

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

**IMPACT WELLNESS CENTER, INC.**

**and**

**Case 28-CA-221411**

**MELISSA TREJO, an Individual**

**and**

**Case 28-CA-223540**

**LAWRENCE THOMAS, an Individual**

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

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## **I. INTRODUCTION**

Respondent Impact Wellness Center, Inc. (Respondent) provides behavior modification programs for children with mental and behavioral disorders and educational and recreational deficits. Its employees work in a fast-paced environment, where they often encounter difficult behaviors. Respondent acknowledges that the work is intense and overwhelming.

In this environment, Respondent's employees Melissa Trejo (Trejo) and Lawrence Thomas (Thomas) expressed concerns to each other and to other employees about Respondent's management being disorganized, Respondent's management failing to communicate with employees, Respondent maintaining an inadequate ratio of staff to children, and Respondent delaying in paying employees or reimbursing them for out-of-pocket expenses. Trejo then brought these group concerns to Respondent's Executive Director, Carolyn Pridgeon (Pridgeon).

Pridgeon was offended that Trejo had discussed these concerns with others instead of first bringing them individually to her. She and her Board of Directors viewed this conduct as a violation of Respondent's workplace etiquette and open-door policies. Because of this, after Trejo disclosed to Pridgeon that she and others had discussed workplace concerns, Pridgeon interrogated employees about their involvement, threatened Thomas with discharge after he confirmed he shared the concerns expressed by Trejo, and discharged Trejo and Thomas.

Although Respondent asserts that it discharged Trejo for other reasons and that Thomas quit, the evidence belies these claims. Pridgeon specifically told Trejo that Respondent had decided to discharge her after she "staffed" (i.e., discussed) the email in which Trejo raised group concerns with her Board of Directors, and she specifically cited Trejo's "whistleblowing," meaning her discussing workplace concerns with other employees instead of raising them directly with Respondent, as a reason for her discharge. Respondent has failed to meet its burden

of establishing that it would have discharged Trejo if not for her protected activities. Although Pridgeon asserts that Thomas quit, Thomas testified, consistently and credibly, that he was threatened with discharge for his protected activities then discharged, while Pridgeon's testimony that he quit was riddled with inconsistencies.

Counsel for the General Counsel (CGC) therefore respectfully requests that the Administrative Law Judge find that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged, and issue a recommended order providing for all appropriate relief.

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

This case was heard before Administrative Law Judge Lisa D. Ross (the ALJ) on February 5 and 6, 2019 in Las Vegas, Nevada. The Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint) alleges that Respondent violated Section 8(a)(1) of the Act by interrogating employees and inviting employees to quit in response to protected activity. Related to these allegations, the ALJ granted CGC's motion to amend Complaint paragraph 4(e)(2) to allege that Respondent "threatened employees with discharge because they engaged in protected concerted activity" rather than "invited its employees to quit their employment." (Tr. 11:19-15:12; GCX 1(e)).<sup>1</sup>

The Complaint also alleges that Respondent violated Section 8(a)(1) of the Act by discharging employees Trejo and Thomas because they engaged in protected, concerted activity.

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<sup>1</sup> GCX\_\_ refers to General Counsel's Exhibit followed by the exhibit number; RX\_\_ refers to Respondent's Exhibit followed by exhibit number; "Tr. \_:\_" refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing.

The ALJ granted CGC's motion to amend the alleged date of Thomas's discharge in Complaint paragraph 4(c) from May 22 to May 21, 2018.<sup>2</sup>

### **III. ANALYSIS OF THE FACTS**

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

##### **1. Respondent's Operations and Organizational Structure**

Respondent operates a facility offering an array of behavior modification programs for local youth in the Las Vegas area. The programs are designed to provide activities and curriculum for youth of all age groups with mental and behavior disorders. (Tr. 31-32). They include before/after school programs, preschool programs, and summer camps. (Tr. 31). Respondent also provides transportation services – both to and from the facility – for program participants. (Tr. 39).

Pridgeon is Respondent's Founder and Executive Director. (Tr. 31). In this role, Pridgeon wears many hats. She "creates the curriculum and the daily activities that the kids are engaged in," coordinates the transportation route, fosters relationships with schools and parents, and is responsible for the day-to-day operations, including scheduling staff. (Tr. 31-32).

Respondent has (or had)<sup>3</sup> a Board of Directors, which Pridgeon described as an "advisory board" before the Board of Directors was put in place sometime in 2018. (Tr. 34-35, 184). In May 2018, there were three members on the Board of Directors, including Pridgeon, Gloria Hollowell (Hollowell), and Amia Mulholland (Mulholland). (Tr. 37). Hollowell<sup>4</sup> is the President of the Board of Directors and handles the human resources files including the

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<sup>2</sup> All dates hereinafter refer to 2018, unless otherwise noted.

<sup>3</sup> Pridgeon testified during Respondent's case-in-chief that, currently, there is no Board of Directors. (Tr. 179)

<sup>4</sup> Hollowell is Pridgeon's cousin and has a significant pecuniary interest in the operations as an investor. (Tr. 35, 144-145). Hollowell did not testify in this matter even though, according to Pridgeon, Hollowell was involved in material conversations on May 21.

fingerprinting and background checks for employees. She also advises Pridgeon on day-to-day operational decisions. (Tr. 35).

In addition to being a member of the Board of Directors, Mulholland is a Clinical Supervisor or Clinical Director. (Tr. 36-37, 87, 184-185). In her role, Mulholland supervises the Clinical Therapists who work under her license. (Tr. 36). Mulholland primarily supervised “from afar,” as she is “contracted for only 10 hours a month.” (Tr. 36). Mulholland does not work at Respondent’s facility but is required to provide clinical training to staff on a monthly basis. (Tr. 185, 207). As discussed more fully below, Mulholland conducted a training meeting on about May 17. (Tr. 68, 185-186).

Pridgeon testified that Respondent’s workplace is a fast-paced workplace and that its employees often encounter difficult behaviors, such as children running away, having tantrums, or even becoming aggressive. (Tr. 42-43, 49-50). Pridgeon acknowledged that the job is so intense and overwhelming that many employees do not make it beyond 30 days of employment. (Tr. 44). Pridgeon explained that, because of this, she gives her employees leniency in terms of the enforcement of work rules. (Tr. 42-43).

## **2. Respondent’s Staff and Other Supervisors**

In May, about seven individuals were employed in various positions at Respondent’s facility: Lawrence Thomas (Thomas), Melissa Trejo (Trejo), BrookeLynn Elder (Elder), Marco Walker (Walker), “Mr. Vic” (Vic), Felicia Thomas (Felicia Thomas), and Keisha Casalberry (Casalberry). (Tr. 37; 51; 57-58; 67; 232). Thomas was initially hired in mid-April as an Adolescent Program Provider. Shortly thereafter, Pridgeon reduced his hours at the request of his job developer or coach. At that time, he also changed positions from a Program Provider to Support Staff. (Tr. 51-52).

Trejo was hired on about May 5 as Support Staff and a Driver. On about May 17, Pridgeon promoted Trejo to the position of Transportation Coordinator, a position that Walker held at the time. (Tr. 57-59; 233-234). Vic was Driver who worked for Respondent for about four years. (Tr. 58). Elder worked as a Program Provider or Support Staff. (Tr. 51).

Felicia Thomas worked as a Licensed Therapist for Respondent. As a Therapist, Felicia Thomas worked with the children in the program, providing individual therapy. (Tr. 38). In May, according to Pridgeon, Felicia Thomas was the acting Clinical Supervisor. (Tr. 37)

In mid-May, Respondent hired Casalberry as its Business Manager.<sup>5</sup> (Tr. 67, 69, 84, 88, 92, 149, 192-193). She was first introduced to some staff on about May 17. At that time, either Casalberry (in Pridgeon's presence) or Pridgeon instructed employees to raise issues with Casalberry instead of Pridgeon going forward when discussing the proper chain of command. (Tr. 67-68, 270-271). Further, according to Thomas and consistent with Trejo's testimony on Casalberry's role, Casalberry told Thomas that employees were to report to her going forward, after she was hired. (Tr. 317). Although Pridgeon described Casalberry's duties as merely being a conduit between her and the staff for certain issues, in addition to assisting with administrative tasks (Tr. 66-69), record evidence shows that Pridgeon expected employees to follow Casalberry's direction, especially in her absence. (Tr. 83-84; 86; 88; 92; 124; 137; 171). Notably, Respondent did not introduce any documents, including Casalberry's offer letter to support Pridgeon's testimony minimizing Casalberry's role as the Business Manager. (Tr. 67).

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<sup>5</sup> Casalberry's supervisory status is at issue in this matter. Notably, Pridgeon was initially evasive regarding Casalberry's title. When asked, "Casalberry was hired as the business manager; is that right?", Pridgeon answered, "She was actually an administrative assistant." (Tr. 66:11-14). Pridgeon continued, minimizing Casalberry's role and doubling down on the fact that "Casalberry was hired as an administrative assistant[.]" (Tr. 66:14-23). However, throughout her testimony, Pridgeon continuously referred to Casalberry as the "Business Manager." (Tr. 67, 69, 84, 88, 92, 149, 368). Although Casalberry's title is not dispositive on the disputed issue, the ALJ should consider Pridgeon's combative and inconsistent testimony when weighing her credibility and resolving material facts.

Regardless of Casalberry's supervisory position though, Pridgeon admitted that Casalberry informed her that employees were complaining about their working conditions shortly before Thomas, Trejo, and Elder, were discharged as discussed below.

### **B. Employees Begin Discussing Workplace Concerns**

Soon after Trejo was hired, employees began discussing their working conditions with each other. Initially, Trejo began discussing wages with Thomas. She questioned him on when she should expect to get paid and he relayed concerns he had about not getting paid yet. They had several conversations to this effect.<sup>6</sup> (Tr. 268-270). Trejo also discussed other concerns with Thomas and Elder,<sup>7</sup> including the ratio of staff to children in the program, the lack of breaks, the overall lack of organization, and lack of communication regarding the transportation route. (Tr. 270:8-17; 324-325). As Thomas described, Trejo and Elder generally came to him in the break room and they would discuss how the operations could be more efficient for them. (Tr. 324). For his part, Thomas discussed his concerns with not having a set schedule, and how Pridgeon got upset or "fussed" when he approached her about certain things. (Tr. 269; 325).

Whether these conversations occurred or whether Respondent knew about the conversations is indisputable. As Pridgeon admitted, she learned that employees were discussing these workplace concerns amongst each other when Casalberry revealed as much during a conversation on May 20. (Tr. 88:17-90:6; 91:8-93:13). According to Pridgeon, Thomas also

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<sup>6</sup> Trejo recalled that these conversations occurred on about May 14 and 16. (Tr. 269). Respondent introduced timekeeping records in an effort to discredit this testimony. (Tr. 395:21-396:5; RX 6). However, regardless of the exact date these conversations occurred, Pridgeon admitted that she knew Thomas and Trejo had these discussions. (Tr. 95-97).

<sup>7</sup> Elder's resignation letter tends to corroborate that that she was also involved in these conversations as the reasons for her resignation include, "the unorganized transportation process, issues with communication, and last month's payment issue." GCX 8(b).

confirmed to her that Trejo was instigating these conversations when he “sung like a canary” on May 21 after she questioned him about his discussions with his coworkers. (Tr. 95:5-97:15).

As discussed in the next section, employees’ concerns came to a head during the chaotic weekend before Respondent discharged Trejo, Thomas, and Elder.

### **C. May 19 and May 20: The Weekend of Chaos and Growing Concerns of Disorganization**

Pridgeon did not work at Respondent’s facility on Saturday May 19, or Sunday May 20. (Tr. 65). According to Pridgeon, she left detailed instructions related to program activities and employees’ duties. (Tr. 137:11-20). However, as the weekend unfolded, employees grew more concerned with the lack of organization and their discussions with each other, and with Casalberry, reflected those concerns. (Tr. 246-248; 266-269). The details of these events follow.

#### **1. May 19: The Skating Rink Incident and Related Protected Activity**

On Saturday, May 19, Trejo worked with Casalberry and Elder. Felicia Thomas was also present at the facility for at least part of the day. In the early afternoon when Trejo returned to the facility after taking the company vehicle for service, she had a conversation with Casalberry, Elder, and Felicia Thomas. (Tr. 266-267). Elder began discussing how there were too many children for them to watch, and Trejo agreed that there should be a set ratio. Casalberry joined the conversation and said that everything was too disorganized. She explained that Pridgeon originally wanted Walker to handle the drop-offs that day, but that she changed it and now wanted Trejo and Elder to handle the drop-offs. Elder added that this was a problem because she had an important meeting to go to that day. Casalberry told them that she was going to discuss the disorganization with Pridgeon and bring it to her attention. At that point, Felicia Thomas laughed and told them not to worry about it. (Tr. 266-268; see also GCX 2 at 1). In part, Trejo’s

account of this conversation is corroborated by Pridgeon's testimony related to what Felicia Thomas told her about what transpired that day. (Tr. 135:16-136:9; 136:22-137:21).

After that, Trejo and Elder took a group of children to the skating rink as instructed by Casalberry. (Tr. 258:17-20). Casalberry gave them petty cash to pay for the children's admission to the rink. However, when they arrived, they did not have enough petty cash to pay for all the children to skate, so Trejo contacted Casalberry to figure out what to do. Casalberry told them to take the children to a nearby Burger King so that they could eat before being dropped off, which they did. (Tr. 258-259; see also GCX 2 at 1).

## **2. May 20: Routes, Scheduling, and Disruptive Children**

The following day, Sunday, May 20, Trejo reported to work in the morning. Shortly after, Casalberry and Thomas arrived. (Tr. 244:1-12). Trejo was trying to figure out the pick-up route but could not find the right information. She asked Thomas if he knew which children needed to be picked up but he was not sure. Then, because Trejo could not access Evernote,<sup>8</sup> Thomas sent a group message to other employees to find out if anyone knew the route for that day. (Tr. 243-245; 313:3-314:23).

Then, Pridgeon called Trejo. Trejo had Pridgeon on speakerphone with Casalberry and Thomas nearby. First, Pridgeon questioned Trejo about why the route was not made. Then, Pridgeon asked why Thomas was there. Trejo explained that he was already scheduled to work that day but came in a little early to make sure Casalberry could access the facility while Trejo was on route because Casalberry did not have a key. Pridgeon told her to tell Thomas to go home and the conversation ended. (Tr. 245-246; 314:24-316:9).

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<sup>8</sup> Evernote is an online interoffice communication tool that Respondent uses. (Tr. 165).

After that, Trejo and Thomas shared their concerns about the overall disorganization with Casalberry. First, Thomas quipped to Trejo, “this is what I’m talking about.” (Tr. 316:8-14). Casalberry said that she did not know why Pridgeon would send Thomas home, as it was a waste of his time and gas to come to the facility in the first place. Casalberry said, “so far what I’ve seen is a lot of disorganization.” (Tr. 247:2-16). In response, Trejo and Thomas agreed and told her that lot of things were disorganized and there was a lack of communication on a regular basis. (Tr. 247:2-23). As Thomas testified, he and Trejo did most of talking as they explained how it was hard to do their jobs because they did not always have clear direction on what to do. They also explained that they could be more efficient at their jobs if everything was more organized. Casalberry told them that she needed to know the problems so that she could help resolve the issues because they reported to her. (Tr. 317:12-318:6). She also told them that she would raise their concerns with Pridgeon, as the Business Manager, and see what happens. (Tr. 247:20-23). Trejo’s and Thomas’ testimony on this conversation is, overall, very consistent and should be credited for that reason. Further, as discussed below, Pridgeon’s testimony related to what Casalberry reported to her later that night also corroborates that Trejo and Thomas had this conversation with Casalberry.

After this conversation, Thomas went home, and Trejo picked up the children for the program. As the day continued, an incident unfolded with a child, who had been unable to remain in other programs for long, and had only been able to remain non-institutionalized since beginning to attend Respondent’s program. (Tr. 79).

Trejo provided the only first-hand account of what happened with the disruptive child.<sup>9</sup> According to her, the incident began when Trejo was interrupted while she was doing some

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<sup>9</sup> Pridgeon provided testimony about this incident, but aside from the portions where Pridgeon was either on the phone with Casalberry or Trejo, Pridgeon’s testimony provides only a second-hand account. (Tr. 78-82). For that

administrative work in an office area by a child. At the time, Casalberry was overseeing the children doing activities. The child told Trejo that another child had hit her, so Trejo went to the doorway to see what was happening. Casalberry placed the child (who had come into the office area) in a time-out and Trejo went back to finish her work. (Tr. 248-249).

Then, Trejo noticed the child was up and ripping things off the wall. Trejo and Casalberry attempted to get the child to stop, but the child's destruction continued. Amid all this, Casalberry pulled Trejo aside to talk. Casalberry unloaded her own frustration, telling Trejo that she was tired of being there and it was too stressful. (Tr. 249:21-250:12).

After that, the child came over and snatched something out of Casalberry's hand. Casalberry responded, "[L]ittle girl, you're not going to sit there and snatch anything out of my hand!" (Tr. 250:24-251:2). As Trejo testified, "things were getting really out of control" at this point, and the child went into another room and closed the door. (Tr. 251:2-5).

After several attempts, Trejo reached Pridgeon over the phone and told her what was going on and asked for direction on how to handle the situation. Pridgeon told Trejo to have Casalberry remove the other children from the building and take them to the park.<sup>10</sup> She told Trejo to call the local police department and mentioned that this was not the first time Respondent had to do so because of this child. (Tr. 251-253).

From that point, Trejo was in regular contact with Pridgeon updating her on what was happening. Trejo contacted the police department as she was instructed to do. A medical ambulance arrived with the police. Trejo gave the medical personnel and police officers

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reason, and because (1) Respondent made no apparent effort to call Casalberry as a witness, and (2) Pridgeon's testimony across the board is unreliable as discussed herein, the ALJ should not give any weight to Pridgeon's account of what happened during the incident with the disruptive child.

<sup>10</sup> Eventually, Walker arrived and took the children to the park with Casalberry. (Tr. 253:24-254:2; 257).

information about the child's identity that she got from Pridgeon. Trejo also attempted to contact the child's foster parent and social worker, but the medical professionals or police officers removed the child from Respondent's facility because no one else was available to pick the child up. (Tr. 252-256). Email records show that Trejo sent Pridgeon emails updating her on what happened, and Trejo spoke with Pridgeon over the phone several times getting instructions along the way. (Tr.252-257; GCX 6; GCX 7). Casalberry instructed Trejo to draft an incident report on a form they found in the office before Trejo left and she did. (Tr. 262-263).

After all the children were gone, Pridgeon spoke with Trejo again over the phone. According to Trejo, Pridgeon confirmed with Trejo that Casalberry was not nearby. Then, Pridgeon told Trejo that she saw everything that happened on the surveillance camera system. Pridgeon said that Casalberry was at fault for aggravating the disruptive child and asked Trejo her opinion of Casalberry's fitness for the position.<sup>11</sup> Trejo responded that Casalberry does her job, but that she gets frustrated, just like everyone else does, because of the lack of communication and disorganization. (Tr. 257; 259:15-260:8). Then, Pridgeon began questioning Trejo about the skating rink incident. Pridgeon questioned why Trejo and Elder did not cover the extra money to get the children into the skating rink and request to be reimbursed later.<sup>12</sup> Trejo responded that she and Elder had their own bills and that it was not their responsibility to pay for activities out-of-pocket. Trejo told her that the employees were never told that they would be covering expenses out-of-pocket when they were hired, and no one

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<sup>11</sup> This is corroborated by Trejo's May 21 email to Pridgeon stating, in part, "When you asked me what I thought about [Casalberry] for the position I told you she does her work. I also told you as well she gets frustrated along with the rest of the staff including myself due to things not being organized and lack of communication." (GCX 2 at 1).

<sup>12</sup> Interestingly, although Pridgeon testified that she never spoke with Elder about what happened over the weekend because Elder submitted her resignation on Monday, May 21 (Tr. 100-101; 105), Pridgeon testified that she questioned Elder about why Trejo and Elder did not pay the extra \$28 for the skating rink admission, which is strikingly similar to the conversation that Trejo described. (Tr. 138:8-17).

figured they should be doing that because they were not even reimbursed for gas like they should be. Pridgeon responded by hanging up on Trejo. (Tr. 260:9-261:4).

Pridgeon gave contradictory testimony about whether she even had a conversation with Trejo after the incident on that day. First, although unresponsive to the actual question that was asked, Pridgeon testified that she “talked to [Trejo] on Sunday night, when [they] talked about the incident with [the disruptive child].” (Tr. 64:14-21). Pridgeon continued, offering additional testimony about this conversation, albeit in far less detail than Trejo. Pridgeon testified that when she spoke with Trejo that evening about the incident, she also asked Trejo about the skating rink incident and taking the children to Burger King. Pridgeon testified that she asked Trejo to send her an email detailing why Trejo thought the weekend was so challenging. (Tr. 64:19-65:9). Notably, this testimony tends to corroborate Trejo’s testimony. However, later, in response to questions from the ALJ, Pridgeon indicated that she did not speak with Trejo Sunday night about the incident, which was why she contacted Trejo on Monday morning. (Tr. 82:5-9).

The ALJ should credit Trejo’s testimony regarding this conversation for several reasons. First, Pridgeon’s testimony related to this conversation in response to CGC’s questioning was glaringly vague in comparison to Trejo’s testimony. For example, Pridgeon entirely glossed over any details about what was discussed related to the disruptive child incident. And, Pridgeon did not offer any testimony as to what Trejo said (or did not say) during this conversation. Second, Pridgeon failed to deny key points where denials would, arguably, have been favorable to Respondent. For example, Pridgeon never denied telling Trejo that she thought Casalberry was at fault for not de-escalating the disruptive child. As another example, although Pridgeon admitted that the facility has cameras during her testimony, Pridgeon never denied telling Trejo that she saw what happened during the incident over the surveillance cameras as it unfolded.

Third, just as Trejo's testimony about this conversation suggests, Pridgeon revealed that she was, in fact, upset that Trejo and Elder did not pay out-of-pocket at the skating rink (Tr. 137:5-10; 401:1-7), which was, according to Trejo, a point of contention during this conversation. Finally, in comparison to Pridgeon, who was often emotional, combative, and meandering throughout her testimony, Trejo was poised and answered questions directly in easy-to-follow detail. Accordingly, the ALJ should credit Trejo's testimony discussed above, and any other testimony from Trejo when in conflict with Pridgeon's.

### **3. Pridgeon Learns that Employees are Complaining About Their Working Conditions**

Just as Casalberry told employees she would, she disclosed their concerns to Pridgeon on Sunday night, May 20. (Tr. 65:20-23; 66:3-9; 90-94). After the incident with the disruptive child and before she locked up the facility upon closing, Casalberry called Pridgeon attempting to quit because the stress of the job was too much. (Tr. 88:17-90:2). According to Pridgeon, she asked Casalberry what happened that day. Casalberry blamed Trejo for not de-escalating the situation. Then, Pridgeon asked why Casalberry did not follow her directive to take the other children to the park.<sup>13</sup> Casalberry also, supposedly, blamed that on Trejo. (Tr. 90:5-23). At that point, Pridgeon asked Casalberry if she could continue working with Trejo. Casalberry told Pridgeon that she thought Trejo, Thomas, and Elder were going to quit. (Tr. 91:3-19).

Pridgeon probed Casalberry on why she thought Trejo and the others were going to quit. In response, Casalberry disclosed that Trejo, Thomas, and Elder were discussing their concerns about Respondent's operations, including their pay, and how they felt about their employment over the weekend. (Tr. 91:10-19). As Pridgeon testified, her initial reaction upon learning this

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<sup>13</sup> Notably, the record indicates that at some point the children were taken to the park, which resulted in one child having an asthma attack. (GCX 2; GCX 6; Tr. 257; 261).

was to question why employees did not bring their concerns to her attention at the staff meeting a few days prior or at any time directly to her. Pridgeon continued, lamenting how employees showed her appreciation for their jobs, but that “as soon as the team disseminate[s],” they start discussing their paychecks with each other, which to her “understanding, [they’re] not even supposed to be able to discuss.” (Tr. 91:20-92:5). According to Pridgeon, this was the last time she ever spoke with Casalberry. (Tr. 65:20-66:8).

The following day, Pridgeon learned from Felicia Thomas that the weekend was chaotic and employees were concerned with miscommunication. As discussed below, Pridgeon’s testimony regarding the timeline of events on May 21 is highly inconsistent. However, Pridgeon revealed that she spoke with Felicia Thomas before she decided to discharge Trejo that day. During this conversation, Felicia Thomas told Pridgeon what happened on Saturday, May 19. In sum, Pridgeon admitted that Felicia told her that Trejo was complaining to other employees about the directions they had for the day. Felicia Thomas also told Pridgeon that everyone was arguing, “trying to figure out who miscommunicated what.” (Tr. 136:4-24). Pridgeon elaborated that she learned that Thomas, Trejo, and Elder were discussing the miscommunication and felt that Casalberry had not worked there long enough to direct their work. She also learned that they were concerned that Casalberry was not in communication with Pridgeon enough that day. (Tr. 137:11-20). While testifying about this conversation, Pridgeon was clearly upset that they were complaining about miscommunication, as she often repeated the fact that she had left written instructions. (Tr. 136:10-14; 136:23-137:4).

#### **D. Trejo Sends Email Exposing Employees' Protected Activity, and Respondent Discharges Employees in Response**

Pridgeon discharged employees Trejo, Thomas,<sup>14</sup> and Elder on May 21. Pridgeon's testimony describing the events on this day is very inconsistent. Despite these inconsistencies, as discussed below, the record shows that Pridgeon decided to discharge them after receiving an email from Trejo that cemented what Pridgeon had recently learned: that employees were increasingly concerned about Respondent's lack of organization and Pridgeon's poor communication.

##### **1. Trejo Sends Pridgeon an "Important Message"**

Pridgeon called Trejo in the morning on May 21. According to Pridgeon, she asked Trejo about the incident with the disruptive child from the day before. Trejo reminded Pridgeon that she was taking a sick day, so Pridgeon asked Trejo to send an email detailing the incident along with a statement about whether Casalberry did anything wrong during the incident. (Tr. 82:12-83:10). According to Trejo, Pridgeon also asked her to explain the skating rink incident just like she did the night before when they spoke. (Tr. 264:2-6).

Then, at 11:10 a.m., Trejo sent Pridgeon an email with the subject, "IMPORTANT MESSAGE." (GCX 2). The first half of the email details what happened during the skating rink incident, and what happened with a child who went to the park during the incident with the disruptive child.<sup>15</sup> (GCX 2). Trejo ended her email with a call for change, stressing that employees were concerned with the lack of communication and disorganization. In relevant part, Trejo's email states:

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<sup>14</sup> Whether Thomas was discharged is disputed. As discussed below, credible record evidence supports a finding that Thomas was discharged after Trejo sent the email to Pridgeon. See Section III.D.3.b below.

<sup>15</sup> The narrative related to these incidents is consistent with Trejo's testimony regarding what actually happened during these incidents, as detailed in Section III.C., above.

[Casalberry] gets frustrated along with the rest of the staff including myself due to things not being organized and lack of communication. If you ever had completed the 2<sup>nd</sup> part of orientation and called a meeting with [Respondent's] staff . . . you will be able to get everyone's opinion. . . . You have a bad attitude and don't listen at times. That's what [is] going to make people not stay and work for [Respondent]. It's a nice company . . . and we all enjoy being around the kids. . . . You have good staff there who are dedicated and loyal. Some work [two] jobs and some have their own family problems to deal with, but haven't gotten off days or become overwhelmed when its so many kids to one person when there's a ratio. Some get up early in the morning including myself who comes a long way just to show up [early] and walk a mile just to get to [the] bus stop. I never complained or just didn't show up. . . . You have a good support team and everyone including [Walker], [Thomas], [Casalberry], and myself. Who are willing to be there for the company but if you don't get things better organized or hear any of us out. People are not going to stay and you will remain to have a turn over. If you were to go over things one time and provide what was needed in a meeting. Then it would be the perfect place to work for. . . . I hope you don't get offended and just hear [me] out because I mean well and so do the others. Everyone wants things to be order so things [can] run smooth once summer camp starts.

(GCX 2 at 1). Trejo explained that she sent the email because, although Casalberry said that she would raise employees' concerns with Pridgeon, she did not think that was happening, and her calls to Pridgeon went straight to voicemail at that time. (Tr. 266; 284-285). Trejo also testified that she based the concerns raised in her email to Pridgeon on the conversations she had with her coworkers, including the conversation described above on May 19 when Felicia Thomas was present. (Tr. 266:2-270:17).

## **2. Pridgeon Investigates Whether Employees Share Trejo's Concerns**

Initially, Pridgeon admitted that, after she received Trejo's email, the Board of Directors instructed her to call everyone referenced in Trejo's email "to get to the bottom of what was going on." (Tr. 100:18-101:3). Pridgeon elaborated, explaining that the Board of Directors wanted to know if Trejo was "whistleblowing and gossiping in the workplace, that goes against [Respondent's] workplace etiquette rule." (Tr. 102:4-15). Pridgeon added that there was a proper workplace etiquette; a way to handle situations and discuss them. (Tr. 102:13-15). She

went further, explaining that “if [employees] don’t know [her] intentions, [they] can’t spread what [her] management intentions are, without asking [her].” (Tr. 102:16-18).

Pridgeon’s initial testimony suggests, as the ALJ should find, that after the Board of Directors (or Mulholland)<sup>16</sup> instructed her to call everyone, she called Walker, Thomas, and Trejo. (Tr. 101:1-4). The only employee she did not contact was Elder, because Elder had already resigned. (Tr. 101:4-6). Trejo did not answer Pridgeon’s calls. (Tr. 105; 112)

Consistent with Pridgeon’s *initial* testimony on this issue, Thomas testified that Pridgeon called him and questioned him about Trejo’s email. According to Thomas, he told Pridgeon that he did not know anything about Trejo’s email, but that he had workplace concerns. He told her that he thought “the place was disorganized, and that she was unapproachable.” (Tr. 320:20-321:8). In response, according to Thomas, Pridgeon told him that if he felt that way, she no longer needed him. (Tr. 321:9-21). Thomas apologized and told her that it was not personal and that he enjoyed working with the children, but Pridgeon said she no longer needed him. (Tr. 321:14-21). Thomas explained that Pridgeon sounded upset during the conversation about Trejo’s email as she kept referring to it. (Tr. 321:23-322:1). Immediately after, Thomas called Trejo. He asked her about the email she sent and told her that he had been fired. (Tr. 272:17-273:2; 322:2-323:5).

Ultimately, Pridgeon denied calling Thomas after she received Trejo’s email while claiming that Thomas quit earlier that morning. (Tr. 105:12-15; 114-116). According to

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<sup>16</sup> As discussed below, Pridgeon’s testimony is so unreliable that it is likely that “the board” did not instruct Pridgeon to call everyone as there was not a board meeting, but rather, Mulholland instructed her to do so. Another possibility is that Pridgeon acted on her own accord and the “the board” is just a euphemism for herself, which is more consistent with Mulholland’s testimony. Regardless of where the instruction came from, if there was one, the record shows that Pridgeon called Walker and Thomas as discussed herein.

Pridgeon, she called Thomas early in the morning.<sup>17</sup> However, Pridgeon’s apparent attempt to distance her interaction with Thomas from Trejo’s email fell short. Throughout her shifting testimony, Pridgeon gave several reasons for why she called Thomas, none of which withstand scrutiny. First, Pridgeon testified that she called Thomas to go over what happened on Saturday with the skating rink incident. (Tr. 94). The record does not show that he was involved in that incident. Then, Pridgeon testified that she called Thomas because she was responding to an email he sent about whether he had to work that day. (Tr. 115:16-25). Bolstering her testimony, Pridgeon explained that she “never” replies by email but calls instead. (Tr. 115:16-25). But then, after being confronted with the fact that she had actually responded to Thomas’ email about his schedule via email,<sup>18</sup> Pridgeon changed her testimony once again. (Tr. 126:1-127:19; GCX 4). This time, she claimed that she called Thomas to investigate what happened during the incident with the disruptive child, even though Thomas was not involved in that incident or even working when it happened. (Tr. 128:2-18).

Additional key contradictions in Pridgeon’s testimony destroy her claim that she spoke with Thomas before and not after she received Trejo’s email. For example, Pridgeon admitted that she called Walker after the Board of Directors instructed her to investigate whether employees shared Trejo’s concerns, reluctantly admitting that she told Walker about Trejo’s email and the Board of Directors’ instruction to call him, thus showing that she spoke with Walker after receiving Trejo’s email. (Tr. 104:2-8). Pridgeon also admitted that when she spoke with Thomas on May 21, she asked him why he had not raised his workplace concerns to her.

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<sup>17</sup> Pridgeon let slip that she did not speak with Thomas or anyone until “towards the afternoon” (Tr. 126:21-127:3) which is consistent with Pridgeon’s initial testimony that she started to call employees after she received Trejo’s email.

<sup>18</sup> Respondent did not provide the emails until after Pridgeon testified that she “never” replies to emails in an effort to support her testimony about the reason she called Thomas. (Tr. 115; 121-122; 126; GCX 4).

Seemingly unwittingly, Pridgen explained that she knew Thomas had concerns “[b]ased off what [Walker] said” during her conversation with him on that same day. (Tr. 111:18-112:6).

Pridgeon confirmed that she only spoke with Walker once that day. (Tr. 112:25-113:7). Based on this sequence of events, Pridgeon must have called Thomas after receiving Trejo’s email and discussing it with Walker, for the purpose of “getting to the bottom of it,” just as Thomas’ testimony shows. In fact, Pridgeon testified as much in another apparent slip when she described how her conversation with Walker ended: Pridgeon testified, “I said, okay, Marco [i.e., Walker], let me go ahead and give [Thomas] a call, because the board said I have to call everyone.”<sup>19</sup> (Tr. 112:7-16).

By way of another example, Pridgeon’s testimony related to the sequence of events is implausible given the nature of the conversation she admits to having with Thomas in context with the Board of Directors’ instruction to investigate whether other employees shared Trejo’s concerns. Pridgeon testified that when she spoke with Thomas, she told him that Casalberry told her that he had concerns that he had not brought to Pridgeon’s attention. (Tr. 93:23-94:1). She also testified that she confronted him about “everybody complaining about miscommunication” and calling her “unprofessional and [un]organized.” (Tr. 95:1-4). According to Pridgeon, she told him, “[Casalberry] said that you guys had a lot to talk about this weekend. Do you mind discussing this with me? Why is it that I’m always the last one to find out everything?” (Tr. 95:7-11). In response, Pridgeon testified that Thomas “got defensive, and he sung like a canary.” (Tr. 95:12-15). Apparently, Thomas told her that Trejo contacted every employee, asking them about their concerns about pay and other things. (Tr. 95:15-21). Then, Thomas disclosed that he

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<sup>19</sup> This testimony does not square with Pridgeon’s self-serving testimony that the ALJ should discredit that during her conversation with Walker, she told him that Thomas had quit earlier that day. (Tr. 103:23-104:1).

told Trejo that he was concerned about why it took so long to get paid. (Tr. 95:23-96:1).

Pridgeon testified that she responded to Thomas by telling him that it was his fault for not filling out the right paperwork. Then, by her own admission, Pridgeon asked Thomas why he would “participate in a conversation (*i.e.*, discuss his concerns about pay with Trejo), instead of owning responsibility for your role?” (Tr. 96:12-22). As Pridgeon explained, she was upset that he had apparently engaged in conversations that made her look bad or “like a villain,” while he did not tell Trejo that he was at fault for not getting paid on time.<sup>20</sup> (Tr. 96:23-97:4). Finally, Pridgeon testified that Thomas admitted that Trejo was “collecting information on [Pridgeon], and taking notes in a notebook, and he admitted that all of these things were going on.” (Tr. 97:5-10).

It simply does not make sense that Pridgeon, having already become aware of all the workplace concerns from Thomas (Tr. 115:4-10), would act as though she was wholly unaware of employees’ discussions when the Board of Directors instructed her to “get to the bottom of it” after receiving Trejo’s email. Indeed, if Thomas had “sung like a canary” before ever receiving Trejo’s email, there would be no need to investigate in the first place. Accordingly, the ALJ should find that Pridgeon questioned Thomas about Trejo’s email, in addition to questioning him about what she learned from Casalberry, after she was instructed to investigate Trejo’s email. Moreover, the ALJ should consider the breadth of inconsistencies described above when weighing Pridgeon’s overall credibility, especially when the disputed issues in this matter are considered.<sup>21</sup>

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<sup>20</sup> As discussed below, Pridgeon claims that Thomas quit during this conversation.

<sup>21</sup> Three of the four substantive, disputed complaint allegations relate to Pridgeon’s conversation with Thomas. It is not a stretch for Pridgeon to believe it is in Respondent’s best interest to insulate this interaction from the best evidence of protected activity in this matter – Trejo’s May 21 email.

As mentioned above, Pridgeon contacted Walker in her attempt to investigate whether employees shared Trejo's concerns.<sup>22</sup> In sum, Pridgeon told Walker that she received an email from Trejo that listed his name and after forwarding the email to the Board of Directors, she was instructed to find out what his concerns were. (Tr. 104:2-8). Pridgeon asked whether he had any concerns and Walker insisted that he did not have any. Walker also disclosed that he told "them" that he did not have any. (Tr. 103:2-10). Pridgeon asked Walker who he meant. Walker told her that Trejo called him the night before asking him to "put something in writing pertaining to [his] working conditions." (Tr. 103:11-13). But, Walker told Pridgeon that he told Trejo that he did not have any issues. Pridgeon further testified that Walker continued to assure her that he did not have any concerns, offering that Walker said, "You've paid me on time every time. You provide me my schedule" and "I didn't have any issue with you or the way you handle things." (Tr. 103:12-104:14). Finally, Pridgeon testified that Walker said that more than likely, Trejo "and them are going to be quitting." (Tr. 103:21-25). In self-serving fashion, Pridgeon added that she told Walker, "funny, [Thomas] just quit."<sup>23</sup> (Tr. 104:1).

As discussed below, Pridgeon discharged each of Respondent's employees who voiced concerns about their working conditions on May 21.

### **3. Pridgeon Discharges Trejo, Thomas, and Elder, but not Walker**

After receiving Trejo's email and questioning Thomas and Walker, Pridgeon responded by discharging Trejo, Thomas, and Elder, but not Walker.

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<sup>22</sup> Notably, although Pridgeon also alluded to conducting an investigation into the incidents that happened over the weekend (Tr. 148:4-13), according to Pridgeon's testimony, she did not ask Walker a single question about the incident with the disruptive child, even though he transported children to the park while the incident was ongoing (GCX 6).

<sup>23</sup> This is wholly inconsistent with Pridgeon's other testimony showing that Pridgeon actually spoke with Thomas after she spoke with Walker. See *supra*.

a. Pridgeon Discharges Trejo in Response to the Email

Regarding Trejo, Pridgeon responded to Trejo's May 21 email at 12:26 p.m. with the following message in relevant part: "Thank you Melissa for your time and dedication. . . . After board members and I staffed this email we truly feel it's best for us to professionally part ways. We appreciate all your work. We wish you well in your professional endeavors." (GCX 2 at 2). Pridgeon explained that she used the word "staffed" as a synonym for "discussed." (Tr. 74:14-75:21).

Despite Pridgeon's response to Trejo's email, Pridgeon attempted to show that she had already decided to discharge Trejo the night before, on May 20, after speaking with Casalberry about the incident with the disruptive child.<sup>24</sup> (Tr. 65:10-22; 70:12-72:2; 76:25-77:6). The ALJ should discredit this testimony because Pridgeon's testimony and documentation show otherwise. For example, Pridgeon testified that when she spoke with Felicia Thomas the next day, on Monday, she still had not made a decision about discharging anyone. (Tr. 141:19-142:7). Again, Pridgeon testified that when she had a conversation with Mulholland on May 21, she had not made a decision to discharge anyone yet, because she was still trying to get "down to the bottom of everything." (Tr. 148:21-149:4). Pridgeon also revealed that, when she spoke with Hollowell on May 21, she was still trying to figure out what went wrong during the incident with the disruptive child, because the child, Trejo, and Casalberry were all saying different things. (Tr. 142:11-20). Moreover, Pridgeon drafted a termination letter related to Trejo's discharge in which she referenced the time of Trejo's discharge as 12:26 p.m., the exact same time that Pridgeon responded to Trejo's email. (GCX 2 at 2; GCX 5). When questioned about

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<sup>24</sup> Notably, Casalberry also disclosed that employees were discussing pay and the company's disorganization during this same conversation. See Section III.C.3 above.

this, Pridgeon testified that she referenced that time because “[t]hat’s when I decided to make the final decision that we were professionally parting ways.” (Tr. 161:3-15; GCX 5). Accordingly, the ALJ should find that, contrary to *some* of Pridgeon’s testimony, the decision to discharge Trejo was made on May 21, after Pridgeon received Trejo’s email.

Further, the ALJ should find, contrary to Pridgeon’s testimony (see e.g., Tr. 73:4-18), that the Board of Directors was not responsible for the decision to discharge Trejo. Rather, Pridgeon was the decision maker, and made the decision after receiving, investigating, and perhaps discussing with the Board of Directors, Trejo’s email. First, Pridgeon’s testimony related to whether, when, and how the Board of Directors even had a meeting in which Trejo’s discharge was discussed, let alone decided, is unreliable, contradictory, and beyond suspect. Pridgeon initially testified that Board of Directors members Hollowell and Mulholland, along with Clinical Supervisor Felicia Thomas, were “conferenced on the call,” referring to a Board of Directors meeting in which they voted on whether to discharge Trejo and discussed the future of the program. (Tr. 59:17-25; see also Tr. 34:4-7; 36:19-25; 133:2-19). Pridgeon continually referenced the meeting in terms of an actual meeting amongst the Board of Directors.<sup>25</sup> (Tr. 72:3-12; 72:13-18; 76:24-77:6; 100:18-101:6; 102:1-21; 104:2-8; 109:16-24; 114:16-23; 116:3-17; 117:1-23; 133:2-19). But then, when probed about what was actually said during the conference call, Pridgeon backtracked, stating that there was no conference call or an actual meeting amongst the Board of Directors. (Tr. 135:4-11). Rather, Pridgeon called Hollowell, Mulholland, and Felicia Thomas separately on May 21, and the timing of those calls is indiscernible. (Tr. 135:12-17; 146:4-11). When weighing Pridgeon’s credibility, the ALJ should

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<sup>25</sup> At times, Pridgeon indicated that some of the members met in-person for the meeting, as Pridgeon claimed that she received Trejo’s email during the meeting and handed her phone to the Board of Directors to review it. (Tr. 72; 116-117; 129)

consider that Pridgeon's misleading testimony on this issue could hardly be viewed as a slip or a faulty memory relating a sequence of events, especially given the transcript as a whole (see the plethora of citations above). Rather, Pridgeon's testimony reflects the unraveling of self-serving statements in that her attempts to shirk her responsibility as the decision maker onto a wider group of individuals, most of whom were not called as witnesses, to give the impression that the decision makers included individuals somewhat insulated from the protected activity at issue in this matter. Accordingly, the ALJ should find that the decision to discharge Trejo rested with Pridgeon alone.

Second, record testimony as to Pridgeon's conversations with Hollowell, Mulholland, and Felicia Thomas, at best, show that only Mulholland made any kind of recommendation as to whether Trejo should be discharged.<sup>26</sup> But, the record testimony regarding Pridgeon's conversation with Mulholland conflicts in material ways. Mulholland testified that Pridgeon called her as the Clinical Supervisor to discuss the incident involving the disruptive child from May 20. (Tr. 188:22-189:17). According to Mulholland, based on what she learned from Pridgeon, Trejo did not use the de-escalation techniques Mulholland taught in a training session just days before the incident, so she recommended that Trejo was not a good fit. (Tr. 190:15-23; 192:1-10). Notably, Mulholland admitted that she was unsure whether Trejo attended the entire training session she referenced.<sup>27</sup> (Tr. 190:24-191:5). Mulholland also testified that: (1) she

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<sup>26</sup> As discussed below, Mulholland's recommendation was only based on what Pridgeon told her about the incident with the disruptive child (Tr. 191) and premised on Trejo's failure to adhere to protocol that was provided at a meeting for which Trejo was not present.

<sup>27</sup> In response to leading questions, as Respondent's witness, Mulholland testified that Trejo failed to document the incident in ICANotes, the electronic medical records system (EMR), even though Mulholland knew that Trejo was trained on doing that because Mulholland held a separate training on the system. (Tr. 209:19-213:24). However, RX 3 shows that Trejo did not have access to ICANotes (Tr. 406:22-407:4), and Mulholland contradicted her own testimony when she initially testified that she only conducted one training session when Trejo was present. (Tr. 186:4-7).

never learned anything about Casalberry's role in the incident; (2) never instructed Pridgeon to investigate or look into anything further because Pridgeon already knew what happened; and (3) did not learn of any other workplace issues going on at that time. (Tr. 191:16-25; 192:17-193:10; 196:1-6). Finally, although Mulholland was sure she had a conversation with Pridgeon about an email Trejo sent, prior to Trejo's termination, she could not recall the details of the conversation "because it was so long ago." (Tr. 188:5-18).

In sum, Pridgeon's testimony about this conversation contradicts Mulholland's in that Pridgeon admitted that she disclosed that: (1) she learned that Thomas had concerns from a "third party;" (2) she was lacking important information related to the incidents that occurred over the weekend; and (3) Mulholland told her to investigate further. (Tr. 146:9-148:13).

According to Pridgeon, the conversation began with a discussion about the incident with the disruptive child, including whether there was an incident report and who was contacted about it. Pridgeon mentioned that she met with the Department of Family Services about the incident earlier that day and suggested that Respondent scale back the program because the children "are really aggressive." (Tr. 146:12-147:3). Then, Pridgeon testified they discussed the upcoming summer camp and their training plan. At that point, according to Pridgeon, she broke down crying and told Mulholland that "I got [Thomas], who indirectly, third party, people are saying that he has concerns that he won't address, or admit that he has and, you know, and then I'm trying to make him comfortable."<sup>28</sup> (Tr. 147:10-16). Pridgeon continued, saying "and then I'm trying to, you know, train [Trejo]." (Tr. 147:15-16). As Pridgeon described, she was expressing her sense of being overwhelmed by the situations that were happening. And in response,

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<sup>28</sup> Pridgeon's testimony indicates that at the time of this conversation, Thomas was still employed, but Pridgeon knew he had workplace concerns which had been unaddressed so far. Again, this conflicts with Pridgeon's attempt to show that he quit earlier that day. Overall, this part of Pridgeon's testimony supports a finding that Pridgeon already received Trejo's email when she spoke with Mulholland.

Mulholland told her that she needed to “call everybody and get to the bottom of what’s going on.” (Tr. 147:17-24). It was at this moment that Pridgeon claims that she received Trejo’s email.<sup>29</sup> (Tr.148:1-3; *see also* Tr. 117:1-15). Pridgeon explained that Mulholland told her to call everyone who worked over the weekend because Pridgeon did not have first-hand knowledge of the incidents that took place. (Tr. 148:4-13; *but see* Tr. 117:16-118:3 (testifying about same conversation but instructed to contact the employees listed in Trejo’s email)).

Based on Mulholland and Pridgeon’s testimony about their conversation, neither gave particularly credible accounts. The portions of Pridgeon’s testimony that conflict with Mulholland’s testimony are, interestingly, in large part, statements against Respondent’s interest (*i.e.*, that Pridgeon did not have all the facts related to the incident; she mentioned Thomas’ concerns; and Mulholland instructed her to investigate) and should be credited for that reason. Additionally, the ALJ should credit such statements from Pridgeon because Mulholland could not recall any details about her conversation with Pridgeon about Trejo’s email, before Trejo was discharged.

In sum, despite Pridgeon’s unclear and often misleading testimony, the record shows that Pridgeon decided to discharge Trejo after she received Trejo’s email and questioned the other employees whom Trejo named in it. Respondent’s asserted reasons for doing so are addressed in Section III.D.4 below.

b. Pridgeon Discharges Thomas on May 21

Contrary to Pridgeon’s testimony, the ALJ should find that she discharged Thomas on May 21. Pridgeon claims that Thomas quit when she confronted him about whether he was

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<sup>29</sup> In the same breath, Pridgeon testified that “to be honest . . . I couldn’t even check my emails or anything yet, just to really be honest.” (Tr. 148:14-20). The ALJ should consider Pridgeon’s side-stepping as an attempt to shield the fact that Pridgeon had, in fact, received Trejo’s email by this point, which she took as a “personal attack.” (Tr. 75:1-7).

discussing his concerns about pay with other employees. The ALJ should discredit Pridgeon's testimony on this issue for countless reasons. First, as discussed at length above, Pridgeon's timeline as to when she spoke with Thomas is contradictory in material respects, including whether she spoke with Thomas before or after speaking with Walker, and thus, whether she discussed Trejo's email with Thomas. (See Section III.D.2 above). Also troubling is that her testimony shifted as to the actual reason she called him: when her explanation about never replying via email failed, she resorted to other inexplicable reasons. These glaring inconsistencies and contradictions cast serious doubt on the nature of the conversation itself.

Second, various snippets from Pridgeon's testimony are revealing on the issue. For example, when Pridgeon was confronted about the actual reason she called Thomas on May 21, Pridgeon caught herself in mid-sentence as she started to say, "We parted –" but then reversed course sticking with "[Thomas] quit on Monday." (Tr. 128:2-13). It is an unlikely coincidence that Pridgeon, when discussing her conversation with Thomas under pressure, appears to have caught herself using her preferred phrase to describe discharging employees; Pridgeon continuously described firing employees in terms of "we parted" or "parted ways." (Tr. 58:2-3; 59:6-7; 89:17; 107:5; 132:21-22; 152:7-8; 170:23-24; 303:8; GCX 2 at 2; GCX 8(a) at 5).

Finally, Pridgeon's initial testimony related to her conversation with Thomas completely omits any reference to Thomas quitting in support of Respondent's position that he quit. (Tr. 94:16-101:6). In fact, Pridgeon only described what Thomas allegedly said with regard to quitting at various points when providing unresponsive answers to unrelated questions. For example, Pridgeon offered the following testimony: "Any communication from [Thomas] after the day of him saying, if my best is not good enough for you, Ms. Carolyn, then it's just best for me not to be there. My answer was, okay." (Tr. 108:10-21). Similarly, Pridgeon offered this

testimony: “[Thomas] just got frustrated and was like, I’m giving you my best, and my best isn’t enough. I don’t know what else you want me to do. I never heard from him.” (Tr. 132:9-18).

Notably, even these accounts from Pridgeon are ambiguous as to whether Thomas was communicating that he quit.

Respondent will likely argue that, because it did not produce a termination letter, Pridgeon’s testimony that Thomas quit should be credited. In support of this, Respondent will likely highlight the existence of Trejo’s termination letter. (Tr. 25). However, Pridgeon drafted Trejo’s termination letter “because [Trejo] made it very clear that [Pridgeon] would be hearing from the Labor Board,” which she did.<sup>30</sup> (Tr. 153:6-11; 108:13-14). On the other hand, Pridgeon was well-aware that Thomas did not file similar claims.<sup>31</sup> (Tr. 108:16-17). As such, the ALJ should give little, if any, weight to Respondent’s lack of a termination letter related to Thomas when resolving the issue of whether he was discharged.

In sum, respectfully, the ALJ should credit Thomas’s corroborated testimony<sup>32</sup> that he was discharged during his conversation with Pridgeon on May 21, when Pridgeon told him that she did not need him anymore, rather than Pridgeon’s testimony that he quit. As discussed

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<sup>30</sup> According to Trejo, she only received a copy of the letter through a state agency related to a wage dispute. (Tr. 271:10-24). Consistent with Trejo’s testimony, and contrary to Pridgeon’s testimony, Mulholland did not recognize the termination letter. (Tr. 152:10-20; 193:11-194:5).

<sup>31</sup> The fact that Thomas did not file for unemployment should not weigh in any direction when resolving whether he was discharged. The record shows that he was employed by Respondent with the assistance or oversight from an agency. (Tr. 48; 343). This fact muddies any inference, even if it were appropriate to draw one, based on his apparent inaction in filing for unemployment.

<sup>32</sup> Tr. 272-273 (Trejo testifying that Thomas called her and asked her about the email and told her that Pridgeon fired him because he agreed with what she wrote); Tr. 322-323 (Thomas testifying that he called Trejo, asked about the email, and told her that he was discharged because of it). Not only should the ALJ credit Thomas’s testimony because it was corroborated by Trejo, but the ALJ should consider Thomas’s statement to Trejo on May 21, that Pridgeon told him that she no longer needed him (Tr. 323:3-5) for the truth of the matter asserted. The record shows that Thomas’s statement was an excited utterance under Rule 803(2) of the Federal Rules of Evidence. Thomas called Trejo right after his conversation with Pridgeon ended. Thomas was obviously startled by the event as evidenced by his call to Trejo trying to figure out what email Pridgeon was referring to.

throughout, Pridgeon's testimony, as a whole, is unreliable and internally inconsistent. Specifically, on this issue, Pridgeon's testimony contains telling slips and omissions that further support a finding that she discharged Thomas after he confirmed participating in conversations with Trejo about his workplace concerns.

c. Pridgeon Also Discharged Elder on May 21, but not Walker

Within minutes of discharging Trejo on May 21, Pridgeon also discharged Elder.<sup>33</sup> Earlier that day, at 6:20 a.m., Elder sent Pridgeon an email with a letter of resignation attached providing a one-week notice. (GCX 8(a) at 6; GCX 8(b)). Elder's letter of resignation clearly indicates that she had similar concerns as those expressed in Trejo's email. Elder's letter states, in relevant part: "Unfortunately, the unorganized transportation process, issues with communication, and last month's payment issue have begun to negatively effect my personal life/schooling." (GCX 8(b)). Elder stated in her email that she would work as scheduled that afternoon. (GCX 8(a) at 6). Pridgeon responded to Elder's email at 12:31 p.m., just five minutes after Pridgeon responded to Trejo's email. Pridgeon thanked Elder for the one-week notice, but stated, "however, we feel it's best to part ways immediately." (GCX 8(a) at 5). The only explanation Pridgeon provided for her response was that Respondent was transitioning to a summer program and did not need Elder. (Tr. 170).

Pridgeon did not part ways with Walker though. As discussed above, Pridgeon questioned him about why Trejo named him in her email, and Walker was extremely deferential to Pridgeon denying he had any issues with his working conditions. When asked whether she discharged Walker after she questioned him, Pridgeon provided the following insight: "So, no, I

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<sup>33</sup> Elder's discharge is not alleged as a violation of the Act, but the circumstances shed light on Pridgeon's motivation as it gives context to Pridgeon's conduct that day.

did not let [Walker] go, because it wasn't a reason to. You know, if you got a problem, bring your problem to the table like an adult. But just be patient and give the leeway for your problems to be resolved. Don't expect them to be resolved overnight." (Tr. 104:15-105:11).

#### **4. Respondent's Reasons for Discharging Trejo**

Pridgeon provided several reasons for discharging Trejo within her testimony and the termination letter she drafted. Pridgeon testified that the ultimate reason the board voted to discharge Trejo was because Trejo was not professionally a good fit for Respondent. (Tr. 60). Pridgeon explained that Trejo was not a good fit based on her lack of "leadership abilities, patience, [and] temperament" necessary for a "grass-root" organization. (Tr. 60:4-17). Throughout her testimony, Pridgeon identified several incidents showing that Trejo was not professionally a good fit, including Trejo making mistakes on the transportation route; Trejo getting upset that the facility was locked when she arrived; blaming Pridgeon for issues with the transportation route; and being combative and not following Pridgeon's instructions during the incident on May 20 with the disruptive child. (Tr. 60:9-63:20; 70:12-72:2). Later, Pridgeon testified that she discharged Trejo "[b]ecause she wasn't professionally a good fit. We didn't get along. We couldn't see eye to eye. I couldn't communicate with her . . . we were just too aggressive together." (Tr. 176:16-21).

Pridgeon also testified that she discharged Trejo, in part, because Trejo did not follow the proper incident reporting procedures or de-escalation methods that were taught during a training session Mulholland held on May 17.<sup>34</sup> (Tr. 83:24-84:11). The ALJ should credit Trejo's

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<sup>34</sup> Mulholland claims that she trained Trejo on the incident reporting procedures on the EMR system using ICANotes days before the May 17 meeting. The ALJ should discredit this testimony because: (1) RX 3 shows that Trejo did not have access to ICANotes (Tr. 382:23-383:2; 406:22-407:4); (2) Trejo and Thomas testified that the first time they met Mulholland was on May 17 (Tr. 237:21-24; 311:14-18); (3) Mulholland is only contracted to do monthly training and is not at the facility day-to-day (Tr. 33:3-9; 68:1-5); (4) Pridgeon testified that Mulholland

testimony that she was only present for 10 to 15 minutes of that meeting. (Tr. 241:9-11). Trejo, in great detail, testified about this meeting. According to Trejo, when the meeting began, she and Elder asked questions about how to handle certain children in the program, but Mulholland said that they would cover that topic later in the meeting. Then, there was a discussion about whether and how to take notes, with Elder mentioning that they were not currently doing that. Mulholland looked surprised, and Pridgeon interjected that they were taking notes but had to be trained on the new system. (Tr. 237:25-239:6). Immediately after that, Pridgeon called Trejo over and asked if she would transport the children home. Trejo did. By the time Trejo got back to the facility, the meeting was over. (Tr. 239:7-241:8; *see also* Tr. 310:10-311:6). Although Pridgeon's instinct was to deny that Trejo was not present for the entire meeting, Pridgeon reluctantly admitted it. (Tr. 84:10-16). However, Pridgeon's testimony conflicts insofar as she claims that Trejo was present for most of Mulholland's presentation. (Tr. 87:12-88:5). At one point though, Pridgeon blurted out, in an apparent reference to Trejo, "I'm like she missed the entire meeting," which also supports crediting Trejo's testimony. (Tr. 97:5-15). Mulholland was unsure whether Trejo stayed for the whole meeting. (Tr. 187:22-188:2). By wide margins, Trejo provided the most detailed and poised recollection on this issue. Accordingly, the ALJ should credit her testimony.

Pridgeon drafted a Written Notification of Termination of Employment dated May 21.

The letter provides the following reasons for Trejo's discharge:

- Failure to comply with scheduling policies, employee documented more than 15 minutes late first week of hire.
- Failure to comply with labor laws (continued to forget to clock in and out, never took breaks and lunches as requested or scheduled).

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covered incident reporting during the May 17 meeting (Tr. 87:2-18); and (5) Pridgeon did not otherwise corroborate Mulholland's testimony.

- Facility incident happened . . . resulting in a child being removed from the facility by police and ambulance, after investigation staff and children provided statements that [Trejo] behavior towards youth provoked her to get irritate [sic]. [Trejo] also did follow incident reporting procedures rendered verbally<sup>35</sup> by [Pridgeon].
- Does not have the required professional skill set and patience to independently handle working in a fast-past [sic] environment and notifying of problems, issues or emergencies pertaining to job role in a calm respectful manner.
- Upon hire employee accepted offered salaried position for \$500.00 per week and was paid early a week. But insisted on additional wages be paid outside company payroll practices, requesting bus passes to get to work.
- Employee intentionally worked passed scheduled hours 3 occasions due to inability to follow basic map to work.
- Employee constantly whistle blower daily in the work place by spreading gossip and disrespectful remarks about the owner and other members of management. Second day of work Employee clocked out and left work 30 minutes early due to a ‘laze employee’ whom was the clinical supervisor at the time.
- Employee didn’t process the temperament to work with behaviorally challenged kids.

(GCX 5 (emphasis added)). Pridgeon testified as to what she meant when she referred to Trejo as a “whistle blower.” She explained that she referred to Trejo in that way because Trejo was violating the “workplace etiquette policy” by not raising her concerns “in a professional manner.”<sup>36</sup> (Tr. 153:22-5). Continuing to explain, Pridgeon said that Trejo could “talk to everybody,” but if she talks to everybody and fails to talk with Pridgeon, it was a problem because Trejo was “creating a hostile work environment for [Pridgeon] as the manager[.]” (Tr. 154:6-21). Pridgeon added that [Trejo] wasn’t being fair by “going around” her. (Tr. 154:19-

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<sup>35</sup> Notably, this is an apparent reference to what Pridgeon instructed Trejo to do. Accordingly, the termination letter does not mention any failures to follow procedures that were addressed during the May 17 training conducted by Mulholland.

<sup>36</sup> This is the same policy Pridgeon referenced when she testified that the Board of Directors instructed her to call everyone named in Trejo’s email to “find out what’s going on.” (Tr. 102; *See also*, Section III.D.2 above).

21). Notably, Pridgeon tied this reason for Trejo's termination directly to Trejo's May 21 email, explaining that Trejo should have come to Pridgeon directly before sending the email rather than discuss issues in a way that came across as though management was "being vindictive." (Tr. 154:20-156:4). Pridgeon concluded, "The day that [Trejo] drafted the email and said that I – that this was the reason why I terminated her." (Tr. 155:2-7).

Finally, Pridgeon provided her definition of "whistleblowing" in response to Respondent's representative's question: "[A] whistleblower in the workplace is someone who has workplace concerns and workplace grievances that they fail to bring to management attention in order to correct it, and they use the information to create a hostile work environment for management and others to kind of coexist." (Tr. 177:12-178:2). Respondent's representative followed up in this exchange with Pridgeon:

Q: So let me see if I understand this right. So they're employees that have complaints, that raise those complaints to other employees to upset those employees? Is that the –

A: In a way, kind of like you have concerns, but you're not really bringing your concerns to the people who can address the concerns and deal with the concerns and manage the concerns. You're taking them to everyone else. So you're basically tainting their work perception of the work environment and the manager has to manage them and the person who has to work with them.

So you're creating a hostile work environment for management and personnel because you're basically discussing things that are directly pertaining to you with other employees, and then you're getting information from them and then using it to place your argument for your stance. But none of these things directly happened to you. So it's more like hearsay.

(Tr. 178:3-19). In other words, Pridgeon considered Trejo a whistleblower because she was discussing workplace concerns with other employees rather than keeping the concerns to herself and raising them with Pridgeon alone.

#### IV. LEGAL ANALYSIS

##### A. Casalberry is a Supervisor Under Section 2(11) of the Act, and an Agent Under Section 2(13) of the Act

Casalberry's supervisory and agency status is disputed. As discussed below, the record shows that Casalberry is a supervisor under the Act, and unquestionably had actual or apparent authority as Respondent's agent. However, CGC notes that whether Casalberry is supervisor or agent is not dispositive to any issues in this matter because, as it turns out, Casalberry's involvement is only material insofar as Casalberry is the first source of Pridgeon's knowledge that employees were engaging in protected activity by discussing concerns about their working conditions. And, Pridgeon admitted to learning about the protected activity from Casalberry. Alternatively, if Casalberry were an employee, it would no less support a finding that Pridgeon became aware of the protected activity when Casalberry told her about it.

Casalberry is likely a supervisor under Section 2(11) of the Act. Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the Board will find individuals to be supervisors if:

- (1) they hold the authority to engage in any 1 of the 12 supervisory functions . . . listed in Section 2(11);
- (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and
- (3) their authority is held "in the interest of the employer."

*Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

Here, the record shows that Casalberry, as the Business Manager, was responsible for the day-to-day activity and oversight of employees when Prigeon was not there, despite her lack of experience. Pridgeon often referred to how she expected employees to listen to Casalberry when she was not there during the weekend. The nature of the business shows that unexpected incidents occur, and thus, Casalberry would necessarily have to use independent judgment in determining the right course of action. Accordingly, the ALJ should find that Casalberry was a supervisor under Section 2(11) of the Act.

Moreover, the record shows that Casalberry had apparent, if not actual, authority to oversee the operations and direct employees while Pridgeon was not there. The Board applies the common law agency standard to determine such agency issues. *See Sanitation Salvage Corp.*, 342 NLRB 449, 541 (2004). “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Id.* (citing *Southern Bag Corp.*, 315 NLRB 725, 725 (1994) (internal quotations omitted)).

Here, Casalberry was introduced to employees on May 17 as the new Business Manager and told to contact her instead of Pridgeon about issues such as scheduling. At a minimum, if this were not indicative of Pridgeon bestowing such authority on Casalberry herself, it would create a reasonable basis for employees to believe that Casalberry had the authority to act on behalf of Respondent in such capacity. Accordingly, the ALJ should find that Casalberry was an agent under Section 2(13) of the Act.

## **B. Pridgeon's Statements and Conduct on May 21 Violate Section 8(a)(1) of the Act**

### **1. Pridgeon Unlawfully Interrogated Employees on May 21**

#### a. Legal Standard

In determining whether an unlawful interrogation occurred, the Board considers “whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176, 1177-78, 1178 n. 20 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). Relevant factors include: the background, including any history of hostility and discrimination; the nature of the information sought; the identity of the questioner, including the person's position in the employer's hierarchy; the place and method of the interrogation; and the truthfulness of the employee's response. *Medcare Assoc., Inc.*, 330 NLRB 935, 939 (2000).

#### b. Analysis

Here, the ALJ should find that Pridgeon's conduct in questioning Walker and Thomas on May 21 rose to the level of unlawful interrogation. During each conversation, Pridgeon questioned them about what they knew about Trejo's email or why she would name them in the email. Thus, the nature of Pridgeon's questioning was directly aimed at obtaining information related to whether either of them discussed any workplace concerns with Trejo or whether they shared her concerns. This factor weighs in favor of finding a violation. Further, even by Pridgeon's account, when Thomas revealed that he had conversations with Trejo about his pay, Pridgeon dug deeper, asking him why he would participate in such conversations. Again, the nature of Pridgeon's questioning was specifically aimed at obtaining information about employees' protected activity, which weighs in favor of finding a violation. Also weighing in

favor of finding a violation is that Pridgeon is a high-level supervisor as the Executive Director and Founder. The only factor weighing against finding a violation is that Thomas and Walker seemingly provided truthful responses to Pridgeon's questions. However, based how Pridgeon met Thomas's answers with hostility, in that she discharged him, the ALJ should find that overall, the circumstances show that Pridgeon's conduct amounted to an unlawful interrogation under Section 8(a)(1) of the Act, as alleged in Complaint paragraph 4(e)(1).

## **2. Pridgeon Threatened Employees with Discharge in Response to Protected Activity**

### **a. Legal Standard**

In determining whether an employer's threat of discharge or other negative consequences violates that Act, the Board applies an objective standard, under which it considers whether the employer's statements "reasonably tend[] to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009). The Board considers the totality of the circumstances in making this assessment. *Id.* It does not consider the employer's motivation or the statement's actual effect. *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006).

### **b. Analysis**

Here, the ALJ should find that Pridgeon unlawfully threatened Thomas with discharge during their conversation on May 21 when Thomas was discharged. During that conversation, Pridgeon questioned him about Trejo's email in which Trejo clearly indicated that Thomas shared workplace concerns about disorganization and poor communication. Pridgeon also questioned him about whether he was discussing concerns about pay with Trejo. As soon as Thomas confirmed that he had concerns, Pridgeon chided him about why he would participate in those conversations. Then, Pridgeon said, "If that is how you feel, I don't need you here."

Pridgeon’s statement would reasonably be understood as a warning that Thomas’ workplace concerns, and the fact that he discussed those concerns with Trejo, were incompatible with continued employment. *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (finding employer's statement that, if employee was unhappy, “[m]aybe this isn't the place for you” was an implied threat of discharge).

Notably, the fact that Pridgeon’s statement also shows that Thomas was discharged does not preclude a finding that the statement itself independently constituted an unlawful threat. Just as the Board has noted in similar situations, “[t]o disregard this violation would effectively privilege unlawful statements –which are independently coercive—when the respondent contemporaneously gives effects to its unlawful words.” *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at n.7 (2016) (quoting *TPA, Inc.*, 337 NLRB 282, 284 (2001)). Accordingly, the ALJ should, respectfully, find that Respondent, by Pridgeon, threatened employees with discharge because they engaged in protected concerted activity, as alleged in Complaint paragraph 4(e)(2), as amended (Tr. 11:19-15:12).

### **C. Respondent Violated Section 8(a)(1) of the Act by Discharging Trejo and Thomas**

#### **1. 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 that framework, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer’s hostility to that activity “contributed to” its decision to take an adverse action against the employee. *Director, Office of*

*Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089.<sup>37</sup>

An employer's animus or 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 the 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, false reasons, and failure to investigate. *See, e.g., Lucky Cab Company*, 360 NLRB 271, 276-77 (2014); *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

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<sup>37</sup> The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the context of the Act, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

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).

Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of “dual motivation” or one of “pretext.” In a dual motivation case, the “employer defends . . . by arguing that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for a permissible reason.” *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005). Thus, the burden is to show, by a preponderance of evidence, that it, in fact, relied upon a legitimate, non-discriminatory reason, not simply to articulate a legitimate reason. *Metro Transport LLC*, 351 NLRB 657, 659 (2007). If the employer cannot demonstrate, by a preponderance of the evidence, that it would have taken adverse action against the employee for the permissible reason, then its rebuttal defense fails and a violation will be found.

In a pretext case, *i.e.*, a case in which the “reasons given for the employer's action are . . . either false or not in fact relied upon . . . the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis.” *SFO Good-Nite*, 352 NLRB 268 (2008). *See also Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004); *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

## **2. Trejo and Thomas Engaged in Protected Concerted Activity**

For an employee's activity to be “concerted,” it must “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985). Even when a conversation involves only a

speaker and a listener, it is concerted if it looks toward group action. *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).<sup>38</sup> Concerted activities are for “mutual aid and protection” and therefore protected under Section 7, if they are aimed at seeking to improve employees’ lot as employees. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-568 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

Applying these principles, the evidence establishes that Trejo and Thomas engaged in protected concerted activity. As discussed above, within a week or so of Trejo’s hire, Trejo and Thomas discussed concerns about getting paid on time. They also discussed, along with Elder at times, concerns about the disorganization of the organization that affected their schedules, the transportation route, and the difficulty in doing their jobs without clear direction. They discussed how Pridgeon’s poor communication underpinned the disorganization.

After discussing these concerns with other employees, Trejo and Thomas took their concerns to Casalberry, the supervisor to whom they were told to report, on May 20. Thus, their complaints to Casalberry were grounded in the concerns they discussed with each other and with other employees. That same day, Trejo raised similar issues directly with Pridgeon over the phone by telling her that Casalberry was getting frustrated just like the rest of the employees because of the disorganization and lack of communication. Then, on May 21, Trejo sent the

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<sup>38</sup> Although the Supreme Court recently considered the scope of Section 7’s protection and held that Section 7 of the Act does not give employees a procedural right to pursue class or collective actions relating to their terms and conditions of employment, the Court’s dicta in that case clearly indicates continuing protection for workplace activities by employees aimed at improving terms and conditions of employment: “All of which suggests that the term ‘other concerted activities’ should, like the terms that precede it, serve to protect things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.’” *Epic Systems v. Lewis*, 138 NLRB 1612, 1625 (2018).

email to Pridgeon echoing those same sentiments. This time though, she named other employees, including Thomas and Walker, as having concerns about the lack of organization. Trejo went so far as to suggesting, twice, that Pridgeon should hold a meeting to “get everyone’s opinion” and to provide employees with what they need so that everything could run smoother. The fact that Trejo brought employees’ concerns like this to Pridgeon demonstrates that their earlier discussions with each other were a precursor to group action and that Trejo did, in fact, initiate group action.

Accordingly, the ALJ should find that Trejo and Thomas engaged in protected activity by discussing their concerns about pay, disorganization, and lack of communication with each other, with Casalberry, and then directly with Pridgeon by Trejo.

### **3. Respondent Knew About Trejo and Thomas’s Protected Activity**

The record shows that it is undisputed that Pridgeon knew about Trejo and Thomas’ protected activity before they were discharged. With regard to Thomas, even if the ALJ found that Pridgeon spoke with Thomas before Trejo sent the May 21 email, Pridgeon admitted that she found out from Casalberry on May 20 that Thomas was amongst the employees who were discussing concerns about getting paid, and likely complaining about other working conditions, as reported to Pridgeon by Felicia Thomas. In fact, even by her own testimony, Pridgeon questioned Thomas about why he would participate in conversations about his pay with other employees when he was the reason he did not get paid on time. However, as discussed at length above, the record strongly indicates, despite Pridgeon’s attempt to show otherwise, that she spoke with Thomas after she received Trejo’s email that specifically named him as having concerns about the lack of organization and poor communication, which are also, notably, the same issues that Trejo and Thomas raised with Casalberry. Finally, Thomas confirmed that had concerns about this pay and Pridgeon’s lack of communication during their conversation, which

likely cemented in Pridgeon's mind what she already knew: that Thomas had been discussing concerns about his working conditions with other employees.

Similarly, regarding Trejo, the record shows that Pridgeon knew she was engaging in protected activity by discussing workplace concerns with other employees before Trejo was discharged. Trejo's email to Pridgeon alone supports this finding. Yet there is more evidence showing that Pridgeon knew about Trejo's discussions with employees about their concerns, including the reports from Casalberry and Felicia Thomas regarding employees complaining about miscommunication, among other things, over the weekend. Moreover, Pridgeon admitted that Walker disclosed that Trejo called him asking whether he had concerns and encouraging him to make a statement about it. Also, Pridgeon admitted that Thomas told her that Trejo was keeping notes about their working conditions and that they spoke about concerns with getting paid. In fact, Pridgeon's investigation to get to the bottom of Trejo's email produced results: Pridgeon was able to confirm that Trejo was instigating group action targeting employees' working conditions.

#### **4. The Discharges of Trejo and Thomas Were Motivated by Respondent's Animus Toward Their Protected Activity**

There are several factors indicating that Respondent was unlawfully motivated in discharging Trejo and Thomas. With regard to Trejo, as discussed below, the best evidence showing Respondent's animus is Pridgeon's words, both through testimony and within her documented statements related to the discharge. Respondent's animus is shown by timing, disparate treatment, contemporaneous conduct, and false or misleading reasons.

a. Pridgeon's Statements Provide Direct Evidence of Respondent's Unlawful Motivation

Pridgeon was motivated by Trejo's protected activity in deciding to discharge her, just as Pridgeon said at various times. First, Pridgeon's response to Trejo's May 21 email is clear: Pridgeon said that after discussing Trejo's email, Respondent decided to discharge her. Thus, the email, at a minimum, contributed to Pridgeon's decision to discharge Trejo.

Second, Pridgeon referenced Trejo's protected activity within the letter she drafted when outlining the reasons for discharge. Notably, Pridgeon highlighted Trejo's issues with pay, and significantly, described Trejo as a "whistleblower." As discussed at length above, Pridgeon testified that she considered Trejo a whistleblower based on the way Trejo discussed concerns about employees' working conditions with everyone except Pridgeon. Pridgeon also explained that when employees discuss their concerns with everyone, except management, it violates the workplace etiquette policy which creates a hostile work environment for management. Pridgeon tied these together, explaining that she views a whistleblower as going against the etiquette policy. Remarkably, Pridgeon also testified that when she received Trejo's email, she was instructed to investigate whether Trejo violated the etiquette policy, or in Pridgeon's terms, whether Trejo was whistleblowing. Thus, there can be no doubt that Pridgeon's listed reason for termination – constantly whistleblowing – is in direct reference to Trejo's protected activity.

b. Timing Supports a Finding of Unlawful Motivation

Timing is highly indicative of animus in this matter. With regard to Thomas, Pridgeon told him that she did not need him anymore immediately after he confirmed that he had been discussing his concerns about pay with Trejo. In fact, Pridgeon's immediate response is sufficient to show that her action in discharging Thomas was unlawfully motivated.

Similarly, Pridgeon discharged Trejo within two hours of receiving Trejo's email, and just after she investigated why Trejo named other employees in the email. Then, just five minutes later, Pridgeon discharged Elder, who had raised similar concerns as Trejo earlier that day. The immediacy of Pridgeon's action, coupled with the quick succession of action, supports a finding that Pridgeon took action against Thomas, Trejo, and Elder because of their protected activity, which Pridgeon was able to confirm.

c. Disparate Treatment Shows Pretext and Unlawful Motivation

Respondent's disparate treatment in this matter shows animus. The fact that Pridgeon did not discharge Walker shows Pridgeon's unlawful motivation in discharging Thomas and Trejo. When Pridgeon questioned Walker about why he was included in Trejo's email, Walker disavowed any notion that he shared Trejo's concerns, unlike how Thomas responded to the same inquiry. Pridgeon discharged Thomas but not Walker. Pridgeon explained that she did not discharge Walker because, presumably in contrast to the others, he was being patient and did not expect Respondent's problems to be resolved overnight. In other words (of Pridgeon's), Walker did not fail to bring his problems to the table like an adult, again, in apparent contrast to Trejo and Thomas and in stark reference to their protected activity. Pridgeon's conduct in treating Walker differently, and her rationale for doing so, show that Pridgeon was undoubtedly hostile towards Trejo and Thomas' discussions about their workplace concerns. Further, Pridgeon also did not discharge Casalberry, who was directly involved in the same incident with the disruptive child that Respondent cites as a reason for Trejo's discharge.

Moreover, more generally speaking, Respondent acknowledges that its employees work in an intense workplace and often encounter difficult behaviors, including tantrums and aggression. Pridgeon testified that Respondent gives its employees leniency for that very reason.

Respondent presented no evidence of any instance in which it has discharged an employee for not deescalating a conflict with a child or for any of the other conduct for which it asserts it discharged Trejo. Respondent also tolerated an array of alleged conduct and performance problems on Trejo's part, until, ultimately, after Respondent learned of her protected concerted activities, they were cited in her discharge letter.

d. Failure to Investigate Shows Pretext and Unlawful Motivation

Finally, Respondent's failure to investigate shows pretext and unlawful motivation. Although Pridgeon claims to have investigated the incident involving the disruptive child over the weekend after the incident, documentary evidence shows that she was told by the board to investigate something else: Trejo's statements in her email about employees' workplace concerns. Pridgeon described questioning Walker over the weekend, but her testimony reflects that she discussed the workplace concerns Trejo had raised with Walker and does not reflect that she asked him anything about the incident involving the disruptive child. Further, Pridgeon asserted that she called Thomas to question him about the incident, but he was not at the facility at the time of the incident, and her testimony reflects that she discussed the workplace concerns Trejo had raised, and not the incident with the disruptive child, with him. Pridgeon also did not fully report all the facts to Mulholland when consulting with her about what to do about the incident. In particular, although Casaberry was present during the incident and was, at least according to what Trejo told Pridgeon, culpable for failing to deescalate, and arguably even for aggravating, the child, Pridgeon made no mention of Casaberry's role in the incident to Mulholland. There is also no evidence that Respondent asked any employee other than Trejo to prepare any written description of the incident. This failure to investigate evidences that

Respondent seized on the incident as pretext to get rid of Trejo due to her protected concerted activities.

Accordingly, the ALJ should find that CGC met her burden in showing that Respondent harbored animus toward Trejo and Thomas's protected activity.

## **5. Respondent Failed to Meet Its Burden Under *Wright Line***

### **a. Respondent Failed to Show that it Would have Discharged Trejo Regardless of Protected Activity**

Respondent has not met its burden in showing that it would have discharged Trejo regardless of her protected activity. Although, as discussed above, Pridgeon's testimony and related documents provide direct support for finding that Pridgeon was unlawfully motivated by Trejo's protected activity, Respondent will likely contend that regardless of the protected activity, Respondent would have discharged Trejo for any of the numerous reasons cited throughout the hearing. For example, Respondent may argue that Respondent would have discharged Trejo for failing to follow the proper de-escalation and incident reporting procedures during the incident with the disruptive child. However, Respondent failed to show that it, in fact, relied upon this reason. Pridgeon testified that just prior to discharging Trejo, when she spoke with Mulholland and Hollowell, she was still trying to figure out what went wrong because she did not have all the facts and she was hearing different versions of what happened. Pridgeon never explained how, between that time and the time that she discharged Trejo, she came to the conclusion that Trejo was at fault, contrary to what Pridgeon initially told Trejo about Casalberry being at fault. Moreover, Pridgeon and Mulholland explained that this proffered reason for Trejo's discharge – that she failed to follow protocol – was cause for discharge because Mulholland had just recently provided training on those protocols. However, Trejo was transporting children when that training took place. Thus, Respondent's entire rationale is

undermined to such a degree that Respondent's proffered reason appears to be nothing but pretext. Accordingly, Respondent has failed to show, by a preponderance of evidence, that it, in fact, relied upon a legitimate, non-discriminatory reason or that it would have taken the same action regardless of Trejo's protected activity.

b. Respondent Failed to Show that it Would have Discharged Thomas Regardless of Protected Activity

Respondent has wholly failed to show that it would have discharged Thomas regardless of his protected activity. In fact, Respondent's only defense is that Thomas quit and Pridgeon took no action against him at all. As discussed above, Pridgeon's testimony that Thomas quit should be discredited. Rather, the ALJ should find that just as Pridgeon discharged Trejo and Elder, Pridgeon discharged Thomas when he confirmed that he was discussing his concerns with other employees. Thus, Respondent's position that Thomas quit is akin to proffering a false reason for his discharge and Respondent is unable, by definition, to show that it would have taken the same action regardless of his protected activity.

**D. To be Made Whole, Trejo and Thomas Should Be Compensated for Any Consequential Economic Harm They 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 101, 102 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act).

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

has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB 101, 104, 105 (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, 292-293 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB 709, 719 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of

an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.<sup>39</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>40</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 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

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<sup>39</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>40</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.

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 at 719 (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a collective-bargaining agreement 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>41</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>42</sup>

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<sup>41</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>42</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

**V. CONCLUSION**

Based on the foregoing reasons and record evidence considered as a whole, CGC respectfully requests that the ALJ find that Respondent violated the Act as alleged in the Complaint. CGC also urges the ALJ to issues an appropriate remedial recommendation, including a make-whole remedies, reinstatement, expungement of disciplinary records, and a notice to employees.

Dated at Phoenix, Arizona this 11<sup>th</sup> day of April 2019.

/s/ Sara S. Demirok  
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**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, and coerce you in the exercise of the above rights.

**YOU HAVE THE RIGHT** to join with your fellow employees in **concerted activities**. These activities include talking to others about your wages, hours, and other terms and conditions of your employment.

**WE WILL NOT** ask you about the concerted activities of your coworkers.

**WE WILL NOT** threaten to fire you because you engaged in concerted activities.

**WE WILL NOT** fire you because you engaged in concerted activities.

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

**WE WILL** immediately offer **MELISSA AMBER TREJO (TREJO)** and **LAWRENCE THOMAS (THOMAS)** immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without any loss to their seniority rights or any other privileges previously enjoyed because we discharged them.

**WE WILL** pay **TREJO** and **THOMAS** for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses, compensation for consequential economic harm resulting from their discharges.

**WE WILL** compensate **TREJO** and **THOMAS** for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

**WE WILL** within 14 days, remove from our files, any and all records of the discharges of **TREJO** and **THOMAS** and **WE WILL** within 3 days thereafter, notify **TREJO** and **THOMAS** in writing that we have taken these actions, and that the materials removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

**WE WILL** compensate **TREJO** and **THOMAS** for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 28, within 21 days of the date of approval of the settlement agreement, a report allocating the backpay award to the appropriate calendar years.

**Impact Wellness Center, Inc.**

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

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

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

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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 **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in *Impact Wellness Center, Inc.*, Cases 28-CA-221411 and 28-CA-223540 was served via E-Gov, E-Filing, and E-Mail on this 11<sup>th</sup> day of April 2019, on the following:

***Via E-Filing:***

Honorable Lisa D. Ross  
Administrative Law Judge  
National Labor Relations Board  
San Francisco Division of Judges  
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San Francisco, CA 94103-1779

***Via E-mail:***

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