

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

GUTHRIE THEATER

and

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, LOCAL 13

Case 18-CA-215022

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

Submitted By:

Kaitlin E. Kelly
Counsel for the General Counsel
National Labor Relations Board
Region 18
212 3rd Avenue South, Suite 200
Minneapolis, MN 55401

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I. Statement of the Case

This is a textbook case of employees who banded together to try to address workplace problems and initiate positive change at their place of employment. It is also a case of an Employer who ultimately got fed up with these efforts and then threatened and retaliated against the employees that took the lead role in raising and addressing the problems. In short, a classic case of retaliation against employee protected concerted activity. The facts and evidence are largely undisputed and both overwhelmingly establish the violations alleged.

II. Background

Respondent is a regional theater in Minneapolis, Minnesota that self-produces and performs plays (Tr. 20). Respondent's employees are represented by the International Alliance of Theatrical Stage Employees Local 13 (Union) (Tr. 22). The theater has various departments, including the Scene Shop (Tr. 21). There are approximately 7-9 full-time employees in the Scene Shop, plus "over-hire" employees, which are temporary employees (Tr. 21, 72).

At the time of the unfair labor practices, Technical Director Josh Peklo (Peklo) and his two assistants Associate Technical Director Jim Gangl (Gangl) and Assistant Technical Director Sean Walters (Walters) supervised the employees in the Scene Shop. (Tr. 21, 72-73) As Technical Director, Peklo was responsible for managing the Scene Shop staff and operations (Tr. 239). Peklo reported to Director of Production David Stewart (Stewart), and Stewart reported to Artistic Director Joseph Haj (Haj) (Tr. 22). The Artistic Director is the highest-ranking position at the theater (Tr. 132). The Managing Director of the theater was Jennifer Bielstein (Bielstein) (Tr. 134). The Human Resources Director was Jean Leuthner (Leuthner), and she had two

assistants including Human Resources Generalist Sadie Ward (Ward) and Human Resources Coordinator Monica Servi (Servi) (Tr. 22, 207-208).¹

In late 2016, employees in Respondent's Scene Shop began taking various actions to address the issues of sexism and workplace culture in the Scene Shop. Employees Molly Diers and Nathan Saul took the lead role in trying to improve the workplace. Both employees discussed these concerns amongst themselves and with other employees. They also raised concerns about these issues with various members of management. Respondent did take some action in response to the concerns the employees raised, but the employees believed additional action was necessary to address the ongoing issues in the Scene Shop, and so they continued to engage in concerted activity around these issues.

Specifically, in September 2017, Diers spoke up during an employee meeting scheduled to address the issues in the Scene Shop. It was at this point that the Respondent became frustrated with the employees' repeated efforts and began to retaliate. Shortly after the Scene Shop meeting, Diers received a performance evaluation with a downgraded score in the communication category. When discussing the communication score, Respondent referred to Diers comments during the Scene Shop meeting as an example of her negativity, which it didn't like, and which resulted in the lower communication score. During this same meeting, Respondent threatened Diers that if she was so fed up with the workplace culture in the Scene Shop, perhaps the theater wasn't the place for her. After Diers' performance evaluation meeting, another employee, Nate Saul had a series of meetings with Respondent wherein he advocated on behalf of Diers. In response to these concerns, Respondent threatened Saul that Diers tests people, isn't a team player, and she brings negative consequences on herself.

¹ Technical Director Josh Peklo, Human Resources Director Jean Leuthner, and Managing Director Jennifer Bielstein no longer work for Respondent (Tr. 131, 239, 270).

III. Respondent Threatens Molly Diers and Downgrades her Performance Evaluation because Employees Engaged in Protected Concerted Activity (Complaint Allegations 5 and 6)

A. Facts

1. Molly Diers' Work History

Molly Diers worked for Respondent from 2004 to 2018 as a carpenter in the Scene Shop (Tr. 21). Diers started as an over-hire or temporary employee, and then became full-time in 2015 (Tr. 23). As a carpenter, Diers was responsible for building scenery, which involved rigging, loading in sets, and running crews (Tr. 21). She was supervised by Technical Director Josh Peklo (Tr. 22). Peklo hired Diers as a full-time carpenter, and he testified that Diers was an “excellent craftsman” whose “technical skills are at the highest level” (Tr. 240).

Diers is a member of the International Alliance of Theatrical Stage Employees Local 13, and she has been on the executive board of the Union for the past five years (Tr. 22-23).

2. Molly Diers' Protected Concerted Activity and Employer Knowledge

Diers had concerns about sexism and workplace culture in the Scene Shop (Tr. 25). She discussed these concerns with other female employees in the Scene Shop, including Kristin Larsen and Rose King (Tr. 25-26). These employees would often talk about the sexist problems they were facing (Tr. 26). Diers also discussed her concerns with the male employees in the Scene Shop, including Union Steward Chris Sabilia and Nathan Saul (Tr. 26). Saul shared Diers' concerns about sexism and the workplace culture in the Scene Shop (Tr. 74-75).

In late 2016, the employees began bringing concerns about sexism and workplace culture to management (Tr. 28, 75-78). The employees' actions were spurred by Respondent's August 2016 promotion of Mark Maurer (Maurer) to Scene Shop Supervisor (Tr. 26-28, 75-78). Many employees in the Scene Shop shared concerns about Maurer's promotion (Tr. 26, 76). The

female employees found Maurer difficult to work with, as he was dismissive and rude to female employees (Tr. 26-27, 76-77). Diers, Saul, Kristin Larsen, and Rose King discussed their concerns about Maurer's promotion (Tr. 27, 77). Saul shared Diers' concerns about Maurer's promotion, and he brought these concerns to Technical Director Josh Peklo around August 2016 (Tr. 75-78).

Two months after Maurer's promotion, Maurer made an inappropriate joke that led employees to feel particularly uncomfortable with his promotion (Tr. 27-28). During a morning meeting in the break room, Maurer made an incestuous rape joke (Tr. 27-28, 68). Diers discussed the joke with Kristin Larsen after the meeting (Tr. 27-28). Diers then went and talked to Associate Technical Director Jim Gangl and Assistant Technical Director Sean Walters about the joke (Tr. 28). Technical Director Josh Peklo testified that about a week after the joke, he acknowledged that an inappropriate joke had been made during an employee meeting (Tr. 242). However, Peklo's testimony is contradicted by both Diers and Saul, who testify that Peklo never talked about the inappropriate joke during an employee meeting (Tr. 299, 300).

After these incidences with Maurer, both Diers and Saul continued to raise concerns about sexism and workplace culture with management. In October 2016, they both raised these concerns during their annual performance evaluations with Peklo (Tr. 32, 78-79). In November 2016, Saul raised concerns about sexism and workplace culture during a meeting with Human Resources Director Jean Leuthner (Tr. 79-81). During Saul's meeting with Leuthner, Leuthner acknowledged that she knew people weren't happy in the Scene Shop and that it needed to be looked into and worked on (Tr. 80-81). After the meeting, Saul sent Leuthner an email encouraging her to talk to Diers to get her perspective on the issues they discussed (GC 11). That same month, during a meeting with Leuthner, Diers raised concerns about the inappropriate joke

and the fact that “women are not heard when we are problem solving” (R 6; Tr. 146-147). In late 2016, during another meeting with Leuthner, Diers and Kristin Larsen raised concerns about Maurer and the Scene Shop (Tr. 32-34). In January 2017, a “women’s affinity group” began meeting to deal with the cultural issues in the Scene Shop (Tr. 152-153). Diers helped institute the group, and was an active member. (Tr. 153-154).

In spring 2017, Respondent began attempting to address the issues in the Scene Shop by holding trainings related to workplace culture and subtle sexism (Tr. 34, 82-83). Diers, Saul, and Kristin Larsen discussed the trainings and Saul sent an e-mail to management with feedback (Tr. 35, 84-85). In the e-mail, Saul wrote that a number of people approached him to say they were disappointed in the “Respect in the Workplace” training, which focused on the “don’t do these things” messages instead of a more proactive session (GC 12). In the employees’ view, despite these trainings, the sexism and workplace culture in the Scene Shop had not noticeably changed (Tr. 35, 86).

To further the discussion on the issues in the Scene Shop, Diers took the lead in organizing a happy hour meeting with her-coworkers to discuss why the employees were unhappy and brainstorm ideas of what they could do about it (GC 5; Tr. 35-37, 87-88). During the happy hour, which occurred in May, the employees discussed their frustrations with Maurer and Peklo, and talked about what they could do about it, including whether they should go talk to Human Resources (Tr. 37, 87-88).

The following month, Diers again raised her concerns about the workplace with management during a meeting with Director of Production David Stewart (Tr. 38-41). Diers requested the meeting because she was frustrated about an incident that had occurred with Associate Technical Director Jim Gangl (Tr. 38). During a build for a show, Diers, Kristin

Larsen, and Rose King had all brought an issue to Gangl's attention about something that wouldn't work, but Gangl dismissed the issue (Tr. 38). Later, when Saul brought the same issue to Gangl's attention, Gangl agreed with him (Tr. 38). Naturally, this frustrated the female employees (Tr. 38). Diers told Stewart that she was going to quit if he didn't do anything about the workplace culture in the Scene Shop (Tr. 39).

In response to Diers' concern, Stewart held a meeting with the male employees in the Scene Shop (GC 6; Tr. 89). During the meeting, Stewart told the employees that he called the meeting because Diers told him that the workplace environment was miserable, intolerable, and if something wasn't done to take action and start addressing the issues, she was going to quit (Tr. 89). Stewart said that the disrespectful and dismissive treatment of the female employees in the Scene Shop was unacceptable (Tr. 89). One of the employees asked if there was anything the theater was willing to do to provide resources and training (Tr. 90). Stewart responded by saying, "how many of you have toolboxes at home?" (Tr. 90). When the employees all raised their hands, Stewart said, "How many of you rely on somebody else to put tools in your toolbox at home?" (Tr. 90). Stewart explained that meant it's on the employees to figure out how to do the work to fix themselves and that wasn't the place of the theater (Tr. 90).

Later that month, Diers again brought up her concerns about sexism and workplace culture during a meeting with Technical Director Josh Peklo (Tr. 42). During this meeting, Diers and Peklo came up with the idea to have Scene Shop meetings to work on addressing the workplace culture (Tr. 42-43, 244). Peklo testifies that when Diers raised these concerns, he acknowledged, "that work had to be done, that this wasn't something – this was what was real and this wasn't going to go away on its own" (Tr. 244).

Neither Stewart nor Peklo scheduled any employee meetings for June or July to address the sexism and workplace culture in the Scene Shop (GC 13; Tr. 43, 90-92). Saul followed up with Stewart in June and August asking that he schedule additional meetings (GC 13, 14; Tr. 90-92). Saul also e-mailed Human Resources Director Jean Leuthner about scheduling additional meetings (GC 15). In his e-mail, Saul wrote that he heard management believes the conflict in the Scene Shop is between Diers and Peklo, but that the conflict actually is about the atmosphere in the shop, which affects everyone (GC 15). In response, Leuthner acknowledged that she didn't believe the issue was just between Diers and Peklo, she understood there to be cultural issues around sexism in the shop and communication challenges (GC 15). She also said that she asked Diers, and would ask everyone in the shop, to consider how they are contributing to the problem and to the solution (GC 15). In contrast, Leuthner described Peklo as a "willing spirit" (GC 15). Around this same time, Diers followed up with Peklo and requested that he schedule meetings soon because a "long list" of sexist incidents had recently occurred (GC 7; Tr. 43). Diers had learned about the sexist incidents from Rose King (Tr. 43).

Leuthner testified that leading up until August 2017, she felt that "we were all working together to try and solve a problem" but "towards the end of August, it started to really take a turn" (Tr. 167). To support this, Leuthner references a comment Diers made during a bargaining session with the Union (Tr. 167). In the session, the parties were discussing wage parity between the contracts, one of which includes more male-dominated jobs and the other more female-dominated jobs (Tr. 167). Leuthner testifies that Diers said, "Well, I don't even know why we're having this conversation. It's never going to change" (Tr. 167). Leuthner describes this as "problematic" and an example of Diers' communication issues (Tr. 167). This example shines an even more negative light on Respondent's actions, as this is a direct reference to Diers' union

and ongoing protected concerted activity around these issues of sexism and inequality being “problematic.”

After this series of follow up communications from Diers and Saul, Respondent held the first Scene Shop meeting in August 2017 (Tr. 44). In attendance at the meeting were the Scene Shop employees and management (Tr. 45). Before the meeting, Peklo asked the employees to write down frustrations in the workplace and place them in an envelope (Tr. 45). During the meeting, the employees read the frustrations out loud (Tr. 45-46). The frustrations included, among other things, sexism and respect in the workplace (Tr. 45-46). The employees discussed the frustrations during the meeting, including Diers who spoke up in furtherance of a “respect” frustration and told Peklo that he didn’t show respect to the employees (Tr. 45-46).

Respondent held its second Scene Shop meeting in September 2017 (Tr. 47). In attendance at the meeting were the Scene Shop employees and management (Tr. 47). During the second meeting, the employees wrote down frustrations on post-it notes, categorized the frustrations, and discussed the frustrations (Tr. 47). The frustrations included, among other things, respect, communication, and sexism (Tr. 47). Towards the end of the meeting, when there was a lot of information but no plan of action, Diers spoke up and said something like “now what?” or “what’s next?” (Tr. 47, 99). Meaning, what are we going to do to take concrete action with the ideas? (Tr. 47). Other employees responded to Diers question with some ideas of how they could take action (Tr. 47, 99). Peklo testifies that he thought “the energy in the meeting was good, until we were wrapping up and cleaning up and sort of scribing down the ideas and things” when Diers commented something like “that there was good energy, but it was only progress if we were actually going to do it” (Tr. 247). Peklo characterized this as “sort of a negative punctuation to the work” (Tr. 247).

3. *Molly Diers' Performance Evaluation is Downgraded because Employees Engaged in Protected Concerted Activity*

The employees in the Scene Shop receive annual performance evaluations (Tr. 23). Diers first began receiving performance evaluations when she became a full-time employee in 2015 (Tr. 23). Technical Director Josh Peklo issued the performance evaluations, which Director of Production David Stewart reviewed and signed (Tr. 23; 31). The performance evaluations would be discussed during a performance evaluation meeting with Peklo (Tr. 23-24). Prior to 2017, Diers' feedback on her performance evaluations was very positive, and none of the evaluations contained negative feedback about her communication skills (GC 2, 4; Tr. 23).

On October 6, 2017, Diers had her annual performance evaluation meeting with Peklo (Tr. 48). During the meeting, Peklo handed Diers a copy of her performance evaluation (Tr. 48). This was unusual, because in the past Diers had received a copy of the performance evaluation in advance of the meeting, so that she could review the evaluation prior to the meeting (Tr. 51). Peklo does not deny that he may have deviated from this practice (Tr. 259-262).

At the beginning of the evaluation meeting, Peklo told Diers that she seemed miserable (Tr. 48). Diers agreed, and explained that the culture was making her miserable, Peklo was defending Maurer, and she was fed up (Tr. 48). Diers testified that in response, Peklo told Diers that if Diers was "so fed up with the culture" perhaps it "wasn't the place" for her (Tr. 48). Peklo admits that they discussed the fact that Diers was frustrated in the Scene Shop, but he denies telling her that the theater might not be the place for her or that he encouraged her to leave the theater (Tr. 251-252).

As for the performance evaluation document itself, there were two areas of the evaluation that Diers received a lower score than in the past (Tr. 50). Diers received a score of "did not meet

expectations” in the communication skills category (GC 8; Tr. 50).² During the evaluation meeting, Peklo gave Diers’ just one example of her communication that he didn’t like (Tr. 50). The example he gave was from the second Scene Shop meeting, when Diers said at the end of the meeting “now what?” (Tr. 50). Peklo said that he didn’t like Diers’ “negativity” and that this was an example of her “negativity” (Tr. 50). While Peklo testifies that there were other reasons for the score, Peklo admits that this is the only example he gave her during the meeting (Tr. 251-252).³

The week after her performance evaluation meeting, Diers requested a meeting with Peklo to discuss the evaluation (Tr. 51). During the meeting, Diers told Peklo that the example he used of her negative communication was from a Scene Shop meeting (Tr. 52). Peklo acknowledged that was a poor choice for an example, but he didn’t offer to modify the evaluation nor did he give any other examples of her “negativity.” (Tr. 52). Diers told Peklo that she didn’t think she could speak freely at the meetings anymore without Human Resources representation, and Peklo promised that he would make that happen for the next meeting (Tr. 52).

On October 11, Diers, Kristin Larsen, and Rose King met with Managing Director Jennifer Bielstein to discuss sexism and workplace culture in the Scene Shop (GC 18; Tr. 54-55). That same day, Diers sent Leuthner an e-mail about her concerns with her performance evaluation (GC 9; Tr. 52). Diers wrote that Peklo had used something she said in a Scene Shop

² Diers also received a lower score in the cleanliness category (GC 8; Tr. 50-51). During the evaluation meeting, Peklo explained that he gave everyone in the Scene Shop a lower score in this category because he was upset with how disorganized the Scene Shop was (Tr. 51).

³ Peklo testified that he discussed Diers’ performance evaluation with Director of Production David Stewart and Human Resources Director Jean Leuthner before issuing the evaluation (Tr. 248-249). Peklo’s testimony about the content of these conversations should not be credited, as it is unreliable self-serving hearsay evidence. Leuthner testified about the content of her conversation with Peklo regarding Diers’ performance evaluation (Tr. 166). For the same reasons, Leuthner’s testimony about the content of the conversation should not be credited.

meeting against her in the performance evaluation, and that she no longer felt she could safely express anything during the Scene Shop meetings (GC 9). She also mentioned that she had asked for Human Resources representation at the meetings, but even with representation, she didn't think it would be wise for her to participate for fear of her job at the theater (GC 9). Leuthner forwarded this email to Director of Production David Stewart, and wrote, "Josh and I talked about this yesterday and he admits it wasn't the best example and he apologized to Molly. There are certainly other examples of her problematic attitude so this was unfortunate. But this email goes to show she remains an unwilling spirit" (GC 18). Leuthner's email again demonstrates Respondent's animus towards Diers' activities around these issues. In response, Stewart wondered if this was the "crux of the jbiel meeting today" (GC 18). Leuthner responded "maybe. Interesting that she felt the need to bring others" (GC 18). Leuthner testified that she assumed "jbiel" was a reference to the meeting that Diers, Kristin Larsen, and Rose King had with Managing Director Jennifer Bielstein that day (Tr. 199).

Leuthner responded to Diers' email and said that she had spoken to Peklo about this and that "he understands this was not the best example to use" (GC 9). Leuthner encouraged Diers to "be open to allowing people to make mistakes, and to be a willing spirit in the process" (GC 9). In response, Diers stated that she had "internalized" Peklo's example, and she still has concerns about participating in the Scene Shop meetings in the future without anonymity (GC 9). Despite acknowledging that Peklo shouldn't have used this example, Leuthner never offered to modify Diers' performance evaluation (Tr. 54). Instead, Leuthner forwarded the email to Director of Production David Stewart and wrote "ugh," which reflected her thoughts about Diers' emails (GC 19; Tr. 200).

When asked on direct why Leuthner thought the example Peklo used wasn't the best, Leuthner responded "well, I think that, you know, that --- you know, I understand that -- how she felt, that was a meeting in which, you know, they were trying to address the scene shop culture. And so you know, she clearly felt that was off bounds, that it was just out of bounds. And so I agree with that. I think a different example would have been better." (Tr. 169).

On October 26, Respondent held a third Scene Shop meeting (Tr. 56). Upon seeing that Human Resources wasn't present, Diers chose not to speak during the meeting (Tr. 56, 101). Rose King also chose not to speak during the meeting (Tr. 56, 101). After the meeting, Diers discussed what happened with Saul, Kristin Larsen, and Rose King (Tr. 57, 101-102). Diers then went to Associate Technical Director Jim Gangl and Assistant Technical Director Sean Walters and told them the Scene Shop needed help, she was frustrated with the tone of the meetings, and given what happened during her performance evaluation, she didn't think she could speak up at the meetings any longer (Tr. 57-58).

After the third meeting, Peklo sent an e-mail to Stewart and Leuthner and wrote, "After today's meeting I think as an idea this ship is sinking" (R 25). Peklo testified that the Scene Shop meetings were making the issues in the Scene Shop worse, not better (Tr. 255).

The next day, Diers sent an e-mail to Leuthner about the third meeting (GC 10; Tr. 58). In the e-mail, Diers states that since her request for Human Resources presence at the Scene Shop meetings was ignored, she doesn't feel like the meetings are productive and she is not comfortable contributing (GC 10). She shared her concern that the third meeting was mainly the men talking about respect, which came off to the female employees as the men complaining about their privilege (GC 10). She said that the female employees in the shop feel like these meetings are setting the shop back instead of moving the shop forward and that without a

professional moderator they are doing more harm than good (GC 10). Diers and Leuthner then had a back and forth about whether Diers did in fact request Human Resources presence at the third meeting (GC 10).⁴ Leuthner told Diers that management would be discussing the next steps to move forward and that “in the meantime, I would ask you to be a willing spirit in this process” (GC 10). Diers responded that the last meeting was “downright offensive,” many others felt the same, and that it’s not about being a “willing spirit” when the meeting is offensive and uncomfortable (GC 10). She asked Leuthner “if I can’t turn to HR then where can I look?” (GC 10).

Leuthner forwarded Diers’ emails to Director of Production David Stewart (GC 22). When she forwarded the e-mails, Leuthner included her thoughts on the e-mail exchange with Diers, which was “ugh” (GC 22; Tr. 204). The e-mail exchange between Diers and Leuthner continued, and Diers told Leuthner “I’m afraid I don’t feel like that your office is a safe space to speak” (GC 23). Leuthner forwarded the e-mail to Stewart, and said “awesome” (GC 23). Stewart’s response was “she is helping absolutely nothing” (GC 23). Leuthner replied, “I’m wondering if Jennifer should attend the scene shop meetings as well as me and Sadie. I don’t feel “safe” from Molly” (GC 23). When asked if she put the word “safe” in quotations because she was being sarcastic, Leuthner testified, “I’m not sure” (Tr. 206).

B. Argument

1. Respondent Threatens Molly Diers and Downgrades her Performance Evaluation because Employees Engaged in Protected Concerted Activity

Respondent violated Section 8(a)(1) of the Act when it downgraded Diers’ performance evaluation in the communication skills category and gave her a “did not meet expectations” score. Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer to

⁴ It’s clear from the record that on October 11, 2017, Diers notified Leuthner that she had asked for Human Resources representation at the Scene Shop meetings (GC 9).

interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. 29 U.S.C. § 158(a)(1). Rights guaranteed by Section 7 include the right to engage in “concerted activities for the purpose . . . of mutual aid or protection.” 29 U.S.C. § 157. An adverse employment action taken against an employee independently violates Section 8(a)(1) of the Act where it is motivated by employee activity protected by Section 7 of the Act.

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(1) of the Act is set forth in *Wright Line*, 251 NLRB 1083 (1980). To prove a violation under *Wright Line*, the General Counsel must make an initial showing that protected concerted activity was a motivating factor in the employer’s decision to take adverse action against the alleged discriminatee. The elements required to meet this initial burden are (1) protected concerted activity by the employee; (2) employer knowledge of that activity; and (3) animus on the part of the employer. *Wright Line*, 251 NLRB at 1083.

Proof of animus or an employer's discriminatory motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004). This includes factors such as inconsistencies between the proffered reasons for the actions of the employer, disparate treatment, deviations from past practice, and proximity in time of the action to the protected concerted activity. *Id.*

Once the General Counsel has met its initial burden, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must demonstrate that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB

278, 280 fn. 12 (1996). If the General Counsel has made a strong prima facie showing, Respondent's burden under *Wright Line* is substantial. See *EddyLeon Chocolate*, 301 NLRB 887, 889 (1990).

a. Molly Diers' Performance Evaluation was an Adverse Employment Action

The record clearly demonstrates that Diers' was subject to an adverse employment action. In her 2017 performance evaluation, Diers' received a score of "did not meet expectations" in the communication skills category (GC 8). In her 2016 performance evaluation, Diers' received a score of "good" in the communication skills category (GC 4). Diers' downgraded score in the communication skills category of her 2017 performance evaluation constituted an adverse employment action. See *Parkview Hospital, Inc.*, 343 NLRB 76 (2004) (a less favorable evaluation is an adverse employment action for purposes of Section 8(a)(1)).

b. Molly Diers Engaged in Protected Concerted Activity

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 3 (2014). Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). Whether an employee's activity is for the purpose of mutual aid or protection focuses on the goal of the concerted activity and whether the employees are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

In *Meyers I*, the Board defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity

includes cases “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.” 281 NLRB 882, 887 (1986) (*Meyers II*). In addition, the Board has held that the activity of a single employee in enlisting the support of his or her fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group action. *Fresh & Easy Neighborhood Market*, 361 NLRB at 153; see also *Whittaker Corp.*, 289 NLRB 933 (1988) (explaining that the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate).

In this case, the record is replete with evidence that Diers engaged in protected concerted activity. Diers repeatedly discussed her concerns about sexism and workplace culture with other employees in the Scene Shop including Nathan Saul, Kristen Larsen, and Rose King. These employees shared the same concerns about sexism and workplace culture, which affected the working conditions of multiple employees in the Scene Shop. Diers even took the lead in organizing an employee happy hour to discuss why the employees were unhappy in the Scene Shop. During the happy hour, the employees brainstormed what they could do about the issues in the Scene Shop.

Not only did the employees discuss their concerns amongst themselves, but they also brought their concerns directly to the attention of management both individually and with other employees. Both Diers and Saul raised their concerns about sexism and workplace culture in the Scene Shop with various members of management on multiple occasions. See *Lou's Transport*, 361 NLRB 1446 (2014) (finding protected concerted activity where two drivers spoke to each other about working conditions, and drivers complained individually to the employer about the

same issues). On some of these occasions, Diers went with other employees to talk to management about these concerns, which would clearly constitute concerted activity.

The concerns with sexism and workplace culture in the Scene Shop were also discussed during the Scene Shop meetings. The Scene Shop meetings were staff meetings specifically scheduled to discuss and address the issues in the Scene Shop. In particular, Diers tried to spur action during the second Scene Shop meeting by asking “now what?” which then prompted a discussion of next steps amongst the employees.

In sum, Diers was engaged in protected concerted activity when (1) she discussed shared concerns about sexism and workplace culture with her co-workers; (2) when she brought these group concerns to the attention of management both individually and with other employees; and (3) when she participated in the Scene Shop meetings.

c. Respondent Knew Molly Diers Engaged in Protected Concerted Activity

The record clearly demonstrates that Respondent knew that Diers was engaged in protected concerted activity. Diers brought her concerns about sexism and workplace culture, which were shared and discussed with other employees, directly to the attention of management. She did this both individually and with other employees. She also spoke up during Scene Shop meetings, which management attended. At the same time that Diers was raising these concerns, Saul was also raising the same concerns to management. In an e-mail to Saul, Human Resources Director Jean Leuthner acknowledged that the issues in the Scene Shop were not just issues between Diers and Peklo, but there were cultural issues around sexism, establishing both knowledge and concert.

Respondent admits in its Answer to the Complaint that Diers raised concerns regarding sexism and the workplace culture in the Scene Shop with members of management and that

Diers and other employees participated in discussions regarding the culture in the Scene Shop (GC 1(g)).

d. Animus, Motive, and Nexus

The record contains ample evidence of Respondent's animus towards protected concerted activity. This includes two 8(a)(1) violations that Technical Director Josh Peklo committed during Diers' performance evaluation meetings and additional animus demonstrated by Human Resources Director Jean Leuthner both in her e-mails about Diers and in her November 2017 meetings with Saul.

i. *Independent 8(a)(1) Violations*

There could be no clearer evidence of animus than the two independent 8(a)(1) violations that Technical Director Josh Peklo committed during Diers' performance evaluation meeting. Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The Board has observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303, 303 (2003).

First, Peklo specifically cited an example of Diers' protected concerted activity as a basis for the downgraded score in the communication category (Tr. 50). During the evaluation meeting, Peklo gave the example of Diers asking "now what?" during the second Scene Shop meeting as an example of her "negativity" (Tr. 50) Peklo told Diers that he "didn't like" her "negativity" (Tr. 50). Diers was engaged in protected concerted activity during the second Scene Shop meeting, which was a staff meeting, when she asked "now what?" or "what's next?" to try and spur discussion on concrete action to take. Peklo's statement expressed his hostility towards

Diers' participation in the Scene Shop meeting. Peklo didn't even try to disguise his animus towards Diers' protected concerted activity by couching his comments in vague terms of "attitude." Instead, he clearly, and admittedly, cited an example of protected concerted activity as the reason for the downgraded score. Further, Peklo described Diers' protected concerted activity as being "negative," which establishes animus. Peklo was clearly not happy with Diers bringing up her concerns about sexism and workplace culture and participating in the Scene Shop meetings. Connecting protected activity with an adverse employment action like a negative performance evaluation score, and describing the protected activity as "negativity," would reasonably tend to interfere with the free exercise of employee rights under the Act.

Second, in response to Diers saying the culture in the Scene Shop was making her miserable and she was fed up, Peklo told Diers if she was so fed up with the culture that perhaps this wasn't the place for her (Tr. 48). An employer that responds to protected concerted activity regarding working conditions by suggesting employees can leave if they do not like the working conditions coerces employees and interferes with the free exercise of employees' Section 7 right to protest working conditions. See *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997) ("It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threatens discharge of the employees involved"); *Ridgeview Indus., Inc.* 353 NLRB 1096 (2009) (employer's statement if you're not happy here, find another job, constituted a threat of discharge and given the context of the employee's protected activities the threat was directed at those activities).

Peklo's statement suggested that Diers, who had been actively engaged in protected concerted activity around the culture in the Scene Shop, should leave her job if she didn't like the culture that she was trying to improve. This would reasonably tend to convey that protected concerted activity is not compatible with continued employment, and would tend to interfere with the free exercise of employee rights under the Act.

Peklo's independent 8(a)(1) violations, which were contemporaneous with the downgraded performance evaluation, are evidence of Respondent's unlawful motivation in downgrading Diers' performance evaluation and provide a nexus between Diers' protected concerted activity and downgraded performance evaluation. See *Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005) (the Board considers an employer's contemporaneous commission of other unfair labor practices as probative evidence of unlawful motivation).

ii. Other Animus

In addition to the above two independent 8(a)(1) violations, there is additional animus demonstrated by Human Resources Director Jean Leuthner's internal emails regarding Diers and her concerns with the workplace. For example, on two occasions Leuthner forwarded her e-mail chains with Diers to other members of management and said "ugh" (GC 19, 22). On another occasion, Leuthner forwarded an e-mail chain with Diers to another member of management and sarcastically said she didn't feel "safe" from Diers (GC 23). Leuthner also repeatedly used the phrase "willing spirit" in her e-mails and tells Diers to be a "willing spirit" (GC 23) Leuthner's repeated use of the word "ugh" to describe her thoughts about Diers' emails, and her sarcasm in stating she didn't feel "safe" from Diers, suggests that she was irritated and frustrated with Diers' actions.

Leuthner was also involved in a series of internal e-mail chains after Diers resigned her employment that suggest Respondent had lingering hard feelings towards Diers. For example, Leuthner forwarded a news article titled “Guthrie Scene Shop was Hostile Place Say Departed Workers” to Human Resources Coordinator Monica Servi, and Servi responded with an “angry emoji” (GC 24). Leuthner conveyed her agreement with the “angry emoji” by responding “right?” (GC 24). On another occasion, Leuthner described Diers attempts to coordinate a protest of the theater as “the gift that keeps on giving...” to which the employee recipient of the e-mail responded, “Dude, Molly needs to fucking move on. Pick one: a) shit on and destroy an organization or b) want to be reinstated and work there. Can't have both!” (GC 30; Tr. 210).⁵

At trial, Respondent pointed out that it took action in response to Diers’ concerns. To be clear, the General Counsel does not dispute that the Respondent took action to address the employees’ concerns about sexism and workplace culture in the Scene Shop. However, to the extent that Respondent is relying on such action to demonstrate that it did not harbor animus towards employee’s protected concerted activity, such argument is not persuasive. As Human Resources Director Jean Leuthner testified, if an employee raises a concern about discrimination based on sex, sexual harassment, or hostile work environment, she is required by various laws to investigate those claims (Tr. 197). Leuthner testified that some of those laws require that she promptly take action to address such issues (Tr. 197). Counsel for the General Counsel would submit that it is likely Respondent was required to take action to address the employee’s concern about sexism by other various laws surrounding discrimination, and therefore should not be considered evidence that its animus was not a motivating factor in its actions. Additionally,

⁵ Because this exchange occurred between Leuthner and a rank-and-file employee, it also likely constitutes a violation of Section 8(a)(1) of the Act. This evidence did not come to light until the hearing. Thus, while not alleged (nor amended in here) it does provide further evidence of Respondent’s animosity towards employee protected concerted activity.

Respondent's response to the employees' ongoing efforts to address these issues clearly illustrate that it did harbor animus against these activities.

e. Respondent Fails to Meet its *Wright Line* Burden

Having established that (1) Diers received an adverse employment action; (2) Diers engaged in protected activity; (3) the Employer had knowledge of the activity; and (4) the Employer harbored animus towards the activity, the burden shifts to the employer to prove it would have taken the same adverse employment action even in the absence of the employee's protected concerted activity. Respondent has failed to meet this burden for two reasons; first, the only example of Diers' negative communication style Respondent gave was when Diers was overtly engaged in protected concerted activity; second, the timing of the onset of Diers "negative" communication style coincided directly with Diers' attempts to address issues of sexism in the workplace.

Technical Director Josh Peklo claimed at trial that the reason he downgraded Diers' performance evaluation was that her communication style was "defensive," "argumentative," and "got in the way of the flow of information" (Tr. 250). Peklo also cited the written examples in Diers' performance evaluation, which were "I appreciate that you are direct in communication but it is not always in the most constructive tone i.e. defensive in morning meetings, not assuming best intentions with engineering or design approaches presented, etc." (GC 8; Tr. 251). However, even this reference implicates Diers' protected concerted activity, as the record is replete with references to the women in the shop not being listened to, including when making suggestions about engineering and design (Tr. 38). Respondent did not introduce any documentary evidence that would establish what exactly these communication issues were. Tellingly, at the time of her performance evaluation meeting, Peklo did not tell Diers that those

were the reasons for her communication score. Instead, it is undisputed that the only example Peklo cited during the evaluation meeting was Diers' statement during the second Scene Shop meeting – a clear and direct reference to her protected concerted activity.

In addition, the timing of the negative evaluation supports a violation. It is undisputed that Diers' had never received discipline regarding her communication style prior to the evaluation meeting (Tr. 257). In addition, Diers credibly testified that prior to her evaluation, she was never notified of any issues with her communication style (Tr. 297). It is also undisputed that Diers received a "good" score in the communication style category in her prior evaluation (GC 4). The new communication style issue only appeared *after* Diers' began engaging in a course of protected concerted activity concerning sexism and workplace culture in the Scene Shop. Therefore, the timing of the downgraded performance evaluation also establishes that Diers' was downgraded because of her protected concerted activity.

Based on the above, Respondent has not proven it would have taken the same action of downgrading Diers performance evaluation in the absence of protected activity and has failed to rebut Counsel for the General Counsel's prima facie case.

IV. Respondent Threatens Nathan Saul because Employees Engaged in Protected Concerted Activity (Complaint Allegation 7)

A. Facts

On November 10, 2017, Saul had a meeting with Human Resources Director Jean Leuthner to discuss employees' ongoing concerns about the Scene Shop (Tr. 103-104). In the course of this conversation, Leuthner threatened employees for engaging in protected, concerted activity.

Specifically, Leuthner asked Saul if he had any insight into why Diers was not communicating to the same extent she had been in the past and why she was so upset (Tr. 104).

Saul responded that it had to do with the series of events around Diers requesting Human Resources at the third Scene Shop meeting, and the fact that that hadn't happened. (Tr. 104). Diers and Leuthner went back and forth about whether Diers had ever requested Human Resources representation at the meetings (Tr. 104-105). Saul told Leuthner that Diers had told him she wrote an e-mail to Leuthner informing her that she had asked for Human Resources representation at the third Scene Shop meeting (Tr. 104-105). Leuthner denied ever receiving such an e-mail (Tr. 105). Saul said "well, maybe Molly didn't send you the e-mail, maybe she just spoke to Josh about it and was just testing him to see if he would actually follow through with it" (Tr. 105). In response, Leuthner rolled her eyes and said, "Yeah, she's testing a lot of people" (Tr. 105, 126). Saul didn't think that was an appropriate thing to say, and he told Leuthner that (Tr. 105).

Leuthner and Saul continued to talk about the situation in the Scene Shop and the fact there were trust issues with management and Human Resources (Tr. 105). Leuthner said that every time there was something brought to her attention, she took action on it (Tr. 105). She then asked Saul how much of the situation, how much of what was going on, did he feel like Diers was bringing on herself because she was being so angry and negative all the time (Tr. 105). Saul was upset by this turn of events and victim-blaming and asked Leuthner "was her skirt too short? Was she asking for it?" (Tr. 106). Leuthner and Saul continued to talk about these issues, with Saul explaining that there were serious trust issues and people perceived that management and Human Resources weren't taking an action to make things better in the Scene Shop (Tr. 106).

Leuthner's initial testimony about this meeting centered solely on what Saul said during the meeting – not what she said (Tr. 176-177). Leuthner testifies that the bulk of what Saul was upset about was the fact that Diers had requested Human Resources presence at the third Scene

Shop meeting, and she had missed it (Tr. 176). When specifically asked on direct if she told Saul that Diers was bringing this on herself because of her negativity or bringing negative consequences on herself, Leuthner denied making such a statement (Tr. 181). When asked if she made a statement about Diers testing people, Leuthner's initial answer was "no, I don't believe I did" (Tr. 181). When later asked if she was not admitting or denying making that statement, but if she just can't recall one way or another, Leuthner testified "I don't believe I said that" and then "I can't recall" (Tr. 232).

The following week, on November 13, Saul had another meeting with Leuthner (Tr. 106). In the course of this conversation, Leuthner again threatened employees for engaging in protected concerted activity.

Specifically, Leuthner informed Saul that he had raised his voice at her during the previous meeting but that she understood it was in the context of the conversation (Tr. 106-107). Saul apologized (Tr. 107). Leuthner reiterated that she didn't receive a request for Human Resources representation, and that it was important that "we all try and be team players in this, and that Molly really wasn't being a team player because she wasn't participating" (Tr. 107). Leuthner provided very little testimony about what was said during this meeting (Tr. 177-178). When specifically asked on direct if she said Diers was not being a team player, Leuthner denied making such a statement (Tr. 181).

Saul followed up the meeting with an e-mail to Leuthner (GC 17). In the email, Saul reiterates that focusing on Diers' "negativity" as a part of the problem, rather than her reaction to the problem, is not okay with him (GC 17). Saul wrote, "Using coded language like she needs to be a "willing spirit" to suggest that her upset and frustration aren't being expressed in a way in which you approve is tantamount to blaming the victim" (GC 17). Leuthner forwarded this email

to Human Resources Generalist Sadie Ward and wrote, “I no longer feel “safe” without having a witness to my conversations with Nate Saul” (GC 36).

On cross-examination of Saul, Respondent appeared to suggest that it was of import that Saul didn’t reference Leuthner’s threats about Diers not being a team player, testing people, and bringing things on herself in his e-mail to Leuthner (Tr. 120). Counsel for the General Counsel submits that it is not reasonable to infer that an employee would send a verbatim recitation of a meeting by e-mail. Further, as a rank-and-file employee, it is likely Saul did not realize at the time that those statements could constitute unfair labor practices and should be memorialized in writing. Saul confirmed that indeed, it was not a verbatim recitation, and that when he wrote, “using coded language like she needs to be a willing spirit” he was referring to the other statements Leuthner made (Tr. 120, 125).

Leuthner testified that she felt Saul misrepresented the meeting in his e-mail and that she sent Saul an e-mail to that effect (Tr. 214). However, when asked if the e-mail was among the exhibits that had been admitted, she initially said yes, but then was unable to locate it and admitted that she “could be wrong” (Tr. 214-215). Respondent clearly had access to this purported email, to the extent it exists, and yet did not offer it into evidence. Thus, Leuthner’s unsupported testimony on this point should not be credited.⁶

Further, while most of the record evidence is not in dispute, to the extent versions of events and meetings differ, employees Diers and Saul should be credited. Their testimony was detailed, specific, and they corroborated each other on critical points. On the other hand, Leuthner proved to be an unreliable witness, as illustrated by her above unsupported testimony

⁶ Respondent also elicited testimony during the trial about Leuthner’s discomfort with her meeting with Saul (Tr. 121). It should be noted that there is no allegation that Saul suffered an adverse action because of his meetings with Leuthner that would require an *Atlantic Steel* analysis. 245 NLRB 814 (1979). The fact that Leuthner may have been uncomfortable with the meeting is irrelevant to the question of whether she threatened Saul.

regarding an e-mail to Saul and her wavering testimony about whether or not she told Saul that Diers was testing people.

B. Argument

1. Respondent Threatens Nathan Saul in the November 10, 2017 Meeting

As discussed above, Saul credibly testified that during a meeting with Human Resources Director Jean Leuthner, Leuthner rolled her eyes and said that Diers was “testing a lot of people” and asked Saul how much of the situation he felt Diers was bringing on herself because she was being so angry and negative all the time. Leuthner’s comments to Saul constitute unlawful threats in violation of Section 8(a)(1) of Act. Again, the test of whether a statement is unlawful under Section 8(a)(1) of the Act is “whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group*, 339 NLRB at 303.

Given Diers had been actively engaged in protected concerted activity, Saul could reasonably interpret Leuthner’s comments to be references to Diers’ protected concerted activity and to mean that employees who engage in protected concerted activity “test” people, are angry and negative, and bring consequences on themselves by doing so. Describing employees that engage in protected concerted activity in this manner would clearly discourage employees from engaging in protected concerted activity, and would reasonably tend to coerce employees in the exercise of their Section 7 rights. See *Children's Studio School*, 343 NLRB 801, 805 (2004) (claim that employee was discharged because she did not have the “right spirit” and for being unwilling to work together as a team deemed similar to accusing the employee of a bad attitude, which is veiled reference to protected activities). In addition to being independent 8(a)(1)

violations, Leuthner's threat to Saul is further evidence of Respondent's animus towards protected concerted activity.

2. *Respondent Threatens Nathan Saul in the November 13, 2017 Meeting*

Saul credibly testified that during a second meeting with Leuthner, Leuthner said that it was "important that we all try to be team players in this and that Molly really wasn't being a team player, because she wasn't participating." Leuthner's comment to Saul regarding Diers constitutes another unlawful threat in violation of Section 8(a)(1) of the Act. Given Diers had been actively engaged in protected concerted activity, which Saul was aware of, Saul could reasonably have interpreted Leuthner's comment to be a reference to her protected concerted activity. Leuthner's comment suggested that Diers, by engaging in protected concerted activity, was not a "team player" and that in order to be a "team player" employees shouldn't engage in protected concerted activity. This comment would reasonably tend to coerce employees in the exercise of their Section 7 rights. See *Kentucky Electric Steel Acquisitions*, 346 NLRB 185, 189–190 (2005) (employer's references to employee's "bad attitude" and failure to be a "team player" are evidence of its animus towards employees' protected conduct).

V. Respondent's Defenses

During the hearing, Respondent took the position that Complaint allegation 7 is not properly before the Administrative Law Judge because the allegation is not referenced in either the original or first amended charge (Tr. 11, 18). This appears to be a 10(b) argument. All of the allegations in the Complaint are closely related to timely allegations and satisfy the three-prong test set forth in *Redd-I, Inc.* 290 NLRB 1115 (1988).

Under the *Redd-I* test, the Board considers (1) whether the timely and untimely allegations involve the same legal theory; (2) whether the allegations arise from the same factual

situation or sequence of events; and (3) “may look” at whether the respondent would raise the same or similar defenses to both timely and untimely allegations. *Redd-I, Inc.*, 290 NLRB at 1115; *Carney Hospital*, 350 NLRB 627, 630 (2007).

Here, each of the *Redd-I* factors are met. First, all of the allegations in the Complaint involve the same legal theory as allegations in the original and first amended charge - alleged interference with, restraint of, and coercion of employees’ Section 7 rights in violation of Section 8(a)(1) of the Act. Specifically, retaliation for employees’ protected concerted activity. See *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989) (explaining that “in determining whether essentially similar legal theories underlie different allegations, we noted in *Redd-I* that usually the same section of the Act will be the basis for both the timely and untimely allegations”).

Second, all of the allegations in the Complaint arise from the same factual situation or sequence of events as the allegations in the original and first amended charges. All of the allegations relate to the threats and retaliation that Diers and Saul faced for engaging in protected concerted activity around the issues of sexism and workplace culture in the Scene Shop. All of the allegations allege conduct that occurred within the same time-period with a similar object. Third, and for these same reasons, Respondent would raise the same or similar defenses to all the allegations. Respondent’s rationalizations for the adverse employment actions would dovetail with its denial of the 8(a)(1) threats and its assertion that it bears no animus towards employee’s protected concerted activity.

Because each of the *Redd-I* factors have been satisfied, all of the allegations in the Complaint are closely related to a timely filed charge and are not barred by Section 10(b) of the Act. Further, Respondent was afforded due process as the Complaint included all of the

allegations and the issues were fully litigated during the hearing with Respondent having the opportunity to call and cross-examine witnesses regarding all of the allegations. See *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990) (due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated).

VI. Conclusion and Remedy

On the basis of the foregoing and the record as a whole, Counsel for the General Counsel respectfully submits that the record evidence and the law establish that Respondent violated Section 8(a)(1) of the National Labor Relations Act as alleged. Counsel for the General Counsel respectfully requests that the Administrative Law Judge include in her recommended order the requirement that: (1) Respondent remove from its files all references to the downgrading of Molly Diers' performance evaluation in the area of skill in effective communication and notify her in writing that the downgraded rating has been rescinded and will not be used against her in any way; and (2) Respondent post appropriate notices within 14 days after service by the Region and that the Respondent mail, at its own expense, a copy of the notice to all bargaining unit employees who were employed at any time since September 1, 2017. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.⁷

Dated: December 19, 2018

Respectfully submitted,

/s/ Kaitlin E. Kelly

Kaitlin E. Kelly
Counsel for the General Counsel

⁷ Appended to this brief as Attachment A is General Counsel's proposed Notice to Employees. Appendix B contains General Counsel's proposed conclusions of law.

National Labor Relations Board Region 18
212 3rd Avenue South, Suite 200
Minneapolis, MN 55401

**Appendix A
Proposed Notice to Employees**

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.

YOU HAVE THE RIGHT to freely engage in protected concerted activity, which includes bringing concerns or complaints regarding sexism or workplace culture to us on behalf of yourself and other employees, and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT threaten that your protected concerted activity is not consistent with continued employment at the Guthrie Theater.

WE WILL NOT threaten that your performance appraisal will be negatively impacted because you bring issues and complaints to us on behalf of yourself and other employees

WE WILL NOT threaten that an employee who brings issues and complaints to us on behalf of themselves and other employees is not a team player, tests people, and brings negative consequences on themselves.

WE WILL NOT downgrade your performance appraisal because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

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

WE WILL remove from our files all references to the downgrading of Molly Diers' performance appraisal in the area of skill in effective communication and **WE WILL** notify her in writing that the downgraded rating has been rescinded and will not be used against her in any way.

GUTHRIE THEATER

(Employer)

Dated: _____

By: _____
(Representative) (Title)

Appendix B
Proposed Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The International Alliance of Theatrical Stage Employees Local 13 is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act when it downgraded Molly Diers' performance evaluation in the area of skill in effective communication by giving her a rating of "did not meet expectations" on October 6, 2017.
4. Respondent violated Section 8(a)(1) of the Act when it threatened employees that protected concerted activity is not consistent with continued employment at the Guthrie Theater on October 6, 2017.
5. Respondent violated Section 8(a)(1) of the Act when it threatened employees that employees' performance appraisals will be negatively impacted because of employees' concerted complaints on October 6, 2017.
6. Respondent violated Section 8(a)(1) of the Act when it threatened employees that an employee who raises concerted complaints about the workplace tests people on November 10, 2017.
7. Respondent violated Section 8(a)(1) of the Act when it threatened employees that an employee who raises concerted complaints about the workplace brings negative consequences on themselves on November 10, 2017.
8. Respondent violated Section 8(a)(1) of the Act when it threatened employees that an employee who raises concerted complaints about the workplace is not a team player on November 13, 2017.
9. The unfair labor practices engaged in by Respondent, as set forth in Conclusions of Law 3-8, affect commerce within the meaning of Section 2(6) and (7) of the Act.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Brief to the Administrative Law Judge on Behalf of the General Counsel was filed via e-filing and served by the methods indicated on December 19, 2018, on the parties whose names and addresses appear below.

Served Via E-Mail

Douglas R. Christensen, Attorney
Littler Mendelson, PC
1300 IDS Center 80 South 8th Street
Minneapolis, MN 55402-2136
dchristensen@littler.com

Justin D. Cummins, Attorney
Cummins & Cummins, LLP
1245 International Centre 920 Second Ave. S.
Minneapolis, MN 55402-3318
justin@cummins-law.com

Alice D. Kirkland, Attorney
Littler Mendelson, P.C.
80 South 8th St 1300 IDS Center
Minneapolis, MN 55402-2136
akirkland@littler.com

Matt Rice, Business Manager
IATSE Local 13
312 Central Ave. SE Suite 398
Minneapolis, MN 55414-1088
matt_rice@iatse13.org

Sadie Ward, Human Resources
Guthrie Theater
818 S 2nd St
Minneapolis, MN 55415-1252
SadieW@guthrietheater.org

Dated: December 19, 2018

/s/ Kaitlin E. Kelly
Kaitlin E. Kelly
Counsel for the General Counsel
National Labor Relations Board Region 18
212 3rd Avenue South, Suite 200
Minneapolis, MN 55401