

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

AMERICAN MEDICAL RESPONSE  
MID-ATLANTIC, INC.

and

Case 05-CA-221233

MOSIAH O. GRAYTON, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S  
OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION**

Counsel for the General Counsel respectfully submits this Opposition to Respondent's Motion for Reconsideration (Motion) of the Board's decision in the above-captioned matter, reported at 369 NLRB No. 125 (July 17, 2020). The Board properly found that American Medical Response Mid-Atlantic, Inc. (Respondent) violated Section 8(a)(1) of the Act by placing Mosiah Grayton (Grayton) on unpaid administrative leave on December 7, 2017, issuing her a last-chance agreement on December 15, 2017, converting her unpaid administrative leave to an unpaid suspension on December 15, 2017, and discharging her on May 22, 2018.<sup>1</sup> Respondent's Motion fails to meet the Board's "extraordinary circumstances" standard for granting reconsideration. Counsel for the General Counsel opposes Respondent's Motion for the reasons discussed below.

I. Legal Standard

A party can move for reconsideration of a Board decision only "because of extraordinary circumstances." Board's Rules and Regulations, §102.48(c)(1). In so moving, the party must "state with particularity the material error claimed." *Id.* Merely repeating arguments already presented to the Board does not constitute extraordinary circumstances. See, e.g., *Raven*

---

<sup>1</sup> Hereinafter, all dates refer to 2017 unless otherwise noted.

*Government Services, Inc.*, 336 NLRB 991, 992 (2001) (denying motion to reconsider “because it represents an untimely attempt to relitigate an issue previously decided by the Board”); *Six Star Cleaning & Carpet Services, Inc.*, Case 28-CA-023491 et al. at 3 fn. 4 (2014) (not reported in Board volumes) (“reconsideration of [respondent’s] arguments is not warranted, as they raise nothing not previously considered in the underlying case”); *Triple A Fire Protection, Inc.*, Case 15-CA-11498 at 3 (2011) (not reported in Board volumes) (“[r]espondent reiterates arguments that, because they were previously considered and rejected by the Board, fail to establish adequate grounds for reconsideration”). Further, a motion for reconsideration is not the forum to raise arguments which could have been raised earlier in the proceeding. See e.g., *Mi Pueblo Foods & the United Food & Commercial Workers Union, Local 5*, Case No. 32-CA-064836 at 1-2 (not reported in Board volumes) (denying a motion for reconsideration of a remedy in part because they could have requested it earlier in the proceeding).

## II. Argument

Respondent fails to demonstrate that extraordinary circumstances warrant reconsideration in this case. Instead, Respondent relies on a subsequently issued Board decision and an argument that the Board previously considered and rejected. As such, Respondent’s Motion should be denied. While counsel for the General Counsel asserts that this case should not be reconsidered, even if it is reexamined under the subsequently issued standard set forth in *General Motors LLC*, 369 NLRB No. 127 (2020), the evidence establishes that Respondent unlawfully disciplined and discharged Grayton in retaliation for her protected concerted activity.

A. Extraordinary Circumstances Do Not Exist to Warrant Reconsideration.

The Board's rule regarding motions for reconsideration requires "extraordinary circumstances" to warrant reconsideration of a Board decision. Board's Rules and Regulations, §102.48(c). Furthermore, "[a] motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on." Id. at §102.48(c)(1).

Neither of Respondent's arguments are persuasive. First, Respondent contends that a subsequently issued Board decision requires overturning the Board's decision in this case. Next, Respondent asks the Board to review, yet again, an argument raised in its Exceptions that Grayton's last chance agreement barred counsel for the General Counsel from issuing complaint, without identifying any material errors of law or fact. Simply, the Board already considered this argument, and Respondent disagrees with the Board's conclusion. This is decidedly not an extraordinary circumstance warranting the granting of its Motion.

1. The subsequent issuance of *General Motors LLC* does not create an extraordinary circumstance.

On July 21, 2020, four days after issuing the decision in this case, the Board issued *General Motors LLC*, supra. A plain reading of *General Motors LLC* reveals that the Board did not intend its holding be applied to this case. The Board elected to apply *General Motors LLC* retroactively, but not to every case; it applies only to the subset of cases that were *pending* at the time of issuance. In *General Motors LLC*, the Board stated:

We find it appropriate to apply *Wright Line* retroactively to all *pending cases* in which the Board would have determined, under one of its setting-specific standards, whether abusive conduct in connection with Section 7 activity had lost an employee or employees the Act's protection.

Supra, slip op. at 17. (emphasis added).

This case was *not* pending when the Board issued *General Motors LLC*. Therefore, it is not appropriate to apply the framework announced in *General Motors LLC* to this case. The Board applied applicable legal precedent at the time of issuance, and therefore, there is no mistake of law or extraordinary circumstance warranting reconsideration of this case.<sup>2</sup>

Moreover, logically, the Board was aware that it was planning to announce the standard set forth in *General Motors LLC* when it issued the decision in the instant case. Accordingly, had the Board determined that this case should be reviewed under *General Motors LLC* standard, it would have waited to issue this decision.

2. Respondent's previously rejected arguments regarding the last chance agreement do not constitute extraordinary circumstances.

The Board will deny a motion for reconsideration where, as here, it has previously considered and rejected the arguments that form the basis for the motion. *Pressroom Cleaners*, 361 NLRB No. 133 (2014). In its Motion, Respondent asks the Board to once again consider its argument that the last chance agreement was lawful and that it barred the General Counsel from issuing complaint. All relevant facts pertaining to Respondent's argument concerning the last chance agreement were known to Respondent prior to the unfair labor practice hearing, yet Respondent failed to timely raise this defense.<sup>3</sup> In his Decision and Order, the Administrative Law Judge (ALJ) properly found that Respondent failed to timely raise this defense. ALJD 8, fn.

---

<sup>2</sup> The Board issues decisions frequently, and it is impractical and contrary to the notions of finality to reexamine, in perpetuity, each decision based on subsequently issued cases.

<sup>3</sup> Respondent first raised this untimely argument in its Exceptions to the Board. Affirmative defenses raised for the first time after the hearing are untimely and may be considered waived. See, e.g., *SEIU United Healthcare Workers–West*, 350 NLRB 284 fn. 1 (2007), *enfd.* 574 F.3d 1213 (9th Cir. 2009) (untimely to raise a deferral defense after trial closes); *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1112–1113 (1999) (a settlement-bar defense is waived if it is not raised in the pleadings or at hearing). Accordingly, Respondent's attempt to raise this defense after hearing is untimely and impermissible.

14.<sup>4</sup> In its Exceptions to the Board, Respondent excepted to the ALJ's finding as to both the timeliness question and to the merits of this defense. The Board considered Respondent's Exceptions, and after that consideration, affirmed the ALJ's findings. See *American Medical Response Mid-Atlantic, Inc.*, 369 NLRB No. 125, slip op. at 1, fn. 1 (2020). The Board also found that the last chance agreement itself violated the Act. See *American Medical Response Mid-Atlantic, Inc.*, supra, slip op. at 1, fn. 2. Respondent's Motion fails to present any new facts or arguments on the topic, and therefore presents no valid justification for the Board to grant reconsideration.

Even if the Board were to reconsider the merits of Respondent's argument that the last chance agreement acts as a settlement agreement barring complaint, the result would remain the same. The last chance agreement issued to Grayton was an adverse employment action and not a settlement. First, as the ALJ properly found, and the Board affirmed, Grayton and the Union<sup>5</sup> were given a choice between Grayton's termination or signing the last chance agreement. ALJD 4; *American Medical Response Mid-Atlantic, Inc.*, supra, slip op. at 1, fn 1. Both parties signed the agreement based on the understanding that Grayton could not return to work without signing it. *Id.* Grayton and the Union's hands were tied because the Union had no grievance and arbitration procedure, nor a collective-bargaining agreement, in place to contest Respondent's discipline. Respondent's decision to issue Grayton a last chance agreement in lieu of discharge Grayton does not make the last chance agreement a settlement agreement.

---

<sup>4</sup> References to the Administrative Law Judge's Decision will be designated as (ALJD \_\_\_\_), to the counsel for the General Counsel's Exhibits as (GC Ex.\_\_\_\_), and to the transcript as (Tr. Page: Line(s)).

<sup>5</sup> The Union referenced herein is American Federation of State, County and Municipal Employees, District Council 20.

Further, even if this were a settlement agreement, it would be repugnant to the Act. Settlements which authorize discipline in direct response to Section 7 activity cannot be lawful. It is offensive to the very core of the Act to permit such settlements, and the Board cannot turn a blind eye to that conduct. The ALJ and the Board determined the last chance agreement was issued because of Grayton's protected concerted activity, in violation of Section 8(a)(1). The Board's role of protecting Section 7 rights includes assessing settlements. See *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127, 1131 (2014). The last chance agreement in this case violates the Act, regardless of whether Grayton or the Union accepted it because of a Hobson's choice.

B. Respondent unlawfully disciplined and discharged Grayton under the framework set forth in *General Motors LLC*.

Counsel for the General Counsel asserts that the Board should not grant Respondent's Motion, and the underlying decision should not be reconsidered. However, even under the standard set forth in *General Motors LLC*, the result remains the same: Respondent unlawfully disciplined and discharged Grayton in response to her protected concerted activity.

#### 1. Brief Recitation of Facts<sup>6</sup>

On December 6, Grayton approached Respondent's Supervisor Paige Johnson (Johnson) and contested the discipline of her coworker, Briana Hampleton (Hampleton). ALJD 4. Both Grayton and Hampleton had recently been issued suspensions for refusing to refuel an

---

<sup>6</sup> Instead of fully restating the facts herein, counsel for the General Counsel directs the Board to the statement of facts in counsel for the General Counsel's Answering Brief to Respondent's Exceptions.

ambulance as directed by a supervisor, even though the supervisor's direction conflicted with past practice and operational procedures. ALJD 2.

During the December 6 meeting, Hampleton initiated the conversation with Johnson by asking Johnson about her own discipline. Hampleton expressed concern that the supervisor involved in the underlying refueling incident provided a false statement, and noted that she never received discipline in the past. ALJD 3. Grayton assertively began defending Hampleton, by clarifying Hampleton's lack of involvement in the refueling incident, alleging that Hampleton's suspension was unfair, complaining that supervisors were inconsistent in their application of rules, and directly asking Johnson to rescind Hampleton's unfair discipline. ALJD 4. Both Grayton and Johnson raised their voices or yelled during the exchange. Ibid.

After the December 6 meeting, Johnson wrote an email to Respondent's Human Resource Generalist Sonsaray Byers (Byers) in which she outlined the December 6 meeting. GC Ex. 5. Importantly, she wrote,

I would like to make sure these accounts are documented and provided to you in timely fashion to be addressed as this is not the first time a provider has yelled or been combative or argumentative with me with no recourse!

GC Ex. 5, ALJD 3-4.

Upon receiving Johnson's statement, Byers placed Grayton on administrative leave the following day, December 7. ALJD 4. Then, Respondent, by Byers, "gave Grayton and the Union a choice between agreeing to a last chance agreement or termination." Ibid. As the last chance agreement was the only way for Grayton to return to work, she and the Union signed it on December 15. Ibid.

As a result of the last chance agreement, Respondent retroactively changed Grayton's unpaid administrative leave into an unpaid suspension. GC Ex. 9, ALJD 5. On May 7, 2018, Grayton and Hampleton were equally involved in an incident at work. ALJD 5. Respondent discharged Grayton but only placed Hampleton on a final written warning. Ibid. "Respondent concede[d] that it would not have terminated Mosiah Grayton had she not violated the December 2017 last chance agreement." ALJD 7.

## 2. Analysis

It is well settled that an employer violates Section 8(a)(1) by retaliating against an employee for engaging in protected concerted activity. *MCPC, Inc.*, 367 NLRB No. 137, slip op. at 1 (May 23, 2019); *Meyers I*, 268 NLRB 493, 479 (1984). In *General Motors LLC*, the Board announced that going forward, all adverse employment action cases involving setting-specific standards will be analyzed under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *General Motors LLC*, supra, slip op. at 2. To establish an employer's unlawful motivation requires: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). A discriminatory motive may be inferred from circumstantial evidence, as direct evidence of general animus is not required. *Caesars Atlantic City*, 344 NLRB 984, 997 (2005). Once the General Counsel makes its initial case, the burden then shifts to the employer to prove that it would have taken the same action regardless of the protected concerted activity. *Manno Electric*, 321 NLRB 278, 281 (1996).

The Board already properly determined that the first two prongs of the *Wright Line* analysis are satisfied in this case. The Board found that Grayton engaged in protected concerted

activity on December 6, when she joined her fellow employee in protesting that employee's suspension and complained about Respondent's inconsistent application of its fuel policy.

*American Medical Response Mid-Atlantic, Inc.*, supra, slip op. at 2, fn. 1. Respondent's Motion provides no facts or arguments compelling the reconsideration of this determination; instead, it only registers its post-Board-decision disagreement with the Board's thoroughly considered result.

The third prong of the General Counsel's burden is satisfied because the evidence establishes a causal relationship between Respondent's animus toward Grayton's protected concerted activity on December 6, and her administrative leave, which was later converted to an unpaid suspension and last chance agreement. See *Bemis Co., Inc.*, 370 NLRB No. 7, slip op. at 1 (Aug. 7, 2020) (citing *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019)).

First, Grayton was unmistakably treated disparately as compared to other employees at her worksite. Discriminatory motive will often be inferred when the employer has long tolerated similar conduct. *Cadbury Beverages v. NLRB*, 160 F.3d 24 (D.C. Cir. 1998) (firing employee for changing lunch schedule where written policy against doing so previously never enforced); see also *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 1 (June 13, 2018) (disproportionate punishment compared to other employees is circumstantial evidence of animus); *Materials Processing, Inc.*, 324 NLRB 719 (1997) (employer's exaggeration of an offense and issuance of a harsh penalty is evidence of pretext). The unrefuted evidence established that Respondent's workplace condoned an environment of frequent loud, vulgar conversation from both employees and supervisors. (Tr. 66:12-13; 69: 8-18, 19-25; 70: 1-10). Remarkably, in this permissive environment, Grayton was harshly issued a last chance agreement allegedly for engaging in rude, disrespectful, and discourteous behavior toward Johnson. (Tr. 32: 7-10; 33: 13-16). Notably,

Johnson's own written account of Grayton's allegedly discipline-worthy behavior, as cited by the ALJ, only accuses Grayton of using a high-pitched tone, or yelling, and cutting Johnson off in conversation. ALJD 3, GC Ex. 5. As the ALJ found, Johnson also raised her voice, or yelled, during the conversation.<sup>7</sup> ALJD 4.

Unrebutted documentary evidence from Respondent's own supervisor shows that other employees engaged in arguably worse conduct than Grayton, but were not subject to *any* adverse employment actions.<sup>8</sup> Johnson's report states, "[t]his is not the first time a provider has yelled or been combative or argumentative with me with no recourse!" See ALJD 4, GC Ex. 5.

Respondent's disparate and overly harsh treatment of Grayton shows the pretextual nature of its claim that she was disciplined for her behavior during the meeting with Johnson, and displays Respondent's animus toward Grayton's protected concerted activity during the December 6 meeting.<sup>9</sup>

Additionally, the timing of Grayton's administrative leave, one day after the December 6 meeting where she engaged in protected concerted activity, coupled with the disparate treatment, supports that she was disciplined based on Respondent's animus toward her activity.

---

<sup>7</sup> Respondent failed to call Johnson as a witness at the hearing in this case.

<sup>8</sup> Respondent's argument that Byers was not given an opportunity to explain the other instances where employees went undisciplined after engaging in inappropriate behavior toward Johnson is completely without merit. Respondent's counsel had a full opportunity to question Byers, a witness Respondent called and questioned extensively on other matters, on this topic.

<sup>9</sup> While Hampleton and Grayton acted in concert to protest Hampleton's discipline, Grayton was clearly the driving force in advocating on behalf of her coworker. Hampleton merely asked questions surrounding her own discipline. Grayton specifically called for Respondent to rescind Hampleton's discipline, defended Hampleton's actions, and pointed to Respondent's unfair disparate treatment. Accordingly, contrary to Respondent's contentions, Grayton and Hampleton cannot be used as direct comparators as to discipline springing from the December 6 meeting.

Respondent's argument that the last chance agreement is somehow evidence of a lawful motive is flawed. The last chance agreement was an adverse employment action, set to ensure that Grayton did not engage in protected concerted activity again and to send a message that such conduct would not be tolerated. Further, it is clear that during the meeting, Johnson was agitated that Grayton was confronting her with protected concerted complaints, as evidenced by the fact that she raised her voice at Grayton during the meeting. Respondent's disparate treatment of Grayton, pretextual excuses for disciplining her, and open hostility toward her actions, establish the third prong of the General Counsel's burden under *Wright Line*.

As the General Counsel established its prima facie case under *Wright Line*, the burden shifts to Respondent to establish that it would have taken the same action against Grayton regardless of her protected conduct. Respondent failed to meet its burden. Importantly, as discussed above, unrebutted evidence from Respondent's own supervisor shows that other employees yelled, were argumentative, and even combative toward Johnson without facing discipline.<sup>10</sup> Respondent did not present any evidence to establish that it issued last chance agreements and suspensions because an employee argued with a supervisor. See e.g. *Carpenters Health & Welfare Fund*, 327 NLRB 262 (1998) (finding disparate treatment where employer offered no evidence that it had ever discharged others for violating telephone policy); *Consec Security*, 325 NLRB 453 (1998) (finding disparate treatment where employer failed to demonstrate it had ever discharged an employee for reason provided). Respondent merely identified several individuals whom it disciplined for nebulous inappropriate conduct against coworkers, customers, patients, or on the monitored radio line.

---

<sup>10</sup> Again, Respondent failed to call Johnson as a witness at the hearing in this case.

Additionally, even if Respondent maintains civility policies, it did not establish enforcement. Accordingly, Respondent failed to meet its burden to establish that it would have similarly disciplined Grayton for her conduct on December 6 absent her protected concerted activity. As such, even under a *Wright Line* analysis, Respondent violated the Act by placing Grayton on unpaid administrative leave on December 7, issuing her a last-chance agreement on December 15, and converting her unpaid administrative leave to an unpaid suspension on December 15.

As Grayton's last chance agreement is unlawful under Section 8(a)(1), her subsequent discharge on May 22, 2018, was also unlawful as it relied upon the last chance agreement. The Board properly affirmed the ALJ's determination to this effect. It is well settled that an adverse employment action is unlawful where it is built upon a previous unlawful action. *Southern Bakeries, LLC*, 366 NLRB No. 78 slip Op. at 2 (May 1, 2018) enf. denied *Southern Bakeries, LLC v. NLRB*, 2019 WL 4280367 (8th Cir. Sept. 11, 2019); *Celotex Corp.*, 259 NLRB 1186, 1186 fn. 2 (1982). Respondent conceded, and the ALJ and Board properly found, that Respondent would not have terminated Grayton had she not violated the 2017 last chance agreement. (ALJD 7 at 7-8).<sup>11</sup> Accordingly, Grayton's discharge violated Section 8(a)(1) of the Act.<sup>12</sup>

---

<sup>11</sup> Respondent did not except to this finding.

<sup>12</sup> Respondent does not appear to argue that Grayton's discharge should be analyzed under *Wright Line*. Such an argument would fail, particularly because Hampleton is an exact comparator to Grayton as to the May 7, 2018 incident. Both Grayton and Hampleton engaged in the exact same conduct that day, but Respondent treated them disparately. Respondent discharged Grayton, and merely gave Hampleton a final written warning. Respondent admitted that it relied on Grayton's last chance agreement to discharge her. Additionally, other than the unlawful last chance agreement, Respondent did not provide any lawful reason as to why it would have treated the two coworkers differently.

III. Conclusion

Accordingly, for the reasons stated above, counsel for the General Counsel respectfully requests that the Board deny Respondent's Motion for Reconsideration.

Dated at Washington, DC, on September 10, 2020, and respectfully submitted by:

/s/ Christy E. Bergstresser

Christy E. Bergstresser  
Counsel for the General Counsel  
National Labor Relations Board, Region Five  
Washington Resident Office  
1015 Half Street, S.E.  
Suite 6020  
Washington, D.C. 20570  
Telephone: (202) 273-1041  
Fax: (202) 208-3013  
[christy.bergstresser@nrb.gov](mailto:christy.bergstresser@nrb.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that, on September 10, 2020, copies of the Counsel for the General Counsel's Opposition to Respondent's Motion for Reconsideration were electronically served on the following individuals by e-mail:

Bryan Carmody, Attorney at Law  
134 Evergreen Lane  
Glastonbury, CT 06033  
[bcarmody@carmodyandcarmody.com](mailto:bcarmody@carmodyandcarmody.com)

Mosiah O. Grayton  
445 Newcomb St, SE  
Washington, DC 20032  
[mgrayton90@gmail.com](mailto:mgrayton90@gmail.com)

**/s/ Christy E. Bergstresser**  
Christy E. Bergstresser  
Counsel for the General Counsel  
National Labor Relations Board, Region Five  
Washington Resident Office  
1015 Half Street, S.E.  
Suite 6020  
Washington, D.C. 20570  
Telephone: (202) 273-1041  
Fax: (202) 208-3013  
[christy.bergstresser@nlrb.gov](mailto:christy.bergstresser@nlrb.gov)