that they could not confirm whether his would ultimately be approved, only that he would have to miss work and then apply for FMLA. (Tr. 53) The Charging Party was not satisfied with the uncertainty of this response because if his claim was denied he could be terminated. (Tr. 53)

The Charging Party called RSM Chopra again and informed her what the FMLA department told him. (Tr. 54) Chopra asked the Charging Party whether he could get someone to cover his shift. (Tr. 54) The Charging Party stated that it was impossible to find a swap because RSCs could not swap shifts within 72 hours of the start of the shift. (Tr. 54-55)[4] Chopra asked the Charging Party whether he could use Kincare[5] to which the Charging Party stated he could not. (Tr. 55) Chopra then asked the Charging Party whether he had any other time off that he could use. (Tr. 54, 55) The Charging Party offered that he did have two vacation days left, which he could use Monday and Tuesday, and as Wednesday was his day off, he could come back to work on Thursday, November 16, 2017. (Tr. 54) The Charging Party asserted that by then he would know more about his fiancée's situation. (Tr. 54) Chopra told the Charging Party to do what he had to do, they would use his vacation, not to worry about it, and they would work it out. (Tr. 54, 55) The Charging Party did not work that day. (Tr. 56)

The next day, Tuesday, November 14, 2017, the Charging Party called ASM Michel Black, who was on his way to the Natomas store. (Tr. 56) The Charging Party asked whether Black had spoken with RSM Chopra about his situation. (Tr. 56) Black responded that he had

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[3] Counsel for the General Counsel respectfully requests that the ALJ take judicial notice that FMLA stands for Family Medical Leave Act.

[4] In reality the practice is that a swap must be made within 48 hours of the shift start. (Tr. 121) This minor error on the Charging Party's part does not matter here where the point is it was too late to make a swap the day before the scheduled shift.

[5] Kincare is another type of excused leave under Respondent's attendance policy. (Tr. 42)

spoken to her and asked whether the Charging Party's fiancée was in the hospital. (Tr. 56) The Charging Party said yes, and he had to be with her that day because she was going to have more surgery. (Tr. 56) Black replied, "You go be with your lady." (Tr. 56) The Charging Party returned to work on Thursday, November 16, 2017. (Tr. 57) It is undisputed that no one spoke with him about his absence upon his return. (Tr. 57) However, Respondent would later claim that the "attendance point" meted for his absence, unbeknownst to the Charging Party, was the basis for his termination.

D. Respondent Terminates Charging Party under the Guise of Attendance Violations.

About a month later, on December 14, 2017, the Charging Party went to work as scheduled. (Tr. 48) However, once he tried to use the iPad to clock in, the Charging Party's passwords would not work. (Tr. 48-49) The Charging Party went to the management office and noticed RSM Sasha Chopra there. (Tr. 49) By that time, Chopra was no longer the RSM at Natomas, so the Charging Party asked the new RSM Raj Sharma to help him log in for work. (Tr. 48; Jt. Exh. 1 Stip, 4) Instead, Chopra answered and told the Charging Party to have a seat in the break room. (Tr. 49)

A few minutes later, Union chief steward Coates arrived. (Tr. 49) The Charging Party asked Coates whether he knew what was going on, and Coates replied that he did not. (Tr. 49) A few minutes later, RSM Chopra called them both into the management office. (Tr. 49) Chopra handed the Charging Party a piece of paper and told him he was being terminated. (Tr. 49) The Charging Party asked why Chopra was doing this. (Tr. 49) Chopra replied that per their conversation she had issued him an attendance point. (Tr. 49) The Charging Party was at a loss as to what Chopra was referring. (Tr. 49) Chopra said that the Charging Party was being terminated for attendance based on an absence point incurred on November 14. (Tr. 123) The

Charging Party asked Chopra how she could do that to him because they had talked about him being off for two days. (Tr. 123) The Charging Party reminded Chopra that she had approved his absence on November 13 and knew that he needed the second day as well because that was the day of his fiancee's surgery. (Tr, 123) Union chief steward Coates asked RSM Chopra whether the Charging Party received an attendance point for November 13, as well. (Tr. 124) Chopra stated that he had not. (Tr. 124) Coates asked why not. (Tr. 124) Chopra stated that she entered vacation time for that date. (Tr. 124) Coates retorted, asking why she had not placed vacation time for November 14, if that was what he had discussed with her. (Tr. 124) Chopra stated that she offered the Charging Party a shift swap. (Tr. 124) Coates asked why she offered a shift swap which could not be done within 48 hours of the scheduled shift, when the request was being made the day before the shift. (Tr. 124) Chopra replied that she was going to allow it. (Tr. 124) Coates asked why it was that if Chopra would make an exception on the shift swap, she would not make an exception to use another vacation day, which the Charging Party had in abundance. (Tr. 124) Chopra stated that she later spoke to ARSM Vanessa Khallouf, and Khallouf told her that it was up to her and that she did not have to accommodate[6] the Charging Party's leave for those days. (Tr. 49-50) The Charging Party stated that this was hurtful and malicious based on the stress that he was going through with his fiancée having surgery. (Tr. 124) The Charging Party told Chopra that they had talked about this on the day he called her about the surgery and she knew the outcome. (Tr. 124) The Charging Party and Coates then left the store. (Tr. 125)

E. Respondent's Enforcement of the Attendance Policy

Respondent's attendance policy consists of allocating points to employees for each unexcused absence. (Jt. Exh. 3) An unexcused absence is defined as "any time away from your

[6] Counsel for the General Counsel respectfully moves for the transcript to be corrected so that Tr. 50, line 1 "combination" be replaced with "accommodation."

scheduled shift due to absences, late arrivals or early departures that is not excused," and is tracked using an "Unexcused Absence Point System." (Jt. Exh. 3, p. 2) The Employer maintains a list of "excused" absences that do not result in points, including "Approved Leave of Absence," "Scheduled/Approved Vacation," "Federal / State / Municipal mandated Leaves (i.e., FMLA, ADAA, etc.)" and "Approved / Company Mandated Time off, (i.e. EWP, vacation, disciplinary time, etc.)." The attendance policy also contains "point thresholds and timeframes for the levels of progressive discipline." (Jt. Exh. 3, p.2) The attendance policy lists the following point accruals and corresponding discipline:

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

With regard to the duration of the points, the attendance policy states:

> Each attendance occurrence and the associated point value will expire after 12 months of active employment following the attendance occurrence. If a discipline level has been administered and is subsequently deactivated, all of an employee's remaining attendance points continue to be active during the rolling 12 months of active employment. If one or more points expire and no additional points are received, the current step of discipline deactivates and any subsequent discipline will be based on the point threshold in the table above.

(Jt. Exh. 3, p. 3)[7]

Part of Respondent's attendance policy includes excused leave, such as vacation and FMLA. (Jt. Exh. 3, p. 2). In order to request to use a vacation day, the requesting employee must make the request before the fifth day of the prior month. (Tr. 120) Management often deviates from that policy and approves use of vacation days on shorter notice for occasions such as going to a football game. (Tr. 121) On the other hand, deviations from shift-swap protocol are less common. (Tr. 121) In order to request a schedule swap with another employee, the swap must be made more than 48 hours from the start of the shift. (Tr. 121) Employees use a People Tools System to request the swap for another shift directly from an employee scheduled for that shift. (Tr. 121) The person to whom the swap is proposed must then accept it before the swap becomes effective. (Tr. 121-122) A request made within 48 hours requires a willing employee and management approval. (Tr. 122) They are so rare that despite having dealt with numerous grievances on attendance issues, and being a nine-year employee of Respondent, Union chief steward Coates has never seen a manager approve a swap within 48 hours of the scheduled shift. (Tr. 151-152)

Although the Charging Party was identified as a team leader and was being groomed for management, he nonetheless accumulated attendance points – *throughout his employment*. (Jt. Exh. 1, Stip 9; Jt. Exh. 5) On March 24, 2016, the Charging Party had accumulated 8.75 points and received a final written warning for attendance. (Jt. Exh. 5, ATT00036)[8] Two months later,

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[7] Respondent's attendance policy and Code of Business Conduct are two different tracks of discipline. (Jt. Exh. 4b, p. 3; Tr. 118) An employee can have a final written warning under each and not be terminated. (Tr. 119)

[8] Before the hearing date, October 24, 2018, the parties had collected the documents for Joint Exhibit 5, consisting of 6 pages. A more accurate copy of the disciplinary action in June 2016 was received prior to the start of hearing and included in Joint Exhibit 5. This accounts for the page number discrepancy.

on May 24, 2016, the Charging Party received another final written warning for having 7.5 attendance points, 1.75 attendance points having been removed since March 24. (Jt. Exh. 5, ATT00039) By February 26, 2017, the Charging Party was down to 4 attendance points. (Jt. Exh. 5, p. 1) By May 9, 2017, the Charging Party had accrued 10.75 attendance points, but had received no corresponding disciplinary action. (Jt. Exh. 5, p. 3) As of November 13, 2017, the day the Charging Party discussed his absences with RSM Chopra and the day before he accrued the final attendance point on November 14, after Chopra decided to deny his request to use vacation time, he had accrued 7.75 points without a written warning to speak of. (Jt. Exh. 5, Stip. 9)[9] The testimony and documentary evidence show that Respondent has not strictly enforced the supposedly corresponding disciplinary action for attendance points, particularly regarding termination. (GC Exh. 11-27) Rather, Respondent has only sparingly exercised its discretion to terminate employees who accumulate over eight attendance points. (Tr. 144; GC Exh. 27) In Union chief steward Coates' seven years working for Respondent, he has seen between three and five examples of employees terminated for attendance points, even though many other had also accumulated eight points or more. (Tr. 143-144; GC Exh. 11-27)

III. CREDIBILITY

A. The General Counsel's Witnesses

The General Counsel's witnesses testified credibly and directly on all subject matters. The Charging Party testified earnestly recalling events with specificity and supplying relevant details. In particular, the Charging Party described meetings with management at which he raised concerns regarding RSC working conditions with apt specificity considering the amount of time

[9] See Jt. Exh. 3, p. 3 "Each attendance occurrence and the associated point value will expire after 12 months of active employment following the attendance occurrence." Between May 9, and November 14, three points had expired and no others had accumulated. (Jt. Exh. 5, p. 3; GC Exh. 23)

that has passed and that speaking up at morning meetings was part of the routine of his work life and not a discrete event distinguished by any particular date. Additionally, the Charging Party testified sincerely about the personal circumstances that ultimately resulted in Respondent delivering his final attendance point and termination – his fiancée's emergency surgery.

Similarly, Union chief steward Coates testified in a knowledgeable and straightforward manner about his experience as both a Union representative and an employee of Respondent. When asked on cross examination whether the Charging Party's situation was unique, Coates credibly testified that though a fiancée having unexpected surgery might be unique, emergencies causing employees to miss a shift are not unique. (Tr. 158) Further, when asked to estimate the number of times employees had been terminated for accruing over eight attendance points, Coates gave a thoughtful, well-considered estimate based on his experience with the bargaining-unit employees at Respondent's stores rather than a guess. (Tr. 144) Moreover, Union steward Coates is a current employee of Respondent and still works as an RSC at the Natomas store.[10] Therefore, the General Counsel's witnesses should be credited as their testimony was straight-forward, candid and appropriately specific on all subject matters.

B. Respondent's Witnesses

Contrary to the General Counsel's witnesses, Respondent's witnesses testified aggressively, vaguely and with a clear intent to mask motive. RSM Sasha Chopra demonstrated

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[10] Employees testifying against their current employer are "likely more credible than not, as they risk significant pecuniary damage in testifying against their employer." *Wilshire Plaza Hotel*, 353 NLRB 304, 336 (2008). See also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, fn. 2 (2004), enfd., 174 Fed. Appx. 631 (2d Cir. 2006); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972); and *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961). Despite Coates' status as a Union steward, his risk at testifying against his employer is the same as any other employee's. Moreover, his status as a steward is even less relevant here where the Union is not pursuing a grievance over the Charging Party's termination.

an obvious disdain for the Charging Party by speaking about his time working under her in a pejorative manner as "my employee." (Tr. 182) She spoke in an exaggerated manner about the Charging Party's request for time off on November 13, stopping mid-sentence and haughtily stating that she wanted to be "accurate," when her effort was concentrated more on portraying the Charging Party as flippant than on accurately recalling the facts, purportedly quoting him as having made the request by stating "if I wanted to fire him, I could fire him." (Tr. 186) RSM Chopra's testimony is also contradicted by the documentary evidence. Chopra claimed that the Charging Party's attendance points were 8.75 in October 2017 and that she counseled him about it, yet the Charging Party's discipline records reflect that in October 2017 his points were 7.5. (Jt. Exh. 5, p. 3) Moreover, there is no record that Chopra counseled him in October 2017. (Jt. Exh. 5, Stip 9) Counseling is an official level of discipline in the attendance policy for which there should have been a record had it occurred. (Jt. Exh. 3, p. 3)

Similarly, ARSM Khallouf exaggerated her representation of the Charging Party's attendance issues by stating that they existed throughout his career. (Tr. 198) Then, she stated specifically that the first time she became aware of any attendance issues was in May 2017. (Tr. 198) Khallouf seemed generally an unreliable witness, as she is the ARSM, but she could not even recall the corporate team she works with to determine terminations based on attendance, CAST (Centralized Attendance Support Team). (Tr. 201)

Respondent's managers also contradicted each other's testimony. ASM Michel Black claimed there was no other manager on duty when the Charging Party called him the morning of November 14, 2017, yet Chopra claims that she was the one who opened the store that day. (Tr. 189) Chopra testified that she informed Black that the Charging Party would be leaving for the day on November 13, 2017, but Black did not corroborate her account. Black testified to no such

conversation occurring with the Charging Party present at the store. Rather, Black testified that the Charging Party called the next day, November 14, 2017, and stated that he would not be coming in that day. Black's testimony is consistent with the Charging Party's, not with Chopra's.[11]

In sum, Respondent's witnesses Chopra and Khallouf exhibited insufficient knowledge and recollection of the subjects of their testimony, and their responses were exaggerated rather than straightforward. Accordingly, their testimony is unreliable and should not be credited where it conflicts with the testimony of the General Counsel's witnesses or with documentary evidence.

IV. ARGUMENT

A. Respondent Disciplined and Terminated the Charging Party in Retaliation for his Union and Protected-Concerted Activity.

To establish that an employee's discharge violates Section 8(a)(3) of the Act, the General Counsel must first establish that the employee's union activity was a motivating factor for the adverse employment action. The General Counsel meets this burden by showing that the employee was engaged in union activity, the employer had knowledge of that activity and the employer had animus toward that activity. See, e.g. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries*, Inc., 341 NLRB 560, 562-563 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If the General Counsel meets its burden and shows that the employee's union activity was a motivating factor for the adverse employment action, the burden of persuasion shifts to the employer, who must prove it would have taken the same adverse employment action even in the absence of the employee's protected activity. *Wright*

[11] ASM Black's testimony is consistent with the Charging Party's account of their November 14, phone call. The Charging Party interpreted Black's knowledge of his fiancée's hospital internment as knowledge of the vacation leave for that day. The Charging Party was not asking for Black's permission or counting on Black's confirmation as Chopra granted his leave the day before. The call was merely a courtesy to his opening manager for the day who was ASM Black.

Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action. Rather, the employer must "persuade" that it would have taken the adverse action even absent the employee's protected conduct "by a preponderance of the evidence." *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Proof of discriminatory motivation can be based on direct evidence of such union animus or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); See also *Healthcare Employees*, 463 F.3d 909, 919 (9th Cir. 2006) (Because an employer will seldom admit that it was motivated by anti-union animus when it made its adverse employment decision, circumstantial evidence is sufficient to establish anti-union motive), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir.1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving."). Factors such as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity. *In re West Maul Resorts*, 340 NLRB 846 (2003). The Board has repeatedly held that timing alone is sufficient to establish animus. *Kag-West, LLC,* 362 NLRB No. 121 (June 16, 2015). Unlawful motive may also be established by showing that the proffered reason for the adverse employment action is pretextual. *Pace Industries, Inc.*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). The General Counsel demonstrates a proffered reason is pretextual by

showing disparate treatment,[12] shifting explanations,[13] or evidence that the non-discriminatory reason is not true.[14]

1. The Charging Party Engaged in Union Activity, Respondent Knew of It, and Respondent Was Motivated by Anti-Union Animus Toward the Union Activity When It Terminated the Charging Party.

"It is axiomatic that the processing of a grievance by a steward or a grievant is protected concerted activity." *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976). The Charging Party's use of the contractual grievance-arbitration procedure to dispute and overturn the final written warning Respondent gave him was Union activity.[15] On October 5, 2017, the Union filed grievances regarding the final written warning under the Code of Business Conduct issued to the Charging Party on October 3, 2017. In addition to grieving the disciplinary action as being without just cause, the Union also grieved the disciplinary action as management retaliation against the Charging Party and as untimely since the incident occurred on June 13, 2017, almost four months before the discipline. After the Union presented the flawed bases for the discipline, including Respondent's untimely action, faulty interview, and failure to interview all witnesses to the incident, Respondent was facing a protracted grievance proceeding over a final written warning that was likely to be thrown out eventually. Respondent calculated that its best option was to reduce the discipline, and it did so by offering a written warning in place of a final written warning to settle the grievance at Step 2. Thus, the grievance settlement was finalized on November 6, 2017 to the Charging Party's satisfaction, but not to Respondent's.

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[12] *Regal Recycling, Inc.*, 329 NLRB 355, 356-357 (1999).
[13] *Abbey's Transportation Services, Inc. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).
[14] *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision).
[15] Respondent's Counsel conceded as much during the hearing. (Tr. 108)

Eight days later, Respondent issued the final attendance point that allowed it to cite "attendance" as its basis for terminating the Charging Party.

In addition to the Charging Party's Union activity through grievance processing, the Charging Party clearly engaged in Union and protected-concerted activity throughout 2017 when he frequently expressed to management his concerns regarding RSCs' terms and conditions of employment. The Charging Party spoke up during morning meetings to argue against management, particularly RSM Amy Rodriguez, requiring the RSCs to make cold calls. (Tr. 38) At least on one occasion, the Charging Party also complained about the RSCs' compensation to RSM Amy Rodriguez. (Tr. 47) Later, he raised the same concerns about compensation with ARSM Vanessa Khallouf when she visited the store. He even voiced concerns with Rodriguez's successor RSM Chopra about the perceived unfairness of Respondent's attendance policy. (Tr. 38, 41, 42) The Charging Party also quickly stood up for himself and other RSCs when ASM David Sum unilaterally decided to prohibit staff from sitting during their shift. (Tr. 33-34) Thus, the Charging Party engaged in a plethora of protected-concerted activity during the months prior to his termination, and Respondent was well aware of it.[16] Indeed, Natomas store management referred to him as a "handful." By the time Respondent issued the final written warnings under the Code of Business Conduct, Respondent was fed up with the Charging Party's constant challenges. Then, the Charging Party compounded Respondent's frustration by successfully

[16] "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014). An employee's subjective motive for taking action is not relevant to whether that action was concerted. "Employees may act in a concerted fashion for a variety of reasons-- some altruistic, some selfish--but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). "Nor is motive relevant to whether activity is for 'mutual aid or protection.' Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees." *Fresh and Easy* supra.

challenging the discipline as well. Just eight days after the grievance settlement, Respondent issued the Charging Party an attendance point on November 14, 2017, in order to trigger his eligibility for termination under Respondent's attendance policy, and thus acted in retaliation. When the Charging Party called Chopra on November 13, 2017, to relate the circumstances that caused him to have to miss work that day and the next, it is undisputed that Chopra asked what type of leave the Charging Party could use. Chopra then consulted with Khallouf and decided that rather than permit the November 14, 2017, absence to be covered by vacation leave, they would issue the Charging Party his final attendance point. By Chopra's own admission, she knew exactly where the Charging Party was in terms of eligibility for further discipline after receiving another attendance point. When CAST (Centralized Attendance Support Team) made the recommendation to terminate, as it routinely does based on points accrued, this time Chopra and Khallouf opted to approve the termination and get rid of their "handful," the Charging Party. Thus, the General Counsel has established that the Charging Party engaged in Union and protected-concerted activity, Respondent was well aware of this activity, and timing of Respondent's decision to issue the Charging Party an attendance point and termination so close on the heels of the grievance settlement creates the inference animus toward the settlement and the other Union activity preceding it and shows that Respondent took the adverse employment action to terminate the Charging Party because of his Union activity.

2. Respondent's *Wright Line* Defense Fails Because Its Proffered Reasons for the Discipline and Termination are Untrue and Pretextual.

For Respondent to rebut the General Counsel's prima facie case, Respondent must persuade by a preponderance of the evidence that it would have taken the same action against the Charging Party even absent his protected activity. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995). Despite Respondent's contention that the November 14, 2017, attendance point

was warranted, the evidence shows that the attendance point was discretionary and meritless based on the Charging Party's advance notice to and seeming approval from his supervisor. It is undisputed that the Charging Party had a telephone discussion with RSM Sasha Chopra on November 13, 2017, in which Chopra asked the Charging Party about the types of leave he had available for his absence. It is also undisputed that the Charging Party called Chopra back to inform her that he could not use FMLA and did not have any other type of pre-approved leave available to him. According to Chopra, while she let the Charging Party have November 13 off, she told him that for his next scheduled shift he would need to do a shift swap with another retail sales consultant. (Tr. 187) Chopra claimed that she was not able to use a full vacation day for him because that is a "pre-requested . . . policy." However, it makes no factual or logical sense, based on Chopra's own explanation of the approval process, that Chopra would be able to approve the first day as a vacation day, but not the second day. It further makes no sense that Chopra would deny the Charging Party a vacation day on the basis that it must be pre-approved, while allowing him to do a shift-swap, which must also be pre-approved. Moreover, a shift swap, as Chopra proposed, requires the consent of a third person, another RSC, to actually accept swapping a shift at short notice. (Tr. 188) The Charging Party pointed this out to Chopra when she proposed it, which is why they ultimately returned to vacation leave as the best option.[17] It is simply untrue that the attendance point was warranted.

[17] Respondent's counsel had Union steward Coates read into the record an excerpt from his notes that purportedly attributed to the Charging Party the statement "nobody wanted to switch, so that's why I called again in 11/14." However, the record is devoid of any evidence that the notes were verbatim or taken contemporaneously. In any case, what the Charging Party may or may not have said about shift swaps during the termination meeting on December 14 is less relevant than the conversation the Charging Party had with Chopra on November 13 and the inconsistencies in Chopra's testimony about why she would not grant the Charging Party's request to use two vacation days.

Attempting to justify its failure to grant vacation leave while offering a swap, Respondent implied that the difference between a swap and vacation is that if vacation were granted, the staff would be left with one less RSC. (Tr. 155) However, this argument is undercut by Chopra's own admission that, before even considering a swap, she was first trying to figure out what kind of leave the Charging Party could take, including FMLA, which would have still left the store short one RSC. Rather, the evidence shows that Chopra, along with Khallouf, decided to apply vacation to November 13, but not to November 14, on a whim, motivated by no explanation apart from animus toward the Charging Party's bothersome Union and protected concerted activity. Significantly, the Charging Party's Union activity was so intertwined with his employment that rather than tell the Charging Party about the possibility of an attendance point for November 14, 2017, Chopra told his Union steward Coates instead. (Tr. 190)

Respondent's proffered reason for the termination, the Charging Party's attendance record, fails not only because the evidence shows that the final point was unwarranted, but also because Respondent routinely allows employees with more than eight attendance points to remain employed and in the past has similarly permitted the Charging Party to accrue and maintain over eight attendance points without being terminated. The only difference this time was the Charging Party's successful challenge to the Code of Business Conduct final written warning that pressured Respondent into a grievance settlement and his increasing outspokenness about the RSCs' working conditions.

When CAST (Centralized Attendance Support Team) issued its recommendation for termination, as it routinely does, (R Exh. 6) Chopra and Khallouf approved the recommendation to terminate the Charging Party. (Tr. 191, 205) Again, the only difference from the Charging Party's previous final written warnings for attendance points was his successful reduction of the

Code of Business Conduct final written warning through the grievance procedure. (Jt. Exh. 5, 3 of 6, ATT00036, ATT00039) That Respondent took drastically different action on the heels of the grievance settlement than it had taken in the past necessarily leads to the conclusion that the termination was triggered by the Charging Party's Union activity.

Respondent's defense that the termination for attendance is consistent with its policy must fail given the great discretion Respondent has exercised in terminating, and more typically in not terminating, employees for accruing eight or more points. Though Respondent has on occasion terminated an employee accruing over eight points, the record evidence shows that Respondent has permitted employees to stand with anywhere between eight and 48 points without terminating them. (GC Exh. 18, 19) The action taken against the Charging Party is completely inconsistent with Respondent's policy and practice of allowing employees to accumulate over eight attendance points without suffering termination.

Respondent permitted the Charging Party to stand with 10.75 points on April 5, 2017, and he accumulated more on April 25 and 27, 2017 without receiving so much as a written warning. (GC Exh. 23, 26) Khallouf's claim that the Charging Party's pending workers compensation claim was the reason for not terminating him is disingenuous. The workers compensation claim had to do with one point, or less than a full point, in dispute regarding a workplace bug bite. (GC Exh. 10, p. 2, 3) Even assuming this attendance point or partial point warranted being expunged because of a workers compensation claim, the Charging Party was 2.75 points over the eight-point threshold for termination. Respondent did not find it necessary to terminate the Charging Party then and only did so on December 14, 2017, after the Charging Party successfully processed his grievance to settlement.

Respondent's *Wright Line* defense that it would have terminated the Charging Party for his accrual of attendance points even absent his Union activity necessarily fails because Respondent did not terminate the Charging Party for his accrual of attendance points on prior occasions. Nor has Respondent terminated every other employee who has reached eight or more attendance points. Because the General Counsel has met its prima facie burden of showing that the Charging Party's Union activity was a motivating factor in his termination, and because Respondent has not shown that it would have taken the same action regardless of his Union activity, the General Counsel respectfully asks the ALJ to correctly conclude that the Charging Party was terminated because of his Union activities in violation of Section 8(a)(3) of the Act.

V. CONCLUSION

Therefore, for the reasons set forth above, the General Counsel seeks a recommended order requiring Respondent to

A. Cease and desist from

1. discharging employees because of their Union or protected concerted activities, and

2. in any like or related manner interfering with employees' rights under Section 7 of the Act;

B. Take the following affirmative action

1. offer the Charging Party immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed,

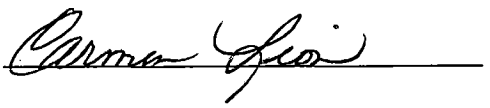
2. make the Charging Party whole for the wages and other benefits he lost because he was discharged, and

3. remove from its files all references to the Charging Party's discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

Further, General Counsel respectfully requests all other relief as may be just and proper to remedy the unfair labor practices alleged.

Respectfully Submitted,

Dated: November 28, 2018



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