

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

CASTRO VALLEY ANIMAL HOSPITAL, INC.

and

CHRISTINA ARIANNA PADILLA, an Individual

and

AKILAH WILLIAMS, an Individual

**Cases 32-CA-251642
32-CA-254220**

**RESPONDENT'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Submitted by:

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NOW COMES Counsel for the Respondent Castro Valley Animal Hospital (“Respondent”), who respectfully submits the following brief to the Honorable Amita B. Tracy, Administrative Law Judge.

Statement Of The Case

At all material times, Respondent has operated a full-service veterinary clinic and animal hospital in Castro Valley, California. Based upon unfair labor practice charges filed by the Charging Parties Christina Padilla (“Padilla”) and Akilah Williams (“Williams”) (collectively “Charging Parties”), a Consolidated Complaint (the “Complaint”) and Notice of Hearing issued alleging that Respondent engaged in various acts and conduct violative of Section 8(a)(1) of the National Labor Relations Act (the “Act”). A hearing on the allegations of the Complaint was held on March 10 and 11, 2020 in Oakland, California.

The Issues

(A) Whether, in or around October 2019, Charging Parties engaged in protected, concerted activity within the meaning of the National Labor Relations Act.

(B) Whether, on or about October 21, 2019, Respondent’s discharge of Padilla violated the Act because she engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Section 8(a)(1) of the Act.

(C) Whether, on or about October 21, 2019, Respondent discharged Padilla based on an honest belief that she had committed misconduct, i.e., stealing.

(D) Whether, on or about October 18, 2019, Respondent took any adverse action against Williams because she engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Section 8(a)(1) of the Act.

Pursuant to Section 102.42 of the National Labor Relations Board’s Rules and Regulations, Respondent submits this Post-Hearing Brief as follows:

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY¹

This case involves a Consolidated Complaint alleging wrongful discharge on behalf of Charging Parties Christina Padilla and Akilah Williams, both of whom are former employees of Respondent Castro Valley Animal Hospital. Padilla filed her Charge on November 12, 2019, alleging that “in order to discourage employees from engaging in protected concerted activities,” she was discharged and disciplined on October 21, 2019 because she engaged in protected concerted activities by “discussing wages[, hours] and/or other terms and conditions of employment” and by “protesting terms and conditions of employment.” (GC Ex. 1(a).) Williams filed her Charge on January 6, 2020, alleging that “[d]uring the past six-month period, the Employer discriminated against [her] by discharging her in retaliation for and in order to discourage protected concerted activities. (GC Ex. 1(e).) Initially a complaint was filed on January 2, 2020 on behalf of Padilla only (GC Ex. 1(c)), but then on February 20, 2020, the local Regional Director filed an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act by terminating Charging Parties. (GC Ex. 1(h).)²

¹ Citations in this brief will be as follows: “Tr. ___” to indicate the hearing transcript’s page and line numbers (referring to the full-sized transcript, not the condensed transcript whose numbering is different for Volume 1), “GC Ex. ___” to indicate an exhibit of the General Counsel, and “Respondent’s Ex. ___” to indicate an exhibit of Respondent.

² Presumably the cases were consolidated for the purpose of efficiency in hearing them. The consolidation should not be interpreted to mean that the two Charging Parties engaged in protected concerted activity with each other, or with anyone.

Administrative Law Judge Amita B. Tracy heard this matter on March 10 and 11, 2020, in Oakland, California.

II. FACTUAL BACKGROUND

A. About Respondent

Respondent operates a full-service veterinary clinic and animal hospital in Castro Valley, California. Dr. Gurbinder Brar is the owner and main veterinarian there. (Tr. 231:1-5.) He was the only individual involved in the decision to terminate Padilla. (Tr. 231:10-15.)

B. About Charging Parties

At the time in question, Padilla was employed with Respondent as a veterinary receptionist and veterinary assistant, earning \$14 per hour. (Tr. 18:3-5; 334:23-335:2.) The job duties of this position included checking in clients; taking phone calls; helping the veterinarians and veterinary technicians with the procedures, which included holding pets to administer injections; putting pets into the kennels; bringing pets from the kennels to the clients; helping the technician after anesthesia; moving pets from surgery into their recovery ward; doing vaccines; explaining medications; and taking payments. (Tr. 335:3-14.) Williams was similarly employed with Respondent in the same position beginning in September 2019, with the same job duties, at a compensation rate of \$13 per hour. (Tr. 149:11-15; 334:23-335:2; 341:17-18; 342:19-20.) All employees in this position, including Padilla and Williams, are required to perform these duties. (Tr. 335:15-17; 336:19-22.) Other receptionists confirmed this at the hearing. (Tr. 293:16-24; 303:16-304:2; 308:7-9.) No one with Respondent has the power to change the duties for this position except for Dr. Brar, and he never had any discussion with Padilla or Williams about limiting or eliminating any of the duties for them. (Tr. 335:18-25.) On the second day of her employment, Dr. Brar explained to Williams the

job duties that would be expected of her, telling her that they included just about anything one sees from the “front door to the back door,” such as taking pets’ weights, putting pets in kennels, and handing medications to clients. (Tr. 338:24-339:18.) One of the receptionists explained at the hearing that there were no employees at the hospital who worked as just a receptionist and not also as a veterinary assistant or veterinary technician. (Tr. 309:13-15.) The hospital’s head receptionist, Ronnie Swart, testified that that were no receptionists who were exempt from performing the duties that Williams ultimately did not want to perform. (Tr. 318:6-19; 319:2-4.)

Indeed, Williams admits that at the beginning of her employment, she was told that she would be around animals and would be expected to help with them, such as by holding a pet down or getting the weight of the pet. (Tr. 162:14-22.) She observed at some point after beginning her employment that the other receptionists worked with the animals. (Tr. 203:22-25.) She was not happy or excited about having to help with any procedures involving the pets. (Tr. 166:2-6.)

C. Williams Refuses to Perform Her Required Job Duties, and Demands Greater Compensation

Although her position as a veterinary receptionist and veterinary assistant required her to perform all of the above-listed functions, after about a week or two of employment Williams began to state that she would not perform certain functions if she was going to be paid \$13 per hour. The duties she declined to perform included explaining medications to clients; taking pets from owners; taking the pets’ weight; putting the pets into the rooms; putting them into and taking them out of the kennels; helping the veterinarians or the veterinary technicians in the treatment area; cleaning; and anything that involved the pet itself. (Tr. 343:3-22.) She was never exempted from those duties, and was not provided the option of declining to perform the duties she preferred not to perform; they were all duties that someone in her position was expected and required to perform. (Tr. 343:23-

344:1.) The only reason she ever provided to Dr. Brar for not performing these tasks was that she wanted more pay. (Tr. 344:2-6.) Dr. Brar explained to her that it was too early to give her a raise but that if she showed improvement in her job performance, he may consider a raise after six months. This did not satisfy Williams. (Tr. 342:7-18.) She continued almost every day to express resistance to performing her duties. (Tr. 344:18-345:4.) Dr. Brar spoke with her multiple times about her needing to perform her job duties, but she would respond rudely and arrogantly, and her performance continued to decline as she refused to perform more and more of her duties. (Tr. 345:25-346:16.) She admits that on the last day of her employment, she declined to assist in procedures because she wanted to be paid more money, and said this to the head receptionist, Ronnie Swart. (Tr. 227:19-24; 228:7-25.)

D. Williams Continues to Indicate Her Refusal to Perform Her Job, Thereby Tendering Her Resignation

While Williams claims that she was removed from the schedule, she is not providing the entire story. Rather, after making it clear on her last day of work (a Wednesday) that she would refuse to do her job unless she were paid more money, and saying “I’m leaving,” she was asked to notify Respondent by the next Friday (two days later) whether she was willing to accept her existing pay and to perform her required job functions. (Tr. 367:12-20.) She said that she would let them know on that Friday when she came to pick up her paycheck (which was delayed) and another check Respondent agreed to provide her for lunches that she claimed to have missed. (Tr. 175:2-13; 176:3-7; 367:23-368:6.) She did not indicate a desire to perform her job at the accompanying pay. (Tr. 261:9-15.) Dr. Brar thus interpreted her refusal to do her job as a resignation, and accepted it. Even so, he still told her that if she was willing to accept her existing pay rate and perform her required job duties, she could continue to work there. (Tr. 264:12-24; 356:7-12.) She never expressed such a

willingness. Contrary to the notion that she was “terminated,” she concedes that when she was supposedly taken off the schedule, she was not told she was never going to be put back on the schedule, nor did anyone at the hospital ever tell her that her employment was being terminated or was going to be terminated. (Tr. 217:5-7, 21-24.) As such, any failure to return to work lies at solely her own feet.

E. Padilla Allegedly Refuses to Sign a Document Whose Origin She Suspiciously Cannot Authenticate

Padilla’s claim is based largely on her alleged refusal to sign a document titled “Staff Note” and purporting to state, among other things, that Respondent had always provided employees with enough time for meals. (GC Exh. 1(h), at ¶ 6(c); GC Exh. 3.) However, Dr. Brar did not prepare this document, which is replete with numerous egregious spelling errors, and he had never seen it as of the date of the hearing in this matter. (Tr. 251:16-22; 283:10-24.) He did not ask Padilla or any other employee to sign it. (Tr. 232:5-8; 283:20-22.) He has never used the term “staff note” in any written communication to the hospital’s employees. (Tr. 349:9-11.) He did not base his decision to terminate her employment based on an alleged refusal to sign it, but rather on her stealing which he himself witnessed. (Tr. 231:16-21.) The only “evidence” connecting the genesis of this document to Dr. Brar is Padilla’s testimony that Veronica Garcia, a co-worker, told her that “Dr. Brar wants you to sign this.” (Tr. 42:4-13, 23-25; 43:1-4.) Padilla concedes, however, that she did not see Dr. Brar create it or anyone else sign it. (Tr. 101:6-16; 105:13-17.) The General Counsel did not present Garcia or any other witness to authenticate the document.

Padilla demonstrated at the hearing that she is not above testifying falsely in order to smear Respondent with this dubious document. When confronted about the document, she claimed that in her experience, “[a]ny document [Dr. Brar] printed out” and gave to her contained misspellings. (Tr.

103:3-10.) However, when shown another document that Dr. Brar had supposedly given her to sign which contained no spelling errors, she was forced to admit that her prior testimony was false. (Tr. 103:11-22.)

The problems with the authenticity of the document do not stop there. Although the document appears to have been signed by another employee of Respondent, Celia Prieto, under oath Prieto denied signing it and testified that she had never previously seen it as of the date of the hearing. (Tr. 291:4-19, 24-25; 292:1-12.) The document did not even look like anything she had previously been asked to sign by Respondent. (Tr. 291:20-23.) She testified unequivocally that her signature had been forged. (Tr. 292:16-18.) She had never been asked to sign a “staff note.” (Tr. 300:11-13.) Two other employees whose names appear on the document next to blank lines ostensibly for their signatures, Maddy Davich and Ronnie Swart, also had never seen the document before the hearing, were unaware of its alleged existence, and had never been asked to sign it or anything resembling it. (Tr. 305:23-307:1, 17-18; 315:8-22; 316:15-16.) Davich’s first name is not even spelled correctly on the document. (Tr. 306:16-21.) All of the above issues place the authenticity and weight of this document into serious question.

F. Dr. Brar Catches Padilla in the Act of Stealing, Contacts Law Enforcement, and Terminates Padilla’s Employment

On October 21, 2019, at about 7:30 or 7:45 PM, Dr. Brar saw Padilla taking cash from the cash drawer in his office, and placing the cash in her pocket. (Tr. 231:16-18; 234:11-235:16.) He instructed her to put it back, which she did. (Tr. 235:17-22.) Padilla then went back to work. (Tr. 236:19-22.) Dr. Brar counted the money and determined that she had put back \$450. (Tr. 236:16-18.) After sitting at his desk for a while and thinking about what he had just witnessed, Dr. Brar called her back and told her “you need to go” because she had put the money in her pocket and was

stealing. (Tr. 237:3-18.) She did not deny this, but merely said “okay” and left. (Tr. 237:19-20.) Padilla’s theft was the only basis for her termination. (Tr. 231:16-21.)

Dr. Brar contacted the Alameda County Sheriff’s Office that evening to report the theft, and they told him that they would come the next day. (Tr. 237:21-22; 238:13-239:1.) A Deputy Sheriff came to Respondent’s facility the next day to speak with Dr. Brar, who explained what had happened. (Tr. 239:2-12.) The Deputy Sheriff gave Dr. Brar his card, writing an inventory number on the back. (Tr. 239:13-14; Respondent’s Ex. 4.)

While Padilla purports to allege that Dr. Brar had an unlawful motive in terminating her employment and lied about her having stolen, she admits that “I don’t have any facts to show why he did it” and that it is only her speculation that Dr. Brar fabricated her theft. (Tr. 116:3-22.)

G. There Was No Concerted Activity

The record is rife with testimony, including Padilla’s and Williams’ own admissions, that completely undermine their assertions that they engaged in protected concerted activity:

- Padilla believes she was fired “for my refusal to sign a document falsely stating that I had always been given accurate meal times.” (Tr. 17:20-22; 85:13-24.) She does not say that this refusal was in concert with anyone else or that her termination had anything to do with concerted activity – only her own. She admits that when she met with Dr. Brar to discuss the document and then supposedly was fired when she refused to sign it, no one else was present. (Tr. 45:20-46:1.)
- Padilla testified that Williams told her that Williams felt that the reason why she (Williams) was allegedly terminated was because she “complained about lunches.” (Tr. 99:6-14.) Williams did not say she had engaged in protected activity or felt she had been terminated for it.

- Padilla never brought up the issue of meal breaks to Dr. Brar jointly with other employees. (Tr. 347:6-8.)
- Williams concedes that she never discussed with her co-workers the fact that she was not allowed to leave the facility to take a meal break. (Tr. 210:16-211:6.)
- Williams theorizes that she was terminated because she “[wasn’t] given lunches,” and she does not believe there was any other basis for the end of her employment. (Tr. 215:7-216:1; 223:5-15.) Unable to get her own story straight, she testified that the reason for her removal from the schedule was “very unclear,” but also that it was because she did not get lunches. (Tr. 223:5-15; 219:1-6.) Thus, even she does not believe that she was removed from the schedule or terminated because she engaged in concerted protected activity. In fact, she admits that there never came a point when she believed she was being treated inappropriately with respect to meal breaks, or the lack thereof. (Tr. 216:2-5.)
- Williams admits that she never complained to anyone at the hospital about any issue relating to overtime; she just stated that she herself wanted to receive it if she actually worked it. (Tr. 216:24-217:1; 219:25-220:3.) (She never worked more than eight hours in a shift. (Tr. 208:12-18.)) She does not believe that she was ever punished by anyone at the hospital for making that point. (Tr. 220:4-6.) This is a direct contradiction of the Complaint, which alleges that she “complain[ed] that Respondent was not providing its employees their lunch breaks and/or overtime pay,” and that “Respondent terminated Akilah Williams for complaining that Respondent was not providing its employees their meal breaks and/or overtime pay.” (GC Exh. 1(h), at ¶ 6(a) & (b).)

H. Dr. Brar Did Not Have Knowledge of Any Concerted Activity By Padilla or Williams

The testimony from both Charging Parties and Dr. Brar makes clear that he was unaware of any alleged concerted protected activity:

- Padilla admitted that she never told Dr. Brar about any conversations she had had with any other employees about clocking out. (Tr. 97:18-20.)
- To Padilla's knowledge, Dr. Brar never became aware of any communications Padilla had had with anyone at the hospital about her meal breaks or overtime. (Tr. 98:15-18.)
- Padilla does not know if anyone other than herself refused to sign the document that she complains she was terminated for refusing to sign. (Tr. 134:19-22.)
- Padilla admits that she never complained to Dr. Brar about Williams' alleged termination, a fact which Dr. Brar confirms. (Tr. 128:24-129:15; 356:13-16.)
- Padilla never told Dr. Brar she was unable to take meal breaks, and she never discussed her meal breaks with him in any way. (Tr. 347:1-5; 348:11-13.)
- Neither Padilla nor Williams ever discussed any issues regarding overtime pay with him. (Tr. 350:3-6; 350:11-15.)
- Dr. Brar never came to learn that either Padilla or Williams had had any communications with any other employees about their meal breaks. (Tr. 348:14-16, 23-25; 349:1.) In fact, no employee had ever come to him to say that they were unable to take a meal break, or to complain about anything relating to meal breaks. (Tr. 349:2-8.)

- Dr. Brar also never came to learn that either Padilla or Williams had discussed with co-workers any issues relating to overtime pay. (Tr. 350:7-10; 350:19-21.)
- Williams testified that during her employment, she discussed her concerns about overtime and meal breaks only with Padilla and co-worker Ronnie Swart, and no one else. (Tr. 213:15-20.) This confirms that she admittedly never brought any issues about overtime and meal breaks to Dr. Brar.
- Williams admits that although she had a conversation with Swart on Williams' last day at work (a Wednesday in October 2019) about not getting a break, she did not thereafter talk to Dr. Brar about wanting to take lunches or breaks. (Tr. 168:22-171:13.)
- Williams admits that as of the time she was supposedly taken off the schedule and fired, she had never had any discussion with Dr. Brar about any issues with her lunches. (Tr. 180:1-3.) She further concedes that prior to receiving a text from Dr. Brar about "trying to make [the] schedule for next week," she had never told him that she needed breaks and lunchtime. (Tr. 185:5-13.)

III. LAW AND ARGUMENT

A. Applicable Law and Standards

The Act prohibits an employer from interfering with, restraining, or coercing employees engaged in any protected concerted activity as outlined in Section 7 of the Act. 29 U.S.C. § 158(a)(1) (otherwise known as Section 8(a)(1) of the Act). Section 7 of the Act grants employees "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 . . . ” 29
U.S.C. § 157.

To establish a *prima facie* case that an employer violated Section 8(a)(1) by taking action against an employee because that employee engaged in protected concerted activity under Section 7, the General Counsel must prove: (1) that the employee engaged in protected concerted activity; (2) that the employer knew of the employee’s protected concerted activity; (3) that the employee was subjected to an adverse employment action; and (4) that the employer harbored unlawful animus or that some other nexus existed between the employee’s protected concerted activity and the adverse employment action. *Am. Gardens Mgt. Co.*, 338 NLRB 644, 645 (2002); *see also Tracker Marine*, 337 NLRB 644, 646 (2002).

If the General Counsel satisfies this *prima facie* burden on all of the above elements, the employer will still avoid liability if it can show it would have taken the same action in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004). The employer need only show this by a preponderance of the evidence. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). The record does not have to be perfectly consistent on this demonstration; a “defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.” *Id.*, *quoting Merillat Industries*, 307 NLRB 1301, 1303 (1992).

For the reasons explained below, the General Counsel has not satisfied its burden as to either Charging Party, and therefore the Complaint should be dismissed.

B. Charging Parties Did Not Engage in Protected Concerted Activity

For an employee to engage in “other concerted activities for the purpose of . . . other mutual aid or protection” under Section 7 of the Act, the employee must satisfy the following two elements: “the activity they engage in must be ‘concerted,’ and the concerted activity must be engaged in ‘for the purpose of . . . mutual aid or protection.’” *Alstate Maintenance, LLC*, 367 NLRB No. 68, at * 2 (2019). Activity is concerted if it is “engaged in[,] with[,] or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984); *see also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984) (“[t]he term ‘concerted activit[y]’ is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals”). Whether an activity is considered concerted is based on the totality of the circumstances. *Nat’l Specialties Installations, Inc.*, 344 NLRB 191, 196 (2005). In *Meyers Industries*, 281 NLRB 882, 886 (1986) (“*Meyers II*”), the Board held: “*Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether ‘specifically authorized’ in a formal agency sense, or otherwise, we shall find the conduct to be concerted.” The Board further held in *Meyers II* that the definition of concertedness “encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management.” *Id.* at 887 (emphasis added).

By this definition, neither Padilla nor Williams engaged in protected concerted activity. The primary activity that Padilla identified at the hearing as having supposedly motivated her termination unlawfully is her refusal to sign a document purporting to state that Respondent’s employees had been given sufficient time for their meal breaks. But this was her own refusal

only. There is zero evidence that she was part of a group that refused to sign, or that she raised issues about the document jointly with other employees, or that she did anything other than decline to sign the document solely on her own. She was alone with Dr. Brar when she expressed her refusal, and there is no evidence that any other employees were unwilling to sign the document or had any other disagreement with the document (and Padilla admits that she does not know if anyone else refused to sign it). Even worse for Padilla, not a single other witness at the hearing vouched for the authenticity of the document. The one witness whose signature appeared to be on the document, Celia Prieto, testified that she did not sign it and had never even seen it, and the General Counsel adduced no evidence indicating that this witness was unreliable. Two other employees whose names appeared on the document also had never seen it, and Dr. Brar himself testified that he did not create it, had never seen it, and had never created a document titled “Staff Note.” In summary, while this document is the linchpin of Padilla’s complaint, its very authenticity is in serious doubt, and there is no evidence that any of her conduct relating to the document was in concert with anyone else. There is also no evidence that she made any kind of complaint on a joint or concerted basis with other employees. They were all solely on her own, and for herself. In the words of *Meyers II*, there were no “truly group complaints.” As for her alleged complaint about Williams’ “termination,” Padilla herself admitted that she never actually made such a complaint to Dr. Brar, who was the sole decisionmaker as to Padilla’s termination, and there is not a shred of evidence that any other employees shared in Padilla’s alleged complaint. Accordingly, the General Counsel’s case that Padilla engaged in protected concerted activity fails resoundingly.

For her part, Williams admitted at the hearing that she believes she was terminated solely because she was not “given lunches.” To the extent this makes sense at all, it certainly reflects

that even in her own mind she does not believe her termination had anything to do with concerted activity. She further conceded that she never discussed with her co-workers that she was not allowed to leave the facility, and never complained to anyone at the hospital about any issue relating to overtime. Going even further, she admits that she was never treated inappropriately with respect to meal breaks, or the lack thereof. In short, the record contains no evidence that she engaged in genuine concerted activity. As such, she has no case.

Charging Parties' alleged communications to management about meal breaks and/or overtime, or whatever other issues they claim to have raised, do not constitute protected concerted activity. They were each discussing their own situations, for their own benefit individually. Charging Parties were not bringing a group complaint to the attention of management. The Board's recent decision in *Alstate Maintenance* is instructive. In that case, the charging party was discharged for griping about not being tipped. The Board held that there were no facts that "under the totality of the circumstances, would support an inference that an individual employee was seeking to initiate or induce group action." 2019 NLRB No. 68, at *21. "Instead, there was a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work assignment, and a gripe about the assignment by an employee" *Id.* The Board further held that "[t]he fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity." *Id.* at *31. "Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." *Id.* Here, similarly, Charging Parties' alleged statements to management were not protected

concerted activity because they neither brought a group complaint to management's attention, nor do the totality of circumstances show that they sought to initiate group action.

C. Respondent Had No Knowledge of Any Protected Concerted Activity

Even assuming *arguendo* that Padilla and Williams engaged in protected concerted activity – which the General Counsel has failed to show – there is no evidence that Respondent was aware of this conduct. “[I]t is axiomatic that the employer could not have been ‘motivated’ by the employee’s protected activity if the employer didn’t know about such activity. Accordingly, credible proof of ‘knowledge’ is a necessary part of the General Counsel’s threshold burden, and without it, the complaint cannot survive.” *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001); *Stanford Linear Accelerator Center*, 328 NLRB 464 (1999). The burden of proving that the employer had knowledge rests solely on the General Counsel. *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338-39 (4th Cir. 1976). Where the individual(s) involved in issuing the alleged adverse employment action testify they were unaware of the employee’s protected activity, no knowledge exists, and the allegation must be dismissed. *Mission Foods*, 350 NLRB 336, 338 (2007).

Here, the record contains absolutely no evidence that Dr. Brar, who is the only person who has been alleged to have made any of the pertinent decisions in this matter (and the evidence does not show otherwise), was aware of any alleged “concerted activity” such that he could have taken any action against Padilla and Williams for it. In accordance with *Mission Foods*, because Dr. Brar has testified unequivocally that he was unaware of any protected activity – which, as demonstrated above, did not occur to begin with – the case must be dismissed. He testified that he never came to learn that either Padilla or Williams had discussed

with co-workers any issues relating to overtime pay or meal breaks, and neither Padilla nor Williams testified that that they ever spoke to him on behalf of anyone other than each of them individually. (There is not even any evidence that either of them brought a complaint on behalf of, or jointly with, the other.) Even Padilla herself admits that to her knowledge, Dr. Brar never became aware of any communications she had with anyone else at the hospital about her meal breaks or overtime, which is wholly consistent with her testimony that she never told Dr. Brar about any conversations she had with other employees about clocking out. She also concedes that she never complained to Dr. Brar about Williams' alleged termination. Williams admitted that she discussed her concerns about overtime and meal breaks only with Padilla and another co-worker, Ronnie Swart, meaning that she did not discuss them with Dr. Brar which would explain why he would be unaware of any purported "concerted activity." Williams also admits that as of the time she was supposedly taken off the schedule and terminated, she had never had any discussion with Dr. Brar about any issues with her lunches. Between Dr. Brar's testimony and Padilla's and Williams' voluminous admissions, there is no basis to conclude that Dr. Brar was ever aware that Padilla or Williams engaged in any concerted protected activity. And the case law makes clear that without that awareness, these claims collapse.

D. Respondent Terminated Padilla for a Legitimate Reason

"It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct." *Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB No. 11, * 4 (2009). The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *Id.* (citing *Marshall Engineered Products Co.*, 351 NLRB 767 (2007); *Pepsi-Cola Co.*, 330 NLRB 474, 475 fn. 7 (2000)).

In certain cases in which the employer has disciplined an employee for asserted misconduct, the Board permits the employer to meet its *Wright Line* defense if it can establish, under all of the circumstances, that it had a reasonable, good-faith belief that the employee engaged in the misconduct, and that it acted on that belief in taking the adverse employment action against the employee. This arises in cases involving misconduct of a severe nature in which the employer conducted an extensive investigation that substantiated its reasonable belief of the employee's misconduct. *See, e.g., DTR Industries*, 350 NLRB 1132, 1135–1136 & fn. 29 (2007) (“Given the magnitude of the financial loss caused by this 2-day spurt of ruined production, and the Respondent’s careful elimination of other bases to explain the production errors,” respondent established its reasonable belief that the employee intentionally produced defective products), *enfd.* 297 Fed. Appx. 487 (6th Cir. 2008) (unpublished); *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (respondent met its *Wright Line* burden by establishing that it would have suspended the employees, even in the absence of their protected activity, because based on its investigation the respondent reasonably believed the employees had engaged in serious misconduct endangering other employees and the plant itself), *enfd.* 924 F.2d 1055 (5th Cir. 1991) (unpublished).

Board precedent clearly establishes that it is reasonable for employers to terminate individuals who steal. *See NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (holding that employer lawfully discharged employee after he stole wage information from his supervisor’s office); *W.R. Grace Co.*, 240 NLRB 813, 820-21 (1979) (holding that employer lawfully discharged employee for stealing salary information from company files); *Bullock’s*, 251 NLRB 425 (1980) (holding that company lawfully discharged employee for wrongfully obtaining employee evaluations).

Further, “[m]ere suspicions of unlawful motivation” are insufficient to establish violation of the Act. *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1408 (5th Cir. 1996).

Here, the evidence is overwhelming that Dr. Brar honestly believed that Padilla had stolen. He testified about what he himself witnessed with his own two eyes; there was no need for an investigation. While Padilla denies committing the conduct, as many accuseds do (including the guilty ones), that does not mean that Dr. Brar did not have an honest belief as to what he had seen, and there is no reasonable dispute that stealing is a valid reason for termination. He even went so far as to contact law enforcement, which people typically do not do unless they believe some kind of wrongdoing has actually occurred. Ultimately, the test is not whether the conduct actually occurred, but whether the employer honestly believed that it did, and the General Counsel did nothing to undercut Dr. Brar’s testimony in this regard. Padilla’s speculation that there was an improper basis for her termination is not enough. Nor can Padilla show she would not have been terminated absent her alleged protected conduct.

E. Williams Was Not Subjected to an Adverse Action

Usually when an employee is terminated, the employee is told about it. As Williams herself admitted, no one ever told her that she had been terminated from the hospital. In fact, no adverse action was ever taken against her, which dictates the end of her case. Williams also admits that there were certain tasks that she was asked to do that she refused to do – tasks that Dr. Brar and others in Williams’ position confirm were part of her job. At some point when an employee refuses to perform her job and says that she will not do so unless she is paid more, and the employer declines to pay her more, the employer is entitled to believe that the employee is leaving her job. That is what happened here. No one but herself bears the responsibility for the

end of her employment at the hospital, although ultimately the issue is moot because, as explained above, she did not engage in protected concerted activity.

F. Credibility Determinations Squarely Favor Respondent

When determining the credibility of a witness, the Board considers: (1) the context of the witness's testimony; (2) the witness's demeanor; (3) the weight of the respective evidence; (4) established or admitted facts; (5) inherent probabilities; and (6) reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). An Administrative Law Judge should not give testimony weight when it is self-serving, inconsistent, contradictory, impeachable, and/or irreconcilable with other witnesses' testimony. *Americare Convalescent Ctr.*, 280 NLRB 1206, 1210 (1986) (witnesses' self-serving statements are not accepted when contradicted by the record as a whole); *Grand Cent. P'ship*, 327 NLRB 966, 969 (1999) (discrediting former supervisor who was contradicted by other witnesses).

Although the timing of a termination can be used to discredit an employer's stated reason for the termination, it can also be used to support it. *See NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (9th Cir. 1998) (stating that the timing of a decision to close a department could be seen either as suspicious, in light of the recent union activity, or a reasonable business decision in light of the department's recent difficulties; court stated that the timing "supports both sides"). Timing alone will not establish a violation.

Here, Respondent emerges as far more credible than either of the Charging Parties. While Padilla may dispute that she committed theft, Dr. Brar testified that he witnessed it himself, and he took the substantial next step of actually calling law enforcement about it that very same day. The General Counsel presented no evidence that would suggest that Dr. Brar is

the type of individual who calls law enforcement with fake allegations (or that this is something that generally occurs with such frequency that Dr. Brar's testimony should be tainted by that theoretical possibility). Moreover, one can be virtually certain that if Dr. Brar had not reported the theft, the General Counsel would have used that omission to challenge his credibility as to whether it had occurred. As for the document that Padilla claims she was terminated for refusing to sign, the General Counsel presented not a single witness other than Padilla herself to vouch for its authenticity, while Respondent presented several witnesses who denied having created, seen or signed the document.³ In fact, one of the alleged signatories unequivocally testified that her signature had been forged. Since multiple witnesses contradict Padilla (who can only muster hearsay testimony from another co-worker as to the document's origin), it is squarely within the ALJ's discretion to discredit Padilla's testimony.

Further, Padilla admitted to providing false testimony at the hearing. In an obviously impetuous effort to attack Dr. Brar that backfired badly on her, she claimed that every document Dr. Brar presented for the hospital's employees to sign contained spelling errors. When she was then shown a document he had supposedly prepared that had no misspellings, she was forced to admit that she had testified falsely. This is a material issue because this case potentially turns on the authenticity of a document that Padilla claims Dr. Brar created and gave to her. As Padilla proved that she was capable of testifying falsely under oath, her entire testimony should be viewed accordingly.

Williams' credibility also suffers from the fact that multiple witnesses contradicted her, while she presented no one to corroborate her. Dr. Brar and the other receptionists that

³ The General Counsel did nothing to impeach the credibility of these receptionists, and barely even made the effort to do so.

Respondent called as witnesses all testified consistently that the job duties that Williams refused to perform were required of all receptionists, with no exceptions. The fact that Williams admitted that there were only limited tasks that she refused to do certainly opens the door to the likelihood that she was not telling the truth about the real extent of her refusal; her testimony allows for a reasonable conclusion that she simply wanted to stay at the reception desk and not do anything to assist with the animals, including tasks that did not require a technician and that the other receptionists did. It is also fair to conclude that she did, in fact, demand more money to perform her tasks.

These serious questions about the credibility of Padilla and Williams should be taken into account in the issuance of a decision in this matter.

IV. CONCLUSION

The General Counsel wholly fails to satisfy its burden in this case. It cannot establish that the Charging Parties engaged in protected concerted activity because the evidence shows that they only acted on personal gripes on their own behalves, and not in concert with, or on behalf of, a group of employees. Even if the General Counsel did produce such evidence, which did not occur, Dr. Brar's testimony is that Charging Parties never discussed any such collective issues with him, and therefore he did not have knowledge of the alleged concerted activity and he could not have taken action because of that activity. As such, the causation element collapses. Moreover, Padilla's claim centers on a document that appears to have been fabricated; at least, Dr. Brar has testified that he did not prepare it, and one of the alleged signatories denies that she signed it or ever saw it. Further, Dr. Brar elected to terminate Padilla's employment after he caught her stealing, and he even contacted law enforcement, which dramatically enhances his credibility as to what he indicates he witnessed Padilla doing. Williams refused to do her job and

effectively resigned, but even if the conclusion were made that she was terminated, there is zero evidence linking that termination to any concerted protected activity. Indeed, the General Counsel conducted the hearing as if it were the California Labor Commissioner enforcing the California Labor Code. But the NLRB has no jurisdiction to prosecute such violations. Because the General Counsel abandoned its actual mission and consequently did not establish a violation of the National Labor Relations Act, the Complaint must be dismissed in its entirety.

Date: April 15, 2020

Respectfully Submitted,

/s/ Jonathan D. Martin

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National Labor Relations Board, Region 32
Cases 32-CA-251642/ 32-CA-254220

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to the action. My business address is 333 Bush Street, Suite 1100, San Francisco, CA 94104-2872. I am employed in the office of the attorney at whose direction the service was made.

On April 15, 2020, I served the following document(s): **RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

Christina Padilla
15754 Via Sorrento
San Lorenzo, CA 94580

Akilah Williams
134 Golden Gate Avenue
San Francisco, CA 94102

The document(s) were served on the above individuals by the following means:

- (BY U.S. MAIL) I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and I deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.

In addition, I served the document(s) on the following person(s) at the following address(es) (including fax numbers and e-mail addresses, if applicable):

Amy Berbower
Amy.Berbower@nlrb.gov

The documents were served on the above individual by the following means:

- (BY E-MAIL OR ELECTRONIC TRANSMISSION) I caused the documents to be sent from e-mail address berenice.barragan@lewisbrisbois.com to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on April 15, 2020, at Antioch, California.

A handwritten signature in blue ink, appearing to read "B-Barragan", written in a cursive style.

Berenice Barragan