

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

**CASTRO VALLEY ANIMAL HOSPITAL, INC.**

**and**

**CHRISTINA ARIANNA PADILLA, an Individual**

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

**and**

**AKILAH WILLIAMS, an Individual**

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

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## I. INTRODUCTION

On July 27, 2020, Administrative Law Judge Amita B. Tracy, hereinafter the Judge, issued her decision (Decision) in the above-captioned case. In her Decision, the Judge correctly concluded that Castro Valley Animal Hospital, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act (Act) when it threatened to terminate Charging Party Christina Padilla (Padilla), falsely reported Padilla to the police on two occasions, and terminated Padilla and Charging Party Akilah Williams (Williams) in retaliation for their protected concerted activities.

On August 24, 2020, Respondent filed exceptions to the Judge's Decision, a request for oral argument, and a brief in support thereof (Exceptions). Pursuant to the Board's Rules and Regulations, Series 8, as amended, Section 102.46, Counsel for the General Counsel hereby files the following Answering Brief in response to Respondent's Exceptions and urges herein that the Board dismiss Respondent's Exceptions and affirm the Judge's Decision in its entirety.

## II. THE JUDGE'S FINDINGS<sup>1</sup>

### A. THE JUDGE MADE APPROPRIATE FINDINGS OF FACT<sup>2</sup>

In support of her correct conclusion that Respondent violated the Act, the Judge made appropriate factual findings and credibility determinations, the vast majority of which Respondent did not file exceptions to. The Judge rightly discredited Dr. Gurbinder Brar (Brar), the only manager or supervisor to testify on behalf of Respondent, whom she described as having a complete lack of credibility. (ALJD 10:28-29; 17:15-18:3). As detailed throughout her Decision, Brar's testimony was contradictory, incredible, and repeatedly disproved by documentary evidence and credible employee testimony. To the extent that Respondent's Exceptions rely on this discredited testimony, they are wholly without merit and should be rejected. It is the Board's established policy not to

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<sup>1</sup> References to the Judge's Decision are cited as (ALJD) followed by the page and line number; citations to the official transcript are (Tr.) followed by the page and line number, and the exhibits are referenced as General Counsel (GC), and Respondent (Resp.) followed by the exhibit number.

<sup>2</sup> Unless otherwise noted, all dates used herein refer to the year 2019.

overrule an administrative law judge's credibility resolution unless the clear preponderance of all relevant evidence dictates that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). Indeed, an administrative law judge's credibility determination enjoys almost "overwhelming deference," absent an egregious error on the part of the administrative law judge. *Sasol N. Am. Inc. v. N.L.R.B.*, 275 F.3d 1106, 1112 (D.C. Cir. 2002). *See also, Circus Circus Casinos, Inc. v. NLRB*, 954 F.3d. 279, (2020); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003)(an ALJ's "decisions regarding witness credibility and demeanor 'are entitled to great deference, as long as relevant factors are considered and the resolutions are explained.>"). Here, the Judge's credibility determinations are well-reasoned and supported by her observations of the witnesses' demeanor and the overall evidentiary record. As such, there is no basis to overturn them and Respondent did not take exception to them.

**1. Respondent's Operation.**

Respondent operates a veterinary clinic and animal hospital in Castro Valley, California, staffed by three veterinarians and between 5 to 7 employees performing veterinary technician and receptionist duties. Brar, the owner and primary veterinarian, oversees the operation and supervises the employees. Brar's wife, Navapereet "Nitu" Brar (Nitu), works at the hospital as a veterinarian. (ALJD 3:14-17; Tr. 19:10-17; 17:16-19; 231:1-15). Charging Party Padilla worked at the hospital as a receptionist/veterinary technician from May 2018 until her termination on October 21, working a varied schedule at \$14 per hour. (ALJD 4:14-17; Tr. 17:25-18:5). Charging Party Williams worked at the hospital as a receptionist from September 10 through her termination on October 18,

working part-time on the closing shift until midnight at \$13 per hour.<sup>3</sup> (ALJD 4:14-17; Tr. 147:12-49:15; GC 13 at p.3 and 14).

Respondent does not have job descriptions or personnel files documenting employees' job titles or duties and does not train employees regarding their job duties.<sup>4</sup> (Tr. 360:17-19). Instead, employees are trained on-the-job by their co-workers. According to the employees, receptionists perform various duties including answering phones, scheduling appointments, making estimates for customers, taking payments and making change, and some duties with the animals such as taking weights, taking animals to exam or treatment rooms, and administering vaccines. The veterinary technician duties include assisting in blood draws, x-rays, surgeries, or other procedures, like euthanasia administration. Receptionists are not required to perform technician duties and can do so within their comfort level. (ALJD 3:17-30; Tr. 19:4-9; 204:24-206:9; 295:12-296:6; 319:2-320:1).<sup>5</sup>

## **2. Respondent Failed to Provide Employees With Lunch Breaks and Overtime Pay.**

Respondent's employees use an AVImark software program to record their hours each day. (Tr. 68:5-7). Each employee has a unique sign-on and password to access the program. They can

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<sup>3</sup> The other employees working for Respondent include: veterinary technician Luis Cordova, head receptionist Ronnie Swart, and receptionists Veronica Garcia, Maddie Davich, and Celia Prieto. (Tr. 19:20-23:4; 289:23-290:3; 295:12-296:4; 319:2-6).

<sup>4</sup> The Judge properly drew an adverse inference that a written job description did not exist based on Respondent's failure to produce a job description despite such documents being subpoenaed by the General Counsel. (ALJD 3:fn.7). Brar initially claimed there was a written position description, but ultimately admitted that he didn't write one and couldn't produce it. Instead, he claimed that the employees knew better what the job entailed, and they collectively wrote the job description and passed it down to new hires. (Tr. 358:15-361:13).

<sup>5</sup> As with nearly all his testimony, Brar's account of employees' duties and assignments is not credible. (Tr. 358:1-360:16). He claimed that all employees work the same position (receptionist and veterinary assistant) and all employees are required to assist in procedures such as euthanasia administration and surgeries. (Tr. 334:23-336:8). However, his testimony was directly contradicted by his long-term head receptionist Ronnie Swart, Padilla, Williams, and receptionist Celia Prieto. (Tr. 19:4-9; 149:6-18; 295:12-296:4; 319:2-320:1).

only edit their work time in real time using a computer in the hospital, they cannot edit or correct missed entries, and cannot access other employees' accounts. Brar reviews and approves the employees' time records and is the only person able to access or correct time entries. (ALJD 4:1-4; Tr. 23:21-25:10; 157:11-158; 244:20-245:2; 272:10-18). Respondent did not provide employees with a handbook, instructions or guidelines regarding clocking in and out, recording their hours, or taking meal breaks. Brar did not train employees, but instead had current employees train new employees how to do these things. (ALJD 3:27-30; Tr. 23:5-16; 86:20-88:9; 151:21-152:9; 208:19-209:21).

Respondent does not schedule employee meal breaks into the weekly schedule and employees were not given 30-minute uninterrupted meal breaks as required by California law. (ALJD 4:5-10; Tr. 28:5-29:25; 118: GC 2). Padilla and Williams credibly testified that they were unable to take uninterrupted meal breaks and could rarely leave the hospital because they needed to cover the front desk in case a client came in. When Padilla started working for Respondent, Brar and the other employees told her not clock out for lunch and just to eat when things were slow. She trained Williams to do the same. Padilla and Williams both credibly testified that they did not clock out for lunch and never took formal breaks during their workday. Padilla credibly testified that during her year and half of employment she clocked out for lunch less than 5 times when she left the hospital to run personal errands, Williams never clocked out for lunch. Brar reviewed and approved each of their timecards, which did not include clock outs for lunch, and he never told the employees they should clock out for lunch. (ALJD 4:19-5:9, 6:1-8; Tr. 30:8-31:15; 33:8-20; 118:18-128:10; 159:16-160:20).

Respondent does not pay employees overtime, even if employees worked over 8 hours in a day. Padilla regularly worked overtime but was only paid her regular hourly rate. (ALJD 4:8-10; Tr. 25:11-26:9; 88:10-19). Brar asked Williams to work a 12-hour shift, but she declined the shift

when Brar confirmed he would not pay her overtime. (Tr. 163:21-164:11). Cordova, Garcia and Swart worked long hours or extra days, including some regularly scheduled 12-hour shifts, but agreed to work on “salary” and were not paid overtime. (Tr. 19:23-20:10; GC 2). Brar admits that Respondent never pays overtime to any employees, but falsely claims that no hourly employee has ever worked even a minute of overtime; he denies that Padilla ever worked overtime and denies asking Williams to work overtime. (Tr. 349:12-350:4; 369:1-23). While Brar admits that several employees regularly work long hours, including 12-hour shifts, he claims they are exempt from overtime because they work on a “salary.”<sup>6</sup> (ALJD 5:-14, 5:27-6:8; Tr. 349:12-349:16).

### **3. Brar’s Perjured Testimony and Falsified Time Records (FTR).<sup>7</sup>**

As noted above, the Judge rightfully discredited Brar’s testimony and her findings in this regard are fully supported by the record and entitled to great deference. Indeed, Respondent does not take exception to her findings in this regard. At the hearing, Brar falsely claimed that Padilla and Williams took regular meal breaks and clocked out for lunch every day. (Tr. 245:3-5; 249:22-25). To support these false claims, Brar altered their time records to show that they signed out for lunch every day that they worked, and he perjured himself at the hearing in this matter and at a hearing before the Labor Commissioner when he testified that the records were true and correct. (Tr. 271:15; 275: 4-11; GC 7 & 13). The records created by Brar are clearly false. The hours of work recorded in Brar’s FTR do not match the hours that Respondent paid the employees for the same pay period, which are accurately reflected in the paycheck stubs that the employees retained.

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<sup>6</sup> Whether they are truly exempt employees is not at issue in this matter; however, it is dubious for Respondent to claim its clerical, non-supervisory, non-managerial employees are exempt. While Brar claims they are exempt because they “make their own schedules,” Garcia’s and Swart’s hours are fixed on the weekly schedule like the hourly employees. Also, like his request that Williams work 12-hour shifts, Brar asked Padilla to work “salary” for 100 hours a pay period with no overtime, even though she is not a statutory supervisor or managerial employee. (Tr. 26:18-28:4).

<sup>7</sup>The FTR are altered time records showing false clock rings for Padilla and Williams (GC 7 & 13).

Attached hereto as **Exhibit 1** is an analysis of the information included in the FTR (GC 7 & 13), the hours paid to each employee according to their official paystubs (GC 8, 9,13 &14), and the hours recorded in the payroll system by Padilla, as shown in the photographs that she took of her own timecards (GC8). The analysis of the documents show conclusively that Williams and Padilla were not paid for the work hours recorded in Brar's FTR. Indeed, of all the paycheck stubs that the employees retained, on only two occasions does the amount of time recorded in the FTR match Padilla's paycheck stubs and photographs of her timecards. None of the hours reported on the FTR for Williams match the hours she was actually paid according to her paycheck stubs. In contrast, the time recorded by Padilla (and captured in her photographs of her time entries) match exactly the hours reported on her paycheck stubs and that she was paid for. This conclusive evidence establishes that Brar lied during his testimony and fabricated the FTR after the fact to hide his failure to provide employees with lunch breaks. In addition, the time records show clearly that Padilla worked overtime for which she was admittedly not paid. The FTR are further contradicted by Padilla's and Williams' credible testimony that they did not clock out for lunch, which is corroborated by Padilla's photographs of her timecards and their paycheck stubs. (Tr. 30:17-22; 118:18-199:6; GC 8).

In order to fit the false "lunch breaks" in the FTR, Brar pushed the employees' start times earlier or end times later each day. This resulted in discrepancies for Williams' and Padilla's start and stop times for the day. The most obvious example is on September 27 when Padilla sent a text to Brar at 8:40 p.m. stating that she forgot to clock her time that day and advising him that she worked 2:00 pm. to 8:00 p.m. (GC 5 at p. 4). Brar edited her timecard and correctly input her hours as 2:00 p.m. to 8:00 p.m. with no lunch break, as reflected in Padilla's photograph of her timecard taken on October 1. (GC 8, p. 6). However, contrary to these documents, Brar's FTR states that Padilla worked 2:00 p.m. to 9:00 p.m. on September 27 and took a 1 hour "lunch break" from 5:00

p.m. to 6:00 p.m. (GC 7, p. 2 entry for 9/27/19). These facts show clearly that the FTR times are false. Padilla would have no reason to text Brar at 8:40 p.m. that day if she were still working. Also, the photograph of her timecard reflects that her hours were accurately reported as 2:00 p.m. to 8:00 p.m. without a lunch break, and her paycheck stub reflects that she was paid for those hours. In addition, the FTR for Williams show that she worked well past midnight on numerous occasions even though the hospital closed at midnight and she credibly testified that she never worked past midnight. (Tr. 189:4-20; GC 13 p.13).

Not only are Brar's FTR easily proven fake by the documentary evidence, his claims that Williams and Padilla clocked out for lunch every day completely fell apart under cross-examination when he admitted that he edited the clock in and out times to reflect lunch periods that the employees "should have" taken whether they actually took them or not. (Tr. 271:24-275:25). Also, Brar's claim that Padilla clocked out for lunch each day, as shown in his FTR, cannot reasonably coexist with his other claim that he had a problem with Padilla eating on work time, while not clocked out for lunch, and her training other employees not to clock out for lunch.<sup>8</sup> (Resp. 1) It is non-sensical that Padilla would be clocking out for lunch each day, but then training others not to do so. It is also non-sensical that Padilla would be eating on paid time, but then clocking out later for an unpaid lunch period. Given his conflicting defenses, Brar ultimately testified that Padilla was eating on paid time and then later clocking out for a second unpaid lunch period each day, and that she was doing this even though he was watching her every day to see if she was clocked in

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<sup>8</sup> As detailed later herein, on the day of her termination, Brar claims he asked Padilla to sign a warning for eating during work time and telling other employees not to clock out for lunch. (Tr. 244:6-21; Resp. 1).

when she was in the breakroom.<sup>9</sup> (Tr. 244:6-251:4; 271:24-272:20). In contrast to Brar's ridiculous testimony, Padilla credibly testified that she was trained not to clock out for lunch, that she ate her lunch on paid time whenever she could fit it in during her work day (often late in the day) while listening for and assisting any clients that came in, and that she trained new employees to do the same. (Tr. 23:5-16; 86:20-88:9).

All of the above corroborates Padilla's and Williams' testimony that they were trained not to clock out for lunch and they did not clock out for lunch, even though Brar's FTR show otherwise.<sup>10</sup> Williams' and Padilla's testimony is also corroborated by Brar's statement in the Staff Note, discussed later herein, that things had been going openly regarding clocking out for lunch and he had not previously minded when employees were on paid time and clocked in while eating in the break room. (GC3). Considering these facts, the Judge properly discredited Brar's testimony and credited Williams' and Padilla's testimony about the lack of breaks and overtime, which was fully supported and consistent with the documentary evidence presented at the hearing; notably, Respondent did not take exception to her findings in this regard. (ALJD 4:fn 10-11; 6:24-34).

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<sup>9</sup> Brar's testimony on this topic is absurd and was properly discredited by the Judge. Brar claimed that he warned Padilla 50 times about eating on paid time, but admits he never actually wrote her up for it. He also testified that he watched her every day to see if she was clocked out while eating in the breakroom (even though he acknowledges employees are allowed to be in the breakroom on work time). He even claimed to have others watching her on days he wasn't there and reporting back if she was eating on paid time; but had no testimony to corroborate this. (Tr. 244:6-247:22; 249:22-251:4; 271:24-272:20). Notwithstanding his testimony about his extreme preoccupation with whether she was clocked out while eating in the breakroom, he later contradicts himself and claims he never had any discussions with Padilla related to her meal breaks. (Tr. 348:11-13). All of his testimony is proven false by Padilla's photographs of her timecards, which show she did not clock out for lunch and which Brar approved.

<sup>10</sup> The FTR also show Padilla and Williams taking one hour lunch breaks and Brar claimed that employees could take 30 minute or one-hour breaks at their discretion, which is completely contradicted by Respondent's employee witnesses who testified that the meal breaks were 30 minutes and they were not supposed to be an hour long. (Tr. 245:3-14; 290:6-12; 304: 3-6; 316:20-317:2; 323:13-24).

**4. In or About Early October, Williams Discussed Respondent's Failure to Provide Lunch Breaks and Pay Overtime With Padilla.**

While Respondent's employees by and large accepted Brar's refusal to provide lunch breaks and pay overtime, shortly after her hire, Williams began to complain to her co-workers about the unlawful policies. Padilla and Williams were high-school friends and Padilla referred Williams to apply for the receptionist position. Within a few weeks of her hire, Williams became concerned about the lack of breaks. She is a smoker and gets anxious in high stress situations, and the inability to leave the hospital or take uninterrupted breaks began to really bother her. (Tr. 166:7-18). Within a few weeks of starting work, in or about early October, Williams raised the issue with Padilla. She asked Padilla why they didn't clock out for lunch and why they didn't get breaks. Padilla told Williams that this was just the way it was because they needed to cover the front. Padilla explained to Williams that she had previously raised the issue with Brar, and he told her that was the way it was and brushed her off. (ALJD 5:25-6:8; Tr. 33:21-35:19; 159:22-162:13).

During the same week as this first conversation with Padilla, Williams was assisting Brar with a procedure and he told Williams that she was doing a good job and, if she kept up the good work, he would give her a raise soon. He then asked Williams if she could work a 12-hour shift (10:00 a.m. to 10:00 p.m.). Williams asked if she would be paid overtime and Brar said no, so Williams declined to take the shift. As the Judge found, Williams credibly testified that this conversation was the only time she discussed a raise with Brar, and he brought up the topic. (ALJD 6:10-33; Tr. 163:4-164:21). After Brar asked her to work a 12-hour day, Williams raised the issue with Padilla and told her it was ridiculous to ask an employee to work 12 hours without overtime and she complained to Padilla that it wasn't fair they didn't get overtime. Padilla agreed that it wasn't fair that they weren't paid overtime. (ALJD 6:37-7:7; Tr. 34:17-35:19; 167:3-19; 225:17-22).

**5. On October 16, Williams Discussed Respondent's Failure to Provide Lunch Breaks and Pay Overtime With Ronnie Swart.**

On October 16, the last day that she worked for Respondent, Williams worked with receptionist Ronnie Swart for the first and only time during her employment; it was the first time they met. The day was stressful and exhausting: one client brought in two pit bulls that had been in a fight and were bleeding profusely, and another dog needed to be euthanized. Swart does not assist in euthanasia procedures and Williams declined Cordova's request that she assist in the euthanasia procedure that day.<sup>11</sup> (Tr. 167:20-169:22; 172:25). By 9:00 p.m., there was a lull in activity and Williams sat down with Swart at the reception desk. (Tr. 169:6-23). Williams was stressed and tired and neither she nor Swart had gotten a break. They began talking about the difficult day and how exhausting it was. During this conversation, which Williams described as a friendly conversation between co-workers, Williams raised the issue of employees not getting breaks with Swart. (Tr. 229:7-16). Specifically, Williams told Swart that she was very irritated because they did all of this work and didn't get breaks. Swart told Williams that she was salaried, so the way she did breaks was different (she admitted during her testimony that she never clocks out for breaks). However, Swart said that, as an hourly employee, Williams should get lunch breaks and she should tell Brar about this. Williams told Swart that she had never been informed about how to take lunch breaks or when to do so. Swart explained that she, Garcia, and Cordova were all salaried so they did their lunches differently, but that Williams should bring the lack of breaks up with Brar. (Tr. 169:22-172:25; 225:25-227:8). Williams also complained to Swart that they were not paid overtime and that they were asked to do duties beyond those of a receptionist position, like putting a dog down

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<sup>11</sup> Williams also declined to assist in the surgical procedures on the two bleeding dogs that came in on October 16 because she did not feel comfortable assisting in those procedures. Neither Cordova nor Brar raised any issue with her choice not to assist and neither claimed that this was part of her duties. (Tr. 173:1-174:19).

or assisting with surgeries. She told Swart that she didn't think it was fair that they want to her to do things like put a dog down or help with open-dog surgeries for \$13 an hour. She said she felt like they needed to pay them more to do these duties that weren't part of the receptionist job. (Tr. 225:17-22; 227:9-229:16). Swart concurred and said that she was not comfortable doing those types of procedures either and as a rule did not do them. She explained to Williams that the most she would do was vaccinations or prescription refills, nothing hands-on. (Tr. 172:14-25; 319:5-320:1). The Judge properly credited Williams' testimony regarding this conversation and rejected Swart's vague denials and selective recollection of this discussion.<sup>12</sup> Respondent did not take exception to her factual and credibility finding in this regard. (ALJD 7:12-8:12).

**6. On October 18, Respondent Terminated Williams in Retaliation for Her Protected Concerted Activities.**

Since Williams only worked Monday through Wednesday, she always received her paycheck directly from Brar on the Wednesday following the end of a pay period, which would have been October 16. However, that evening Brar informed Williams that her check was not available, and she could pick it up on Friday, October 18. (Tr. 174:20-22). Even though she was not scheduled to work, Williams went to the hospital on October 18 to pick up her paycheck. Swart

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<sup>12</sup> The Judge properly and reasonably discredited Swart's blanket denials and inconsistent testimony about her conversation with Williams. Swart first testified that employees "should" clock out for their meal breaks but admitted that she personally did not clock out for lunch and didn't know if other employees did. She initially denied ever speaking to or working with Williams. But under cross-examination, admitted she worked with Williams on October 16. She initially denied it was an overwhelming day, but then waived and claimed she couldn't recall, and ultimately admitted that it could have been. However, she categorically denied having any conversation with Williams, claiming that they didn't talk about anything related to work-*nothing work-related at all*-even though they worked together for nearly an entire shift. Her incredible testimony is contradicted by Williams' credible and detailed testimony about the way the day was going, the context of the conversation, and the fact that they had just met and were getting to know each other. Also, while Swart denied talking to Williams about the euthanasia procedure or additional duties receptionists were being asked to do, she corroborated Williams' testimony that she herself refused to perform hands-on technician duties-like assisting in surgeries or euthanasia procedures. (ALJD 8:4-12; Tr. 316:20-318:5; 319:2-320:20; 322:11-13; 323:25-324:17).

and Garcia were at the front desk and Gurbinder Brar's wife, Nitu, came out to the lobby to speak with Williams. Nitu told Williams that they needed her to return the keys to the hospital, which Williams used to close the hospital after her shifts. Williams said the keys were at her house. Nitu demanded repeatedly that Williams go home and get the keys right away. Williams asked why. Nitu said that Brar had gotten someone to cover her shift Monday through Wednesday and they needed to give the key to that person. Nitu didn't explain why Williams had been taken off the schedule and replaced by this other person but kept insistently demanding the keys. Williams said she didn't have the keys and didn't have the time or money to go get them and bring them back. Nitu offered to pay Williams for her time and transportation costs to go get them and Williams said she would bring them the next day. (ALJD 8:16-23; Tr. 176:3-179:1; 368:14-19).

Williams asked Nitu when she would next be scheduled to work and Nitu said they would let her know on Monday, October 21. Nitu then told Williams that they would compensate her for her lunches and would mail her the check. Nitu initiated the discussion of paying Williams for her lunches. Williams had never met Nitu before this conversation and had never told Nitu or Brar that she was unhappy with Respondent's failure to give lunch breaks; she had only discussed the issue with her co-workers, including Padilla and most recently Swart on October 16. Williams told Nitu that she wanted the check immediately. Nitu said that they would work with the timecard processor to figure out how many lunches they owed her and would mail her a check. Nitu asked Williams how much she thought they owed her. Williams, who was upset and confused about getting pulled off the schedule, did not trust them to send her a check, so she stated that she would not return the keys until she got her check. Nitu agreed that Williams could return on Monday, October 21 at noon to exchange the key for the check. (ALJD 8:23-31; Tr. 179:2-180:6). Nitu also gave Williams her the check for the prior pay period (the reason Williams came to the hospital) but had her sign a form to get the check, which she had never done for prior checks. (Tr. 180:17-182:6).

Respondent did not call Nitu to testify and Williams' testimony regarding this conversation is uncontested. The Judge properly drew an adverse inference from Respondent's failure to call Nitu, and admitted Section 2(11) and 2(13) supervisor and agent of Respondent, finding that her testimony would not have corroborated Brar's testimony as to what occurred when Williams returned to the facility to pick up her paycheck; Respondent did not take exception to the Judge's finding or her taking an adverse inference on this matter.<sup>13</sup>

**7. On October 18, Williams Exchanged Texts With Brar Regarding Her Termination.**

Immediately following her conversation with Nitu, Williams called and told Padilla what happened. Williams was very upset and asked Padilla what this meant, concerned that she had been terminated. Padilla said she shouldn't have been fired and told her to call Brar directly to find out what was going on. (ALJD 9:18-23; Tr. 35:20-3; 98:19-99:14; 182:16-183:5). Williams then called Brar. When he did not answer, she sent him a text. All of Williams' subsequent communications with Respondent were via text message with Brar.

Within about an hour of her conversation with Nitu, Williams texted Brar asking why she was no longer scheduled to work. Brar responded via text that they needed the key back to give to the person that would be closing, and that the hospital staff was trying to fit her in where she might "take needed breaks and lunch times." He said they would contact her with further update on Monday. Williams responded that she would bring the key on Monday, but that sudden changes in

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<sup>13</sup> It is within the judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) Here, Respondent failed to call Nitu, even though Brar admitted she was in town at the time of the hearing and provided no explanation as to why she wasn't called to testify. Instead of calling her, Brar improperly tried to provide hearsay testimony about what was said during the conversation between Nitu and Williams, which the Judge properly rejected. (Tr. 262:22-263:2; 266:13-267:1; 368:4-25).

her schedule should've been communicated to her at the end of the shift. She noted that there were multiple occasions where they could've discussed changes or even discussed lunch hours within her shift. She complained that waiting until her day off and having Nitu do it in front of Swart was extremely unprofessional. The next day, October 19, Williams texted Brar reminding him that she would be exchanging the key for her check and was expecting a check for her unpaid lunches. Brar responded that they would, as a courtesy, be giving her check to compensate her for "anything you said about unpaid lunch." He stated that she had been seen eating food clocked in at the front desk in front of cameras, but that she would get some extra check for lunch times she did not clock out. Williams responded that she ate her lunch at the front desk because they didn't schedule breaks and lunches and she was required to work the front desk, so she had no choice but to eat and work. Brar asked her how many lunches she wanted to be paid and he would tell the CPA to put it in a check. Williams complained that she had been working hard and covering for employees who were out sick and that other employees ate at the front desk as well. Brar responded: "How many lunches you want to be paid????? Do not talk about others. All others are very happy with policy and procedures. It's you who wants lunches paid. Which I am asking now. How many you want to be paid? Tell me exactly the number of lunches." Williams responded that she was defending herself because others eat lunch in the front as well and that 12 lunches was what she had in her file. Brar responded: "Okay, we will have those included in your check. It will be ready Monday. Thanks a lot for your great help. All the best." (ALJD 9:21-10:8; Tr. 184:15-186:1; GC 12).

Despite telling Williams that she would be told her schedule on Monday, neither Brar, Nitu, nor any other representative of Respondent called Williams on Monday about a revised schedule or her return to work, and she never heard from Respondent again. On October 21, Williams went to the hospital to return the key and pick up the check for missed lunch breaks. Veronica Garcia and Padilla were the only employees there. Williams gave Garcia the key and Garcia gave her a

final paycheck that included her last day of work on October 16 (even though the pay period was not over), pay for 12 half hour lunches (at the minimum wage of \$12 per hour instead of her hourly rate of \$13) and \$10 for travel, which Nitu had agreed to pay her on October 18. (ALJD 10:10-16; Tr. 186:2-187:2; GC 13 at p. 7).

**8. On October 18, Padilla Complained to Her Co-workers About Williams' Termination and Respondent's Failure to Provide Lunch Breaks and Pay Overtime.**

Padilla reported to work on October 18, shortly after receiving the call from Williams about being removed from the schedule. Ronnie Swart and Luis Cordova were at the hospital when she arrived. Shortly after arriving, Padilla asked Swart what had happened with Williams and that Williams said she was being terminated. Swart said she wasn't sure what happened. Padilla told Swart that Williams said that it was regarding her lunches and Brar was upset that she'd been complaining about lunches. Padilla was upset and said that Williams was her friend. Padilla told Swart that it was not fair that they all work overtime and don't get lunches. She told Swart that Brar should have just had a conversation with Williams instead of firing her, the same way he had a conversation with Padilla when she had raised the issue with him. Swart said she didn't know what happened with Williams, but that she didn't think it was fair either. (ALJD 12:1-9; Tr. 36:4-38:12).

Later that day, Padilla asked Cordova if he knew anything about what happened with Williams. He told Padilla that Swart told Brar that Williams was complaining about the lack of lunch breaks and overtime. Padilla told him that she didn't think it was fair and they should just have a conversation with her. She said that they all do way more than what should be expected of a receptionist. Cordova told her that Williams had only been working for three weeks and she shouldn't be complaining to all of her coworkers when everything has been fine so far. (ALJD 12:11-18; Tr. 38:11-41:8).

**9. On October 21, Padilla Refused to Sign the “Staff Note” Acknowledging Breaks She Never Received and Complained to Her Co-worker Veronica Garcia about Respondent’s Failure to Provide Lunch Breaks.**

Shortly after Padilla reported to work on October 21, receptionist Veronica Garcia handed her a form that began with the words “Staff Note” (Staff Note), which states:

Staff Note

Every time you want somethings, it’s food/snack/lunch break, you are required to clock ut. So far it was going openly. As I did not mind, even any of the team memebers are actually on paid time and clockedmin but, sitting in break room enjnyng their meal. YOU ARE REQUIRD TO CLOCK OUT AT LEAST ONCE BEFORE REACHING 5 HOURS ON YIUR CLOCK WINDOW.

HERE BY, I ACKNOWLEDGE THAT SO FAR I HAVE BEEN ALWAYS GIVEN ENOUGH TIME FOR MEALS DAILY. (GC 3; errors and emphasis appear in the original)

The document contained signature lines for all of the remaining employees; tellingly, it did not have a line for Williams’ signature. Garcia told Padilla that Brar wanted her to sign it and she thought it had to do with what happened with Williams. Padilla read it and saw that Cordova and Garcia had already signed it. She told Garcia that she would not sign it, that she didn’t think it was fair, and that Williams was her friend. She told Garcia that they hadn’t been given enough time for meals, so she wasn’t going to sign it. Garcia laughed and said she would just leave it on Brar’s desk. (Tr. 41:15-43:18). Later that shift, Padilla discussed the Staff Note with Cordova, who confirmed to Padilla that he’d signed the Staff Note. Cordova told Padilla just to sign it and warned her: “You don’t want to cause problems. You see what happened to Akilah.” (Tr. 102:12-21).

**10. On October 21, Respondent Threatened to Terminate Padilla if She Did Not Sign the Staff Note and Terminated Her for Refusing to Abandon Her Protected Concerted Activities.**

Brar arrived to work at approximately 6:00 p.m. on October 21. At approximately 6:30 p.m., he called Padilla into his office, handed her the Staff Note and told her she needed to sign it. Padilla said that she didn’t feel comfortable signing it and that she also wanted to bring up the subject of

their lunches and overtime. Brar asked why she didn't want to sign it. She said because she didn't understand it, it was saying they were being asked to clock out for lunches, but how could she do that if she was the only one at reception. He said she could clock back in to help if someone came in, and then clock back out later to finish her food. He told her that he needed to cover himself. Padilla said he wasn't covering himself, and that he was supposed to give them 30 consecutive minutes of break. She said it would not be consecutive if she were clocking in and out to help people that came in. He said he didn't want to argue about it and he just needed her signature. When she responded that she would not sign it, he said: unfortunately, we will have to say good-bye then. She asked if he was firing her. He said yes, that if she didn't want to sign it then he would need her key and she would need to leave. She asked again: so, you are firing me, and he said yes. Padilla said that she would need access to her payroll records to prove her overtime and lunches. He said that they would just have to go to court to deal with that. Padilla returned her key and left the facility at approximately 7:00 p.m. She was never given a termination letter and received her final paycheck later by mail. (ALJD 13:18-14:4; Tr. 45:9-48:10; 52:25-53:6).

**11. On October 22, Padilla Took Photographs of Her Timecard and the Staff Note.**

Padilla returned to the hospital on the morning of October 22 to pick up her jacket and phone charger. Garcia was working by herself and Padilla told her she had been fired and was coming for her things. While there, Padilla signed on to the computer and took a picture of her last timecard. (GC 8 at p. 10). She got her jacket and went into Brar's office looking for the Staff Note she had been asked to sign. She found it on Brar's desk along with another version of the document, which had fewer errors, but no signature lines. (GC 4). Padilla took photographs of both documents with her cell phone and left the originals on Brar's desk. (GC 3-4; GC 19). Padilla provided screenshots of the photos she took that morning, which confirm that she took the photographs of GC 3 and GC 4 on October 22 at 8:50 and 8:51 a.m., respectively. (Tr. 386:17-387:11; GC 19). The

Staff Note now had the signatures of Garcia, Cordova and receptionist Celia Prieto.<sup>14</sup> (ALJD 14:6-15; Tr. 50:16-53:15).

**12. On October 22, Respondent Falsely Reported Padilla to the Police Because She Refused to Abandon Her Protected Concerted Activities and to Prevent Her From Pursuing Her Payroll Records.**

After leaving the hospital on October 22, Garcia went to Respondent's CPA firm to get her payroll records. The CPA's office refused to give them to her and admitted to Padilla that Brar had instructed them not to release the documents to her. Padilla then went to file claims against Respondent with the Board and the Labor Commissioner. (ALJD 14:16-19; Tr. 53:15-58:22).

Around 11:30 a.m., Padilla received a call from a deputy with the Alameda County Sheriff's Department. The officer advised her that Brar was claiming that the previous night she had stolen \$200, and he claimed he caught her stealing it and then she put it back. Padilla denied that she had stolen anything and was very concerned. The officer told her not to worry, that they weren't taking it that seriously, and that Brar's description of what happened was all over the place. He told her not to go to the hospital again. She said she needed to serve him with papers from the

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<sup>14</sup> The Judge properly concluded that the Staff Note was genuine and signed by other employees based on a wealth of record evidence supporting the authenticity of the Staff Note, including contemporaneous photographs of the note taken by Padilla, the credibility of witnesses who testified about the document, and a comparison of authenticated exemplar signatures for the employees who signed it. Respondent did not take exception to the Judge's finding regarding the authenticity of the Staff Note or the signatures on it. Indeed, the Board's judges are deemed competent to reach conclusions about the authenticity of a signature based on a visual comparison of disputed signatures and undisputed exemplar signatures. *Traction Wholesale Center Co.*, 328 NLRB 1058, 1059-1060 (1999). Here, Padilla recognized Cordova's and Garcia's signatures, noting it was common for Brar to ask them to sign documents like this. (Tr. 43:19-45:6) The signatures also match exemplars of employees' signatures subpoenaed from Respondent. Garcia's signature matches her signature on GC 11 and GC 16 at p. 3, which Brar testified he saw her sign; Respondent could not produce her W-4. Cordova's signature matches the signature on his W-4 (GC 18) and his signature on GC 16 at page 4, which Brar testified he saw Cordova sign. While Prieto testified that she did not sign the document, her signature matches the one on her W-4, which she admitted was her signature. (Tr. 45:7-8; 259:21-260:3; 291:4-18; 300:23-301:2; GC 17).

Labor Board and needed to get her final paycheck. The officer told her not to go to the Hospital to do that. (ALJD 14:21-15:2; Tr. 58:14-59:17; 111:12-112:22; 117:11-118:3).

The police report shows that Brar called the Alameda County Sherriff's office on October 22 at 11:12 a.m. and reported Padilla for petty theft, stating that she took \$200 yesterday (October 21) at approximately 7:00 p.m. and was terminated. The notes of the Event Register for the call state: RP (reporting party), Gurbinder Brar, called to report that he suspected terminated employee (10/21/19) Christina Padilla of stealing \$200 cash. RP was unable to prove Padilla had stolen money, but said he caught her attempting to steal cash on 10/21/19, which was cause for termination. After totaling daily transactions, cash was \$200 short and he suspected Padilla. The report notes: no report requested for PC 484 (California Penal Code Section 484 is the California law related to theft), just wanted Padilla contacted and advised to not return to business. The report notes that Padilla was contacted on her cell phone with "advise" given. (GC 6 page 2).

Padilla credibly testified that, prior to receiving the call from the sheriff's deputy, Brar had never accused her of stealing, and she did not steal or attempt to steal any money from Respondent. Immediately after the deputy's call, at 11:35 a.m., Padilla sent Brar the following text: "You know damn well that no cash was stolen. A friend of mine will be by later today to drop off your charge from the labor board. I'm very disappointed in the behavior you're taking, to go so far as lying about cash. I have never been a thief and was always a good employee. It's unfortunate that we will have to be going through court. (GC 5, pg. 5). Brar did not respond to her text nor dispute her assertion that he was lying about her stealing. Padilla testified that she believed that he was reporting her to the police to deter her from pursuing her payroll records and claims against him. The Judge correctly concluded that Brar fabricated the theft claim and falsely reported Padilla to the police, and Respondent did not take exception to her finding. (ALJD 15:4-10, Tr. 17:15-18:3; 59:18-62:25; 116:6-117:10).

**13. On November 7, Respondent Falsely Reported Padilla to the Police Because She Refused to Abandon Her Protected Concerted Activities and to Prevent Her From Pursuing Her Payroll Records.**

Padilla continued to pursue her claims of missed lunch breaks and unpaid overtime with the Labor Commissioner and through her Board charge. On November 7, Padilla texted Brar reiterating her prior requests for her payroll records and noting she had asked for them on the day of her termination and it had been a few weeks. Brar responded: "Do not contact me directly. Your case is reported to authorities already. You have received all the details about your pay, hours etc, with every paycheck. In future contact my attorney. Any direct contact/communication to me will be taken as threatening message and we are reporting to the police immediately. I will not respond anymore." Padilla then asked for contact information for his attorney and noted his attorney would advise him that there are penalty fees for not releasing her payroll information. She stated: "Dr you may be used to dealing with people who don't understand the law such as yourself. I happen to know there is no impending case against me as the authorities would have informed me. I have made no threats, just requests for MY personal payroll information. Your failure to cooperate in sending my information is highly incriminating on your part." Brar responded: "It's your small brain, which makes you make judgements on others if they understand something or not. How dare you went to CPA, Have you hired him? Do you understand how these guys work? Do whatever you want. Do what ever you can. I am and will continue responding within my legal rights. Yes, there is police report made on same day of incident. It's number has been provided to the labor court as well. Go and find my attorney your self. Otherwise, we will just respond to court letters. Absolutely no obligation to follow your instructions. Yes, I understand your frauds 101% from day one. What a person, who gets fired then apologized for same job then try to do scams. I can deal with it. Now I will be blocking your number." (ALJD 15:12-22; Tr. 63:2-23; GC 5, pages 6-8; errors appear in the original).

Based solely on this text exchange, Brar once again falsely reported Padilla to the police. The Police report reflects that on November 7 at 7:50 p.m., Brar called the Alameda County Sheriff's office and reported that Padilla was harassing him and sending him threatening messages. (GC 6, p. 3). Later that evening, between 10:00 and 11:00 p.m., Padilla received a call from the Alameda Sheriff's Department and an officer told her that Brar was claiming that she was calling and sending threatening messages to him and his family. Padilla said that she never called him and would provide them with her text messages showing that she never threatened him or his family. The officer again told her that they were not taking the report seriously and that she should not contact him again and she agreed. (ALJD 15:24-29; Tr. 64:1-25). The police have not pursued any charges against Padilla as a result of Brar's frivolous reports. (Tr. 140). Respondent did not except to the Judge's finding that Brar falsely reported Padilla to the police on November 7.

**B. THE JUDGE CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED THE ACT**

The Judge correctly found that Respondent violated Section 8(a)(1) of the Act when Brar threatened to terminate Padilla, falsely reported Padilla to the police twice, and terminated Padilla and Williams in retaliation for their protected concerted activities. Based on her reasoned credibility determinations and the record evidence as a whole, the Judge rightly rejected Respondent's fabricated claims that Padilla was terminated for theft and its "alternative" argument that Williams either voluntarily quit or was terminated for failing to perform her job duties.<sup>15</sup> These defenses were not supported by any credible or coherent record testimony, were wholly disproved by documentary evidence, and were convincingly dismissed by the Judge. In Exceptions 12 and 13, Respondent took exception to the Judge's ultimate conclusions that the Employer violated the Act.

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<sup>15</sup> In its eighth affirmative defense, Respondent asserts that Williams' voluntarily quit her employment. In its ninth affirmative defense, Respondent asserts that, if she was terminated, it was for legitimate, non-discriminatory and non-retaliatory reasons and because she refused to perform her required job duties. (GC 1(j)).

However, as noted throughout, Respondent failed to take exception to the Judge's factual findings upon which her conclusions are soundly based.

**1. The Judge Applied the Correct Legal Framework.**

The Judge applied the proper legal framework for establishing unlawful discrimination under Section 8(a)(1) as set forth in *Wright Line* and its progeny. *Wright Line*, 251 NLRB 1083 (1980). She correctly found that the General Counsel met its burden to demonstrate by a preponderance of the evidence that the employees were engaged in protected activity, that Respondent had knowledge of that activity, and that Respondent's hostility to that activity was a substantial or motivating factor in its decision to take adverse action against them. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007). She also correctly found that Respondent failed to meet its burden to establish, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. While Respondent takes exception to the Judge's findings and conclusions, Respondent does not claim that the Judge failed to apply the correct legal framework to her analysis.

**2. The Judge Made Appropriate and Reasoned Credibility Determinations.**

The Judge made appropriate credibility determinations in reaching her conclusion that Respondent violated the Act and Respondent did not file exceptions to her findings in that regard. As detailed throughout her Decision, the Judge's credibility determinations were based on many factors including witnesses' demeanor and apparent truthfulness or lack of candor, an assessment of corroboration for and consistency of witnesses' testimony with their prior testimony, documentary evidence, and other witnesses' testimony. She noted that Williams and Padilla provided credible first-hand accounts regarding the events at issue in this matter. When testifying about conversations, they described when the conversations occurred, where they occurred, who

else was present, and the context of how the conversations began and ended. Their testimony is corroborated by documentary evidence and Respondent's own admissions. In contrast, Respondent's witnesses primarily provided generic denials that conversations took place, many times in response to leading questions from Respondent's attorney. Their accounts of what did occur were vague and often non-sensical, not supported by corroborating evidence, contradicted one another, and were easily disproved by documentary evidence. (ALJD 4: fn.10-11; 17:15-18:3).

As noted by the Judge, Brar's testimony is not even slightly credible and he has proven himself willing to lie, to withhold documents, and to falsify documents in order to avoid culpability for his unlawful conduct. His testimony is clearly disproven by documentary evidence and his own words, and he was impeached repeatedly with his prior testimony, his texts, and documents that he drafted. (ALJD 2:fn.3, 14:fn 30, 17:15-18:3; Tr. 241:3-244:5; 253:7-254:20; 261:6-15; 266:4-25). Indeed, on the second day of trial he contradicted his own testimony from the first day of trial and admitted that his testimony on the first day may have been false, and he was just guessing about facts to which he had testified. (Tr. 236:19-237:2; 239:15-22; 378:2-379:25). Brar's direct testimony consisted primarily of self-serving denials in response to leading questions, and his counsel was warned several times about his leading questions and how such questions affect the credibility of his witnesses, but the leading questions continued. (Tr. 345:5-24, 347:9-348:8; 355:20-24; 357:15-20). In stark contrast, Brar's rambling responses to the General Counsel's questions were incredibly evasive and he rarely answered a question directly, even beginning his answers repeatedly with the statement: my answer will be long. (See Tr. 246:12-19; 248:14-22; 270:10-271:4; 276:17-277:22; 369:1-23; 374:2-377:22; 380-381; 383:9-24). His rambling accounts of events lacked coherency, were internally contradictory, and were rightly discredited by the Judge. Brar also withheld documents that might incriminate him, leading the Judge to appropriately draw an adverse inference related to Respondent's failure to produce relevant documents, which

Respondent did not take exception to. (ALJD 3; fn. 7, 16; fn. 38).<sup>16</sup> Indeed, the record reflects that Brar took drastic measures to prevent Padilla from getting her payroll records. There can be little doubt this was because the records proved he did not provide employees with lunch breaks or overtime pay, and he needed time to alter the documents. Brar, who prepared Respondent's documents in response to the General Counsel's trial subpoena, also withheld documents requested by the subpoena, including personnel files, documents signed by employees, documents showing Padilla's alleged theft (including the log book that he provided a photograph of, but not a copy for review), and any evidence of disparate treatment. He claimed incredibly that he did not have any employee records or files – not even W-4s for some employees. (Tr. 258:4-260:10; 358:17-362:11; 363:25-365:17; 373:11-377:19).

For the most part, Respondent's employee witnesses, Ronnie Swart, Celia Prieto and Maddy Davich, provided vague and inconsequential testimony. (Tr. 289:10-301:2; 303:9-313:6; 314:15-326:17). Swart's generic and formulaic denials about having conversations with Williams and Padilla about lunches and overtime are not credible and were properly rejected by the Judge. (ALJD 4:fn.11; 7:44-8:12). Swart worked with Padilla regularly for nearly a year and a half and it strains credulity to believe that they never once discussed lunches, breaks, or overtime. Swart's claim that she and Williams worked nearly an entire shift together on October 16 and never once spoke about *anything* work related is similarly unrealistic and unbelievable, particularly when this was the first time they met and worked together. In contrast, as found by the Judge, Williams' testimony about decompressing and taking over what happened during the shift with Swart was

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<sup>16</sup> See *Forsyth Electric Co.*, 332 NLRB 801, 818 (2000); *Galesburg Construction*, 267 NLRB 551, 552 (1983) (adverse inference drawn when employer failed to produce pay records); *Cooke's Crating*, 289 NLRB 1100, fn. 8 (1988) (adverse inference drawn from failure to produce production records to support a defense regarding lack of work); *Teddi of California*, 338 NLRB 1032 (2003) (adverse inference drawn from employer's failure to furnish list of employees supposedly slated for layoff).

reasonable, believable, and corroborated by the fact that details of their discussion were later provided to Brar. If the conversation had not occurred as Swart claimed, Brar and Nitu would have no knowledge of Williams' complaints unless Padilla informed them, which she testified convincingly that she did not. Tellingly, to the extent that Respondent's employee witnesses may have actually witnessed pertinent events, Respondent's counsel did not ask them about those events. For example, Prieto testified that she was working the night that Padilla was fired, but Respondent did not ask her to corroborate Brar's account of events that night; in fact, under cross-examination, she denied hearing that Padilla was terminated or had been caught stealing, and contradicted Brar's claim that he informed every employee working that night that Padilla had been caught stealing. (Tr. 279:25-280:9; 298:25-299:5). Similarly, Swart was present when Nitu informed Williams that she was removed from the schedule and questioned her about missed lunch breaks. Despite calling Swart as a witness, Respondent's counsel did not ask her about what she witnessed that day.

Finally, Respondent's employee witnesses, including Swart, testified that they had never been asked to sign "staff notes" or documents setting forth Respondent's policies. In contrast, Padilla testified that Respondent asked employees to sign such documents on numerous occasions, including a policy about use of cell phones, a policy about the number of chairs that could be in reception, and a policy about referring pets to other facilities. (Tr. 43:19-44:12). Padilla's testimony is corroborated by her screenshot showing that Swart circulated a memo to the employees that Brar wanted each employee to sign regarding Respondent's policy that employees could not refer pets to other facilities without permission. (Tr. 389:21-392:4). The memo, which was addressed to the "staff of the hospital," contained both Brar's signature and Swart's signatures, which undermines their testimony that he never circulated memos to staff, never asked staff to sign memos, and they didn't recognize other employees' signatures. (Tr. 252:13-20; 349:9-12; GC 22). Indeed, Brar

contradicted himself on this point when asked if he ever makes spelling or grammar mistakes when he's writing he answered: "Specifically for staff note, never. I check it three times at least." (Tr. 252:9-12). Swart's testimony on this point is further contradicted by Padilla's screenshot of a text from Swart (GC 21), wherein Swart told employees that Brar was upset about the way things had been going, that he was making changes, and she had to type up the changes and would be sending it out to employees. (Tr. 389:6-20; GC 21).

For all of these reasons and the factual discrepancies cited throughout, it is clear that Respondent's witnesses' testimony is not as credible as the Charging Parties testimony and, where in conflict, the Judge correctly discredited Respondent's witnesses.

**3. The Judge Correctly Found That Williams and Padilla Engaged in Protected Concerted Activities.**

Contrary to Respondent's Exceptions 1 through 9, the Judge correctly determined that Williams and Padilla engaged in protected concerted activity when discussing Respondent's failure to provide lunch breaks and pay overtime with each other, with their co-workers, and directly with Brar. Respondent's Exceptions rely almost exclusively on the claim that Padilla and Williams were engaged in unprotected personal gripes, as opposed to protected concerted activity. The Judge thoroughly analyzed and properly rejected Respondent's claims in this regard. (ALJD 19:45-20:7; 21:21-22:5). The record clearly demonstrates, and the Judge correctly found, that Williams engaged in repeated efforts to raise the Employer's unlawful terms and conditions of employment with her co-workers and spurred her co-worker Padilla to initiate continued discussions of these matters with co-workers and Brar directly. These protected activities led directly to their unlawful terminations. In light of the Judge's reasoned credibility and factual findings, many of which Respondent failed to take exception to, Padilla and Williams were undoubtedly engaged in protected concerted activity, one of the most fundamental rights guaranteed by Section 7 of the Act.

Section 8(a)(1) of the Act prohibits interference with the Section 7 rights of employees to engage in concerted activities for mutual aid or protection. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 154 (2014) (citing *Summit Regional Medical Center*, 357 NLRB 1614 (2011)). The “concertedness” and “mutual aid or protection” elements are analyzed under an objective standard, whereby motive for taking the action is irrelevant. *Fresh & Easy Neighborhood Market*, 361 NLRB at 154. The Board has noted that employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. *Id.* citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993). In *Meyers Industries*, 281 NLRB 882 (1986) (*Myers II*), the Board reiterated the definition of concerted activity as encompassing “those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” In *Meyers II*, the Board also recognized that at its inception, concerted activity only involves a speaker and a listener, and added that the initial conversation is an “indispensable preliminary step to employee self-organization,” provided that the conversation had some relation to initiating, inducing or preparing for group action in the interests of employees. *Id.* (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) and *Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986)).

As correctly found by the Judge, the discussions that Williams had with her co-workers initiated the prospect of potential group action and are exactly the types of nascent concerted activities that develop into group action. (ALJD 21:34-43). For example, in her first conversation with Padilla, Williams stated that the terms and conditions of employment they were working under were unfair. Padilla agreed with Williams and stated that Respondent’s refusal to provide meal breaks and pay overtime was unfair and likely illegal. Padilla then explained to Williams that she had previously raised the issue with Brar, but he brushed her off. (Tr. 33:21-35:19; 159:22-162:13).

The fact that Padilla described her prior efforts to address the situation demonstrates that their discussion contemplated the possibility of taking some action to remedy the situation. Moreover, as noted by the Judge, the fact that Padilla ended up raising the issues with three other co-workers, Garcia, Swart and Cordova, and spoke directly with Brar about them on October 21, demonstrates that Williams' initial efforts to raise the alarm and initiate group action about these unfair conditions was effective. (ALJD 21:9-12; Tr. 36:4-43:18; 46:23-47:12). When Williams raised the issue with Swart on October 16, she stated that the terms were unfair and, while Swart stated that she was content with her particular situation, Swart agreed that the lack of breaks for Williams was unfair and encouraged Williams to raise them with Brar. As noted by the Judge, the fact that Swart didn't share Williams' concern personally does not impact a finding that Williams' efforts in raising the issues was concerted. (ALJD 22:13-15) See *Circle K Corp.*, 305 NLRB 932, 933 (1991) (solicited employees do not need to share an interest in the matter raised by the soliciting employee for the activity to be concerted). With Swart, Williams also complained that they were not paid enough to do all the extra work they were being asked to perform that was outside the scope of their receptionist position and Swart agreed and explained that she refused to do those activities. Finally, as noted by the Judge, Williams continued to raise her complaints about Respondent's failure to give employees lunch breaks directly with Brar after she was removed from the schedule and he told her to leave other employees out of it because "all others were happy with procedures and policies." (ALJD 43:22-44:2; GC 12). Thus, even Respondent considered her complaints to be concerted.

Following her initial discussions with Williams, Padilla similarly initiated numerous other conversations with her co-workers about Williams' unjust termination and the unfair terms and conditions of employment that Williams was terminated for complaining about. She raised these concerns with Swart and Cordova on October 19 and with Garcia on October 21. (Tr. 36:4-41:8;

45:9-48:10; 52:25-53:6). On each occasion, she explained that she didn't think it was fair that Williams had been summarily fired just for talking about the issues. She also stated that she agreed with Williams that it was not fair that they did not get lunch breaks and weren't paid overtime. Padilla's conversations with her co-workers were in furtherance of the protected concerted activities initiated by Williams. Padilla further engaged in protected concerted activity on October 21 when she told Brar that she didn't feel comfortable signing the Staff Note and that she also wanted to bring up the subject of lunches and overtime with him. She then engaged him in a conversation about breaks and stated that he was supposed to give employees 30 consecutive minutes for their lunch breaks. (Tr. 45:9-48:10; 52:25-53:6). It is well-settled that concerted activity can include conduct when an employee brings a group complaint to the attention of management. *In re Phillips Petroleum Co.*, 339 NLRB 916, 917 (2003); *Meyers Industries*, 281 NLRB 882, 887 (1986)(*Meyers II*). As such, an employee bringing group complaints that involve working conditions, including wages and benefits, as Padilla did with Brar, surely falls within the bounds of concerted activity for mutual aid or protection. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 (1978).<sup>17</sup>

Respondent is correct that the Board has long distinguished between an employee raising personal complaints with co-workers and the type of concerted activity protected by Section 7, and that concerted activity does not include mere griping or activities of a purely personal nature that do not envision group action. See *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019), citing

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<sup>17</sup> See also *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424-25 (2004) (employee complaints regarding loss of health insurance found to be concerted because he discussed issue with coworkers who also protested loss of benefits); *In re Phillips Petroleum Co.*, 339 NLRB 916, 917 (2003) (employee engaged in protected concerted activity when he sought to obtain sick leave for family medical emergencies that would benefit all employees); *Talsol Corp.*, 317 NLRB 290, 317 (1995) (employee engaged in protected concerted activity when he raised concerns at a staff safety meeting that affected all other employees); *KNTV, Inc.*, 319 NLRB 447, 450-51 (1995) (employee conduct held to be concerted when he had discussions regarding pay and compensation with coworkers and then those issues with employer).

*Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)(statement by single employee concerning customer call routed to him amounted to mere griping and was not concerted as employees as a group had no preexisting concerns about customer calls, and no evidence that employee sought to initiate or induce group action); See also, *Jeannette Corp.*, 217 NLRB 653, 657 (1975), *enfd.* 532 F.2d 916 (3d Cir. 1976)(noting that entirely individual action is not concerted “and may amount to no more than an unprotected personal gripe or complaint”). However, as described above and found by the Judge, Williams’ and Padilla’s raising of complaints about shared working conditions with each other, other employees, and then directly with Respondent clearly do not constitute mere griping about purely personal issues. (ALJD 21:21-25).

In its Exceptions, Respondent relies heavily on the Board’s decision in *Alstate Maintenance LLC*, 367 NLRB No. 68 (2019) for its proposition that Williams and Padilla were engaged in unprotected individual griping. In her Decision, the Judge noted and rejected Respondent’s reliance on *Alstate Maintenance*, which is clearly inapposite to the facts of this case. (ALJD 21:25-22:5) In *Alstate Maintenance*, the Board found a single employee’s complaint to a manager in the presence of other employees about a personal gripe related to a customer’s poor tipping habit to be neither concerted nor protected. *Id.* at p. 2. Notably, in *Alstate Maintenance*, the employee did not have prior discussions with other employees about the subject of his complaint and his complaint did not directly relate to terms and conditions of employment set by the employer or directly shared by other employees. *Id.* Respondent’s reliance on *Alstate Maintenance* in this case is wholly flawed and ignores salient distinguishable facts demonstrating Williams’ and Padilla’s clearly protected and concerted activities; namely, the numerous instances where Padilla and Williams raised complaints to their co-workers, the fact that the complaints concerned shared terms and conditions of employment established by Respondent, and they later raised those complaints directly with Respondent themselves. The Board has made clear that employee discussions with coworkers are

indispensable initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012) enfd. 734 F.3d 764 (8th Cir. 2013), citing *Relco Locomotives*, 358 NLRB 298, 309 (2012). It was precisely the lack of prior discussions with co-workers that led the Board to find that the employee in *Alstate Maintenance* was not engaged in concerted activity.

Contrary to Respondent's urging, Williams' and Padilla's complaints and discussions with co-workers were not merely personal gripes about their own situation but related to shared working conditions established by and within the control of Respondent. In *Alstate Maintenance*, the fact that the employee's complaint did not relate to terms and conditions of employment set by the employer and instead concerned a past bad experience he had with a customer led the Board to determine that the complaint was unprotected because it was not made for mutual aid and protection. This is not the case here, where Williams' and Padilla's complaints concern basic employment conditions, including wages and hours, which were established and maintained by Respondent in the workplace.

As noted by the Judge, the concept of "mutual aid or protection" focuses on the *goal* of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB at 154, supra at 3, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. *Id.* Respondent complains that the employees did not state that they were pursuing a specific "goal" of concerted activity. (Respondent's brief at p. 12). However, Board law does not require employees to affirmatively state or articulate a goal of engaging in concerted activity as Respondent suggests. To the contrary, the Board has stated that the

object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate and a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions. *Whittaker Corp.*, 289 NLRB 933, 934 (1988). In its Exceptions 1 and 2, Respondent takes issue with the Judge's statements that she was considering the "entire situation" and was viewing the facts "under a totality of circumstances" in articulating her finding that Williams' and Padilla's activities were both concerted and protected. However, the Board has long held that such decisions are to be based on the totality of circumstances and record evidence, and the Judge properly analyzed the relevant facts and totality of the circumstances in making her reasoned decision in this regard. *Id.* See also *Alstate Maintenance*, 367 NLRB No. 68, at p. 3 (2019), citing *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984).

In Exception No. 4, Respondent attempts to parse out the Charging Parties' initial early October discussion about the lack of lunches and overtime from their subsequent discussions, and Respondent complains that the Judge failed to adequately explain how their initial discussion became protected and concerted activity. This strawman exception is wholly without merit. The Judge clearly and rightly concluded that, when evaluating the totality of the circumstances, Williams and Padilla were engaged in protected concerted activity when they complained about Respondent's lack of lunches and overtime pay. The judge did not conclude that Williams' and Padilla's preliminary discussion in early October was unprotected, as Respondent seems to suggest. Rather, she noted that their very preliminary conversation about these issues "may not be considered to be protected concerted activity," but then immediately explains that their actions went well beyond these preliminary discussions as they reached out to other employees in attempting to improve their working conditions for the mutual aid and protection, which clearly rendered their actions protected. (ALJD 21:4-19). Contrary to Respondent's Exceptions, the Judge detailed Williams' and

Padilla's numerous actions in reaching out to each other, their co-workers and Brar, both in her factual findings and analysis, all of which establish conclusively that they were engaged in protected concerted activity. (ALJD 7:9-8:13; 12:1-13:28; 20:9-22:39).

Respondent also complains that the employees did not express an altruistic sentiment for their efforts to raise these unfair working conditions with other employees. The fact that the employees wanted to improve their own working conditions, does not render their efforts to raise the issue with other employees not concerted or unprotected. The Board has held that the fact that personal vindication may be among the soliciting employee's goals, does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1134 (2014). If the employees were only interested in changing their own working conditions, they wouldn't need to raise the issue with other employees and would just raise their complaint directly with their employer, as the employee in *Alstate Maintenance* did. In contrast, here, Williams' repeated initiation of conversations with her co-workers about shared terms and conditions of employment clearly go well beyond mere griping about purely personal issues, and instead raise concerns about ongoing and shared unlawful terms and conditions of employment. This is plainly evidenced in Williams' first conversation with Padilla when Padilla explained to Williams that she had previously raised these issues directly with Brar, but he dismissed them. It is clear from the context of this discussion that Williams' raising the issues with Padilla revived Padilla's own dormant, but pre-existing, concerns and led Padilla to then raise the issues with other co-workers and re-raise them directly to Brar. Padilla's subsequent speaking to three co-workers regarding her and Williams' shared complaints about the lack of breaks and overtime clearly constitutes concerted activity for mutual aid or protection and is protected under the Act. Also, when Williams raised the lack of lunch breaks and overtime pay with Padilla and Swart, she did so in the context of it being

unfair that they all work hard and don't get breaks. She also complained to Swart about the unreasonable amount of work they were expected to do as receptionists, a position that they shared. Swart agreed and explained to Williams that she refused to perform these additional duties that Williams was discussing and had been asked to perform, such as assisting in surgeries and euthanasia procedures. It is also important to note that Williams raised the unfairness of Respondent's failure to pay employees overtime, even though she herself refused to work additional hours without overtime pay. By continuing to raise this issue, Williams was raising concerns about terms that primarily impacted other employees, clearly demonstrating that she was raising these concerns not just for herself but for mutual aid and protection.

In light of these facts, the Judge properly rejected Respondent's misapplication of *Alstate Maintenance*, which is clearly and completely distinguishable from the basic facts of this case. The Board should similarly reject Respondent's unfounded Exceptions, which are also based on *Alstate Maintenance*, and uphold the Judge's sound finding that Williams and Padilla engaged in protected concerted activity.

**4. The Judge Correctly Found That Respondent Had Knowledge of Williams' and Padilla's Protected Concerted Activities.**

Contrary to Respondent's Exceptions 10 and 11, the Judge properly found, and there truly can be no doubt, that Respondent had knowledge of Williams' and Padilla's protected concerted activity. Indeed, Respondent cites to no evidence to support its claim that the Judge erred in finding Respondent's knowledge of Williams' and Padilla's protected concerted activities and bases its Exceptions as to Respondent's knowledge on its flawed claim that the employees' activities were not protected or concerted. As noted above, Williams' and Padilla's activities were clearly protected and concerted and there can be no legitimate claim that Respondent was not aware of them.

As found by the Judge, at the time of Williams' termination, Nitu advised her that Respondent was aware she had been complaining about not getting lunches and Respondent would pay her for those lunches; this testimony is uncontested. (Tr. 179:2-180:3). The same day, in his text exchange with Williams, Brar admitted that Williams' shift was given to another person, that they trying to make a schedule for next week, and "trying to fit you in where you may take needed breaks and lunch times." (GC 12). The authenticity of his texts is uncontested.<sup>18</sup> Thus, while Williams never raised the issue directly with Respondent it is clear that either Swart, or someone who overheard her conversation with Swart on October 16, advised Respondent of Williams' complaints. Indeed, while Brar claimed that no employee had ever raised any concerns about the lack of lunch breaks to him, he admitted on two occasions during his testimony that he found out that Williams was complaining to other employees about not getting lunch breaks. (Tr. 263:16-18; 268:24-269:19). Also, in addition to corroborating Williams' and Padilla's testimony that they did not clock out for lunch, Padilla's photograph of her final timecard establishes that Brar was aware of Padilla's and Williams' protected concerted activity by the early morning of October 18 and prior to either termination. Padilla's photograph of her final timecard shows that at 1:08 a.m. on the morning of October 18 someone clocked Padilla in for work and clocked her out for lunch one minute later; there is also a lunch entered at 1:10 a.m. on October 21, the morning prior to Padilla's termination. (GC 8 at p. 10) Padilla testified that she did not make these entries and did not work at 1 a.m. when the hospital is closed, and she clearly would not be clocking in and out during non-

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<sup>18</sup> During his testimony, Brar initially denied that Williams was taken off the schedule because they were trying to fit her in where she could take needed breaks and lunches and instead claimed that she was supposed to tell them if she was willing to do the work at the same pay rate on Friday, October 18. However, when confronted with his text exchange he admitted that he informed Williams that she wasn't on the schedule because they were trying to fit her in where she could take needed breaks and lunches, and that he didn't provide her with any other explanation for this. (Tr. 261:6-263:15).

working hours when the hospital is closed. Since the record reflects that Brar is the only person with the ability to edit employees' times, this timecard shows definitively that Brar was experimenting with adding lunches to employees' time records in the early hours of October 18, before he terminated Williams or Padilla. (Tr. 72:10-73:9; GC 8 at p. 10).

**5. The Judge Correctly Found That Respondent Terminated Williams Because of Her Protected Concerted Activities.**

Contrary to Respondent's Exceptions 12 and 13, the Judge rightly found that Respondent harbored animus against Williams because of her protected concerted activity and terminated her because of it. The Judge's Decision in this regard is supported by the tremendous animus that Respondent displayed toward its employees' protected activities, the timing of Williams' termination in relation to those activities, and the clearly pretextual reasons proffered by Respondent for her termination.

As an initial matter, while Respondent never explicitly told Williams that she was being terminated, the Judge correctly found that Respondent terminated Williams when she was permanently removed from the schedule on October 18; Respondent did not file an exception to the Judge's factual finding in this regard. The only reason ever given to Williams for her termination was that she was removed from the schedule because she wanted lunch breaks, the subject of her protected concerted activity. Respondent claims that Williams voluntarily quit<sup>19</sup> or, in the

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<sup>19</sup> Brar's testimony that Williams quit is incoherent and uncorroborated. He first claimed that she quit on her last day of work (October 16) claiming she wanted more money and refused to work for less. He then claimed that, while she quit on October 16, she said she would tell Nitu on Friday, October 18, if she wanted to return to work for her original pay. At one point, Brar also claimed that Williams was never taken off the schedule and she quit on October 18 when talking with Nitu. (Tr. 368:4-369:1). At another point, he claimed that on her last day of work (October 16), Williams claimed additional lunches and, as he was preparing her "lunch check," she told him that she wanted higher pay. (Tr. 263:16-267:1). This scenario is impossible. In his October 19 text to Williams, Brar demanded to know how many lunches she wanted to be paid, so he couldn't have been preparing her "lunch check" on October 16 when she supposedly quit. Brar also testified that on October 22, he spoke with his CPA about making her final/lunch check. (Tr. 276:23-277:5).

alternative, was terminated because she refused to perform her required duties.<sup>20</sup> The Judge rightly concluded that neither was true, and Respondent did not take exception to those factual findings. (ALJD 24:5-33).

Respondent's animus toward Williams' protected concerted activities cannot reasonably be contested. In his October 18 text message exchange with Williams, Brar is openly hostile toward her and her protected concerted activity. He states: How many lunches you want to be paid????? Do not talk about others. All others are very happy with policy and procedures. It's you who wants lunches paid. Which I am asking now. How many you want to be paid? Tell me exactly the number of lunches.<sup>21</sup> (GC 12). It is clear from his own words, that he was upset about her protected concerted activity, particularly the concerted element, and he did not want her complaints to infect other employees who were willing to work under his abusive terms and conditions of employment. The fact that Respondent openly informed Williams that she was removed from the schedule

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<sup>20</sup> Brar's testimony in apparent support for Respondent's alternative argument that Williams was terminated for refusal to perform her job duties is similarly incredible and uncorroborated. In fact, at trial, Brar categorically denied that Williams was terminated and insisted that she quit. (Tr. 367:1-22). Nevertheless, Brar testified in response to incredibly leading questions that within a week or two of her hire, Williams stopped doing any of her assigned duties other than answering phones and taking payments, and refused to work for the rate she agreed upon at hire. Brar claims he talked to Williams repeatedly about her refusal to perform these duties, but her performance only got worse and she responded to his corrections in an arrogant and rude manner. Despite what would clearly be insubordination and unacceptable work performance, Brar never disciplined Williams, claiming it was "too early" to write her up. (Tr. 338:24-346:25; 365:18-367:22). Brar further testified that Williams' refusal to work meant other receptionists had to do her work, but Respondent failed to ask a single employee witness to corroborate this. In fact, Davich, Prieto and Swart each admitted that they were not aware of or had no personal knowledge of Williams supposedly refusing to perform assigned work. (Tr. 308:7-13; 294:16-294:7, 318:15).

<sup>21</sup> Brar's lack of credibility is clearly shown when you contrast his texts regarding payment of the lunch break with his testimony at trial where he claimed he paid Williams for twelve 30 minute lunch periods out of the "kindness of his heart" and because he was still hoping she would continue working for Respondent. (Tr. 269:17-270:9). The absurdness of this testimony is further demonstrated by the fact that Brar claimed Williams took lunch breaks every day, refused to do nearly all of her assigned duties, and was insubordinate toward his corrections. (Tr. 338:24-346:25; 365:18-367:22).

because of her complaints to her co-workers about the lack of lunch breaks also demonstrates hostility toward those activities.

In addition to Respondent's openly demonstrated animus, the timing of Williams' termination in relation to her protected concerted activity supports the Judge's finding of discriminatory motive. See *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003) ("where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised"); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275 (D.C. Cir. 1999) (court noted that timing is a telling consideration in determining whether employer action is motivated by animus). The timeline of events leading to Williams' termination is striking. Respondent implemented Williams' termination on Friday, October 18, a mere two days after she raised these issues with Swart. While she had raised these issues earlier with Padilla, Padilla credibly testified that she did not inform Brar about her conversations with Williams. Thus, as found by the Judge, Brar could only have learned of Williams' complaints from Swart or someone who overheard Williams' conversation with Swart on October 16. The swiftness of her termination leaves little doubt that Respondent was motivated to keep Williams from continuing to complain to her co-workers about the issue. The contemporaneous text exchange between Williams and Brar makes clear that the subject had never been raised with Williams prior to her termination, as she states it should have been raised with her during one of her shifts, not her day off. (GC 12). Moreover, Respondent's motive to keep Williams from encouraging others to pursue the issue is evident from Brar's text and his urgency to pay Williams and be rid of her to keep her complaints from getting to others. For all of these reasons, the swift timing of Respondent's termination supports the Judge's conclusion that Respondent discharged Williams because of her protected activity in violation of the Act. See *Christy Janitorial Svcs.*, 271 NLRB 857 (1984)(finding unlawful termination when discharge occurred a "few days" after protected activity and the employer's hostile remarks); *Mira-*

*Pak, Inc.*, 147 NLRB 1075 (1964) (finding unlawful termination when discharge occurred two days after discriminatee engaged in protected activity).

In addition to the numerous instances of direct evidence clearly demonstrating Respondent's animus toward Williams' protected concerted activities, Respondent's unlawful motive is further evidenced by the circumstantial evidence of its shifting and clearly false explanations for her termination. In *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (Aug. 2, 2019), the Board stated that when an employer's stated reasons for its decision are found to be pretextual--that is, either false or not in fact relied upon--discriminatory motive *may* be inferred, but such an inference is not compelled. See also *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Wright Line*, 251 NLRB at 1088 fn. 12. Here, Respondent claimed that Williams voluntarily quit, which is clearly disproven by her texts with Brar. In addition, Respondent offered the unsupportable claim that she was fired for refusing to perform her job duties. Respondent offered even more reasons for Williams' termination in Brar's submission to the Labor Commissioner where he stated that she "left the job" for various reasons including that she wanted more pay, didn't want to do the assigned tasks, was rude to customers and late, and didn't want to improve her behavior in these respects. However, he states in the same document that "due to us not being a position to support her demands of higher pay, we had to let her go." (GC 13 at p. 1). Notwithstanding the obvious piling on of explanations for her separation from employment, the only coherent explanation Brar ever gave for Williams' separation was his text to her in which he explained that she was removed from the schedule due to her need for lunch breaks, the very subject of her protected concerted activity.

When an employer's proffered reasons for a discharge are merely pretextual, it is unnecessary to proceed to the second step of the *Wright Line* inquiry. See *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Brink's, Inc.*, 360 NLRB 1206, 1217 (2014);

*Parkview Lounge, LLC*, 366 NLRB. No. 71, slip. op. at 4 (2018). The reason for this is clear. If, as here, Respondent is unable to present any legitimate, non-pretextual basis for the termination, it could not possibly meet its burden to establish that it would have taken the same adverse action in the absence of the protected activity. Nevertheless, the Judge properly analyzed Respondent's affirmative defense that it would have terminated Williams absent her protected concerted activity and correctly determined that Respondent failed to meet its burden in that regard. (ALJD 26:23-39). As detailed above, Respondent failed to present any coherent explanation for Williams' separation from her employment and clearly failed to establish any legitimate basis for her termination.

Under these circumstances, it is clear that Respondent terminated Williams in retaliation for her protected concerted activities almost immediately after learning about them. Respondent overtly tied her removal from the workplace to her complaints about missed lunch breaks, failed to offer any other credible or corroborated reason for her termination, and failed to meet its burden to establish that it would have terminated her in the absence of her protected concerted activity. As such, the Judge properly concluded that Williams' termination violates Section 8(a)(1).

**6. The Judge Correctly Found That Respondent Threatened to Terminate, Terminated, and Falsely Reported Padilla to the Police Because of Her Protected Concerted Activities.**

Contrary to Respondent's Exceptions 12 and 13, there can be little doubt that Respondent's conduct toward Padilla violated the Act. The record is replete with direct evidence of animus toward Padilla because of her protected, concerted complaints about Respondent's failure to provide employees' lunch breaks and failure to pay overtime. Indeed, immediately before firing her, Brar threatened to terminate Padilla if she did not sign the Staff Note disavowing her protected concerted

complaints about lunches. (Tr. 46:15-47:20).<sup>22</sup> The Judge correctly found that Brar’s direct and explicit threat to terminate Padilla violated Section 8(a)(1) of the Act. When Padilla declined to abandon her protected concerted activities, Brar followed through on his threat and immediately terminated her, and then falsely reported her to the police twice, based on made-up claims that she stole money from him, harassed him, and threatened him and his family, all in order to dissuade her from further pursuing her protected, concerted activity. Notably, Respondent did not take exception to the Judge’s factual findings that Padilla did not steal or attempt to steal money and Brar’s reports to the police were spurious and completely fabricated. In light of these facts and the record as a whole, the Judge correctly found that Respondent violated the Act when Brar threatened Padilla and falsely reported her to the police.

As noted above, there is substantial direct evidence of Respondent’s animus and hostility toward Padilla for her protected activities, including the following:

- On October 21, Brar demanded that Padilla abandon her protected activity and sign the “Staff Note” agreeing that she had always been given adequate time to eat lunches (Tr. 46:15-47:11);
- On October 21, Brar threatened Padilla with termination if she did not sign the Staff Note and abandon her protected concerted activity (Tr. 47:11-19);
- On October 21, Brar terminated Padilla because she refused to sign the Staff Note and abandon her protected activity (Tr. 47:17-20);

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<sup>22</sup> Brar could not even effectively deny threatening Padilla. In response to a generic and leading question from his attorney, Brar stated that he never threatened any employee with termination if they did not waive a complaint about their terms and conditions of employment and claimed that it was never needed, that it’s a small team that was running “very wonderfully” and that “everybody is happy.” (Tr. 357:4-9). However, he essentially admitted to threatening Padilla with termination when his attorney asked him in the very next question if he ever threatened any employee with termination if they did not sign a particular document. In response, Brar stated: “Never needed. It was never until now this thing happen like another thing. Oh, this is – yeah, I’m still shocked with what this is.” (Tr. 357:10-14).

- On October 21, after Padilla said that she would need access to all of her payroll records to prove her overtime and lunches, Brar refused her request and said they would just have to go to court to deal with that (Tr. 47:20-22);
- October 22, Brar instructed his CPA not to release Padilla’s payroll records to her (Tr. 53:15-58:22; GC 5, pages 6-8);
- On October 22, after Padilla requested her payroll records from the CPA, Brar falsely reported her to the Police and wrongfully accused her of stealing (GC 6 p. 2);<sup>23</sup>
- At the hearing, Brar testified that Padilla’s action in returning to the hospital on October 22 to collect her belongings constituted a threat to him and his family, even though he admitted he had no idea why she came back or what she said or did when she was there; he also admitted to being very upset, mad and scared by Padilla for this otherwise innocuous act (Tr. 278:8-281:7);
- On November 7, Brar responded to Padilla’s request for her payroll records in a hostile manner, stating: “Do not contact me directly. Your case is reported to authorities already. You have received all the details about your pay, hours etc, with every pay check. In future contact my attorney. Any direct contact/communication to me will be taken as threatening message and we are reporting to the police immediately” (GC 5 at p. 7, errors in the original);
- Also on November 7, Brar responded to Padilla’s request for his attorney’s number in a hostile and hateful manner, stating: “It’s your small brain , which makes you make judgements on others if they understand something or not. How dare you went to CPA,

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<sup>23</sup> The Judge correctly found that Respondent violated Section 8(a)(1) of the Act when Brar falsely reported Padilla to the police on October 22 and November 7 immediately after she requested her payroll records. The Judge rightly determined that this false reporting of Padilla was an attempt to interfere with her protected activities and that Padilla’s conduct to obtain her payroll records were a continuation of her protected activity as she was seeking her payroll records in furtherance of her complaints about Respondent’s lunch and overtime policies. Respondent did not file exceptions over her findings of fact in this regard. (ALJD 29:4-27). As noted by the Judge, the fact that Padilla was seeking her own payroll records does not render her activity no longer concerted. Rather, her conduct is a continuation of her earlier protected concerted activity. See *Alton H. Piester, LLC*, 353 NLRB 369 (2008)(Board found that discharged employee’s request for a notation on his own payroll stub, was a continuation of his prior protected concerted activity of complaining about employer’s adverse change to pay method).

Have you hired him? Do you understand how these guys work? Do whatever you want. Do what ever you can. I am and will continue responding within my legal rights. Yes, there is police report made on same day of incident. It's number has been provided to the labor court as well. Go and find my attorney your self. Otherwise, we will just respond to court letters. Absolutely no obligation to follow your instructions” (GC 5 at p. 8, errors in the original);

- On November 7, after Padilla requested her payroll records, Brar falsely reported her to the police this time fabricating a claim that she made threats against him and his family (GC 6 p. 3);
- At the hearing, Brar testified that Padilla’s efforts to obtain her payroll records made him quite upset and quite angry. (Tr. 276:23-277:20).

In light of this evidence, and Brar’s demeanor during the hearing, the Judge rightly found that Brar harbored animus against Padilla’s because of her protected concerted activity; Respondent did not take exception to her factual findings in this regard. Since Brar admitted that he was the only person to make the decision to terminate Padilla on October 21, there is no doubt that the decision was motivated by his extreme animus toward her, which he was openly demonstrating at the time he made the decision to terminate her. (Tr. 231:10-17). Like Williams, Padilla was terminated within a few days of Brar learning of hers and Williams’ protected concerted activities, as discussed above, and immediately after Padilla refused to abandon her protected concerted complaints and sign the Staff Note. Respondent’s swift response to Padilla’s protected concerted activities further supports the Judge’s conclusion that Respondent’s unlawful conduct toward Padilla was motivated by its animus and hostility toward its employees’ protected concerted activities.

Respondent also offered a patently false and pretextual reason for Padilla’s termination, namely that she stole money from Respondent, and Brar was unable to provide a reasonable explanation for the events leading up to her termination. (Tr. 231:10-24). Indeed, the evidence of Padilla’s alleged theft is based entirely upon Brar’s incoherent and uncorroborated testimony,

which could not possibly be credited. As an initial matter, Brar admitted that on the day of Padilla's termination, October 21, he asked her to sign a memo related to breaks and clocking-out, but he categorically denied that he asked her to sign the "Staff Note" (GC 3). Instead, he claimed that Davich, Prieto and a third employee (whose name he could not remember) had informed him that Padilla had instructed them not to clock out for lunch, so he decided to draft a memo as a warning to Padilla about needing to clock out for breaks, among other things.<sup>24</sup> He claimed that he called Padilla into his office at around 6:30 p.m. and asked her to sign this memo, but she categorically refused to look at it or sign it. (Tr. 232:5-233:22; Resp. 1). Respondent's Exhibit 1 was clearly created after-the-fact and Padilla credibly denied that she was ever shown it or asked to sign it. (Tr. 131:12-133:5). Brar's claims that this was the document that Padilla refused to sign also fell apart when he admitted that the document was not finished when he was supposedly called Padilla in to discuss it, that he was planning to add a signature line for himself and Padilla but hadn't done it yet, that he had not actually printed Respondent's 1 when he asked Padilla to sign it, that it was just on his computer screen, and that Padilla refused to even look at it and said she would not sign it (even though it was not printed). (Tr. 285:3-286:1). Brar's shifting and absurd testimony about this document, was properly rejected and the Judge reasonably concluded, and the overwhelming evidence demonstrates, that the document Brar asked Padilla to sign on October 21 was the Staff Note. Respondent did not take exception to the Judge's factual finding in this regard. (ALJD 27:28-28:31; GC 3)

Notwithstanding Padilla's purported categorical refusal to look at or sign Respondent's supposed disciplinary memo, Brar testified that Padilla returned to work until about 7:30 or 7:45

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<sup>24</sup> The memo claimed that Padilla had been found eating lunch while clocked in, that she needed to clock out for lunch, that other employees had reported she was encouraging them not to clock out for lunch, that she was seen on her cell phone while clocked in, that customers complained she was rude, that she was late, and rude to employees and co-workers. (Resp. 1).

p.m., when he saw her in his office taking \$100 and \$50 dollar bills from the cash drawer and placing them in the right side pocket of her scrubs. He did not ask her why she was taking the money or putting it in her pocket, he claims he just told her to put it back and she did, and he allowed her to return to work. Brar testified that he then counted the bills that she put back and it was \$450. (Tr. 233:17-236:237:2). Brar testified that he sat down at his desk thinking and, after “a few minutes,” he called her back and told her that “she needed to go,” that she was putting money in her pocket and stealing. He testified that she just said okay and left. After she left, he went to his “notebook” where he claimed he wrote down how much is in the cash drawer each day, and matched it with his software and customer receipts, and he could tell that the drawer was “still running short as of \$200,” so he called the police. He testified that he called the police at about 10:00 p.m. on October 21 and they said that they would come the next morning. (Tr. 237:3-239:1). Brar testified that when the police came the next day, he told them he saw Padilla putting \$450 in her pocket and she put it back. He claims that after he counted the money it was still short \$200 and since Padilla was the only employee he saw there, so he was naming her as the thief. (Tr. 239:2-240:12).<sup>25</sup>

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<sup>25</sup> At the hearing, Brar could not explain how he supposedly matched the amount in the drawer to receipts to figure out how much was missing. He provided no copies of the “notebook” or “log” he claimed to have used to match the day’s receipts, despite them being subpoenaed by the General Counsel. (Tr. 373:11-374:17). Indeed, his head receptionist Swart said she never used the notebook and no employee who testified corroborated Brar’s claim that he kept a log or running tally of the amount in the cash drawer. (Tr. 59:20-60:3; 299:6-300:10; 325:2-326:12). Brar initially claimed that he showed the police the documents and how he matched them to determine money was missing, but then he retracted that testimony when questioned about why he didn’t produce those documents pursuant to the subpoena. He then claimed he could only make the matches in his head to determine how much was missing. (Tr. 374:18-377:22; 380:21-381:13). Also, Padilla testified that the cash drawer often did not have money to make change for customers, and it is unlikely it would be filled with \$100 and \$50 bills as Brar claimed. Indeed, Respondent submitted a photograph of the drawer and it appeared to have no bills larger than a \$20. (Tr. 60:4-16; Resp. 2).

The Judge properly rejected Brar's testimony about Padilla's supposed theft as it was completely illogical, shown to be wholly fabricated by documentary evidence, and completely fell apart under further questioning. No reasonable employer would catch an employee stealing money and just tell her to put it back without any further discussion and let her return to work. Brar's hearing testimony regarding the alleged theft also contradicted a sworn statement he provided to the NLRB and the statements he made to the police, as reflected in the police report.<sup>26</sup> (GC 6). For example, the police report states that Brar called and reported Padilla's supposed theft on October 22 at 11:12 a.m., after she came to the facility to take pictures of the Staff Note, not the day before when the theft allegedly occurred. The report states that he claimed that the employee took \$200 cash and does not mention anything about her trying to steal \$450. Brar was similarly impeached by the declaration that he submitted to the NLRB, which he signed under penalty of perjury, where he claimed he caught Padilla stealing \$250, he confronted her and accused her of stealing, she did not deny it and he sent her home, and she left stating that she would be going to the Labor Board. (Tr. 241:3-244:5). When confronted by the contradictions of his prior statements to the Board and the police, Brar's testimony about the supposed theft crumbled and he ultimately admitted that didn't know how much money she took, he didn't know how much money she put back, he didn't know how much he told the police he caught her stealing, that he was just guessing about how much money she put back and it was an "approximation," that the amount he claimed he caught

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<sup>26</sup> Also, as noted by the judge, it is very telling that Brar drafted statements for employees to sign shortly after Padilla's termination that appear to defend Respondent regarding Padilla's termination but say nothing about her purported theft. Brar prepared a statement for Luis Cordova, who was just outside the door to Brar's office when Padilla was terminated, but his statement says nothing about the supposed theft. Instead, the statements refer to Padilla being seen on many occasions sitting in the break room and eating meals when clocked in and on paid time. These self-serving statements do nothing to support Brar's false claim that she was terminated for theft and again tie her termination to her protected concerted activity related to the lack of breaks. (ALJD 28:24-35; Tr. 256:17-258:2; GC 16).

her stealing in his statement to the NLRB was a typo, and he didn't know which pocket he supposedly saw her putting the money. (Tr. 271:5-14; 377:20-380:20, 381:14-382:7). His inability to offer a coherent account or basic facts about the supposed theft demonstrated conclusively that he completely fabricated the event and the Judge determined that the sole reason proffered by Respondent for Padilla's termination was categorically false.<sup>27</sup> (ALJD 27:28-28:35). Respondent did not take exception to the Judge's finding in this regard. Finally, since Respondent was unable to present any legitimate, non-pretextual basis for Padilla's termination, the Judge correctly concluded that Respondent failed to meet its burden to establish that it would have taken the same adverse action in the absence of her protected concerted activity. (ALJD 28:37-29:2)

#### **7. The Judge Ordered Appropriate Remedies.**

Contrary to Respondent's Exceptions 14 through 17, the Judge ordered appropriate remedies for the violations found. Since Respondent's unlawful actions resulted in lost wages and other expenses to the Charging Parties, the Judge correctly ordered Respondent to make Williams and Padilla whole for those losses through the traditional remedy of backpay and reinstatement, including compensation for search-for-work and interim employment expenses, reimbursement for any adverse tax consequences of receiving a lump sum payment, and expungement of any reference to their discharge from their personnel records. In addition, she ordered that Respondent post a

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<sup>27</sup> Contrary to Brar's absurd, self-serving testimony about the supposed theft, Padilla credibly testified that she did not steal any money from the cash drawer, did not put any money in her pocket, and Brar never accused her of stealing any money on October 21. She testified that the first time she heard she was being accused of stealing money was when she received the call from the police on October 22. Her testimony is corroborated by the fact that she immediately texted Brar at 11:35 a.m. on October 22 stating: You know damn well that no cash was stolen...I'm very disappointed in the behavior you're taking, to go so far as lying about cash. I have never been a thief and was always a good employee. (Tr. 49:9-50:15; 61:7-63:23; GC 5, pg. 5). Brar's failure to respond to or deny her claims has evidentiary significance and constitutes an admission by silence. See *Coca-Cola Bottling Co.*, 313 NLRB 1197, 1200 (1994). If Padilla had stolen money, it would be expected that Brar would respond to her text, but he did not. Indeed, there are many examples of Brar arguing with Williams and Padilla by text, so it is extremely telling that he did not respond to this particular text, as the Judge rightly noted in her Decision. (ALJD 28:40-43; Tr. 59:18-62:25; GC 5 & GC 12).

traditional Board Notice, electronically if needed, with a narrow cease and desist order, which is a standard remedy for the violations found. (ALJD 30:11-41). The Judge's remedial orders are appropriate and should be adopted by the Board.

### **III. RESPONDENT'S REQUEST FOR ORAL ARGUMENT SHOULD BE DENIED**

Along with its Exceptions, Respondent requests oral argument of this matter before the Board. Respondent did not offer any factual or legal authority to support its request. Oral argument is not needed in this case. A total of 6 witnesses testified over the course of this two-day trial and the record is complete. There is nothing novel or complex about the issues presented in Respondent's Exceptions, and there is simply no basis to support a request for oral argument in this case. Therefore, Respondent's request should be denied.

### **IV. CONCLUSION**

Counsel for the General Counsel submits that the foregoing, and the record as a whole, establishes that the Judge's findings that Respondent violated Section 8(a)(1) when it threatened to terminate Padilla, falsely reported Padilla to the police on two occasions, and terminated Padilla and Williams in retaliation for their protected concerted activities are fully supported by a preponderance of the evidence and current legal authority. Accordingly, Respondent's Exceptions should be denied in their entirety and the Judge's Decision should be affirmed and adopted by the Board.

**DATED AT** Oakland, California this 22<sup>nd</sup> day of September 2020.

Respectfully Submitted,

*/s/ Amy L. Berbower*

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## Akilah Williams – Analysis of Payroll Information

Pay period	Actual Hrs. Paid <sup>1</sup>	FTR Total Hours <sup>2</sup>	Discrepancy Between FTR hrs. & actual paid hrs.	Unpaid OT per pay period Shown on FTR <sup>3</sup>
10/16-10/21/19	7.93	7.82	-0.11	
10/01-10/15/19	51.20	51.12	-.08	.39
09/16-09/30/19	38.05	38.22	+0.17	
09/01-09/15/19	12 <sup>4</sup>	10	+2.0	

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<sup>1</sup> Paystubs for Williams are found in GC 13 & GC 14

<sup>2</sup> The Falsified Time Records for Williams are found in GC 13

<sup>3</sup> Hours worked over 8 in a day.

<sup>4</sup> This check includes the 6 hours paid to Williams at \$12 for missed lunches; these hours are not reflected as hours worked.

## Christina Padilla – Analysis of Payroll Information

Pay period	Actual Hrs. Paid <sup>5</sup>	FTR Total Hours <sup>6</sup>	Discrepancy Between FTR hrs. & actual paid hrs.	Unpaid OT per pay period on FTR <sup>7</sup>	Total Hrs. Shown on CPP <sup>8</sup>	Discrepancy Between CPP & actual hrs. paid	Unpaid OT per CPP
10/16-10/21/19	16.78	20.91	+4.13	.27	16.78 <sup>9</sup>	0	
10/01-10/15/19	76.62	76.64	+0.02	.05			
09/16-09/30/19	75.95	75.97	+0.02	3.27	75.95	0	3.26
09/01-09/15/19	75.98	75.99	+0.01	.24			
08/16-08/31/19	78.65	78.64	-.01	2.14	78.65 <sup>10</sup>	0	2.63
08/01-08/15/19	<sup>11</sup>	64.47		3.38			
07/16-07/31/19	38.97	43.11	+4.14	3.11	38.97	0	1.7
07/01-07/15/19	72.53	68.45	-4.08	2.63	72.53	0	6.55
06/16-06/30/19	60.00	60.02	+0.02	0			
06/01-06/15/19	74.70	74.71	+0.01	1.76			
05/16-05/31/19	87.42 <sup>12</sup>	87.48	+0.06	1.08 <sup>13</sup>			
05/01-05/15/19	57.63	57.64	+0.01	2.05			
04/16-04/30/19	61.23	61.23	0	0.25			
04/01-04/15/19	73.02	73.00	-.02	1.12			
03/16-03/31/19	60.85	59.55	-1.3	2.17			
03/01-03/15/19	78.75	80.08	+1.33	1.05			
02/16-02/28/19		60.48		2.3			
02/01-02/15/19	50.20	50.39	+.19	.06			
01/16-01/31/19	49.25	49.25	0	0			
01/01-01/15/19		29.96		0			
12/16-12/31/18	45.32	48.61	+3.29	0.4			
12/01-12/15/18	47.23	43.43	-3.8	0.93			

<sup>5</sup> Paystubs for Padilla are found in GC 8 & GC 9

<sup>6</sup> The Falsified Time Records for Padilla are found in GC 7

<sup>7</sup> Hours worked over 8 in a day.

<sup>8</sup> Christina Padilla's Photographs (CPP) of her timecards are located in GC 8

<sup>9</sup> Note Padilla was paid .02 hours for the added clock in on 10/18/19 from 1:08 a.m. to 1:09 a.m.

<sup>10</sup> This photograph includes hours for 9/1, a day that is not included in the pay period;

Total hours shown is 84.58 less hours for 9/1 (5.93) total hours for the pay period equals 78.65.

<sup>11</sup> Blanks appear for pay periods that Padilla did not have paystubs.

<sup>12</sup> This figure includes .25 hours that was actually paid to Padilla as overtime during this period.

<sup>13</sup> This figure is in addition to the .25 hours of overtime actually paid to Padilla during this pay period.

**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**

**Date: September 22, 2020**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Christina Arianna Padilla  
4788 Proctor Road  
Castro Valley, CA 94546  
**VIA Email: padillachristina8@gmail.com**

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Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE Washington,  
DC 20570-0001  
**VIA Efile**

September 22, 2020

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida lam