UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEFFIELD BARBERS LLC

and **Cases 28-CA-199308**
28-CA-210447

NELLIS BARBERS ASSOCIATION

and **Case 28-CA-209734**

UNCHONG THROWER, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS

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REGION 28

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I. INTRODUCTION

Administrative Law Judge Gerald M. Etchingham (ALJ) properly found that Sheffield Barbers LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it disciplined and discharged its employee Unchong Thrower (Thrower) because of her protected concerted activities. The ALJ also found that Respondent committed a series of violations of Section 8(a)(5) of the Act by refusing, as a successor employer, to recognize and bargain with the Nellis Barbers Association (NBA) as the representative of the employees at the Nellis Air Force Base (Nellis AFB); and violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities; stating that the NBA's CBA was a fraud, telling NBA business representative Barbara Dyson to "shut up" while informing her that having the support of the Department of Labor was superior to the National Labor Relations Board, and promulgating and maintaining discriminatory rules in retaliation of its employee Unchong Thrower's protected concerted activities. Notably, Respondent does not take exception to those serious and flagrant violations of the Act.

Respondent, however, does take 11 exceptions to the ALJ's determinations regarding Thrower's discipline and discharge. Respondent's overt attempt to overturn the ALJ's credibility determinations should be rejected. Indeed, by its exceptions, Respondent simply seeks a credibility determination "do-over" and ignores the results of earlier litigation in which the ALJ properly credited the testimony of employee witnesses over Respondent's witnesses' incredible, contradictory, and self-serving testimony. Given Respondent's witnesses' severe lack of credibility, the ALJ ultimately and correctly found that Respondent violated the Act, as alleged. In short, Respondent's attempt to substitute its own credibility determinations over the ALJ's should be summarily rejected.

II. RESPONDENT'S CREDIBILITY EXCEPTIONS[1]

The overwhelming majority, if not all, of Respondent's exceptions rest on its implicit and direct attempts to overturn the ALJ's credibility resolutions. Despite the Board's well-settled policy not to overrule an administrative law judge's credibility findings unless the clear preponderance of all relevant evidence demands otherwise. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Peppered throughout its brief, Respondent seeks unprecedented scrutiny of the ALJ's credibility resolutions (and resulting findings of fact) by repeatedly ignoring the credited testimony of the employee witnesses presented by Counsel for the General Counsel (CGC). Respondent, through its exceptions 1-8, asks the Board to overturn several of the ALJ's specific credibility resolutions—the Board should refuse.

[1] 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 unfair labor practice hearing held between January 30 to 31, 2018; "ALJD _:___" refers to the Administrative Law Judge Gerald M. Etchingham's Decision issued on August 27, 2018; "RXB at ___" refers to Respondent's Consolidated Exceptions and Supporting Brief to the Administrative Law Judge's Decision, filed on January 29, 2020.

The testimony of the six employees called as witnesses for CGC was properly credited when in disagreement with the testimony of Respondent's witnesses. Five of the six employees were employed by Respondent at the time they testified, and the sixth, Unchong Thrower, testified in a manner consistent with the other five. This fact of continuing employment by Respondent may be properly weighed and considered in resolving credibility, based on the particular reliability of such witnesses. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978). Additionally, a sequestration order was in effect throughout the hearing.

Each of the employee witnesses called by CGC testified truthfully and in detail, without a hint of guile, deceit, or exaggeration and the ALJ properly credited these witnesses. The ALJ specifically found that Thrower testified in a "straight-forward no-nonsense manner confident in her recollection of the facts" surrounding the April 28 and April 29 events with Respondent's management and the specific incidents from November 9-11 (the subject of Respondent's exceptions 1-4). ALJD 18:40-42. Regarding the events on November 10, employee Myoung Suk Kim (Kim) testified consistently with Thrower on various key aspects, which was properly credited by the ALJ.

In contrast, the testimony of Respondent's supervisors and Managers Christina Deardeuff (Deardeuff), Arlene Fiori, and Trixie Monroe (Monroe) was marked with inconsistencies. In fact, the ALJ specifically found that Deardeuff was not a credible witness and that she made several false statements. ALJD 19:2-35. After testifying to her recollection of a job fair, Deardeuff was impeached by CGC with a prior inconsistent statement made under penalty of perjury. GCX 8; Tr. 68. After which the following exchange occurred between ALJ Etchingham and Deardeuff:

> ALJ Etchingham: And I'd admonish the witness to understand that the penalty of perjury is an important –
>
> Deardeuff: I do understand that, Your Honor. But I have a few issues with that, and I'm just going to leave it at that at this time. Tr. 68:25, 69:1-4.

As this example plainly shows, Respondent's selective presentation of record evidence is wholly insufficient to disturb the ALJ's credibility resolutions, and the Board should reject Respondent's exceptions that are similarly supported by cherry-picked portions of the record.[2]

The record contains plenty of reasons why Respondent's witnesses were discredited. During questioning by Respondent's counsel, Deardeuff testified about the contents of different documents marked as Respondent's exhibits, documents which Respondent never attempted to move into evidence, and Deardeuff mischaracterized what was said in them. e.g. Tr. 138:10-11. As discussed below, under direct examination by CGC, Deardeuff testified to one version of what employee Kim allegedly said on November 11 and then testified to a different version under cross-examination by Respondent's counsel—which occurred after the hearing broke for lunch. With regards to new rules that Respondent posted on November 11 after Thrower's discharge (GCX14), Deardeuff made the absurd claim that Monroe posted that document "at the discretion of Loren Unchong Thrower," who had just been discharged. Tr. 223:4-9. Respondent's witnesses' credibility was further weakened by Respondent's counsel repeatedly leading Deardeuff throughout questioning, guiding her testimony. Tr. *passim, e.g.*, 197:1-7.

Regarding the basis of Thrower's discharge, Managers Monroe and Deardeuff contradicted themselves in their testimony as well with their own discharge paperwork. Monroe testified that part of the reason Thrower was discharged was because Thrower had bullied and harassed Monroe. However, Deardeuff made no mention during her testimony of Thrower bullying or harassing Monroe, and Thrower's Employee Termination Report makes no mention

[2] Respondent's exceptions to other specific findings resting on credibility are discussed throughout, below, although this is just one of many striking examples of how, contrary to Respondent's exceptions, the ALJ made crucial findings not only by considering the demeanor of a witness that appeared before him during the trial, but by reconciling such testimony with, often, conflicting evidence.

of this in its description of the conduct leading to Thrower's discharge. As discussed further below, the ALJ properly discredited Respondent's belated attempts to establish additional reasons for Thrower's discharge.

In sum, as the above examples demonstrate, the ALJ had ample reason to credit CGC's witnesses over the testimony of Respondent's supervisors and managers. Under *Standard Dry Wall*, the Board should reject Respondent's cherry-picking of the record to bolster flatly rejected testimony because the clear preponderance of the record (as a whole) supports the ALJ's credibility resolutions and the resulting facts. The ALJ's credibility resolutions should be upheld.

III. RESPONDENT'S SPECIFIC EXCEPTIONS

A. The ALJ correctly found that Thrower told Monroe and Kim that she would like to leave early; that Thrower asked Monroe if Kim could stay and close instead; and that Thrower asked Kim if she could close on November 10, and Kim responded by saying "okay" – Respondent's Exception 1-3

The ALJ found that on the Veterans Day holiday on Friday, November 10, Thrower and Kim worked from 9 a.m. to 5 p.m. During the early afternoon, Monroe asked which employees would like to leave early. The ALJ found that Thrower told Monroe and Kim that she would like to leave early and that she was taking her Air Force member husband out to dinner between 5:30 and 6 p.m. to celebrate Veterans Day but Monroe told Thrower to stay until after 5 p.m. to help with closing the Barbershop. ALJD 13:26-30. Contrary to Respondent's exception 1, the ALJ's finding is supported by the record evidence, including Kim's credited testimony regarding what Thrower told her and Monroe, i.e., that Thrower had an appointment with her husband. Tr. 166–167. Additionally, the ALJ relied on credited testimony from Thrower that Monroe told her to stay until after 5 p.m. 437, 477–478.

The ALJ then found that at approximately 5 p.m., Thrower told Monroe that she was going to leave. Monroe insisted that Thrower stay and help Monroe with closing the Barbershop.

Thrower asked Monroe if Kim, the other remaining employee at the Barbershop, could stay and close instead. Monroe asked if Kim was capable of closing and Thrower, in Kim's presence, assured Monroe that Kim could do so as Kim had closed the Barbershop by herself at least twice before in the prior two weeks. ALJD 13:31-37. Contrary to Respondent's exception 2, the ALJ's finding is supported by the record evidence including Thrower's credited testimony where she suggested Kim could close and had closed the barbershop on previous occasions. Tr. 146, 437.

Finally, the ALJ found that Thrower asked Kim if she could close on November 10 and Kim responds by saying: "Ok." ALJD 13:37-38. Contrary to Respondent's exception 3, the ALJ's finding is supported by the record evidence including Thrower's credited testimony where she testified that "I asked Suk [if she could close], she say okay." Tr. 437–438.

The ALJ's findings above are based on credibility resolutions and Respondent has failed to show by "clear preponderance of all relevant evidence" that such determinations should be overruled. Rather, the record evidence supports the ALJ's specific credibility resolution that Thrower and employee Barbara Dyson were "much more believable than Managers Monroe and Deardueff" as to Thrower's interaction with Kim and Monroe in early November. ALJD 18:40-45.

B. The ALJ correctly found that after Kim left Monroe's office on November 11, Deardeuff and Thrower agreed that despite Sheffield's progressive discipline policy and Thrower's spotless discipline record, Monroe would immediately terminate Thrower as they misinterpreted Kim's "strong woman" description of Thrower to be that Thrower "bullied" Kim. – Respondent's Exception 4

The ALJ found that after Kim left the office, Deardeuff and Thrower[3] agreed that despite Sheffield's progressive discipline policy and Thrower's spotless discipline record, Manager

[3] The ALJ referenced Thrower but could have meant Monroe, as Thrower was not present when the decision was made to terminate her.

Monroe would immediately terminate Thrower as they misinterpreted Kim's "strong woman" description of Thrower to be that Thrower had "bullied" Kim. ALJD 15:32-35.

Contrary to Respondent's exception 4, the ALJ's finding is supported by the record evidence, including Thrower's credited testimony. Tr. 437–438. The record also shows that after the first discipline was issued to Thrower, Deardeuff was having a phone call with Monroe when Kim entered the office. Tr. 97:9-18. Kim speaks broken English and Deardeuff does not speak Korean. Tr. 97:20-21; 98:1-4. Under direct examination by CGC, Deardeuff testified that Kim said "strong woman" and "I close for her. I get her in trouble. I'm in trouble. Please no write her up." Tr. 98:9-12. Deardeuff also testified under direct examination by CGC that the foregoing was all she heard Kim say. Tr. 99:1-6. Following CGC's direct examination of Deardeuff, the hearing went on break. Tr. 105:21-25. Under cross examination by Respondent's counsel later that same day, after the hearing broke for lunch (Tr. 139:22-25), Deardeuff testified that Kim came into the office and stated "Loren strong. I no want to lose my job. I scared. I no – I want to work for you, for the Company. I scared." Tr. 217:14-16. Deardeuff's contradictory and likely fabricated testimony had little weight. Moreover, Kim credibly testified that she "went into the office and talked to the manager that if [Thrower] got write-up, it's because of what I did. And then I asked if she could – if the manager could remove the write-up that [Thrower] got." Tr. 156:22-25. Kim never testified she ever stated to Deardeuff or Monroe that she was scared. Tr. 142-167.

In contrast to the credited testimony of Thrower and Kim, the testimony of Managers Deardeuff and Monroe was marked with inconsistencies. Deardeuff testified to one version of what Kim allegedly said on November 11 and then unbelievably testified to a different version under Respondent's cross-examination, which occurred after the hearing broke for lunch.

Accordingly, the ALJ's credibility determinations regarding the November 11 conversation is well supported by the relevant facts and testimony and should not be overruled.

C. The ALJ correctly found that Kim described Thrower as a leader who Kim would sometimes follow; that Dyson told Monroe and Deardeuff that Thrower had never bullied anyone and that she had never heard Thrower bullying anyone – Respondent's Exceptions 5-7

The ALJ found that Kim specifically denied she was bullied by Thrower on November 10 or 11 and she also stated that Thrower, instead, was very opinionated with a "very outgoing" personality. The ALJ then found further that Kim described Thrower as a leader who Kim would sometimes follow. ALJD 16:12. Contrary to Respondent's exception 5, the ALJ's finding is supported by the record evidence, including Kim's credited testimony. Tr. 157–158. Specifically, Kim testified that "pretty much [Kim] would go along with what [Thrower] insists on." Tr. 158. Respondent points to Eileen Dinger's testimony as evidence that Thrower bullied coworkers, Tr. 531-536, but she only worked with Thrower for 21 days, testified in a conclusory manner about Thrower's personality, and was uncorroborated by the credited testimony of current employee witnesses, including employees Dyson and Kim.

The ALJ found that Deardeuff asked Monroe to call Dyson into the office and when Dyson arrived sometime between 1–2 p.m. on November 11, Monroe told her that Thrower had bullied and harassed Kim and was therefore being terminated. Dyson responded by telling Monroe and Deardeuff that Thrower had never bullied anyone as far as Dyson was concerned and Dyson had never heard of Thrower bullying anyone. ALJD 16:14-18; 17:32-33. The ALJ's finding related to Respondent's exceptions 6-7 is supported by the record evidence, including Dyson's credited testimony regarding what she said when she was told about Thrower's discharge. Tr. 343–344. Specifically, as discussed, Dyson responded by telling Monroe and Deardeuff that Thrower had never bullied anyone as far as Dyson was concerned and Dyson had

never heard of Thrower bullying anyone. Tr. 344:4-8, 348–349. The ALJ's credibility determination regarding Dyson's testimony should not be overruled.

D. The ALJ correctly found that Dyson asked Kim to go see a Korean interpreter who worked at Nellis AFB – Respondent's Exception 8

The ALJ found that the day after Thrower was discharged, on November 12, Dyson asked Kim to go see a Korean interpreter who worked at Nellis AFB so that she could hear Kim's explanation interpreted to English from Korean. ALJD 17:37-38. Contrary to Respondent's exception 8, the ALJ's finding is supported by the record evidence, including Dyson's credited testimony regarding what Dyson told Kim after Thrower's discharge. Tr. 347–349. Specifically, the day after Thrower's discharge, Dyson asked Kim to go with her to talk to a lady that spoke Korean on Nellis AFB so she could translate for her. Tr. 348:13-16. When Dyson and Kim went out and started to get a translation, Monroe came out there and asked if Kim was on break, to which Kim responded no and asked if she should go on break. Tr. 348:16-19. Monroe said no, "you're being paid to cut hair, get back in there and cut hair." Tr. 348:19-20. Respondent points to nothing in the record that supports overturning the ALJ's finding in this regard or his credibility determination crediting Dyson's testimony. Accordingly, Respondent's exception 8 should be rejected.

E. The ALJ did not err in concluding that Thrower's termination was unlawful; and did not err in concluding that Thrower's termination was motivated by animus – Respondent's Exceptions 9-11

In order to establish unlawful discrimination under Section 8(a)(1) of the Act, 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 Management*, 462 U.S. 393, 395, 403 n.7 (1983); *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). In applying the standard in *Wright Line*, the ALJ found that Thrower's termination was unlawful. ALJD 27:24-30:26.

First, the ALJ found that Thrower engaged in protected concerted activity and that Respondent knew of such activity—which Respondent does not dispute and does not take exception. RXB at 8. Specifically, the ALJ found that Thrower engaged in protected concerted activity by leading and gathering a group of employees at the Barbershop immediately after a job fair to discuss possible collective actions to take toward getting back their 45.2 percent commission; exchanging correspondence with Respondent about the barbers' desire to have a meeting with management to discuss raising their commission rate; and at the meeting, at which all of Respondent's owners were in attendance, trying to inform Respondent that there was a CBA in effect at the barbershop. Additionally, the ALJ found that two days prior to her termination, Thrower engaged in protected concerted activities by complaining about Respondent's micromanagement of the barbers; asking Monroe for documentation to verify the alleged failed health inspection; asking Monroe how the barbers would be paid if they worked late since they were paid on commission. ALJD at 28. The record supports the ALJ's findings and Respondent does not take exception to the ALJ's finding that Thrower engaged in protected concerted activity and that it was aware of such activity.

However, Respondent's exception 10 does take exception to the ALJ's finding that Thrower's termination was motivated by animus. ALJD 28:42-30:26. The ALJ properly noted that common indicators of animus are a showing of "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices,

tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee." *Medic One, Inc.*, 331 NLRB 464, 475 (2000). ALJD 28:44-47. Unlawful motive can be proven by direct evidence or circumstantial evidence of general animus. See *Lewis Grocer Co.*, 282 NLRB 166 (1986) (finding unlawful motivation based on the suspicious timing of discipline and respondent's knowledge that the discriminate was involved in a Board investigation).

The record clearly shows evidence of suspicious timing between Thrower's undisputed protected activities in the two days immediately preceding her discipline and termination on November 11. Close timing between discovery of the employee's protected activities and the discipline is evidence of unlawful motive. See, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (employer fired a card-signer immediately after learning that union had obtained a majority of authorization cards from employees). Respondent's suspicious timing in discharging Thrower, shortly after she engaged in her protected activities, shows evidence of animus.

The ALJ found that Thrower worked at the Barbershop for almost four years, and although she was known to have disagreements with co-workers from time-to-time, she did not have a reputation for bullying nor was she disciplined for bullying or any other reason prior to November 2017. By Thrower and Kim's own accounts, the two were amicable and had no major disputes during their tenure together at the Barbershop. The only witnesses who testified that they were bullied by Thrower were Managers Monroe and Deardeuff, both of whom offered inconsistent testimony and were not credible witnesses. Deardeuff testified that she took bullying seriously, and always documented and addressed any instances of bullying, but she had no written documentation of any pattern of bullying or harassment involving Thrower. Tr. 103:13-

23. CGC subpoenaed Thrower's complete personnel file, and it contained no evidence of any history of bullying or harassment.

Regarding the basis of Thrower's discharge, Monroe and Deardeuff contradicted themselves in their testimony as well with their own discharge paperwork. Monroe testified that part of the reason Thrower was discharged was because Thrower had bullied and harassed Monroe. However, Deardeuff made no mention during her testimony of Thrower bullying or harassing Monroe, and Thrower's Employee Termination Report makes no mention of that in its description of the conduct leading to Thrower's discharge.

There is also record evidence of disparate treatment regarding Thrower's discharge. The ALJ properly found that Respondent produced no evidence of previous terminations for bullying, either at the Nellis AFB or any other facility that it operated. ALJD 29:11-12. The ALJ's finding here is supported by the fact that CGC subpoenaed the personnel records for all of Respondent's employees who had been discharged for reasons similar to Thrower. GCX 21. Respondent never submitted into evidence or provided the personnel files for any of its employees disciplined for reasons similar to Thrower. Tr. 27-30.[4] Moreover, after Thrower was discharged, Monroe testified that Dyson made "very insulting" remarks to Monroe about Monroe's transgender status. Tr. 260:23-25; 261:1-5. Yet, no discipline was ever issued to Dyson for those remarks. Tr. 261:6-7. Respondent argues that other employees engaged in protected activity and Respondent took no adverse employment action directed towards those employees. RXB at 10. Respondent's

[4] Deardeuff's testimony that she discharged another employee, Christie Perez, for bullying (Tr. 90:24-25) should be discounted as Respondent never provided Ms. Perez's personnel file, despite it being subpoenaed in GCX 21.

argument is disingenuous at best, as Barbara Dyson—the President of the NBA—was also discharged.[5]

The record evidence shows a complete lack of investigation into Thrower's alleged misconduct. Respondent did not talk to any of its other employees in an attempt to even find out what happened, including failing to ask Thrower what, if anything, occurred between her and Kim. Instead, Respondent made the decision to discharge Thrower based on a conversation she had with someone who clearly is not able to speak any more than broken English. The ALJ noted that despite Kim's very limited English language skills, Deardeuff, and Monroe made no efforts to corroborate Kim's recounting of her interaction with Thrower. ALJD 29:18-19; Tr. 101:20-25; 102:1-7. When Dyson attempted to solicit the services of a Korean-language translator, which would have allowed Kim to describe what happened in her native language, Monroe prevented Dyson from taking Kim out of the Barbershop and told her to she could not take a break. Respondent performed no investigation into whether any actual bullying occurred. Respondent failed to do a thorough investigation of Thrower's alleged misconduct, and even took steps to prevent additional investigative measures from occurring. Respondent's justification, that Kim claimed that Thrower was bullying her, also appears to have been fabricated. On the witness stand, Kim denied stating anything to Respondent that could reasonably be construed as a complaint of bullying by Thrower. Instead, Kim asked Respondent to not issue any discipline to Thrower. Moreover, under direct examination by CGC, Deardeuff herself did not describe any statements by Kim on November 11 which could be reasonably construed as bullying.[6]

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[5] A Complaint and Notice of Hearing issued in Cases 28-CA-225252 and 28-CA-229367, alleging that Respondent made numerous violations of Sections 8(a)(1), (3), (4), and (5), including an allegation that Respondent discharged Dyson because of her protected activities. The Regional Director approved an informal settlement agreement resolving those cases prior to hearing—without a non-admissions clause.

[6] Under examination from Respondent's counsel, after the hearing went on break for lunch, Deardeuff claimed that Kim stated Thrower was "scary."

Deardeuff admitted that Kim was speaking in broken English, but nevertheless based entirely on that broken English, and without speaking to any other witnesses, including Thrower, Respondent decided to discharge Thrower. The complete lack of an investigation—and overt efforts to stifle Dyson's attempt to investigate further—reveals Respondent's unlawful animus.

The ALJ noted that without providing a valid justification, Respondent determined that Thrower needed to be terminated for bullying Kim even though Monroe originally drafted a written warning for the same offense. ALJD 29:14-16; Tr. 102:8-18. Yet, prior to her discharge, Respondent had never documented any complaints received against Thrower. The ALJ determined that Deardeuff misconstrued Kim's statements about Thrower being a "strong woman" and relied exclusively on this misinterpretation to terminate Thrower despite the obvious ambiguity of Kim's remark and the availability to investigate the matter further. Moreover, the ALJ correctly noted that Respondent did not apply its customary progressive discipline policy for this incident as Dyson requested and Respondent did not issue Thrower a written warning or suspension rather than termination for a first-time discipline offender who had worked at Nellis AFB in the NBA for almost four years with no prior disciplinary record. Respondent's failure to follow its own progressive discipline policy, for an ambiguous and uninvestigated charge of "bullying," is more evidence of animus. The ALJ's references to the possibility of lower discipline is not an attempt to substitute his own view of the proper discipline that should have been issues, but, rather, simply a statement of Board law that failing to abide by a progressive discipline policy may be evidence of animus—such as the case here.

The ALJ noted that the Board also finds animus towards employees' protected concerted activity where contemporaneous unfair labor practices are found. See *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 3 (2016) (contemporaneous unfair labor practices evidence of

animus); see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees). Here, Respondent engaged in numerous contemporaneous violations of Section 8(a)(1) and (5) —which Respondent has not taken exception.

After determining that CGC established a prima facie case, the ALJ correctly applied the applicable law that the burden shifts to Respondent to prove that it would have terminated Thrower regardless of her protected concerted activity. *Wright Line*, 251 NLRB at 1089; *Manno Electric*, 321 NLRB 278, 281 (1996) **(**employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities); See also *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). Applying that standard, the ALJ found that Respondent failed to meet that burden. ALJD 29:38-39.

Respondent argued that Thrower would have been terminated even absent her concerted protected activity because of her bullying of Kim. However, as the ALJ noted, it is not enough for an employer to merely assert a good reason for its alleged unlawful action. ALJD at 29-30. Indeed, an employer cannot rely on a legitimate and substantial business reason for its actions where the business reason was not the real reason for its actions. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (rejecting the respondent's argument that its concern for patient healthcare was the reason for discipline when the *real* reason was found to be its concern the employee's comments might have on her fellow employees). There was record evidence that Respondent's asserted reason for Thrower's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, and the failure to investigate

whether the employee engaged in the alleged misconduct. *Manor Care Health Services – Easton*, 356 NLRB 202, ,204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)). Accordingly, the ALJ properly found that under the totality of the circumstances, the suspicious character of Respondent's investigation into Thrower's alleged misconduct, and the shifting reasons for termination (discussed below) created an inference of pretext that sustained CGC's claim that Thrower was terminated in violation of Section 8(a)(1) of the Act. ALJD at 30.

Finally, Respondent's exception 11 argues that the ALJ improperly found that Respondent offered inconsistent reasons for Thrower's termination. RXB at 11. The ALJ noted that the Board has consistently held that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for the conduct is not among those asserted." *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985). Indeed, Monroe and Deardeuff did not provide consistent reasons for why Thrower was terminated. Although the alleged bullying of Kim was the most vocalized reason, other justifications included an alleged pattern of intimidation and bullying, and Thrower specifically bullying Monroe and Fiori. The ALJ noted that none of these added allegations of intimidation or bullying were documented or corroborated and were all raised for the *first time* at hearing.

Indeed, Thrower's Employee Termination Report regarding this discipline makes no mention of any discrimination or bullying towards Monroe, and Respondent never supplied any written documentation regarding any discrimination or bullying towards Monroe by Thrower. Tr. 251:24-25; 252:1. Monroe testified that Thrower was terminated for insubordination, bullying

Kim, and bullying her. Tr. 248–249. Deardeuff stated that Monroe was authorized to discharge and discipline Thrower on November 11 for bullying and because of an ongoing pattern of bullying and intimidation although Deardeuff admits that Respondent had no written documentation of any prior instance or ongoing pattern of bullying or harassment by Thrower. Tr. 89–90, 98–100, 102–103. Initially, Thrower was going to receive a written warning for the alleged bullying, but then that decision changed to a discharge, without any changed circumstances. The two bullying disciplines in Thrower's Employee Termination Report specifically reference the alleged bullying of Kim after the insubordination discipline was issued; however, on the stand, Monroe stated the discharge was also because Thrower had been bullying her. Deardeuff testified that while it started as a warning, Deardeuff exercised her discretion to make it a discharge. Finally, after the discharge, Respondent claimed this was part of an ongoing pattern of bullying by Thrower. But Deardeuff, Monroe, and Fiori could not get on the same page about whether there was any documented history of bullying or harassment by Thrower. More importantly, Monroe's own testimony casts doubt on what the exact reasons were for Thrower's discharge. Based on the contradictory testimony by Respondent's supervisors and managers, the ALJ had little choice in finding that Respondent offered inconsistent reasons and shifting justifications for Thrower's termination.

Nevertheless, the ALJ properly found that even if the uncorroborated allegations against Thrower possessed merit, the shifting explanations serve as potent evidence that the reasons for Thrower's termination were pretextual. See *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001) (finding the employer's reasons for terminating the discriminate were pretextual where the employer added two new justifications for the discharge at hearing). ALJD at 30. Accordingly, Respondent's exception 11 should be rejected.

IV. CONCLUSION

Respondent has demonstrated a hostility to the rights of its employees under the Act throughout the course of its operations at Nellis AFB and it is respectfully requested that the Board affirm the ALJ's recommended order and conclusions that Respondent violated Sections 8(a)(1) of the Act when it disciplined and discharged Thrower for her protected concerted activities.

Dated at Phoenix, Arizona, this 12th day of February 2020.

Respectfully submitted,

/s/ Fernando Anzaldua

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CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S ANSWERING BRIEF TO EXCEPTIONS** in Cases 28-CA-199308, et al. was served via E-Gov, E-Filing, and electronic mail, on this 12th day of February 2020, on the following:

Via E-Gov, E-Filing:

The Honorable Roxanne Rothschild
Executive Secretary
National Labor Relations Board
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