



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**Region Four**  
**100 Penn Square East, Suite 403**  
**Philadelphia, PA 19107**

Telephone: (215) 597-7601  
Fax: (215) 597-7658

May 8, 2020

Roxanne Rothschild  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

Re: Ground Zero Foundation d/b/a  
Academy for Creative Enrichment  
Case 04-CA-245956

Dear Ms. Rothschild:

Enclosed are Counsel for the General Counsel's Motion for Permission to File Late Answering Brief, Sworn Affidavit of Field Attorney David G. Rodriguez, and Answering Brief to Respondent's Exceptions in the above-captioned case. Copies of the above have been served via email to the individuals listed below.

Very truly yours,

DAVID G. RODRIGUEZ  
Counsel for the General Counsel

Enclosures:

Motion for Permission to File Late Answering Brief  
Sworn Affidavit of Field Attorney David G. Rodriguez  
Counsel for the General Counsel's Answering Brief to Respondent's Exceptions

cc:

Lauren DeLuca, Esq., Connolly Gallagher, LLP  
ldeluca@connollygallagher.com  
Stefanie Hamill  
stefanie.m.hamill@gmail.com

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

**GROUND ZERO FOUNDATION d/b/a  
ACADEMY FOR CREATIVE ENRICHMENT**

**and**

**Case 04-CA-245956**

**STEFANIE HAMILL, an Individual**

**MOTION FOR PERMISSION TO FILE LATE ANSWERING BRIEF**

Pursuant to Rule 102.2(d) of the Board’s Rules and Regulations, Counsel for the General Counsel files this Motion for Permission to File Late Answering Brief, a Sworn Affidavit, and the General Counsel’s Answering Brief to Respondent’s Exceptions.

Rule 102.2(d) allows for the late filing of briefs to the Board “only upon good cause shown based on excusable neglect and when no undue prejudice would result.” In determining whether neglect is excusable, the Board takes into account all relevant circumstances, including: any prejudice to the non-moving party; the length of the delay and its potential impact on judicial proceedings; the reason for the delay, including whether it was within the reasonable control of the movant; and whether the movant acted in good faith. The Board currently places the greatest weight on the reasons for the delay. In this regard, “inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *International Union of Elevator Constructors, Local No. 2 (Unitec Elevator Services Company)*, 337 NLRB 426, 427 (2002). Thus, inattentiveness or carelessness, absent other circumstances or further explanation, will not excuse a late filing.

For the reasons detailed in the adjoining Sworn Affidavit, Counsel for the General Counsel requests that the Board find that sufficient reasons exist to excuse the undersigned's failure to file the Answering Brief in a timely manner. The adjoining Answering Brief is being filed two days late and there is no prejudice to Respondent as a result of this late filing. In fac, on May 7, 2020, Respondent informed the undersigned that it does not oppose the instant motion.

Dated: May 8, 2020

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David G. Rodriguez". The signature is written in a cursive, flowing style with some loops and flourishes.

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**DAVID G. RODRIGUEZ**  
Counsel for the General Counsel  
National Labor Relations Board  
Fourth Region  
100 Penn Square East, Suite 403  
Philadelphia, Pennsylvania 19107

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

**GROUND ZERO FOUNDATION d/b/a  
ACADEMY FOR CREATIVE ENRICHMENT**

**and**

**Case 04-CA-245956**

**STEFANIE HAMILL, an Individual**

**SWORN AFFIDAVIT OF FIELD ATTORNEY DAVID G. RODRIGUEZ**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say as follows:

On March 25, 2020, Chief Administrative Law Judge (ALJ) Robert Giannasi issued a Decision in the captioned case finding that Respondent Ground Zero Foundation d/b/a Academy for Creative Enrichment violated the Act. On April 22, 2020, Respondent filed timely exceptions to the ALJ's Decision. Pursuant to Rule 102.46(b)(1), an Answering Brief to Respondent's exceptions was due to be filed with the Board on May 6, 2020.

On April 22, 2020, I received service of Respondent's exceptions and subsequently reviewed them and determined that I should file an Answering Brief. I am familiar with the Board's Rules that granted me 14 days to file this brief. However, I failed to account for this task in my workload and only realized my failure to file the brief on May 7, 2020.

Region Four's Regional Office, where I am employed, has been closed since March 16, 2020 due to the COVID-19 pandemic. Since that time, like all Board employees, I have been teleworking full time. I have also had primary childcare responsibility for my 5- and 2-year old children. My spouse is a full-time healthcare provider at a local hospital, so I am solely responsible

for my children's care and schooling during regular working hours when I am also performing my work duties.

Since the week of April 27, I have also been working to prepare for a scheduled June 2, 2020 administrative law judge's hearing in a complex matter that may take place by video conference. This, in addition to my investigation of two unrelated charges in important, high-profile cases has put significant strain on my ability to balance my schedule. I sincerely apologize for my failure to timely file the Answering Brief, and I request that you find this negligent failure to be excused under these unusual circumstances.

**I have prepared and read this Sworn Affidavit consisting of 2 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct.**

Dated: May 8, 2020

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David G. Rodriguez". The signature is fluid and cursive, with a large initial "D" and "R".

---

**DAVID G. RODRIGUEZ**  
Field Attorney  
National Labor Relations Board  
Fourth Region  
100 Penn Square East, Suite 403  
Philadelphia, Pennsylvania 19107

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

**GROUND ZERO FOUNDATION d/b/a  
ACADEMY FOR CREATIVE ENRICHMENT**

**and**

**Case 04-CA-245956**

**STEFANIE HAMILL, an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTION**

Respectfully Submitted,



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**DAVID G. RODRIGUEZ**  
Counsel for the General Counsel  
National Labor Relations Board  
Fourth Region  
100 Penn Square East, Suite 403  
Philadelphia, Pennsylvania 19107

Dated: May 8, 2020

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## **I. STATEMENT OF THE CASE**

This National Labor Relations Act (the Act) was signed into law in order to bring to the workplace some of the rights we take for granted in our democratic society. Among these rights are freedom of association and the right of employees to petition their employer for the adjustment of their grievances. *National Labor Relations Act*, 29 U.S.C. § 151. In *Alstate Maintenance, LLC*, the Board recently noted that the right to engage in protected concerted activity is “one of the most fundamental rights guaranteed by Section 7” of the Act. 367 NLRB No. 68, slip op. at 1 (2019).

On July 31, 2019, Stefanie Hamill exercised her right to discuss wage concerns with her fellow employees and to raise these concerns directly with her employer in the hope that they may be remedied. In response to this conduct, Respondent saw fit to summarily discharge Hamill, lest her activities influence the sentiments of other employees.

Respondent seeks to excuse its unfair labor practices by asking the Board to instead rely on the pretextual rationale it has offered for its unlawful conduct. However, to ascertain Respondent’s true motive for firing Hamill, one need look no further than the words Respondent’s principal officer used when she notified Hamill that her employment was at an end. Administrator Finé Washington admittedly told Hamill that she was being discharged because she was a “bad apple” and “a bad apple spoils the bunch.” This statement clearly demonstrated that Hamill was discharged to prevent her from engaging in protected concerted activity and to discourage other employees from doing so.

The Administrative Law Judge, herein called the ALJ, properly found that Respondent’s egregious conduct violated Section 8(a)(1) and that it failed to meet its burden to show that it would have discharged Hamill absent her protected concerted activity.

## II. PROCEDURAL HISTORY

Charging Party Stefanie Hamill filed a charge in Case 04-CA-245956 on August 5, 2019 (GC-1(a)).<sup>1</sup> She filed an amendment to that charge on October 28, 2019<sup>2</sup> (GC-1(c)). On October 30, the Regional Director issued a Complaint and Notice of Hearing (Complaint) alleging that Respondent has been engaging in conduct in violation of Section 8(a)(1) of the Act (GC-1(e)). Specifically, the Complaint alleges that: 1) on or about July 31, Respondent through its Administrator Finé Washington, told an employee that employees are prohibited from discussing their wages with each other; and 2) on or about July 31, Respondent discharged Stefanie Hamill because she engaged in protected concerted activity for the purpose of mutual aid and protection by exchanging text messages concerning wages and hours with other employees, and by raising employee concerns about wages and hours with Respondent's management. (GC-1(e)). On November 13, Respondent filed an answer to the Complaint denying these allegations (GC-1(g)). Respondent's answer also included a demand for "attorney's fees and court costs" to be paid by "Complainant" (GC-1(g)).

On January 9, 2020, a hearing on the allegations in the Complaint was held before Chief ALJ Robert Giannasi in Philadelphia, Pennsylvania. At the start of the hearing, Respondent withdrew the portion of its Answer seeking "attorney's fees and court costs" to be paid by "Complainant" (6).

The ALJ issued his decision in this matter on March 25, 2020. Respondent filed Exceptions on April 22, 2020. In its Exceptions, Respondent contends that the ALJ: 1) failed to consider

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<sup>1</sup> References to the Transcript are identified by the page number(s) in parenthesis. Exhibits are identified with number of the exhibit. General Counsel's exhibits are shown as (GC-) and Respondent's exhibits as (R-). ALJD- (followed by a number) refers to the ALJ's Decision.

<sup>2</sup> All dates herein occurred in 2019, unless otherwise stated.

evidence of a text message Hamill sent Respondent's principal at 10:16a.m.on the date of her discharge; 2) erroneously found that Respondent discharged Hamill in retaliation for her protected concerted activity and offered "shifting" and "inconsistent" reasons to justify the firing (ALJD-11; ALJD-13); 3) erroneously found that Respondent's discharge of Hamill was not actually motivated by Hamill's texting during working hours; 4) mischaracterized certain documentary evidence; 5) erroneously found that Respondent's failure to mention insubordination to Hamill during her discharge meeting bolstered the ALJ's ultimate conclusion that Respondent's proffered defense was pretextual; 6) erroneously found that the timing of its preliminary decision to discharge Hamill supported a finding of unlawful motive; and 7) mistakenly referred to Hamill as "Ramos" in the remedial section of the Decision (ALDJ-15). As explained below, Respondent's arguments lack merit, and the Board should adopt the ALJ's Decision with a modification to correct a typo by the ALJ, as described in Respondent's seventh exception.

### **III. FACTS**

#### ***A. Overview of Operations***

Respondent operates a children's daycare center from a facility in Bear, Delaware (14). During the summer months, Respondent offers a summer camp program for children of all ages, into adolescence (14). The summer camp in 2019 ran from about June 3 to August 23 (14; 89-90; GC-11, p. 1). Each Wednesday, Respondent took the campers on field trips by bus (15). Respondent employs about seven summer camp counselors to care for children enrolled in the summer camp program (16).

***B. Respondent hires Stefanie Hamill***

Stefanie Hamill was a late hire into Respondent's summer camp program (16). She was hired on June 18—about two weeks after the camp began, and so she was not present for orientation (15-16). Respondent hired her as an hourly employee at a wage of \$15 per hour (17). Hamill was assigned to supervise a group of boys aged six to eleven (15).

Administrator Finé Washington and Director Jennifer Porter are Respondent's only two supervisory employees (16; GC-11). Washington owns Respondent and is its chief executive (89; GC-11).

***C. Hamill discusses Respondent's wage practices with another employee***

On Wednesday, July 31, Respondent's employees received their paystubs for the upcoming pay day that Friday, August 2 (30-31). At about 9:30a.m., as employees were preparing to go on the weekly field trip, Counselor Megan Barnett<sup>3</sup> approached Hamill and asked her how much she had been paid (20). Hamill responded that she was not sure because she did not have access to the online application required to check her paystub (20). Barnett told Hamill she wanted to know Hamill's pay because Barnett's hours appeared to have been rounded down, and she wanted to know if this had also impacted other employees (20). Hamill said that she would download the online application, check her paystubs, and let Barnett know what she learned (21).

Respondent's counselors are hourly employees who generally work from 8:00a.m. to 5:00p.m., Monday through Friday (17). However, they often clocked in and out of work outside this time band (20-21). Sometime in June, Washington advised employees they should arrive to work 10 minutes early every day in order to be ready to receive the campers when they were

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<sup>3</sup> Hamill testified that she did not know Megan's last name (19). However, Respondent's September 4 position statement included a list of employees, only one of whom is named Megan (GC-8, p. 2). Her last name is Barnett (GC-8, p. 2).

dropped off at 8:00a.m. (25). In addition, field trips often ran late, and employees occasionally did not return to the Employer’s facility until after 5:00p.m. (21). Barnett’s query raised the concern that Respondent was underpaying employees by not compensating them for the full amount of time they were on the clock (20).

Barnett’s questions compounded in Hamill a concern she had been carrying for some time (18). Hamill had noticed that Respondent had failed to pay her for a “practicum” day she worked prior to formally starting her employment (18). Also, Respondent had not paid Hamill for several hours she stayed late to work on an incentive board meant to assist her with maintaining discipline among her campers (108-109). Thus, Barnett’s questions served to reinforce Hamill’s pre-existing sense that Respondent’s pay practices were not fully transparent or fair.

***D. Hamill texts Washington about Respondent’s wage practices***

After the counselors and children boarded the bus that would be taking them to the field trip, Hamill texted Washington to ask for copies of her paystubs (GC-2). Washington advised Hamill that she would need to obtain that information from ADP<sup>4</sup> (GC-2). When Hamill downloaded the ADP application and examined her paystub, she noticed that, like Barnett, her hours had been rounded down (29). Moreover, while Barnett had been paid for exactly 82 hours, Hamill’s paystub was for 70 hours—12 hours short of what Hamill had expected (29). In addition, Respondent had not followed through on its promise to pay Hamill for the six-hour practicum she completed prior to formally beginning her employment (18; GC-2).

At 10:01a.m., Hamill texted Washington and told her she had been “shorted” on her hours (GC-2). Five minutes later, at 10:06a.m., Hamill texted Washington that she thought she should

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<sup>4</sup> According to its website, ADP is a leading provider of payroll services. See <https://www.adp.com/what-we-offer/payroll.aspx>.

have been paid at least 97 hours because of the hours Washington still owed her (GC-2). Hamill also noted:

Also, I am a bit early or stay a bit late so I don't understand why it's a rounded 82 [hours], for the other counselors as well. Especially if we are expected to be here 10 minutes early every day and sometimes the field trips run late.

It might be better to talk about this in person because it is a bit concerning (GC-2).

These messages are significant, as they disclose to Washington that Hamill was very much aware that Respondent's practice of rounding down hours was also impacting other employees—notably Barnett, to whom Hamill spoke earlier that morning.

At 10:10 a.m., Washington told Hamill that she was hired to work from 8:00a.m.to 5:00p.m. and that Washington had no intention of paying her beyond those hours—including for the time Hamill had stayed late at work to complete the incentive board (108-109; GC-2). Hamill retorted that she had in fact asked for permission to stay and work on the incentive board (GC-2). Hamill then sent the following series of text messages over the course of two minutes:

[10:11 am] Sometimes the field trips we come back at 5:10-5:15

[10:12 am] And if we are expected to be a bit early in order to meet the kids at 8 (or even 755 because sometimes they are early) then we should be paid for that too

[10:12 am] Or it should have been clarified that we would not be paid for that extra time

[10:13 am] I talked to Meghan and she was paid for 82 hours, so even if my hours were rounded I'm not sure how they ended up at 70 [hours]

(GC-2).

Washington's response dismissed Hamill's concerns. While Washington responded that she had misunderstood Hamill's concerns, she added again that Respondent did not plan of paying Hamill for work she could complete during the course of the day (GC-2). At 10:14a.m., Washington texted Hamill, "you should probably be active involved in whatever is going on [in]

the bus but instead you are on your cell phone which I notice you do often” (GC-2). Prior to this instant, Respondent had never told Hamill that she used her cellphone too often (27). In its Exceptions, Respondent contends that this text message was tantamount to a direct order to Hamill to stop texting (GC-7; GC-8). The ALJ directly addressed this argument in the Decision and found it unpersuasive (ALJD-14). Instead, he found that to the extent Washington’s text was a direction for Hamill to stop texting, it was only an effort to stop Hamill’s protected concerted complaints (ALJD-14).

By this point, Hamill had become increasingly frustrated by Washington’s refusal to engage on the issues Hamill was raising (27). Hamill’s response made clear that she considered Washington’s admonition about phone usage to be an effort to avoid directly dealing with Hamill’s accusations of wage theft (GC-2). At 10:16a.m., Hamill responded,

When I am being underpaid that is going to be my main concern, I am checking on the kids while I am texting but I don’t think the attention should be taken off the subject at hand, which is my pay being docked.

If you want to address the texting we can talk about that too another time and I can do it less.

(GC-2). Hamill testified that her response sought to reassure Washington that she was watching the campers, while making sure Washington dealt with the issues Hamill was raising (27). According to Respondent’s position statements and its Exceptions, Washington considered Hamill’s response to be an insubordinate refusal to stop texting (GC-7; GC-8).

At 10:19a.m., Washington texted Porter, “Houston we have a problem” (R-1). Washington suggested to Porter that she intended to discharge Hamill (R-1). Washington sent these messages after Hamill had raised serious concerns that Respondent was engaged in across-the-board wage theft impacting all Respondent’s employees (GC-2; R-1; ALJD-12).

Between 10:20a.m. and 10:26a.m., Hamill sent three additional text messages concerning why she had been paid for only 70 hours of work (GC-2). Notably, during this exchange, Washington told Hamill that there were no hours recorded for July 10—despite the fact that there is documentary evidence that Hamill worked a full day on that date (GC-2; GC-5). Hamill sent a final, brief text to Washington at 11:09a.m.(GC-2).

***E. Follow-up Conversation with Barnett and Ramirez***

After the bus arrived at the destination for the field trip, Hamill had another conversation with Barnett outside the bathrooms at the arcade to which they had travelled (28). Counselor Sarai Ramirez<sup>5</sup> was also present for the conversation (30). Hamill told Barnett that she had been able to check her paystub and confirmed that her hours had also been rounded (29). Moreover, Hamill said that she had only been paid 72 hours, despite having worked every day that pay period (29). Barnett said she had raised the issue with Porter and that she was planning on raising it with Washington as well (29). Barnett added that in previous years employees earned more money because their hours were not rounded (29). Hamill suggested that the employees speak to Washington about the pay issues as a group and noted that she would also discuss the matter with Porter, just as Barnett had done (29-30). After this exchange, Hamill approached Porter and asked her if she knew why employees' hours were being rounded (32-33). Porter said she was not sure and referred Hamill to Washington (33).

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<sup>5</sup> The transcript erroneously recorded Sarai's name as "Suri." Hamill testified that she did not know Sarai's last name (24). However, Respondent's September 4 position statement included a list of employees, only one of whom is named Sarai (GC-8, p. 2). Her last name is Ramirez (GC-8, p. 2).

***F. Hamill recruits her coworkers to join an effort to curb Respondent's unfair wage practices***

After the employees and the campers boarded the bus to return to Respondent's facility, Hamill initiated a group text conversation with Counselors Barnett, Ramirez, and Vaughn Simmons-Williams (GC-3). She sent them a screenshot of a Google search result suggesting that Respondent was engaged in wage theft by requiring employees to arrive at 7:50a.m., but not paying them until 8:00a.m. (GC-3; GC-4). Hamill texted Barnett, Ramirez, and Simmons-Williams that the lost wages amounted to at least \$50 per month, without accounting for the days employees clocked out late due to field trips (GC-3). Simmons-Williams responded that he would enjoy the additional income (GC-3).

Hamill expressed confidence that the lost income exceeded \$50 per month, but said she did not know how they could prove it, given that their hours were apparently being reset by the computer to 8:00a.m. to 5:00p.m. each day (GC-3). Hamill added that her aunt was an attorney and could assist them if they were unable to resolve the issue "in house" (GC-3). Simmons-Williams, who is Washington's nephew, said he understood, but added that he hoped that they would be able to resolve the issue internally (GC-3). Hamill stated that she would speak to Washington individually, but that she intended to bring up the matter during the staff meeting scheduled for the coming Friday, August 2, and that she wanted other employees to speak up as well (37; GC-3). Hamill added that the problem was more likely to be resolved if several employees spoke up (GC-3). Simmons-Williams expressed reservations about bringing up the wage issue during the staff meeting but added that they should certainly speak to Washington (GC-3).

***G. Simmons-Williams tells Respondent about the group conversation***

Shortly after returning to Respondent's facility that evening, Simmons-Williams went to Washington's office and alerted his aunt to the group text conversation (116; 138-139; GC-11). Porter testified that she observed Simmons-Williams show Washington the group text conversation on his cellphone (138-139).

***H. Respondent discharges Hamill***

Shortly after Washington spoke to Simmons-Williams, Hamill arrived in her office (116). Washington began the meeting by telling Hamill that her employment with Respondent would not work out because Hamill was a "bad apple" spreading negativity to other employees and "starting drama" (39). Washington told Hamill that she should have come to her first, before bringing up the pay issue with other employees (39; 115). Washington also expressed to Hamill that other employees would not be able to help her with her problems (116).

Hamill said that she was not the only employee with concerns, noting that Barnett had approached her first about the issue (39). Washington told Hamill she still should have come to her first, since that way they might have been able to work out the issue (40). Washington added that it was a shame that Hamill had not attended new employee orientation because then she would have known that employees were not allowed to discuss their pay with each other (40).<sup>6</sup> Hamill said she had not been aware of that policy and argued that Washington should have made clear to employees that they would only be paid from 8:00a.m.to 5:00p.m., regardless of the time they clocked in and out (40).

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<sup>6</sup> According to Washington, during orientation, she told employees that it was unprofessional to discuss their wages (112; GC-11). Hamill was a late hire, so she did not attend orientation and was not present when Washington made this statement to employees (16; 40).

Washington told Hamill that any overtime employees accrued would be paid to them at the conclusion of the summer camp program (41). Hamill said she had not been made aware of this policy (41).<sup>7</sup> Hamill added that she did not think Barnett was aware of this policy either because she was concerned about her pay, and that this was the reason Hamill had texted other employees about the issue— “because it concerned everyone” (42). Washington said Hamill should not have been texting while she was on the bus, and that she should instead have been paying attention to the campers (42). Hamill said that she had been keeping an eye on the children, but she apologized for not simply talking to Washington about the issue (42). Washington offered Hamill no other reasons for her termination (57).

Washington then gave Hamill a print-out of her hours, so she could point out any inconsistencies, but Hamill asked to take the documents home to work on them at a later time (42). At this time, the meeting concluded. Respondent never issued Hamill written documentation concerning her discharge (43). The ALJ fully credited Hamill’s testimony about her discharge meeting, which was largely corroborated by Washington (ALJD-6). He further generally discredited Washington’s testimony generally, unless it was “against interest” or supported by credible evidence (ALJD-6). At various points throughout the Decision, the ALJ described Washington’s testimony as “self-serving,” “tortured” and “unreliable” (ALJD-8).

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<sup>7</sup> It is unclear when Respondent implemented this policy. Simmons-Williams worked for Respondent for at least two prior summers, but his text messages gave no hint that he knew about the policy (GC-3). Moreover, it seems unlikely that Barnett would have raised the issue of rounding hours with Hamill if she already knew that she would be paid the additional time at the end of the summer (19-20). Finally, Washington failed to mention this policy during her text message conversation with Hamill earlier that day (GC-2).

*I. Respondent's phone usage policy and practice*

Respondent contends that Washington terminated Hamill's employment, in part, because her July 31 text messages to Washington and other employees violated its Phone Usage Policy. In her Board affidavit, Washington testified that she only rarely texts employees during working hours, and that employees normally communicated with each other via walkie-talkie (GC-11, p. 7, line 8-12). In addition, Washington told employees during staff meetings that they should not use their phones (45). However, Respondent's written policy is significantly broader than these statements suggest.

Respondent maintains a Phone Usage Policy in its handbook that sets as follows:

Although employees may use their cell phones for curriculum activities involving the children during the summer, employees may not utilize their cell phones or landlines for personal use while they are scheduled to work. Personal phone usage while working poses a potential safety risk as the children are not fully supervised.

(GC-8, page 18). In its answer to the Complaint, Respondent further elaborated on this policy by pointing out that texting during working hours endangers children and Respondent's operating license (GC-1(g)).<sup>8</sup>

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<sup>8</sup> On January 22, after the close of the hearing, Respondent introduced into evidence a document purporting to show Delaware's Regulations for Early Care and Education and School-Age Centers (R-2). Highlighted in the regulations is a provision that states: "staff members providing care for children may not be given other duties or participate in personal activities, such as using a cell phone that would interfere with providing care to children (R-2). The Regulations also indicated that the minimum staffing ratio for school-aged children is 1:15 (R-2). Respondent contended, for the first time in its answer, that Hamill's texting placed Respondent out of compliance with the minimum staffing ratios (GC-1(g)). There is no evidence regarding whether the number of children on the bus on July 31 exceeded the ratio, or whether Hamill's conduct violated the regulations.

But most importantly, this defense was not raised until long after Hamill's discharge and there is no evidence that the Regulations played into Respondent's decision to discharge Hamill. There is certainly no evidence that Respondent investigated the ratio of counselors-to-campers prior to Hamill's termination. There is similarly no evidence that Hamill's texting "interfered with providing care to children," or that Respondent even investigated whether it did. Thus, the Regulations are of little, if any, relevance in this case.

Despite the blanket prohibition in the handbook, the ALJ found Respondent's *de facto* texting policy allowed employees wide latitude to use their cellphones (ALJD-8). Washington texted employees almost every workday and employees were expected to reply promptly to her missives (71). By way of illustration, Hamill's July 31 text message conversation with Washington—the same that precipitated her termination—was initiated by Washington herself (23; GC-2). Between 9:23a.m. and 9:39a.m., Hamill and Washington exchanged six messages—all of which were prompted by questions or comments by Washington (GC-2).

Moreover, Washington's messages that day were not isolated or unusual. General Counsel's Exhibit 5 shows multiple group text message conversations in which Washington participated on the following dates: July 5, 9, 12, 16, 22, 23, 24, 25, and 30 (GC-5). On July 25, employees exchanged 19 messages between 9:20a.m. and 2:23p.m.—all of which were initiated by Washington (GC-5, pp. 9-12). All of the text message exchanges on these dates concerned work matters, but it is worth noting that Hamill's July 31 text conversations were also work-related. Hamill texted Washington and other employees about Respondent's wage practices—which is presumably not violative of a policy that prohibits only personal phone usage.

That said, there is evidence that Respondent permitted, and even encouraged, employees to text about matters wholly unrelated to their employment. On July 10, Respondent's employees were on their way back to the facility from a field trip when Washington initiated a game meant for her employees' amusement (50; GC-6). Over the course of 47 minutes, between 4:00p.m. and 4:47p.m., employees exchanged approximately 176 text messages as part of a game where one player texted the lyrics of a song as a clue, and the remaining players then guessed the title of the song (50; GC-6). Whomever guessed correctly first earned the right to give the next clue (50; GC-6). Employees seemed to have eagerly participated in this game and during the bus ride back from

the field trip, they played many rounds of the game—exchanging lighthearted jokes and jibes (GC-6). This occurred just three weeks before Hamill sent the text messages that led her discharge.

During the hearing, Hamill testified that campers are often asleep, talking to each other, or sitting quietly during the bus rides (38; 70). Porter and Washington disputed this, testifying that Respondent always actively plays games with the campers for the duration of the bus rides (105; 129). However, the fact that this game was permitted lends credence to Hamill’s testimony. The sheer quantity of messages exchanged during the game (about one message every 16 seconds) suggests that employees were engrossed on their cellphones. Moreover, during the game, Simmons-Williams sent the group photographs of campers who had fallen asleep on the bus—proof positive supporting Hamill’s account (GC-6).

Washington offered shifting explanations for the July 10 texting game. Initially, she testified that the game was intended for the enjoyment of young campers on the bus (105). However, Hamill credibly testified that the campers did not participate in the game (50). Hamill’s account is logical given the content of the messages themselves. The lyric clues chosen by employees were often vulgar, profane, and sexually explicit (GC-6). For example, at 4:23p.m., one employee offered the follow lyric clue: “I’m that bad type, make your momma sad, might seduce your dad type” (GC-6, p. 12). Shortly thereafter, Simmons-Williams offered the following clue: “I’m thinkin bout it out, it’s hard to pop sh\*t with my grill in” (GC-6, p. 12). Four minutes later, at 4:29p.m., Simmon-Williams offered another clue: “I ain’t tryna die young so i ride one, stand ten toes down in my Balenciaga” (GC-5, p. 12). It seems unlikely that any of the young children on the bus offered these clues, or that Washington would have felt that such a game was appropriate for children. Thus, her assertion that the campers participated in the game is not credible.

Washington also testified, despite the fact that she started the game, that she was unaware the game was going on (120). She further testified that all of the employees who participated in the game she initiated would not be rehired (120). This testimony, however, is also not credible. The screenshots of the game show that Washington actively participated in the game until 4:29p.m., 29 minutes after the game started (GC-5, p. 13). Moreover, messages sent in a group chat are received by all its participants (35). Even if Washington was not paying attention to her cellphone at any particular moment, she would have received the alerts of the messages and would have been able to see them when she checked her notifications.

During the hearing, at various points, the ALJ pressed Washington to detail precisely what she found objectionable about the text messages exchanged on July 10 (120-121; 124-126). However, Washington could not persuasively respond to the ALJ's line of questioning. Initially, she testified that she found it objectionable that the game was unrelated to the campers (124). But and the ALJ and Counsel for the General Counsel pointed out that that Washington had participated in the early part of the game without objection, Washington suggested that there were missing messages that would have shown that the campers were involved (126). Needless to say, Respondent did not offer to produce the "missing" messages. Washington also said she found the use of adult language in the game to be offensive, but as detailed above, Washington was still actively participating in the chat after the use of adult language and references began (125).

Unsurprisingly, the ALJ found Finé Washington's tortured effort to distance herself from the substance of the July 10 text message conversation to be wholly unpersuasive and incredible (ALJD-8). Still, her effort to disassociate herself from it is understandable. The July 10 text message conversation occurred in the same context as Hamill's texts on July 31. In each instance, employees texted during a field trip bus ride . The only difference between the July 10 game and

Hamill's July 31 text messages is that while Hamill's texts were work-related, the July 10 lyrics game was just a way for employees to amuse themselves and pass the time during a long bus ride. It is particularly telling that Ms. Washington personally initiated this diversion.

***J. Respondent's shifting rationale for discharging Hamill***

Respondent offered shifting rationales for why it discharged Hamill. Shortly after the initial charge in this matter was filed, Washington submitted a preliminary position statement on August 21 attaching Hamill's discharge letter (GC-7). Two weeks later, on September 4, Washington submitted a formal position statement that offered additional grounds for Hamill's discharge (GC-8). These shifting defenses and the factually inconsistent assertions offered in the statements undermine Respondent's credibility. Instead, they suggest an effort by Respondent to conceal its unlawful motive—an inference the ALJ explicitly made in concluding that Respondent unlawfully discharged Hamill (ALJD-13).

**The August 21 Preliminary Position Statement**

Respondent's August 21 position statement attached a document purporting to be Hamill's discharge letter (GC-7). That document fully states the reasons for Hamill's discharge as follows:

On Wednesday, July 31, 2019 Stefanie [Hamill] began texting the Admin, Ms. [Finé] Washington at 9:23 am. The camp groups were rallied and boarded their field trip bus a little before 10 am[.] On their way to their field trip destination Stefanie was observed by the Director, Ms. [Jennifer] Porter with her head down for most of the trip. This is unusual as we are very active on the bus singing songs and playing games. Stefanie was still texting the Admin, Ms. Washington regarding her questions she had about her pay. The texts lasted until 11:09 am even though the Administrator texted her at 10:14 am, "This matter should be discussed when she returned and she should be giving her full attention to the campers." Her response was, "When I am being underpaid that is going to be my main concern." She continued to text. On the bus ride back to the camp Stefanie proceeded to text three other counselors on the bus for the duration of the trip. Stefanie was terminated due to:

- Excessive use of her cell phone

- Neglect of the campers in her charge
- Insubordination

(GC-7, p. 3) (quotations in original).

The factual misrepresentations in the discharge letter are legion. First, Respondent asserts that Hamill began texting Washington at 9:23a.m., despite the fact that the text message exchange from July 31 clearly shows that it was Washington who initiated the communications with Hamill that morning (GC-2). This misrepresentation is significant because the fact that Washington began texting Hamill the morning of July 31 undermines Respondent's position that texting during working hours is rare and generally prohibited.

The letter also asserts that Porter witnessed Hamill with her "head down" for most of the trip—thus implying that Hamill was actively texting during the trip and not paying attention to her campers. However, Porter testified during the hearing that while she saw Hamill texting on the bus, she did not know how long Hamill spent texting because she was "20 rows" behind where Porter was seated (128-129).

Next, Washington asserts in the letter that at 10:14a.m., she told Hamill, "This matter should be discussed when she returned and she should be giving her full attention to the campers" (GC-7, p. 3). However, this statement, is nowhere to be found in the July 31 text message exchange between Washington and Hamill (GC-2). The misrepresentation appears intended to show that Washington's directive to Hamill was clear and unambiguous, and that Washington was not trying to avoid the discussion Hamill had attempted to broach, but simply trying to postpone it to a more appropriate time. But Washington's actual message to Hamill, discussed above, was not an order to stop texting. Instead, as the ALJ concluded it was an effort to deflect and avoid a difficult conversation (ALJD-14). Moreover, Washington continued responding to Hamill's text messages,

which suggests Washington herself did not appear to think she had given Hamill an order to stop texting (GC-2).

The discharge letter also cites Hamill's afternoon text messaging with other employees as part of the reason for her discharge (GC-7, p. 3). At the hearing and in its Exceptions, Respondent contends that Hamill was discharged solely for the morning text messages with Washington (R-1). Finally, while Respondent's letter claims that Hamill was guilty of "neglect of the campers in her charge," Respondent offered no evidence that Hamill neglected her campers (GC-7, p. 3; ALJD-13). Hamill, on the other hand, testified that during the brief periods where she texted, she was still supervising the children in her charge (26).

#### The September 4 position statement

On September 4, Washington submitted another position statement suggesting, for the first time, that Hamill was discharged in part because of a June 26 incident where she lost track of a camper during a field trip (GC-8). The position statement also notes that Respondent received numerous complaints from parents and employees prior to Hamill's discharge, and misleadingly contends that Hamill received documented counseling for this misconduct (GC-8).

On June 26, during Hamill's first field trip, she lost track of one of her campers while moving from one floor of a museum to another (55). Porter found the lost camper and returned him to Hamill's group (55). After Hamill returned to Respondent's facility after the field trip, she immediately went to Washington's office and informed her of the incident (56; 95). Hamill accepted responsibility, apologized, and asked for constructive criticism to ensure something similar never happened again (56; 95). Respondent did not issue any discipline to Hamill (57). The incident occurred five weeks before Hamill's discharge and Washington made no mention of it during Hamill's termination meeting.

The September 4 position statement asserted that “employees and parents mentioned [Hamill’s] excessive use of her cell phone to which she was again counseled and it was documented” (GC-8, p. 1). However, Respondent offered no evidence of any complaints about Hamill’s texting that predated her discharge. Moreover, there is no documentary evidence that Hamill was counseled about her cellphone use, and Hamill testified that Washington never spoke to her about her personal cellphone use prior to the day of her discharge (27).

***K. Disparate treatment evidence***

As discussed above, there is overwhelming evidence that Respondent did not consider texting during working hours a dischargeable offense. On July 10, Washington participated with all her employees in a text message game that occupied counselors for the duration of a bus ride returning from a field trip (GC-6). During this game, employees exchanged 176 messages over the course of 47 minutes—a rate of one message every 16 seconds (GC-6). On July 31, over the course of an eight-hour day, Hamill sent a total of 28 text messages, the first three of which were prompted by questions and comments from Washington (GC-2; GC-3).

On the one occasion when Respondent did discipline an employee for his cellphone use, that discipline fell short of discharge (GC-10). On June 27, Respondent documented issuing verbal counseling to Simmons-Williams because he had used his phone to post picture on social media during working hours (GC-10). However, the incident described in this disciplinary document is clearly distinguishable from Hamill’s conduct. Simmons-Williams was disciplined for using his cellphone for personal reasons, while Hamill’s communication directly related to her employment conditions and those of her fellow employees. While it is undisputed that Respondent discussed at Friday meetings that employees were using their cell phones too much, Respondent stipulated that did not discipline any other employee for excessive cell phone use (84; GC-9).

Finally, during the hearing, Respondent stipulated that Hamill was the only employee discharged for any reason during the five-year period preceding the issuance of a subpoena *duces tecum* on December 30 (84; GC-9). The only evidence Respondent provided showing the termination of an employee dated back to 1997 (GC-10). Respondent fired that employee because she refused to hang up Respondent’s landline telephone when directed to do so, instead telling Respondent’s administrator to “bite my butt” (GC-10). Respondent evidently did not impose the ultimate form of discipline on another employee until 22 years later, when it discharged Stefanie Hamill on July 31, 2019 for texting about her pay discrepancy.

#### IV. ARGUMENT

##### ***A. The ALJ properly found that Stefanie Hamill engaged in protected concerted activity***

In *Alstate Maintenance, LLC*, the Board described protected concerted activity as follows:

In relevant part, Section 7 of the Act gives 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” (emphasis added). Thus, for employees to enjoy the protection of the Act under the language of Section 7 italicized above, two elements must be satisfied: the activity they engage in must be “concerted,” and the concerted activity must be engaged in “for the purpose of . . . mutual aid or protection.”

The governing standards for determining whether an activity is concerted are set forth in the Board’s decisions in *Meyers Industries*. In *Meyers I*, the Board held that “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

367 NLRB No. 68, slip op. at 2 (2019) (internal footnotes omitted); citing *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

*Alstate Maintenance* also noted that under longstanding Board precedent,

an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of “group activities”—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management’s attention a “truly group complaint,” as opposed to a purely personal grievance. Absent such evidence, there is no basis to find that an individual employee who complains to management about a term or condition of employment is acting other than solely by and on behalf of him- or herself.

367 NLRB No. 68, at slip op. 3 (2019); citing *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Here, Hamill’s complaints to Washington that she was rounding employees’ hours were prompted by her conversation with Barnett earlier on the morning of July 31. See *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 4 (2019) (employee discussions related to wages are protected by the Act). The Board has found that such wage discussions are “inherently concerted,” even in the absence of any contemplation of group action. *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992).

Moreover, Hamill gave Washington clear indications that she was raising concerns that impacted other employees as well, and even explicitly mentioned that she had been talking about her wages with Barnett. At 10:06a.m., Hamill texted Washington, “I don’t understand why it’s a rounded 82 [hours], for the other counselors as well.” Thereafter, Hamill repeatedly questioned Respondent’s practices and how they impacted all the employees by consistently using the plural pronoun. While Hamill’s complaints to Washington also raised personal grievances beyond the rounding of hours, all of these grievances concerned the same overriding complaint—that Respondent had a practice of not paying its hourly employees for the full time they worked. Thus, any argument by Respondent that Hamill acted alone and not on behalf of other employees is factually and legally deficient.

Respondent's exceptions implicitly argue that, even if Hamill's early comments to Washington were protected, her 10:16a.m. message was insubordinate and lost her the protection of the Act. However, remarks made in the course of concerted activity lose the Act's protection only if they are particularly opprobrious. Some leeway is allowed for impulsive behavior, and intemperate comments are not sufficient to cause an employee to forfeit her rights. The mere fact that Washington subjectively found Hamill's comments offensive does not call for a different result. *Dickens, Inc.*, 352 NLRB 667, 672-73 (2008); *Caval Tool Division*, 331 NLRB 858, 863 (2000), *enfd.* 262 F.3d 184 (2d Cir. 2001); *American Telephone & Telegraph Co.*, 211 NLRB 782,783 (1974). In sum, on July 31, Hamill raised group complaints to Washington in an effort to obtain some form of redress. Her conduct falls squarely into protect/in the protections of the Act.

Hamill's July 31 afternoon text message exchange with Simmons-Williams, Barnett, and Ramirez was also protected by the Act. See *Alstate Maintenance*, 367 NLRB No. 68, slip op. 3 (2019) (an individual employee's efforts to "induce group action" concerning terms and conditions of employment are protected by Section 7). After a frustrating exchange with Washington early on July 31, Hamill sought to enlist employees in an effort to raise their concerns as a group during the upcoming August 2 staff meeting. In so doing, Hamill explicitly told the other counselors, "I think it will be more likely to be resolved quickly if more than one or two people are saying something [at the staff meeting]." Anticipating the possibility that the pay issues would not be successfully resolved with Washington, Hamill also raised the prospect of taking legal action to recoup their lost wages. See *Cordua Restaurants, Inc.*, 368 NLRB No. 43, at slip op. 5 (2019) ("Section 7 has long been held to protect employees when they pursue legal claims concertedly").

Thus, the ALJ properly concluded that Hamill's conversations with her coworkers concerning Respondent's wage practices, as well as her effort to communicate these complaints to

management, constitute protected concerted activity. To the extent Hamill's efforts to induce group action would not come to fruition, it was only because she was terminated shortly after sending these messages.

***B. The ALJ properly found that Finé Washington made statements on July 31 which violated Section 8(a)(1) of the Act***

Respondent did not except to the ALJ's finding that it violated Section 8(a)(1) by telling Hamill that employees are not allowed to discuss their wages.

***C. The ALJ properly found that Hamill's protected activity was a motivating factor in her discharge***

The Board applies a two-part standard in cases where a claim is made that an employee was discharged for engaging in protected concerted activity. Under this standard, the initial burden is placed on General Counsel to demonstrate that the employee's protected conduct was a motivating factor in the employer's personnel decisions. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. den.* 455 U.S. 989 (1982). The framework is "inherently a causation test." *Tschiggfrie Properties, LTD.*, 368 NLRB No. 120, slip op. at 10 (2019). The General Counsel's burden is normally satisfied by showing that the employee engaged in protected concerted activity; that the employer was aware of the protected conduct; and that the employer demonstrated animus toward the employee's protected activity. *Id.* Proof of discriminatory motivation "can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." *Id.* slip op. at 11. Once it is established that protected activity was a motivating factor in a personnel decision, the burden shifts to the employer to show that it would have taken the same action in the absence of protected conduct. *Wright Line*, *supra*.

The ALJ found that the evidence that Hamill's concerted wage discussion and complaints were a motivating factor in her discharge was "overwhelming" (AJD-11). First, Hamill engaged

in protected concerted activity on the morning of July 31 by discussing concerns about Respondent's pay practices with Barnett and thereafter raising these concerns directly with Washington. Hamill continued her protected conduct during the afternoon of July 31 by texting her coworkers about Respondent's practice of rounding hours and by inducing them to engage in group action.

Washington knew about Hamill's protected activity because she was directly involved in the morning text message conversation. Then, after the counselors returned from the field trip that evening, Simmons-Williams told Washington about Hamill's efforts to induce group action and even showed her the group conversation.

Respondent's animus is clear from Washington's statements to Hamill during her discharge meeting, as well as the close timing between the discharge and Washington's acquisition of knowledge about Hamill's group texts to employees. See *Case Farms of North Carolina*, 353 NLRB 257, 260-261 (2008). Washington told Hamill that she was a "bad apple" spreading negativity—presumably by riling employees up about Respondent's pay practices and suggesting legal action. Washington confessed that she had previously told employees she thought it was unprofessional for employees to share wage information, and she reiterated this sentiment in the meeting with Hamill. During the hearing, Washington also admitted telling Hamill that her coworkers would not be able to help her with her wage concerns—a statement that suggests that Hamill's protected activities were futile. In short, all of the elements normally required to show the presence of an improper motive—activity, knowledge and animus—are present here.

To the extent Respondent's Exceptions contend that Washington's decision to discharge Hamill was based solely on their text exchange the morning of July 31, that argument is belied by Washington's own statements during Hamill's discharge meeting. While it is true that Washington

expressed to Porter an intent to discharge Hamill the morning of July 31, she did not carry out that action until hours later. More importantly, during the actual discharge meeting, Washington dwelled on issues regarding Hamill's contacts with other employees. She asked Hamill why she had not approached her first about the pay issues and told Hamill that other employees would not be able to help her. Washington's evident fixation on the impact of Hamill's conduct on other employees suggests that Washington's concerns about Hamill's continued employment were directly related to her efforts to persuade other employees to challenge Respondent's pay practices.

It is also significant that Hamill was the only person fired by Respondent in the recent past. As explained above, Respondent stipulated that no other employees were fired since at least 2014. Further, the only evidence of a discharge Respondent produced dated back to 1997. Respondent appears to have had no practice of firing employees. Yet, Respondent now contends that Hamill's texting on July 31 necessitated her termination. When all the circumstances are considered, it is virtually impossible to avoid the inference that Hamill's protected activities precipitated her discharge.

Respondent's Exceptions repeatedly argue that Hamill's discharge was motivated by her neglect of children and her insubordinate refusal to stop texting Washington the morning of July 31. However, Respondent's exceptions ignore that the ALJ directly discredited Washington's testimony that these were the reasons she fired Hamill (ALJD-14). While Respondent does not explicitly contest the Administrative Law Judge's credibility determinations, many of its exceptions are simply disagreements with the ALJ's factual findings. The Board has an established policy not to overrule an ALJ'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). Here, Respondent failed to marshal any arguments for overruling the ALJ's credibility resolutions.

Respondent objects to the ALJ's conclusion that Respondent's actions were motivated by the content of Hamill's texts, rather than the fact she was texting (ALD-12). To that end, Respondent asks the Board to defer to the nature of Respondent's industry and business. However, Respondent does not address the evidence upon which the ALJ relied in reaching this conclusion. He relied on Washington's statements during the discharge meeting evincing preoccupation with the impact of Hamill's complaints and actions on other employees (ALJD-11 to 12). He relied on Respondent's position statements admitting that Hamill was discharged for texting other employees on the return bus ride from the field trip (ALJD-12). He relied on extensive evidence that Respondent never enforced its prohibition on cellphone use, despite clear evidence of pervasive texting during working time (ALJD-12). Respondent's Exceptions do not attempt to reconcile any of these facts. Rather, Respondent's arguments show a continued tendency to "cherry pick" favorable facts, while ignoring the weight of evidence against its contentions (ALJD-10).

Therefore, Respondent's Exceptions challenging the ALJ's factual finding that Respondent's discharge of Hamill was motivated by her protected concerted activity should be dismissed.

***D. The ALJ properly found that Respondent failed to show it would have discharged Hamill if she had not engaged in protected activity***

The ALJ's finding that Hamill's protected activity was a motivating factor in her discharge shifted the burden of proof to Respondent to show that it would have discharged Hamill regardless of her protected activity. See *Tschiggfrie Properties, LTD.*, 368 NLRB No. 120, slip op. at 8 (2019). If, however, as the ALJ found, the evidence shows that the reasons given for its action are pretextual, Respondent fails to show that it would have taken the same action for those reasons,

and its *Wright Line* defense necessarily fails. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Circumstantial evidence that the proffered reason is pretextual includes, but is not limited to, disparate treatment<sup>9</sup> and shifting defenses.<sup>10</sup> These factors also strengthen the General Counsel's case of discriminatory motive, while simultaneously weakening Respondent's case that it would have taken the same action regardless of the discriminatory motive. See *Verizon Wireless*, 365 NLRB No. 93 (2017); cf. *Electrolux Home Products, Inc.*, 368 NLRB No. 34 (2019) (pretext alone may not be sufficient to show unlawful motivation).

Here, as discussed above, during their July 31 meeting, Washington offered Hamill the following three reasons for her termination: (1) that Hamill was a bad apple spreading negativity to other employees; (2) that Hamill should have talked to Washington instead of talking to her coworkers; and (3) that Hamill should not have been texting on the bus. However, during the Board's administrative investigation of the charge in this matter, Respondent offered two additional reasons for firing Hamill. First, it asserted that Hamill had insubordinately refused to stop texting when given an order to do so. And, second, Respondent argued that the June 26 incident involving a lost camper also justified Hamill's termination.

The first two reasons Washington offered Hamill for her termination make explicit that the discharge was motivated by Hamill's protected activity. However, the third reason is not necessarily unlawful. An employer would certainly be within its rights to fire an employee for texting during working hours. However, the issue is not simply whether Respondent "could have" taken action against Hamill, but whether it "would have" in the absence of protected activity. *Pratt*

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<sup>9</sup> *Pontiac Care & Rehabilitation Center*, 344 NLRB 761, 767 (2005); *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn. 2 (1998).

<sup>10</sup> See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

(*Corrugated Logistics*), 360 NLRB 304, 312 (2014); *Carpenter Technology Corporation*, 346 NLRB 766, 773 (2006). Here, there is abundant evidence that Respondent tolerated texting during bus rides during field trips. While Respondent admonished employees generally during staff meetings not to use their cell phones, Respondent only ever enforced this rule on one occasion. Moreover, in the one instance Respondent took action to discipline an employee for using his cellphone, that discipline fell far short of discharge. This, in tandem with the complete absence of evidence that Respondent had a practice of discharging employees, shows that the third rationale Washington offered Hamill for her discharge was pretextual.

The two additional rationales Respondent offered during the Board's investigation constitute shifting defenses that tend to prove Respondent's unlawful motive. First, the contention that Hamill was insubordinate is simply factually incorrect. Moreover, Washington did not mention that rationale during the July 31 discharge meeting.<sup>11</sup> Instead, it appears that this justification was seized upon after-the-fact, based on an intentionally misleading portrayal of the underlying text message conversation.

Second, the June 26 incident Respondent sought to highlight during the hearing occurred a full five weeks prior to Hamill's discharge. Hamill accepted responsibility for the incident and apologized to Washington. Washington, even according to her own testimony, did not mention this incident during the discharge meeting. The Board has held that such significant delays in time between the issuance of discipline and the underlying misconduct may be suggestive of pretext. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1029-1030 (2014) (one-month delay between incident and implementation of discipline supports a finding of unlawful motive).

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<sup>11</sup> See *Tschiggfrie Properties, LTD.*, supra, at 7 (an employer's failure to reference certain conduct during discharge meeting suggest the conduct did not, in fact, factor into its rationale).

Respondent's first Exception contends that the ALJ failed to consider evidence showing that Washington would have discharged Hamill even if she had not engaged in protected activity. Specifically, Respondent contends that the ALJ failed to consider the timing between Hamill's 10:14a.m. text to Washington, and Washington's 10:19a.m. messages to Porter indicating an intent to discharge Hamill. This evidence, Respondent argues, proves that Washington would have fired Hamill in the absence of her protected conduct.

However, the ALJ deal with this issue at length in the Decision (ALJD-12). As a preliminary matter, the ALJ noted that Hamill had already engaged in protected concerted activity by the time Washington texted Porter her intent to discharge Hamill (ALJD-12). Further, the ALJ noted that during the discharge meeting, Washington explicitly referenced Hamill's afternoon communications with employees as grounds for her termination—a fact the ALJ noted “amounted to an admission” of Respondent's unlawful motive (ALJD-11).

Because Respondent explicitly discharged Hamill for her protected concerted activity and because its proffered non-discriminatory rationale for discharging Hamill were pretextual, the ALJ properly concluded that Respondent failed to meet its *Wright Line* burden to show it would have fired Hamill absent her protected activity (ALJD-14).

## **V. CONCLUSION AND REMEDY**

Based on the foregoing, Counsel for the General Counsel submits that the ALJ properly found that Respondent violated Section 8(a)(1) of the Act. As a result, the Board should adopt the ALJ's remedial order in its totality, with a modification to the ALJ's typo referring to Hamill as Ramos.

Respectfully Submitted,



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**DAVID G. RODRIGUEZ**

Counsel for the General Counsel

National Labor Relations Board

Fourth Region

The Wanamaker Building

100 Penn Square East, Suite 403

Philadelphia, Pennsylvania 19107

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