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

Challenge Manufacturing Company, LLC *and* Michael Daniel Kiliszewski. Case 07–CA–199352

August 1, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On September 5, 2018, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and a motion to strike the Respondent's attachments to its exceptions,[1] and the Respondent filed a reply brief.

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

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

ORDER

The National Labor Relations Board orders that the Respondent, Challenge Manufacturing Company, LLC, Holland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals if they engage in protected concerted activities.

(b) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(c) Discharging or otherwise discriminating against employees for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Michael Daniel Kiliszewski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Daniel Kiliszewski whole for any loss of earnings and other benefits suffered as a result of

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[1] In view of our disposition of this case, we find it unnecessary to pass on the General Counsel's motion.

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

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Further, we correct a factual error in the judge's decision. The judge erroneously stated that Drew Ferris attended the May 9 meeting and proceeded to describe Ferris' testimony regarding Michael Kiliszewski's support for the Union. However, the record and transcript establish that it was maintenance manager Jeff Glover, not Ferris, who attended the May 9 meeting and subsequently testified at the hearing about Kiliszewski's union support. This error has no effect on the outcome of the decision.

[3] We agree with the judge, for the reasons he states, that the Respondent violated Sec. 8(a)(1) in April 2017 by threatening Kiliszewski with unspecified reprisals for engaging in protected concerted activity. We also agree with the judge that the Respondent violated Sec. 8(a)(1) by creating the impression that Kiliszewski's protected concerted activities were under surveillance by the Respondent. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 7 (2018) (finding an impression of surveillance violation where a supervisor told an employee "just watch yourself, because they [are] watching both of us, so watch your back").

In addition, we agree with the judge's application of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to find that the Respondent violated Sec. 8(a)(3) and (1) by discharging Kiliszewski for his union activity. As to the General Counsel's initial burden, we agree with the judge that the General Counsel established that Kiliszewski engaged in union activity and that the Respondent was aware of this activity. In finding that the General Counsel met his burden of proving animus, we rely only on the timing of the discharge, the presence of the Respondent's unfair labor practices, discussed above, and the evidence of disparate treatment found by the judge. Turning to the Respondent's rebuttal burden, we agree with the judge, for the reasons he states, that the Respondent failed to prove that it would have discharged Kiliszewski even absent his union activity.

[4] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. In addition, in accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall amend the remedy to require the Respondent to compensate Kiliszewski for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). We shall modify the Order to reflect these remedial changes, and to conform to the violations found and the Board's standard remedial language. We shall substitute a new Notice to conform to the Order as modified.

the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Michael Daniel Kiliszewski for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, 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.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its Holland, Michigan facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 1, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals for engaging in protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO or any other labor organization.

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

WE WILL, within 14 days from the date of the Board's Order, offer Michael Daniel Kiliszewski full reinstate-

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

ment to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Daniel Kiliszewski whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Kiliszewski whole for his reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Daniel Kiliszewski for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, 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 from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Michael Daniel Kiliszewski, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHALLENGE MANUFACTURING COMPANY, LLC

The Board's decision can be found at http://www.nlrb.gov/case/07-CA-199352 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Donna M. Nixon, Esq., for the General Counsel.
David M. Buday, Esq., and *Andrew A. Cascini, Esq. (Miller Johnson, PLC*), of Kalamazoo, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Grand Rapids Michigan, on June 6 and 7, 2018. Michael Daniel Kiliszewski, an individual, filed the charge on May 23, 2017, and the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued the complaint on January 31, 2018. The complaint alleges that on about April 25, 2017, the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening employees with unspecified reprisals for engaging in union and protected concerted activities and by creating the impression that such activities were under surveillance. The complaint further alleges that on May 12, 2017, the Respondent discriminatorily discharged Kiliszewski in violation of Section 8(a)(3) and (1) of the Act because he engaged in union and concerted activities. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, manufactures and sells automobile parts. In conducting those operations, the Respondent purchased and received at its Holland, Michigan, facility goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent manufactures structural metal components for the automotive industry. It operates a total of eight plants. All of the alleged violations alleged in this case concern conduct at the Respondent's plant in Holland, Michigan, which the Respondent refers to as Plant 4. The Holland facility is 600,000 square feet in size and had a workforce of about 700 to 1000 during the relevant time period.

The charging party, Michael Kiliszewski, was an employee at the Respondent's Holland facility for over 8 years. On May 12, 2017, when the Respondent terminated his employment, he was a maintenance mechanic. He was assigned to the 3rd shift, which started at 10:30 p.m. and continued to 6:30 a.m. the following morning. Kiliszewski's most recent performance appraisal rated him: above average for quality of work, quantity of work, and dependability; and average in attitude and safety habits. Kiliszewski's prior performance appraisal, from November 2015, rated him: outstanding in work quality; above average in both work quantity and safety habits; average in attitude; and, between below average and unsatisfactory for dependability (attendance/punctuality). Kiliszewski's personnel file includes an undated letter from his supervisor, Lawrence Boyer, who stated that "Kiliszewski is one of my best employees I have on 3rd shift" who works without rest at a speed of "go, go, go." Boyer stated that Kiliszewski "[c]an be outspoken to get his point across verbally," but that he "is an asset to the company with his work ethic, knowledge and ability" with a "long long future" with the company. Prior to the discharge at issue in this case, the Respondent had never disciplined Kiliszewski during his 8 years with the company.

Employees at the Holland facility are not represented by a union, although at the time of trial the United Automobile, Aerospace and Agriculture Implement Workers of America (UAW or Union) represented employees at five of the Respondent's other facilities. In 2013 and again in 2015, the UAW campaigned, unsuccessfully, to represent employees at the Holland facility. Kiliszewski contacted the UAW to initiate both of those campaigns. During the 2015 campaign Kiliszewski talked to hundreds of employees about the UAW, obtained employee signatures on union authorization cards, and wore UAW paraphernalia while working. In 2015, a group of employees signed a letter in which they identified themselves to the Respondent as members of "the UAW Volunteer Organizing Committee." Kiliszewski's signature was the first one appearing among the 35 on the document. The Respondent actively campaigned against the Union by, inter alia, distributing flyers, which stated that the Respondent was "100 percent opposed to unionized plant," suggested that unionization was involved in "closures and bankruptcies" of other facilities, and accused the Union of making "empty promises." During the 2015 union campaign, Kiliszewski was talking with another employee when he observed Drew Ferris, the plant manager, photographing him from behind a piece of equipment.

On May 1, 2016, the Respondent and the UAW signed an agreement, which called for them to chart a friendlier course. The agreement provided that the Respondent would not express opposition to the UAW and the UAW would not express a negative attitude towards the Respondent. In addition, the Respondent agreed to provide the UAW with the names, telephone numbers and addresses of production and maintenance employees, and also to voluntarily recognize the Union upon verification that a majority of the bargaining unit employees had submitted signed UAW authorization cards. For its part, the UAW agreed that until a labor contract was ratified at the Respondent's previously organized facility, the UAW would not commence an organizing campaign at any of the Respondent's other facilities. The parties refer to the May 1 document as a neutrality agreement

B. Kiliszewski and Organizing Effort in April 2017

As of April 2017, the Respondent and the UAW were negotiating an initial labor contract for the Respondent's most recently organized facility, which was located in Pontiac, Michigan. Since the parties had not signed a labor contract for the Pontiac bargaining unit, the terms of the neutrality agreement required the UAW to temporarily refrain from campaigning to represent employees at the Holland facility. As the Respondent's legal counsel recognizes, however, the neutrality agreement between the UAW and the Respondent did not negate the rights of individual employees of the Holland facility to engage in activities to seek representation by a union, including by the UAW.[1] Kiliszewski did just that, soliciting employees to sign UAW authorization cards and discussing the UAW with coworkers.

Among the persons with whom Kiliszewski discussed the UAW in April 2017 was Carl Leadingham. At that time, Leadingham was a "third shift group leader" and, the parties agree, a supervisor and agent of the employer, although Leadingham testified that he was unaware of his supervisory status at the time.[2] Craig Ridder, a maintenance supervisor, informed the Respondent about reports that Kiliszewski and Leadingham were involved with circulating UAW authorization cards at the facility and with an off-site union meeting. Ridder obtained a union authorization card and forwarded a picture of it to management officials including human resources manager Darlene Compeau. Ridder subsequently memorialized the communications about union activity by Kiliszewski and Leadingham in written reports dated April 28 and May 1, 2017. General Counsel Exhibit Number (GC Exh.) 20. Mike Tomko (vice-president of human resources) testified that when he received the information about organizing efforts by Kiliszewski and Leadingham, he was very concerned and considered their activity a "very clear breach of the neutrality agreement." Transcript at Page(s) (Tr.) 259–260.

On April 24 or 25, after the Respondent was informed that Kiliszewski and Leadingham were involved in union organizing activities, Tomko and Compeau called Leadingham to a meeting and confronted him about those activities. In addition, they asked Leadingham to identify the employees who were engaged in union activities. At the meeting, the Compeau and Tomko suspended Leadingham for a period of 5-week days.[3] After Leadingham was suspended, he contacted Kiliszewski by telephone. During their telephone conversation, Leadingham stated that he had been suspended for discussing the UAW with Kiliszewski and for attending an organizing meeting. Leadingham warned Kiliszewski to watch his back and stated that the Respondent's managers were after him and anyone else who was talking about the Union. Tr. 137.

C. May 5 Incident Between Kiliszewski and Sanchez

On the night of May 5—about 2 weeks after the Respondent received information that Kiliszewski was involved in union activities—the incident occurred that the Respondent relies on to explain its decision to end Kiliszewski's employment with the company.

On the night in question, Kiliszewski, a maintenance mechanic, was scheduled to work his regular assignment on the Respondent's 3rd shift—which began at 10:30 p.m. on Thursday and ended on Friday morning at 6:30 a.m. On May 5, Kiliszewski arrived early—approximately 30 minutes before the start of his scheduled shift—to the maintenance area where his toolbox was. Often, as on this occasion, Kiliszewski arrived before the start of his shift and used the time to prepare his area, make coffee, and/or obtain information from the 2nd shift mechanics who were ending their day's work. In this instance, he engaged in such activities for a period of time, and "punched

[1] Tr. at pp. (Tr.) 270-271. The Board has held that a neutrality agreement between an employer and a union, "cannot negate employees' exercise of their Section rights." *Parc Fifty One Hotel*, 306 NLRB 1002 (1992).

[2] The Respondent had previously issued paperwork to Leadingham that noted his promotion to a supervisory position, but Leadingham testified that he was unaware that he was a supervisor at the time of his conversations with Kiliszewski.

[3] At a later date, the Respondent reimbursed Leadingham for most, if not all, of the pay he lost during the period of his suspension.

in" at 10:17 p.m. The record is clear that even though Kiliszewski punched in at that time, the Respondent would not begin to pay him until 10:30 p.m., his scheduled start time.

At some point after 10 p.m. and before the start of his shift at 10:30 p.m., Kiliszewski spoke with Joe Maynard, a 2nd shift production supervisor, who asked Kiliszewski to look at a piece of equipment that was in high demand and required repairs. Kiliszewski told Maynard that he would "go right over there" once he was "on the clock."

After the conversation with Maynard, Kiliszewski was approached several times in the maintenance area by Norma Sanchez, a production supervisor on the shift prior to Kiliszewski's, and who, like Maynard, wanted Kiliszewski to make a repair. All the relevant exchanges between Sanchez and Kiliszewski occurred before the start of Kiliszewski's shift at 10:30 (when the Respondent would begin to pay him). Kiliszewski's supervisor, Larry Boyer, worked on the 3rd shift and was not involved in any of these exchanges. The record establishes that the exchanges between Sanchez and Kiliszewski eventually became heated, with both participants raising their voices and speaking rudely to one another.

In the first exchange, Kiliszewski was in the vicinity of his toolbox when Sanchez approached him and stated that she wanted him to repair a piece of equipment. Kiliszewski responded that he was not on the clock yet and that Sanchez would have to ask the 2nd shift maintenance mechanics—who were still on the clock—to do the work. Sanchez left, but soon returned and told Kiliszewski to fix the equipment immediately. Kiliszewski responded that he was not on the clock, was not even supposed to enter onto the production floor area,[4] and to "go see your 2nd shift crew." Sanchez left. When Sanchez returned again, Kiliszewski was in the company of another 2nd shift maintenance mechanic, James Eric Mathews. The equipment she had referenced earlier still required repair, and Sanchez directed Kiliszewski and Mathews to fix it. Mathews told Sanchez essentially the same thing that Kiliszewski had been stating—i.e., that they were not on the clock and would address the problem when they were. Sanchez left.

About 5 minutes later, Sanchez approached Kiliszewski and Mathews again and the most heated of the exchanges ensued. Sanchez pointed at the two mechanics and yelled at them to fix her machine "right now." Both mechanics again stated that they were not on the clock yet. In response Sanchez yelled, "you'll do as I say, when I say." By Kiliszewski's own account, his "blood was boiling" at this point. He yelled at Sanchez to "go see your fucking 2nd shift maintenance crew." He also yelled either that she should get the "hell out of my face" or get the "fuck out of my face." Sanchez said that she was going to talk to Kiliszewski's supervisor and Kiliszewski encouraged her to do so.

According to Sanchez, after she turned and was walking away, Kiliszewski said "fuck you bitch." Kiliszewski emphatically denied that he said this and Mathews' testimony supported that denial. Given the conflicting testimony, I find that the record does not establish that Kiliszewski used the term "bitch," or, in fact, made any statement to Sanchez as she was walking away. Based on Sanchez' and Kiliszewski's testimony and demeanor I do not consider the testimony of either of them to be wholly free of bias. I note, however, that Kiliszewski did not generally shy away from admitting to using profanity towards Sanchez. He freely testified that he told Sanchez to see her "fucking 2nd shift" mechanics and to "get the hell out of my face." Mathew's testimony lends credence to Kiliszewski's denial regarding the use of the word "bitch" during the May 5 incident. Although Mathews is a friend of Kiliszewski, he is also current employee of the Respondent who by testifying contrary to his employer's position is exposing himself to the possibility of retaliation.[5] Mathews testified in a calm and cooperative manner and did not appear to be going out of his way to embellish or shade his testimony to favor either side. There is nothing in the record, or in Mathews' demeanor, that would lead me to believe that his testimony regarding the encounter was not credible. I note, moreover, that Sanchez' testimony that Kiliszewski said "fuck you bitch" is unreliable on its face. Sanchez had her back to Kiliszewski and therefore could not have seen him make the statement. When asked how, in the noisy plant environment and with her back to Kiliszewski, she could tell that he was the one who she heard, she did not even claim that she had recognized his voice. Rather she stated that she believed it was Kiliszewski because "I was not talking with nobody else, . . . [s]o who going to come fuck you, bitch." However, the evidence showed that, at a minimum, Sanchez had also been talking with Mathews. Indeed, the written response that Kiliszewski provided to the Respondent when first accused of this reports that it was Mathews who said something to Sanchez as she walked away. Moreover, as is discussed below, not a single one of the other witnesses who Compeau interviewed as part of her investigation reported hearing Kiliszewski say "fuck you bitch" to Sanchez. Under these circumstances I credit Kiliszewski's emphatic and consistent denial that he made the statement.

D. Respondent's Investigation

On Friday morning, about 3 hours after the heated exchange that Sanchez had with Kiliszewski, Sanchez sent an email about the incident to Compeau (the human resources manager who had previously suspended Leadingham for union activity) and Jeff Glover (maintenance manager). Sanchez also copied the email to other individuals, including: Maynard, Larry Boyer (Kiliszewski's supervisor on the 3rd shift), Keith O'Brien (vice president and plant manager), and Ferris (plant manager). Sanchez's email stated:

> I continue to have issues with Mike Kiliszewski. I have addressed my concerns with Larry Boyer and not much has

[4] The Respondent's maintenance manager confirmed at trial that employees were not supposed to enter onto the production floor prior to the start of their scheduled shifts. Tr. 374.

[5] See *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 8 fn.6 (2018), *Portola Packaging, Inc.*, 361 NLRB 1316, 1316 fn.2 (2014), and *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). A witness' status as a current employee is among the factors that a judge may utilize in resolving credibility issues. See, e.g., *DHL Express, Inc.*, 355 NLRB 1399, 1404 fn.13 (2010).

> changed. Today around 10:00 pm I asked Mike to come restart [machine] w079. Mike was in area 1 maintenance area talking with another maintenance person. W079 is still a [heavily used machine] and we still was working on Monday numbers. After around 10 minutes, w079 was still down and I went to Mike still the maintenance area talking. I said Mike I need you to go fix 79. Mike screamed to me Where's your fucking 2nd shift maintenance guy? I told him that they were working on other [equipment] . . . . I told Mike this was why I'm asking you. Mike said You're not my boss, you don't tell me what to do. Then he told me to get the fuck out of his face. I say I'm going to tell your boss. Mike asked if I wanted to call his boss. I say no I will go look for your boss. As I walked away Mike yelled Fuck you bitch. I feel Mike tries to intimidate me when I ask him for help. I find Mike to be very disrespectful to me and I am afraid to ask for help because he give me bad attitude. I have a witness statement from an employee who also heard Mike call me names. This happens right out on the production floor and I would like for this behavior to stop.

Shortly after receiving the email, Kiliszewski's supervisor—Boyer—provided a copy of the email to Kiliszewski and told him to "steer clear" of Sanchez.

The following Monday—May 9—Kiliszewski was called to a meeting with Compeau and Glover about Sanchez' complaint. Both Compeau and Glover were aware that Kiliszewski was involved in union activity.[6] Indeed only weeks earlier, Compeau had questioned Leadingham about Ridder's report that Kiliszewski was behind recent organizing activities.

Kiliszewski wanted to make a tape recording of the May 9 meeting, but Compeau said she would not permit him to do so. Kiliszewski asked why he could not record the meeting, and Compeau said that recording was "against company policy." Kiliszewski responded that he had never seen such a policy and, indeed, in this proceeding the Respondent has not pointed to any language in company materials showing that such a policy existed. Kiliszewski took the position that it was within his federal rights to record the meeting. Compeau told Kiliszewski that they needed to start the interview and that he would not be permitted to make a recording of it. According to Compeau, Kiliszewski was refusing to look at, or talk directly to, her and she was concerned that the meeting was becoming antagonistic. Compeau excused herself and returned with plant manager O'Brien, the highest ranking official at the facility. O'Brien told Kiliszewski that he would not be permitted to record the meeting. At this point, Kiliszewski complied by removing the tape from the recorder. This did not satisfy O'Brien, who then required Kiliszewski to also remove the batteries from the recorder. Kiliszewski did that too. Then O'Brien required Kiliszewski to put his cell phone on the table and turn the power off.

Deprived of the opportunity to record the meeting, Kiliszewski asked to have Mathews present as a witness. The Respondent's officials stated that Mathews had already left for the day. They warned that if Kiliszewski delayed the meeting until the next time when Mathews was available it would mean that he would be suspended in the interim. Kiliszewski asked why they would suspend him and O'Brien replied, because "we make the rules here not you; you just work here." Faced with the choice of proceeding without Mathews, or being suspended, Kiliszewski agreed to proceed with the meeting.

Kiliszewski's statements at the meeting consisted primarily of responding to the statements in Sanchez' email. His response largely tracked written notes that Kiliszewski had prepared on a copy of Sanchez's email. He provided a copy of those notes to the management officials who were present. Kiliszewski disputed Sanchez's statement that the two had previously had "problems." He stated that their only previous issue was when he believed that Sanchez was approving substandard parts and he reported this to the Respondent's quality control manager.

During the May 9 meeting, Kiliszewski stated that the May 5 exchanges with Sanchez occurred before the start of his shift at 10:30 p.m. He recounted that he and Mathews repeatedly told Sanchez that they were not on the clock yet, and finally told her "not to bother us until we're on the clock." He disputed Sanchez's statement that 2nd shift mechanics were unavailable, and said that he directed Sanchez' attention to a 2nd shift mechanic who was "still on the clock doing nothing." He complained that Sanchez had not "asked" him to make the repair prior to the start of his shift, but had "demanded," that he do so. According to Kiliszewski, Sanchez told him "'You'll do as I say, when I say.'" Kiliszewski recounted that, in response, he and Mathews pointed out to Sanchez that they did not "take orders from [her], only requests" since she was not their supervisor. Kiliszewski emphatically denied Sanchez' claim that he said "fuck you bitch" as she was walking away. According to Kiliszewski, it was Mathews who said something to Sanchez after she turned and began walking away, and that what Mathews said was "we're not on the clock." Kiliszewski identified five witnesses whom he said were present and would tell Compeau that "Norma [Sanchez] was the aggressor and was out of line." During the portion of the May 9 meeting when Kiliszewski was being interviewed by Compeau, O'Brien, and Ferris, Kiliszewski expressed the view that they were targeting him because of his union activity.[7]

[6] Glover testified that he knew that Kiliszewski supported the UAW. Tr. 368. Compeau denied that she any familiarity with Kiliszewski prior to the incident with Sanchez. Tr. 281. However, the evidence shows that just 2 weeks earlier in April she had a meeting with Leadingham that was occasioned by Kidder's report about recent union activity by Kiliszewski. Tr. 134–136; GC Exh. 20. It was Leadingham's reported involvement in that activity that led the Respondent to suspend Leadingham.

[7] I do not credit O'Brien testimony that he was unaware that Kiliszewski was a union supporter at the time he approved Compeau's termination recommendation. Tr. 402. Even the Respondent's own witness, plant manager Ferris, testified that Kiliszewski had brought up his support for the Union during the May 9 meeting. Tr. 371–372. Thus in the unlikely event that O'Brien somehow remained ignorant of Kiliszewski's extensive history of organizing activity at the Holland facility, and also ignorant of the fact that the Respondent had recently suspended Leadingham based on Kidder's report that Kiliszewski and Leadingham were engaged in union organizing, I would find that

Compeau testified, accurately I find, that during the May 9 meeting, Kiliszewski took the position that the heated and rude character of the May 5 interaction between Sanchez and himself was Sanchez's fault, not his own. Beyond that, however, I find that Compeau liberally embellished her description of the May 9 meeting in ways that profoundly undermine her credibility. For example, when describing what was discussed about the Sanchez-Kiliszewski incident, Compeau asserted that Kiliszewski's response to Sanchez's request for help was you "dumb . . . disrespectful Hispanic woman." (Tr. 296.) Later Compeau repeated the claim that Kiliszewski had made racially harassing statements during the disputed exchange. (Tr. 305.) Compeau's claim that Kiliszewski referred to Sanchez's race or national origin during the incident with Sanchez has not a whit of support in the record. Elsewhere, Compeau made a similarly unsupported claim that during the exchange between Kiliszewski and Sanchez, he had said "you stupid woman." Tr. 295. Neither O'Brien nor Glover—the other two management witnesses at the May 9 meeting—claimed that statements referring to Sanchez as an "Hispanic woman" or a "stupid woman" were alleged. Similarly, the testimonies of witnesses to the May 5 incident are contrary to Compeau's accusation. Sanchez herself gave lengthy testimony about what she remembered Kiliszewski saying on May 5 and she made no claim that Kiliszewski referred to her national origin or called her a "dumb woman" or a "stupid woman." Indeed when Compeau herself was pressed on cross examination about whether Kiliszewski had actually made racist statements towards Sanchez on May 5, she became evasive and instead of answering the question she criticized Kiliszewski's attitude towards management on May 9. (Tr. 334.) My review of the record leads me to conclude that Compeau invented the "dumb Hispanic woman" and "you stupid woman" statements. These false accusations and Compeau's angry demeanor while making them, evidenced an unusual animosity towards Kiliszewski and one for which the record provides no ready explanation beyond hostility towards Kiliszewski's unionizing efforts.

Compeau attempted to further her narrative about gender harassment by asserting that Kiliszewski, by not directly looking at or addressing her during the May 9 meeting, was treating her "the way he treated Norma[Sanchez]"on May 5. However, Kiliszewski did not refuse to address Sanchez directly on May 5. To the contrary, the Respondent's explanation for discharging Kiliszewski relies on the fact that Kiliszewski *did* directly address Sanchez. In a similar vein, Compeau, after asserting that Kiliszewski refused to address her on May 9, claimed that he yelled at her, just like he did at Sanchez. Tr. 334-335. Compeau's claim that Kiliszewski yelled *at* her on May 9 is, of course, hard to square with her claim that he refused to even speak to her at the meeting. When pressed, Compeau conceded that Kiliszewski did not yell at her. (Tr. 335.)

Compeau denied that, during the May 9 interview, Kiliszewski ever reported that Sanchez had yelled at him on May 5. (Tr. 331–332.) However even management witness Glover testified that, during that interview, Kiliszewski stated that Sanchez yelled at him. Indeed, Glover testified that he *believed* Kiliszewski's report that Sanchez had yelled at him. (Tr. 367, 375.)[8] I note, moreover, that Compeau was at times overly susceptible to influence by the Respondent's counsel. For example during questioning by the General Counsel, Compeau denied knowing what certain writing on a document meant. However, after the Respondent's counsel interrupted the questioning and asserted that it said "D-A-V-I-D , like David Napier," Compeau changed her answer and said "it's saying David." (Tr. 326–,327.) For the reasons stated above, as well as her demeanor on the stand, which was nervous, erratic and angry, and based on the record as a whole, I find that Compeau was an unusually biased witness, and one who succumbed to the temptation to exaggerate and fabricate in an effort to justify Kiliszewski's termination. Compeau's testimony is entitled to little or no weight regarding disputed matters.

Compeau testified that by end of the May 9 meeting, and before interviewing any other witnesses, it was already her opinion that Kiliszewski should be discharged. It was after reaching that conclusion that Compeau performed the Respondent's investigation of the incident. In addition to Sanchez and Kiliszewski, Compeau interviewed Gerald DeCheney, Lilianna Guajardo, Stacey Karsten, Mathews, Eugene Miles and Ian Pershing. She did not interview Willie May Walton, a former employee who Kiliszewski identified to Compeau as a witness who could corroborate that Sanchez had moved towards him in an aggressive manner on May 5. The results of Compeau's investigatory interviews are notable for the extent to which those interviewed indicated that Sanchez was the aggressor in the confrontation.

DeCheney, a welder gave a statement to the Respondent in which he recounted that at 10:20 p.m: "Norma . . . went up to [Kiliszewski] and started to yell at him about a machine being down for 20 minutes to a half hour.." DeCheney reported that Kiliszewski responded by asking "where were the four maintenance people on her shift"? Norma responded that she did not know. Then Kiliszewski said "OK, as soon as I get my ear plugs in and unlock my tool box." DeCheney concluded: "It was not fast enough for [Sanchez] and she went off on [Kiliszewski]." Respondent's Exhibit Number (R Exh.) 21.

Guajardo, a welder, told Compeau that Sanchez had been laughing with some other employees immediately before approaching Kiliszewski and Mathews in an aggressive manner and yelling at them. The written statement she provided during the investigation stated:

> I heard Norma[Sanchez] yell at Mike[Kiliszewski] and Eric[Mathews] "Aye I have all these machines down." Mike yelled back at her not sure what Mike said but then Norma began to snap at him raising her voice louder and they both started screaming back and forth. Norma was pointing her finger at them both yell that she was going to get their supervisor and Mike said "that's fine go get him." At some point I heard [Mathews] say something back to Norma which I never

O'Brien knew that Kiliszewski was a union supporter based on the May 9 meeting.

[8] At any rate, Compeau conceded that by the time she recommended Kiliszewski's termination she had received multiple witness statements to the effect that Sanchez had been screaming at Kiliszewski. Tr. 333.

> heard him say anything. Norma had just been joking and laughing around right before she saw Mike and [Mathews] by their table.

(R. Exh. 27.) Compeau conceded that she did not think Guajardo was lying. The fact that the Compeau knew that Sanchez was joking and laughing with other employees immediately before yelling at Kiliszewski calls into questions her purported belief, heavily relied on in the Respondent's brief, that Sanchez was scared of Kiliszewski.

Stacey Karsten, a weld operator, also provided a statement. She reported seeing Sanchez tell Kiliszewski to fix a machine. Kiliszewski "said he wasn't on the floor yet and to leave the area." Sanchez walked away, but returned a few minutes later and told Kiliszewski to fix the machine. Kiliszewski "told her again that he's not on the floor yet and to leave his fucking area." According to Karsten, Sanchez then "got more aggressive and said she would go to his boss," to which Kiliszewski replied "something like do you need an invite and directions." Sanchez then walked away. Karsten said that Kiliszewski did not say "fucking bitch" as Sanchez was walking away and that Sanchez did not swear at Kiliszewski. (R. Exh. 29.)

Mathews gave a statement in which he recounted that, when Sanchez approached them, he told her that their "shift did not start yet" but that "we will be there as soon as we can." A few minutes later Sanchez approached him and Kiliszewski again "demanding that we go fix her down machine now!" Sanchez was "pointing and shouting" at them and saying she was going to their boss. According to Mathews, Sanchez began shouting, "focused on Mike[Kiliszewski] and wouldn't back down." He said that Sanchez "wasn't listening to me in the background saying we are not even on the clock yet." Mathews reported that Kiliszewski told Sanchez it "was not our fault that her machine was down for 30 min[utes,] we just walked in the door go find your 2nd shift maint[enance]." Mathews says that Sanchez "kept coming at [Kiliszewski] about it, not letting him walk away." Notes of Compeau's interview with Mathews report that Mathew stated that Kiliszewski "when . . . talking about second shift maintenance . . . used the 'f' word," but that he did not curse otherwise. Mathews stated that Sanchez "was climbing all [up] our back, trying to get us to go over there," and "tempers flared." (R. Exh. 17.) Compeau testified that she did not think Mathews was lying.

Compeau's notes of her interview with Pershing recount Pershing stating that he heard Sanchez and Kiliszewski yelling at one another. He stated that the equipment "had been down for an hour and it seemed to me that [Sanchez] was taking it out on the guy who just got there"—i.e., Kiliszewski—instead of the second shift mechanic "who was supposed to be working and wasn't." Pershing said he thought he heard both Sanchez and Kiliszewski use the word "fuck." (R. Exh. 23.) Compeau testified that she believed Pershing.

Compeau personally interviewed all the above employees regarding what they had witnessed. Compeau also received written accounts from David Napier, a welder, but unlike the investigation participants discussed above, Compeau did not interview Napier. Rather, Sanchez was the one who obtained the initial statement from Napier and provided it to Compeau. That statement reports that Sanchez and Kiliszewski had "a screaming match" during which Kiliszewski said "fuck you bitch." (R. Exh. 14.) A second Napier statement, dated May 11, was obtained by other staff of the Respondent and essentially repeated the first statement. (R. Exh. 15.)

As found earlier, Kiliszewski did not say "fuck you bitch" to Sanchez. Moreover, Compeau did not have a reasonable basis for concluding that Kiliszewski had done so. As discussed above, Sanchez made this claim, but even in her account she did not see who had made the alleged statement. On the other hand, Compeau interviewed five witnesses to the incident (DeCheney, Guajardo, Karsten, Mathews, and Pershing[9]) and not a single one of them corroborated Sanchez' claim that Kiliszewski had said "fuck you bitch" to her. Indeed Karsten expressly denied that Kiliszewski had done so. Kiliszewski himself denied both during the Respondent's investigation and under oath at trial that he made the statement.

E. Respondent Discharges Kiliszewski

After her investigation, Compeau made a recommendation that Kiliszewski be discharged for "not just gender but racial harassment," as well as "vulgar language" and "refusal to perform work." At trial, Compeau at first attempted to deny that that there were any statements obtained during the investigation that reported Sanchez was the aggressor during the confrontation. (Tr. 333–334.) When pressed, Sanchez backpedaled, stating that she did not recall whether there were any such statements. (Tr. 334.) Regarding Kiliszewski's refusal to perform work, Compeau conceded during her testimony that the exchange occurred before Kiliszewski's shift and at a time when he would not be paid for working. She testified that employees are not, in fact, expected or required to perform work when they are not on the clock or getting paid. (Tr. 336.) Glover, the Respondent's maintenance manager, testified that employees were not supposed to be on the production floor prior to the start of their scheduled shift. (Tr. 374.)

O'Brien was the company official who gave final approval to Compeau's recommendation that Kiliszewski be terminated. O'Brien did not perform an independent investigation of the incident. He relied on Compeau's investigation and also said that his decision "ultimately came down to" his view that "Norma [Sanchez] was believable."

F. Handbook and Discipline of other Employees

The Respondent's handbook states that employees will be subject to progressive discipline for various types of misconduct, including "failing or refusing to follow clear instructions of a supervisor, undermining supervisory authority or other insubordination," or for "directing abusive or profane language toward a fellow Team Member, supervisor or manager." (R. Exh. 4 at p. 18.) This section states that a "verbal written warning" is the appropriate discipline for the first such offense. The discipline for the second offense is a written warning, and for the third offense is a written warning plus a 2-day suspension. It is only after the employee commits a fourth such offense that discharge is indicated. The section provides that the progressive

[9] Compeau also interviewed Miles, but her summary of the interview indicates that Miles did not witness the incident.

discipline steps may be accelerated based on the "seriousness" of the offense and "just cause."

The Respondent's employee handbook also includes a policy on team member dignity and respect/harassment. Id. at Page 3. The handbook states that violations of that policy will "typically lead to termination." Id. at Page 17. The policy defines harassment as "serious and pervasive unwelcome conduct, whether verbal, physical or visual, that is based on a person's race, color religion, sex, age, national origin, height, weight, marital status, veteran status, disability, genetic information or any other characteristic protected by law." Id. at Page 3. The section states that "Challenge expects all of its team members to conduct themselves with dignity and with respect for fellow team members, customers, the public, and others."

The parties presented evidence regarding the Respondent's disciplinary responses to a number of other individuals who violated the above rules. At the outset, I note that Mathews received no discipline at all for his conduct on May 5 even though he joined Kiliszewski in refusing Sanchez' direction to perform work before the start of their shift. The General Counsel presented documents from the Respondent's files that discussed the following disciplinary responses to conduct by other individuals:

- A team leader received a "verbal written warning" on July 7, 2017, for using "abusive language at a manager."
- An employee received a "verbal written warning" on January 13, 2017,for "directing profane language toward a shift lead."
- An employee received a "verbal written warning" on May 17, 2016, for sending a text with profane language to another employee.
- A maintenance apprentice received a "verbal written warning" on July 18, 2017, for "profane language/causing a scene in front of our customer."
- An employee received a warning on March 30, 2017, for "directing abusive language towards a team leader/teammate."
- An employee received a "written warning" for both "undermining supervisory authority," and "abusive language towards a fellow team member"
- An employee received a warning on March 30, 2017, for "using profane language towards another team member."
- A welding employee received a "verbal written warning" on March 1, 2018, for "using profane language toward a co-worker" and then cursing and yelling at staff in human resources.
- A maintenance employee received a "verbal written warning" for using profanity over the radio and swearing at a shift supervisor. The discipline notes that this was not the employee's first offense.
- An individual received a warning on August 1, 2017, because she "created hostile environment by yelling profane comments on several occasions."
- An individual received a "1st written warning" on July 14, 2016, for "abusive or profane language toward a fellow team member."
- An individual was terminated on January 1, 2017, for "cussing people out." The record states that before terminating this individual, management tried to address the problem by moving the offending employee to another area at the facility. The record also notes that three employees had given statements complaining about the employee's offensive conduct towards them.
- A male employee was "sent home pending investigation" on February 9, 2017, for the use of profane language after two female employees complained that he had made comments to them about their breast size and engaged in unsolicited and unwanted touching of the breasts of one of the women.
- A shipping employee received a "verbal written warning" on April 5, 2018, after refusing a manager's direction to help pack parts.
- A team leader in the "weld destruct" department received a warning on August 3, 2016, after "bec[oming] hostile," repeatedly refusing to follow directions over a period of days, and being "caught loafing on the job too many times."
- An employee received a second written warning and 2 days off without pay on March 11, 2016, for "insubordination, including refusal to perform work assigned within an employee's work classification"
- An employee received a "first written verbal" warning on May 10, 2016, for refusing to follow the instructions of a supervisor, then yelling and throwing something before walking away from his work station. Two days later, the same employee receive a "first written warning" for refusing to follow the instruction to work on a particular piece of equipment.
- An employee received a "verbal written warning" on May 12, 2016, for failing to follow clear instructions regarding safety, and received a second written warning on June 11, 2016, for failing to follow clear instructions about which job to perform. The documents indicate that this employee voluntarily quit.
- An employee was cited on October 5, 2016 for failing to follow a supervisor's clear instructions. The citation form does not indicate that any discipline at all was issued for this. Nine days later, on October 14, the same employee received a second written warning for again failing to follow instructions. The warning notes that the employee was asked to perform a task, but "refused and went home." It was not until October 26, when the employee was cited a third time in the same month for refusing to follow directions, that he was terminated.
- A maintenance/auto technician was spared by the Respondent, and still employed at the time of trial, despite repeated instances of misconduct. The record contains no fewer than 10 instances when the Respondent's records describe this employee's miscon-

duct, performance, and/or attendance issues. His offenses included swearing and yelling at team leaders and operators, disrespecting supervisors, sleeping on the job, taking unscheduled smoking breaks, smoking in non-smoking areas, causing damage to equipment, deliberately violating a safety rule to lock equipment, and using another employee's log-in information. GC Exh. 25 at Page 000578, GC Exh. 22, see also Tr. 342 lines 11 to 13.

The Respondent presented evidence of four employees who it disciplined for misconduct of various types:

- An employee was terminated on January 23, 2017, for repeatedly cursing at other employees. The Respondent received statements about this from three employees. According to the Respondent's records, the offending employee told management that cussing out other employees is "who she is and that is what she is going to do." The person who recommended termination, noted that the company had previously attempted to address the problem by transferring the employee to different area within the plant.
- The Respondent "ended the assignment" of an employee on May 11, 2017, after the employee, "blew up" when a supervisor directed her to perform an assignment, then deserted her duty station and declared that she was "going to punch out and go home."
- The Respondent terminated an employee on May 18, 2017,[10] for using profanity towards supervision, being disruptive towards two different supervisors in front of the entire group of employees assembled for a shift meeting, refusing to move the discussion with the supervisors to an area out of the presence of the other employees, continuing to yell at a supervisor even after being told he was "on notice for insubordination," and accusing a manager of being "a boozer" who was "drunk right now." All the witness statements indicated that the discharged employee was the aggressor.
- On May 18, 2018, the Respondent ended the assignment of a non-employee who had worked at the facility for about 6 weeks through a temporary staffing service. According to information gathered by the Respondent, the employee had threatened an employee by saying she would "fuck her up" and would "fuck up that lesbian ass bitch." That information also notes that the removed non-employee made derogatory remarks about supervisors and team leaders "ongoing through the entire shift."

III. DISCUSSION

A. Section 8(a)(1): Leadingham's Warning to Kiliszewski

The General Counsel alleges that the Respondent unlawfully threatened and created the impression of surveillance of union activity when, in late April 2017, Leadingham, a supervisor, told Kiliszewski to watch his back because the Respondent's managers were after him and anyone else who was talking about the Union and that he himself had been suspended for discussing the Union with Kiliszewski. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights to engage in protected union and concerted activity.[11] In deciding whether an employer has made a threat in violation of this prohibition, the Board applies an objective standard. This means that it considers whether the remark would reasonably tend to interfere with the free exercise of employees' Section 7 rights, and does not look at the motivation behind the remark, or rely on the success or failure of the remark in suppressing protected activity. *Midwest Terminals of Toledo*, 365 NLRB No. 158, slip. op. at 21 (2017), *Divi Carina Bay Resort,* 356 NLRB 316, 320 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.,* 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury,* 314 NLRB 470, 471 (1994).

At the time he made the statements alleged to be unlawful, Leadingham was a Section 2(11) supervisor and an agent of the Respondent within the meaning of Section 2(13). Leadingham's warning that Kiliszewski should watch his back because managers were after him because of his union activity reasonably tended to interfere with the free exercise of Kiliszewski's Section 7 rights to engage in protected union and concerted activities and created the impression that such activities were under surveillance. Those statements are a clear violation of Section 8(a)(1) of the Act under the cases cited above.

In reaching the conclusion that Leadingham's statements to Kiliszewski violated the Act, I considered the totality of the relevant circumstances, including the appearance that Leadingham may have only intended to help Kiliszewski by giving him a friendly warning. As noted above, however, the Board evaluates whether a statement by a supervisor is unlawful through an objective inquiry into whether the statement would reasonably be expected to interfere with Section 7 activity, not an inquiry into the supervisor's subjective motivation for making the statement. The Board has repeatedly and consistently applied that objective standard to hold that a supervisor's threats about union activity violate Section 8(a)(1) even if the speaker only intended to give the employee a "friendly warning." For example, in *Long Island College Hospital*, 327 NLRB 944, 945 (1999), the Board held "'friendly warnings' from supervisors to employees to 'watch your back,' 'keep a low profile' and similar advice to be unlawful." See Also *Tecmec*, 306 NLRB 499, 504 (1992) ("[A] remark, made by a supervisor, about the reaction of a higher level supervisor, constitutes a

[10] The documentary evidence does not demonstrate that this employee was terminated, R. Exh. 50, but Compeau testified that the employee was terminated, Tr. 320–321.

[11] Sec. of 7 of the Act provides that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

coercive threat that interferes with employee Section 7 rights even if it is given in a 'friendly' manner."), enfd. 992 F.2d 1217 (6th Cir. 1993). The Board finds a violation even when the supervisor who gave the friendly warning about union activity was, in fact, a friend of the warning's recipient. In *J.T. Slocomb Co.*, 314 NLRB 231 (1994), for example, a supervisor who had previously spoken favorably about unionization with an employee later gave that same employee what the administrative law judge characterized as a "warning from a friend to be careful." The administrative law judge found no violation, but the Board reversed, and held that the supervisor's "warning from a friend" was a violation because it would reasonably be seen as conveying a message from management to stop talking about the union and would reasonably cause fear on the employee's part. In *M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1288 (1984), the Board affirmed that a supervisor's warning was coercion in violation of Section 8(a)(1) even though the supervisor had merely taken "it upon himself to warn his *good friend* that he could be putting his job in jeopardy if he decided to engage in union activity." (Emphasis Added). Similarly, in *Continental Chemical Co.*, 232 NLRB 705, 706 fn. 5 (1977), a supervisor's statement "warning . . . a friend and colleague to be more discreet" about his union activity constituted unlawful coercion and created the impression of surveillance.

I find that the Respondent violated Section 8(a)(1) in April 2017 by threatening Kiliszewski with unspecified reprisals for engaging in union and other protected activity and by creating the impression that such activities were under surveillance by the Respondent.

B. Section 8(a)(3) and (1): Discharge of Kiliszewski

The complaint alleges that the Respondent discharged Kiliszewski because of his protected union and concerted activity in violation of Section 8(a)(3) and (1) of the Act. The Respondent asserts that the discharge decision was not motivated by Kiliszewski's protected activity, but by his conduct on May 5 when it contends that he violated its policies against gender and national origin harassment, use of vulgar language towards a supervisor, and refusal to perform work. In cases, such as this one, where motivation is in dispute, the General Counsel bears the initial burden under the *Wright Line* analysis of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-75 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain,* supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The record easily establishes the first element of the initial showing under *Wright Line*. Kiliszewski had a history as leader of union organizing efforts at the Holland facility. He contacted the UAW to initiate the 2013 and 2015 organizing campaigns and during the 2015 campaign he distributed and collected union authorization cards, wore pro-union paraphernalia, and talked with hundreds of employees about unionization. More recently, in April 2017, Kiliszewski exercised his Section 7 right to engage in union organizing activity at a time when the UAW itself had agreed to temporarily refrain from organizing at the Holland facility. See *Parc Fifty One Hotel*, 306 NLRB at 1002 (although "neutrality agreements may be commendable they cannot negate employees' exercise of their Section 7 rights"); see also Tr. 270-271 (Respondent's trial counsel recognizes that Kiliszewski's right to engage in Section 7 activity was not waived by the neutrality agreement). Kiliszewski's activities in April 2017 included soliciting employees to sign union authorization cards and discussing unionization with other employees.

The second element of the *Wright Line* initial showing is also established since the record shows that the Respondent was aware that Kiliszewski had resumed his union activity in the weeks leading up to his discharge. In April, Ridder informed the Respondent that Kiliszewski had been circulating union authorization cards and conducting off-site union meetings. Although Compeau, the primary mover behind Kiliszewski's discharge, gave the impression that she was not aware of his union activity – testifying that she did not have "any familiarity" with Kiliszewski prior to her involvement in the discipline – the evidence shows that she participated in a meeting in late April that was prompted by Ridder's report that Kiliszewski and Leadingham were engaged in union activity. During that meeting, Leadingham was interrogated about the identities of employees engaged in union activity and was himself suspended. At any rate, during the May 9 interview with Compeau, Glover, and O'Brien—before the recommendation or final discharge decision were made—Kiliszewski notified those three officials of his union activity by accusing them of singling him out because of his support for the Union. Thus, Compeau had information about Kiliszewski's recently resumed union activity at the time she conducted the investigation of the Sanchez incident and recommended Kiliszewski's discharge. I do not believe it is necessary for the General Counsel to show that O'Brien, who made the final decision to approve Compeau's discharge recommendation, was, like Compeau, aware of Kiliszewski's protected activity. O'Brien conducted no independent investigation before approving Compeau's recommendation to discharge Kiliszewski. At a minimum the Respondent's knowledge of Kiliszewski's union activity was connected to the discharge decision by way of Compeau and her significant part in the decisional process. Even were it necessary to show that O'Brien was aware of Kiliszewski's union support, I find that such a showing was made since Kiliszewski

notified O'Brien of that support during the May 9 meeting.

The General Counsel has also established the third and final element of its initial burden, i.e., that the Respondent bore animus towards Kiliszewski's union activities. Management at the Holland facility aggressively resisted the union campaigns in 2013 and 2015 by, inter alia, photographing Kiliszewski's interactions with coworkers, informing employees that it was "100 percent opposed to a unionized plant" and raising the specter that unionization would lead to closure and bankruptcy. In 2017, when management at the Holland facility discovered that Kiliszewski was again engaging in organizing activity at a time when management believed the neutrality agreement guaranteed it a respite from such activity, it reacted aggressively to what it incorrectly believed was a "very clear breach of the neutrality agreement." Contrary to management's apparent misunderstanding, the neutrality agreement did not negate the federally guaranteed Section 7 rights of the employees themselves.[12] Tomko and Compeau called Leadingham into a meeting and interrogated him about the identities of employees engaged in union activity and then suspended him. After Leadingham, a supervisor, left the meeting, he contacted Kiliszewski and gave warnings that constituted threats of unspecified reprisals for union activity and which created the impression that union activities were under surveillance by the Respondent. In addition, Compeau's false accusations about national origin harassment by Kiliszewski and her vitriolic demeanor while making those accusations at trial betrayed an unusual level of animosity for which the record provides no ready explanation beyond hostility towards Kiliszewski's recently discovered unionizing activity.

An inference of antiunion animus is also supported by the timing of the decision to discharge Kiliszewski. *Camaco*, 356 NLRB at 1185; see also *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 31 (2016), enfd. in relevant part by 860 NLRB F.3d 639 (8th Cir. 2017); *Gaetano & Associates*, 344 NLRB 531, 532 (2005) (animus may be inferred from timing), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (same). Kiliszewski had not received prior discipline of any kind during his more than 8 years with the Respondent. Then just 2 or 3 weeks after the Respondent first received a report that Kiliszewski was behind a 2017 organizing effort, the Respondent not only disciplined him, but imposed the ultimate discipline of discharge. The evidence raises an inference of anti-union animus connected to the discharge and easily clears the General Counsel's third hurdle under *Wright Line.* Id., see, also, *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005) (fact that employer's adverse action against employee immediately followed employer's first knowledge of that employee's union sympathies, supports an inference of animus), enfd. 232 Fed. Appx. 270 (4th Cir. 2007).

The evidence shows that Kiliszewski was a leader of unionization efforts at the facility, the Respondent's animosity towards that activity and a connection to the discharge decision. Therefore, the General Counsel has met its initial burden under *Wright Line* and the burden shifts to the Respondent to show by a preponderance of the evidence that it would have terminated Kiliszewski even in the absence of his protected activity. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent cannot meet this burden by simply showing a legitimate reason for the termination, but rather must show that it would have taken the same action for that legitimate reason even in the absence of the protected activity. *Monroe Mfg*., 323 NLRB 24, 27 (1997); *T & J Trucking Co*., 316 NLRB 771, 771 (1995), enfd. 86 F.3d 1146 (1st Cir. 1996) (Table).

I find that the Respondent has failed to meet its responsive burden. Compeau testified that the decision to terminate Kiliszewski was based on his racial and gender harassment as well as vulgar language and refusal to perform work. As stated above, Compeau's claim that Kiliszewski made reference to Sanchez being Hispanic or called her "stupid woman" or "dumb woman" during the incident was invented whole cloth by Compeau. The most plausible explanation for this fabrication is her awareness that the Respondent's handbook provides that "national origin" or "sex" harassment will "typically" lead to the harasser's termination. Thus if Compeau could show that Kiliszewski had made such statements and that they rose to the level of "serious and pervasive" harassment under the handbook (a big "if"), then Compeau could arguably justify imposing discharge as the very first disciplinary action against Kiliszewski. On the other hand, the handbook provides that directing profane language at supervisors and insubordination—the offenses that the Compeau can more plausibly attribute to Kiliszewski—are dealt with through progressive discipline starting with a verbal warning for the first offense and only reaching discharge after the fourth such offense. Given that Compeau had no basis for claiming that Kiliszewski made the allegedly harassing statements, she is left to defend Kiliszewski's discharge based on "profane language" and insubordination. The handbook and the comparator evidence show that discharging Kiliszewski for the first instance of such an offense was a profound departure from the Respondent's own guidelines and usual practice.

In reaching the conclusion that the Respondent has not met its responsive burden, I considered that the handbook, while setting forth steps of progressive discipline, provides that the disciplinary steps may be accelerated based on the "seriousness" of the offense and "just cause." In this case, the Respondent has not shown that it had a reasonable basis for skipping any of the three disciplinary steps preceding discharge, much less that it had a reasonable basis for skipping *all* of those steps as it did here. If anything, Compeau's investigation revealed significant factors that should have mitigated the disciplinary response to Kiliszewski's conduct. For example, while it true that the Respondent's handbook provides that an employee may be disciplined for refusing their supervisor's direction to perform work, in this case Sanchez was not Kiliszewski's supervisor or even a supervisor on his shift. Indeed, she was directing Kiliszewski to perform work before his start time and at a time when he would not be paid for the work and was not even supposed to enter onto the production floor.

[12] As discussed above, the neutrality agreement between with the UAW did not, and could not, waive employees' own rights to engage in Section 7 activity. *Parc Fifty One Hotel*, supra.

Compeau herself testified that employees are not required to perform work at times when they are not getting paid. It is strange, then, that Compeau would conclude that Kiliszewski should receive any discipline at all for declining to perform work at a time when he was not, in fact, getting paid, and was not supposed to enter onto the production floor. While even a verbal warning would have been hard to justify under those circumstances, Compeau's decision to bypass the first three disciplinary steps and recommend Kiliszewski's immediate discharge is inexplicably draconian and, under all the circumstances here, highly suspicious.

Similarly, Compeau's investigation revealed mitigating factors with respect to Kiliszewski's conduct in directing profane language at a supervisor. Compeau interviewed five witnesses to the incident (in addition to Sanchez and Kiliszewski) and the statements of those witness suggest that Sanchez was the aggressor and was taking out frustration with her own second shift mechanics on Kiliszewski—a third-shift mechanic who had just arrived at the facility and whose shift had not started. Witnesses reported that Kiliszewski had told Sanchez that he was not on the clock yet and would make the repairs once he started work, but that Sanchez repeatedly accosted him and, according to one, was resisting Kiliszewski's efforts to disengage from the confrontation. Compeau discounted this evidence, claiming, incredibly, that there was nothing in the investigation indicating that Sanchez was the aggressor during the exchange. Instead of making a downward adjustment of the discipline based on Sanchez' part in provoking and prolonging the confrontation, Compeau did just the opposite – accelerating the progressive discipline for Kiliszewski's first infraction past the recommended verbal warning, past written warning, past suspension, and all the way to the ultimate penalty of discharge.

The record evidence of the discipline imposed on other employees does nothing to advance the Respondent's efforts to meet its responsive burden of showing that it would have discharged Kiliszewski even if its animosity towards his protected activity had not been a motivating factor. To the contrary, the record shows that employees who the Respondent disciplined for first offenses of directing profanity at supervisors and coworkers and/or for refusing to perform work had almost always received verbal warnings or other lesser discipline. The evidence, which is summarized above in the statement of facts, showed over a dozen instances in which the Respondent imposed only a verbal warning on employees for directing abusive or profane language at others. This included instances where the language was directed at managers, supervisors, and team leads. The instances where a verbal warning or other lesser discipline was imposed encompassed misconduct that included repeatedly refusing to follow work directions, angrily throwing an object in the work area, walking off the job, and groping a female co-worker's breasts. Some of the employees involved were eventually terminated, but only after the Respondent first attempted to address the behavior with lesser discipline or by transferring or moving the offending individual within the facility. No such opportunity was afforded to Kiliszewski. The evidence identified one employee who the Respondent continued to employ even after he had received ten separate citations for, inter alia, swearing at team leaders, disrespecting supervisors, sleeping on the job, taking unscheduled breaks, damaging equipment, and deliberately violating safety rules. Instead of allowing Kiliszewski 10 second chances as it did that individual, the Respondent's first disciplinary response for Kiliszewski was to discharge him.

The Respondent proffered two examples in which there was evidence that the first discipline or action taken to address a worker's misconduct was termination.[13] In one, the Respondent terminated the assignment of a contract worker who had been at the Respondent for only a matter of weeks and who threatened a coworker with violence by stating, inter alia, that she would "fuck up that lesbian ass bitch." That situation is not at all comparable to Kiliszewski's both because the worker there was a recently engaged contract worker whereas Kiliszewski was an 8-year employee, and also because the alleged comparator's conduct included threats of violence. The second instance concerned an individual whose conduct was not comparable to Kiliszewski's in that she not only refused a work direction and blew up at a supervisor, but abandoned her job duties and, by her own report, was leaving the facility during her scheduled shift. Arguably this employee quit before the Respondent "terminated her assignment." Kiliszewski's failure to perform work, on the other hand, occurred before the start of his scheduled shift and at a time when he was not required to perform work, and the record shows that he attended to his duties once his shift started. Even assuming, contrary to my own findings, that the circumstances in one or both of these last two examples are properly viewed as somewhat comparable to those surrounding Kiliszewski's termination, such evidence would be easily outweighed by the contrary evidence in this case. The record, taken as whole, shows that a warning was not only what the handbook identified as the appropriate discipline for Kiliszewski's alleged first-time offense, but was the harshest discipline that the Respondent customarily imposed in such circumstances.

For the above reasons, I find that the General Counsel has met its initial burden of showing that animus towards Kiliszewski's union and concerted activities was a motivating factor in the Respondent's decision to discharge him, and that the Respondent has failed to meet its responsive burden of showing that it would have discharged Kiliszewski even if it had not been motivated by such animus. The Respondent terminated the employment of Kiliszewski, an 8-year veteran of the facility who had no prior discipline, just 3 weeks after it discovered that he was behind a new unionization effort at the facility. It attempts to justify the discharge on the basis of con-

[13] The Respondent presented evidence that two other individual were terminated for misconduct, but the record indicates that in neither instance was termination the first action that the Respondent had taken to address the misconduct. In one of these instances, the documentary evidence reveals that the Respondent had made prior efforts to address persistent misconduct by transferring the employee. In the other, the evidence showed that before being terminated the employee was verbally warned that he was "on notice for insubordination." The employee was only terminated after he ignored that warning and continued the misconduct—which included profane, unprovoked, and potentially slanderous attacks on company officials in the presence of employees assembled for a shift meeting.

duct that the Respondent's own handbook provides should be addressed, in the first instance, with a verbal warning and which it was the Respondent's practice to address with verbal warnings or other lesser punishment.

The Respondent unlawfully discriminated against Michael Kiliszewski based on his protected union and concerted activities in violation of Section 8(a)(3) and (1) of the Act when it terminated his employment on May 12, 2017.

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) in April 2017 by threatening Kiliszewski with unspecified reprisals for engaging in union and other protected activity and by creating the impression that such activities were under surveillance by the Respondent.

3. The Respondent unlawfully discriminated against Michael Kiliszewski based on his protected union and concerted activities in violation of Section 8(a)(3) and (1) of the Act when it terminated his employment on May 12, 2017.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Kiliszewski, must offer him full and immediate reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[14]

ORDER

The Respondent, Challenge Mfg. Company, LLC, Holland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals for engaging in protected union and concerted activities.

(b) Creating the impression that employees' protected union and concerted activities are under surveillance.

(c) Discharging or otherwise discriminating against any employee for supporting the UAW or other any union, or for engaging in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Michael Kiliszewski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Kiliszewski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Holland, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted, including all bulletin boards in break rooms located on units where bargaining unit employees work. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2017.

Dated, Washington, D.C. September 5, 2018

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity.

WE WILL NOT threaten you for supporting or choosing to be represented by the UAW or any other union, or for engaging in protected concerted activity.

WE WILL NOT create the impression that your protected union and concerted activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Kiliszewski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Kiliszewski whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily, and WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Michael Kiliszewski for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Michael Kiliszewski, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CHALLENGE MANUFACTURING COMPANY, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-199352 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.