United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

February 19, 2019

Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, CA 94119-3939

Re: *NLRB v. Natural Life, Inc. d/b/a Heart and Weight Institute*
Board Case No. 28-CA-181573

Dear Ms. Dwyer:

I am enclosing a copy of the National Labor Relations Board's application for enforcement of its order in this case. Within 40 days of the Court's docketing of this application, I will file the agency record and a certified list of its contents.

Please serve a copy of this application on the Respondent Natural Life, Inc. d/b/a Heart and Weight Institute, whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case. The Board attorneys

directly responsible for this case are Usha Dheenan, (202) 273-2948, and Rebecca Johnston (202) 273-1066.

Very truly yours,

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-0979

Encls.

SERVICE LIST

NLRB v. Natural Life, Inc. d/b/a Heart and Weight Institute
Board Case No. 28-CA-181573

Natural Life, Inc. d/b/a Heart & Weight Institute 2235 East Flamingo Road Suite 208 Las Vegas, NV 89119-5152	Respondent
Robert L. Rosenthal, Esquire Howard & Howard PLLC 3800 Howard Hughes Pkwy Suite 1000 Las Vegas, NV 89169-5958 rlr@h2law.com	Respondent's Counsel
Myeasha Strain 2068 N Nellis Blvd Apt 250 Las Vegas, NV 89115-5564 velvetchimes@yahoo.com	Charging Party
Cornele A. Overstreet NLRB Region 28 2600 North Central Avenue, Suite 1400 Phoenix, AZ 85004-3099	Regional Director
Barbara B. Baynes NLRB Resident Office 300 Las Vegas Boulevard South, Suite 2-901 Las Vegas, NV 89101	Resident Officer

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	Board Case No.
	)	28-CA-181573
NATURAL LIFE, INC. d/b/a HEART	)	
AND WEIGHT INSTITUTE	)	
	)	
Respondent	)	

APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Natural Life, Inc. d/b/a Heart and Weight Institute on March 30, 2018, in Board Case No. 28-CA-181573, reported at 366 NLRB No. 53. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practice occurred in Las Vegas, Nevada.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-0979

Dated at Washington, DC
this 19th day of February 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	Board Case No.
	)	28-CA-181573
NATURAL LIFE, INC. d/b/a HEART AND WEIGHT INSTITUTE	)	
	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that the foregoing document is being served today via e-mail upon the following counsel:

Robert L. Rosenthal, Esquire
Howard & Howard PLLC
3800 Howard Hughes Pkwy
Suite 1000
Las Vegas, NV 89169-5958
rlr@h2law.com

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-0979

Dated at Washington, DC
this 19th day of February 2019

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Natural Life, Inc. d/b/a Heart and Weight Institute *and* Myeasha Strain. Case 28–CA–181573

March 30, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS MCFERRAN AND EMANUEL

On April 5, 2017, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel filed limited exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions,[3] to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The Respondent, Natural Life, Inc. d/b/a Heart and Weight Institute, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' protected concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) Informing employees that they are being discharged because they engaged in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[1] Invoking the "missing witness" rule, the judge drew an adverse inference against the Respondent for its failure to call former sales manager John Finley to testify about the dates of his employment. The Respondent excepted to the judge's ruling, and we find merit in this exception. The "missing witness" rule allows a judge to draw an adverse inference against a party that fails to call a witness who is under the control of that party and is reasonably expected to be favorably disposed towards it. *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999); *Reno Hilton*, 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999). A former employee, such as Finley, however, is not generally considered to be under a party's control. See, e.g., *Food & Commercial Workers Local 1439 (Rosauer's Supermarket)*, 275 NLRB 30, 35 fn. 10 (1985); 48A Am.Jur. 2d Labor and Labor Relations Sec. 2021 (2017). Nevertheless, we find this was harmless error. Because we agree with the judge that the Respondent discharged its employees in retaliation for their engaging in protected concerted activity, not because there was no available manager, an adverse inference about the dates of Finley's employment would not affect the outcome of the case. We also observe that, in summarizing the "missing witness" rule, the judge appears to have inadvertently misquoted 29 Am.Jur. 2d Evidence Sec. 178.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act when it discharged the sales department employees on July 27, 2016, because they engaged in protected concerted activity. As a result, we find it unnecessary to pass on the judge's additional conclusion that the Respondent's failure to recall all of those employees independently violated Sec. 8(a)(1), as that additional finding would not materially affect the remedy. Member McFerran would simply affirm both violations. She would note that the Respondent failed to provide argument in support of its exception to the failure-to-recall violation.

The Respondent also excepts to the judge's findings that it violated Sec. 8(a)(1) by creating an impression of surveillance on July 27 and by telling employees that they were terminated and would not be rehired because of their protected concerted activities. However, the Respondent presents no argument in support of these exceptions. In accordance with Rule 102.46(a)(1)(ii), we shall therefore disregard them. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by surveilling employees on July 27 and August 3 and by creating the impression of surveillance on August 3.

Member McFerran would find merit to the General Counsel's exception to the judge's finding that the Respondent did not promulgate an unlawful rule against workplace complaining. However, rather than deem the Respondent's statement the promulgation of a new rule, she would find it to be an unlawful "suggest[ion] that expressions of dissatisfaction with working conditions were inconsistent with continued employment.' *Stoody Co.*, 312 NLRB 1175, 1175 (1993).

[4] Given the judge's findings, we shall include Emmanual Findley among the employees entitled to reinstatement. The Respondent will have the opportunity to present evidence during the compliance stage of this proceeding regarding Findley's prearranged transfer to the customer service department and its corresponding remedial obligations to him. We shall amend the judge's remedy to require the Respondent to read the remedial notice to its employees. Given the number of employees involved (nine) and the Respondent's expulsion of an entire department (sales) for unlawful reasons, we believe an oral repudiation of the unlawful conduct is necessary to dispel its effects. See *The Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 2 (2015) (notice reading warranted where employer's violations are serious and widespread); *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006) (ordering notice reading where employer unlawfully discharged four employees for voting in a representation election and committed one additional Sec. 8(a)(1) violation). We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Myeasha Strain, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, and Robert Thompson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Compensate Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year(s) for Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 2016.

(g) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to employees by a responsible management official in the presence of a Board agent if the Region so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 30, 2018

Marvin E. Kaplan, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 create the impression that we are engaged in surveillance of your protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT inform you that you are being discharged because you engaged in protected concerted activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Myeasha Strain, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, and Robert Thompson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed

WE WILL make Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

NATURAL LIFE, INC. D/B/A HEART AND WEIGHT INSTITUTE

The Board's decision can be found at www.nlrb.gov/case/28-CA-181573 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Elise F. Oviedo, Esq., for the General Counsel.
Erica J. Chee, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on a complaint and notice of hearing (the complaint) issued on October 18, 2016, arising from unfair labor practice charges that Myeasha Strain (Strain) filed against Natural Life, Inc. d/b/a Heart and Weight Institute (the Respondent or the Company), alleging violations of section 8(a)(1) of the Act.

Pursuant to notice, I conducted a trial in Las Vegas, Nevada, on January 9–11, 2017, at which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

(1) Did the Respondent, on July 27, 2016,[1] discharge its entire sales department, including Strain, Donovan Boyd, Emmanuel (Manny) Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, because sales department employees had engaged in protected concerted activities?

(2) Did the Respondent, after July 27, refuse to consider rehiring, and did not rehire, Strain, Frenzel, Martin, McCawley, and Thompson because they had engaged, or were suspected of engaging, in protected concerted activities?[2]

(3) Did the Respondent, after July 27, also refuse to consider rehiring, and did not rehire, Strain because she posted comments and pictures on her Facebook critical of the Respondent's policies regarding sales employees' pay and workplace conditions?

(4) Did the Respondent's quality assurance department (QA) engage in surveillance of employees to discover their concerted activities, by listening in on their telephone calls from about February 5 through about July 27?

(5) Did Linda Guggia, as an agent of the Respondent, tell employees on July 27 that the Respondent had recorded calls of people talking about getting an attorney with regard to their terms and conditions of employment, thereby creating the impression of surveillance of their protected concerted activities?

(6) On the same date, did Guggia threaten employees with discharge/not being rehired because of their negativity and complaints about terms and conditions of employment?

(7) On the same date, did Guggia, through her oral announcement, promulgate and since then maintain the rule that employees are not allowed to be negative or complain about terms and condition of employment?

(8) Did Guggia, in response to Strain's earlier protected activity, go to Strain's Facebook page on August 3, to engage in surveillance of employees engaged in concerted activities?

(9) Did Guggia, on August 3, create the impression of surveillance of employees' protected activities, by commenting to Strain about her posting comments and pictures on her Facebook critical of the Respondent's policies regarding sales employees' pay and workplace conditions?

Witnesses and Credibility

The General Counsel called Strain and Thompson (her son), as well as Guggia as a 611(c) adverse witness. The Respondent called Company Owner Konstantine (Korny) Stoyanov and Guggia.

Strain was a reliable witness. She testified confidently; in appropriate detail, considering the length of her employment, the many incidents involved, and the frequent changes in her position and compensation; and without any apparent attempts to embellish or skew her testimony in her favor.

For example, Strain testified that on an occasion when Manager Jim Spencer made a racist statement, other employees but not she, told him that he could not say that. As another example, when I asked Strain how often, between May and July 27, 2016, she and other employees spoke about going to the NLRB or getting an attorney, Strain testified that it was less than a majority of weeks. Strain conceded that she casually uses the expression, "I got something for their asses," and she testified that she recalled one occasion prior to July 27 when she had used it when talking with Guggia. Further, Thompson corroborated her testimony of what she said (or did not say) to Guggia during and after the July 27 meeting, contradicting Guggia's testimony. Finally, Strain's testimony of the protected concerted activities in which she and other employees engaged was supported by the stipulations into which counsels entered, as well as Guggia's statements at the July 27 meeting.

In contrast, neither Guggia nor Stoyanov were credible. In demeanor, Guggia appeared nervous and uncomfortable, to the point of distressed. Although she answered background questions directly and without hesitation, she was markedly equivocal, vague, and/or nonresponsive when answering questions concerning her supervisory status on and before July 27, what she told employees when she terminated them that day, when she started reconstituting the sales department after July 27, and why Strain was not rehired. Indeed, she appeared to be making an almost desperate attempt to say the "right words,"[3] which I interpret as not harming the Respondent's case. For example, regarding resumption of the sales department after July 27:[4]

> GC: When did you say you started calling people to build up at a team?
> Answer: Well, I mean, it wasn't—they were already calling me, but I mean I called people back that had called me. Like, the beginning—probably the beginning of August, maybe second week of August. I don't remember.
>
> GC: And can you please tell us again when you started back hiring[sic] employees for your team?
> Answer: I don't remember. I don't know.

My demeanor assessment wholly aside, her testimony itself was replete with inconsistencies. For example, she first testified that prior to July 27, when Sales Manager John Finley was absent, no one filled in for him as acting manager because the employees "always. worked together as a team. ," but she then stated that "[W]hen he was gone, I would, of course, step up to the plate" and communicate directly with Stoyanov.[5] As another example, Guggia testified more than once that Strain's purported threat on July 27 was the main reason she did not recall Strain back to work. Yet, when Strain asked her on the stand whether she felt threatened on July 27, Guggia replied, "I didn't. No, I didn't. I thought that we were friends. [T]hat's why it bothered me a lot. "[6]

[1] All dates hereinafter occurred in 2016 unless otherwise indicated.

[2] Par. 4(l) of the complaint alleges that they were "applicants" as of August 3, but Strain did not apply for reemployment after July 27, and there is no evidence that any of the others did so.

[3] Tr. 64.

[4] Tr. 145, 152–153.

[5] Tr. 34–35.

[6] Tr. 168.

Most damaging to Guggia's credibility was that her testimony on key points was directly contradicted by statements that she made in her affidavit of September 7 (GC Exh. 7) and in the stipulated transcript of the tape recording that Strain made of Guggia's statements when she terminated the employees on July 27 (GC Exh. 3(b) (the transcript). Moreover, the tape recording contradicted statements in her affidavit.

Thus, Guggia denied telling employees at the meeting that the Company was closing its doors and that they were fired.[7] And, in her affidavit (at 3) she stated that she told employees that "we would be closing down temporarily for about a week or two." On the contrary, the transcript shows that she said the following (at 2-3):

> Strain: So basically, Kony fired everybody.
> IT Supervisor Hensley: Everybody's gone.
> Guggia: Yup.
> Hensley: He's shut it down.
> Guggia: He can't afford to pay us anymore.

Guggia testified that she did not bring up employees' complaints about losing their base salary, losing their openers from the Philippines, or bumped chargebacks vis-à-vis their contracts. In contrast, the transcript reflects that she mentioned all of these complaints. She further testified that she did not say anything about negativity, but the transcript reflects that she made numerous references to negativity, including the statement (at 8), "If everybody feels that negative about the company, they shouldn't be here."

Guggia denied telling the employees on July 27 that QA had recordings of them talking about a lawsuit, but the transcript states (at 3–4):

> But this is what happens when you have angry people all the time, and you have QA constantly listening to what we say behind closed doors, behind to each other, side by side; they have recordings of people saying things that are just horrible. They have a whole conversation of people talking about a lawsuit like, half an hour long.

As to why she did not call Strain back to work, Guggia testified that the primary reason was that Strain threatened her as she was leaving the facility on July 27, after being fired; more specifically, that Strain said, "I have something for their asses,"[8] which Guggia purportedly took as a personal threat to her and her vehicles. Such a reaction is unreasonable from an objective standpoint, since there is nothing in the record suggesting that Strain had ever engaged in, or threatened, violence. In contrast, Guggia's affidavit (at 4) states that Strain made the comment during the meeting, not as she was leaving, and that "I did not respond to her. I simply said that I love everybody and the timing couldn't be worse for my cruise. "

Guggia's affidavit mentions nothing about her taking that remark as threatening or that it played any part in her decision not to recall Strain. Instead, the affidavit states (at 4–5) that Guggia looked at Strain's Facebook page after she returned from vacation and decided not to call Strain back because she had said "horrible things about the company and the Owner, and his affiliate[sic] companies." In this regard, Guggia testified that after the July 27 meeting, she sent an email to Stoyanov about the purported threat that day, but the Respondent's counsel represented that no such document was provided to her. Furthermore, as earlier stated, Guggia testified at one point that she did not feel threatened on July 27.

Guggia testified that when she went on her cruise on July 28, she had no idea of any plans for the sales department after her return; rather, she had an epiphany while on the cruise of how the department could be restructured. According to Guggia and Stoyanov, they discussed this only after she came back on August 1, and he gave approval on a trial basis. However, statements that Guggia made on July 27, to Strain individually and to the sales persons as a group, reflect that she was already planning to have a new sales team upon her return. Moreover, a document (GC Exh. 9(a)) that the Respondent provided during the investigation states (at 2), "On August 2, when Linda came back the [sales] agents was[sic] Lori Bass, Trudy Maxey, and Carrie Pappan," strongly suggesting that they were already working in sales even before Guggia returned from the cruise or, at the very least, that they were doing so within a day of her return. In view of this time frame, I have to believe that Stoyanov and Guggia had firm plans on July 27 to reopen the sales department almost immediately.

In sum, Guggia's testimony—itself deficient—was undermined by her affidavit, the tape recording of what she told employees on July 27, and the Respondent's own submission to the Region. As such, I conclude that it was totally unreliable.

Stoyanov, too, was not a credible witness, especially in view of his business acumen, as reflected by his testimony that he owns and operates a number of businesses, in Las Vegas, the Philippines, and Europe; and his testimony that, although he is not often physically present at the facility, he maintains regular contact with company managers by Skype or email.

Thus, Stoyanov was often evasive, some of his testimony was contradictory, and portions of his testimony were not believable. As to Guggia's authority between March and July, Stoyanov incredibly testified that he could "not recall" if he used her to convey messages to employees, used her to convey messages when Sales Manager John Finley was absent, or if he had anyone else make announcements when Finley was not there.[9] When asked when he made the decision to close the sales department, he answered nonresponsively: "It was on the table every single month."[10]

Stoyanov gave contradictory testimony regarding what instructions he gave Guggia concerning what to tell sales employees about the July 27 closing. At one point, he testified that he called Guggia by Skype from Europe and told her they needed to close the office "temporarily" while she was on vacation because "we [had] no idea what's going on with John Finley.[11] He further testified that he told her to tell employees that the department would reopen after she returned from vacation. Yet, he later testified that he authorized her to tell employees

[7] Tr. 70, 75.
[8] Tr. 107.
[9] Tr. 585–586.
[10] Tr. 519.
[11] Tr. 546.

that the Company was closing the sales room and not to come back. Moreover, for a businessperson who operates internationally, Stoyanov's professed ignorance of what the term "fire" means in the employment context was wholly unbelievable.

For a variety of reasons, Stoyanov failed to provide a convincing reason for the timing of the closing of the sales department on July 27. Both he and Guggia testified that on July 27, they believed that Finley was looking for another job and was not coming back to work and that they discussed the fact that in Guggia's absence, there would be no onsite supervisor for the sales department.

However, I credit Strain's unrebutted testimony that on the morning of July 27, Finley sent a Skype to the sales department stating that Stoyanov had given him a personal day off, that Guggia would be in charge for the day, and that he would be returning tomorrow. In this regard, Stoyanov could "not recall" if he gave Finley that day off on personal time,[12] and Guggia did not testify on that point. In fact, Stoyanov indirectly corroborated Strain's testimony reflecting that Finley was still the sales manager as of July 27 and 28—he testified that he called Guggia on July 27 because he could not get in touch with Finley.

The Respondent did not call Finley as a witness, and the date that he left the Company's employ, as well as the circumstances of his separation, remain unknown. Our system of jurisprudence has what is called the "missing witness rule," which provides that:

> Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. 29 Am. Jur.2d §178.

Normally, an administrative law judge has the discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988).

The Respondent offered no evidence to show that it sought to procure Finley's presence as a witness, by subpoena if necessary, and I draw the appropriate adverse inferences.

Even if Finley and Guggia were not going to be present from July 28 to on about August 1, the Respondent had customer service and IT departments, each of which had a supervisor. Furthermore, Guggia told Stoyanov a few weeks prior to July 27 that she was going on vacation on July 28, so he knew considerably ahead of time that she would be gone for a few days.

As General Counsel Exhibit 9(a) shows, the Respondent by August 2 and by Guggia's return already had three employees doing sales, two from customer service and one prior sales person who had just been fired. I can think of no legitimate business justification for terminating an entire sales department and then within a few days starting a resumption of the operation.

At this junction, I will address my rejection of Respondent Exhibit 3, daily reports from January 1—March 6. After Stoyanov testified on voir dire that he relied on the document in making the decision to close the sales department, the General Counsel objected to the document and any testimony thereon on the basis that the document was not provided pursuant to the General Counsel's subpoena duces tecum (GC Exh. 11). Paragraph 18 thereof asked for "documents and communications which set forth, discuss, and/or relate to the reasons for which" the sales department employees were discharged on July 27, and paragraph 19 requested "[d]ocuments on which Respondent relied in discharging" them. In response to the General Counsel's objection, the Respondent's counsel advanced the rather creative argument that the document did not specifically relate to the discharges but to the closure of the sales room. I rejected that argument on the basis that the two events have to be considered one and the same res gestae and cannot be meaningfully distinguished.

The General Counsel requested sanctions for noncompliance, including rejection of Respondent Exhibit 3 and barring the Respondent from presenting evidence about the subject matter sought by the subpoena, more specifically, purported economic bases. I granted that request, citing *M.D. Miller Trucking,* 361 NLRB 1225 (2004); *McAllister Towing & Transportation,* 341 NLRB 394 (2005), enfd. Mem 156 Fed Appx. 386 (2d Cir. 2005); and *Perdue Farms,* 323 NLRB 345 (1997), affd. in relevant part, 144 F.3d 830, 839–834 (D.C. Cir. 1998).

In any event, in view of Stoyanov's unreliability as a witness, I cannot fathom how documents relating to business conditions for the first quarter of 2016 could show justification for the timing of the discharges on July 27. Significantly, Stoyanov first testified that the Company was not profitable for the past "three or four years" and then that it "[w]as never a profitable company" despite his "always" bringing in new managers.[13]

This provides one example of aspects of his testimony that strained credulity. The Company has been in operation since 2004, and I simply cannot believe that he would have operated a business at a loss for 12 years. Another example was his professed ignorance of whether Finley was still an employee of the Company on July 27. Finally, although both Stoyanov and Guggia testified that she always needs to get his approval, including for the hiring of sales people, Stoyanov testified that he gave her no guidelines on how many people to hire when the operation resumed in August and could "not recall" giving her

[12] Tr. 564.

[13] Tr. 503.

guidelines on pay rates.[14]

For all of the above reasons, I credit Strain's testimony over that of Stoyanov and Guggia where they diverged.

Facts

Based on the entire record, including the pleadings, testimony of witnesses, and my observations of their demeanor, documents, and the parties' stipulations, I find the facts as follows.

The Respondent's Business Operation

Since 2004, the Respondent, a corporation with an office and place of business in Las Vegas, Nevada (the facility), has engaged in the telemarketing retail sale and distribution of health supplements. The Respondent has admitted jurisdiction as alleged in paragraph 2 of the complaint, and I so find.

Konstantine (Korny) Stoyanov is the owner and president of the Company. He also owns an affiliated company in Cebu, the Philippines, the employees of which have interacted with those of the Company; and a separate company in Las Vegas, 411Locals, an advertising agency. At one time, the human resources (HR) office of 411Locals performed HR services for the Company, and for purposes of this case, the Respondent stipulated that Hollie Anderson and Gina Neist of that office acted as its agents. HR functions are now performed at the Company by Mariana Stoyonova, Stoyanov's mother,[15] and Militsa Georgieva. 411Locals continues to perform accounting services for the Company. Finally, Stoyanov has businesses in Europe. He spends about 70 to 80 percent of the year outside the United States.

The Respondent has used several classifications of sales persons, including:

(1) Opener – opens up leads for the closer by "cold-calling" potential customers and finding out of they are interested. If so, the next step is handled by a closer.

(2) Closer – calls a customer back and reviews the conditions of the order. If the deal is closed, the closer gets the customer's information and sets up a payment plan.

(3) Front-to-Back – salesperson both opens and closes the transaction.

(4) Bumper (or Verifier) – verifies everything that the closer original started and then offers a package deal, for example a year's product, at a reduced cost but requiring a lump sum payment. This is called "bumping" because the sale is considered an increased sale. This has been the position with the highest compensation and responsibility.

(5) Reloader – calls customers who have discontinued buying and tries to get them back on the product or to order a different product, or calls customers who are close to running out and get them to reorder.

The flat wage rate and commission varies by classification and has not stayed constant. At times, openers in the Philippines have made the initial calls to potential customers in the United States, with closers in Las Vegas taking over thereafter.

It is undisputed that Stoyanov has at all times maintained ultimate decision-making authority and has regularly communicated with local management. The management structure at the facility has undergone numerous changes in recent years, making difficult precise demarcation of lines of authority. From approximately late 2014–2016, Sales Director Jim Spencer was the highest-ranking manager. Under him were Sales Manager John Finley, from approximately mid-2015 on; and, when she served as a sales manager, Linda Guggia.

Prior to March 2016, the Company maintained sales offices on the first and second floors of a commercial building, each with a separate team of sales persons. The offices were accessible through outside corridors and had no physical connection with one another. In March, the upstairs sales office was closed and merged with the downstairs office, at which time Finley became the sales manager for all of the sales people. Guggia, who had been the upstairs sales manager since August 2015, returned to her former position of bumper. Nevertheless, during the period March to July 26, she served as the acting manager in Finley's absence, at which times she instructed employees and directed their breaks. As of around July 1, she held daily morning meetings with sales employees, and she conducted a meeting in about June with sales employees, at which she announced changes that the Company was making in the operation and the employees' job duties. It is undisputed that she has been the sales manager and a supervisor and agent since at least shortly after she returned in August.

Myeasha Strain's Employment

Strain started with the Company as an opener in September 2011 and 6 months later was promoted to a closer. She left in December 2012 and returned in March 2013 as a closer/bumper in the downstairs sales office. In March, she became a loader for about 2 weeks and then became a closer, with bumper and training responsibilities, as needed.[16] She remained in that position until July 27, 2016.[17]

The Respondent has not contended that any deficiencies in Strain's performance played a role in her termination or its failure to recall her after July 27. On the contrary, the record reflects that Stoyanov held her in high esteem, as reflected by a July 19 email from Stoyanov to Finley (R. Exh. 2). Therein, Stoyanov rejected Finley's proposal to use openers in Cebu or Las Vegas rather than have only front-to-back sales. Stoyanov went on to state that if Finley did not think that he could make it work, Strain, I.T. Supervisor Shawn Hensley, or Guggia could take over for him.

[14] Tr. 562.

[15] The spelling of her last name differs from her son's.

[16] At that time, Guggia was made the regular bumper over all of the sales people. Strain questioned why she was demoted from bumper when she had more seniority than Guggia, but this is not an issue before me. The General Counsel does not contend that any conduct of the Respondent prior to July 27 was unlawful.

[17] See GC Exh. 10, Strain's last contract, effective July 5. For purposes of this case, the Respondent is not contending that she or the other individuals named in the complaint were independent contractors rather than employees.

Strain's and Other Employees' Protected Concerted Activities Prior to July 27, 2016

Spencer held the role of a sales manager prior to leaving in 2014 and returning as sales director in approximately late 2014. Both during his tenure as manager and after he returned as director, he constantly made racist or sexist comments.

For example, on one occasion as a manager, in front of several salespeople, he sang a ditty in which he used the term, "coon babies." At that time, other employees not including Strain objected. However, a week thereafter, Strain "Skyped" Stoyanov and complained that Spencer was prejudiced. Stoyanov told that he would talk to Spencer. Spencer continued using racist terms, and Strain repeatedly complained about this to Stoyanov, who told her that "you guys need to get along."[18]

On another occasion, which Strain believed occurred when Spencer was already a director, Stoyanov had lunch delivered to the sales room. The following occurred.[19] Spencer ordered chicken, saying, "[Y]ou guys just want chicken don't you, don't you guys like chicken?" As Spencer was passing out the chicken, he asked Strain what piece she wanted. When she said a breast, he said, "Why should I give you the breast, you have two big ones already." One of the male employees responded that Spencer was not supposed to say that, to which Spencer replied, "Well, why shouldn't I; she does, two big ones." The other employee wrote up a written complaint about this and gave it to Gina Neist of HR.

Neist came in one day and told the sales employees that she was going to meet them one-on-one the next day so they could write up their complaints about Spencer. Neist did so, and Strain presented her with written complaints concerning him.

After Finley became downstairs sales manager in approximately mid-2015, employees, including Strain complained to him about their pay going up and down, Spencer and his comments, and their desire for better benefits. Within a month of Finley's becoming sales manager, he came into Strain's office, which was on the first floor. He told her that he was the liaison between the upstairs and downstairs sales offices and wanted to get here statements about what was going on. He wrote down what she said about Spencer's racist and sexist remarks, the changing of rules and pay, and the Respondent's failed attempt in late 2015 to institute a fingerprint system for signing in. Afterward, Strain observed him going over to other sales persons, sitting down with them, and writing as they were talking.

From May to July 27, at various locations in the premises, Strain spoke with other employees about going to the NLRB or getting an attorney because the Company was taking money out of their paychecks for charge backs for returned products that had been bumped up. This occurred on many, but not a majority, of weeks during that period. Strain and other employees voiced this complaint to Finley.

As a specific example, on May 16, Strain went over to Finley's desk and asked why approximately $200 was being deducted from her paycheck. He responded that it was for charge backs. Strain replied that she had not agreed to such. He responded that was how the Company was going to do it. Strain then stated that if the Company was going to do so without permission, she would have to get an attorney. Finley told her that he typed up what she said and sent it to Stoyanov. Later, Finley told her that Stoyanov said to give her the money.

At one time, Las Vegas had about 15 sales persons designated as openers, who worked with about 8 closers. Starting in late 2015, the number of openers in Las Vegas gradually decreased, and by approximately the end of May, all of the openers were in the Philippines.

In around June, Guggia held a meeting with the sales employees. She told them that in the following month, the Company was eliminating the position of openers, employees in the Philippines would no longer perform that function, and Las Vegas employees now would have to sell front-to-back (and would lose the benefit of having "warm leads"). The sales people, including Strain, objected to this change. Strain specifically asked whether the Company wanted warm bumps, to which Guggia responded that Stoyanov and Finley had decided the cost of openers was too high. Strain then said that she had been there for 5 years and that every manager who had tried front-to-back had failed.

The change was implemented about a week later, and employees saw reductions in their next paychecks. Strain and others frequently complained about this among themselves in various locations, both inside and in the proximity of the facility; and to Finley and Guggia at morning meetings around July 1. In this regard, I credit Strain's testimony that at those meetings, "all of us" complained "as a group" about no longer having openers.[20]

The last contracts for the sales people were distributed on about July 5. It provided, inter alia, that they would be charged back only on recurring bottle sales (one bottle every month), as opposed to a big bulk package. About a week afterward, Finley announced the amount of money that would be taken out for bulk chargebacks. Thereafter, the employees, including Strain, complained among themselves that this was not in their contracts.

At around noon on about July 15, Strain and Pappan went to speak to Finley. They had their latest contracts with them. Strain was the first to ask why she was being charged bulk chargebacks. Finley replied that he would get a copy of her contract, and he called in Militsa Georgieva of HR. Then he typed up something and said that he would wait for a response from Stoyanov. Strain went back to her desk, which was right next to his. She heard Pappan complain to him about the chargebacks to her pay and that the Company had her owing money rather than getting paid. About an hour later, Finley told Strain that Stoyanov said to pay her.

On July 26, Strain sent Stoyanov an email, complaining that "[t]here's so much negativity coming from management daily," about the way management was treating employees, and about bonus payments. (R. Exh. 1.)

The parties stipulated (for purposes of this case only) that at various times from the end of 2013 to 2015, Strain and other

[18] Tr. 231.

[19] Tr. 229.

[20] Tr. 303–305.

employees engaged in concerted activities by making complaints to HR and management regarding racism and sexism in the workplace. The parties further stipulated that for the period February 5–August 3, employees other than Strain complained about canceled customer orders, meaning deducting charge back fees from employee pay; office negativity; and other terms and conditions of employment.

July 27, 2016 Closure of the Sales Department and Discharges of its Employees

Because Stoyanov and Guggia were singularly unreliable witnesses, I can make no findings of fact of why and when the Respondent made the decision to close the sales department and terminate all of the employees. I do find, based on their consistent testimony on point, that Stoyanov conferred actual authority on Guggia to communicate the closing to the sales employees.[21]

On the morning of July 27, Finley sent a Skype to the sales employees. He stated that he had something wrong with his water heater, that Stoyanov had given him a personal day off, and that Guggia would be in charge for the day. He further stated that he would see them (the sales people) tomorrow. Later on, at some point, Guggia announced to employees that she had made salesperson Emmanuel Findley a customer service agent.

At approximately 11:30 a.m., Guggia began calling employees one by one into her office, for approximately 5–7 minutes each. When Strain was there, Guggia stated that they were trying to get rid of Finley and asked how Strain felt. Strain replied that she just wanted to work. Guggia then asked, "How do you feel about working on my team if I can get a team together?"[22] Strain repeated that she just wanted to work. Guggia then stated that she and Stoyanov were still in discussion about how to make the sales team work. Strain returned to her work station.

At 2 p.m., Guggia came onto the sales floor, as did IT Manager Shawn Hensley. Employees remained at their work stations. Guggia announced that the Company was "closing the doors today."[23] Guggia and Hensley both stated that they had tried without success to get Stoyanov to reconsider that decision. Guggia also said, "You know, you guys already know what you've been doing, people have been complaining."[24]

At this point, Strain started recording on her cell phone. General Counsel's Exhibit 3(b) is the stipulated transcript of what is said on the tape recording (GC Exh. 3(a)). It is 10 pages long. Following is a summary, with selected excerpts.

Throughout her remarks, Guggia spoke of the negativity in the sales department, and the failure of sales people to work together. She blamed this on both the employees and (not by name) Spencer, and cited employee complaints about one another and about the workplace.

During the course of those remarks, Guggia specifically referenced the Company's use of openers in Cebu, stating that a plan to train them better was needed. She also referred to employees' complaints about their base salaries and bump backs.

Near the beginning, both Hensley and Guggia were unequivocal in saying that the sales department employees were fired. After Guggia stated that she would help them to get other jobs, the following statements were made (at 2–3):

> Strain: So basically, Kony fired everybody.
> Hensley: Everbody's gone.
> Guggia: Yup.
> Hensley: He's shut it down.
> Guggia: He can't afford to pay us anymore. [W]e have to close the doors."

Thereafter, Guggia repeatedly offered to help them get other jobs. Paradoxically, Guggia also made statements clearly indicating that the closure was not permanent. Thus, Guggia stated that she would be returning to work after her cruise, both she and Henley stated that the operation needed to be restructured, and she said (at 5):

> I want the best team. I want the best people. I don't want people who want to sue. I don't want people who are gonna[sic] constantly nag. . And if you ever want to be on my team again one day, . I would love to have you if you fit into that criteria. If you're a negative person that's not willing to grow or learn, or deal with the hard times, I don't want to work with you.

In fact, she said at one point (at 6), "I foresee us working together soon."

As far as the reason for the closure, Guggia said (at 3–4):

> But this is what happens when you have angry people all the time, and you have QA constantly listening to what we say behind closed doors, behind to each other, side by side; they have recordings of people saying things that are just horrible. They have a whole conversation of people talking about a lawsuit like, like, half an hour long. . I don't want to deal with people that, you know, want to do that to me. You pick and choose who you want down the road to work with you.

Stoyanov testified without controversion that quality control listens in and records conversations between sales persons and customers on a random basis or if there is a question of how a particular sales person is performing.

Although Guggia stated in her affidavit (GC Exh.7 at 4) that Strain said during the meeting that "she had something for their ass," this remark does not appear in the stipulated transcript, which I find more reliable than Guggia's testimony. The transcript (at 10) does support Strain's testimony (and that of Thompson) that after the conclusion of the meeting, Strain asked for a mail bucket so that she could retrieve her personal possessions from her desk.

For reasons previously stated, I do not believe Guggia's testimony that as Strain was leaving the facility, Strain directed the remark about "something for their ass" at her. I credit

[21] Tr. 67, 565–566.
[22] Tr. 359.
[23] Tr. 361.
[24] Tr. 363.

Strain that, although she does use the expression at times in casual conversation, she did not say it to Guggia at any time that day.

Events after July 27

By August 2, Lori Bass and Trudy Maxey from customer service, and former sales employee Pappan were working as sales agents, and Boyd came back in that role on August 10.[25] In mid-August, Guggia rehired Smith, and she has also hired at least two other sales persons who had previous experience with the Company but were not employed as of July 27. Guggia's testimony concerning why she rehired certain ex-employees but not others was vague and evasive, and patently unreliable. By mid-August, Guggia was formally designated the bumper and sales manager, a position that the Respondent concedes was supervisory within the meaning of Section 2(11) of the Act.

As of August 3, Guggia and Strain were Facebook friends, and that day, Guggia initiated a series of Messenger communications with her.[26] Guggia started by stating that she was told Strain was taking pictures of her Facebook page and sending it to people. Strain denied this, but Guggia continued with the accusation, and their exchange grew increasingly antagonistic, to the point of overtly hostile.

Strain had a Facebook account that she used before and after July 27. Among those posts after July 27 were those contained in General Counsel Exhibit 6(a), which represents some of the posts that Guggia provided to the Region during the investigation. Page 1 is a cartoon negative toward employers in general; page 3 makes negative comments about 411Locals; and pages 4 and 5 criticize the Company for racism and outsourcing to Cebu.

I do not credit Guggia's claim at trial that the Board agent simply requested confirmation of Strain's Facebook account and that Guggia did not specifically select certain posts. Rather, logic dictates that she sent posts that she believed supported the statement in her affidavit (GC Exh. 7 at 4–5) that, after hearing that Strain had said "horrible things" about her on Facebook:

> I then looked at her Facebook page and saw her saying horrible things about the company and the Owner, and his affiliate companies. For example, she was saying things like, the company was stealing from her paycheck and the company was racist. Based on her comments, I decided not to ask her to come back to work for the company.

In contrast to her affidavit, Guggia emphasized at trial that her primary reason for not recalling Strain was Strain's comment as she left on July 27 that "she had something for their ass," which Guggia asserts she construed as a serious threat to her personal safety and her automobiles in the parking lot.

In an October 5 email to Stoyanov (GC Exh. 4 at 2), Guggia stated that she did not recall Strain because she was "not only threatening to sue the company but said she had something for that ass," which Guggia took as a threat. In the context of feeling threatened, Guggia went on to say that she had seen or learned that as recently as September 30, Strain was making statements on her Facebook page that Guggia perceived to be negative references to her.

Analysis and Conclusions

I. GUGGIA'S AUTHORITY ON JULY 27

Unquestionably, Guggia was vested with actual and apparent authority when she conducted the July 27 meeting with employees and told them that they were terminated. Thus, Stoyanov and Guggia admitted that she had actual authority to speak on behalf of the Company. As far as apparent authority, Guggia's statements at the meeting, with IT Manager Henley's participation, clearly would have led employees to reasonably believe that she was speaking as a management representative. See *Pan Oston Co.*, 336 NLRB 305, 305–306 (2001). Significantly, Guggia had been a sales manager, filled in for Sales Manager Finley in his absence, regularly conducted meetings with employees regarding company policies, and announced that same day that she had made salesperson Findley a customer service agent. She was therefore clothed with implied authority to act for management. See *Quality Drywall Co.*, 254 NLRB 617, 620 (1981). I therefore reject the Respondent's argument (Br. 11–14) that she acted without authority when she conducted the July 27 meeting.

II. INDEPENDENT 8(A)(1) ALLEGATIONS

Surveillance

An employer violates Section 8(a)(1) when it observes employees engaged in Section 7 activity in a way that is "more than ordinary or casual," making such conduct coercive. *Sands Hotel & Casino* 306 NLRB 172, 172 (1992), enfd. sub nom. mem. 993 F.2d 913 (D. C. Cir. 1993); *Arrow Automotive Industries,* 358 NLRB 860, 860 (1981), enfd. 679 F.3d 875 (4th Cir. 1982). Indicia of coerciveness include the nature and duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming LLC,* 345 NLRB 585, 585–586 (2005), rev. denied sub nom. 515 F.3d 942 (9th Cir. 2008). An employer's surveillance of union organizing meetings attended by employees constitutes an unfair labor practice. *Athens Disposal Co.,* 315 NLRB 87, 97 (1994); *Action Auto Store,* 298 NLRB 875, 887 (1990).

> 1. Did the Respondent's QA department engage in surveillance of employees to discover their concerted activities, by listening in on their telephone calls from about February 5 through July 27, 2016?

The statement that Guggia made on July 27 concerning the QA department does not in and of itself establish the above conduct. Stoyanov testified that QA records only calls between sales persons and customers on a random basis or if there is a question of how a sales person is performing, and there is no evidence to the contrary. Accordingly, I recommend dismissal of this allegation.

[25] GC Exh. 9(a) at 2.

[26] GC Exh. 5. Strain's moniker was "Velvetheoneandonly.'

2. Did Guggia, in response to Strain's earlier protected activity, go to Strain's Facebook page on August 3, and thereafter, to engage in surveillance of employees engaged in concerted activities?

On August 3, Guggia and Strain were still Facebook friends, and Guggia testified that she had heard that Strain was saying "horrible things" about her and then looked at Strain's Facebook page. Similarly, in her October 5 email to Stoyanov, Guggia inferred that she had looked at Strain's Facebook page as recently as September 30 in the context of what Strain was saying about her individually. Although Guggia was not a credible witness in general, this is not enough to warrant the drawing of an inference that Guggia was engaging in surveillance of Strain's concerted activities. I therefore recommend dismissal of this allegation.

Impression of surveillance

The Board's test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the statement in question that their union or other protected activities had been placed under surveillance. *Durham School Services, L.P.*. 361 NLRB No. 44, slip op. at 1 (2015); *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000). An employer creates such an impression by indicating that it is closely monitoring the degree of employees' involvement in protected activities. *Flexisteel Industries*, 311 NLRB 257, 257 (1993); *Emerson Electric Co.*, 287 NLRB 1065, 1065 (1988).

1. Did Guggia tell employees on July 27, 2016 that the Respondent had recorded calls of people talking about getting an attorney with regard to their terms and conditions of employment, thereby creating the impression of surveillance of their protected concerted activities?

In discussing the closing of the sales department, Guggia made the statement:

> [T]his is what happens when you have angry people all the time, and you have QA constantly listening to what we say behind closed doors, behind. to each other, side by side; they have recordings of people saying things that are just horrible. They have a whole conversation of people talking about a lawsuit like, like, half an hour long.

The filing of an employment—related class or collection action relating to terms and conditions of employment is protected activity. *Planet Beauty,* 364 NLRB No. 3, slip op. at 1 fn. 1 (2016); *Beyoglu,* 362 NLRB No. 152, slip op. at 2 (2015). Accordingly by stating that the Company was constantly listening in and recording employees' conversations about taking legal action, Guggia gave employees the reasonable impression that their protected activities were under surveillance, and the Respondent thereby violated Section 8(a)(1).

2. Did Guggia, on August 3, create the impression of surveillance of employees' protected activity, by commenting to Strain about her posting comments and pictures on her Facebook critical of the Respondent's policies regarding sales employees' pay and workplace conditions?

This relates to Guggia's Messenger communications to Strain, in which Guggia stated that she had been told Strain was taking pictures of her Facebook and sending to people. Guggia said nothing in her comments explicitly or implicitly referring to the Company or its policies or practices. Accordingly, I recommend that this allegation be dismissed.

Other alleged violations

These pertain to Guggia's statements at the July 27 meeting.

1. Did Guggia threaten employees with discharge/not being rehired because of their negativity and complaints about terms and conditions of employment?

Inasmuch as all of the employees were actually discharged that day, it well could be argued that any threat to discharge them is essentially subsumed by the issue of the legality of the discharges themselves. See now Chairman Miscimarra's dissent on point in *Andronaco Industries*, 364 NLRB No. 142, slip op. at 1 fn. 1 (2016). Nonetheless, the Board has held that an employer's statements linking an unlawful discharge to an employee's protected activity independently violates Section 8(a)(1). *Triple Play Sports Bar & Grill*, 361 NLRB 308, 308 fn.2 (2014), affd. sub nom. *Three D, LLC d/b/a Triple Play Sports Bar 7 Grille v. NLRB,* 629 Fed. Appx. 33 (2d Cir. 2015), 361 NLRB No. 31, slip op. at 1 fn. 2; *Benesight, Inc.*, 337 NLRB 282, 283–284 (2001). I will return to this allegation at the conclusion of my analysis of the discharges themselves.

2. Did Guggia, through her oral announcement, promulgate and since then maintain the rule that employees are not allowed to be negative or complain about terms and condition of employment?

It is difficult to conceptualize how Guggia was promulgating a rule when all of the employees to whom she spoke were being discharged; there would be no rules of any kind to enforce once they were no longer employed. There is no evidence that any employees other than sales persons heard what she said at the meeting. Neither is there is any evidence that since the resumption of the sales department's operation, Guggia has said anything along the same lines. Accordingly, I recommend dismissal of this allegation.

III. THE JULY 27 DISCHARGES

The framework for analyzing alleged violations of Section 8(a)(1) turning on employer motivation is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). Under *Wright Line,* the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee en-

gaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line,* if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

As far as Strain and other employees engaging in protected concerted activities and employer knowledge thereof, the parties stipulated that at various times from the end of 2013 to 2015, Strain and other employees engaged in concerted activities by making complaints to HR and management regarding racism and sexism in the workplace.[27] The parties further stipulated that for the period February 5—August 3, 2016, employees other than Strain complained about canceled customer orders, meaning deducting charge back fees from employee pay; office negativity; and other terms and conditions of employment. In this regard, at morning meetings conducted by Guggia, employees, as a group, voiced complaints about losing openers. Strain herself, on numerous occasions from 2015 to July 26, 2016, talked to other employees about their shared dissatisfaction with chargebacks, bonuses, office negativity, outsourcing policies, and other terms and conditions of employment; and she voiced those complaints directly to Finley and/or Stoyonav.

Not every single sales person might have engaged in such protected activity. Nonetheless, employees are protected from discriminatory conduct by an employer due to their suspected union or other protected activity, even if the employer's belief is mistaken. See *NLRB v. Link Belt Co.*, 311 U.S. 584, 589–590 (1941); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 8 (20014). Guggia's remarks at the July 27 meeting, as well as the discharges of all employees, shows that the Respondent considered all of them collectively to have discussed filing a lawsuit against the Company and to have complained about various terms and conditions of their employment.

I therefore find that the General Counsel has established the elements of engagement in protected concerted activity and employer knowledge with respect to all of the sales employees who were discharged on July 27.

The elements of employer animus and action as a result of that animus are satisfied by Guggia's statements at the July 27 meeting and the concomitant discharges: Guggia unequivocally connected the closure of the sales department and the discharges of all of its employees to their conversations about filing a lawsuit; their negativity toward the Company; and their complaints about terms and conditions of employment, including base salaries and bump backs. Additionally, she made it abundantly clear that the Respondent would not consider rehiring employees who engaged in such conduct. In view of that express animus, I need not consider at this junction the issue of implied animus.

Accordingly, I conclude that the General Counsel has made out a prima facie case that Strain and the other individuals named in paragraph 4(j) of the complaint were discharged on July 27 because they engaged in protected concerted activities.

The next step in the analysis is whether the Respondent has met its burden of persuasion of showing that it would have discharged the entire sales department on July 27 even in the absence of their protected concerted activities.

The Respondent advanced two reasons for the closing of the sales department and the discharges: (1) financial considerations, which I will address for the sake of argument even though I rejected evidence thereof; and (2) lack of supervision when Guggia would be away on vacation. I find them both pretextual, for the following reasons.

Obviously, at the time that the discharges occurred, the Respondent had concrete plans to reopen the department within a very short time and the intention to staff it with employees who, as Guggia made clear, would not threaten lawsuits, be "negative" toward the Company, or complain about terms and conditions of employment. These conclusions are confirmed by the fact that by August 2, mere days after the closure, the Respondent already had a new sales team with two employees from customer service and one rehire from July 27, and by mid-August had rehired two additional former sales department employees. It is inconceivable in these circumstances that economic considerations played any role in the timing of the closure, especially when Stoyanov testified that the business had been losing money for years.

The Respondent's argument that it had to close on July 27 because no supervisors would be available during the 4 or 5 days that Guggia was on vacation is, frankly, laughable. First, the evidence shows that Finley was still employed as of July 27

[27] An employer's Equal Employment practices come under the penumbra of "terms and conditions of employment," and concerted activity protesting racism or sexism is protected. See, e.g., *Continental Pet Technologies,* 291 NLRB 290, 291 (1988); *Diagnostic Center Hospital Corp.,* 228 NLRB 1215, 1217 (1977). The Respondent does not contend that the activities here were pursued in a manner that stripped them of the Act's protection.

and planned to return to the office on July 28 and, even if he was not available, the Respondent could have used the customer service supervisor or Manager Hensley to cover for Guggia for the brief period that she was away. Moreover, Strain was serving as a bumper and trainer as needed, and she had previously been a full-time bumper. Indeed, in an email of July 19, Stoyanov suggested Strain as one of the individuals who might take Finley's position if Finley did not want to implement Stoyanov's proposals. The Respondent has not demonstrated any good reason why none of those individuals could have run the sales department in Guggia's stead for a period of such short duration.

Based on the above, I conclude that the Respondent discharged Strain, Boyd, Findley, Frenzel, McCawley, Smith, and Thompson on July 27 because they engaged in protected concerted activities, or the Respondent believed such. Therefore, their discharges violated Section 8(a)(1) of the Act.[28] I further conclude that the Respondent independently violated Section 8(a)(1) when Guggia told employees that they were being terminated and would not be rehired because of their protected concerted activities. See the cases that I cited earlier.

IV. FAILURE TO RECALL STRAIN AND OTHER EMPLOYEES

Because the Respondent discharged the above employees, it had the obligation to offer them reinstatement and backpay in accordance with the normal Board remedy. The Respondent did not do so as to Strain, Frenzel, Martin, McCawley, and Thompson. This was despite the fact that Guggia, after August 10, hired as sales persons at least two people who had previously worked for the Company but not been department employees as of July 27.

As to Strain, Guggia stated in an October 5 email to Stoyanov that one of the reasons she did not recall Strain was she was "threatening to sue the company. ." As I noted, this constitutes a protected activity.

Further as to Strain, Guggia's affidavit—which I credit over her unsatisfactory testimony—unequivocally states that Guggia did not recall Strain because, after Strain was discharged, she posted "horrible" Facebook posts about the Company, 411Locals, and Stoyanov, including "saying things like, the company was stealing from her paycheck and the company was racist." Thus, Guggia admitted that Strain was not rehired because she had engaged in complaining on Facebook about terms and conditions of employment.

Among Strain's posts that Guggia provided to Region were posts criticizing the Company for racism and outsourcing to Cebu, policies that affected the sales department as a whole, as reflected by the employees' concerted complaints concerning them. The Board has held that Facebook comments protesting employer's policies regarding terms and conditions of employment, as opposed to "mere griping," constitute protected activity unless the comments are so egregious as to take them outside the protection of the Act. *Pier Sixty, LLC,* 362 NLRB No. 59, slip op. at 2 (2015); *Triple Play Sports Bar & Grille,* above at 310–311. The Respondent does not contend that Strain's comments lost the Act's protection because they amounted to "offensive, defamatory, or opprobrious." See *Container Corp. of America,* 244 NLRB 318, 321 (1979), enfd. in part 649 F.2d 1213 (6th Cir. 1981).

Rather, the thrust of the Respondent's argument (br. at 19, et. seq.) is that Strain's Facebook posts were not engaged in with the express object of inducing any future group action and therefore did not constitute protected concerted activity. However, in *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 fn. 1 (2015), the Board affirmed its earlier holding in *Sabo, Inc.*, 359 NLRB 355, 357 (2012), that contemplation of group action is not required when the conduct applies to "vital terms and conditions of employment," including wages and job security. In *Hoodview Vending*, ibid, the Board left open the possibility that other topics might come under this category. Clearly, the outsourcing of work to the Philippines directly impacted employee's wages and, indirectly affected their job security. Therefore, I conclude that outsourcing constituted a "vital term and condition of employment," and that contemplation of group action was not required. I recognize the great importance of preventing racism in the workplace, but I need not decide whether that topic also should be fall under this category.

The Respondent (Br. 20) cites *World Color (USA) Corp.*, 360 NLRB 227, 228 (2014), enf. denied on other grounds 776 F.3d 17 (D.C. Cir. 2015), for the proposition that Facebook posts must concern terms and conditions of employment and be intended for, or in response to, coworkers. However, in that case, the testimony indicated only that the employee had posted "unspecified criticisms of the Respondent' and that there was an "evidentiary gap" in showing that the posts amounted to protected concerted activity. That is not the situation here.

Accordingly, I conclude that the Respondent committed an additional violation of Section 8(a)(1) by refusing to consider Strain for rehire after July 27 because she engaged in protected concerted activities through social media, specifically Facebook. As far as the other individuals who were not recalled, I cannot make a determination on whether the Respondent's failure to recall them was based on anything other than their earlier actual or suspected protected concerted activities at the workplace.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Discharged Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson on July 27, 2016.

(b) Refused and failed to recall Strain, Frenzel, Martin, McCawley, and Thompson on and after about August 1, 2016.

(c) Gave employees the impression that their protected con-

[28] Guggia announced that day that Findley was transferring to customer service, in which event he may not have had a break in employment. However, this purported transfer was not confirmed by record evidence, and I will therefore treat him as a dischargee. Additionally, any change in his remuneration as a result of the transfer is unknown.

certed activities had been under surveillance.

(d) Told employees that they were being discharged and would not be rehired because of their protected concerted activities.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily discharged Myeasha Strain, Donovan Boyd, Emmanuel Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, must make them whole for any losses of earnings and other benefits suffered as a result of their discharges.

Specifically, the Respondent shall make Strain, Boyd, Findley, Frenzel, Martin, McCawley, Pappan, Smith, and Thompson whole for any losses, earnings, and other benefits that they suffered as a result of their unlawful discharges and, where applicable, the unlawful refusal and failure to recall them. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Strain, Boyd, Findley, Frenzel, Martin, McCawley, Pappan, and Thompson for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Strain, Boyd, Findley, Frenzel, Martin, McCawley, Pappan, and Thompson for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent also having discriminatorily failed and refused to recall Strain, Frenzel, Martin, McCawley, and Thompson, must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

The Respondent shall expunge from its records any and all references to the discharges of Strain, Boyd, Findley, Frenzel, Martin, McCawley, Pappan, Smith, and Thompson.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Natural Life, Inc. d/b/a Heart and Weight Institute Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, refusing, and failing to recall, or otherwise discriminating against employees for engaging in protected concerted activities.

(b) Giving employees the impression that their protected concerted activities have been under surveillance.

(c) Telling employees that they are being discharged and will not be rehired because of their protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Myeasha Strain, Roberta Frenzel, Mary Martin, John McCawley, and Robert Thompson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Make Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided

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

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 5, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives 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 discharge, fail, and refuse to recall you, or otherwise discriminate against you because you engage in protected concerted activities, including voicing complaints about your pay and other terms and conditions of employment, either at the workplace or on social media.

WE WILL NOT give you the impression that your protected concerted activities have been under surveillance.

WE WILL NOT tell you that you are being discharged and will not be rehired because of your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Myeseha Strain, Roberta Frenzel, Mary Martin, John McCawley, and Robert Thompson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson whole for any loss of earnings and other benefits they suffered as a result of our discrimination, with interest.

WE WILL remove from our files any references to the discharges of Myeasha Strain, Donovan Boyd, Emmanual Findley, Roberta Frenzel, Mary Martin, John McCawley, Carrie Pappan, Jennifer Smith, and Robert Thompson, and we will, within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

NATURAL LIFE, INC. D/B/A HEART AND WEIGHT INSTITUTE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-181573 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.'