

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**MALCO ENTERPRISES OF NEVADA, INC. d/b/a  
BUDGET RENT A CAR OF LAS VEGAS**

**and**

**Case 28-CA-213222**

**FRANCINE SCOLARO, an Individual**

**GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

In order to find that Malco Enterprises of Nevada, Inc. d/b/a Budget Rent a Car of Las Vegas (Respondent) did not violate the Act in disciplining and discharging Francine Scolaro (Scolaro), Your Honor must ignore undisputed facts and the Respondent's internal documentation and find, instead, credit inconsistent testimony about a small number of details attendant to the key events. Counsel for the General Counsel (CGC) urges Your Honor to give due weight to the majority of the evidence, which establish that Respondent violated the Act as alleged and order an appropriate remedy.

## **II. STATEMENT OF FACTS**

### **A. RESPONDENT'S OPERATIONS**

Respondent is a vehicle rental agency, operating multiple facilities, including one at the Las Vegas airport (Respondent's facility). Respondent's facility includes a customer service area, which is referred to as the "front counter." Tr. 18.<sup>1</sup> It also includes a managers' office, which is an open area with four chairs, computers, and a window providing a view of the front counter. Tr. 55, 116, 121. The managers' office is about 15 feet from the front counter. Tr. 215.

### **B. RESPONDENT'S MANAGERS AND SUPERVISORS**

Rosalie Perez (Perez) has worked for Respondent since January of 2014. Tr. 45-46. She is a rental sales agent supervisor. Tr. 46. Perez answers to Michael Montecino (Montecino). Tr. 25.

Montecino is Respondent's station manager, a position he has occupied for two years. Tr. 18. In that capacity, he is responsible for overseeing employees' payroll, their break

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<sup>1</sup> References to the Transcript are Tr. \_\_, showing page or pages. GCX \_\_ refers to General Counsel's Exhibits. RX \_\_ refers to Respondent's Exhibits.

schedule, and the front counter. Tr. 18. Montecino's supervisor is Joselito "J.T." Reyes (Reyes). Tr. 18.

Jose Alfaro (Alfaro) has worked for Respondent for two years. Tr. 203. He is Respondent's lot manager, a position he had held for a year. Tr. 203. In that capacity, he is responsible for overseeing the parking lot and the vehicles. Tr. 203.

Laura Sottile (Sottile) is Respondent's customer relations manager. Tr. 65, 75. In that capacity, she is responsible for handling customer complaints. Tr. 76, 98. Sottile answers to Ocampo. Tr. 76.

Reyes has worked for Respondent for over five years. Tr. 59. He is Respondent's training and sales manager, a position he has occupied for about four years. Tr. 59, 235. Regarding training, he is responsible for training new agents. Tr. 59, 98. Regarding sales, he oversees customer service agents' sales quotas. Tr. 235. He answers to Paulino Ocampo (Ocampo). Tr. 59.

Ocampo has worked for Respondent since 2002. Tr. 88. He is Respondent's city operations manager. Tr. 59, 235. In that capacity, he oversees Respondent's entire operation. Tr. 88. He answers to Respondent's owner, Tom Mallo. Tr. 88.

### **C. CUSTOMER SERVICE AGENTS' DUTIES**

Scolaro began working for Respondent on April 7, 2015. Tr. 105. She worked as a customer service agent (agent). Tr. 105. Agents are responsible for completing customer service agreements, also referred to as "contracts." Tr. 19. They must meet a quota of 300 contracts per month. Tr. 105-106. Agents must also meet a sales quota. Tr. 60. Sales include insurance, car accessories, and upgrades. Tr. 60. Agents receive an hourly wage. Tr. 59-60. They may also

receive a bonus. Tr. 60. In order to do so, agents must meet their quotas. Tr. 60. Agents may also face discipline and, eventually, discharge for failing to do so. Tr. 60.

In order to complete their job duties, agents use a computer, signature pad, and printer. Tr. 106. Each contract requires the customer to provide a signature and up to eight points where the customer must initial. Tr. 19. The signature pad allows customers to provide an electronic signature and initials on the contract. Tr. 106. The printer is used to generate copies of the contracts. Tr. 106. Agents also utilize two software programs, GUI and Wizard, to complete contracts. Tr. 20.

#### **D. SCOLARO'S PAST PROTECTED CONCERTED ACTIVITY**

There are 16 work stations within the front counter. Tr. 19. The signature pads at some of the work stations did not function. Tr. 19. In that case, the agent was required print a copy of the contract in order to obtain the customer's signature and initials. Tr. 19, 106. The workstations share six printers. Tr. 20. However, the printers connected to some of the work stations did not function. Tr. 20, 106. In that case, the agent was required to approach another agent with a connection to a working printer and ask that agent to print the contract. Tr. 20, 106-107. An additional issue for Scolaro was that not all computers were able to operate Wizard and GUI.<sup>2</sup> Tr. 107. GUI was more streamlined than Wizard. Tr. 20-21. However, it was easier to perform vehicle exchanges in Wizard. Tr. 21. GUI had other shortcomings: it did not always display which vehicles were available for rental, and it would allow two agents to reserve the same vehicle for two customers. Tr. 107-108.

These issues were a matter of concern to Scolaro and other agents, who expressed their concerns to Scolaro. Tr. 106, 108. Scolaro reported these issues to Respondent's manager,

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<sup>2</sup> By January 2018, Respondent had been transitioning from Wizard to GUI for at least two years. Tr. 88-89. This transition caused technical issues. Tr. 89. Ocampo claimed, however, that it has caused no difficulty to the agents. Tr. 89-90.

Andrew Bell (Bell). Tr. 139-140. In order to document these issues, on January 3, 2017, Scolaro visited each computer and made a chart documenting which issues each work station was experiencing. Tr. 108, 109, 111. That chart is GCX 8. Tr. 108. The “Y” and “N” designations on GCX 8 indicate whether the named equipment/function was operating. Tr. 109. “MXC” signifies that the computer required a special command to print. Tr. 109. The zero with a strike through it denotes that a work station was entirely inoperable. Tr. 109.

Scolaro delivered GCX 8 to Bell and asked him to send an email to Respondent’s information technology personnel to notify them of the issues. Tr. 110. Bell responded by asking why Scolaro was going to the trouble and opining that no one was concerned. Tr. 140. However, because Scolaro insisted, Bell sent an email and, pursuant to Scolaro’s request, provided Scolaro with a copy. Tr. 110, 111, 140. That email is GCX 9. Tr. 110-111. Scolaro then took her copy of GCX 9 to all of the agents who were working at the time and obtained their signatures. Tr. 111-112. That signed copy is GCX 10. Tr. 112. Scolaro’s purpose in obtaining signatures was to urge Respondent to resolve the issues, since not all of the agents were willing to complain as Scolaro did. Tr. 112-113.

Approximately a day after obtaining the signatures on GCX 10, Scolaro gave a copy to Ocampo, Bell, and Sottile. Tr. 113. Ocampo admitted he was aware that agents faced equipment-related difficulties. Tr. 90. Other agents would ask Scolaro at the beginning of their shifts which work stations were functional and whether Respondent had resolved the any equipment issues. Tr. 114. Scolaro spoke with Bell and asked if he had heard anything back. Tr. 140. She continued to voice her concerns to managers about how the equipment issues were affecting her and other employees. Tr. 113-114.

Scolaro had a general practice of voicing concern to managers when she felt that she or her coworkers were being treated unfairly. Tr. 114. For example, in 2017, Scolaro reported to Sottile that lead agents' behavior toward Scolaro's coworker, Mary, had caused Mary to cry. Tr. 115. Ocampo recalled that Scolaro complained to him about equipment difficulties on a regular basis. Tr. 90. In this regard, Scolaro was more prominent in Ocampo's memory than other employees because she was more vocal about her complaints. Tr. 91.

In late 2017, Respondent began to track the resolution of technical issues.<sup>3</sup> Tr. 92.

#### **E. THE JUNE 26 INCIDENT**

Scolaro acknowledged having disputes with Perez. Tr. 148. One of the disputes occurred on June 26, 2017. Tr. 148-149; See GCX 12, RX 3. Scolaro had recently returned to work after having disc replacement surgery. Tr. 149. Under doctor's orders, Scolaro was working part-time. Tr. 150. On that date, she left to use the restroom ten minutes before her scheduled break, telling Terri<sup>4</sup> beforehand. Tr. 149. Scolaro also had a doctor's note instructing her to rest her throat but had not been permitted to do so at that time. Tr. 149. While in the restroom, Scolaro heard Perez loudly calling her name and asking where she was. Tr. 149.

When Scolaro exited the restroom, she informed Perez that she had advised Terri prior to going to the restroom.<sup>5</sup> Tr. 149. Nevertheless, Perez instructed Scolaro to return to the customer service counter. Tr. 149. Scolaro protested that she could not talk and could not continue working. Tr. 149. Again, Perez insisted that Scolaro return to the counter. Tr. 149-150. In

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<sup>3</sup> Although Ocampo could not recall who initiated this tracking system, he stated it was due to an "irregular" inspection he performed, which revealed that two work stations had been inoperable for about four months. Tr. 92-93.

<sup>4</sup> The record does not further identify Terri.

<sup>5</sup> Agents are to notify a supervisor when leaving the front counter. Tr. 146; see RX 2.

response, Scolaro admitted telling Perez to leave her “the fuck alone.”<sup>6</sup> Tr. 150, GCX 12, RX 3. Scolaro wrote a report of the incident and delivered it to human resources. Tr. 197; see GCX 12.<sup>7</sup>

Scolaro admitted that she did not have a special accommodation on June 26, 2017. Tr. 150. In order to obtain an accommodation, Scolaro had to approach Mallo. Tr. 150. The two of them had a conversation about the June 26 incident within a couple of days after it occurred. Tr. 156, 195. Scolaro described her medical condition, of which Mallo was unaware. Tr. 156-157. She also gave Mallo a copy of GCX 12. Tr. 197. Mallo told Scolaro, “You know it’s not right to curse.” Tr. 195-196. Scolaro acknowledged that it was not but explained her reason for doing so. Tr. 196. Mallo seemed to understand Scolaro’s position and made no other comments about her behavior. Tr. 151, 155-156, 196. He told Scolaro that he would “take care of” the matter. Tr. 196.

Ocampo became aware of the June 26 incident.<sup>8</sup> Tr. 165-166. He decided that discipline was warranted. Tr. 165. He took GCX 12 into account and acknowledged that Scolaro had a medical condition, but determined that discipline was warranted because Scolaro had cursed at a

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<sup>6</sup> Respondent presented no testimony to refute Scolaro’s testimony regarding these events.

<sup>7</sup> Scolaro drafted GCX 12 on June 26, 2017. Tr. 197. It was part of a five-page document. Tr. 197. The pages included in GCX 12 encompass all that Scolaro wrote concerning the June 26 incident. Tr. 198.

<sup>8</sup> Ocampo had no firsthand knowledge, but claimed he learned of the incident via multiple incident reports. Tr. 165-166. RX 3 makes reference to witnesses. Ocampo could not recall speaking to any witnesses in person, but stated again that he read “three or more statements. Tr. 166-167. Despite CGC’s subpoena, which requested all documents on which Scolaro’s termination was based, Respondent produced no reports other than Scolaro’s, which is GCX 12. Tr. 167, 168. Ocampo reviewed GCX 12, which is the Scolaro report referenced in RX 3. Tr. 168. Ultimately, Ocampo agreed with Respondent’s counsel that he had followed standard practice before issuing RX 3. Tr. 182-183.

supervisor. Tr. 168-169, 179, 180. Ocampo stated that, on July 8, 2017,<sup>9</sup> he drafted RX 3, a “warning notice.” Tr. 165, RX 3.

Ocampo claims he presented RX 3 to Scolaro on July 8, 2017, together with Reyes. Tr. 169, 182. Reyes stated he was present. Tr. 238. His signature is on RX 3. Tr. 169, 238. Reyes’ signature is dated July 7 a day prior to the day RX 3 was purportedly generated.<sup>10</sup> RX 3. Ocampo wrote on RX 3 that Scolaro refused to sign. Tr. 170. Regarding what happened during that meeting, Ocampo testified using hypothetical language that “Scolaro would be in front of us. I would read it to her.”<sup>11</sup> Reyes stated only that he and Ocampo explained RX 3, and Scolaro refused to sign. Tr. 238. He could not recall a particular reason why or Scolaro’s having said anything in that regard.<sup>12</sup> Tr. 238, 240.

Scolaro testified that she had never seen RX 3. Tr. 148, 149.

Scolaro had a second meeting with Mallo, which included Ocampo and human resources representative, Lucy Moreno.<sup>13</sup> Tr. 194. The purpose of the meeting was to discuss the June 26 incident. Tr. 195. Scolaro had submitted doctor’s notes to Respondent. Tr. 175. Some of those

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<sup>9</sup> Regarding the 12-day gap between the time of the incident and the time Ocampo drafted RX 3, Ocampo guessed it was caused by the need to collect incident reports from individuals with varying schedules. Tr. 168. Ultimately, he did not know what caused the delay but stated it was not unusual. Tr. 168.

<sup>10</sup> Ocampo could not explain this. Tr. 169. In addition, the Reyes noted the year as 2016. RX 3. Reyes could not explain why he wrote the wrong year. Tr. 239. He had no independent recollection of when the meeting occurred. Tr. 239.

<sup>11</sup> Ocampo then testified generally regarding Respondent’s practice when issuing discipline. See Tr. 182.

<sup>12</sup> When CGC first asked if Reyes could recall Scolaro saying anything in connection with her refusal to sign, he answered, “Not specifically, but most -- I mean, most of the time, the only thing I could say is -- I mean, there’s always problem with management.” Tr. 239. Reyes then testified about Scolaro’s attitude in general and with regard to previous disciplines. Tr. 239. Only after CGC repeated the question did Reyes state he could not recall Scolaro saying anything. Tr. 240.

<sup>13</sup> Ocampo recalled meeting with Scolaro about her medical condition in around July 2017. Tr. 173. He also recalled discussing Scolaro’s medical condition with someone from human resources, but could not recall having a meeting including anyone else. Tr. 173. It was around this time that he became aware of Scolaro’s medical condition. Tr. 173. He was aware that Scolaro had submitted doctor’s notes to human resources. Tr. 172, GCX 11.

doctor's notes are contained in GCX 15. During that meeting, Mallo generated an agreement between Respondent and Scolaro authorizing Scolaro to take additional breaks outside of the regular schedule. Tr. 151, 157, 174, 196; see GCX 11. That agreement is GCX 11. GCX 11 also places Scolaro on light duty. Tr. 173. GCX 11 was influenced by Scolaro's doctor's orders. Tr. 174. Ocampo and Scolaro signed GCX 11. Tr. 173. Scolaro remained on light duty until she was discharged. Tr. 176, 179.

#### **F. THE CHAIR INCIDENT**

On September 5, 2017, Scolaro witnessed Perez "berating" Scolaro's coworker, Rao Ali (Ali) in the managers' office. Tr. 116, 151. According to Scolaro, Perez' tone was sarcastic and belittling. Tr. 155. Ali's expression seemed surprised, and his behavior was defensive. Tr. 155. Later during the workday, Sottile, Perez, and an agent named Alva Severino (Severino) were working at the front counter. Tr. 117.

Sottile was working at one station, Severino's work station was immediately to the right, Perez' was working at a station immediately to the right of Severino, and Scolaro was immediately to the right of Perez.<sup>14</sup> Tr. 117. That placed Scolaro about two feet from Perez. Tr. 117. At some point, Severino went to lunch. Tr. 78, 231. As Scolaro was working, Severino entered the customer service area and asked where her chair was. Tr. 48. Perez informed Severino that Ali had taken it. Tr. 48. Perez yelled<sup>15</sup> toward Ali directing him to get out of his

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<sup>14</sup> Although Perez demonstrated some difficulty recalling, she testified that Severino's work station was in between her and Scolaro. See Tr. 50.

<sup>15</sup> In contrast, Sottile testified that Perez "politely asked [Ali] if he could be gentleman and give his chair" back to Severino. Tr. 78, 231.

seat and give it to Severino. Tr. 48, 117. Scolaro whispered,<sup>16</sup> “[Perez], you sound real rude; you shouldn’t do that, especially in front of customers.” Tr. 48, 117. She said nothing else. Tr. 48, 79, 117-118. Perez did not respond. Tr. 49. Scolaro made this statement out of sympathy for Ali because she disagreed with the way that Perez had treated him during that shift. Tr. 118. There is no evidence that any customer reacted to, commented on, or complained about Scolaro’s statement.<sup>17</sup> Tr. 50, 233.

Sottile drafted and signed a “verbal warning,” GCX 6. Tr. 77-78, GCX 6. Her reason for doing so was that Scolaro had “a public outburst in front of customers to” Perez.<sup>18</sup> Tr. 78. Later that day, Sottile met with Scolaro and issued GCX 6. Tr. 118, 230. Sottile testified that she would have disciplined Scolaro for the incident even if customers had not been present because Scolaro “was confrontational with a supervisor.” Tr. 80. During that meeting, Sottile did not elaborate on what the wording contained in GCX 6: “Employees should never speak negatively about one another,” “Always conduct him or herself in a polite, professional manner,” or “The next infraction can lead to further disciplinary action.” Tr. 119. Scolaro signed the document and added her comments at the bottom. Tr. 118, GCX 6.

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<sup>16</sup> Perez stated that Scolaro was not shouting when she made this comment. Tr. 49. Sottile testified that Scolaro raised her voice, but her characterization was that Scolaro “mentioned to Rosalie that that was rude and to not say that in front of the customer.” Tr. 78, 231. Ultimately, Sottile could not say how loud it was, but would not call it a shout. Tr. 79. She nevertheless characterized it as an “outburst.” Tr. 79.

<sup>17</sup> When CGC first asked if customers had reacted to the incident, Sottile testified that the lobby was full of customers. Tr. 233. She then confirmed she had not seen a reaction from any customer. Tr. 233.

<sup>18</sup> At the time Sottile provided an affidavit in connection with the investigation of the underlying charge, she could not recall details about the incident in GCX 6. Tr. 80. She refreshed her recollection by reviewing GCX 6. Tr. 82.

## **G. RESPONDENT'S RELATIONSHIP WITH COSTCO**

Respondent has a multi-million dollar contract with Costco.<sup>19</sup> Tr. 47, 119, 236. Costco is Respondent's largest client, representing approximately 30% of Respondent's business. Tr. 61, 91, 191. As a result, service to Costco customers is very important to Respondent. Tr. 94. In November 2017, Respondent's contract with Costco had been in effect for nearly a year, and Respondent was preparing to renew it. Tr. 61, 236. Representatives from Costco and from Respondent's parent company were scheduled to visit Respondent's facility. Tr. 61, 91-92, 236. In preparation for that visit, Mallo made some changes, including designating a separate desk, formerly known as the "luxury line," to exclusively serve Costco and prepaid customers. Tr. 22, 46-47, 61-62, 92, 93. The luxury line desk became known as the "Costco desk." Tr. 62. Respondent, by Perez, created a schedule requiring agents to make two-hour rotations to the Costco desk, and Respondent assigned other agents as needed. Tr. 22, 47, 62.

Some agents complained, believing that it was not as easy to sell to Costco customers and that equipment at the Costco desk was not fully functional.<sup>20</sup> Tr. 21, 47, 62, 93. In December 2017, Respondent discharged an agent named Donna Vilmenay for refusing to work at the Costco desk. Tr. 47, 62-63, 94.

## **H. RESPONDENT'S BULLETIN BOARD**

Respondent maintains a bulletin board near the managers' office in a non-public area of Respondent's facility. Tr. 25. Respondent uses the bulletin board to post policies and announcements. Tr. 25-26, 121. This is Respondent's chief way of announcing new policies.

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<sup>19</sup> Costco members receive a discount on rentals, free upgrades, a free additional driver, and priority in line. Tr. 91, 236-237.

<sup>20</sup> Ocampo could not recall what the basis of the complaints was but guessed it was that the Costco desk used a shared printer, which caused agents to take more time to complete contracts. Tr. 93-94.

Tr. 26, 52. Respondent also holds periodic meetings, but it is not Respondent's practice to hold meetings to announce new policies. Tr. 26-27. Rather, employees are expected to view the bulletin board. Tr. 27, 129.

## **I. THE MEMO INCIDENT**

In January 2018, Reyes sent an email to supervisors warning that employees and supervisors faced the risk of being assigned to a graveyard shift for failures in customer service – the “graveyard policy.” Tr. 22, 50. That email is reflected in GCX 2. Tr. 22, 50. Most agents would view a graveyard shift assignment as punishment. Tr. 50, 51. Reyes had emailed Perez<sup>21</sup> a copy of GCX 2, and she advised agents about the graveyard policy, including by telling agents who were not serving customers that she did not want to work the graveyard shift. Tr. 51, 52, 53. GCX 2 was not posted on the bulletin board or distributed to agents, and Perez was not aware of whether agents were informed of the graveyard policy in any manner other than by Perez informing them. Tr. 25, 26, 52. Perez' shift is from 6:00 a.m. to 2:30 p.m. Tr. 55. Scolaro worked the morning shift from 9 a.m. to 3 p.m. Tr. 144. On January 6, 2018, Perez was discussing the graveyard policy with agents near the bulletin board. Tr. 53, 120. Scolaro, who had just arrived for her shift around, overheard the conversation. Tr. 53, 119, 120, 227. She had not seen evidence that the graveyard policy existed. Tr. 121. Perez told Scolaro, “And that goes for you, too,” and Scolaro asked if there was a memo setting forth the graveyard policy. Tr. 120. Scolaro requested to see the memo. Tr. 53.

The next day, Perez gave Scolaro a copy of GCX 2. Tr. 53, 121. At the time, Scolaro was at the front counter, helping a customer. Tr. 53-54, 121, 122. Scolaro had a habit of placing documents under her bra strap because her pants pockets were shallow and posed the risk that the

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<sup>21</sup> GCX 2 was also sent to Montecino. Tr. 23. Montecino printed a copy of GCX 2 and kept it on his desk. Tr. 24-25. He stated it was “basically” for his reference, but he gave a copy to Perez. Tr. 25.

document might fall out. Tr. 122. Scolaro also had a habit of keeping copies of company documents. Tr. 122. For example, that day, she had made a copy of a company policy requiring agents to collect a \$500 deposit for rentals of the Chrysler 300. Tr. 122, 123. Scolaro was unsure, but believed she placed both documents it under her bra strap.<sup>22</sup> Tr. 122-123, 138.

Perez usually arrived at work before Montecino. Tr. 55. Montecino worked in the managers' office. Tr. 21. Perez entered the managers' office and told Montecino that she had given GCX 2 to Scolaro. Tr. 54, 228. Montecino responded only by saying, "Okay." Tr. 54.

Perez remained in the managers' office for about an hour,<sup>23</sup> when she saw Montecino approach Scolaro at the front counter where Scolaro was helping a customer. Tr. 54, 55. She had not seen Montecino approach Scolaro prior to then. Tr. 54. Montecino told Scolaro that she was not supposed to have GCX 2 and requested that she return it. Tr. 124. In response, Scolaro

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<sup>22</sup> Your Honor may recall that Scolaro motioned toward her chest when talking about her practice of carrying documents, but unfortunately, the record does not reflect this fact.

<sup>23</sup> There are numerous discrepancies between the testimonies of the witnesses to the event – Scolaro, Perez, Montecino, and Alfaro – regarding the timeline of events and pertinent details. CGC attempts in this brief to form a cohesive narrative. Due to the number of discrepancies, this task is somewhat difficult. For example: Scolaro stated that Perez requested that Scolaro return GCX 2 within five minutes of giving it to her. Tr. 123. Perez testified that it was an hour later and only after Montecino approached Scolaro. Tr. 54, 55. Montecino claims that he sent Perez to instruct Scolaro to come to his office. Tr. 32, 37, 216, 217. Perez testified that Montecino did not instruct her to do so. Tr. 56. Scolaro and Montecino testified that Montecino asked her on two occasions to return GCX 2. Tr. 31, 152. They agree that one of the requests took place near the front counter and one in the managers' office. Tr. 29-30, 127, 153. Otherwise, there is wide divergence between their accounts. Montecino claims that the first occasion he asked her to return it was after she approached him in the managers' office. Tr. 28, 31, 215. Perez' and Scolaro's testimonies indicate otherwise. See Tr. 56-57, 153. Scolaro testified that Montecino and Perez approached her together. Tr. 124. Montecino testified to the same. Tr. 33. Perez testified that she remained in the managers' office. Tr. 54, 55. Scolaro testified that her customers were conversing at the time of her interaction with Montecino and that they did not react to her statement. Tr. 125. Montecino and Alfaro claim that they laughed or had an awkward look, although Montecino's testimony is inconsistent on this point. Tr. 39, 212, 218, 220; see GCX 3. Alfaro denied that they laughed but stated that they "went back." Tr. 212. Scolaro and Montecino agreed that there was a line of customers at the time. Tr. 126, Tr. 216. However, Scolaro testified that the customers approached her without being beckoned, that she did not refuse to serve them because it was contrary to Respondent's policy, and that from the time Perez first requested that Scolaro return GCX 2 to the time she went to the managers' office, she interacted with only two sets of customers. Tr. 126-127. Montecino claimed that he witnessed Scolaro beckon multiple customers. Tr. 31, 32, 33, 35, 36-37, 216, 217. Perez testified that she only asked Scolaro to return GCX 2 on one occasion. Tr. 228. Scolaro stated it happened twice. Tr. 152. Perez testified that these events took place over the course of hours. Tr. 56. Montecino claimed they took place within 30 minutes. Tr. 35-36.

requested that she be permitted to finish serving her customers, and stated that she would go to the managers' office momentarily. Tr. 30, 124-125, 153-154. Because Scolaro wanted to understand the graveyard policy, she refused to return GCX 2 to Montecino at that time. Tr. 129, 138, 154. Montecino told her to come "back" when she finished. Tr. 31. Montecino claimed he did not demand that Scolaro come to the managers' office at that time because he wanted to give her the opportunity to come back voluntarily.<sup>24</sup> Tr. 36. Montecino returned to the managers' office and informed Perez that Scolaro would not return the copy of GCX 2. Tr. 55-56. He called Alfaro over the radio in order to have him act as a witness. Tr. 37, 204. About 15 minutes later, Perez approached Scolaro and told her to return GCX 2 to her. Tr. 56. Scolaro, who was helping a customer at the time, told Perez that she would return GCX 2 after she finished serving her customer. Tr. 29-30, 56, 123, 124, 228, 229. Scolaro explained that she did not return GCX 2 immediately because she viewed customer service as her first priority, and she had not yet read the document.<sup>25</sup> Tr. 123-124. Scolaro wished to read GCX 2 because the prospect of working a graveyard shift was unattractive. Tr. 124. Perez responded only by saying, "Okay."<sup>26</sup> Tr. 56. That was the only time Perez asked her to give it back. Tr. 228. Perez told Montecino that she had asked Scolaro to return GCX 2 and that Scolaro told her she would return it when she finished with her customer. Tr. 229. There was a line of customers at the time. Tr. 126, 216.

When Scolaro finished with her customers, another customer approached her. Tr. 125.

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<sup>24</sup> Montecino later testified that he told Scolaro that GCX 2 was in her front pocket but suggested they not discuss it, instructing her to come to the managers' office. Tr. 218.

<sup>25</sup> In addition, Scolaro stated that the chance build rapport with customers and helps agents offer sales and that interruptions were detrimental. Tr. 154.

<sup>26</sup> Perez later testified that when she asked Scolaro to return GCX 2, Scolaro complained that she did not feel comfortable with Perez behind her, so Perez left. Tr. 228. Specifically, when Respondent's counsel asked what Perez did after requesting that Scolaro return GCX 2, Perez stated, "When -- before I tried to retrieve it with her, before -- she called the customer before I -- I asked the customer to excuse me and that's -- excuse us. That's when I asked Francine for the email. And then that's when she said, I don't feel comfortable with you standing behind me. I'll give it back after the customer. So that's when I left it alone." Tr. 229.

Montecino informed Perez that he was going to get GCX 2 from Scolaro. Tr. 56. Montecino, accompanied by Alfaro,<sup>27</sup> requested that Scolaro return GCX 2, and Scolaro responded that she believed GCX 2 was in her bra. Tr. 33, 125, 204, 217. To address Montecino, Scolaro turned her chair and used a low voice.<sup>28</sup> Tr. 124-125, 153-154, 204. Montecino then approached Perez, who was in the managers' office, and instructed her to take over the transaction that Scolaro was working on. Tr. 39, 56-57, 204-205, 211, 218. Perez then approached Scolaro told her she would take over the transaction. Tr. 126. Out of concern for meeting her quota, Scolaro requested that Perez process the customer agreement under Scolaro's identification. Tr. 126. Perez declined and called the customer to a separate work station. Tr. 126. Scolaro then went to the managers' office. Tr. 126, 2015.

Montecino and Alfaro were present. Tr. 126. Montecino told Scolaro that she had disparaged Respondent by making the comment about her bra.<sup>29</sup> Tr. 37-38, 218. Montecino told Scolaro that she was not supposed to have GCX 2, as it was an internal message, and instructed her to return it. Tr. 30, 38. Scolaro expressed confusion about the level of Montecino's concern, pointing out that Perez had given it to her<sup>30</sup> and that agents should know about new policies. Tr.

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<sup>27</sup> Perez did not accompany Montecino. Tr. 56.

<sup>28</sup> Montecino and Alfaro claimed Scolaro used a loud voice. Tr. 204, 218. Scolaro admitted that she is not generally soft-spoken. Tr. 128-129.

<sup>29</sup> He later testified that Scolaro had claimed that GCX 2 was in her bra, knowing that it was in her pocket, and that he was concerned her statement could lead to Respondent's being portrayed negatively by customers on social media: "We don't know what these people are going to -- are capable of doing." Tr. 218, 219.

<sup>30</sup> Montecino first testified that he was "not too sure" how Scolaro had obtained the copy of GCX2, that he did not remember, but that it was the copy he had on his desk. Tr. 30. He stated repeatedly that he was not concerned about how Scolaro obtained it. Tr. 30. He later admitted that he knew Perez had given Scolaro GCX 2 because Scolaro had told him so. Tr. 41. He also stated he was concerned that Perez had done so, but less so than he was about retrieving GCX 2. Tr. 41-42. He claimed he spoke to Perez about the matter later that day. Tr. 42. Perez was not disciplined for providing GCX 2 to Scolaro. Tr. 42, 57.

30, 127, 152-153, 219. She then removed GCX 2,<sup>31</sup> told Montecino that there were typographical errors in the document, that policies should be posted, and she attached it to the bulletin board. Tr. 38, 127-128. Montecino again requested that she return it. Tr. 128. Scolaro took a photo of GCX 2. Tr. 38, 128. She then returned it to Montecino. Tr. 38. Montecino told Scolaro to clock out and leave. Tr. 38, 130, 219. Montecino sent Scolaro home for her refusing to return GCX 2, for her comment about her bra and for arguing with him,<sup>32</sup> not for posting GCX 2 or taking a photo. Tr. 39-41. Scolaro then left Respondent's facility. Tr. 206. No one other than Montecino and Alfaro<sup>33</sup> were present at the time of the interaction in the managers' office. Tr. 128. Customers are never present in the managers' office. Tr. 128. All of these events occurred within a few hours. Tr. 56.

Montecino sent an email about the memo incident, GCX 3, to the managers at Respondent's facility. Tr. 63, 219. Reyes was among those who received GCX 3.<sup>34</sup> Tr. 63. Sometime thereafter,<sup>35</sup> Montecino spoke with Reyes<sup>36</sup> about the incident, but he could not recall whether he told Reyes anything not included in GCX 3. Tr. 42-43, 220. In that conversation,

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<sup>31</sup> Scolaro admitted GCX 2 was not in her bra. Tr. 138, 139. Rather, upon withdrawing the document in her bra, she realized it was the Chrysler 300 memo. Tr. 138, 139. She then removed GCX 2 from her pocket. Tr. 138, 139.

<sup>32</sup> Montecino described Scolaro's argument as expressing incredulity that GCX 2 held such importance. Tr. 40. He could not recall any other details about the argument. Tr. 40.

<sup>33</sup> Alfaro offered extensive, excited testimony about what occurred – e.g. “So that’s when the little story comes up,” “And she’s went -- yelling about a bunch of stuff that, you know, these guys -- something about the Company,” “I just -- my job, I need to -- I’m like...,” “I’m following her like a little lost puppy dog,” “She’s carrying a bunch of bags, like she just came out of a grocery store, big old bags.” Tr. 207. However, the majority of his testimony concerned events occurring after Scolaro was discharged and will not be summarized because it is irrelevant. In response to Respondent’s counsel’s question “And after that incident, did you have any further interaction with Ms. Scolaro?” Alfaro offered testimony occupying two full pages of transcript, interrupted only by CGC’s objection, about an incident involving Scolaro’s keys. Presumably, this testimony was solicited in an attempt to show that Scolaro is dishonest.

<sup>34</sup> Reyes also claimed that Perez sent him a text and that he spoke with her the next day. Tr. 63, 64. In contrast, Perez testified she did not discuss the incident with anyone from other than Montecino. Tr. 57, 229. She did not recall texting Reyes about the incident. Tr. 57.

Reyes claims he learned a few more details that were not revealed in GCX 3 or Perez' text, but he could not recall what those details were. Tr. 64.

## **J. SCOLARO'S SUSPENSION**

Based on Montecino's report in GCX 3, Sottile drafted and signed a suspension form, GCX 4.<sup>37</sup> Tr. 83, 231-232. She also reviewed Scolaro's entire employment file. Tr. 189. The notation on GCX 4 of a "first offense on 5<sup>th</sup> September 2017" refers to the chair incident.<sup>38</sup> Tr. 86. Sottile suspended Scolaro for refusing to return GCX 2 to Perez and Montecino.<sup>39</sup> Tr. 232. Scolaro returned to work on January 8, 2018. Tr. 130. Scolaro was presented with GCX 4, which she signed and added comments to the bottom. Tr. 130, 131, GCX 4.

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<sup>35</sup> Montecino could not recall when their conversation occurred. Tr. 42.

<sup>36</sup> In an affidavit Montecino provided in connection with the investigation of the underlying charge, he stated, "I sent an email to the station managers and human resources about the incident and that I had sent [Scolaro] home. I believe I spoke with someone from the Company about the incident within a day of its occurrence, but I don't recall who or the specifics of the conversation." Tr. 224. When CGC asked how Montecino recalled speaking with Reyes and Sottile (see Tr. 220) about the incident, he first appeared to express some lack of certainty whether he had. See Tr. 222-223. He first stated that he might have spoken with other managers. Tr. 220. He then asserted that he spoke to all of the managers at some point. Tr. 223. When CGC asked Montecino if had spoken with anyone about his testimony after testifying the previous day other than counsel, he said, "Just -- no. Just my testimony, if I did speak to the counsel... My -- I spoke -- no, I've only spoken to my counsel about this in regards to my testimony yesterday." Tr. 223-224. He explained that he recalled speaking with Reyes and Sottile by thinking about the matter after providing his affidavit. Tr. 225. A sequestration order was in effect during the hearing. See Tr. 7-8.

<sup>37</sup> Reyes believed he participated in the drafting of GCX 4. Tr. 65. Sottile claimed Montecino might have provided input. Tr. 83-84. After some difficulty, Sottile claimed that Montecino provided input by sending GCX 3 and conversing with her on January 8, during which the two of them decided that Sottile should be suspended for insubordination. Tr. 83-84. Montecino testified he made no disciplinary recommendations regarding Scolaro. Tr. 220.

<sup>38</sup> When CGC asked whether the notation on GCX 4 referred to the chair incident documented in GCX 6, Sottile, apparently confused, replied that GCX 4 was not Scolaro's first offense and that Scolaro had an outburst on September 5, 2017, and on January 7, 2018. Tr. 86. When CGC repeated the question, Sottile confirmed that the notation on GCX 4 refers to the chair incident. Tr. 86.

<sup>39</sup> Respondent's suspensions are always pending investigation. Tr. 64.

## **K. THE DECISION TO DISCHARGE SCOLARO**

On January 8, 2018, after Scolaro was suspended, Reyes and Sottile met at Ocampo's desk to discuss Scolaro. Tr. 65, 66, 95, 232. The three of them decided to discharge her.<sup>40</sup> Tr. 66, 94, 95, 99-100.

### **i. OCAMPO'S REASONS**

Ocampo could not recall details about the meeting except that there was a discussion of "the violation" and "verifying some facts."<sup>41</sup> Tr. 95. During that meeting, Ocampo learned that Scolaro repeatedly refused to return a document, and the incident required the involvement of a manager. Tr. 101-102.

He also learned that Scolaro stated in front of a customer, "Do you want me to take this out of my bra?" Tr. 102. In Ocampo's view, those two points demonstrated Scolaro's insubordination. Tr. 102. Ocampo concluded that Reyes and Sottile had conducted a full investigation. Tr. 98. Ocampo considers Reyes and Sottile his senior managers – his "left and right hand" – and he did not deem it necessary to review anything else. Tr. 98. Ocampo stated that his reason for determining that discharge was appropriate was also due to his knowledge of "the history of this particular employee." Tr. 98. He explained that Scolaro took frequent

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<sup>40</sup> Montecino does not participate in decisions to terminate employees and provides no recommendations. Tr. 27-28.

<sup>41</sup> In an affidavit given on March 13, 2018, in connection with the investigation of the underlying charge, Ocampo stated, "I do not recall having any involvement in the discharge of Francine Scolaro." Tr. 95, 96. When CGC asked Ocampo to explain how he refreshed his recollection for the hearing, Ocampo explained that his wording meant that he was not involved in the *act* of discharging Scolaro, but that he was involved in the *decision* to discharge her. Tr. 95-97.

breaks.<sup>42</sup> Tr. 98, 99. He also made reference to the June 26 incident,<sup>43</sup> including the language Scolaro had used, although he could not recall any other details. See Tr. 99-100, 102, 170-171. The breaks and the June 26 incident, in addition to the memo incident, were sufficient support for Scolaro's discharge. Tr. 100. Ocampo had no involvement in Scolaro's discharge beyond that January 8, 2018, meeting. Tr. 97-98.

ii. SOTTILE'S REASONS

In preparation for the January 8, 2018, meeting, Sottile performed a review of Scolaro's employee file. Tr. 191. In Sottile's view, Scolaro's discharge was justified by two "outbursts," namely the chair incident and the memo incident.<sup>44</sup> Tr. 190-191, 232. With respect to the memo incident, the problem was that Scolaro asked Montecino in front of a customer if he wanted her to pull GCX 2 out of her bra. Tr. 232. Sottile testified that she also considered two other incidents that factored into her decision that Scolaro be discharged; one in which a customer complained about Scolaro<sup>45</sup> and another in which Scolaro cursed at Perez. Tr. 191. However, Sottile testified that she had never seen RX 3 and was unaware of the incident described therein. Tr. 189, 190. Sottile is in charge of customer service. Tr. 98. She first appeared to state that she

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<sup>42</sup> Ocampo admitted that Scolaro was entitled to benefits under FMLA. Tr. 99. Respondent's counsel represented that Scolaro was terminated for insubordination and misconduct in failing to follow supervisor's instructions and denied that Scolaro was discharged for taking excessive breaks; however, he declined to stipulate on that point. Tr. 178-179.

<sup>43</sup> Ocampo first made two references to "incidents." Tr. 171.

<sup>44</sup> In an affidavit Sottile provided on March 13, 2018, as part of the investigation of the underlying charge, she stated, "I am not aware of the reasons for [Scolaro's] termination and do not recall having any involvement in it." Tr. 191-192. She explained that this lack of recollection was because she did not have the necessary documents present. Tr. 192. Sottile refreshed her recollection of the discharge by consulting Respondent's counsel, Reyes and Ocampo and by reviewing GCX 4 and GCX 6. Tr. 192-193.

<sup>45</sup> When first asked, Sottile stated she could not recall how many customer complaints she had received about Scolaro. Tr. 77. She then described the memo incident. See Tr. 77. When CGC asked again whether Sottile had ever received a customer complaint about Scolaro, Sottile could recall only one, the only detail of which she could recall was that it concerned Costco. Tr. 77. She later recalled that the customer was Brandon Yee. Tr. 191.

received a customer complaint about the memo incident but later admitted she had not, rather, she received “an actual email,” which was Montecino’s email, GCX 3. See Tr. 77. Eventually, Sottile admitted that she received no customer comments about the memo incident and that she was unaware of any social media posts, documents, discussions, or references to the memo incident outside of the company. Tr. 233-235; see Tr. 125.

iii. REYES’ REASONS

Reyes determined that Scolaro’s comment about her bra merited her discharge.<sup>46</sup> Tr. 72. However, Reyes would have been in favor of discharging Scolaro even without the comment about her bra because she was insubordinate. Tr. 72. Reyes also testified that at least two<sup>47</sup> prior instances of insubordination factored into the decision to discharge Scolaro. Tr. 67-68, 69, 185. Reyes referred to the chair incident, of which he learned by consulting human resources and reviewing Scolaro’s employee file. Tr. 68-69. Reyes also claims he, Sottile and Ocampo relied on an incident from July 2017, but he could not recall any details regarding that incident except that it related to insubordination. Tr. 69, 70, 71, 184.

Reyes completed Scolaro’s discharge document, GCX 5. Tr. 66, 133. The boxes for “insubordination” and “failure to follow instructions” under the “dismissal” portion of GCX 5 both refer to the memo incident. Tr. 68, 70. The notation on GCX 5 to “employee handbook (appendix C, pg. C2 + C3)” is a reference to GCX 7. Tr. 72, 237-238.

Reyes regularly participates in decisions to discharge employees and in the majority of written discipline. Tr. 63, 65. Reyes drafted the discharge paperwork for two other employees,

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<sup>46</sup> When CGC asked Reyes if he informed Scolaro that she was discharged for insubordination, Reyes responded, “Yes, that was part of it and also some other stuff.” Tr. 67. When asked whether Reyes meant he had informed Scolaro of some other things or if he meant that there were other things he considered, he answered, “Well, on here it’s insubordination and just the conduct, the Company feels like adversely, you know, the employee hurt the Company, so you know, Budget ethics as far as the handbook, basically.” Tr. 67.

<sup>47</sup> He later claimed there was “a bunch.” Tr. 70.

Donna Vilmenay and Kelli Wimberly, who were discharged for insubordination. Tr. 184. Their discharge paperwork is GCX 13. The purpose of the space on the discharge sheets labeled “Any Prior Disciplinary Action” is to record any prior discipline in the employee’s file. Tr. 185. On those documents, Reyes documented the employees’ prior disciplines by reviewing their employee files. Tr. 185. That space is unmarked on GCX 5. Reyes could not explain why he did not make any notations on GCX 5 under the “Any Prior Disciplinary Action” section. Tr. 186.

#### **L. THE DISCHARGE MEETING AND RELEVANT SUBSEQUENT EVENTS**

Scolaro met with Reyes and Moreno on January 10, 2018. Tr. 66, 131; see GCX 5. Reyes informed Sclaro that she was terminated for insubordination and gave her GCX 5. Tr. 131, 132-133. Sclaro told Reyes that Perez had been “taunting” her and other employees and threatening them with a graveyard shift. Tr. 132-133. Sclaro signed GCX 5 and added the wording “taunting by lead.” Tr. 132. Her purpose in making this notation was to document, for Respondent’s benefit, what had occurred. Tr. 132. In its official filing with the state of Nevada, to contest Sclaro’s unemployment claim, Respondent mentioned only the chair incident as a past infraction. GCX 14.

#### **III. AUTHORITIES**

A rule is unlawful where it is promulgated in response – or applied – to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (the Board in *The Boeing Company*, 365 NLRB No. 154 (2017) overruled only “prong one” or the “reasonably construe” standard in *Lutheran Heritage* and explicitly excluded these other two prongs. *Id* slip op. at 1 fn. 4, and slip op. at 2).

In evaluating whether a would-be threat violates of Section 8(a)(1), the Board must determine whether the statement is a threat of retaliation in response to protected activity. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). In determining whether an employer has implicitly threatened employees with negative consequences because of their protected activities, the Board applies an objective standard, under which it considers whether the employer's statements "reasonably tend[] to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009). It does not consider the employer's motivation or the statement's actual effect. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006).

Section 7 of the Act secures employees' right to engage in concerted activities for the purpose mutual aid or protection. Protected concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986). This includes concerns expressed by an individual which are a "logical outgrowth" of other concerted activity. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992).

As the Board explained in *Public Service Company of New Mexico*, 364 NLRB No. 86 slip op. at 7 (2016), when an employer defends disciplinary action based on employee misconduct that is integral to the events constituting protected concerted activity, it is appropriate to analyze the case under *Atlantic Steel Co.*, 245 NLRB 814 (1979) (affirming the judge's ruling but stating that application of *Wright Line* or *Burnup & Sims* was not appropriate). In *Atlantic Steel* the Board set forth four factors to be considered in determining whether an employee who is engaged in concerted activity can lose the protection of the Act: (1) the place of the discussion

(2) the subject matter of the discussion (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id* at 814.

Applying this standard, the Board has found that employees did not lose the protection of the Act when, in the course of engaging in protected activities, they failed to follow the direction of supervisors. For instance, in *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992), the Board found that an employee did not lose the protection of the Act when, in response to supervisor telling him to leave cafeteria where a heated discussion with union agents was taking place, he refused to leave the cafeteria and then, when again told to leave, said loudly to the supervisor to come and take him out, and, when told to punch out and go home, sat down or said he would sit down, but then left. *Id*; see also *Postal Service*, 360 NLRB 677 (2014) (steward did not lose protection when, after repeatedly being told to leave the area after a dispute about union time to file a grievance, the steward refused to leave until the supervisor said she was calling the police).

In *Soltech, Inc.*, 306 NLRB 269 (1992), the Board affirmed the ALJ's ruling that an otherwise legitimate disciplinary action was unlawful because it was based, in part, on previously-issued unlawful discipline. See also *Lincoln Park Subacute & Rehab Center*, 336 NLRB 891, 891 fn 3 (2001); *Tricil Environmental Management*, 308 NLRB 669 (1992); *Metro-West Ambulance Services, Inc.*, 360 NLRB 1029, 1031 n. 14 (2014). In *E-Z Recycling*, 331 NLRB 950, 952 (2000), the Board found that the wording in a previous, unlawful disciplinary action that the next infraction would result in termination established the connection between this unlawful disciplinary action and the discharge that followed. It also defeated any showing by

respondent that it would have taken the same action even in the absence of the previous discipline. *Id.*

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 411–414; *Double Eagle Hotel & Casino*, *supra*. Nonetheless, an employer can avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee’s conduct actually interfered with the employee’s own work or that of other employees or otherwise actually interfered with the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. *The Continental Group*, *supra*, at 413. The employer bears the burden of asserting this affirmative defense and establishing that the employee’s interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee’s interference with production as a reason for the discipline, not simply the violation of the over-broad rule. *Flex Frac Logistics, LLC*, 360 NLRB No. 120, slip op. at 2 fn. 5 (2014).

*Component Bar Products, Inc.*, 364 NLRB No. 40, slip op. at 11-12 (2016).

Finally, when an employer asserts that it discharged an employee for reasons separate and apart from the employee’s protected activities, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in determining whether the discharge was unlawful. Under *Wright Line*, the existence of a violation turns on an analysis of the employer’s motivation. *Gravure Packaging, Inc.*, 321 NLRB 1296, 1304 (1996). The General Counsel must make an initial showing that animus toward the protected activity was a substantial or motivating factor for the employer’s action. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). To do so, the General Counsel must demonstrate that: (1) the employee engaged in protected activity; (2) the employer had knowledge of that activity; and (3) the employer harbored animus toward that activity. *Nichols Aluminum, LLC*,

361 NLRB 216, 218 (2014) (see fn. 7 discussing the Board’s approach of the multi-factor test under *Wright Line* and its dismissal of the view that a fourth ‘nexus’ factor is also required).

If the General Counsel carries its initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.*, 303 NLRB 638, 649 (1991). To meet this burden “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence, *Merrilat Industries*, 307 NLRB 1301, 1303 (1992), that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Durham School Services, L.P.*, 360 NLRB 15 No. 85 (2014).

An employer’s failure to conduct a meaningful investigation and to give the employee an opportunity to explain his side of the story is an indicator of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 279, 291 (1987). When an employer presents shifting defenses for its actions, this may be evidence of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978).

#### **IV. ARGUMENT**

##### **A. SCOLARO’S ACTIONS CONSTITUTED PROTECTED CONCERTED ACTIVITY (Complaint Paragraph 4(a))**

Scolaro had a habit of engaging in protected concerted activity. While Scolaro stood to benefit by creating the chart of the widespread equipment issues in GCX 8, her coworkers stood to benefit to the same degree. Scolaro could not occupy more than one work station at a time, and the record demonstrates agents were not assigned to a single work station. The equipment agents use is integral to their job functions. As such, it constitutes a term and condition of employment. Repairs to any of the work stations would benefit agents equally.

At the time Scolaro took it upon herself to create GCX 8, she had been an employee of Respondent for about a year and a half. She was not a veteran employee who might feel comfortable making waves because of her tenure. Rather, this proclivity to take action on behalf of her coworkers seems to arise from Scolaro's nature. This is likely why her coworkers shared their complaints with her. Scolaro would reasonably have felt like their spokesperson in taking GCX 8 to Bell and insisting that he draft the report in GCX 9. Further, Scolaro did not stop there. Having reported the equipment issues in a concrete fashion, she took the additional step of involving her coworkers directly in the matter by obtaining the nine (one being her own) signatures shown in GCX 10 and delivering those to Respondent as well. Scolaro's disposition was to address matters of group concern directly and boldly, for which in Ocampo's eyes, she was especially noteworthy.

Although that particular activity is historical with relation to Scolaro's discipline, it illustrates her character and better explains later actions for which she was disciplined. About nine months after Scolaro took action to address employees' complaints about Respondent's equipment, she directed her attention to a distinct matter – a lack of courtesy. When Scolaro witnessed Perez' behavior toward Ali, she spoke up for Ali. It is clear that Scolaro's and Perez' working relationship was less than harmonious at times, but Scolaro's admonishment was purely on Ali's behalf.

To come to a coworker's defense against perceived disrespect is a classic example of acting for the purpose of mutual aid. Indeed, given that Scolaro had had disagreements with Perez in the past, she might have spoken up for Ali on this occasion in hopes that he might do the same for her in the future. The fact that Ali did not consult her prior to her action does not

change its concerted nature. Board law does not require an employee to solicit aid in order for the aid to be concerted.

Finally, Scolaro was engaged in protected concerted activity when she requested, retained, and took a photo of GCX 2. Scolaro became aware of the graveyard policy explained in GCX 2 as Perez announced it to Scolaro's coworkers. It was clearly a matter of group concern, as employees do not favor the graveyard shift, so procedure to avoid it would be a matter of interest. The initial step of what would become a series of protected concerted actions occurred when, in the presence of her coworkers, she requested that Perez provide GCX 2.

Given Scolaro's status as the agents' unofficial spokesperson, her comprehension of the graveyard policy was important to her coworkers as well as herself. Having heard only a cursory explanation from Perez the day before, Scolaro understandably wished to read a written version of the graveyard policy. At every instance when Respondent requested that Scolaro return GCX 2, she had not yet read it. It is worth noting that there was initially some confusion among Respondent's management regarding the graveyard policy as GCX 2 begins with the words "Just to clear things up."

Scolaro's act of retaining GCX 2 was likewise protected or, if not, was certainly an outgrowth of her prior act of requesting it. The same is true of her decision post GCX 2 and to take a photo. Neither she nor her coworkers had an opportunity to read it, and in light of Respondent's labeling it an internal document and insisting that she return it, it was likely they never would. Scolaro's posting – however temporary – together with her admonition that Respondent's policies should be posted and her subsequent photographing of GCX 2 were a continuation of efforts to educate herself and her coworkers about the ominous graveyard policy.

In sum, based on Scolaro's history of acting as other employees' spokesperson, her explicit request that policies be posted for employees to see, and her physically posting GCX 2 to illustrate her point, Respondent would understand that Scolaro was not acting only on her own behalf and in her own interest, but was acting on behalf of, and for the benefit of, herself and other employees. CGC therefore respectfully requests that Your Honor find Scolaro's actions to be protected concerted activity.

**B. RESPONDENT DISCIPLINED SCOLARO DUE TO HER PROTECTED CONCERTED ACTIVITY (Complaint Paragraphs 4(e) and (k))**

There is little dispute about the events that occurred on September 5, 2017. Scolaro admonished Perez on behalf of Ali for what Scolaro perceived as rudeness. Her admonishment consisted of two short sentences, telling Perez that she was behaving rudely and that she should not do so in front of customers. As argued above, this statement is protected concerted activity, and it is the sole reason Respondent issued the verbal warning in GCX 6. The question is whether Scolaro's actions were so egregious as to lose the protection of the Act.

The first factor, the place of the discussion, favors protection. Scolaro was at her work station at the front counter, equivalent to the production area of a plant. There is no reason to conclude that comments made there risked a disruption in production.

The second factor, the subject matter of the discussion – to the extent two short sentences may be called such – favors protection. Scolaro's statements solely concerned Perez' behavior toward Scolaro's fellow employee.

The third factor, the nature of the Scolaro's "outburst" – again, to the extent it can be labeled as such – favors protection. All witnesses agree that Scolaro did nothing more give a brief admonishment that Perez had behaved rudely. Scolaro testified that she spoke softly. Perez testified that Scolaro did not shout. There is no evidence that anyone else present other

that Sottile – such as Ali or Severino, who was in between Scolaro and Perez – heard the statement. Only Sottile referred to the statement as an “outburst.” This claim merits some scrutiny.

In an affidavit provided six months after the incident, Sottile had no recollection of the events. Her testimony at hearing was the result of a recollection refreshed by reviewing GCX 6, although it took some effort for Sottile to provide this explanation. Sottile claimed that Scolaro raised her voice, but she was unwilling to say that Scolaro shouted. In fact, she declined to describe the volume in any way other than that she was able to hear it. Sottile was seated right next to Scolaro, so this is no surprise. It is noteworthy that when describing Scolaro’s statement, Sottile used the word “mention,” which is not a word most people would use to describe an outburst. Nowhere in GCX 6 did Sottile document that Scolaro’s volume factored into her decision to issue discipline.

In addition, Sottile demonstrated a willingness to exaggerate. For example, she claimed that Perez “politely asked [Ali] if he could be a gentleman and give his chair” back to Severino. If that were the case, one is left to wonder what Scolaro could have found rude about Perez’ statement. To the extent Sottile’s testimony conflicts with that of Perez and Scolaro, CGC respectfully requests that Your Honor discredit it.

Finally, although she emphasized that the lobby was full of customers, Sottile admitted that she did not see any of the customers react to the comment. In order to characterize Scolaro’s statement as an “outburst,” one must stretch the definition to an extent that renders the word meaningless.

The fourth factor does not weigh in favor of protection. CGC does not argue that Perez was committing an unfair labor practice by instructing Ali to give his seat to Severino.

With the first three factors of the *Atlantic Steel* test weighing heavily in favor of protection, CGC respectfully requests that Your Honor find that Scolaro did not lose the protection of the Act and that Respondent's action of disciplining her violated the Act as alleged.

**C. RESPONDENT UNLAWFULLY DIRECTED, THREATENED, AND SUSPENDED AND DISCHARGED SCOLARO DUE TO HER PROTECTED CONCERTED ACTIVITY (Complaint Paragraphs 4(f),(h),(j), and (k))**

**i. YOUR HONOR SHOULD CREDIT PEREZ' AND SCOLARO'S VERSION OF EVENTS**

As if often the case, the witnesses here presented varied versions of the events surrounding the memo. Your Honor should credit the testimony of Perez. Your Honor may recall that Perez' demeanor was calm, and her responses were consistently prompt and straightforward, demonstrating excellent recall and a forthright attitude. It is noteworthy that Perez' and Scolaro's testimonies were almost entirely consistent with regard to the memo incident.

Although Scolaro's testimony was at times impassioned, she demonstrated a commitment to the truth. For example, she did not deny that she used the word "fuck" when speaking to Perez in connection with the June 26 incident. She volunteered that Mallo had reprimanded her for doing so. Further, regarding the June 26 incident, she testified without prompting that she had left to use the restroom prior to her scheduled break and that Respondent had not agreed to that accommodation at the time. Scolaro admitted that she is not soft-spoken, a factor of great significance in this case. Similarly, she admitted that GCX 2 was in her pocket instead of her bra.

Montecino, on the other hand, in an affidavit given just two months after the memo incident, stated he could not recall who he spoke to about the incident or any specifics about the

conversation. He offered testimony on the subject during hearing, claiming that he recalled after giving the matter more thought, although his arrival at that explanation was hard to obtain and hard follow. In instances too numerous to list, Montecino's testimony was at odds with that of Perez and Scolaro. Montecino also demonstrated an unwillingness to admit to unfavorable facts. For example, he was reluctant to admit that he knew that Perez had given GCX 2 to Scolaro. He even seemed to imply that Scolaro might have taken it from his desk. Only when CGC pointed out that he documented knowing Perez had given it to her in GCX 3, did he admit it.

To the extent that Montecino's testimony conflicts with that of Perez and Scolaro, CGC requests that Your Honor discredit it.

ii. **RESPONDENT UNLAWFULLY DIRECTED AND THREATENED SCOLARO (Complaint Paragraph 4(f))**

Scolaro made it clear that she refused to return GCX 2 because she had not yet read it. As argued above, given Scolaro's proclivity for engaging in protected concerted activity, and as cemented by her statement that GCX 2 should be posted concurrent with her act of posting it; Montecino directed her to return it to prevent this protected concerted action. When Montecino characterized Scolaro's actions as "disparagement," he implied that she was violating company policy and was subject to unspecified reprisals. CGC respectfully requests that Your Honor find that Montecino's instructions were unlawful and that his characterization constituted an unlawful threat.

iii. RESPONDENT SUSPENDED SCOLARO FOR HER PROTECTED CONCERTED ACTIVITY (Complaint Paragraphs 4(h) and (k))

Sottile<sup>48</sup> issued GCX 4 based, in part, on the chair incident and GCX 6. To the extent that GCX 6 was issued based on Scolaro's protected concerted activity, as argued above, Scolaro's suspension is also unlawful. Scolaro's suspension was unlawful irrespective of GCX 6 because it was issued based on Scolaro's protected concerted activity during the memo incident. As argued above, Scolaro was engaged in protected concerted activity. Scolaro did not lose the protection of the Act.

The first factor, the place of the discussion, favors protection. Crediting Perez' and Scolaro's testimony, it was Respondent who chose to confront Scolaro while she was working at the front counter.<sup>49</sup> The record indicates that Respondent first instructed Scolaro to return GCX 2, rather than simply instructing her to return to the managers' office and there initiate the discussion. As with the chair incident, retention of GCX 2, her statement about her bra, her discussion with Montecino and Alfaro, and her subsequent posting and photographing of the memo did not interfere with production. There is no evidence that any other employees were aware of the incident. Except for Scolaro's refusals to return GCX 2 and her bra comment, the interaction took place outside the presence of any other employees in a non-public area of Respondent's facility.

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<sup>48</sup> There is no reason to credit testimony that anyone but Sottile was involved in the drafting of GCX 4. Sottile provided a convoluted explanation of how Montecino was involved, and Montecino denied any involvement. Reyes believes he participated in drafting GCX 4, but Sottile made no mention of him.

<sup>49</sup> In this regard, there is reason to credit Perez' and Scolaro's testimony that the interaction began when Montecino approached Scolaro on at the front counter. Perez delivered GCX 2 to Scolaro while she was working with a customer. Montecino's version of events does not explain how, on a day when there was a line of customers, Scolaro, who was unwilling to interrupt her customer interactions, wandered back to the managers' office in order to discuss typographical errors.

The second factor, the subject matter of the discussion, favors protection. There is no dispute that the discussion concerned entirely GCX 2, which, as elaborated fully above, was a term and condition of employment.

The third factor, the nature of the Scolaro's outburst, also favors protection. Accepting Montecino's and Alfaro's inconsistent version of events, the worst that can be said is that customers heard Scolaro ask another employee (customers would not know Montecino's position with Respondent) if he wished for her to remove something from her bra, not whether he wished for her to show him her bra, remove her bra, or to be involved with anything under her bra. Her comment and its attendant behavior were brief. It was not gratuitous, obscene, or harassing. Scolaro believed – although it turned out she was incorrect<sup>50</sup> – that GCX 2 was in her bra. Even if Scolaro's motive in referring to her bra were to retain GCX 2, that motive was protected, in that her purpose was to make herself and her coworkers familiar with the graveyard policy.

Respondent admitted that it received no customer comments about the memo incident and that it was unaware of any social media posts, documents, discussions, or references to the memo incident outside of the company. Further, as mentioned, there is no evidence that any employees were aware of the incident. If Scolaro's comment caused a significant stir, it is reasonable to expect that at least one other employee present would have provided an incident report. Further, there is reason to doubt Montecino's and Alfaro's recollection.

It is evident by the fact that Montecino sent Scolaro home, reported the incident, and by the language he used in GCX 3 that he took umbrage at Scolaro's behavior. In GCX 3, he claimed that he "repeatedly walked to her and asked for [GCX 2]." At hearing, he testified that he only did so twice. Regarding the customers' reaction, he was inconsistent. He wrote in GCX

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<sup>50</sup> Nowhere does Respondent allege that this false statement factored into its decision to send Scolaro home or suspend and discharge her.

3 that they laughed. At hearing, he denied that they had, but that they had given awkward looks. When confronted with the apparent inconsistency, Montecino stated that they laughed awkwardly. Alfaro denied that they laughed but stated that they “went back.” In any case, the sum of evidence indicates that the outburst was a minor event with no consequences for anyone but Scolaro.

Further, Scolaro ultimately complied by going to the managers’ office and returning GCX 2 after arguing that she should and other employees should be permitted to become familiar with the graveyard policy. Finally, although Montecino informed Perez that GCX 2 was an internal document, he testified that this was not the reason he sent her home. Indeed, Perez, after explaining the graveyard policy to Scolaro and others, had delivered GCX 2 to Scolaro, and she faced no repercussions for doing so.<sup>51</sup>

The fourth factor also weighs in favor of protection. The memo incident was provoked by Respondent’s effort to prevent Scolaro from reading and showing GCX 2 to other employees.

With all four factors of the *Atlantic Steel* test weighing in favor of protection, CGC respectfully requests that Your Honor find that Scolaro did not lose the protection of the Act and that Respondent’s act of suspending her violated the Act as alleged. Respondent’s proffered reasons for discharging Scolaro are more limited with regard to the memo incident, and more expansive in that Respondent proffered additional reasons beyond the memo incident. Those additional reasons are discussed below, but to the extent that the Respondent relies on the memo incident, CGC argues that the same analysis here should apply.

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<sup>51</sup> If Your Honor credits Montecino’s testimony that he first became aware that Scolaro had possession of GCX 2 when she cited its typographical errors, Your Honor might conclude that it was Montecino’s fear of criticism of the document (especially given Scolaro’s tendency to criticize Respondent’s policies and practices to, and on behalf of, other employees), not his concern about its confidential nature that motivated his request that Scolaro return it. According to Montecino, Scolaro informed him that Perez had voluntarily given GCX 2 to her, yet Perez suffered no adverse consequence for doing so.

iv.       RESPONDENT DID NOT RELY ON RX 3 IN DISCHARGING  
SCOLARO (Complaint Paragraphs 4(h) and (k))

There are several reasons to doubt the claim that Respondent relied on the June 26 incident or RX 3 in deciding to discharge Scolaro. In its filing with the state of Nevada regarding unemployment in GCX 14, Respondent cited only the chair incident and made no mention of the June 26 incident. GCX 14 was formed three weeks after Scolaro's discharge, enough time for Respondent to perform a thorough review of Scolaro's employee file. Indeed, GCX 14 even includes one of Scolaro's new hire documents. Three weeks is also enough time to confer with Sottile, Reyes, and Ocampo to ascertain all of the reasons they decided to discharge Scolaro. GCX 14 is demonstrably well-organized and thoughtfully constructed. It is reasonable to conclude that Respondent would seek to include all favorable applicable evidence in this filing, so this omission is telling.

Neither RX 3 nor the underlying June 26 incident was mentioned as a prior incident in GCX 4. In GCX 4, Sottile identified the chair incident as Scolaro's first offense despite having reviewed her entire employee file at the time. Reyes made no reference to it in GCX 5. Despite having reviewed Scolaro's entire employee file, at hearing Sottile did not even recognize RX 3. Sottile did offer testimony about an occasion in which Scolaro had used the word "fuck" in speaking to Perez, but she stated she was unfamiliar with the incident described in RX 3. Ocampo's recollection was just as vague. Reyes could recall no details about the June 26 incident except that it concerned insubordination and happened sometime in July. In light of these facts, it is unlikely any substantive discussion took place.

It hard to accept that an employer would not rescind a discipline issued to an employee who was on light duty, entitled to benefits under FMLA, and with whom it had formed a private agreement offering accommodations for the condition that Scolaro was in the act of addressing at

the time she engaged in the alleged misconduct.<sup>52</sup> It could be that Respondent is especially sensitive to vulgarity or especially sensitive to demonstrations of disrespect toward supervisors.

However, RX 3 itself is problematic. Ocampo wrote in RX 3 and testified during hearing that he read multiple incident reports. He did not state the exact number of witnesses or identify them in any way. Despite receiving a subpoena encompassing such documents, Respondent produced no reports regarding the June 26 incident beyond that of Scolaro. Ocampo's claim that the 12-day gap between the date of the June 26 incident and the date of RX 3 was standard is belied by GCX 4 and 6, which were both issued within a day of the incident. It is also odd that Reyes signed as a witness a year and a day before RX 3 was generated. In addition, GCX 4 and GCX 6 demonstrate that Scolaro has a habit of signing discipline forms and writing her defense on the documents. Respondent could not explain why Scolaro did not do so on this occasion. Further, both Ocampo's and Reyes' descriptions of the meeting in which they presented RX 3 to Scolaro were general and vague, lacking any details of their conversation. When questioned, Reyes offered testimony about Scolaro's attitude in general.

On balance, the evidence indicates that the June 26 incident did not factor into Respondent's decision to discharge Scolaro.

v.       RESPONDENT PROVIDED VAGUE AND INCONSISTENT  
EXPLANATIONS FOR SCOLARO'S DISCHARGE – *WRIGHT LINE*  
(Complaint Paragraphs 4(h) and (k))

Even if Your Honor chooses to evaluate this case under a *Wright Line* standard, there is ample evidence that Respondent discharged Scolaro for her protected activities, and not for other conduct, including her bra comment.

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<sup>52</sup> Given that Perez was shouting Scolaro's name loud enough to be heard in the bathroom and in light of Respondent's purported extreme concern over customers' impressions, it is interesting that Perez was not reprimanded as well.

Ocampo's recollection of the meeting with Sottile and Reyes was vague. He first cited insubordination based on the memo incident, specifically refusing to return GCX 2 and Scolaro's bra comment. He then mentioned Scolaro's history of taking frequent breaks<sup>53</sup> and made a vague reference to the June 26 incident. About two months after Scolaro's discharge, Ocampo provided an affidavit in connection with the underlying charge, which alleged that Scolaro was unlawfully discharged. In that affidavit, he stated that he did "not recall having any involvement in the discharge of Francine Scolaro." At hearing, he claimed that his statement meant that he was not involved in the *act* of discharging Scolaro, but that he was involved in the *decision* to discharge her. It is plausible that Ocampo's memory is lacking in this regard or that he was less than forthright. Indeed, Ocampo demonstrated unwillingness to concede unfavorable facts. For example, while admitting that Respondent's software transition had caused technical issues, he claimed it had posed no difficulties to agents.

Like Ocampo, in an affidavit Sottile provided two months after Scolaro's discharge, she stated she was "not aware of the reasons for [Scolaro's] termination and [did] not recall having any involvement in it." She offered extensive testimony about the reasons for Scolaro's discharge at hearing, explaining that she refreshed her recollection by consulting Respondent's counsel, Reyes and Ocampo and by reviewing GCX 4 and GCX 6. It is presumable that her recollection was influenced, to some extent, by her discussion with other witnesses. Even so, regarding the reasons for Scolaro's discharge, Sottile first testified about the chair and memo incident, the most important factor being that Scolaro commented on her bra. She also made a vague reference to the June 26 incident. She made no mention of Scolaro's breaks, but she

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<sup>53</sup> Despite Respondent's counsel's representation that Scolaro was terminated for insubordination and misconduct, not for taking excessive breaks, he declined to stipulate on that point. If Scolaro did have a problem with taking excessive breaks, one might expect to see this matter noted in RX 3, in which she admittedly left her work station prior to her scheduled break.

added that an additional factor contributing the Scolaro's discharge was that she had received a customer complaint. On the first day of hearing, she could recall only that it involved Costco. On the second day, she recalled the customer's name.

Reyes stated that Scolaro would have been discharged even if she had not made the bra comment because she was insubordinate during the memo incident. However, he offered vague testimony regarding Scolaro's insubordination: "Yes, [insubordination] was part of it and also some other stuff." When asked to explain, he offered nothing, instead referring to GCX 5 and stating, "Well, on here it's insubordination and just the conduct, the Company feels like adversely, you know, the employee hurt the Company, so you know, Budget ethics as far as the handbook, basically." Reyes also went from claiming that Scolaro had engaged in two instances of insubordination to claiming there was "a bunch." Reyes' recollection may also be flawed. For example, he claimed to have learned of the memo incident, in part, from a text he received from Perez; Perez denies ever sending one. Reyes made no mention of Scolaro's breaks or a customer complaint against her. Neither issue was raised in GCX 14.

In sum, all three of the witnesses agree that Scolaro was discharged due to insubordination in connection with the memo incident. They agree on little else. These varied explanations suggest that Respondent either failed to come to a well-defined accord or that it provided a variety of explanations in the hopes of fortifying one that it suspected was legally problematic. CGC urges Your Honor to consider only the single factor on which the three witnesses agree and find that Scolaro was discharged for her alleged insubordination in connection with the chair incident and the memo incident and that, but for those instances of protected concerted activity, Respondent would not have suspended or discharged Scolaro.

vi. OTHER FACTORS ARISING UNDER *WRIGHT LINE* (Complaint Paragraphs 4(h) and (k))

It is noteworthy that Respondent had no complaints from customers, no incident reports from employee witnesses, nothing beyond Montecino's email in GCX 3 regarding the incident when it made the decision to discharge Scolaro. There is no evidence that Respondent sought to obtain any such witness statements, most notably, from Scolaro herself. This lack of investigation indicates that Respondent was less concerned about the fairness of its decision and more about discharging an employee who had a habit of engaging in protected concerted activity.

**D. RESPONDENT PROMULGATED AND ENFORCED ITS RULES UNLAWFULLY AND THREATENED SCOLARO FOR HER PCA (Complaint Paragraphs 4(b), (c), (d), (g) and (i))**

Scolaro was issued a verbal warning for speaking up for Ali. As argued above, Scolaro's act of speaking up on behalf of Ali was concerted activity, protected under the Act. It is undisputed that Sottile issued Scolaro the verbal warning in GCX 6 because of this statement. Therefore, by informing Scolaro in GCX 6 that "Employees should never speak negatively about one another in front of others whether it be customers, peers, or management," Sottile was issuing a directive in response to her concerted activity. The meaning of the directive is clear: Scolaro was not to speak to a supervisor in a disrespectful manner, including when her speech was to aid of a coworker. There is no evidence that this directive was ever rescinded. If allowed to stand, Respondent might discipline employees for speaking out against a decision to, for example, unfairly assign an employee to a graveyard shift. CGC respectfully requests that Your Honor find that this rule was promulgated in response to, and in order to discourage, Scolaro's protected concerted activity.

Similarly, by citing in GCX 6 Respondent's handbook rule that Scolaro must "Always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully," Sottile was enforcing its rules to discourage Scolaro's protected concerted activity.

Sottile cited the same rule in GCX 4 when she suspended Scolaro. Respondent suspended Scolaro for her actions in connection with GCX 2 and discharged her for those same actions and in reliance on GCX 6. Again, Respondent enforced its politeness rule against Scolaro for due to her protected concerted activity. The same is true of the two rules in GCX 7 that were cited in Scolaro's discharge paper in GCX 5. While otherwise lawful, they were enforced against Scolaro due to her protected concerted activity, and CGC respectfully requests that Your Honor so find.

In context, the warning in GCX 6 that the "Next infraction could lead to further disciplinary action up to termination," is a clear threat of future adverse action if Scolaro were to engage in similar protected concerted activity, and CGC respectfully requests that Your Honor so find.

**E. RESPONDENT SHOULD BE ORDERED TO COMPENSATE SCOLARO FOR ANY CONSEQUENTIAL ECONOMIC HARM RESULTING FROM HER DISCHARGE**

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often

not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enfd.* as modified, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB 101,102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v.*

*Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB at 104-05 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enf. denied on other grounds* 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.<sup>54</sup> Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).<sup>55</sup>

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<sup>54</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

<sup>55</sup> Economic harm also encompasses “costs” such as losing a security clearance, certification, or professional license, affecting an employee’s ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See *Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enfd.* 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB at 719 (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board’s existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board’s ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly “acts in a public capacity to give effect to the declared public policy of the Act,” not to adjudicate discriminatees’ private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.<sup>56</sup> In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving “pain and suffering” damages that were inherently “speculative” and “nonspecific.” *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985))

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<sup>56</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

(respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), enfd. mem., 105 F.3d 671 (11th Cir. 1996)).<sup>57</sup>

## V. CONCLUSION

The record provides multiple points of evidence that demonstrate that Respondent disciplined, suspended, and discharged Scolaro due to her concerted activities, under circumstances which did not cost her the protection of the Act. CGC respectfully requests that Your Honor so find.

A proposed notice to employees is attached.

Dated at Las Vegas, Nevada this 6<sup>th</sup> day of December 2018.

/s/ Nathan A. Higley

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<sup>57</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affd. mem.*, 862 F.2d 304 (2d Cir. 1988).

**(To be printed and posted on official Board notice form)**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights, including your right to engage in protected concerted activities by raising concerns about wages, hours, and other terms and conditions of employment, including concerns about the treatment of employees or changes to our policies and practices, on behalf of yourself and other employees.

**WE WILL NOT** announce rules or directives prohibiting you from speaking negatively about one another in front of others, whether it be customers, peers, or management, because you engage in protected concerted activities.

**WE WILL NOT** maintain the following rules in our employee handbook or enforce them against you because you engage in protected concerted activities:

- a rule requiring you always to conduct yourself in a polite, professional manner, treating customers and co-workers courteously and respectfully;
- a rule prohibiting insubordination or refusal to comply with instructions or failure to perform reasonable duties which are assigned; and
- a rule prohibiting conduct which the Company feels reflects adversely on the employee or company.

**WE WILL NOT** threaten you with discipline, discharge, or other reprisals for engaging in protected concerted activities.

**WE WILL NOT** direct you to return copies of rules or policies to us in order to prevent you from engaging in protected concerted activities.

**WE WILL NOT** retaliate against you in any manner, including by disciplining, suspending, or discharging you, because you engage in protected concerted activities.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

**WE WILL** rescind our rule or directive prohibiting you from speaking negatively about one another in front of others, whether it be customers, peers, or management.

**WE WILL** rescind our rules requiring you always to conduct yourself in a polite, professional manner, treating customers and co-workers courteously and respectfully; prohibiting insubordination or refusal to comply with instructions or failure to perform reasonable duties

which are assigned; and prohibiting conduct which the Company feels reflects adversely on the employee or company; and **WE WILL** furnish you with inserts for the current employee handbook that advise that these rules have been rescinded, or **WE WILL** publish and distribute revised employee handbooks that do not contain these rules.

**WE WILL** return to our employee Francine Scolaro a copy of the email regarding the designation of a three-work-station area to serve Costco customers that we made her return to us.

**WE WILL** make employee Francine Scolaro, who has waived an offer of reinstatement, whole for any loss of earnings and other benefits suffered as a result of her suspension and discharge, plus interest, and compensation for any consequential economic harm.

**WE WILL** immediately remove from our files any reference to the discipline, suspension, and discharge of employee Francine Scolaro, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that these actions will not be used against her in any way.

**MALCO ENTERPRISES OF NEVADA, INC. d/b/a  
BUDGET RENT A CAR OF LAS VEGAS**

\_\_\_\_\_  
(Employer)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_  
(Representative) (Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

2600 North Central Avenue  
Suite 1400  
Phoenix, AZ 85004

**Telephone:** (602)640-2160

**Hours of Operation:** 8:15 a.m. to 4:45 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

## CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in *Malco Enterprises of Nevada, Inc. d/b/a Budget Rent a Car of Las Vegas*, Case 28-CA-213222 was served via E-Gov, E-Filing, and E-Mail, on this 6<sup>th</sup> day of December 2018, on the following:

**Via E-Gov, E-Filing:**

Honorable Dickie Montemayor  
Administrative Law Judge  
NLRB Division of Judges, San Francisco Branch  
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**Via Electronic Mail:**

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