UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

AT&T MOBILITY SERVICES, LLC,

and Cases 20–CA–215835

EDWARD MEGUAL WILLIAMS, formerly known as JACKSON, an individual.

*Carmen Leon, Esq.*,
for the General Counsel.
*Michael G. Pedhirney, Esq.*, of Littler Mendelson, P.C.,
for the Respondent.

## DECISION

### STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Edward Megual Williams, formerly known as Edward Megual Jackson[1], an individual, (the Charging Party or Jackson), filed the original charge in this case on February 28, 2018. The Regional Director at Region 20 issued the complaint on June 29, 2018 (complaint), and the Respondent AT&T Mobility Services, LLC (Respondent or Employer) answered the complaint on July 13, 2018, and amended its answer on August 16, 2018, generally denying that Jackson's discharge was due to his union or protected concerted activities.

This case involves the Respondent's discharge of Charging Party Jackson on December 14, 2017,[2] after he accumulated 8.75 points for unexcused absences and tardy arrivals at work

[1] The Charging Party officially changed his last name from Jackson to Williams in April 2018. Tr. 11–13, 22. Hereafter, the Charging Party is interchangeably referred to as Williams and Jackson in the record. They are the same person. Because the documentary evidence refers to the Charging Party as Jackson, I will primarily reference the Charging Party as Jackson in this decision. Stipulated Fact #10, Joint. Exhibit 1.

[2] All dates in 2017 unless otherwise indicated.

while previously having received a final written warning for his numerous attendance issues. Respondent denies that Jackson was engaged in union or protected concerted activities of any kind when he was discharged in December, and, more importantly, if he was, Respondent argues, and I find that its discharge of Jackson was based entirely on Jackson's violation of Respondent's attendance policy and was unrelated to any union or protected concerted activity.

This case was tried in Sacramento, California on October 24, 2018. Closing briefs were submitted by the General Counsel and the Respondent on November 28, 2018.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent admits, and I find, that it has been a limited liability company with offices and places of business located throughout California, including a place of business located at 3591 Truxel Road, Sacramento, California (the Natomas Store), and has been engaged in the retail sale of wireless voice and data communications products and services. (GC Exh. 1 (d) at 1-2, GC Exh. 1(j) at 1-2; Stip. Fact #1, Jt. Exh, 1.)[4] Respondent further admits, and I also find, that in conducting its operations during the calendar year ending December 31, Respondent derived gross revenues in excess of $500,000 and it purchased and received at its California facilities goods valued in excess of $5,000 that originated from points outside the State of California. (Tr. 8–10.) I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Respondent's General Business Operations*

Respondent is engaged in the retail sale of wireless voice and data communications products and services. Respondent provides these services from stores across the country including the Sacramento, California area. Stipulated Fact No. 1 (Stip. Fact #1, Jt. Exh. 1.)

Respondent employs thousands of Retail Sales Consultants (RSCs), who are all represented by the Communications Workers of America (CWA). (Tr. 72, 141.) RSCs are

[3] The transcript in this case is mostly accurate, but I correct the transcript (Tr). as follows: Tr. 50, line (l.) 1: "combination" should be "accommodation;" and Tr. 142, l. 11: "David's son" should be "David Sum."

[4] Abbreviations used in this decision are as follows: "Jt. Exh." for a joint exhibit; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief and "R Br." for the Respondent's brief; "Stip. Fact#" for stipulated facts in joint exhibit 1. Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

responsible for selling Respondent's products and services, as well as assisting customers with technical and service issues. (Tr. 23.)

Respondent maintains nine retail stores in the Sacramento area. They are: a. Folsom; b. Creekside, Roseville; c. Douglas, Roseville; d. Citrus Heights; e. Natomas; f. Davis; g. Arden; h. Laguna, Elk Grove; and i. University. (Stip. Fact #2, Jt. Exh. 1.) In 2017, the Charging Party worked in Respondent's Natomas store. (Jt. Exh. 1, ¶ 2.)

In California, the CWA represents hundreds of RSCs at Respondent's stores. (Tr. 141–142.) CWA Local 9421 (the Union) represents the RSCs in the Sacramento area. (Tr. 140.) The Union represents approximately 70 to 80 Respondent employees in or around Sacramento. Id.

Vanessa Khallouf (Khallouf) held the position of Area Retail Sales Manager for the Sacramento Area from March 15, 2016, until November 30, 2017. (Tr. 197.) Corey Carver has held the position of Area Retail Sales Manager for the Sacramento Area since December 1, 2017. During these time periods, they were supervisors of Respondent as defined by Section 2(11) of the Act and agents of Respondent as defined by Section 2(13) of the Act. Khallouf remained a supervisor of Respondent as defined by Section 2(11) of the Act and agent of Respondent as defined by Section 2(13) of the Act at the time of the Charging Party's termination. (Stip. Fact #3, Jt. Exh. 1.)

Khallouf has worked at Respondent for 8 years and she is responsible for working with Union Steward Robert Coates (Coates) to negotiate grievance resolutions of 15–20 grievances per month pending in the Sacramento area as the retail sales manager at Respondent's 9 area stores in 2016–2017. (Tr. 197–198.)

The following individuals held the position of Retail Sales Manager (RSM) at Respondents Natomas store located at the Natomas Store during the time periods set forth beside their names. During these same periods of time, these individuals were supervisors of Respondent as defined by Section 2(11) of the Act and agents of Respondent as defined by Section 2(13) of the Act: a. Amy Rodriguez [January 16, 2016 - on or about July 1, 2017]; b. Sasha Chopra (Chopra) [July 16, 2017 - November 30, 2017]; and c. Raj Sharma (Sharma) [December 1, 2017 - April 30, 2018]. Chopra remained a supervisor of Respondent as defined by Section 2(11) of the Act and agent of Respondent as defined by Section 2(13) of the Act at the time of the Charging Party's termination. (Stip. Fact #4, Jt. Exh. 1.)

Chopra has been an RSM with Respondent for 2.5 years and she has 11 years with the Employer. Chopra handled 5–10 pending grievances while working at the Natomas store. (Tr. 181.)

The following individuals held the position of Assistant Retail Sales Manager (ASM) at the Natomas Store during the time periods set forth beside their names. During these same periods of time, these individuals were supervisors of Respondent as defined by Section 2(11) of the Act and agents of Respondent as defined by Section 2(13) of the Act: a. Nora Brambila [December 1, 2017 - April 30, 2018]; b. Brad Troutfelt [August 16, 2017 - May 16, 2018]; c.

Michel Black (Black)[July 16, 2017 - November 30, 2017]; d. David Sum (Sum) [January 1, 2017 - July 30, 2017]; and e. Jeff Palma [July 1, 2016 - July 15, 2017]. (Stip. Fact #5, Jt. Exh. 1.)

At all material times, the Regional Collective-Bargaining Agreement in effect between CWA and Respondent from February 10, 2013, to February 11, 2017 (the CBA) applied and was in full effect. (Stip. Fact #6, Jt. Exh. 1; Jt. Exh. 2.) Coates has been the chief steward for the Union for more than 4 years at Respondent's 5 East Sacramento stores, including a call center, and Coates meets with store managers and area store mangers at every step of the grievance process, excluding arbitration and last step. (Tr. 96–98, 140.) Coates estimates that he represents 70–80 unit member employees for the Union and oversees over 100 grievances in a typical year for the Union. (Tr. 140–141.)

### *B. Respondent's Attendance Policy*

Respondent maintains a "Progressive Discipline Policy for AT&T Mobility Non-Management Employees." (the attendance policy). (Jt. Exh. 5.) This attendance policy sets forth four levels on which Respondent can act to correct performance or conduct issues---Counseling Notice, Written Warning, Final Written Warning/Suspension, and Termination. Id. at 2. However, the attendance policy expressly states that "based on the seriousness of the offense, steps of discipline may be skipped." Id. As a result, Respondent need not issue a disciplinary action at each level prior to terminating an employee for repeated offenses---attendance-related or otherwise.

Respondent's attendance policy in and before 2017 provides that the point thresholds and timeframes for the levels of progressive discipline are as follows:

**Point Accruals Based on Rolling 12 Months of Active Employment Point Thresholds**

**4.00 — 4.75** - Level of Discipline - *Counseling Notice*

**5.00 — 6.75** - Level of Discipline - *Written Warning*

**7.00 — 7.75** - Level of Discipline - *Final Written Warning*

For each of the above, Discipline step deactivates when current points fall below discipline thresholds.

**8.00 – 8.0+** - Level of Discipline – *Termination*

(Jt. Exh. 3 at 2–3.) Coates explained that with respect to Respondent's attendance points policy as distinguished from Respondent's Code of Behavioral Conduct (COBC) policy where investigations are performed, for the attendance policy – "whatever points you are at is what sets what discipline you should be." (Tr. 118–119.)

With regard to the duration of the points, the attendance policy states that "[e]ach attendance occurrence and the associated point value will expire after 12 months of active employment following the attendance occurrence." (Jt. Exh. 3, p. 3)[5]

Generally, in order to request a shift swap with another employee, the swap must be made more than 48 hours from the start of the shift. (Tr. 121.) Employees use a People Tools System to request the swap for another shift directly from an employee scheduled for that shift. (Tr. 121) The person to whom the swap is proposed must then accept it before the swap becomes effective. (Tr. 121–122.) A request made within 48 hours requires a willing employee and management approval. (Tr. 122.) Deviations from shift-swap protocol are discretionary by management and are less common than other protected absences although Chopra convincingly opined that she has granted shift swaps multiple times. (Tr. 122, 188.)

Part of Respondent's attendance policy also includes excused leave, such as vacation and FMLA. (Jt. Exh. 3, p. 2.) In order to request to use a vacation day, the requesting employee must make the request before the fifth day of the prior month. (Tr. 120.) Management also has discretion to deviate from that policy and may approve use of vacation days on shorter notice for various reasons depending on the circumstances. (Tr. 121; Jt. Exh. 3.)

The Sales Attendance Guidelines expressly vest the Employer with discretion over the application of discipline resulting from attendance point accruals. Specifically, the Guidelines provide, "Exceptions to the above progression guidelines may be made as appropriate at the company's discretion." (Jt. Exh. 3 at 3.)

If an employee's accrual of attendance points potentially warrants termination, then the proposed termination decision is subject to four layers of review by different persons within Respondent. Specifically, the proposed termination decision is subject to review and approval by: (1) the Store Manager; (2) the Area Retail Sales Manager; (3) the Director of Sales; and (4) Respondent's Centralized Attendance Support Team (CAST), which is a division within Respondent's Employee Relations department. (Tr. 192–193.) CAST is also referred to internally within Respondent as "CAG," which stands for "Centralized Attendance Group." (Tr. 191, 201; R. Exh. 7.)

### *C. Charging Party's Apparent Union or Protected Activities in 2017*

In May 2017, Jackson and all of the Natomis store employees and Respondent's employees nationwide participated in a strike against Respondent. (Tr. 32.) Jackson also wore a union pin 3–4 times a week at work at Respondent around his Natomis store in 2017 that said that he supported the Union. (Tr. 27–28.) However, Jackson was not a shop steward for the Union at Respondent---that role went to his fellow Natomis store employee Coates in 2015–2017. (Tr. 96–98.)

In May and October 2017, Coates filed grievances against Respondent for Jackson as part of the step 1 process under the CBA between Respondent and the Union. Those grievances all

[5] As the General Counsel and chief shop steward Coates point out, Respondent's attendance policy and Code of Business Conduct are two completely different tracks of discipline. Tr. 118; Jt. Exh. 4b. Both policies are progressive, and an employee can have a final written warning under each and not be terminated. Tr. 119.

settled prior to December 2017 resulting in dismissal of the grievance and reduced discipline to Jackson. (Tr. 100; GC Exhs. 2 and 8.)

Other than filing grievances for Jackson in 2017, Coates does not mention Jackson wearing union pins or apparel at work, attending the May 2017 nationwide strike for the Union, or wearing union t-shirts at work. I find that other than filing grievances against the Respondent, Jackson did not participate in any union activities in 2017 that distinguished him from any other employee at Respondent other than chief steward Coates.

### *D. Respondent's Progressive Discipline to Charging Party in 2016–2017 for Numerous Attendance Policy Violations*

Despite Respondent's written attendance policy, Respondent does not in all circumstances terminate an employee once the employee has accrued eight attendance points. For example, the Respondent did not terminate Jackson on at least three instances when he accrued over eight attendance points – (1) on March 16, 2016, when he accrued 8.75 points but was issued a Final Written Warning in lieu of discharge (Jt. Exh. 5 at 9–11); (2) on or about May 9, 2017, when he accrued 10.75 points and was issued a Final Written Warning instead of discharge (Jt. Exh. 5 at 3–4; Tr. 198–199; GC Exh. 2; GC Exh. 10 at pp. 1–2); and (3) in or around late September 2017 after he accrued another attendance point on May 11, 2017, which led to Respondent keeping Jackson on the Final Written Warning that had issued on May 9, 2017. (Jt. Exh. 5 at 5–8; Tr. 78, 199–204; R. Exh. 6; R. Exh. 7.)

Jackson worked as an RSC for Respondent from August 2013 until December 14, 2017. (Tr. 23.) He worked at multiple stores but was assigned to the Natomas store from the Spring of 2015 until December 14, 2017, when he was terminated. (Tr. 23–24, 99.)

Area Retail Sales Manager Khallouf knows Jackson and knew that he had several attendance issues in 2016 and 2017 and throughout his career at Respondent. (Tr. 198–199.)

From March 2016 to his termination, Jackson was issued multiple disciplinary actions under Respondent's attendance policy.[6]

As part of Jackson's running total of attendance points in 2016–2017, he also received the following discipline within that timeframe:

- a Final Written Warning for attendance on March 24, 2016 (Jt. Exh. 5 at 6, 9–11);
- a Final Written Warning for attendance on May 24, 2016 (Jt. Exh. 5 at 7–8);
- a Counseling for attendance on February 26, 2017 (Jt. Exh. 5 at 1–2);

[6] Coates explained that if an employee receives 2 final written warnings for violations of Respondent's Code of Business Conduct (COBC) policy within a year's time, this will trigger termination but under Respondent's attendance points policy, an employee may incur more attendance points even though they have reached the 8-point threshold and are under a written final warning. Coates recalled that 3–5 employees other than Jackson have been terminated by Respondent for reaching the 8-point attendance points threshold in one year's times. Tr. 143–144; GC Exh. 27. Coates further explained that an employee can have a final written warning under the attendance points policy and under the COBC policy and this will not automatically trigger a termination. Tr. 118–119.

- a Final Written Warning for attendance on May 9, 2017 (Tr. 198:20–199:15; Jt. Exh. 5 at 3–4; GC Exh. 2; GC Exh. 10 at pp. 1–2);

- a continued Final Written Warning for attendance in or around late September 2017 for an unexcused absence on May 11, 2017, which was only two days after he received a Final Written Warning for excessive accrual of attendance points (Jt. Exh. 5 at 5–6; Tr. 79, 185, 199–204; R. Exh. 6; and R. Exh. 7).[7]

Respondent employees, other than Jackson, have also received final written warnings from Respondent after reaching or exceeding the 8.0 attendance points limit in one year's time from 2015-2018 including, but not limited to, Pierre J. DeLuna, Mabel Salgado, Justin Golner, Joshua Forbes, Eliza Gali, Crystal Crosby, Simone Guzmon, Kia Vanderaa, Andrew Muela, Cashmere Eguilos, Carina Ramirez, Tre Ewell, Luis Quintero, Kyle Miller, and Esther Mata and they were also not terminated. (GC Exhs. 11–22; GC Exhs. 24–26.)

Specifically, Respondent issued Jackson 7.75 points as of July 21, 2017 comprised of 1.0 point on February 18, 1.0 point on February 20, 1.0 point on March 14, .75 points on March 22, 1.0 point on April 1, 1.0 points on April 25, 1.0 point on April 27, and 1.0 point on May 11, 2017. (GC Exh. 10 at 2.) These 7.75 attendance points are undisputed.

Khallouf recalled that Jackson had received a final written warning for excess attendance points in May 2017. (Tr. 199.) Khallouf opined that Jackson was just over 10 points total in attendance points for the year in May 2017. Id.

Khallouf also recalled that Jackson had filed a grievance of his final written warning issued to him on May 9 to make sure that the attendance point total did not include a point from March 11 when he left work early due to a bug bite and filed a workers' compensation claim and Khallouf confirmed that the point total did not include this bug bite early departure date. (Tr. 199; Jt. Exh. 5 at 3–4.) Khallouf also confirmed that a general threshold point total that can trigger a termination at Respondent under its attendance policy is 8 points.[8] Id.

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[7] Prior to Jackson's December termination in 2017, Jackson was also issued two disciplinary actions under Respondent's separate and independent Code of Business Conduct policy. Specifically, Respondent issued Jackson the following discipline within that timeframe:

- On October 3, 2017, Jackson was issued a Final Written Warning under Respondent's Code of Business Conduct policy for an incident between his ASM Sum and Jackson in June 2017 violating Respondent's harassment/hostile work environment policy which Jackson grieved and reached agreement with Respondent on November 6, 2017 for a reduced settled Written Warning. Tr. 62–63, 87–88, 91, 183–184 207–209; GC Exh. 3; and
- a Final Written Warning on November 16, 2017 also under Respondent's Code of Business conduct policy for an incident in September 2017 between Jackson and co-worker Justin Estrada for violating Respondent's workplace violence/threats policy. Tr. 59–60, 115–117, 183, 207, 209; GC Exh. 4.

[8] On July 21, Manager Khallouf settled Jackson's Step 2 grievances emailing Coates that a March 11 attendance point to Jackson was not included and his 10.5 total attendance points, adjusted down from 10.75, and this meant

Two days after the May 9 final written warning was issued to Jackson, he accrued another attendance point on May 11, 2017 bringing his total attendance points to over 10 points. (Tr. 200; GC Exhs. 10 and 23.) Jackson's RSM at the time, Amy Rodriguez, informed Khallouf of this in May 2017. Id.

Khallouf opined that Respondent's CAST department, a division within Respondent's Employee Relations department, be forwarded Jackson's latest post-final written warning points after the May 11 added point for the attendance system to run its course and get management views on whether Jackson should be terminated under Respondent's attendance policy due to the new May 11 attendance point. (Tr. 200.)

Khallouf opined that, at this point by incurring one additional attendance point on May 11, 2017, she supported terminating Jackson for violating Respondent's attendance points policy because he already had been given a final written warning which remained active, Jackson knew that he was already at the discretionary termination level of 8 points, and in Khallouf's opinion, Jackson should be terminated for his most recent May 11 point. (Tr. 200.) Nonetheless, Khallouf did not pursue termination of Jackson at this time with Chopra or Respondent's upper management as she accepted giving Jackson another chance.

Ultimately, Jackson was not terminated in September for his March absence despite Khallouf's support of termination because Respondent's CAST department conducted a thorough investigation of Jackson's attendance points and there was a workers' compensation case involving Jackson that was open and because of that pending case, the termination process was delayed until Patricia Whelan of the CAST department heard back as to the outcome in Jackson's workers' compensation case. (Tr. 200–201; R. Exh.6.) By the time Respondent determined it appropriate to deny Jackson's workers' compensation case in August, however, too much time had elapsed from March 11 to September so the recommendation from the CAST department was to leave Jackson on the final written warning.[9] (Tr. 200–201, 206; R. Exhs. 6–7.) Khallouf further opined that despite her recommending termination for Jackson in May, she understood that due to the time that had lapsed from March to September on processing the workers' compensation claim denial, it was best to just keep the final written warning in place for Jackson by September. (Tr. 204.)

Sometime in September 2017, at the Natomas store where Jackson worked, RSM Chopra and ASM Michel Black (Black) discussed Jackson's attendance points accumulation for the year and Chopra specifically informed Black that she had to provide Jackson a reminder that he still

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that Jackson was still subject to a final written warning facing possible termination if he incurred further points over one year's time but was not being terminated for his 10.5 points in July 2017. Tr. 131; GC Exh. 10.

[9] Jackson's workers' compensation injury is alleged to have occurred on March 11, 2017 and a workers' compensation claim appeared to Respondent on May 18 and CAG team member Patricia Whelan started to evaluate the claim on June 15, the workers' compensation claim was denied on August 1, and closed due to no medical evidence filed in support of the claim. The termination evaluation was completed on September 22 with Jackson having over 10 attendance points at that time and the CAST department member Cynthia B. Kimble-Echols recommended to Respondent's management that due to the delay from investigating Jackson's workers' compensation claim from May to September, instead of terminating Jackson in September, there should be a discussion with him advising him of his attendance point total being over the threshold and confirming with him that he was under a final written warning and the consequences of additional unprotected absences. Tr. 201–204, 206; R. Exhs. 6–7.

maintained the final written warning due to his May 11 point accumulation for unexcused absences or tardy arrivals. (Tr. 161–162, 183–185, 204.)

By October 2017, Jackson and Chopra were well aware that Jackson had accumulated enough attendance points in a year to warrant the still present final written warning so if he were to incur any additional unexcused absences or tardy arrivals from work, he could face termination. Khallouf had brought Jackson's running attendance points total to Chopra's attention earlier in September and Jackson admitted knowing by November 1 that he was on a final written warning for attendance issues. (Tr. 78, 183-186, 199-206.) Khallouf is Chopra's Area Retail Sales Manager and she is also Chopra's direct supervisor. Id.

On October 3, when Chopra delivered the final written warning to Jackson concerning a June 2017 incident under Respondent's Code of Business Conduct policy before she arrived at the Natomas store, she also reviewed Jackson's accumulated attendance points with him as of October 2017.[10] (Tr. 184.) At this time, Chopra met with Jackson and Coates and Jackson brought to Chopra's attention his concern regarding his accumulated attendance points. At this meeting, Chopra reminded Jackson that he had been issued a final written warning in July for his attendance points and she told Jackson that any more missed days would lead to his termination. (Tr. 185; GC Exh. 10 at 2.)

### *E. The Charging Party's Unprotected Absence on November 14, 2017*

On Monday, November 13, 2017, Jackson was scheduled to work the opening shift at the Natomas store at 9:30 a.m. (Tr. 50–51, 53) He arrived at the store prior to his shift to notify the manager on duty, ASM Brad Troutfelt, that he believed that his fiancée Chelsey was having emergency appendicitis surgery that same day. (Tr. 50–51, 53, 155.) ASM Troutfelt advised Jackson to contact RSM Chopra who was not scheduled to work on November 13. (Tr. 53, 186)

Next, Jackson called Chopra to inform her that his fiancée, Chelsey, was in the hospital, and that he was going to leave to be with Chelsey at the hospital and that if Chopra wanted to fire him, she could fire him, and that he was going to go take care of her because he did not want something to happen to Chelsey without him there for her. (Tr. 186.) At this time on November 13, Jackson admits knowing that he could be terminated if he accrued any more unexcused absences or tardy arrivals. (Tr. 53, 185; GC Br. At 6.)

Specifically, Chopra opined that she was emphatic about Jackson's situation and she responded to Jackson's early morning telephone call and advised him to think of various options and directed him to call Respondent's payroll and HR services, to see what other options he had available for requesting the November 13 day off.

[10] Besides monitoring Jackson's 2017 attendance points accumulation while at the Natomas store from July-November, Chopra also presented to Jackson the settled written warning from a June incident involving Jackson and ASM Sum that was settled on November 6 as well as the issuance of a final written warning to Jackson on November 16, 2017, in response to a September 29, 2017 incident between Jackson and fellow employee Justin Estrada, both under Respondent's separate Code of Business Conduct policy. Tr. 59–60, 62-63, 87–88, 91, 115–117, 183–184; GC Exhs. 3 and 4. Also, while a termination normally cannot occur until at least 8 attendance points accrue, a final written warning can be issued with less than 8 points. See, i.e., Jt. Exh. 5 at 7.

Jackson immediately called Chopra back after speaking to Respondent's Family Medical Leave Act (FMLA) department and HR and Jackson told Chopra that he could not take FMLA because he and his girlfriend Chelsey were not married and that a fiancée does not qualify for FMLA. (Tr. 186–187.)

Next, Chopra exercised her supervisory discretion to accommodate Jackson and grant him the remaining day off for November 13, because he had already reported to work. (Tr. 186–187.)

Chopra also directly advised Jackson that for his next scheduled shift on November 14, she was further willing to accommodate him and allow Jackson to do a shift swap with somebody else, if necessary, because Chopra was not able to plug in another full vacation day on November 14 after exercising her discretion to allow Jackson to use a vacation day for missing November 13 to be with his girlfriend and her mother at the hospital for her emergency health matter. (Tr. 146–147, 155, 187.)[11]

Chopra made it clear to Jackson that while she would allow a shift swap for Jackson to miss more time on November 14, Chopra clearly instructed Jackson that she was unwilling to just treat November 14 as another vacation day because it was not pre-requested ahead of time as vacation under Respondent's attendance policy. (Tr. 54, 186–187.) Finally, on November 13, Jackson said to Chopra: "ok, I [Jackson] understand [this plan for using a vacation day for November 13 and a shift swap for November 14]." (Tr. 187.)

Jackson understood that Chopra was off for the day and she informed Jackson that ASM Black would be coming into the Natomas store and that Chopra would contact Black and ensure that Jackson's November 13 vacation hours were inputted by Black. (Tr. 187.)

Later on Monday, November 13, between 10 and 11 a.m., Chopra telephoned ASM Black to inform him that Jackson had reached out to Chopra earlier on the 13th because Jackson was going to miss work that Monday to visit his girlfriend in the hospital. (Tr. 163, 188–189.) Store Manager Chopra next informed ASM Black that Respondent was going to allow Jackson to use a vacation day for just one emergency day off on November 13. Black responded to Chopra's instruction telling her that he understood Respondent's attendance position to allow Jackson an excused absence for only November 13. (Tr. 163.)

For November 14, however, Chopra further informed ASM Black that Jackson would contact Respondent and request a shift swap, so Black was authorized to allow a shift swap

[11] Coates took notes at a December 14 termination meeting with Jackson, Chopra and Sharma and confirmed that Chopra offered Jackson a vacation day for November 13 and a shift swap to use on November 14. Tr. 146–147. At the December 14 meeting, Coates' notes indicate that Jackson responded to Chopra's shift swap offer by saying that on November 13, Jackson could not find anyone to shift swap with for November 14 and Chopra was unwilling to allow Jackson's shift on November 14 to go empty a second day in a row. Tr. 146–147, 187. I reject Jackson's argument that he unsuccessfully tried to contact anyone about a shift swap as this is unsubstantiated by the preponderance of evidence and it contradicts Jackson's other alleged false and unsubstantiated fact allegations that Respondent somehow granted Jackson two vacation days off for November 13 and 14 when Jackson spoke to Chopra on November 13 and/or Black on November 14.

for Jackson for November 14 that Chopra had authorized with Jackson, "but any other absences we [Respondent] were not going to make exceptions for." (Tr. 163, 188–189.)

On Tuesday, November 14, sometime between 6:30 and 7:00 a.m., Jackson and his girlfriend Chelsey's mother, also present at the hospital with Jackson, heard Chelsey's prognosis directly from her doctor saying that Chelsey would need two additional surgeries. (Tr. 93.)

In response to this, Chelsey's mother instructs Jackson to just leave the hospital and go to work because "there was nothing … [Jackson] could do there" at the hospital while Chelsey recovered and waited for more surgeries especially since Chelsey's mother was able to stay with Chelsey at the hospital on November 14 if she needed anything. (Tr. 93.)

At this point in time early in the morning on November 14, Jackson admits that because Chelsey's mother was able to cover for him to assist Chelsey at the hospital, Jackson actually planned to go into work at Respondent the morning of November 14. (Tr. 93.)

Jackson next claims he called assistant Natomas store manager Black and purportedly said to Black: "hey, I just spoke to Sasha [Chopra]. And he [Black] said, yes." (Tr. 93.) Jackson further alleges:

> And at that point, I [Jackson] … said did she [Sasha] tell you what's going on? *You know, I won't be there.* My – fiancée [Chelsey], she had – she needs two additional surgeries. *So I [Jackson] was giving them [Respondent] kind of a – let them – let them know what was going on [and that Jackson planned to missed a second day of work on the 14th]*. And he [Black] said, yes. He said, oh, okay, go take care of your lady. And I [Jackson] stayed at the hospital.

(Tr. 56, 93–94.) (Emphasis added.)

Black, however, convincingly denied Jackson's false version of their conversation that he: (1) told Jackson on November 14 that Jackson was excused to miss a second day of work under these circumstances; and (2) said that Jackson should just go take care of his lady and take a second day off from work. (Tr. 164–165, 189–190.) I further find Jackson's statement to Black that Jackson "just spoke" to Chopra again on November 14 is also untrue.

Rather, on November 14 before Black left for work, Jackson phoned Black and Jackson first asked Black whether Black had spoken to Chopra and Black informed Jackson that yes - he had spoken to Chopra on November 13. (Tr. 164.) Jackson next informed Black that Jackson was not going to make it into work on November 14. Id. Black responded to Jackson and told him okay. Id. Jackson then asked Black whether Black "knew the situation," and Black told Jackson: yes. Id.

At no point during this November 14 phone conversation did Black advise or direct Jackson that Jackson should miss work on November 14 or "go take care of your lady." (Tr. 152, 164–165, 189–190.)

Immediately after hanging up with Jackson on November 14, Black called Chopra and he informed her that Jackson had just called him, and that Jackson would not be coming into work at Respondent on November 14. (Tr. 165.) Chopra responded to Black saying that Jackson knows what he was told or informed by Chopra on November 13 about Jackson's options and Respondent's attendance policy for absences after November 13. (Tr. 165.)

Jackson missed work on November 14 and Respondent marked this absence as unexcused giving him a total of 8.75 points leading Respondent to consider Jackson's termination under its attendance policy as Jackson understood as recently as November 13. (Tr. 53, 128.) At no time, did Jackson offer any evidence that he attempted to arrange a shift swap on November 14 by contacting any other employee to request to swap shifts with him on November 14.

Later on November 14, between 1-1:30 p.m., Chopra approached Coates and informed him of Jackson's unexcused absence on November 14 and Chopra and Coates re-visited the conversation that was had on October 3 between Chopra, Coates, and Jackson about Jackson's previous attendance point incurrences and that Jackson had been issued a final written warning in July for his attendance points and she told Jackson in October that any more missed days could lead to his termination. (Tr. 185, 190.) Chopra also told Coates that: "Eddie [Jackson] is not coming into work today [on November 14], and based on our last conversation [in October], that you know there's nothing I can do at this point. I had already offered [Jackson] a shift swap and he did not do that accordingly." (Tr. 190.)

Jackson returned to work on Thursday, November 16, 2017. (Tr. 57)

Sometime thereafter, Respondent's CAST or CAG department began its investigation in house of Jackson's 8.75 accumulated points in less than a year by having its HR department work up an analysis to present to Respondent's upper management for a final decision.[12] (Tr. 192–193, 201; GC Exh. 23; R. Exh. 7.) The 8.75 total points included unchallenged points adding up to 7.75 for Jackson's absences or tardiness to work on February 18, February 20, March 14, March 22, April 1, April 25, April 27, and May 11, 2017. Only the single point incurred by Jackson on November 14 is challenged in this case. (GC Exh. 23.)

The CAST department review of Jackson's attendance points accumulation as of November 14 went quicker than the May 2017 review referenced above as no ticket was opened because this time his point accumulation was not as complex as the May 2017 situation where Jackson's workers' compensation claim needed review and a decision from Respondent. (Tr. 206–207.) By the end of November, Chopra, Khallouf, Respondent's Director of Sales, Justin Garig, and Respondent's employee relations manager signed off on Respondent's termination of Jackson as prepared and presented by its CAST department. (Tr. 191–193, 205.) In addition, Chopra needed to put in a request for Jackson's final paycheck. (Tr. 193.)

[12] Khallouf explained that the CAST department review process includes analysis whether there is anything else related to a new attendance point such as an absence falling under FMLA or being a protected absence, and they submit a termination letter if there is an unprotected absence after a final written warning letter has issued. Tr. 205.

### *F. Charging Party's Termination on December 14, 2017 After His Return from Vacation*

Ultimately, Respondent decided to present Jackson his termination from excess unexcused absences once he returned from his 2-week vacation in early December. (Tr. 193.) On December 13, Chopra and Sharma arranged with Coates to attend a representation meeting on December 14 and Coates responded that he would be there as he was already scheduled to work that day. (Tr. 123, 193.)

On December 14, Jackson went to work as scheduled. (Tr. 48) However, once he tried to clock in, Jackson's passwords would not work. (Tr. 48–49) Jackson went to the management office and noticed RSM Chopra there. (Tr. 49.) By this time, Chopra was no longer the RSM at the Natomas store, so Jackson asked the new RSM Sharma to help him log in for work. (Tr. 48; Jt. Exh. 1 Stip, 4) Instead, Chopra answered and told Jackson to have a seat in the break room. (Tr. 49.)

A few minutes later, Union Chief steward Coates arrived. (Tr. 49.) A few minutes later, RSM Chopra called them both into the management office. (Tr. 49.) Chopra handed Jackson his notice of termination and told him he was being terminated. (Tr. 49; GC Exh. 23.) Jackson asked why Chopra was doing this. (Tr. 49) Chopra replied that per their conversation on November 13, she had issued him an attendance point. (Tr. 49)

The termination notice says that Jackson was terminated on December 14 for having not demonstrated the necessary actions/behaviors related to attendance and for failure to follow Respondent's guidelines for attendance in accumulating 8.75 total attendance points over a year's time. (Tr. 123; GC Exh. 23.) Coates confirmed that Chopra and Sharma met with Jackson and Coates on December 14 and Chopra said: "Eddy [Jackson], you're being terminated for attendance based on being absent for … November 14th." (Tr. 123, 191–192.)

Jackson reacted by sounding surprised and alleging to Chopra that she had agreed to allow him to use a vacation day for his absence on November 13 and accused Chopra of knowing that Jackson also needed to use a second vacation day on November 14 because that's the day Jackson needed because his girlfriend was going into surgery. (Tr. 123.) Chopra responded by confirming that she had allowed Jackson to use a vacation day for his absence on November 13 but for November 14 Chopra said: "I [Chopra] offered him [Jackson] a shift swap for November 14." (Tr. 124, 146–147, 154–155, 186–187.) Moreover, Chopra further admitted that she was allowing Jackson to use a shift swap with less than 48 hours' notice by exercising her discretion as manager. Id.

Next, Coates' handwritten notes from the December 14 meeting detail that Jackson responded to Chopra's shift swap offer on November 13 by saying to the group at the December 14 termination meeting that: "nobody wanted to switch with me so that's why I [Jackson] called again on [November 14] at 8 a.m. that['s why] I'm still at the hospital because my fiancée is going into surgery." (Tr. 146–148, 153–154.)

Once again, I reject Jackson's statements that he unsuccessfully attempted to arrange a shift swap as he makes no mention as to who rejected his attempt at a shift swap, how many employees he called, or when he made the calls. More importantly, Jackson saying that he called Black at 8 a.m. on November 14 to tell him that he needed to miss work because his fiancée "is

going into surgery" is also untrue as Jackson had just spoken to his girlfriend's doctor in the presence of her mother and was told that his girlfriend was not going into surgery but, instead, that she would need 2 additional surgeries at some unknown future time and that her mother actually instructed Jackson to leave the hospital and go to work because "there was nothing … [Jackson] could do there" at the hospital while Chelsey recovered and waited for more surgeries especially since Chelsey's mother was able to stay with Chelsey at the hospital on November 14 if she needed anything. (Tr. 93.)

Chopra further explained to Jackson and Coates that her manager, Khallouf, reminded Chopra that, as Jackson's manager/supervisor, she was not required under Respondent's attendance policy to allow Jackson to use a second vacation day for November 14. (Tr. 124, 150–151; Jt. Exh. 3.) At the end of their December 14 meeting, Jackson finally exclaimed to Chopra and Sharma: "wow, you finally did it. I can't believe you. They [Respondent management] finally got you [Chopra] to do this [termination] to me [Jackson]." (Tr. 194.)

Other Respondent employees have been terminated from Respondent after reaching or exceeding the 8.0 attendance points limit in one year's time in 2015–2016 including, but not limited to, Darrin Farria. (GC Exh. 27.) In fact, Coates confidently recalled representing up to three employees as union steward, other than Jackson, who were terminated for exceeding this same Respondent's attendance points policy threshold. (Tr. 143–144.)[13]

In sum, I find that the evidence and testimony here show that as a result of Jackson's flippant disrespect for Respondent's attendance policy, Respondent discharged Jackson on December 14, 2017, pursuant to its attendance policy and not due to any union or protected concerted activity from Jackson.

## ANALYSIS

### I. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

I observed that Jackson was not believable in his testimony about what was discussed between Chopra and him on November 13 when he called her to tell her that he was going to the hospital to be with his girlfriend even if it meant that he would lose his job. Specifically, I reject Jackson's testimony that Chopra agreed to let Jackson use 2 days of vacation for November 13

[13] As a result, I further find that Respondent's discipline and termination proceedings as to Jackson were consistent with the discipline and termination proceedings for similar attendance policy points accumulations.

and November 14 as Chopra clearly accommodated Jackson by allowing him to use a vacation day for the emergency on November 13 and a second accommodation allowing Jackson to arrange a shift swap for November 14, if necessary. (Tr. 50, 54-55, 163-165, 185-190.) Moreover, Jackson unbelievably testified that Chopra granted him 2 vacation days on November 13 for November 13 and 14, he denied at hearing that he made any attempt to call any employee to see if they could swap shifts with him on the 14th, but he told Coates and Chopra at his termination meeting on December 14 that he could not find an employee to swap shifts with on November 14 which is why he called Black on November 14. (Tr. 50, 54-55, 86-87, 147.)

Jackson also provided general denials and less than full recollection of events. Many of his responses were expansive in numbers but vague on specifics and when pressed for a more accurate estimate, many of his answers involved just one or two alleged coworkers who did not testify at hearing. For example, Jackson stated that his union activities were notable and stood out among his coworkers other than chief shop steward Coates. Jackson was not a shop steward or Union representative. I find that the record is devoid of admissible evidence of Jackson's actual union activities other than those performed nationwide by all Respondent employees.

Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. *C & S Distributors*, 321 NLRB 404 fn. 2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Stabilus, Inc*., 355 NLRB 836, 840 fn. 19 (2010). Here, no one was called to corroborate Jackson's alleged union activities beyond his filed grievances and his participation in the Union's nationwide strike in May.

In sum, Jackson was a difficult witness and his testimony was confusing and hard to believe. Based upon Jackson's demeanor, contradictory testimony, embellishment, and his history of unexcused absences in 2016 and 2017, I do not credit his testimony except where it was corroborated by other evidence or the testimony of a credible witness, or was inherently plausible. Moreover, I further find that Jackson was granted 2 accommodations by Chopra on November 13 – use of a vacation day on November 13, and, if needed, use of a shift swap on November 14. As Jackson admits, the November 13 medical emergency had subsided by the next morning on November 14 so much so that Chelsey's mother instructed Jackson to just leave the hospital and go to work because she was able to stay with Chelsey through the uncertain timing of any additional surgeries and Jackson he was actually going to go to work. (Tr. 93.) Instead of going to work on November 14, as instructed by his fiancée's mother, Jackson chose to lie about his conversations with Chopra the day before and ASM Black on November 14 and stay away from work fully aware that he was risking the incurrence of another attendance point that could result in his termination.

After observing their demeanors, established or admitted facts, the admitted evidence, and inherent probabilities, I find that Chopra and Black were the more credible witnesses as they had a detailed recollection of the most significant facts and they testified in a confident and calm manner with little hesitation and no assistance from any lawyer. Moreover, the documentary evidence in this case supports their testimony. Also, Chopra and Black presented a convincing

and consistent recollection as to the events in 2017 and, specifically what was said on November 13 and 14, 2017, resulting in Jackson's termination for his absence from work on November 14 which put him at an attendance points total of 8.75 and resulted in Respondent discharging Jackson's employment at Respondent. (GC Exh. 23.) I also find that Chopra's discretionary decision as Jackson's supervisor to allow Jackson a shift swap and not another vacation day on November 14 was reasonable and not suspect under the circumstances according to Respondent's attendance policy. Chopra was particularly convincing when she opined that she has approved a shift swap that occurred within 48 hours of one of the shifts multiple times as well as her November 13 approval of a shift swap for Jackson. (Tr. 188.) Finally, if Chopra had granted Jackson both November 13 and 14 off as vacation days on November 13, there would be no logical reason for Jackson to call ASM Black, a subordinate supervisor to Chopra, to seek Black's approval once Chopra allegedly had pre-approved the 2 vacation days.

In addition, I found Area Retail Sales Manager Khallouf to be quite believable in her demeanor that she believed that Jackson was eligible for termination in May 2017 but for the delay from the CAST department investigating Jackson rejected workers' compensation claim. I also observed her to be quite honest in her belief that after the CAST department investigation and conclusion in September 2017, it was most appropriate to not terminate Jackson at that time and to give him another chance to get past the final written warning stage by not accruing more unprotected absences.

I found Coates to be a generally credible witness. He testified in an earnest and direct manner and his brief testimony had the ring of truth. Thus, I credit Coates' testimony that he took notes at the December 14 termination meeting of what Jackson and Chopra said.

## II. The Lawful Discharge of Jackson

Complaint paragraphs 5–7 allege that Respondent's December 14 discharge of Jackson was based on his assistance to the Union and Jackson's engagement in union and other protected concerted activities in 2017 to discourage employees from engaging in these activities and through this conduct Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act. (Tr. 11–13; Jt. Exh. 1; GC Exh 1(d); GC Exh. 1(f); GC Exh. 1(j); and GC Exh. 1(m).)

Respondent denies that the decisionmaker who terminated Jackson had any knowledge beforehand that Jackson was involved in protected union activity and further argues that Respondent was discharged not for any union or other protected concerted activity but because Jackson had reached the position under Respondent's progressive discipline policy that because of one final unexcused absence on November 14, Jackson had accumulated 8.75 attendance points which exceeded the allowable limit of 8.0 within one year's time, and that this, combined with his prior final written warning, led to Respondent's termination of Jackson as part of Respondent's progressive discipline attendance policy. Finally, Respondent argues that Jackson's termination was wholly unrelated to any union or protected concerted activity.

While it is true that Jackson filed union grievances against Respondent in May and October 2017 which filings are protected under the Act, he was also frequently absent or tardy from work in 2016–2017. I find that Jackson acted fast and loose and pushed the envelope with

Respondent and its attendance policy with his numerous absences and tardy arrivals such that when Jackson reached his limit for these progressive disciplines and an emergency arrived in November 2017, Jackson was fully aware on November 13 that one more unexcused absence on November 14 would lead to his termination and his refusal to follow his girlfriend's mother's advice and return to work on November 14 justified Respondent's termination of Jackson for missing work on November 14, 2017.

In the mixed-motive context of this case, the Board applies the burden-shifting analysis set forth in *Wright Line* to determine whether an employee's discharge is unlawful. 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a motivating factor in discharging the employee. The General Counsel's evidence must show that the employee engaged in union or protected activity, that the employer knew about the protected activity, and that the employer had harbored animus toward the protected activity. *Club Monte Carlo Corp.*, 280 NLRB 257, 261–262 (1986), enfd. 821 F.2d 354 (6th Cir. 1987). If the General Counsel meets this burden, the burden then shifts to the employer to show that it would have discharged the employee even absent the employee's protected activity. *Wright Line*, 251 NLRB at 1089.

### *A. Jackson's Prima Facie Case*

#### 1. Protected concerted activity

To be protected under § 7, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market,* 361 NLRB 151, 153 (2014). The General Counsel alleges that throughout 2017, Jackson assisted the Union and engaged in protected union activities by filing grievances against the Respondent. (GC Exh. 1(d) (2-3); GC Exh. 1(m)(1-2).)

On the entire record, I find that Respondent stipulated, and the General Counsel demonstrated that Jackson engaged in protected union activity on May 9, May 11, and October 5, 2017, when he filed grievances against Respondent. (Tr. 108; GC Exh. 2; GC Exh. 8.)[14] I do

[14] I further find that any underlying evidence presented by the General Counsel of the terms offered or accepted or exchanged or conduct or statements made during compromise negotiations about any or Jackson's settled claims leading up to the settlement of Jackson's various grievances under Respondent's attendance policy and its Code of Business Conduct policy is irrelevant and inadmissible under Federal Rules of Evidence (FRE) rule 408(a). Rule 408 excludes evidence offered to prove liability for or invalidity of a settled and negotiated claim. Here, the General Counsel is only challenging Respondent's termination of Jackson under its attendance policy and not any of its discipline of Jackson under the admittedly separate and distinct Code of Business Conduct Policy. Tr. 118–119. The General Counsel, however, argues that somehow the validity of Jackson's settlement after negotiations of his October 3 grievance is a reason Respondent would retaliate against Jackson and terminate him in December. GC Br 1-2, 4-5, 16–18. I reject this argument as no one forced Respondent or Jackson to settle his grievance on November 6. Moreover, on November 6, 2017, Jackson accepted the Respondent's offer to settle his October 3 grievance and Jackson accepted a reduced discipline from Respondent for his conduct on June 15, 2017. Jackson had two settled grievances under Respondent's Code of Business Conduct policy that resulted in Respondent disciplining Jackson. If Jackson wanted to present evidence of Respondent's settlement offers exchanged or conduct or statements made during compromise negotiations or questioned Respondent's discipline of Jackson under its conduct policy, Jackson could have not settled them, he could have, instead, kept his grievances alive, and filed additional unfair labor claims with the NLRB on Respondent's discipline of Jackson for violating its business conduct policy. Instead, once

not find that Jackson was also a union activist in 2017 as the preponderance of evidence shows that other than the union grievances he filed in May and October 2017 and Jackson's participation in the Union's nationwide strike with his coworkers, I reject Jackson's claim that he participated in any union activities on his own that set him apart from his coworkers and would have made him a target of Respondent's management especially in the last half of 2017. In addition, Jackson did not stand out any differently than other employees as to union activities other than Chief Shop Steward Coates, and Jackson's coworkers also filed grievances against Respondent and complained about various working conditions and wages at Respondent that led to the nationwide strike in May 2017. (Tr. 27, 32, 34, 37–38, 41, 45–47, 62, 71–78, 117, 142, 183, 198.) Respondent also denies that Jackson was involved in protected union activity related to his termination and argues that it would have terminated Jackson regardless of any union or protected concerted activity, because Jackson violated Respondent's attendance policy by accumulating more than 8 points in a year's time after having been issued a final written warning. (See R. Br. 23–25, 32.)

2. Knowledge of protected concerted activity

Because I find that the General Counsel presented sufficient evidence of protected union activity, I reject the Respondent's argument that it was unaware of such activity at the time of Jackson's termination. Chopra and Khallouf are admitted supervisors under § 2(11) of the Act. (Jt. Exh. 1 at 1.) It is well established that a supervisor's knowledge of protected concerted activities is imputed to an employer in the absence of credible evidence to the contrary. See *State Plaza, Inc.*, 347 NLRB 755, 757 (2006); *Dobbs Int'l Services*, 335 NLRB 972, 973 (2001).

It is not inconsistent that Respondent had knowledge of Jackson's alleged protected activities. Given the rebuttable presumption that a supervisor's knowledge of protected activities is imputed to the employer and given Chopra's and Khallouf's active roles in Jackson's termination process, I find that the General Counsel has carried its burden in demonstrating that Respondent had knowledge of Jackson's May and October grievances against Respondent. See *Club Monte Carlo Corp.*, 280 NLRB 257 at 261.

3. Animus to protected concerted activity

"The General Counsel must make a showing sufficient to support a conclusion that [animus toward] the protected conduct was a motivating factor in the employer's decision to suspend or discharge." Id. at 261–262. In *ManorCare Health Services—Easton*, the Board relied on the following five factors to divine the employer's discriminatory motive or animus: (1) the proximity of ManorCare's discipline to the employee's alleged protected activities; (2) ManorCare's unlawful interrogation and threats toward the employee; (3) ManorCare's failure to repudiate the employee's assertion that her discipline was motivated by animus; (4)

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Jackson settled on reduced discipline, the underlying conduct and statements made in compromise negotiations in support or against the claim's validity in each grievance become inadmissible and irrelevant in this case. See Tr. 59, 62-63, 87, 91, 102, 107–110, 113–115, 126-130, 133–134, 142; GC Br 1-2, 4-5, 16–18; R Br. 27, fn. 21; GC Exhs. 3, 4, and 8. Jackson cannot offer to prove invalidity of Respondent's 2 fully negotiated and settled Code of Business Conduct disciplines in this case. "Rule 408 prohibits use of settlement offers 'to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.'" *Bodega Latina Corporation*, 367 NLRB No. 67, slip op. 1, fn 1 (2018).

ManorCare's failure to investigate the employee's alleged conduct; and (5) ManorCare's deviation from its typical policy in disciplining the employee. 356 NLRB 202, 204 (2010). Assuming, as stated above, that the General Counsel presented sufficient evidence of protected concerted activity, I find that the General Counsel has not met its additional burden of demonstrating that such activity was a motivating factor in the decision to terminate Jackson.

Here, the record failed to establish any animus on the part of the Respondent toward Jackson. This, as well as other factors noted above, persuade me that the General Counsel has failed to prove, prima facie, that Respondent acted with an illegal motive when it discharged Jackson on December 14, 2017.

First, unlike the employer in *ManorCare*, the gap between Jackson's alleged protected activities (May and October) and the termination (December) was much wider (months), while the gap between Jackson's misconduct (November 14) and the termination (December 14) was tighter (weeks). See id. at 225. Here, Jackson filed his grievances on May 9, 11 and October 5, 2017. (Tr. 108; GC Exh. 2 and GC Exh. 8.) While Jackson was no stranger to accruing attendance points throughout 2016–2017, the only discipline at issue here is Respondent's discharge of Jackson on December 14, 2017.

The General Counsel contends that a temporal thread links all of these incidents to the December 14 termination, arguing that Jackson was decision to terminate occurred on November 14 soon after a settled Code of Conduct grievance signed off on both sides on November 6. (GC Br. 18.) However, this characterization of the timeline strains credulity. In *ManorCare*, the discipline occurred days after the employee's protected activity. 356 NLRB at 225. Here, I find that an unrelated settled conduct discipline on November 6 is inappropriate to use as a timeline starting point here because the grievance settled and the grievance filing date of October 3, months before the December 14 termination date, is more appropriate, but, again, Jackson's Code of Business Conduct discipline is unrelated and irrelevant to his discharge under Respondent's attendance policy. (See footnote14, supra.) Instead, Jackson's discharge took place "weeks" after he missed work on November 14 with another unexcused absence despite being subject to a final written warning and in defiance of Chelsey's mother's instruction that Jackson leave the hospital and go to work. (Tr. 93.) I therefore find that the proximity of the alleged protected union activity to the adverse action is not indicative of animus.

Second, unlike the employer in *ManorCare*, Respondent did not threaten Jackson for his protected conduct. See 356 NLRB at 226. The record simply does not support such a finding here. Indeed, it seems that throughout much of the alleged protected activity, both Chopra and Khallouf patiently dealt with Jackson's attendance issues by issuing progressive discipline or passing Jackson's excess point total to Respondent's CAST personnel who investigated and reached conclusions before the September 2017 decision was made not to discharge Jackson and the December 2017 decision came in to terminate Jackson's employment.[15] This same

[15] Jackson's denied workers' compensation claim from an alleged bug bite and the related CAST department investigation and the ultimate decision to maintain the final written warning rather than terminate Jackson in September 2017 is significant to note because if Chopra and Khallouf were out to get Jackson because of his May 9 grievance, as alleged by the General Counsel, the Respondent could have used Jackson's missed work on March 11, 2017 for a denied workers' compensation claim to terminate Jackson in September. Khallouf and Chopra were definitely well aware of the progressive discipline policy for accumulated attendance points and they could have

management patience was exhibited in settling Jackson's two conduct disciplines in 2017. That Chopra at no time told Jackson to stop complaining and that Jackson never brought any concerns about Chopra, Sharma, Black or Troutfelt to Khallouf, further undermine the notion that Respondent was demonstrating animus toward Jackson.

Third, unlike the employer in *ManorCare*, Respondent did not fail to repudiate an assertion that Jackson's discipline was motivated by animus. See 356 NLRB at 226. Chopra responded at the December 14 termination meeting with Jackson and his union representative Coates by confirming that she had allowed Jackson to use a vacation day for his absence on November 13 but for November 14, Chopra said: "I [Chopra] offered him [Jackson] a shift swap for November 14." (Tr. 124, 146–147, 154–155, 186–187.) Moreover, Chopra further admitted that she was allowing Jackson to use a shift swap with less than 48 hours' notice by exercising her discretion as manager. Id. Chopra further explained to Jackson and Coates that her manager, Khallouf, reminded Chopra that, as Jackson's manager/supervisor, she was not required under Respondent's attendance policy to allow Jackson to use a second vacation day in a row for November 14. (Tr. 124, 150–151; Jt. Exh. 3.) As a result, I further find that Chopra convincingly repudiated any assertions on December 14 that Jackson's November 14 attendance point for an unexcused absence was motivated by Respondent's animus.

Fourth and fifth, unlike the employer in *ManorCare*, Respondent here extensively investigated Jackson's attendance points accumulation and conducted the investigation and discipline procedures in strict accordance with Respondent's attendance policy. See 356 NLRB at 227. There is no dispute that Jackson's accumulation of excess attendance points was triggering Respondent's progressive discipline to him and ultimately subjected Jackson to the December 14, 2017 termination as a result of Jackson's unexcused absence on November 14 despite his fiancée's mother's instruction that Jackson not miss another day of work on November 14.

Respondent's CAST department conducted attendance points investigations for Jackson's 2017 attendance point tied to his denied workers' compensation claim where, ultimately, Jackson was not terminated because due to that pending workers' compensation case, the termination process tolled until Patricia Whelan of the CAST department heard back as to the outcome in Jackson's workers' compensation case. (Tr. 200–201; R. Exh. 6.) By the time Respondent determined it appropriate to deny Jackson's workers' compensation case in August, however, too much time had elapsed so the recommendation from the CAST department was to leave Jackson on the final written warning rather than terminate him for excessive attendance points. (Tr. 183-185, 200–201, 206; R. Exhs. 6–7.) A second CAST department investigation occurred after Jackson's November 14 unexcused absence and this investigation resulted in the decision to terminate Jackson on December 14. I therefore find that Respondent's investigation and disciplinary actions against Jackson are not indicative of animus. (Tr. 191–193, 205–207; GC Exh. 23.)

There is also no dispute that Jackson had been disciplined previously for poor attendance and that Respondent followed the progressive discipline steps in its attendance policy appropriately and that Jackson understood by November 1 that he was on a final written

recommended discharge if they harbored any animus toward Jackson's alleged protected union activity and not waited until December 14 to discharge Jackson.

warning for attendance issues since September before he accrued an attendance point on November 14 and that Jackson's next unexcused absence could result in his termination.[16] (Tr. 78, 86, 183-185, 199–206; Jt. Exh 5; R. Exhs. 6 and 7.)

Further, the record shows that Respondent has disciplined other employees for poor attendance and has also terminated them for the same reason. Consequently, I find that the General Counsel did not establish disparate treatment such that other employees under similar circumstances were treated more leniently than Jackson was treated. See *Storer Communications*, 287 NLRB 890, 899–900 (1987) (Disparate treatment where discriminatee's warning was more severe than warnings issued other employees).

The General Counsel's reliance on the *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1194 (2004), case is distinguishable from the facts in this case. In *Robert Orr*, employee Thomas was discharged only *after* Thomas showed that he was a union supporter in late August and not three separate times earlier in the year in May and twice in June despite being in violation of the employer's progressive discipline system for productivity. More importantly here, Jackson showed he was a union supporter when he filed 3 grievance against Respondent in May 2017 as protected union activities known to Respondent and rather than discharge Jackson soon thereafter like the employee in the *Robert Orr* case, Respondent in September merely kept Jackson on his final written warning for excess attendance points rather than discharging him at that time. Respondent generously held back from terminating Jackson in September even though the CAST department's investigation of Jackson's missed work on March 11 showed that Respondent had discretion to terminate Jackson in September but for the delay it took Respondent to resolve Jackson's workers' compensation claim which was ultimately denied for lack of supporting medical evidence. (Tr. 183-185, 200–201, 204, 206; R. Exhs. 6 and 7.) In August, however, too much time had elapsed so the recommendation from the CAST department was to leave Jackson on the final written warning. (Tr. 183-185, 200–201, 204, 206; R. Exhs. 6–7.) Respondent exercised discretion in not terminating Jackson in September because of the time that had lapsed from March to September. (Tr. 183-185, 200–201, 204, 206; R. Exh. 6; R. Exh. 7.)

Finally, there were no shifting reasons for Jackson's discharge or that the nondiscriminatory explanation defies logic or is clearly baseless. The sole reason for Jackson's discharge was his accumulation of attendance points in a year's time with the final point incurred on November 14 for Jackson's unexcused absence while under a final written warning. Jackson's own testimony shows that early in the morning on November 14 after Jackson and Chelsey's mother received the doctor's prognosis of Chelsey's medical condition, the emergency situation from November 13 had subsided to a point that Chelsey's mother instructed Jackson to just leave the hospital and go to work because "there was nothing … [Jackson] could do there" at the hospital while Chelsey recovered and waited for more surgeries especially since Chelsey's mother was able to stay with Chelsey at the hospital on November 14 if she needed anything. (Tr. 93.) Jackson chose to miss work on November 14 fully aware that if

[16] Even if Jackson was not on his final written warning, Respondent would be justified given Jackson's prior attendance history and counseling sessions with his supervisors to terminate him because Respondent need not issue a disciplinary action at each level prior to terminating an employee for repeated offenses---attendance-related or otherwise. (See Jt. Exh. 5 at 2.)

he incurred another attendance point for an unexcused absence, he could be terminated by Respondent. On December 14, Jackson was terminated by Respondent.

Thus, in summary, the record supports a finding that Jackson engaged in protected union activity when he filed grievances in May and October against Respondent. Assuming such activity, while the record also supports a finding that Respondent knew Jackson was engaged in this protected union activity, the record does not support a finding that Respondent harbored animus toward Jackson's union activities. Moreover, I further find that the General Counsel has not established any retaliatory or discriminatory motivation through Respondent's conduct prior to discharging Jackson on December 14. The General Counsel has also failed to show by a preponderance of the credible evidence that any protected union activity engaged in by Jackson was a motivating factor in his discharge. It is therefore recommended that the complaint be dismissed.

### *B. Respondent's showing that it would have discharged Jackson in any event*

Assuming, arguendo, that General Counsel carried its burden in showing by a preponderance of the evidence that Jackson's protected union activity played a motivating role in his termination, the burden would then shift to Respondent to show that it would have terminated Jackson in the absence of such conduct. See *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. 7 (2016).

I further find that Respondent has proven that it would have discharged Jackson on December 14, 2017, even in the absence of any alleged protected concerted or union activities. Chopra made the decision to issue an attendance point to Jackson for his absence on November 14 which sent Jackson's accumulated 8.75 points to Respondent's CAST Department to decide if Jackson would be terminated given Jackson prior attendance points accumulations, counsel from his supervisors, and the fact that he was issued an attendance final written warning in September. Chopra and Black credibly testified that Jackson missed work on November 14 even though Jackson was given the option of securing a shift swap with another employee on less than 48 hours' notice. Respondent terminated other employees for this same excess attendance point accumulation. Coates recalled that from 3–5 employees had been terminated other than Jackson for excess attendance points. Faria is one specific example of an employee, like Jackson, who was terminated for excess attendance points in a year's time on November 16, 2016—almost a year before Jackson's termination. (GC Exh. 27.)

In addition, the fact that Jackson did not even attempt to take advantage of his supervisor's second accommodation to allow him to swap his November 14 shift with another employee when Jackson knew and understood that missing work would result in his accruing another attendance point while he was under a Final Written Warning demonstrates that Respondent had reasonable non-retaliatory justification for terminating Jackson on December 14, 2017. Accordingly, I find that Respondent has proven that it would have discharged Jackson on December 14, 2017, even in the absence of any alleged protected union or concerted activity. I therefore find that the General Counsel failed to prove that Respondent discharged Jackson for unlawful or discriminatory reasons, and Respondent did not violate Sections 8(a)(1) or 8(a)(3) of the Act.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Sections 8(a)(1) or 8(a)(3) of the Act, as alleged in the complaint.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended[17]

## ORDER

The complaint is dismissed in its entirety.

Dated: Washington D.C., April 9, 2019

Gerald Michael Etchingham
Administrative Law Judge

[17] 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.