

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON BRANCH OFFICE**

* * * * *
HEALTHY MINDS, INC.
and
KIMBERLY R. DEFRESE-REESE, an Individual
* * * * *

Case 15-CA-231767

**BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD**

BEFORE: MICHAEL A. ROSAS
ADMINISTRATIVE LAW JUDGE

Respectfully Submitted by:

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**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Naricia Nelson, Counsel for the General Counsel in the above case, submits this post-hearing brief to the Honorable Michael Rosas, Administrative Law Judge.

I. PROCEDURAL HISTORY

On November 28, 2018, Kimberly Defrese-Reese (Reese) filed a charge in Case 15-CA-231767 alleging Healthy Minds, Inc. (Respondent) violated of Section 8(a)(1) of the National Labor Relations Act (the Act). GC-1(a).¹ On November 29, 2018, the charge was served on Respondent. GC-1(b).

On June 25, 2019, a Complaint and Notice of Hearing (CNOH) issued with a hearing scheduled for October 2, 2019. GC-1(c). The hearing was later rescheduled for November 5, 2020. GC-1(j). On July 9, 2019, Respondent filed an Answer admitting in paragraph 3 to receiving gross revenues in excess of \$250,000.00. GC-1(e). However, Respondent denied in its Answer that it purchased and received goods valued in excess of \$5,000 directly from points outside the State of Louisiana. GC-1(e).

On October 13, 2020, General Counsel issued a subpoena duces tecum B-1-1AMRY57 (subpoena) to Respondent. GC-2. The only document the Respondent provided in response to the subpoena is a letter dated July 30, 2019, addressed to the Louisiana Department of Health. GC-2b.

Administrative Law Judge Michael Rosas presided over the hearing on November 5, 2020 by videoconference using Zoom.gov.

¹ References to the Exhibits of the General Counsel and Respondent will be designated as "GC- #" and "R- #," respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr. at." An Arabic numeral(s) after "Tr. at" is a reference to a specific page of the transcript, and Arabic numerals following page citations reference specific lines of the page cited.

II. OVERVIEW OF THE FACTS

A. Respondent's Business Operations

Respondent operates a mental health counseling facility in Bastrop, Louisiana.

Respondent is owned and operated by Dr. Angela Nichols (Dr. Nichols), J. Garland Smith, and Jerry Brown. Tr. at 22, Tr. at 38, Tr. at 80. Dr. Nichols also owns and operates a related business, House of Hope, which is a therapeutic group home for boys with behavioral problems in Bastrop, Louisiana. Tr. at 25, 6. In addition to common ownership, Respondent and House of Hope share a property line. Tr. at 38, 10-11.

Respondent employs approximately forty employees including an office manager, a file clerk, a licensed practical nurse, a program manager, a clinical director, a corporate compliance officer, and mental health professionals. Tr. at 32, 15-23. Of those positions, the clinical director, the corporate compliance officer, and the program manager are salaried positions while the remaining employees are hourly. Tr. at 36-7, 12-13, 1-3.

On a monthly basis, Respondent billed between \$170,000.00 to \$200,000.00 to Medicaid for mental health counseling services provided to individuals in the community. Tr. at 36, 1-2. Additionally, Respondent also purchased alarm services from ADT Security Services at \$200.00 per month, DirecTV service at \$200.00 per month, and Suddenlink internet services at \$200.00 per month. Tr. at 33-4. Also, on a bi-monthly basis, Respondent's office manager purchased approximately \$300.00 in office supplies such as copy paper, binders, pens, pencils, and printer toner online from Office Depot. Tr. at 34-5.

B. Reese's Employment History

Reese began working as an office manager for Respondent on March 3, 2015. Tr. at 32, 13-14. As office manager, Reese's job duties included performing receptionist type work,

paying the monthly bills, billing Medicaid insurance, and completing payroll for employees at Respondent and House of Hope. Tr. at 33, 8-10. Reese was supervised by program manager Dr. Nichols. Tr. at 32-33, 24-5 and 1-3.

During her employment, Reese received performance evaluations from Dr. Nichols. Tr. at 55-6, 22-25. In Reese's 2016 performance evaluation, Dr. Nichols rated Reese as a four (4), which meant Reese exceeded expectations or consistently exceeded expectations in the following categories: productivity/performance, quality, job knowledge, interpersonal teamwork, and attendance/punctuality. GC-10. In 2017, Dr. Nichols also rated Reese's performance as exceeding expectations in productivity/performance, job knowledge, safety/housekeeping, and even a 4.5 in attendance/punctuality. Additionally, Reese received ratings of meets expectations in quality and interpersonal teamwork. GC-9. In Reese's March 3, 2018, performance evaluation, just a few months before Dr. Nichols discharged Reese, Dr. Nichols rated Reese's performance at exceeding expectations in the categories of quality, job knowledge, safety/housekeeping, and attendance/punctuality and that Reese met expectations in productivity/performance. The only category where Reese did not meet or exceed expectations was interpersonal teamwork. GC-11.

During her three plus years working for Respondent, Respondent only one discipline to Reese, which was a verbal warning issued over a year before her discharge. R-9a.

In or about June 2018, a House of Hope employee, Sarah Hollis (Hollis), asked Reese to process termination paperwork for House of Hope direct care workers LeMatthew Wilson (Wilson) and Tyanna Jones (Jones). Tr. at 39. Later that day, Hollis asked Reese if Dr. Nichols had the right to withhold paychecks from House of Hope employees until Dr. Nichols got reimbursed from Medicaid. Tr. at 40. Reese told Hollis she would find out. Tr. at 40.

Around the same time, Reese began contacting the Wage and Hour division of the Department of Labor (DOL) to question whether Respondent could change employees' pay dates. Tr. at 40. Reese learned from the DOL investigator that an employer can change a pay date at any time without advanced notice. Tr. at 40. Reese also contacted the Arkansas Department of Labor and learned that an employer could make a permanent change to a pay date. Tr. at 40. Thereafter, Reese called House of Hope employee Hollis about the conversation with DOL and the Arkansas Department of Labor. Tr. at 40.

Also in June 2018, Reese contacted DOL a second time to ask whether it was unlawful for House of Hope employees to be paid at the straight time rate when working over forty hours in a week. Tr. at 41, Tr. at 84-85. The DOL investigator instructed Reese to have the affected employees contact DOL directly. Tr. at 41. After speaking with DOL, Reese told House of Hope employees Hollis and Misty Stacy-Hollis (Stacy-Hollis) to have former House of Hope employees Wilson and Jones contact Reese. Tr. at 41.

Thereafter, Wilson contacted Reese. Tr. at 41. Reese gave Wilson contact information for the DOL investigator. Tr. at 41. During the same conversation, Wilson requested copies of his paystubs. Tr. at 41. In her position, employees would regularly ask Reese for copies of their paystubs to apply for government assistance, purchase a home, or file tax returns. Tr. at 43.

After speaking with Wilson, Reese went to Dr. Nichols office and told Dr. Nichols that Wilson requested copies of his paystubs. Tr. at 42. Dr. Nichols told Reese to mail the paystubs to Wilson, and Reese did so. Tr. at 42.

Around the same time, former House of Hope employee Jones contacted Reese. Tr. at 42. Reese gave Jones contact information for the DOL investigator. Tr. at 42. During the same conversation, Jones requested copies of her paystubs. Tr. at 42. After speaking with Jones,

Reese went to Dr. Nichols's office and told Dr. Nichols that Jones requested copies of Jones's paystubs. Tr. at 42. Dr. Nichols told Reese to print the paystubs for Jones, and Reese did so and delivered them to Jones. Tr. at 42.

On July 24, 2018, Reese received a text message on her personal cell phone from Dr. Nichols. Tr. at 44-45, GC-3, GC-4. After receiving the text message, Reese called Dr. Nichols and confirmed that Dr. Nichols wanted Reese to pick up the supplies listed in GC-4 for House of Hope. Tr. at 46.

On the morning of July 25, 2018, Reese went to Walmart to pick up the supplies for House of Hope. Tr. at 46. After picking up the supplies, Reese called to let Hollis know she was on her way to House of Hope to drop off the supplies. Tr. at 46. When Reese arrived at House of Hope that morning, House of Hope employee Stacy-Hollis and some of the boys from the group home met Reese in the driveway to help carry the items from Reese's vehicle. Tr. at 47. While on the front porch or in the driveway of House of Hope, Reese talked with Stacy-Hollis. Tr. at 47, Tr. at 81. During the conversation, Reese told Stacy-Hollis to "turn in her correct hours on her time card, because at the time, she had a kind of an hourly salary" status since House of Hope was short-staffed. Tr. at 48. Reese told Stacy-Hollis to "keep up with her timesheets, make sure to turn them in correctly, and watch her back." Tr. at 47, Tr. at 82. Reese told Stacy-Hollis to keep copies of her timesheets because Reese had done some research about filing a third-party complaint with the Wage and Hour Division of DOL. Tr. at 48. Reese also told Stacy-Hollis that Reese could possibly have a race discrimination case against Respondent because Reese was the only office employee who did not get a raise. Tr. at 49, Tr. at 82. However, Reese did not tell Stacy-Hollis the specifics of any employees' wages. Tr. at 82. After her conversation with Stacy-Hollis, Reese went to Respondent's office. Tr. 49.

C. Respondent's Meeting with Reese on July 25, 2018

That same morning on July 25, 2018, Dr. Nichols called Reese into the office of corporate compliance officer Tillman Watkins (Watkins). Tr. at 49. Clinical director Clarence Thomas and Dr. Nichols were present; however, Watkins was not. Tr. at 49. Dr. Nichols asked Reese if she was “gathering documents to make a claim against her with Wage and Hour.” Tr. at 50. Dr. Nichols also asked Reese if she was stealing her documents and if she was using timesheets to file a claim with the DOL. Tr. at 50. Each time, Reese answered no. Tr. at 50. Dr. Nichols asked Reese if she wanted Stacy-Hollis to come to the meeting. Tr. at 50. After Reese agreed, Dr. Nichols summoned Stacy-Hollis to the office. Tr. at 50, Tr. at 112. Dr. Nichols asked Stacy-Hollis about her conversation with Reese that morning. Tr. at 83. Stacy-Hollis told Dr. Nichols what Reese said about “everyone in the office getting a raise but her, and that [Reese] thought it was a race issue.” Tr. at 51, Tr. at 83, Tr. at 112. Stacy-Hollis testified that Reese told Stacy-Hollis about “making copies of all the staff’s timesheets” and instructed Stacy-Hollis to “make timesheets as well.” Tr. at 83. Reese emphatically denied making copies of employees’ timesheets and called Stacy-Hollis a liar. Tr. at 50-1, Tr. at 84. During the meeting, Reese admitted she told Stacy-Hollis about having a race discrimination case because Reese did not get a raise. Tr. at 51. Dr. Nichols said she knew Stacy-Hollis was telling the truth because Stacy-Hollis would not have known about the raises in the office. Tr. at 84.

D. Reese's Discharge on July 25, 2018

After questioning Reese, Dr. Nichols summarily fired Reese. Tr. at 51, Tr. at 84, Tr. at 112. Reese gathered her personal belongings and left the office. Tr. at 51.

After she was discharged, Reese contacted the Wage and Hour Division of DOL. Tr. at 53. Reese, Wilson, and Jones filed a collective complaint for unpaid overtime against

Respondent in the United States District Court in the Western District of Louisiana. Tr. at 54, GC-5. On August 3, 2020, United States District Judge Terry A. Doughty issued a ruling granting a Motion for Summary Judgment in part and requiring Respondent pay Reese, Wilson, and Jones unpaid wages. GC-6.

III. ARGUMENT AND ANALYSIS

A. Respondent Is Engaged in Commerce within Meaning of the Act

The Board has jurisdiction over Respondent because Respondent admitted it has receivable in excess of the minimum statutory amount of \$250,000.00 for health care institutions and evidence at trial established Respondent engaged in interstate commerce. Interstate commerce requirement was proven by the following: (1) Respondent receives between \$170,000.00 to \$200,000.00 per month in federal Medicaid payments, (2) Respondent purchases items from entities engaged in interstate commerce , and (3) Respondent failed to comply with subpoena duces tecum seeking evidence of commerce such that an inference against it is warranted.

First, bookkeeper and office manager Reese, who prepared the billing for Medicaid, testified the Respondent billed and collected between \$170,000.00 and \$200,000.00 per month to Medicaid. Because Medicaid funds are federal funds transferred across state lines, the General Counsel contends Respondent meets the statutory jurisdiction requirement under the Act. Tr. at 36, GC-1(e). *See J. M. Abraham, M.D., P.C.*, 242 NLRB 839 (1979) (Medicare reimbursements sufficient to establish jurisdiction). Although Respondent disputed the exact amounts of Medicaid reimbursement, the distinction is meaningless for purposes of establishing commerce since the Respondent does not dispute receiving or collecting Medicaid funds. Tr. at

68-70. Because Respondent received Medicaid, Respondent engaged in interstate commerce within the meaning of the Act.

Furthermore, Reese testified she paid the monthly bills for Respondent. Tr. at 33. Respondent utilized the following services: ADT Security Services (ADT), DirecTV services, and Suddenlink internet services. Each of these services cost approximately \$200.00 per month. Tr. at 33-4. *See, e.g., ADT Sec. Servs.*, 369 NLRB No. 31 (2020) (the Board found that ADT directly engaged in interstate commerce). On an annual basis, the three monthly services equal \$7,200.00 per year. Additionally, Reese testified that she purchased \$300.00 in office supplies online from Office Depot every other month for an annual total of \$1,800.00. Thus, at a minimum, the Respondent purchased and received goods and services in excess of \$9,000.00 from companies engaged in interstate commerce. *Marty Levitt*, 171 NLRB 739 (1968) (\$1500 in out-of-state activities “is more than the trifle or matter of a few dollars, which the courts have characterized as *de minimis*”); *Aurora City Lines, Inc.*, 130 NLRB 1137, 1138 (1961), *enfd.* 299 F.2d 229, 231 (C.A. 7, 1962), (court upheld the Board's assertion of legal jurisdiction on the finding that \$2,000 of indirect inflow was not *de minimis*). Because Respondent purchased goods and services from other employer’s engaged in interstate commerce in excess of \$5,000.00, Respondent engaged in interstate commerce within the meaning of the Act.

Jurisdiction may also be inferred from Respondent’s failure and refusal to supply subpoenaed documents. The General Counsel issued a trial subpoena duces tecum to Respondent on October 13, 2020. GC-2. As reflected in paragraphs 1 through 7 of the subpoena, the General Counsel requested documents to establish jurisdiction. However, the only document the Respondent provided in response to the subpoena is a letter dated July 30, 2019, addressed to the Louisiana Department of Health. GC-2(b). However implausible,

Respondent claims it did not retain any documents, except for certain tax documents, related to the business after allegedly selling its business to Seaside Healthcare on August 1, 2019. Tr. at 23, Tr. at 27. Although Respondent's co-owner Dr. Nichols claims she made efforts to secure the subpoenaed documents, Dr. Nichols admitted she did not document any requests to Seaside Healthcare to obtain the documents relevant to the subpoena. Tr. at 26. Additionally, Respondent's co-owner, Dr. Nichols, admitted she retained certain tax documents but did not provide those documents as requested in paragraphs 21 and 22 of the subpoena. Tr. at 27-8. Moreover, Respondent did not comply with the subpoenas instructions to explain the circumstances by which a document ceased to be in Respondent's possession, custody or control, identify the document and specify all persons known or believed to have the document or a copy thereof in their possession. GC-2, at 3.

Under *Bannon Mills*, the Board has the power issue three categories of sanctions to parties that fail to comply with Board subpoenas – (1) drawing an adverse inference against the non-complying party; (2) prohibiting the non-complying party from presenting or contesting evidence relevant to the unproduced evidence; and (3) permitting the use of secondary evidence when the noncomplying party withholds the best evidence. 146 NLRB 611, 633-34 (1964). Because the Respondent failed to respond to the subpoena or make a good faith effort to obtain the subpoenaed documents, the General Counsel urges a finding of an adverse inference that any documents that should have been provided in response to the subpoena would have supported a finding that Respondent is a statutory employer under the Act; therefore, Respondent engaged in interstate commerce within the meaning of the Act.

B. Respondent Interrogated Reese and Stacy-Hollis in Violation of Section 8(a)(1) of the Act

Based on the totality of the circumstances, on July 25, 2018, Respondent violated the Act by interrogating Reese and Stacy-Hollis about their protected concerted activities. *See Westwood Health Care Ctr.*, 330 NLRB 935 (2000) (Board uses a totality of the circumstances test and analyzes factors such as (1) “the nature of the information sought,” essentially asking whether the interrogator appeared to be seeking information on which to base taking action against employees; (2) the identity and rank of the questioner; (3) “the place and method of the interrogation” and whether it creates “an atmosphere of unnatural formality;” and (4) “the truthfulness” of the replies when determining whether the questioning of an employee constitutes an unlawful interrogation).

Here, on July 25, 2018, Dr. Nichols, the Respondent’s co-owner and highest-ranking officer, capable of issuing discipline to employees, questioned Reese and Stacy-Hollis about their protected concerted activities in a supervisor’s office and in the presence of clinical director Thomas. Dr. Nichols, asked Reese if she was “gathering documents to make a claim against her with Wage and Hour.” Tr. at 50. Dr. Nichols also asked Reese if she was stealing her documents and if she was using timesheets to file a claim with the DOL. Tr. at 50. Dr. Nichols went so far as to call Stacy-Hollis in the office to elicit information about Reese’s conversation with Stacy-Hollis. Tr. at 50, Tr. at 83, Tr. at 112. After the questioning, Respondent’s co-owner and program manager immediately discharged Reese. Tr. at 51, Tr. at 84, Tr. at 112. Because Respondent inspired fear in the questioning by summoning Stacy-Hollis to her office in order to intimidate Reese, created an atmosphere of unnatural formality by unnecessarily including clinical director Thomas in the meeting, and used the questions to obtain information to base

action against Reese, it is indisputable that Respondent violated the Act when Dr. Nichols unlawfully interrogated Reese and Stacy-Hollis about their protected concerted activities in violation of Section 8(a)(1) of the Act. *See Unique Pers. Consultants*, 364 NLRB No. 112 (2016) (affirming ALJ's finding that the primary purpose of the questioning was to determine whether or not the employee spoke to a co-worker about her protected activity and therefore the interview amounted to an unlawful interrogation). *See also Salon/Spa at Boro, Inc.*, 356 NLRB 444, 459 (2010) (questioning employees about their conversations with coworkers and talking negatively about management amounted to an unlawful interrogation).

C. Respondent Discharged Reese in Retaliation for Reese's Protected Concerted Activities

The record clearly demonstrates Reese engaged in protected concerted activities when she (1) provided copies of the former House of Hope employees with copies of their timesheets when requested to do so, (2) warned House of Hope employee Stacy-Hollis to keep track of her timesheets and watch her back, (3) told Stacy-Hollis that she could have a race discrimination complaint against Respondent. An employer violates Section 8(a)(1) of the Act when: (1) employees engage in protected concerted activities; (2) the employer knows of its employees' concerted activity; and (3) the employer then takes adverse action against the employees motivated at least in part by the protected activity. *Amelio's*, 301 NLRB 182 (1991).

1. Reese's Protected Concerted Activities

Reese engaged in concerted activity when she provided copies of paystubs to former House of Hope employees Wilson and Jones. Those former employees requested their own payroll documents during discussions with Reese about pursuing a wage and hour claim against Respondent, a claim that Reese joined. (Tr. 41-3, GC. Ex. 5). In concluding that Reese engaged

in concerted activity, it is irrelevant that the other individuals she spoke with either had not worked or did not work for Respondent because employees engage in concerted activity under Section 7 when they act in support of employees of employers other than their own. *Reliant Energy*, 357 NLRB 2098, 2100 & n.19 (2011); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942). *See Office Depot*, 330 NLRB 640, 642 (2000) (employer unlawfully discharged employee because she commented to an employee of a third party that he was working for a scab newspaper); *New York Party Shuttle, LLC*, 359 NLRB 1046 (2013) (tour guide's email and Facebook entries appealing to employees of different employers constituted protected concerted activity).

Reese also engaged in protected concerted activity when she warned House of Hope employee Stacy-Hollis to turn in her timesheets because Stacy-Hollis's exempt status was unclear, and then discussed both how to file a third-party claim for unpaid overtime and her own potential employment discrimination claim based on race. *See, e.g., Churchill's Rest.*, 276 NLRB 775, 777 (1985) (employee statement protesting employer's alleged discriminatory treatment against Hispanic employees regarding terms and conditions of employment was protected activity); *Vought Corp.*, 273 NLRB 1290, 1294 (1984) (employee statement was protected because it concerned employer's alleged racial discrimination), *enfd.*, 788 F.2d 1378 (8th Cir. 1986); *Honeywell, Inc.*, 250 NLRB 160, 160-61, 161 n.6 (1980) (employee graffiti accusing the employer of racially discriminatory promotional practices was protected because it concerned employer's alleged racial discrimination), *enfd. mem.*, 659 F.2d 1069 (3d Cir. 1981). *See also Every Woman's Place*, 282 NLRB 413, 413 (1986) (employee engaged in protected concerted activity when she called Wage and Hour Division of the Department of Labor).

2. Respondent's Knowledge of Reese's Protected Concerted Activities

It is undisputed that Respondent knew Reese provided copies of paystubs to former House of Hope employees Wilson and Jones. Reese's uncontroverted testimony is that she received permission from Dr. Nichols before sending Wilson and Jones copies of their paystubs. Tr. at 42, 1-3 and Tr. at 42, 16-18. Additionally, Respondent knew that Reese discussed potentially filing a third-party claim for unpaid overtime and a potential employment discrimination claim based on race with Stacy-Hollis. Reese's uncontroverted testimony is that she was called in for a meeting with Respondent's co-owner and program manager, Dr. Nichols, and clinical director Clarence Thomas on July 25, 2018. Tr. at 50, 4. During the meeting, Dr. Nichols asked Reese if she was "gathering documents to make a claim against her with Wage and Hour" and "stealing her documents." Tr. at 50, 6-10. Thereafter, Dr. Nichols called Stacy-Hollis to the office and questioned Stacy-Hollis about the conversation with Reese that morning. Stacy-Hollis testified that Reese told Stacy-Hollis that Reese could possibly have a race discrimination case against Respondent because Reese was the only office employee who did not get a raise. Tr. at 49, Tr. at 82, Tr. at 112.

3. Nexus Between Reese's Protected Concerted Activities and Reese's Discharge

The timing of Reese's discharge clearly establishes Respondent retaliated against Reese for engaging in protected concerted activities. After confronting Reese about gathering documents to make a claim with Wage and Hour and Reese's discussion with Stacy-Hollis about discrimination and overtime issues, Dr. Nichols challenged Reese about providing time records to other employees, and immediately thereafter, Dr. Nichols discharged Reese. (Tr. 49-51, Tr. 83-4, Tr. 112). The cause and effect prove Respondent discharged Reese in retaliation for her protected concerted activities.

Regarding the Respondent's proffered reasons at trial for Reese's discharge, they are without merit. Respondent's reasons for discharging Reese are unsubstantiated, made after the fact, pretextual, and do not prove the termination was lawful. *See, e.g., Atelier Condo & Cooper Square Realty*, 361 NLRB 966, 999 (2014) ("piling on" of unsubstantiated reasons for disciplinary action taken against an employee is evidence of unlawful motivation); *Approved Elec. Corp.*, 356 NLRB 238, 239 (2010) (finding employer gave shifting reasons for discharges when initial discharge letters claimed layoff was due to cut back in staff, but at hearing the employer claimed the discharges were for two unrelated nondiscriminatory reasons: excessive cell phone use and inadequate job performance).

In particular, at trial, Respondent claimed Reese was discharged for failing to follow instructions regarding clocking-in and clocking-out and poor job performance. Tr. 116, R-9a.

Regarding Reese's job performance, other than the verbal warning from June 19, 2017, there is no documentation that Reese was ever issued any other discipline during her employment. R-9a. Moreover, Reese's 2018 performance evaluation, completed by Dr. Nichols just months before Reese's discharge, does not mention any issues with Reese's job performance. In fact, in Reese's 2018 performance evaluation, Dr. Nichols rated Reese's job performance as meets expectations. GC-11, 1. Because Respondent never mentioned anything about poor job performance or failing to follow instructions regarding clocking-in and clocking-out during the July 25, 2018, meeting, the only evidence of any discipline issued to Reese is a verbal warning from July 19, 2017, more than a year before Reese's discharge, and Reese's 2018 performance evaluation completed by Dr. Nichols just months before Reese was discharged shows Reese met expectations in her job performance, the evidence indicates the Respondent is piling on unsubstantiated reasons in an attempt to justify the unlawful discharge of Reese, which

the Board has recognized as telltale evidence of pretext. *See Enjo Contracting Co.*, 340 NLRB 1340, 1351 (2003) (respondent's "shifting and piled on defenses" warranted an inference of animus and pretext).

Regarding clocking-in and clocking-out issue, there is no evidence Reese was ever disciplined for failing to follow instructions regarding clocking-in and clocking-out. Reese testified that after filing a complaint with DOL, DOL provided her with a copy of page 4 of General Counsel Exhibit 11. Tr. at 63. Reese testified that pages 1 through 3 of General Counsel Exhibit 11 is her unaltered 2018 performance evaluation that she received during her employment. Tr. at 63. Reese also testified that page 4 of General Counsel Exhibit 11 reflects an altered version of the month 12 comments section of the 2018 performance evaluation. Tr. at 58-60, GC-11, 3-4. From the notations in the month 12 comments section in the altered version, Respondent added an additional line to Reese's performance evaluation reflecting, "Ms. Reese is to understand that at no time she should work no more than 35 hours a week." Tr. at 56-60, GC-11, 4. Reese testified she was unaware of page 4 of General Counsel Exhibit 11 until she received copies of the documents from DOL after her discharge. Tr. at 63. Reese's testimony is undisputed because Dr. Nichols did not testify in this matter. Since it is obvious Respondent made changes to Reese's 2018 performance evaluation after the fact in order to support its claim that Reese was lawfully discharged for failing to follow instructions regarding clocking-in and clocking-out, the evidence further establishes the Respondent is piling on unsubstantiated reasons in an attempt to justify the unlawful discharge of Reese, which once again is further evidence of pretext.

Based on all these reasons, Respondent violated Section 8(a)(1) of the Act by discharging Reese in retaliation for her protected concerted activities.

IV. RESPONDENT'S WITNESSES LACKED CREDIBILITY

In cases largely concerning unlawful verbal statements, witness credibility during the hearing carries significant weight. Administrative Law Judges may properly base credibility determinations on witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Shen Auto. Dealership Grp.*, 321 NLRB 586, 589 (1996). Respondent presented multiple witnesses whose testimony was uncorroborated, biased, or implausible such that they should not be credited.

A. Tillman Watkins's Testimony is Contradicted by the Evidence

Respondent presented Watkins, corporate compliance officer, during its case in chief. Watkins provided testimony about the Respondent's disciplinary procedures. Watkins initially testified the Respondent had different levels of disciplinary action including a "talking to" and "any time there was any kind of disciplinary action, it was always met with...counseling and understanding, and let's ...let's converse about it" with the implication the Respondent did not document discipline. Tr. at 106-7. However, on cross-examination, Watkins testified the Respondent did in fact issue written reprimands and those written reprimands would be kept in the employee's employment file. Tr. at 107-8. Because the General Counsel requested the Respondent provide copies of all discipline issued to Reese in the subpoena, and the only document the Respondent provided, albeit not in response to the subpoena, was a July 19, 2017, verbal warning issued to Reese over a year before her discharge, Watkins's testimony about the Respondent's disciplinary procedures generally being verbal is contradicted by the evidence presented by Respondent at hearing. R-9a. Therefore, the General Counsel urges Watkins's testimony is contradicted by the evidence and should be discredited.

B. Nicole Nichols's Testimony is Uncorroborated and Biased

Respondent also presented Nicole Nichols, assistant office manager, during its case in chief to show that Reese was reprimanded for failing to follow instructions regarding clocking-in and clocking-out. Without any foundation, Nicole Nichols testified that Reese failed to follow instructions regarding clocking-in and clocking-out and was reprimanded for failing to follow the Respondent's procedures for clocking-in and clocking-out. Tr. at 116-7. However, on cross-examination, Nicole Nichols admitted she did not have authority to issue discipline and was merely Reese's co-worker. Tr. at 117. Additionally, as discussed *supra*, the General Counsel issued a subpoena to Respondent requesting documents reflecting any discipline issued to Reese, and the only document the Respondent produced at hearing was a July 19, 2017, verbal warning issued to Reese that was completely unrelated to clocking-in or clocking-out. R-9a. Because Watkins testified the Respondent does maintain written disciplinary records, the Respondent only produced one disciplinary document, a verbal warning from July 19, 2017, which was over a year before Reese was discharged and completely unrelated to clocking-in and clocking-out, and the Respondent failed to comply with the subpoena, Nicole Nichols' testimony is uncorroborated and self-serving and should be discredited.

V. CONCLUSION

The evidence at hearing demonstrated that Respondent interrogated and discharged Reese on July 25, 2018. Accordingly, the evidence supports and Counsel for the General Counsel requests a finding that Respondent violated Section 8(a)(1) of the Act. Additionally, General Counsel seeks an order requiring Respondent to: (1) cease and desist from engaging in such conduct; (2) make Reese whole for her loss of employment with Respondent; (3) expunge the discharge notice from Reese's employment and disciplinary files; (4) offer immediate and full

reinstatement to Reese to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed; and (5) post an appropriate notice to employees in all entities in which Dr. Nichols has an ownership interest.

Dated: December 2, 2020

Respectfully submitted,

/s/ Nariea K. Nelson

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, a copy of the Post-Hearing Brief of Counsel for General Counsel to the Administrative Law Judge was electronically filed via NLRB E-Filing system with the Division of Judges.

Honorable Michael A. Rosas
Administrative Law Judge
Division of Judges
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

I further certify that on December 2, 2020, a copy of the Post-Hearing Brief of Counsel for the General Counsel to the Administrative Law Judge was served on the following:

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