

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES – SAN FRANCISCO**

**DROCK GAMING, LLC d/b/a  
THE D CASINO, Respondent**

**and**

**Case 28-CA-219756**

**XSTAL CAMPBELL, an Individual**

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

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## **I. INTRODUCTION**

On October 15, 2017, actress Alyssa Milano, invoking the work of activist Tarana Burke, tweeted “if you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” Milano’s tweet was a call to collective action to reject the status quo of harassment in the workplace and elsewhere. This call to action was taken up by a wide range of workers throughout the United States.

In December 2018, in Las Vegas, Nevada, Charging Party Xstal Campbell (Campbell) led the charge at DROCK Gaming, LLC d/b/a The D Casino (Respondent) by raising her voice on behalf of herself and her coworkers in an effort to challenge Respondent to provide her and her coworkers with a workplace free of sexual harassment and inappropriate conduct by managers. In response, Respondent directed Campbell to focus on herself, treated her as if she were being dishonest in bringing forth the group’s complaints, and began a campaign of retaliation that culminated in Campbell’s suspension and discharge.

Respondent denies that it harbored any animus toward Campbell based on her sexual harassment complaint on behalf of herself and fellow dancing bartenders. Instead, Respondent claims that it had a shared interest in receiving and rectifying employee complaints about harassment. This defense is belied by the way Respondent’s managers treated Campbell after her complaint. Respondent further claims that Campbell was treated the same as other employees and was just “difficult to work with” and possibly “dishonest.”

Section 7 of the National Labor Relations Act (the Act) empowers an employee to bring groups complaints to the attention of management to improve working conditions. When an employer presumes that an employee is dishonest or difficult merely because she has exercised her Section 7 rights, it impermissibly restrains employees in violation of the Act. Respondent has

done just that by labelling Campbell as “dishonest” and “difficult” because she is unwilling to happily endure the mistreatment and disrespect of Respondent’s supervisors and managers. As discussed below, the Act prohibits employers from behaving in this manner and provides robust protection to employees like Campbell. Counsel for the General Counsel (CGC) respectfully requests that such protection be extended to Campbell.

## **II. STATEMENT OF THE CASE**

This case was heard before Administrative Law Judge Lisa Ross (the ALJ) on November 14-16, 2018 in Las Vegas, Nevada, concluding telephonically on January 30, 2019.<sup>1</sup> The Complaint and Notice of Hearing (the Complaint) alleges that DROCK Gaming, LLC d/b/a The D Casino (Respondent) violated Section 8(a)(1), (3), and (4) of the Act by directing employees to not raise concerted complaints, denying the vacation leave request of Campbell, imposing more onerous working conditions on Campbell, and suspending and then discharging employee Campbell because she engaged in protected activity. GCX 1(e).<sup>2</sup>

## **III. ISSUES PRESENTED**

- A. Whether Respondent Violated Section 8(a)(1) of the Act by Directing Employees to Not Raise Group Complaints.
- B. Whether Respondent Violated Section 8(a)(1) and (3) of the Act by Denying Campbell’s Leave Request.
- C. Whether Respondent Violated Section 8(a)(1) and (3) By Subjecting Campbell to More Onerous Working Conditions by Questioning Her About Medical Conditions, Requiring Campbell to Provide a Medical Prescription, Requiring Her

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<sup>1</sup> Unless otherwise noted, all dates refer to 2018.

<sup>2</sup> GCX\_\_\_ refers to General Counsel’s Exhibit followed by the exhibit number; RX\_\_\_ refers to Respondent’s Exhibit followed by exhibit number; JX\_\_\_ refers to Joint Exhibits followed by the exhibit number; “Tr. \_:\_\_\_” refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing.

to Provide Her Phone for Inspection, and Requesting Her Cellular Telephone Records.

D. Whether Respondent's Termination of the Charging Party's Employment Violated Section 8(a)(1), (3), or (4) of the Act.

#### **IV. ANALYSIS OF THE FACTS**

##### **A. Background**

###### **i. Respondent's Operations**

Respondent operates a casino and hotel in downtown Las Vegas on Fremont Street. Tr. 44. Respondent has approximately twenty departments with about 915 employees. Tr. 45. A majority of Respondent's 915 employees are represented by a labor union. Tr. 97. Respondent and the Local Joint Executive Board of Las Vegas (the Union) had a collective bargaining agreement in effect at all material times. GCX 1(m) at 3 and JX 2. The D Casino is a hotel gaming hall with a variety of departments ranging from the Slot Department to Engineering. Respondent has both third-party operated restaurants and company owned bars handled by the Beverage Department.

###### **ii. Xstal Campbell's Employment History**

Beginning in March 21, 2017, Charging Party Xstal Campbell was employed as a Dancing Bartender in Respondent's Beverage Department.<sup>3</sup> Tr. 160 and GCX 9 at 2 Campbell reported directly to Beverage Manager Bladen Ficarrota and Beverage Manager Abigail Lopez. Tr. 161. Both Ficarrota and Lopez reported to Beverage Director David Rosborough. Tr. 161. During her employment, there were approximately 7 to 10 Dancing Bartenders total. Tr. 161-162.

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<sup>3</sup> Charging Party Xstal Campbell was employed by the Respondent for less than thirty days in September 2016 and resigned due to a loss of transportation. Tr. 160. Her previous employment is not relevant.

Campbell was concerned about inappropriate conduct by Ficarrota and testified that she began to discuss her concerns with coworkers in August of 2017, after her probationary period ended and she felt comfortable with her coworkers. Tr. 165. The coworkers included in those discussions were Antoinetta (last name not in the record), Laura Posse, Khin Sun, and Xondria Brown. Tr. 164 and Tr. 174.<sup>4</sup> Campbell testified that Ficarrota's inappropriate conduct included yelling at employees; asking her personal questions about her sexual relationships; coiling her hair; rubbing his fingers through her hair; rubbing his fingers down her back; caressing and attempting to massage the shoulders of employees; grabbing the lower waist of employees; and attempting to hug employees. Tr. 164, GCX 3, and GC 5. Campbell testifies that Ficarrota's inappropriate behavior was such a pervasive aspect of the workplace that "almost every time we worked with Bladen, one of us would have a complaint with each other about his behavior." Tr. 165. These discussions were frequently in reference to Ficarrota's yelling, rude behavior, or the way that he spoke to employees. Tr. 167.

Campbell stated that she witnessed several coworkers make individual complaints to Rosborough. Tr. 167. Rosborough testified that employees would raise complaints about Ficarrota being "a jerk" and that it seemed that he had been "deemed the bad guy," but claimed that it was because he was more apt to take corrective action. Tr. 429 and Tr. 430. Campbell also testified that she was "venting" to Lopez about the bar about the way that Ficarrota touched her and that the interaction was not pleasant. Tr. 167. Campbell was not sure when she spoke with Lopez, except that it was before she made a complaint to Human Resources. Tr. 167-168. Campbell testified that Lopez told her that Ficarrota was valuable to the company because he had various certifications and might be a sommelier. Tr. 168 and Tr. 244. Lopez denies having

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<sup>4</sup> The transcript incorrectly refers to Xondria Brown as "Andrea Brown" at Line 2, Page 174.

made that statement and stated that Beverage Managers are “highly replaceable, unfortunately.” Tr. 393-394.

On December 18, 2017, Campbell submitted a request to leave work by 7:00 p.m. on New Year’s Eve because she was under contract to work for Best Agency at LAVO Night Club. RX 2. Shortly thereafter, on December 20, 2017, Ficarrota denied the leave request because it was a blackout day, which meant that employees could not receive approved time off. Tr. 176 and Tr. 251-260 and RX 2 .Campbell testified that she believed that she might be able to work a shift earlier in the day on New Year’s Eve because Ficarrota had allowed her to modify her schedule on days that were not blackout days. Tr. 254. However, Campbell confirmed that understood why she was not able to receive time off for New Year’s Eve. Tr. 176 and Tr. 247. Though she was repeatedly asked the same question, Campbell stated that she was not angry with Ficarrota about the leave denial on New Year’s Eve. Campbell stated, instead, that she was upset that she would earn points because she planned to call out on New Year’s Eve. Tr. 248. When the request was denied, Campbell then called out from work. Tr. 246. Campbell planned to call out because she had already agreed to work for another employer. Tr. 246.

**B. Xstal Campbell Reported Group Concerns About Harassment to Human Resources**

On December 27, 2017, Campbell met with Labor Relations/Risk Manager Brain Swartwood, Human Resources Manager Dominic ”Nikki” O’Brien, and Safety Manager Kimberly Beasley. Tr. 169 Beasley’s presence at the meeting was solely as a notetaker and that she was a disinterested participant. Beasley testified that she “didn’t care. It wasn’t [her] job to care.” Tr. 143. Campbell testified that during this meeting she informed Swartwood that other employees shared her concerns:

I let him know that I wasn't the only girl experiencing sexual harassment from Bladen, that there were other girls that I worked with experiencing the same thing. And he said, well, they're not here, so worry about yourself. And so I continued to express Bladen's behavior but again went back to speaking of my coworkers. And I was again told to worry about myself.

Tr. 170 and Tr. 172. Beasley's notes corroborate Campbell's testimony. Specifically, Beasley wrote that Campbell stated "I don't like the touch. He's unprofessional. He makes me/us uncomfortable." In response, Swartwood stated "talking to you," and Campbell then said "me uncomfortable." GCX 5 at 1.. At the end of the meeting Swartwood asked Campbell to write an e-mail summarizing her concerns. Tr. 175. In her e-mail she states, in part,

I would like to see immediate change with how Bladen carries himself as a manager and treats his subordinates. Touching and pulling hair, rubbing backs, and massaging is all considered sexual harassment. Either Bladen does not know this or he does not care. Either way I view this to be a major problem. Hugging subordinates is also inappropriate. Professional Managers shake hands. Unfortunately I do not have dates and times that any of these incidents have occurred however, everything has always taken place at my work station where other slush girls have witnessed and experienced the same kind of treatment.

GCX 3. On December 28, 2017, Swartwood spoke to Ficarrota about the need to be professional and sent Campbell an e-mail stating that Ficarrota's conduct would be professional going forward. CGX 3.

### **C. Respondent Directed Campbell to Not Raise Group Complaints**

Based on Beasley's notes, it is likely that Swartwood did say something to the effect of "other employees are not here, focus on yourself." Tr.109, Tr. 172. In explanation for the notes, Swartwood offered the improbable testimony that the notation "talking to you" was him clarifying that Ficarrota was talking to Campbell. Tr. 60 Swartwood also testified that he told Campbell to focus on herself so that "we could get to what her issue was, and then move on to others." Tr. 465 Swartwood acknowledges that he never shifted the conversation to ask Campbell which other employees had also raised concerns. Tr. 529-530. Notably, Swartwood

testified that it might be possible that Campbell raised her sexual harassment complaint because her leave request was denied. Tr. 90. It seems improbable that any of Respondent's managers would continue to truthfully think this in November 2018 when multiple other employees raised complaints related to Ficarrotta's misconduct by March 2018, requiring Respondent to take remedial action. RX 15.

#### **D. Respondent Retaliated Against Campbell Because of Her Group Complaints**

On December 26, 2017, Campbell requested leave from February 16, 2018 through February 19, 2018. In early January 2018, Ficarrotta denied the request, stating that two employees could not be off at the same time. Tr. 177 and GCX 12. Campbell discussed this with other employees and reviewed previous schedules showing more than one employee has previously received time off at the same time. Tr. 177-179 and JX 3. Campbell confirmed that another employee Posse requested leave before she did. Tr. 179. Ficarrotta did not testify about his basis for denying the requested leave. Rosborough offered general testimony about how leave requests were handled in the department, but Ficarrotta was the manager that was primarily responsible for processing leave requests during the relevant time period. Tr. 429.

Campbell testified that before making complaints to Human Resources about sexual harassment, she enjoyed a pleasant relationship with Beverage Manager Lopez. Tr. 218-219. On January 16, 2018, Lopez wrote Campbell up for leaving the bar without permission and also had security escort her off the property after she requested permission to leave at the end of her shift. Tr. 395. During her direct testimony, Lopez stated that Campbell requested permission to leave at the end of her shift sarcastically and that the request was motivated by Campbell's bad attitude. Tr. 395-397. During cross examination, Lopez admitted that it was the first day that a new policy was announced regarding leaving the work and that members of the management

team had not explained the nuances of the policy to employees, such that Campbell could have been genuinely confused about the policy. Tr. 405. Lopez was reprimanded by Rosborough for having security escort Campbell off the property without proper justification and was advised that further infractions could result in termination. Tr.394. Shortly after January 22, within about a week of this incident, Lopez resigned her employment. Tr. 402.

**E. On April 25, 2018, Campbell Missed Work Due to a Serious Medical Condition**

Campbell testified that she worked the night of April 24, but started to feel unwell that night experiencing a migraine. Tr. 182 and GCX 14. Campbell is not sure whether she finished her shift on April 24 or left a little early. Tr. 182. The next day, Campbell testified that migraine got worse and her entire body, specifically her muscles, were aching. Tr. 182. Campbell states that she arrived home after midnight on the morning of April 25, she got in bed and slept until approximately 6:00 a.m. or 7:00 a.m., which is an earlier wake time than normal for her. Tr. 183. Through the morning on the April 25, Campbell spoke with her family and attempted to find a home remedy to avoid having to go to the hospital. Tr. 183.

Campbell testified that she saw her psychologist in the late morning or early afternoon of April 25, but consistent with her other testimony was unable to state precise dates or times. Tr. 184. Campbell is able to recall her day on April 25, up until the point when she got a massage, came home, and let her dog out. She testified that the rest of the day is a “blur” and that at some point she passed out. Tr. 184. At approximately 11:56 p.m. on April 25, Campbell drove herself to the hospital and sent a text message to her cousin Kye, informing him that she was en route to get medical treatment. Tr. 228-229 and GCX 14.

Campbell’s testimony comports with what she told Respondent during her due process

meeting. Tr. 79 Campbell has consistently stated that she remembers the morning of April 25, but passed out at some point and experienced confusion through large portions of the day due to a migraine and rhabdomyolysis. She was able to piece together portions of the day by searching her phone after the May 3 due process meeting with Respondent. Tr. 230 -231.

Campbell provided hospital discharge paperwork to Respondent that showed that she discharged on April 26, 2018 at approximately 3:20 a.m.. GCX 6 at 2. On the night of Campbell's no call, no show, she was scheduled to work either 6:00 p.m. to 2:00 a.m. or 7:00 p.m. to 3:00 a.m. according to the undisputed testimony of Swartwood Tr 130.<sup>5</sup>

Campbell testified that she contacted Beverage Director Rosborough as soon as she realized that she missed her shift, which was shortly after midnight on April 27. Tr. 190. Campbell testified that Rosborough told her that she should be fine; she just needed to take her doctor's note to Human Resources. Tr. 190. When she provided her note to Human Resources, O'Brien stated that the note was not sufficient because she was discharged on a date other than her shift and Respondent scheduled a due process meeting for May 3 to investigate the whether the no call, no show was for just case. Tr. 368 – 370.

#### **F. Respondent Subjected Campbell to Intense Scrutiny Despite Hospital Discharge Paperwork**

On May 3, 2018, Respondent held a due process meeting with Campbell to determine whether her no call, no show was for just case. The meeting was held in Respondent's Human Resources Department and Union Representative Joe Cano, Brian Swartwood, Kim Beasley, Nikki O'Brien, Rich Danzak, David Rosborough and Michael (last name unclear) were present. Tr. 192-193. The testimony is undisputed that Swartwood examined Campbell's cellular phone

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<sup>5</sup> This should not be confused with Campbell's testimony that she was scheduled to work from 4:00 p.m. to 12:00 p.m, midnight on the night before. Tr. 307.

by looking through her text message, Facebook messenger, searching for a screenshot of a Facebook post and looking through her call logs. Tr. 79 -81. Swartwood claimed that he searched her phone, attempting to put together a timeline because it was not clear what happened during the day of her no call, no show. Tr. 113 –114. It is not clear why Swartwood needed to examine Campbell’s cellular phone since he admits that Campbell never stated that she unable to make or receive phone calls that. Tr. 122. Instead, Campbell testified that she was so sick that work did not cross her mind. Tr. 224. Campbell testified that Swartwood stated that he did not believe her and thought that she might be “out partying.” Tr. 303. Campbell stated that she agreed to let him examine her phone because he said that he would allow her to return to work if there was nothing in her cell phone “going against what she was telling him.” Tr. 235.

After examining her cell phone, Swartwood asked Campbell whether she believed that her anxiety was a serious medical condition and whether she took any medicine to treat it. Tr. 201-202. Swartwood and O’Brien then discussed Campbell’s medicine being a beta blocker. Tr. 203-204. Eventually, Swartwood told Campbell that he “didn’t believe [she] was sick that day, and he needed to see [her] prescription to prove that [she] had anxiety.” Tr. 205. Campbell had not stated that she was absent due to anxiety. Tr. 205.

Once he searched her phone and interviewed her about her medical conditions, Swartwood declined to return her to work and asked that she produce telephone records because he didn’t believe that she was sick and that he did not believe that she had not made any calls that day. Tr. 208. Again, Campbell never told Swartwood that she had not made any calls that day. Tr. 207.

The record evidence suggests that Swartwood was unable to locate Campbell’s calls from April 25 because he is not familiar with the operation of an iPhone. Tr. 78-79, Tr. 122-126; Tr.

208. It seems doubtful that any results from Swartwood's search of Campbell's iPhone would have satisfied him since he had convinced himself that rather than being sick she was out partying. Tr. 303. Campbell was not returned to work after allowing Swartwood to search her phone. Tr. 232

#### **G. Respondent Claims Campbell Engaged in Misconduct During Exit Interview**

On May 13, 2018, Campbell met with Swartwood, Union Business Agent Joe Cano, O'Brien, Richard Hilsabeck, and notetaker Beasley. Swartwood asked Campbell to provide phone records, and she declined stating that she did not believe that he would return her to work even if she provided her phone records:

I told him that he told me that if I had let him go through my phone and he didn't find anything going against what I said, he would send me back to work. And when I did that, he wanted more things from me. And that I didn't feel comfortable providing my phone records because I felt that in doing so he still would not let me back to work.

Tr. 222. The meeting was brief. Campbell declined to provide phone records, Cano asserted that she should be returned to work without them, and Swartwood left to caucus with the other managers. Tr. 759. Hilsabeck had no previous involvement in the investigation, and the record evidence suggests that Swartwood was the decisionmaker in the termination. Swartwood testified that Hilsabeck made the termination decision. Tr. 84. This testimony is contradicted by O'Brien's testimony and seems inherently improbable given the course of the investigation.

Hilsabeck read the discharge paperwork, and then Cano and Campbell were asked to leave. Tr. 670. Swartwood testified that he wished Campbell good luck, and she responded, "good luck to you, sweetie." Tr. 507. Swartwood further testified that once Campbell was 10 feet down the hall, he heard her call him a "white bitch." Tr. 507. Once Cano heard this claim from Swartwood, he immediately asked Campbell if she called him a "white bitch," which she immediately denied. During her testimony, Campbell confirmed that she instead said "weak

shit,” meaning that her termination was unjustified and weak. Tr. 233.

With six witnesses present at this meeting and in close proximity to Swartwood and Campbell, only two purport to have heard Campbell loudly call Swartwood a “white bitch.” Swartwood claims to have heard it, and former Human Resources Specialist Ashley Dixon claims to have heard Campbell call Swartwood a “white bitch” very clearly from her office down the hall and that she was 100 percent positive that she heard her correctly. Tr. 517-518. No other witness could corroborate Swartwood’s claim.

#### **H. Respondent Treated Campbell More Harshly Than Comparable Employees**

Respondent produced records for employees with no call, no shows from January 1, 2017 through early November 2018. Tr. 569. The vast majority of terminated no call, no show employees left work and never returned. There were approximately 148 employees who never returned to work and their absences did not warrant investigation by Respondent because they essentially abandoned their jobs. Tr. 569-571 and RX 10. During that time period, three employees were involved in no call, no show absences that were investigated by the employer. O’Brien cited hospitalization and incarceration as the two main reasons that an employee would be returned to work despite a no call, no show. Tr. 365. O’Brien specifically testified that for no call, no shows, “Our policy is unforeseen circumstances such as hospitalization, incarceration, something that we would deem incapacitation, that would prevent them from being able to call. Not my cell phone didn't get paid or things of those nature. So we would ask, you know, what had happened.” Of the three employee investigations related to no call, no show, two of those employees were returned to work: Lorena Flores and Bakari Font. Tr. 571.

Another employee, Lawrence Goddard, had a no call, no show and was ultimately

terminated because he claimed that he had called out when he hadn't. Tr. 576. O'Brien testified that Swartwood examined Goddard's phone to determine whether he had contacted the company on the date that he claimed. Tr. 593. Additionally, Respondent produced records of another employee, Jompon Chotikamars, whose phone was inspected because the Employer had evidence that he engaged in abuse of FMLA leave. Tr. RX 12. Chotikamars was terminated for dishonesty. Tr. 583.

**i. Comparator Employee Lorena Flores**

Swartwood testified that he was not involved in the investigation into the no call, no show involving Lorena Flores. Tr. 67. The record evidence suggests that he was involved. First, O'Brien testified that Swartwood was present at the meeting and that the general practice was to not hold meetings without both of them being present. Tr. 380 and Tr. 368. Second, the documentary evidence shows that Flores's manager, Avery Sylva, e-mailed Swartwood informing him that Flores' mistakenly believed that her leave was approved; the e-mail does not suggest that Flores' mistaken belief was reasonable. In her e-mail, Flores' manager Sylva explained that "Lorena came to me for assistance in putting in a day in for her in ADP. I complied. I never approved it *nor did I at anytime state that it would be approved since I put it in ADP for her.* She thought it's (sic) I put it in for her, it would automatically be approved."

(emphasis added) GCX 20 at 1.

The evidence shows that employee Lorena Flores requested leave and had her request denied. Tr. 572. O'Brien later testified that the request was neither approved nor denied. Tr. 597. Flores's department had two managers: one manager helped Flores submit her leave request while the other was responsible for handling scheduling, including approval and denial of leave requests. Tr. 572. There is no evidence that the manager who handling the scheduling did not

see the request in ADP, the scheduling system.

O'Brien testified that employees are supposed to check on a regular basis to determine whether their leave is approved or denied. "So our current ADP system when you put it into -- when you put a request into the system, it notifies the employee via email, which is also something they have to put in. And employees can check, and they're supposed to on a regular basis if they put in requests like that to see if they've been approved or denied." Tr. 596-597 In fact, the record suggests that had Flores checked the housekeeping schedule, she would have known that her request for leave was denied. GCX 20 at 6.

During her due process meeting, Flores stated that "every time she asks for a day she is denied." GCX 20 at 4. Flores was suspended without pay to allow Respondent to investigate her absence. As a result of an April 7, 2017 due process meeting, Respondent returned Flores to work with pay and advised her to check the schedule in the future. Tr. 573 and GCX 20 at 4.

#### **ii. Comparator Employee Bakari Fant**

In May of 2018, a non-union team member Bakari Fant was a no call, no show for work. Tr. 375. O'Brien testified that Human Resources was informed of Fant's absence by his manager. Tr. 376. Fant's absence was due to his arrest for an expired license. GCX 19. After Fant provide Respondent a copy of the police report, Respondent returned him to work without further investigation. Tr. 377 and GCX 19.

#### **iii. Comparator Employee Lawrence Goddard**

Lawrence Goddard was a SE Utility Porter for Respondent from May 30, 2013 through his termination on September 13, 2017. GCX 21 at 8. Goddard was a no call, no show on September 13, 2017. GCX 20 at 11. According to the record evidence, Goddard initially claimed that he had called in to inform Respondent of his absence. Tr. 576. When Respondent requested

phone records to support Fant's claim, the evidence showed that he had not called in. Tr. 576 and GGX 20 at 11. Goddard also produced a doctor's note dated September 15, 2017 – two days after his absence – in an attempted to excuse his absence on September 13, 2017. GCX 21 at 15. After further investigation, Goddard admitted that he had not called in. GCX 20 at 11.

Though Respondent offered Goddard as an example of an employee who was terminated for a no call, no show and whose phone was examined, Goddard is actually an example of Respondent's progressive discipline and relative leniency toward most employees. Goddard had several previous disciplinary incidences. GCX 11 at 8. He also had a previous no call, no show that was excused because he called the FMLA hotline, but not his department. Tr. 594. During his due process meeting, manager Joe Campbell remarked, "Larry was given plenty of chances. Isn't that right, Larry?" GCX 21 at 4. To which Larry replied, "oh yeah." GCX 21 at 5.

#### **iv. Comparator Employee Jompon Chotikamars**

Respondent suspended Jompon Chotikamars after multiple incidents where he called off from work using FMLA leave and later posted to Facebook about being out of state. Tr. 581 Chotikamars was not a no call, no show, but rather the investigation was triggered by a member of management finding his Facebook posts. Tr. 582, Tr 584, and RX 12. Specifically, Chotikamars would request time off, and if he were denied time off, he would take the same day off using FMLA leave. RX 12 at 1. Unlike the Charging Party, Chotikamars's phone was examined because Respondent already had evidence that Chotikamars was abusing his leave, and he was being investigated for dishonesty, not a failure to call out. Tr. 582 - 584.

### **V. ARGUMENT**

#### **A. When in Conflict with that of Respondent's Witnesses, the Administrative Law Judge Should Credit the Testimony of General Counsel's Witnesses**

In determining whether Respondent engaged in unfair labor practices as alleged in the complaint, the ALJ must make certain credibility determinations. A close examination of the credible facts, both disputed and undisputed, the reasonable inferences from those facts, the inherent probabilities of the respective versions of the events and the inconsistencies between witnesses in this case as well as between witness testimony and documentary evidence, shows that the credibility issues should be resolved in favor of the General Counsel's witnesses and against Respondent's witnesses. See *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 664 (1996). Accord *Warren L. Rose Castings, Inc.*, 231 NLRB 921, 913 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978). Generally, testimony elicited in response to leading questions is afforded minimal weight. See e.g. *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977); *Desert Cab, Inc.*, 367 NLRB No. 87 (2019).

Some of Respondent's witnesses such as Kimberly Beasley provided limited, but very credible testimony. Further, O'Brien's testimony appeared to be straightforward and not embellished. On the other hand, at times the testimony of some of Respondent's witnesses contained inconsistencies, and those witnesses should not be credited where their statements or contradictory or improbable. For example, Swartwood made the improbable claim that Beasley's notes "talking to you" meant that he sought to clarify who Ficarrota was talking to. Swartwood testified that he was not involved in the investigation into Flores' no call, no show, while documentary evidence suggests otherwise. Additionally, Swartwood insisted that he was not a decisionmaker in Campbell's termination. Tr. 84. Yet, O'Brien testified that it was a collective decision between the department and human resources. Tr. 380. Further, the manager that was cited as the decisionmaker had no knowledge of the investigation and his decision was made based on a five minute interaction and Swartwood's recommendation. Swartwood also denied

any memory of having received a call from a Board Agent regarding Xstal Campbell' suspension before her termination, which seems improbable given that he rarely receives calls from agents of the National Labor Relations Board. Tr. 91.

Ashley Dixon's testimony should not be credited. While her demeanor does not suggest she purposefully lied, it is inherently improbable that she would hear a statement from Campbell from down the hall while others in closer proximity did not. The more likely version of events is that she heard Swartwood accuse Campbell of calling him a "white bitch" and then assumed that the phrase that she heard earlier was "white bitch" rather than "weak shit." It seems unlikely that the Charging Party would be so angry and out of control that she called Swartwood a vulgar name only to deny it mere moments later. Joe Cano's testimony seemed straight-forward and unembellished. He admitted that he did not hear that statement and asked Campbell, who denied it. He also testified that he had many interactions with her and found that sort of misconduct would be inconsistent with her general demeanor.

The Charging Party struggled with remembering dates and times, but her testimony was otherwise consistent with her earlier statements and consistent with the record evidence. While attorneys certainly prefer witnesses who can give a clear chronological recollection of events including dates and times from memory, Campbell honestly testified that she could not remember specific dates and times, but knew what happened. Campbell's testimony should be credited as to what happened, and the record is replete with evidence that otherwise establishes the relevant dates and time and/or establishes them in relation to other events. As to Campbell's inability to remember what happened on April 25 because she was in a "blur" (memory fog), that is explained by her diagnosis of rhabdomyolysis and perhaps her migraine. The Charging Party's testimony regarding April 25 was consistent with her earlier representations to Respondent.

While Respondent has made much noise about the Charging Party's inability to remember the day, other employees have been excused for no call, no show when they simply neglected to check their work schedule. The notion that Campbell has to explain every hour of April 25 to be credible and reinstated to work is a different standard than applied to other employees and evidence of animus itself.

Further, the Charging Party displayed a great deal of willingness to answer questions from Respondent's counsel despite his inappropriate references to her incapacitation which lead the ALJ to admonish him. Tr. 149-150. Eventually the Charging Party became less willing to answer questions, but this was not due to wanting to hide the truth or evade questions, but instead was caused by Respondent's counsel repeatedly asked the Charging Party the exact same question despite receiving a clear answer. Tr. 247-257. The Charging Party should be credited as to the events that happened, despite not being great at remembering dates and times that are largely undisputed.

## **B. Campbell Engaged in Protected Activity**

### **i. Campbell Engaged in Concerted Activity for Mutual Aid and Protection**

Section 7 of the Act expressly protects employees' right to "self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. *See, e.g., NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 829 (1984). To fall within the ambit of this protection, an employee's conduct must be both "concerted" and for mutual aid or protection. Board precedent makes clear that these two elements are analytically distinct. *Summit Regional Medical Center*, 357 NLRB 1614, 1615 (2011); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d

941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Conduct is concerted when it is “engaged in with or on the authority of other employees,” or when an individual employee seeks “to initiate or to induce or to prepare for group action” or to bring group complaints to management’s attention. *Meyers Industries (Meyers II)*, 281 NLRB at 885, 887. An individual acts on the authority of other employees even if not directly told to take a specific action if the concerns expressed by the individual employee to management are a “logical outgrowth of the concerns expressed by the group.” *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-39 (1992) (finding four employees’ individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), supplemented by 310 NLRB 831 (1993), enforced, 53 F.3d 261 (9th Cir. 1995); *Every Woman's Place*, 282 NLRB 413 (1986) (employee’s telephone call to Department of Labor, related to and was a “logical outgrowth” of a prior complaint made by three employees to employer about overtime compensation for holidays.); *Salisbury Hotel, Inc.*, 283 NLRB 685, 687 (1987) (individual employee’s call to Department of Labor grew out of employee’s concerted protest of employer’s change in lunch hour policy, and was therefore a continuation of that concerted activity). Employees’ discussion of shared concerns about terms and conditions of employment can be concerted, even when the discussion “in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.” *Meyers II* at 887, quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). When analyzing whether an employee has engaged in protected concerted activity, the Board has found that the subjective motivations of the individual employee are irrelevant because the standard is an objective one.

*Circle K Corp.*, 305 NLRB 932, 933 (1991) (“Employees may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one.”), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993).

Mutual aid or protection focuses on the goal of the concerted activity and whether the employee or employees involved 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). As with the element of concert, the standard for determining whether the purpose of the conduct was for mutual aid or protection is an objective standard. *See Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976) (“The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of ‘mutual aid or protection’ of employees.”).

Campbell’s complaints about sexual harassment were both “concerted” and “for mutual aid or protection.” Notably, Respondent stipulates that before Campbell made a sexual harassment complaint, “statutory employees including Charging Party Xstal Campbell discussed among themselves terms and conditions of employment involving workplace actions which they perceived as unwelcome harassment.” JX 1. It is also undisputed that when Campbell met with Swartwood on December 27, she referenced other employees and made it clear that the concerns that she was raising were of a group nature. She not only used plural pronouns such as “us” and “we,” but she specifically told Swartwood that she was not the only one who had concerns about Ficarrota. Further, Campbell specifically named at least one other employee – Xondria Brown – who shared her concerns. Campbell did not need express authorization from other employees to

bring the group complaints to the attention of management because her complaints were a logical outgrowth of those earlier complaints.

As to the question of whether Campbell's activity was for "mutual aid or protection," her complaint related to the group's working conditions, and the goal of the complaint was to create an environment free of harassment. The results of her complaint would necessarily inure a benefit or protection to all employees in her department who had been subject to harassment. Therefore, the complaint was "for mutual aid or protection."

**ii. By Raising Concerns with Human Resources, Campbell Asserted a Contractual Right to Be Free from Sexual Harassment**

In *N.L.R.B. v. City Disposal Systems, Inc.* (1984), 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed.2d 839, the United States Supreme Court affirmed the Board's longstanding "*Interboro* doctrine," under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activit[y]" and therefore accorded the protection of Section 7. See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966). As the Court explained, an employee's invocation of a collectively bargained right is "unquestionably an integral part of the process that gave rise to the agreement" and affects the rights of all employees covered by the agreement. *Id.* at 831-832. According to the Court, the employee's conduct falls within Section 7 "[a]s long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement." *Id.* at 840. An employee need not explicitly refer to the collective bargaining agreement at all. Indeed, as the Court continued, "[i]n the context of a workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that

the employee explicitly refer to the collective-bargaining agreement is likely to serve as nothing more than a trap for the unwary. *Id.* Further, an employer violates Section 8(a)(1) and (3) of the Act by discriminating against an employee for asserting a contractual right as their actions discourage union membership. *Crown Wrecking Co.*, 222 NLRB 958, 962 (1976).

Though Campbell did not explicitly reference the collective bargaining agreement, she asserted the right of bargaining unit employees to work in an environment free from sexual harassment by registering a group complaint about sexual harassment with Respondent's Human Resources Department. Certainly, various state and federal law already provide employees the right to be free from sexual harassment. Yet, the Union and Respondent specifically affirmed the right in its collective bargaining agreement. Article 8, Section 1 of the collective bargaining agreement expressly forbids discrimination against employees because of "race, color, religion, sex, age, national origin, disability, or choice of sexual partner." JX 2 at 15. The record leaves little doubt that the nature of Campbell's complaint was both reasonably clear to the person to whom it was communicated (Swartwood) and it refers to a reasonably perceived violation of the collective bargaining agreement.

### **iii. Campbell Engaged in Protected Activity By Filing Charges with the Board**

Filing charges with the Board is a form of protected activity. Section 8(a)(4) of the Act makes it unlawful, "to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act." The approach is generally a "liberal" one when reviewing such allegations. *NLRB v. Scrivener*, 405 U.S. 117, 92 S.Ct. 798 (1972). The Act provides a "fundamental guarantee" under Section 8(a)(4) to those seeking to invoke the

procedures of the Act and is intended to preserve the Board's process from abuse. *Filmation Associates*, 227 NLRB 1721 (1977).

### **C. Respondent's Directive to Not Discuss the Group's Concerns Violated**

#### **Section 8(a)(1) of the Act**

The Board has held that an employer's announcement of a work rule or directive that "would reasonably tend to chill employees in the exercise of their Section 7 rights," violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). In particular, a rule is unlawful if it explicitly restricts protected activities, or if it was promulgated in response to protected activities, or if they are applied to restrict protected activities." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004).

In *Boeing Co.*, the Board overruled the standard the Board established in *Lutheran Heritage Village-Livonia*, for evaluating the lawfulness of employer rules that do not explicitly restrict employees' exercise of their rights under Section 7 of the Act. 365 NLRB No. 154, slip op. at 2 (2017).<sup>6</sup> The Board held that, when evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, it will balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule. *Id.* at slip op. at 3. In conducting this balancing, "when a rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful." *Id.* at slip op. at 16.

Respondent's directive to Campbell to focus on herself is unlawful because it explicitly

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<sup>6</sup> An analysis under *Boeing* is not necessary in the current case because Respondent's directive explicitly restricts Section 7 activity.

restricts protected activities, was promulgated in response to protected activity and applied to restrict protected activities. First, the instruction to Campbell to only focus on her concerns would prevent her from raising concerns on behalf of the group and insisting that others shared her concerns. Thus, Swartwood's instruction amounted to an explicit restriction on employees' participation in protected concerted activities, specifically bringing group concerns to the attention of management. Second, even if Swartwood's statements were not found to explicitly bar protected concerted activities, the instruction to focus on yourself would lead employees to believe that they can only raise harassment complaints on an individual basis, and not concertedly with other employees. Finally, the directive was given in response to concerted activities, as it was a response to Campbell concertedly raising concerns about an atmosphere of harassment created by Ficarrota and ignored by her other supervisors and managers.

Accordingly, Swartwood's instruction to discuss trip sheets in private violates Section 8(a)(1) of the Act.

**D. Respondent's Subjected the Charging Party to Adverse Actions in Violation of Sections 8(a)(1), (3), and (4) of the Act**

**i. Legal Standard**

In assessing whether an action has been taken against an employee for unlawful reasons or for other reasons cited by an employer, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make an initial showing that the employee's protected activity was a motivating factor in the employer's adverse action. *Id.* In meeting this burden, the General Counsel must show that the employee engaged in the protected activity, that the employer had knowledge of the activity, and that the adverse

action was because of the activity. *Id.*

An employer's discriminatory motive can be established by the timing of the adverse action, the presence of other unfair labor practices, statements and actions showing the employer's hostility toward protected concerted activity, and evidence that rationale advanced by the employer in support of its adverse action is pretext. *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 n.2, 260 (2000) (other unfair labor practices), *enfd. mem.* 11 Fed. Appx. 372 (4th Cir. 2001); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (anti-union statements); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992) (pretext). Pretext can be evidenced by disparate treatment, shifting defenses, and timing. *See, e.g., Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *Seminole Fire Protection, Inc.*, 306 NLRB 590, 592 (1992) (shifting defenses); *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (timing) An employer's unexplained failure to call a witness who would reasonably be assumed to be favorably disposed toward it can also give rise to an adverse inference with respect to the employer's conduct. *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n.1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 n.1 (1977).

Once the General Counsel's burden has been met, the employer bears the burden of proving that it would have taken the same action even if the employee had not engaged in the protected activity. *Wright Line*, 251 NLRB at 1089. If the employer fails to assert any legitimate reason for its action against an employee, other than reasons that have been found to be pretextual, the employer has failed to meet its burden. *Aero Metal Forms*, 310 NLRB 397, 399 n.14 (1993).

## **ii. The General Counsel Has Presented a Prima Facie Case**

Campbell engaged in protected activity by raising sexual harassment complaints on behalf of a group of employees, by asserting a contractual right to work in an environment free from sexual harassment, and by participating in the Board's processes by filing a charge.

Respondent was aware of each form of protected activity engaged in by Campbell.

Respondent knowledge of the group nature of Campbell's sexual harassment complaint is made plain based on the meeting notes, written e-mail complaint, and record as a whole. Further, the record evidence suggests that Swartwood was aware of the pending Board charge when he made the decision to terminate her. Respondent's unlawful motivation is laid bare by direct statements to Campbell about her concerted activity, the timing of adverse employment actions, and other statements and actions showing hostility toward her harassment complaints. When Campbell raised group concerns to Swartwood, he immediately made statements indicating that Campbell should only make complaints on her own behalf.

Immediately after the December 27 meeting in which Campbell raised group complaints, Respondent's almost immediately began taking adverse employment actions culminating in her termination. In mid-January 2018, Respondent, by Ficarrota, denied Campbell's leave request. Soon thereafter on January 16, 2018, another supervisor Abigail called security and had Campbell escorted off the property because she asked permission to leave at the end of her shift pursuant to a policy newly announced by Respondent. The lack of non-discriminatory reason for denying Campbell's leave and engaging in an extreme action such as having an employee escorted out by security, in such close timing to her concerted activity supports an inference that it was motivated by hostility toward the Charging Party's concerted activities. Additionally, the timing of Campbell's Board charge in relation to her discharge is compelling. Although the

filing of the Board charge may not be precipitating event leading to her discharge, it cannot be extracted from the chain of conduct by Respondent leading to Campbell's discharge.

Most saliently, while investigating Campbell's no call, no show, Respondent treated Campbell as if she had a history of dishonesty. Campbell was treated this way despite providing sufficient medical documentation that showed a hospital discharge within hours after her shift. The record evidence shows that Campbell's shift was scheduled to end at either 2:00 a.m. or 3:00 a.m. on April 26, and she was discharged from the hospital at 3:20 a.m..

Respondent has yet to explain the basis for its belief that Campbell was dishonest, and Respondent testified that her scheduled shift overlapped with her time in the hospital, such that Respondent's skepticism that she was actually ill during her shift was illogical and unwarranted. Given that Respondent's managers had no interaction with Campbell besides her harassment complaint and grievance meetings, Respondent's belief that Campbell was dishonest could have only stemmed from her earlier protected activity. The record evidence shows that the responsible management officials, most notably Swartwood, were not familiar with Campbell before she raised concerns about sexual harassment by her manager, and they have provided no basis for believing that she was dishonest.

### **iii. Respondent's Asserted Reason for Its Actions is Pretextual**

Respondent cannot meet its burden under *Wright Line* to show that it would have denied her leave request in the absence of her concerted activity. Respondent did not call Ficarrota to testify about why he denied Campbell's February 16 to February 19 leave request and Rosborough only testified to the general practices of Respondent regarding leave request.

Further, Respondent stated reason for Campbell's suspension and subsequent discharge is that Campbell's absence on April 25 is not supported by the record evidence. Respondent created

and then enforced a rule that Campbell could only be excused if she was incapacitated and unable to call in to work. This explanation is offered to justify the examination of her cell phone and medication, request for medical records, and subsequent termination. The notion that an employee must be incapacitated is pretext, and the pretextual nature of it is clear when Respondent's treatment of Campbell is contrasted with its treatment of Lorena Flores -- an employee who missed work because she mistakenly and unreasonably believed that she had approved leave.

Further, it is hard to believe that any rational employer would hold an employee who is incarcerated blameless while requiring an employee to call out from work while in a hospital waiting room. Respondent has not met its burden under *Wright Line* because it cannot offer a non-discriminatory justification for its harsh treatment of the Charging Party in the face of the comparator evidence.

Likewise, Respondent has only examined an employee's phone in two instances. The Employer did this once when the employee Lawrence Goddard falsely claimed that he had called in and when he provided a backdated note in an attempt to excuse his absence. In the other instance where an employee's phone was examined, Human Resources had already received evidence in the form of Facebook posts that the employee was requesting FMLA leave, claiming to be sick and then going to places like Disneyland and Legoland. Unlike Goddard, Campbell made no claim as to having called in; nor did she claim that she was physically incapable of calling in. She merely stated that she was ill, in a "blur", and had gotten treatment at the hospital around the time of her shift. It is hard to reconcile Respondent's treatment of Goddard, who was given "plenty of chances" before his termination and Flores, whose no call, no show was excused because she did not check the schedule, while Campbell was scrutinized as if she had a

history of dishonesty or Respondent had evidence that she was not telling the truth. The disparate treatment of comparable employees cannot be explained other than to conclude that Respondent's managers thought that Campbell was dishonest because she registered a group complaint about sexual harassment on December 27, 2017. Respondent's belief about Campbell's dishonesty stems from her protected activity, and the body of Board law prevents Respondent from making such negative judgments based only on an employee's protected activity. To allow Respondent to do so would impermissibly punish employees for making concerted complaints.

**E. Campbell is Entitled to a Full Remedy Because Respondent Failed to Establish That She Engaged in Post-Discharge Misconduct**

Respondent claims that Campbell should be denied a remedy because she called Swartwood a "white bitch" immediately after Swartwood informed her that her employment was terminated. For the reasons cited above, CGC would argue against a finding that Campbell actually engaged in post-discharge misconduct. However, even if Campbell had engaged in post-discharge misconduct, she would still be entitled to reinstatement.

In assessing whether post-discharge comments should disqualify a discriminatee from backpay and reinstatement, the Board affords discriminatees leeway in consideration of the experiences they have suffered. *Fund for the Public Interest*, 360 NLRB 877 (2014); *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011), *enfd.* 677 F.3d 1241 (2012). The Board has acknowledged the reality that unlawfully discharged employees "often say unkind things about their former employers," and that "an 'evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge.'" *Id.*, citing *Trustees of Boston Univ.*, 224 NLRB

1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977). Thus, the Board has held that “[e]mployers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims’ natural human reactions to the unlawful acts.” *Hawaii Tribune-Herald*, at 662. Consistent with these principles, the Board has found the disqualification of an unlawfully discharged employee from backpay and reinstatement to be an “extraordinary measure.” *Id.* An unlawfully discharged employee will only be disqualified from backpay and reinstatement based on postdischarge conduct if his or her conduct is “so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.” *Id.*

Thus, as the Board explained in *Fund for the Public Interest*, it “has granted a full remedy despite an attempted assault of a supervisor, *Casa San Miguel, Inc.*, 320 NLRB 534, 534 fn. 2 (1995), and the utterance of an ethnic slur unaccompanied by threats or violence, *C-Town*, 281 NLRB 458 (1986).” 360 NLRB 887 (2014). In contrast, the Board has found extraordinary circumstances warranting termination of the right to backpay and reinstatement “where a discriminatee threatened to kill someone, *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 520-521 (2000); *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992); *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992); intentionally struck a supervisor with his automobile, *Hillside Ave. Pharmacy, Inc.*, 265 NLRB 1613 (1982); and threatened to report a probation violation in order to influence a witness’s testimony during a Board hearing, *Lear-Siegler Management Service*, 306 NLRB 393, 394 (1992).”

Campbell’s alleged post-discharge misconduct is most analogous to the post-discharge misconduct found in *C-Town* where a discriminatee, Sabina Perez, referred to replacement employee as a “shit Dominican.” 281 NLRB 458 (1986) The Board noted that both the

replacement employee and the president of C-Town were of Dominican descent. Nonetheless, Board order reinstatement commenting that “ While we do not condone Perez' ethnic slur, Perez' conduct is not of such a serious or flagrant nature to warrant withholding the Board's traditional reinstatement remedy.” *Id.*

Here, Campbell’s alleged statements to Swartwood do not amount to the type of extraordinary, flagrant statements that would disqualify an unlawfully discharged employee from backpay and reinstatement. Even if Campbell had called Swartwood a “white bitch,” misconduct of that nature falls far short of the conduct that the Board has found renders an employee unfit for further service. It is undisputed that Campbell did not make any physically threatening gestures at Swartwood or any other manager present. In fact, when asked whether she called Swartwood a “white bitch,” she immediately denied it. Under the operative facts, Respondent has failed to establish that Campbell is unfit for further service.

**F. To be Made Whole, Campbell Should Be Compensated for Any  
Consequential Economic Harm She Incurred as a Result of Respondent’s  
Unfair Labor Practices**

Under the Board’s present remedial approach, some economic harms that flow from a respondent’s unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board’s standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g., Graves Trucking*, 246 NLRB 344, 345

n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate,

the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8- 9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful

act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.<sup>7</sup> Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).<sup>8</sup>

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's

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<sup>7</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

<sup>8</sup> Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See *Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board’s “broad discretion”); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent’s unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent’s original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board’s existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by

the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.<sup>9</sup> In *Nortech Waste, supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).<sup>10</sup>

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<sup>9</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

<sup>10</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and

## VI. CONCLUSION

Based on the foregoing and the record evidence considered as a whole, CGC respectfully requests that the Administrative Law Judge find that Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in the Complaint. CGC also urges the Administrative Law Judge to issue an appropriate remedial order recommending that the Board order Respondent to cease and desist from its unlawful conduct; make Campbell whole for wages and other benefits lost because of her unlawful suspension and termination ; offer Campbell immediate reinstatement to her former position; post an appropriate Notice to Employees at its facility (a proposed copy of which is attached as Appendix A); and provide any other relief deemed just and necessary to effectuate the policies and purposes of the Act.

Dated at Phoenix, Arizona, this 6th day of March 2019.

Respectfully submitted,

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other non-pecuniary losses.” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

Appendix A – Proposed Notice to Employees

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

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

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

**WE WILL NOT** interfere with restrain or coerce you in the exercise of the above rights.

**YOU HAVE THE RIGHT** to freely bring concerns about your wages, hours, and other terms and conditions of employment, including sexual harassment complaints, to us on behalf of yourself and other employees, and to freely discuss such concerns with other employees, and **WE WILL NOT** do anything to interfere with your exercise of that right.

**YOU HAVE THE RIGHT** to invoke your rights under our collective-bargaining agreement with your union, including the right not to be subjected to discrimination based on your sex, and **WE WILL NOT** do anything to interfere with your exercise of that right.

**YOU HAVE THE RIGHT** to file charges with the National Labor Relations Board, and **WE WILL NOT** do anything to interfere with your exercise of that right.

**WE WILL NOT** tell you not bring concerns about your wages, hours, and other terms and conditions of employment to us on behalf of yourself and other employees.

**WE WILL NOT** tell you not to discuss concerns about your wages, hours, and other terms and conditions of employment with other employees.

**WE WILL NOT** discriminate you in any manner, including by denying your leave requests, placing more onerous conditions on you, suspending you, or firing you, because you bring concerns to us on behalf of yourself and other employees or invoke your rights under our collective-bargaining agreement with your union.

**WE WILL NOT** discriminate you in any manner, including by firing you, because you file charges with the National Labor Relations Board.

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

**WE WILL** offer **Xstal Campbell** immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or

any other rights and privileges previously enjoyed.

**WE WILL** pay **Xstal Campbell** for the wages and other benefits she lost because we fired her.

**WE WILL** remove from our files all references to the discharge of **Xstal Campbell**, and **WE WILL** notify her in writing that this has been done and that the discharge will not be used against her in any way.

**DROCK Gaming, LLC d/b/a The D Casino**

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(Employer)

**Dated:**

**By:**

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(Representative)

(Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.*

2600 North Central Avenue  
Suite 1400  
Phoenix, AZ 85004

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

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge in *DROCK GAMING, LLC d/b/a The D Casino*, Case 28-CA-219756 was E-Filed and served by email on this 6<sup>th</sup> day of March 2019, in the manner set forth below:

### *Via E-Filing:*

Honorable Gerald M. Etchingham  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### *Via E-Mail:*

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