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I. SUMMARY

The National Labor Relations Board (“Board”) has neither the jurisdiction nor the factual grounds to pursue this case. The Bonanza Ventures, LLC Montgomery, Texas Sport Clips (“Montgomery Sport Clips” or “Respondent”) is a small, local business with no more than de minimis interactions with interstate commerce and less than $500,000.00 in annual revenue. The Board lacks jurisdiction over the Montgomery Sport Clips.

Further, the charge in this case, that

On January 27, 2021, the Charging Party engaged in concerted activities with other employees for the purpose of mutual aid and protection by raising concerns about employment conditions including employee breaks and discipline, a matter of group concern, during a scheduled shift

and that such concerted action led to Megan Weisinger’s (“Weisinger” or “Charging Party”) termination on January 28, 2021 is simply unsupported by the evidence before this tribunal. Charge, ¶ 6(a). The Charging Party was terminated on January 28, 2021 for violations of company policy, none of which involved any conversations with other employees or any alleged matters of group concern. Weisinger was terminated from the Montgomery Sport Clips for cause.

This brief will first lay out the facts in a statement of the case, then address jurisdiction, the charge, and the proposed remedies. This brief will not address the handbook charge amendment offered by the General Counsel (“GC”) at the January 24-27, 2022 hearing before Judge Muhl (“Hearing”) because that amendment was disallowed at that time. Should that amendment be allowed at a later date, Respondent will request further time and space for briefing that entirely separate issue. This brief will show that the evidence, the record and the Charge do not support jurisdiction in this matter and that the allegations made by the Charging Party are wholly unsupported by the evidence and testimony before this tribunal.
II. STATEMENT OF THE CASE

A. Bonanza Ventures, LLC


The Montgomery Sport Clips made $390,810.80 income from January 1, 2021 through December 31, 2021. GC Ex. 10. The Montgomery Sport Clips purchases approximately $4,000.00 to $5,000.00 in products and other goods from Direct Beauty Express under the name CosmoProf. Tr. 185:15-185:18; 186:18-186:22; 233:8-233:13; 325:14-326:2. Direct Beauty Express is headquartered in Denton, Texas. Tr. 270:21-270:25. The products and other goods purchased by the Montgomery Sport Clips through Direct Beauty Express ship from Denton, Texas to the store in Montgomery, Texas. Tr. 271:10-272:1. The Montgomery Sport Clips additionally purchases other materials from local retailers in Montgomery, Texas, including Sam’s Club, Target, Costco, Best Buy, Office Depot, and Hobby Lobby, among others. Tr. 329:15-330:21. There is no information in the record and the Judge has taken judicial notice of no facts which establishes a connection between any of these retailers and interstate commerce.

B. Megan Weisinger

Megan Weisinger was employed as a stylist at the Montgomery Sport Clips from November
2017 through her termination on January 28, 2021. Tr. 23:23-23:24; 24:13-24:21; 25:9-25:13; Jt. Ex. 5. Weisinger was an assistant manager for a period of time during her employment at the Montgomery Sport Clips but was given a “corrective” as part of a disciplinary action taken on May 26, 2020 for “speaking inappropriately to other team members in front of clients” and demoted. Tr. 25:14-25:24; 383:232-384:11; Tr. Ex. 50, p. 31. Weisinger additionally had been counseled, part of the discipline process at the Montgomery Sport Clips, for failing to “follow CMS protocol for Covid 19 with her client & spoke inappropriately to another team member on the floor.” R. Ex. 50, p. 30; Tr. 522:25-524:6.

According to Renee Raney (“Raney”), an assistant manager, working with Weisinger was “eventful.” Tr. 235:7-235:9; While Raney did not have any problems with Megan, other coworkers felt differently. Id. According to Katherine “Chrysta” Thomas (“Thomas”):

[O]ver the course of her employment at that store we had many run-ins regarding her behavior with other team members, and occasionally conversations on the floor that were not appropriate with clients. So a lot of times, people wouldn’t want to come and help us at our store because they were felt like Megan would go out of her way to make it an uncomfortable situation for them. She also -- we had many, many conversations about her raising her voice and yelling and cussing at people over the course of that time.

[...]

[T]here were times when she would try to tell people what to do, or she would -- there were many times that she would walk out and leave someone there by themselves because she had to go for whatever reason without alerting anyone, and we don’t generally like to leave somebody in a store by themselves. She would just try to run all over everybody at the store. Tr. 362:8-363:2.

Weisinger affirmed that her discipline and demotion in May 2020 was related to “a little incident” where she was telling another stylist how to cut hair and that “Chrysta Thomas came and told me that I needed to learn how to speak to the other girls.” Tr. 25:25-26:10.

Thomas was not the only one to testify to problems working with Weisinger. Erin Bryce
(“Bryce”), another stylist, noted:

I do remember Megan being unprofessional before at various times. [...] I consider specific topics on the floor to be unprofessional. She used a very loud, extreme, you know, tone of voice. She could definitely talk across the room, you know, speaking to other people in a very overly dramatic way. I believe that’s unprofessional.


Christy Nino (“Nino”), a stylist who no longer works for the Montgomery Sport Clips, Bonanza, or any of the Lovins’ entities, commented:

She was very loud. She would talk a lot about her personal life and bring up a lot of drama. I mean that’s basically it. She wouldn’t really follow the rules on like the masks going on while the pandemic was going on. Yeah, she -- I mean she was unprofessional a lot of the times. Tr. 468:11-468:16.

Occasional or frequent unprofessional behavior or a loud voice are not themselves necessarily fireable offenses. However, as will be explored in detail below, Weisinger crossed a line on January 27 in a manner completely consistent with the behavior and mannerisms described by her former coworkers. That behavior and those mannerisms became a problem where they interfered with the business being conducted at the Montgomery Sport Clips and violated company policy.

C. Christy Nino

Christy Nino is not a party to this action, but she and her status as a new mother at the time of Weisinger’s termination are central to the alleged concerted action in the Charge. Nino left Bonanza, the Montgomery Sport Clips, and the Lovins’ employ entirely in mid-2021. Tr. 467:19-467:22. Nino was an assistant manager at the Montgomery Sport Clips in January 2021. Tr. 467:7-467:11. Nino had had a child in late 2020 and had only recently returned from maternity leave six or eight weeks postpartum. Tr. 468:23-469:4.

Nino chose to breast-feed her child and was allowed time, space, and breaks sufficient to pump her breasts, consistent with Texas and Federal law. Tr. 469:5-469:23; TEX. HEALTH & SAFETY...
CODE §165.002 (“A mother is entitled to breast-feed her baby or express breast milk in any location in which the mother’s presence is otherwise authorized.”); 29 U.S.C. §207(r) (mother entitled to as many breaks as needed and a place to express milk); 42 U.S.C. §§1786(a), 1790. The layout of the Montgomery Sport Clips meant that Nino would pump in the breakroom:

[O]ur store was basically -- it was the salon in the front and then the shampoo bowls in the middle. Then after that is the restroom, and then in the back is the breakroom. In the breakroom, when you open the door, you can kind of see most of it. I would sit on the side where you couldn’t, so closer to like the sink more toward the right side or the left side if you’re facing the store. So you wouldn’t be able to see me if you were to open the door. You would have to like walk in physically into the breakroom and turn to your left.

[..]
And I would cover up as much as possible. We didn’t have like a manager room then. I know most Sport Clips have like a manager room, but this Sport Clips doesn’t, or the store doesn’t. So I would do it in the breakroom in the back. I didn’t want to do it in like my car because a lot of time it would be hot and sweaty. Tr. 471:4-471:22.

Nino was not required to pump in her car - she was legally entitled to the breaks she needed and the space she needed to express milk. 29 U.S.C. §207(r).

Weisinger complained to management regarding the frequency and duration of the breaks taken by Nino. As Store Manager Stacy Hall testified:

RESPONDENT’S COUNSEL: And were there complaints lodged by Megan Weisinger about Christy Nino pumping her breasts?
STACY HALL: Not specifically about her pumping her breasts, but just about her number of breaks and when she would take the breaks, because we would be busy, and Christy would need to stop working, and would need to go pump, and it would -- it came across to me that it was more of an inconvenience for -- to Megan, that Christy was taking a break at the time she was taking a break, but she needed to pump. That is how it came across to me. Tr. 524:24-525:8.

Nino was aware of Weisinger’s complaints:

RESPONDENT’S COUNSEL: So, Ms. Nino, did Megan Weisinger ever complain to you about you pumping your breasts at work?
CHRISTY NINO: She did. She would sometimes say that I was doing it too often or to cover up, but I would do it in the back where people couldn’t really like see me.
I mean I would try my best to cover up as much as possible. Tr. 470:19-470:25.

RESPONDENT’S COUNSEL: But Ms. Weisinger complained that she wanted you to cover up?
CHRISTY NINO: Yes. She basically one time -- not all the time, but one time she would, you know, like she would walk back there, and she was just like, oh, okay. And I guess it kind of took her by surprise, so I covered up. And she was just like, okay, cool. You know, so when I covered up, she was like, well, all right. So I was like, okay, sorry, you know. Like I was trying to be more discreet, but you know. And I would let them know ahead of time, you know, like hey, I’m going to go pump in the back. And the same with Maighann Carroll. She would also go back there and be like, oh, okay, sorry. And then they would like just leave me alone. Tr. 471:23-472:11.

RESPONDENT’S COUNSEL: Okay. Your manager, Stacy Hall, had come and discussed with you the concerns of Megan Weisinger about you taking excessive breaks to express breast milk?
CHRISTY NINO: Yes, she did tell me about it. She basically said that, you know, she complained about me taking too many breaks, but she didn’t take action. She just told that she complained about it, and she said that I have the right to pump my breasts. So she didn’t --
Q Ms. Hall told you that?
A Right. And she didn’t like tell me I couldn’t. Tr. 473:9-473:18.

Weisinger also complained to Erin Bryce and the room at large about Christy Nino’s breaks:

RESPONDENT’S COUNSEL: So, Ms. Bryce, did you hear Megan Weisinger complain about Christy Nino during the December 2020 and January 2021 timeframe?
ERIN BRYCE: Yes.
Q: And what were the complaints that Megan Weisinger was expressing about Christy Nino?
A: Christy Nino was a new mom, and she was breast pumping, so she often needed to take breaks off the floor to do so, to go back and pump. She would constantly complain that she was back there way too much, that she wasn’t pumping, that she was taking advantage of the time that she needed, which I do not believe, in fact, that she was not taking advantage. Tr. 453:22-454:9

Q: So these conversations that you had or you heard Ms. Weisinger expressing these concerns, where did these occur?
A: They would often occur in the back room or if Christy was in the back room, they would occur in the front of the building. You know, it just depended on where Christy was at the time or if she was there. Tr. 454:21-455:2.
Q: And she is telling these to you? Is she expressing these complaints to you?
A: Yes, and openly, too.
Q: And when she was expressing them openly, who was she speaking with when you
overheard her expressing these complaints openly?
A: Anyone in the room that was working at the time. You know, often these were
happening before we opened while we were getting the store ready to be open. You
know, while we’re doing sink towels, while we’re cleaning up our cones and guards
or anything. You know, she wouldn’t do it in front of Christy Nino, but it would
definitely happen very openly.
Q: So these complaints that Ms. Weisinger was expressing, were they complaints that
Ms. Weisinger was complaining that you all weren’t getting adequate breaks?
A: There was a few times where she would want a break and couldn’t have it, but
they weren’t -- she was not complaining often times about not getting adequate
breaks. Tr. 455:12-456:7.

JUDGE MUHL: And the complaint was that Ms. Nino was taking too many breaks?
A: Too many, taking too long, she wasn’t working enough. Tr. 463:23-464:1.

Weisinger also complained about Nino taking her legally protected breaks to express milk
with Renee Raney, as Raney testified:

GENERAL COUNSEL: Were employees upset that they couldn’t take their breaks
even when allowed?
A: Yes.
Q: Why is that?
A: At the time, it was due to one of the other employees. She was nursing her
newborn, and she would always say that -- when somebody needed to take a break,
she would say, oh, I got to go pump. Then she’d go to the back, and she would pump,
and nobody could give her her privacy. Nobody really wanted to be in the back on a
break while she was pumping her breast milk. Tr. 237:17-238:2.

RESPONDENT’S COUNSEL: Okay. Now the issue that Ms. Weisinger was
complaining to you about on the 26th is that the issue of Christy Nino being in the
breakroom doing the breast milk pumping making her, you, or someone apparently
feel uncomfortable. Is that accurate?
A: Yes.
Q: Okay. The issue wasn’t about you or anyone else being denied breaks. The issue
was Ms. Nino taking all these breaks in which she would go into the breakroom and
take the steps necessary for a woman to express breast milk, right?
A: No. The issue that was brought up was that whenever we needed to take a break,
if there was only two of us there working, that we weren’t able to because she would
say that she needed to pump milk, her breast milk. Tr. 251:18-252:8.
In the General Counsel’s redirect, Raney testified:

GENERAL COUNSEL: In January 2021, when you and Megan were discussing the break issue, was the concern that you couldn't take a break because Christy was in the back expressing milk?
RENEE RANEY: We could take a break, but to give her privacy, once she was expressing her milk into -- you know, breast pumping, we didn't go back in the breakroom, for privacy. Tr. 255:21-256:2.

D. Thursday, January 21, 2021

There are, of course, conflicting accounts regarding the lead-up to the January 21, 2021 confrontation between Hall and Weisinger from the three witnesses who were there in person or by telephone: Hall, Weisinger, and Thomas. According to Weisinger:

MEGAN WEISINGER: I got to work, but between the time I worked last, Stacy and I didn’t work together, so I got there in the morning, and I wanted to apologize to Stacy for being a little upset because I was really hungry, and I was tired, and the fact that I wasn’t able to sit down and take a break, that I had to take the next haircut, so I started off by apologizing. You know, now that I’m pregnant, I’m going to need, you know, make sure that I get some, you know, little breaks in. I can’t keep on working like I used to before, you know, when I wasn’t pregnant. And she got upset and she said, “You will take a break if and when I tell you that you can.” And I told her no, that I was going to need to take a break when I need to if I feel sick or if I feel lightheaded. If I’m hungry, my stomach hurts. If I feel, you know, like I’m about to throw up, I’ll clock out and that’s when I will take a break during my pregnancy. GENERAL COUNSEL: And in response to these comments that you told Ms. Hall about when you needed a break and why, her response -- what was her response again?
A She was upset, and she didn’t like it. So I told her, I said, “Well, then I’m going to call Chrysta Thomas because she’s the area manager.” She’s over Stacy Hall.
Q: From what you observed, what was Ms. Hall’s demeanor?
A: She was upset. She was argumentative. I knew that morning when I got there because one of the other girls called in and said that she wasn’t able to work that day, so it was going to be a long day for both of us. I was worried I wouldn’t get breaks because there was only going to be two of us, and I was super sick. So I wanted to make sure that she knew I needed breaks. Tr. 41:17-42:24.

The apology that Weisinger allegedly wanted to make was related to an incident where a customer brought food for the stylists. Tr. 40:4-41:4. Weisinger claims this incident occurred on
January 18, 2021, though Hall testified that it was earlier, possibly back in December 2020. Tr. 40:4-40:7; 554:18-554:24. Hall recalled the inciting incident on January 21, 2021 differently from Weisinger:

RESPONDENT’S COUNSEL: If you would, please explain for the Court this incident that happened about a week later at the store.
STACEY HALL: What -- what happened was Christy had called out of work, and so, Megan and I were going to be working by ourselves, so we were going to be short-staffed on that day. She seemed to be agitated about something already whenever I got to work, and then she had asked me about if I had talked to Christy about the breaks, and I told her I wouldn’t discuss it with her. I didn’t feel like I needed to just follow up with her on an issue with Christy, that I had talked to her about, and with Chrysta where she needed to talk, and then she had said that she was going to be able to take a break. Then I told her that she would need to take a break when I told her that day, and when she -- when I said that, she got mad. She said, “No.” She started screaming and yelling at me. She had makeup in her hand that she was putting on. She threw it on the -- like on the station, and she said she was not going to do that, and she -- she started to say all of these things. I can’t think of everything exactly of that day. I would have to go back to my statement that I made at the time, and she tried calling Chrysta, and -- and then I was so frustrated, I -- I called -- I called Chrysta at the same time, and then Chrysta picked up the phone whenever I called, and she could hear Megan going on and so upset about everything, and at that point, I was asking Chrysta to come in, and have her go home, because I would have rather be working at the salon by myself than having to listen someone scream and yell at me for something that I really didn’t understand why -- what was going on. I was not wanting to deal with it, so I asked her to (inaudible). Tr. 526:22-528:6.

At this point, both Hall and Weisinger agree that Chrysta Thomas was brought into the conversation via phone. Thomas recalls:

RESPONDENT’S COUNSEL: So let’s go talk about January 21st, 2021.
CHRYSTA THOMAS: Okay.
Q: And it began by you receiving a phone conversation that morning from Ms. Thomas.
A: Ms. Hall.
Q: I mean Ms. Hall. I’m sorry. Ms. Hall.
A: Yes.
Q: Did Ms. Weisinger also attempt to call you that morning?
A: Well, Ms. Hall called me and then put me on speaker, so I could hear both of them. Then eventually I asked just to speak to Megan. Tr. 366:23-367:9.
Q: What was the attitude you heard from Ms. Weisinger when you got on that phone call?
A: She was very angry, very upset, yelling, screaming, obviously very bothered and not professional.
Q: And when she was on the phone with you, describe the way she was talking to you to the court.
A: She was yelling and screaming at me.
Q: What was she yelling and screaming about?
A: She was upset with Ms. Hall because she felt like Ms. Hall was not hearing her conversation. They were not -- they were both upset with each other regarding an incident from previous about breaks. So she was just very upset because she didn’t feel like she was being heard the right way.
Q: What was the issue about breaks that Ms. Weisinger was complaining about?
A: That another team member, Ms. Nino, was taking too many breaks and that she was not getting enough breaks. Tr. 367:20-368:12.

Q: And when she was speaking to you, did she lodge those same complaints? Ms. Weisinger lodged those same complaints in your call conversation on the 21st?
A: About Ms. Nino? Her main conversations were regarding her and Stacy’s interaction. She didn’t like the way that Stacy talked to her. Tr. 403:7-403:12.

Both Weisinger and Hall gave a written statement of the events of January 21, 2021 at that time. Jt. Ex. 4; R. Ex. 10. On January 25, 2021, Hall wrote that:

On Thursday, I came into work at 8:45 am and Megan was here opening up the salon. When I came in, I said hi and I told her another stylist called out for the day and only she and I would be working. I also told her that Chrysta would be coming in to train new hires @ [sic] 10 am. Megan started talking to me about an incident that occurred last week with another stylist. I did not say anything. She seemed upset and as we were talking about taking breaks, I said, “you’ll need to take a break when I tell you to take one” This to make sure she would get one. She immediately screamed “no! I’m not doing that” and then started screaming and yelling about other things. She then threw her makeup on the station and said “I’m going home.” Then she said “I’m going to call Chrysta.” I did not say anything else and I called Chrysta and told her Megan was threatening to leave but with her attitude I wanted her to leave. I then put Chrysta on speaker phone to talk to Megan and I continued to open the salon. Megan continued to yell and scream at Chrysta and wouldn’t [sic] calm down. She made statements like how she was putting her baby in danger and how she hates her job. How she wasn’t [sic] going to do what would be asked of her, etc. She brought up an incident that happened last week and I told her I did talk to the other stylist but as the manager, I don’t follow up with her when I talk to the other girls. I didn’t say anything else to her and Chrysta eventually told Megan to go home. R. Ex. 10.
On January 26, 2021, Weisinger wrote:

I left my shift because Chryst [sic] told me I could go for a little bit to calm down. I did so and let her know I was coming back. Chrysta told me not to come back that she had my shift covered so therefore I wasn’t allowed to come back. With Stacy we get along just fine except that day I simply apologized to her for something and she clearly didn’t like it so she raised her voice at me so yes I got upset. Jt. Ex. 4.

In a later statement to the Texas Workforce Commission, Weisinger wrote:

THEY SUSPENDED ME WHY [sic] I WAS PREGNANT ASKING IF I WAS MENTALLY STABLE TO WORK I TOLD THEM I WAS STEPPING OUT TO THROW UP AND SHE TOLD ME NOT TO COME BACK AND THEN SHE TOLD ME NOT TO COME BACK TO WORK AND THAT WELL [sic] TALK ABOUT IT I ASKED IF I CAN TAKE MY PAY VACTION [sic] AND SHE TOLD ME NO I CAME BACK TO WORK WORKED 2 DAYS AFTER AND THEN MY MANAGER CAME BACK AND SAID CLMT [sic] WERE COMPLAIN [sic] THAT I WAS PRGNAT [sic] SO SHE FIRED ME[.] R. Ex. 9.

From all of these statements and testimony, Thomas’ testimony is likely the most reliable because she was not part of the argument that led to the telephone call. The near present-sense impressions of both Hall and Weisinger are somewhat useful, though only Hall gave a full statement regarding the argument in her statement. It seems reasonable that there may have been an apology, the details and impetus for which is unclear. There was a disagreement regarding breaks for that day, January 21, 2021, when they were short staffed. There was a disagreement regarding whether Hall should tell Weisinger about the details of her conversation with Nino regarding Nino’s breaks. Both Hall and Weisinger lost their tempers and Thomas was called to mediate.

Thomas was called and spoke to both Hall and Weisinger together and then Weisinger alone. When asked to describe the conversation, Thomas testified:

Well, she [Weisinger] was very upset with Ms. Hall regarding their conversation, you know, about their disagreement about breaks, and she continued to tell me that she was so upset that she needed to leave, she couldn’t work right then because she was pregnant, and her unborn child was at risk, and she couldn’t stay. And I said, “Well,
there’s nobody else there.” I was actually on my way to the store because I had to train three new team members that day, and I said, you know, that we don’t like to leave a person by themselves, you know, and can you stay, and she said she didn’t feel that she could do that. She felt very -- she was scared for her unborn child, and I said if you say those words to me, then I cannot ask you to stay, so I told her to go ahead and go and that I would contact her later in the day or after my training.

... Okay. So she continued to say those things, and when you say those things, obviously I’m not going to allow you to continue to work if you feel like you’re putting your child at risk because that’s not how we live our values. So, you know, I said if you need to go, then go and that I would contact her later to discuss it because I had three people coming in for training, and I didn’t have time to get into it before I trained the team members at the store. I needed to get on the phone and try to call someone else to cover her shift.

... RESPONDENT’S COUNSEL: And so did she go?
CHRISTA THOMAS: She did go, yes. She was gone by the time I got there.
Tr. 369:6-370:18

Weisinger testified:

GENERAL COUNSEL: And what did Ms. Thomas tell you?
MEGAN WEISINGER: She told -- well, I told her, you know, the situation and that I was trying to apologize, and Stacy yelled at me and, you know, that upset me, of course. So then she asked me -- Chrysta Thomas asked me if my pregnancy was making me mentally unstable. With that I felt very insulted because I wasn’t. Instead of trying to resolve the situation, it was like she was attacking me.
Q: Was that the end of the conversation with Ms. Thomas?
A: No, ma’am. Then I told her that with all this stress and, you know, them yelling at me and insulting me, it made me feel really even more sick and nauseous due also my pregnancy. So I told her it was like I can’t work like this right now. I need to leave for a little bit, and I’ll be back, but I feel like super sick, and I need to go. And she told me I could. Tr. 43:24-44:16.

After Weisinger left, Thomas and Weisinger spoke and texted several more times that day.

As Thomas recalled:

RESPONDENT’S COUNSEL: And so after she left and you had this conversation and you told her just to go if she was putting her newborn child or unborn child at risk. Were there later conversations you had with her that day?
CHRISTA THOMAS: Yes. I had texted her and told her not to come in, and I would contact her later. And then she had texted me, if I recall, that same day she texted me and said that her father was in the hospital, she was going to go be with her family,
and she didn’t -- she was extremely upset and was just calming down. I think that
was after I had ended my training. It would be in the text messages what she said. So
because she was going to be with her family, I just told her that. Tr. 370:19-371:6.

The text messages between Thomas and Weisinger were admitted as Respondent’s Exhibit 20, with
the relevant texts beginning on page 33 of the exhibit. R. Ex. 20. Weisinger was not suspended,
though she disagrees. Thomas testified:

  RESPONDENT’S COUNSEL: Now did you suspend her?
  CHRYSTA THOMAS: No,
  Q: When was she scheduled to come back to work for the next time?
  A: I mean I’d have to reference the schedule, but she normally didn’t work on
  Sundays, so she would have been off on Sunday. I think that she had requested
  Saturday off, but I can’t confirm that. I’d have to reference the schedule. So it really
  was going to be like an additional day because I told her that we would talk to her on

Whereas Weisinger testified:

  GENERAL COUNSEL: Did anything else happen that day after you left work?
  MEGAN WEISINGER: Later on that day, Chrysta Thomas did give me a phone call.
  Q: And what did she tell you?
  A: She told me that I was suspended and that -- I was suspended and that I needed to
  think about if I wanted to work at Sport Clips, if Sport Clips was the right place for
  me while I was pregnant, which I told her yes, I do, and it is -- I have a lot of clientele
  there. Then I was suspended for five days. Tr. 46:8-46:18.

There is no documentary support for the assertion that Thomas suspended Weisinger for five
days. Neither the Incident Report signed on January 25, 2021 nor the Corrective Report signed by
the managers and Weisinger on January 26, 2021 list a suspension as one of the disciplinary actions
taken. Jt. Ex. 3; 4.

There is, however, evidence that Weisinger abandoned her shift. Thomas testified that she
arrived at the Montgomery Sport Clips before 9:00 a.m. on January 21, 2021 and that Weisinger had
already left at that time. Tr. 372:8; 369:22-396:34. The first text message exchange between
Thomas and Weisinger on January 21, 2021 took place at 9:37 a.m. R. Ex. 20, p. 33. Weisinger
testified as follows about why she left her shift in her direct examination:

GENERAL COUNSEL: And did you -- why did you leave that shift?
MEGAN WEISINGER: Because I wasn’t feeling good, and all the stress that they were putting on me just when I was trying to apologize and ask for breaks.
Q: But didn’t you also leave that shift because Ms. Thomas asked you to leave the premises?
A: Whenever I came back -- oh, yes, ma’am. I thought you were talking about when I left the first time.
Q: No, when you came back. I think when you left to take your break you received a text message from Ms. Thomas, and during that text message she --
A: She told me not to come back.
Q: Okay. So that’s why you gathered your belongings and left for the day?
A: Yes, ma’am. Tr. 47:2-47:16.

Based upon this testimony and the timing of the text messages, it is clear that Weisinger abandoned her shift first and was then told by Thomas not to return that day.

E. Monday, January 25, 2021

On Monday, January 25, 2021, Thomas and Barbara Rodriguez (“Rodriguez”), the other Area Manager, attempted to call Weisinger to discuss the events of January 21, but Weisinger initially texted that she was too busy. Jt. Ex. 3; R. Ex. 20, pp. 36-37. When they did manage to get on the phone with Weisinger, the conversation was cut short by Weisinger’s mother taking the phone to yell at the managers. Jt. Ex. 3. As Thomas testified:

RESPONDENT’S COUNSEL: And what were you planning to talk to her about on the following Monday?
CHRYSTA THOMAS: Well, I wanted to investigate and make sure we knew what had happened between the two of them and figure out, you know, how we needed to deal with the fact that we can’t have team members screaming and yelling at each other, and we can’t have people saying that they’re, you know -- if the job is too stressful for them, then that’s the conversation we needed to have. Tr. 373:5-373:13.

Thomas described the disciplinary policy and procedure at the Montgomery Sport Clips:

So generally we coach. You know, we train people, and then if their behavior doesn’t meet standards, we coach. And then we would redirect once or twice, depending on the severity of whatever it was that they did wrong, then it could lead to termination.
GENERAL COUNSEL: And discipline is progressive in various stages of determination, correct?

CHRISTA THOMAS: Correct, unless it’s gross misconduct, which means that that’s a serious violation and could lead to termination immediately.

Q: Can you describe those levels of discipline specifically?
A: I thought I just did that. So, you’ve got coaching, right? So, I would coach. And then that would lead into the corrective or counseling/warnings. Those could be written warnings or verbal warnings. And then it would be then to corrective warnings, and then that would lead to termination. Again, unless it was gross misconduct, it can go straight to termination because it’s a flagrant violation.

Tr. 405:4-405:25.

Hall, the Store Manager, later testified to her understanding of the disciplinary process:

GENERAL COUNSEL: Ms. Hall, can you describe the discipline policy at Sports Clips?
STACY HALL: Yes, ma'am. Typically when an incident occurs, you would get the verbal -- whether a verbal sometimes would be a written, but you would have a conversation about the incident, and that incident should be documented. That didn’t always -- I will be honest, that didn’t always happen, but a verbal -- a verbal and then it move on from there to counseling statements, and then corrective statements if behavior wasn’t changed.

Q: So this is a progressive and goes through many steps up to termination; correct?
A: Yes.

Q: And how many levels of progressive -- of progressive discipline are there?
A: My understanding of our policy is that there is no less than two but there can be up to three. It just depends on the nature of the behavior. It does say that a verbal isn’t necessarily necessary as the first step. You can get a counseling statement and then a corrective statement, and a corrective statement can result in termination, so there could be up to three steps, and then the termination. Tr. 550:17-551:14.

The employee handbook that was in place at the time of Weisinger’s termination makes it clear that gross misconduct “will be subject to immediate disciplinary action up to and potentially including termination of employment.” GC Ex. 15.

On January 25, 2021, Rodriguez and Thomas attempted to discuss the January 21, 2021 incident with Weisinger. The conversation was unproductive and Rodriguez filled out an Incident Report regarding both the January 21 incident and the January 25 phone call (“Incident Report”). Jt. Ex. 3; Tr. 489:17-490:6. As noted on the Incident Report, Weisinger “was on a corrective
already.” Jt. Ex. 3; R. Ex. 50, p. 31; Tr. 491:19-492:17. The decision was then made, by Thomas, Rodriguez, and Hall, to issue a “final corrective” to Weisinger. Tr. 489:22-489:23. As Thomas testified, Weisinger had, at that time, been disciplined a number of times:

GENERAL COUNSEL: You testified earlier that Megan had a history of yelling and being unprofessional, correct?
CHRYSTA THOMAS: Correct.
Q: And you testified that Megan was coached multiple times on safety procedures and didn’t adhere to those safety practices established by the company regarding Covid, correct?
A: Correct.
Q: And you also testified that Megan was demoted from the management team because of her behavior, correct?

F. Tuesday, January 26, 2021

Weisinger was scheduled to work and did work on January 26, 2021. R. Ex. 61. This was her first shift after January 21. Tr. 48:15-48:19. Weisinger and Erin Bryce opened the store that day. R. Ex. 61; Tr. 48:20-48:21; 457:5-457:7. Rodriguez and Hall met with Weisinger in the break room that morning to discuss January 21. Tr. 48:25-49:20. According to Weisinger:

GENERAL COUNSEL: What did you talk about?
MEGAN WEISINGER: About the incident, how I abandoned my shift. They supplied a write-up, a last chance write-up, and said I needed to sign it or I would be terminated. So, of course, I felt like I needed to. We discussed everything that happened on the 18th. [sic] Tr. 49:21-50:1.

GENERAL COUNSEL: During this meeting with Ms. Thomas and Ms. Rodriguez, did they tell you that you needed to project a professional image with clients and other team members?
A: Yes, ma'am. Tr. 52:14-52:18.

Q: Were you also told that you needed to conduct yourself in a professional manner?

1It is unclear if the reference to the 18th is a misstatement or not; it is included here for completeness, not probative value.
Weisinger further testified that she added a statement to the Corrective Report presented to her in the meeting (“Corrective”):

So I put that I didn’t abandon my shift. Chrystal [sic] let me go, and that Stacy and I have no problem. It was a bad morning and that I was upset that Chrysta Thomas asked me if my pregnancy was making me mentally unstable. Tr. 52:6-52:10.

Barbara Rodriguez recalled:

RESPONDENT’S COUNSEL: So, Ms. Rodriquez, if you would, inform the Judge what you recall happening in the counseling session or the corrective that you participated in on January 26th, 2021.
A: Like I said though, it was a corrective for Megan. We had discussed it prior. We tried to discuss part of it or to meet us on the 26th. We were discussing her behavior, and this was a final and last corrective. I did say there was a corrective before, but it was a long time ago, so this was the final corrective for her behavior and for violating store policies and procedures.
Q: Okay. And what was discussed with Weisinger about her behavior in this corrective on January 26th, 2021?
A: You know, we discussed what was on the actual paper. I let her read it. We went through it. Exactly what’s on the corrective. We just went through it, let her read it, and then she replied. Tr. 498:21-499:13

GENERAL COUNSEL: And is it your understanding that Ms. Thomas told Ms. Weisinger to leave the shift after the incident with Ms. Hall?
A: It is my understanding that Ms. Weisinger needed the time off, so we were not going to stop her from leaving. She did have a question on the corrective day, and I had her write her response as you can see on the corrective to refer to that. Tr. 505:10-505:17.

Erin Bryce was present in the shop during the counseling session and recalled:

I was in the back getting everything ready, and then Chrysta and Barb and Stacy came in and they tell us to go ahead and go to the front of the store and wait out there until they’re done. And they closed the back door so it would be quiet. It seemed very quickly -- we opened the store at 9:00 a.m. promptly, and within minutes, I could hear Megan screaming, you know, very angrily in having this discussion with them. I don’t remember any specifics about what they were talking about, but never once did I hear anybody else’s voice becoming loud enough for me to hear. I just know that Megan was very, very upset. Tr. 457:13-457:24.

Chrysta Thomas recalled of the interview:
RESPONDENT’S COUNSEL: And what was the reason given for the interview?
A: This was relating to her speaking inappropriately about -- that’s relating to the way that she was acting on the phone and in the store, the screaming, the yelling, and leaving her shift, and not following policies and procedures. Tr. 385:2-385:7.

The outcome of the January 26, 2021 interview was the Corrective Report, which is in the record as Joint Exhibit 4. All of the testimony affirms that the discipline on January 26, 2021 concerned the abandonment of Weisinger’s shift and her screaming at other employees. The testimony and documents do not support the idea that Weisinger was in any way disciplined due to a concern about breaks. In fact, Rodriguez testified:

RESPONDENT’S COUNSEL: Well, I’m trying to learn if employees such as Christy Nino are allowed to take a break any time they wish to take a break.
A: Yes, sir. I’m sorry. I thought we were talking about the corrective because there was nothing about breaks for her corrective, so anytime in between clients stylists can take breaks. Tr. 500:22-501:3.

Later in the General Counsel’s cross-examination:

GENERAL COUNSEL: When you spoke internally to Ms. Hall and Ms. Thomas, you never once heard Ms. Hall describe the statement that I just read to you that Ms. Weisinger was asking her about the amount of breaks that her coworker was taking?
A: Is this about the 21st?
Q: Yes.
A: So the 21st. I’m not sure who you’re talking about with breaks because there were only two people there that day.
Q: Well, are you aware that Ms. Weisinger was complaining about the amount of breaks that Christy Nino was taking and that she also took a long time when she was on her breaks?
A: I recall vaguely she said something about it, but I don’t remember it on the 21st.
Q: But you do recall that it happened?
A: No.
Q: You don’t recall hearing that from Ms. Hall and Ms. Thomas when you investigated the incident that you -- the corrective that you signed? You signed this corrective, correct? I mean you’re on here. You signed it. You said you were present for this incident. And that’s the incident that we were just talking about.
A: Okay. But you were talking about a break, and I’m not sure of your question exactly.
Q: This incident that you were present for, and you said you spoke to Ms. Thomas and Ms. Hall about it began when Ms. Weisinger ended her shift and started asking
about a coworker and the amount of breaks she was taking.
A: I don’t remember anything about a coworker or anything about breaks because it
was on the 21st, and she was the only one there, so I don’t remember that. I wasn’t
there for that.
Q: I thought she was complaining about Christy Nino taking breaks to express milk.
A: I don’t --
Q: Do you have knowledge about that?
A: Later on, but I don’t remember her saying she was complaining about taking
breaks or about that.
Q: So what knowledge do you have about that, about Ms. Weisinger raising concerns
that a coworker was taking a lot of breaks and was taking long breaks?
A: This corrective is about Ms. Weisinger, not about somebody taking a break, so
I’m not sure what – [.] Tr. 509:2-510:11.

Any complaints Weisinger may have had about breaks were not at issue in the January 26, 2021
corrective.

Renee Raney testified to conversations with Weisinger on January 26 that simply do not
make sense. Raney testified:

Q: Directing your attention to January 26th, do you recall working with Megan that
day?
A: Yes.
Q: Is this the last time that you worked with Megan?
A: Yes.
Q: Do you remember what hours you worked that day?
A: I believe it was 9:00 to 1:00.
Q: What do you recall from that day?
A: She was just stating that she wasn’t able to take a break the day before because
every time she would go to take a break she would say -- or Christy would say that
she had to go pump. So Megan had gotten sick, and she brought it to their attention.
She brought it to Stacy’s attention. Then that was pretty much it. And Stacy didn’t
do anything about it.
Q: Was anyone else present for this conversation that you had with Megan?
A: No.
Q: Were customers present for this conversation?
A: No. It was before we opened.
Q: Now turning to the time you worked with Megan in January 2021, did any
customers or other employees mention to you that they were uncomfortable hearing
Megan talk about her break issue?
A: Not that I’m aware of. Not that I can remember.
Q: Were you aware that Megan was suspended for five days?
A: She had mentioned it.
Q: When she mentioned it, did this conversation occur while you were working?
A: No, it was before the salon opened.
Q: Okay. But it was at the location. It was at the salon?
A: Yes.
Q: And do you recall what Megan told you about her suspension?
A: It just supposedly had to do with her getting upset because she wasn’t being able to take breaks when she needed to.
Q: Did she tell you what happened or who she spoke to and why she was suspended?
A: She said that she had spoken to Chrysta because Stacy, I guess, had called Chrysta and told Chrysta about it, and I believe she said that Chrysta was the one that suspended her for the five days.
Q: Do you recall how long that conversation was?
A: Maybe five or ten minutes.
Q: And were any other employees around?
A: No.
Tr. 238:14-240:12.

Megan Weisinger did not work on January 25, the day before this conversation allegedly took place. R. Ex. 61. Additionally, Renee Raney did not clock in at the Montgomery Sport Clips until nearly an hour after the store opened. R. Ex. 61. Renee Raney also did not work any opening shifts with Megan Weisinger from January 21 through Weisinger’s termination on January 28. R. Ex. 60; 61. These alleged conversations could not have taken place in the manner described by Raney. This testimony is uncorroborated and provably, substantively false and should be disregarded by this tribunal.

G. Wednesday, January 27, 2021

Megan Weisinger and Christy Nino opened the Montgomery Sport Clips alone on January 27, 2021. R. Ex. 61. Megan Weisinger clocked in at 8:32 a.m. and clocked out at 4:14 p.m. R. Ex. 61. Christy Nino clocked in at 8:50 a.m. and clocked out for the final time at 7:00 p.m. Maighann Carroll, another stylist, clocked in at 12:44 p.m. and clocked out for the final time at 7:00 p.m. R. Ex. 61. Stacy Hall did not work on January 27, 2021. R. Ex. 61.
Christy Nino sent Stacy Hall a text message which Hall read at 12:33 p.m. stating “Lol so me and my client just learned everything that went down yesterday with barb, Chrysta, and Megan [facepalm emoji] she just a tad loud .-. And honestly Idc [I don’t care] but my client commented so I felt the need to tell you”. GC Ex. 26, p. 1. Only Nino and Weisinger were at the Montgomery Sport Clips at this time. R. Ex. 61. After a brief exchange in which Nino conveyed the name of her client, she commented “He wanted a wash but then said nvm [nevermind] my guess is cus [because] he wanted to leave lol”. GC Ex. 26, p. 2. Nino then conveyed the name of Weisinger’s client - Chance Montgomery - and Hall responded “Okay.. jsyk [just so you know].. I have screen shot your messages and sent them to Chrysta.” GC Ex. 26, p. 2.

Weisinger testified about her interactions with one of her clients - Chris Ogorchock - who came in on either January 26 or January 27, implying that he was the client Weisinger was talking to when Nino overheard on January 27. Tr. 59-65; 110:6-110:9; GC Ex. 3. This part of Weisinger’s testimony is confusing as to which events happened on which day. However, based upon Christy Nino’s text messages sent on January 27, Weisinger’s customer at the time of Nino’s customer’s premature departure was not Chris Ogorchock. GC Ex. 26, p. 2. As a result, all of Weisinger’s testimony regarding Chris Ogorchock is irrelevant to these proceedings and should be disregarded by this tribunal. This confusion regarding the client perhaps explains why the General Counsel believed Maighann Carroll was a witness to the conversation about which Nino texted Hall.

Nino testified to the following regarding the incident on January 27:

So I believe it was me and her working in the morning. I was in the front station, and she was in the third station. So we were about six to eight feet apart. We both had clients in our chairs. She was -- I think -- I’m most positive that her client was a regular, so she felt more comfortable talking to this client. While I had a client in my chair at the beginning of the consultation, the client told me he wanted a wash and haircut. So, you know, as we proceeded to do the haircut, we’re talking, we
overheard Megan talking to her client about what had happened the day before and how she got in trouble with the mask stuff among other things. And how basically -- she said that she wanted to sue or owners and the manager because of something they had said before. I believe she had miscarried before, and they had said something about it wasn’t the right time, so that was good that she miscarried. Basically, she was saying how she might sue them, but she didn’t want to do that because her father has been sued so many times, and she knows that suing ruins people’s lives, so she said she wasn’t going to do that. She just proceeded to say the stuff that happened the day before about the owners, you know, getting on to her and her getting in trouble and almost being fired like I believe for the masks and for like other things. Then my client was overhearing, and while we were listening, he was like, oh, so you know, that’s what happens at Sport Clips. And I didn’t really know how to answer. And then as we proceeded the haircut, he ended up telling me he didn’t want the wash anymore. And so he just wanted to get out of there. So he ended up leaving without the wash. Tr. 475:2-476:8.

RESPONDENT’S COUNSEL: Okay. All right. So on this day when this occurred, the client that you had in your chair prior to this conversation between Megan Weisinger being heard, what services had he opted for?
A: He wanted the Triple Play. So he wanted a haircut and a wash.
Q: Okay. And then did he change his mind and just scale back to just the haircut?
A: Yes. After we heard Megan and he made the comment about, you know, oh, so this is what happens in Sport Clips, I didn’t really know how to, you know, answer him, and I just started cutting. And then he had enough and basically he was just like I don’t want the wash anymore. He wanted to just leave.
Q: And did he just leave?
A: Well, he paid and then left, yes.
Q: Okay. And so as a result of that incident, did you then contact the store manager?
A: I did. I wouldn’t have if it hadn’t cost me the wash, but because it did, I proceeded to tell my manager that, you know, like hey, you know, we overheard Megan and all this stuff that went on yesterday. My client was overhearing it as well, and he ended up not wanting the wash that we had first talked about when he came in. So because it cost me the wash, I felt the need -- you know, we’re losing money, so I told my manager. Tr. 477:8-478:8.

Q: At the time that this happened, were the only two employees in the salon yourself and Ms. Weisinger?
A: I believe so. And then Maighann Carroll, MC, she came in later. Tr. 480:6-480:9.

GENERAL COUNSEL: Okay. I have some more questions. So you stated that Megan Weisinger was talking to her customers about -- you mentioned something about masks and among other things that she talked about, the owners and being fired. What other things was she mentioning? She talked about her discipline, correct?
A: Right. So she was saying how she almost got fired basically for not, you know, wanting to use a mask properly, and her (inaudible), kind of like a face shield that wasn’t like necessarily covering the bottom part. Then she was saying how they were, you know, mean to her telling her, you know, what she needed to do and, you know, the rules of the store, and like, you know, not being so loud, and being respectful towards other people that are there. Tr. 483:19-484:8.

Once Nino contacted Hall, Hall referred the matter to Area Manager Thomas, who testified:

RESPONDENT’S COUNSEL: And so was there an incident that you learned about in the store on January 27th?
A: Yes. Ms. Nino had a client in her chair, and the client was upset because Ms. Weisinger was speaking really loudly and talking negatively about the store, threatening to sue, and things like that, so Christy’s client was very upset and declined to finish his service or get a shampoo because he said he was uncomfortable by the conversation. Tr. 378:22-379:5.

A: So, Ms. Nino called her manager, Ms. Hall, because she was upset and didn’t know how to deal with the situation. Ms. Hall called me and relayed that story to me. So we then had to address it. So I didn’t want to address it over the phone, so obviously I needed to address it in person.

Q: Is that behavior where she was talking negatively about Sport Clips and causing a Sport Clips’ customer there at the Bonanza Ventures store in Montgomery to decline the services as the basis for you all finally deciding to terminate Ms. Weisinger?
A: Yes. Because after we had already talked about inappropriate and unprofessional behavior. Tr. 389:22-390:9.

Q: Now as part of your investigation as to what had happened in the store on the 27th, did you investigate whether or not there was a customer in Ms. Nino’s chair that opted out of certain services after hearing what Ms. Weisinger was saying?
A: Yes.
Q: And is that something that led to the ultimate termination of Ms. Weisinger?
A: Yes.
JUDGE MUHL: What is the source of that information?
A: Well, first we talked to Stacy. I talked to Stacy and then I talked to Christy. Then Christy did write a statement, which I’m sure we have somewhere regarding that. If I recall, I did verify that client’s history. I just don’t have that right now, but it’s something I can look for. Tr. 381:1-382:8.

GENERAL COUNSEL: So, Ms. Thomas, you took Christy Nino’s word that Megan made disparaging remarks, correct?
A: Yes, because there was a client complaint as well.
Q: Do you have documents for that client complaint?
A: I think we do, but I don’t have it handy right now. I’d have to look back through the statements. I should have made her make a statement regarding that at that time, but I don’t have that handy right now.

Q: Did you question Megan yourself and ask her about the alleged disparaging remarks?

A: Yes, we did.

Q: You spoke to Megan before you terminated her to figure out what was her side of the story?

A: I’m pretty sure we did. That was on the 27th that she made the remarks, right? I mean she was terminated on the -- I don’t remember. So it wouldn’t have been me then. It would have been -- I can’t remember honestly if I spoke to her or if Stacy spoke to her.

Q: So you don’t remember whether you spoke to Ms. Weisinger to confirm who the client was and what the comments were? You just took the statement from Ms. Nino instead?

... 

A: So, I’m sorry. I don’t remember, but I know that she admitted to having conversations with a client on the floor. Tr. 412:7-413:16.

I think that at that point it was the final -- she had already violated the policies many, many times, and it was just the final time. And we felt that we couldn’t allow it any longer. Tr. 414:3-414:6.

The decision was made on January 27, 2021 to terminate Weisinger. As Thomas testified:

RESPONDENT’S COUNSEL: So following the investigation of this incident, were you involved in the decision to terminate the employment of Ms. Weisinger?

A: Yes.

Q: Who all was involved in coming to that decision?

A: Myself, Ms. Rodriguez, Barbara Rodriquez, and Cody Lovins were involved. Tr. 382:9-382:15.

Q: And after that decision was made, was the plan to terminate her the next day?

A: Yes.

Q: Were you present for the termination?

A: I was not. I didn’t feel comfortable.

Q: Why would not have felt comfortable terminating Ms. Weisinger?

A: Because Ms. Weisinger has a pattern of -- she yelled at me and cussed at me on numerous occasions, and I felt like it would be a calmer situation if someone else handled it because I don't need to be treated like that. Tr. 382:16-383:2.

H. Thursday, January 28, 2021

Megan Weisinger was terminated from her employment at the Montgomery Sport Clips on
January 28, 2021. As Thomas testified:

Q And what role did you have in Megan's termination?
A What do you mean what role did I have in her termination?
Q Do you know the reasons why Megan was terminated?
A Yes.
Q And why was she terminated?
A Because she violated company policies and procedures.
Q What specific procedures did she violate?
A She was inappropriate to clients and team members, and she was speaking really loudly on the floor inappropriately and caused loss of clients. She violated numerous policies and procedures.
Q Can you list those for us?
A I thought I just said that. So she was speaking inappropriately about the company and other team members and about the management team loudly on the floor causing other team members to feel uncomfortable and causing us to lose clients. That was the final -- I mean she violated many policies, but that's -- we don't always address every single policy. We're addressing a specific policy. So, client diversion itself is something that she violated. Tr. 407:5-408:2.

JUDGE MUHL: Hold on there. Ms. Thomas, what is the policy that’s being violated by this communication by Ms. Weisinger?
A: Client diversion. So, these are Sport Clips’ clients that come to Sport Clips, and they don’t belong to any individual stylist even if they request the stylist. And that is the way that -- in the handbook, it states that.
JUDGE MUHL: And you’re talking about the discussion at the start of it regarding --
A: Well, any discussion -- generally, you wouldn’t be giving your phone number out to a Sport Clips client. So, we shouldn’t be exchanging or setting up with clients on our own. If they are diverting the client then they are taking the client.
Tr. 400:11-400:25.

Client diversion is not limited to poaching clients from the Montgomery Sport Clips - it is simply conduct that “Diverts clients away from our store or any other Sport Clips store.” GC Ex. 15, p. 49.

Weisinger signed a Handbook Acknowledgment when she was hired in November 2017. R. Ex. 1.

In that Handbook, version 5, ("Handbook"), "Gross Misconduct" is listed as a reason for termination.

GC Ex. 15, p. 49. The Handbook further explains:

Failure to support our values or the established Sport Clips Values at all times will be a cause for disciplinary action, up to and including termination. Any behavior
inconsistent with this statement displayed through interaction with Clients or Team Members is unacceptable, and is considered misconduct.

Examples of Gross Misconduct – Team Members who do any of the following will be subject to immediate disciplinary action, up to and potentially including termination of employment.

• Cause confrontations with Clients or other Team Members.

• Give out their home phone or or cell phone number or collect Clients' phone number for any purpose.

• Divert clients away from our store or any other Sport Clips store.

GC Ex. 15, p. 49. Weisinger engaged in each of these behaviors in the week leading up to her termination, though management was unaware at that time that Weisinger had given her phone number to Sport Clips clients. Tr. 399-400. As Thomas testified, diversion of clients, as Weisinger did with Nino's client on January 27, is an independent ground for termination. Tr. 400:8-400:10.

Cody Lovins testified regarded the reason for Weisinger’s termination as follows:

GENERAL COUNSEL: So Megan was terminated because she violated the company’s policy, correct?
A: Yes.
Q: And what specific policy did Megan violate?
A: You’re not allowed to discuss stuff with clients regarding, you know, she was telling a client she was going to sue us and all that, and we’d had previous problems with what she was discussing how bad she hates her business, how she hates it, she’s going to sue us, and all that. And that’s what she was terminated for. It was a violation of the handbook. Tr. 207:18-208:3.

RESPONDENT’S COUNSEL: Mr. Lovins, was Megan Weisinger fired because she engaged in some sort of concerted activities, and you did not want other employees to engage in those activities?
A: No, she was not. Tr. 275:6-275:10.

Stacy Hall also testified as to the reason for Weisinger’s termination:

RESPONDENT’S COUNSEL: And so, after you contacted Ms. Thomas, were you involved in the decision to terminate the employment of Ms. Weisinger?
A: I was -- I did talk to Ms. Thomas and Ms. Rodriguez. I did not believe that Ms.
Weisinger’s behavior would change, so I agreed with their decision to terminate her employment.

Q: Okay, and was her employment terminated because she was having discussions with other employees about the breaks?
A: No, sir.

Q: Why was her employment terminated?
A: My recollection is from her unprofessional behavior, and her misconduct in the workplace, herself and her own clients. Tr. 237:11-237:25.

Weisinger arrived at the Montgomery Sport Clips at around 8:30 a.m. on January 28, 2021. Tr. 65:23-65:24. She testified that she was met by Stacy Hall and that Cody Lovins was also present at the store, though not in the breakroom with Hall. Tr. 65:25-66:9. Wesinger continued:

...we said good morning, and then Stacy told me that they were going to have to let me go.

GENERAL COUNSEL: Did she say anything else?
A: Yes, ma’am. She told me they were going to have to let me go because I was making my coworkers and I was making clients feel uncomfortable because I was talking about my situation of being suspended and the breaks.

Q: Did you say anything in response to Stacy’s reasons for the termination?
A: I asked her, of course, who said that because I mean nobody showed any kind of anything when I came back to work. I was happy, smiling, laughing like I always am. All my clients were super happy, so it really threw me off. So I was upset, but she already had all of my -- my clippers and scissors and everything. She already had it all boxed up, so she pretty much handed it to me and said I was done.

Q: Do you recall how long that conversation lasted?
A: Not too long. Maybe five minutes or so. Then I went to my locker at my station. We all have lockers. And I went to double check to make sure that she did put all of my stuff in the box, which she didn’t. There was still my charger there, so I grabbed it and the rest of my stuff. Then Stacy and I didn’t talk anymore. I was crying.

...Q: Did Mr. Lovins approach you that morning to say anything?
A: I did call my mom crying and really upset, and he told me I needed to leave while I was still trying to get my belongings. So I told him -- I’m grabbing my stuff.

Q: And after that point, you just left?

Stacy Hall also testified regarding the events of January 28:

RESPONDENT’S COUNSEL: And after you informed Ms. Weisinger she was terminated, what did she tell you?
A: She had asked me why she was being let go, and I told her that she had violated
her Final Corrective, and -- and then she kept inquiring further as to why, and then she brought up the incident that Christy, my other stylist person, you know, had brought up about her conversation with the client, and she immediately had went to see if it was about that conversation that they were having, you know, and -- and I think she used the words “my personal client,” and -- and to seemingly to justify her behavior, so where it seemed like it was a result of that incident, and I did not say anything to her, but then it confirmed -- I just told her, again, that it was she violated her Corrective -- I did not say anything beyond that. Tr. 542:5-542:20.

Q: So, Ms. Hall, if you would, tell the Judge what you overheard Ms. Weisinger tell her mother that she was on the phone with, after you had told her that she was terminated?
A. She, again, was -- from whatever call with her mother, talking about -- brought up this conversation about the conversation she was having with her client, and she also was making -- and she was making other statements, and that she was frustrated about things, but she was going to sue, and she needed to contact a lawyer, because she was going to -- to do whatever she can because she was getting let go. But, again, the other part of that that I recall was just -- was she was aware of the incident because -- she was seemingly justifying the conversation she had with the client previously. Tr. 543:10-543:25.

At this point, Weisinger left the salon. Renee Raney testified that she was pulling into the parking lot of the Montgomery Sport Clips when Weisinger was leaving the parking lot on the morning of January 28. Tr. 240:16-240:22; 248:17-248:19. Raney clocked in on January 28, 2021 at 8:45 a.m. R. Ex. 61.

That same day, January 28, 2021, Hall filled out an Employee Separation Form. Jt. Ex. 5. The stated reason for Weisinger’s termination on that form was “Gross Misconduct” and “Megan Was on a final Corrective as of 1-26-2021. Megan continued to Flagrantly violate Sportclips [sic] Policies and procedures for which she knows and final corrective signed, handbook acknowledgment [sic], other witness documentation included with seperation [sic] form.” Jt. Ex. 5. The version of this document provided by Respondent did not include the attachments, but at least one witness statement, that of Christy Nino, was taken during or before Nino’s next scheduled shift on January 29, 2021. R. Ex. 11; Tr. 483:1-483:5.
III. JURISDICTION

The NLRB lacks jurisdiction over Bonanza because the NLRB does not have unlimited jurisdiction and because it does not meet any of the NLRB’s threshold requirements for jurisdiction.

The NLRB has pled specific jurisdictional facts in the various versions of the Complaint. This section of the Brief will address the jurisdictional language of the Complaint, the changes made in the Second Amended Complaint, the jurisdictional thresholds at issue in this matter, and the interstate commerce requirement.

A. Bonanza Does Not Meet the $500,000.00 Threshold for NLRB Jurisdiction Over a Retail Enterprise.

The Board has chosen, as a discretionary matter, to limit the exercise of its statutory jurisdiction to cases with a substantial impact on interstate commerce. Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1507 (2000), supplemented 333 NLRB 963 (2001), 345 F.3d 1049 (9th Cir. 2003). The burden to establish Board jurisdiction belongs to the General Counsel. Laborers Local 1177 (Qualicare-Walsh, Inc.), 269 NLRB 746, 746 (1984). The gross volume threshold for NLRB discretionary jurisdiction over a retail enterprise is $500,000.00. Carolina Supplies & Cement Co., 122 NLRB 88 (1958).

i. The Montgomery Sport Clips Does Not Meet the $500,000.00 Threshold Based Upon the Evidence Presented at the Hearing.

The Montgomery Sport Clips made $390,810.80 in gross income from January 1, 2021 through December 31, 2021. GC Ex. 10. That’s it. This is a black and white case of a business too small to meet the NLRB’s discretionary threshold for jurisdiction.

ii. Paycheck Protection Program Loans are not Income.

The question of whether Paycheck Protection Loans (“PPP Loans”) are income has not yet
been litigated to with any clarity. As of now, the clearest authority on the classification of the PPP Loans is found in the federal tax code. The Paycheck Protection Program (“PPP”) is codified at 15 U.S.C. § 636(a)(36). The Paycheck Protection Loan forgiveness provisions are codified at 15 U.S.C. § 636m. Section 636m(i) lays out the tax treatment of the forgiven PPP loans:

For purposes of title 26-
(1) no amount shall be included in the gross income of the eligible recipient by reason of forgiveness of indebtedness described in subsection (b),
(2) no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by paragraph (1)

15 U.S.C. § 636m(i)(1)-(2). PPP Loans do not count for income purposes under the tax code and should not be considered income in another part of the U.S. Code. There is no authority to support such a deviation.

B. Bonanza Does Not Meet the Minimum Threshold for Greater Than De Minimis Contacts With Interstate Commerce for NLRB Jurisdiction.

While the Supreme Court has long held that a mere de minimis participation in interstate commerce is sufficient to establish the NLRB’s jurisdiction under the NLRA, the GC has failed to plead and establish that Bonanza meets that low bar.

The Supreme Court has stated:

Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.

Labor Board v. Fainblatt, 306 U.S. 601, 607 (1939). There is no firm threshold at which point a volume of commerce becomes more than de minimis, thought the NLRB uses a $5,000.00 threshold.
i. The NLRB Has Not Pled Jurisdiction Based Upon the Purchase of Services in Interstate Commerce, Therefore Any Evidence of the Purchase of Services in Interstate Commerce Should Be Disregarded in Determining Jurisdiction in this Matter.

When the General Counsel made its final amendment to the Complaint on February 26, 2022, all evidence and testimony had been submitted in the Hearing. The General Counsel had every opportunity to build its case and reshape the Complaint to the evidence presented. The resulting paragraph in the Complaint regarding the interstate commerce requirement for jurisdiction in unfair labor practices cases under the NLRA alleges:

(b) In conduction its operations during the period of time described above in paragraph 3(a), Respondent purchased and received at its Montgomery, Willis and Houston (Meyerland), Texas facilities product, goods, and materials valued in excess of $5,000 directly from points outside the State of Texas.

Second Am. Complaint, 3(b). The General Counsel only alleges this jurisdictional point based upon the products, goods, and materials - not services - purchased and received at Bonanza's three locations. The record does not support this claim.

ii. The Evidence Presented at the Hearing Does Not Support the Conclusion That Bonanza Ventures has Greater Than De Minimus Contacts with Interstate Commerce.

The GC highlighted certain retailers listed on the General Ledgers of Bonanza during the redirect of Cody Lovins, from which Mr. Lovins affirmed that Bonanza made purchases during the jurisdictional period (the "Retailers"). Tr. 329-330; GC Ex. 17; GC Ex. 18. The GC, however, presented no evidence, elicited no testimony, and did not request that the Judge take judicial notice of any facts about the Retailers that would establish that purchasing goods or materials from the Retailers constitutes participation in interstate commerce.

The General Counsel also questioned Mr. Lovins and other witnesses extensively about
Direct Beauty Express/CosmoProf, but failed to establish that purchases made through that entity involved any commerce outside of the state of Texas.

There is no evidence in the record that Respondent obtains any products, goods, or materials from outside of the state of Texas, whether directly or indirectly. The General Counsel has failed to meet its burden of pleading and showing more than a de minimis connection between Respondent and interstate commerce.

C. The NLRB Does Not Have And Has Not Proven Jurisdiction Over Bonanza Based Upon the Record in This Matter.

There are two primary components to establish NLRB jurisdiction over a matter under the NLRA: revenue and interstate commerce. The General Counsel has established neither in this matter. For this reason, Respondent respectfully requests that all charges and claims against it be dismissed.

IV. THE CHARGE

The charge in this case is unsupported by the evidence. The crux of the charge is the allegation that:

On January 27, 2021, the Charging Party engaged in concerted activities with other employees for the purpose of mutual aid and protection by raising concerns about employment conditions including employee breaks and discipline, a matter of group concern, during a scheduled shift. Complaint, 6(a).

A. Authority

“There can, of course, be no violation of § 8(a)(1) by the employer if there is no underlying §7 conduct by the employee. Conduct must be both concerted and protected to fall within §7.”

Yesterday’s Children, Inc. v. NLRB, 115 F.3d 36, 44 (1st Cir. 1997). Section 7 of the National Labor Relations Act (“NLRA”) guarantees that “[e]mployees shall have the right to [...] engage in other

Mutual aid focuses on the “goal of the concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.’” Fresh & Easy, 361 NLRB 151, at 153, quoting Eastex, Inc. v. NLRB, 437 US556, 565 (1978).

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Meyers Industries (Meyers II), 281 NLRB 882, 887, quoting Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3rd Cir. 1964). “Activity which consists of mere talk must, to be protected, be talk looking toward group action... if it looks forward to no action at all, it is more than likely to be mere griping.” Daly Park Nursing Home, 287 NLRB 710, 710-711 (1987).

The charge in this case was brought under section 8(a)(1) of the NLRA, which states that “[i]t shall be an unfair labor practice for an employer-

B. Megan Weisinger was Terminated from the Montgomery Sport Clips for Violation of Company Policy, Not Due to Any Protected Concerted Activity.

Weisinger's termination was the result of the loss of business reported by Nino on January 27. GC Ex. 26; R. Ex. 11; Jt. Ex. 5; Tr. 378-390; 412-414; 475-484. The conduct by Weisinger that resulted in the diversion of a customer's business violated the Montgomery Sport Clips policies and procedures and led to Weisinger's termination. Tr. 382:9-382:15; 407:5-408:2; GC Ex. 15, p. 49. The conduct was consistent with behavior habitually displayed by Weisinger and for which she had been previously disciplined. Tr. 25:14-26:10; 275:11-275:23; 362:8-363:2; 383:23-384:11; 453:1-453:9; 468:11-468:16; 522:25-524:6; R. Ex. 50, pp. 30-31. After the loss of a customer's business due was reported to management, an investigation took place, which included collecting the statement of the reporting employee and verifying the client's record and decision to decline services due to the behavior by Weisinger. Tr. 381:1-382:8; 412:7-413:16. While it is unclear whether management interviewed Weisinger as part of the investigation, it is clear, based upon Weisinger's behavior and comments when terminated, that Weisinger was aware that there had been a problem with her conduct the day before, specifically regarding her conversations with customers. Tr. 543:10-543:25. Such an awareness strongly suggests that Weisinger was informed of the investigation into the lost business. The investigation was sufficient and termination due to gross misconduct was justified.

i. The Record in this Matter Does Not Support the Allegation that Megan Weisinger Engaged in Protected Concerted Activity on January 27, 2021.

There is simply no evidence before this tribunal that Weisinger participated in concerted activities on January 27, 2021 or, equally important for the allegation, that anyone in management
was aware of any concerted activities that may have taken place. There is evidence that Weisinger had a conversation with a customer about her recent discipline on January 27, thereby causing another customer to decline services and leave the Montgomery Sport Clips. GC Ex. 26. Further, there is no evidence that Weisinger's conduct was anything more than mere griping. The General Counsel presented no evidence of any future action that Weisinger was allegedly working towards on January 27, or any other day for that matter.

There is potentially evidence that Weisinger and Raney had some conversations on January 26 that could conceivably be considered protected concerted activity, but that testimony is a particularly unreliable and inconsistent section of Raney's testimony and contains several demonstrably, materially false statements, as previously discussed, including inconsistencies about who worked when and with whom. Tr. 238:14-240:12. As discussed below, Weisinger’s recollection of that conversation is also problematic. In any event, there is no evidence that management was in any way aware of the conversations that may or may not have taken place on January 26. Plus, January 26 is not the subject of the NLRB's charge in this matter.

The NLRB’s charge alleges that very specific action on a specific day led to the retaliatory termination of Weisinger. This simply is not true. Weisinger's behavior with clients while working in the public-facing salon led to a loss of business, which resulted in Weisinger's termination. This action did not come out of the blue, it was preceded by substantial disciplinary action for similar behavior that Weisinger chose not to change. No protected concerted action led to the termination of Weisinger.

ii. The General Counsel cannot meet its Wright Line burden in this matter.

Where, as here, the allegations involve an alleged wrongful termination in violation of
Section 8(a)(1), "[i]nitially, the employee must establish that the protected conduct was a substantial or motivating factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct." Wright Line, 251 N.L.R.B. 1083 (1980); enf’d 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Weisinger and the General Counsel have no evidence that Weisinger’s January 28, 2021 termination was substantially due to or motivated by any protected conduct. Even more so if we solely look at Weisinger’s behavior on January 27, 2021. Weisinger testified about a conversations that allegedly took place on January 26, 2021 with Renee Raney and Maighann Carroll, but there is no testimony that anyone from management knew of or investigated any conversations or behavior from January 26, 2021 after Thomas and Rodriguez left following the corrective. Tr. 56:5-59:7. Additionally, the testimony regarding Christy Nino being present or on the floor for the January 26 conversation is not credible and sheds doubt on the entire recollection because, as the time cards for that week show, Christy Nino was not present on January 26. R. Ex. 61. Any connection the General Counsel or Weisinger may have been trying to draw between Nino's presence for that conversation and Nino's discussions with management on January 27 regarding the lost business does not hold water.

In addition, there is no connection between the January 26 discipline and the January 28 termination save for the fact that the January 26 Corrective explicitly states that it is a final corrective and termination is the next disciplinary action. Jt. Ex. 4. In fact, Nino’s testimony, contemporaneous statement, and text messages about Weisinger’s behavior on January 27 do not mention concerns about breaks or the confrontation with Hall at all. Tr. 475:2-476:8; 477:8-498:8; 483:19-484:8; GC Ex. 26; R. Ex. 10. At most, Nino’s impression seems to be that the discipline on January 26 had to
do with improper masking. See, e.g., R. Ex. 10; Tr. 483:19-484:8. There was no testimony connecting the termination and the January 26 discipline beyond the fact that they are both parts of Weisinger's disciplinary history.

The General Counsel cannot meet its Wright Line burden.

iii. The Record Does Not Support the Proposition That Gross Misconduct and Violation of Company Policy are Pretextual Reasons for Megan Weisinger's Termination.

Even if the General Counsel somehow meets its Wright Line burden, Respondent can clearly show that Respondent would have reached the same conclusion and both disciplined Weisinger on January 26, 2021 and terminated Weisinger on January 28, 2021 in the absence of any potential protected conduct. The best evidence for this is Weisinger's disciplinary history. Tr. 362:8-363:2; 406:1-407:4.

Weisinger was disciplined and demoted on May 26, 2020 for two separate reasons. First, Weisinger received a counseling statement for failing to follow Covid protocols and was told that "Megan must maintain a professional behavior and conversation in front of team members and clients. [...] Clients will not return if they do not enjoy the experience". R. Ex. 50, p. 30. Next, Weisinger received a Corrective and demotion from Assistant Manager for speaking inappropriately to a stylist in front of clients. R. Ex. 50, p. 31; Tr. 25:25-26:10. The reasons for the May 26, 2020 interview were selected as "Compliance with Sport Clips policies" and "Relationships with other Team Members." R. Ex. 50, p. 31. These are two of the same reasons for the January 26, 2021 Corrective, indicating a continuity of behavior and disciplinary issues. Jt. Ex. 4. In fact, the text exchange between Thomas and Weisinger on May 26, 2020 confirms that the same behavior that was disciplined in January 2021 was at issue in May 2020. In response to a text message from
Weisinger, Thomas texted:

I'm not trying to get you to quit Megan I'm trying to get you to take accountability for your actions. [...] You are a professional woman and you need to remember that your [sic] speaking to other people. [...] I also get frustrated but I can't scream and yell at people or only look at things from my perspective. We value you as a long term team member but that doesn't mean we ignore things that happen. You really need to reflect on how your actions or words may affect others - be it clients or team members [...] We all have the same expectations - Sport Clips expectations. [...] 


The January 26 corrective states that:

Megan has continued to violate Sportclips [sic] Policies and Procedures. On 1-21-21 Megan disrupted the business flow of the store, displaying unprofessional behavior while in the store and disregarding of management team. Walking out & abandoning scheduled shift is unacceptable and will not be tolerated, Megan must follow Sportclips [sic] Policies and conduct herself in professional manner.

Jt. Ex. 4. Thomas testified:

RESPONDENT’S COUNSEL: And what was the reason given for the interview?  
A: This was relating to her speaking inappropriately about -- that’s relating to the way that she was acting on the phone and in the store, the screaming, the yelling, and leaving her shift, and not following policies and procedures. Tr. 385:2-385:7.

While the parties disagree over whether Weisinger abandoned her shift or was allowed to leave, though the evidence supports the assertion that Weisinger abandoned her shift, the discipline still stands on the other grounds stated in the Corrective and testified to. See Jt. Ex. 3; 4; R. Ex. 10; Tr. 46:8-46:18; 369:22-369:34; 372:8-373:1. The reason Weisinger began shouting at Hall had to do with breaks in some way, though it is unclear whether the issue was Weisinger’s breaks for that day.
or Nino’s breaks in general. Tr. 41:1-42:24; 367:20-368:12; 526:22-528:6. The provocation, however, is immaterial to the discipline. In addition, Rodriguez testified that the Corrective had nothing to do with breaks or concerns about breaks. Tr. 500:22-501:3; 509:2-510:11. Weisinger had been disciplined before for yelling or screaming at another employee and it is both consistent and reasonable to find that Respondent would have disciplined Weisinger in this manner no matter what the trigger for the yelling happened to be. It is also worth noting that there is no evidence in the record of whether or how Hall was disciplined or counseled for her role in the confrontation, so Respondent respectfully requests that that not be taken into consideration in evaluating the legitimacy of this discipline.

In addition, Weisinger's claims to not understand what "professional" behavior means strain credulity. Tr. 52:14-53:2. Weisinger has been a professional hair stylist since at least 2017. Tr. 25:9-25:11. To accept that Weisinger did not have an idea of the basic shape of professional behavior is ridiculous. In addition, there is no evidence that Weisinger asked for clarification on this very common term she allegedly did not understand, so Respondent respectfully requests that this tribunal regard that portion of Weisinger's testimony with skepticism.

The outcome of the January 26, 2021 Corrective, under "What action was taken?" states:

Last and Final corrective, if Megan continues to violate any policies and procedures she will be choosing not be be [sic] part of the team which will result in termination of employment.

Jt. Ex. 4. This Corrective makes it explicitly clear that Weisinger would be terminated the next time she violated company policy. That next time just happened to be the next day.

It is important to view Weisinger's termination in light of this disciplinary history because the discipline applied on January 28, 2021 - termination - did not happen in a vacuum or as a
surprise. It was the result of a substantial history of discipline and repeated second, third, and fourth chances given to Weisinger to correct her unprofessional behavior. Tr. 406:1-407:4. As Thomas testified, Weisinger was terminated “Because she violated company policies and procedures. [...] She was inappropriate to clients and team members, and she was speaking really loudly on the floor inappropriately and caused loss of clients.” Tr. 407:5-408:2. Weisinger was explicitly informed on January 26 that further violation of company policy would result in termination. R. Ex. 50, p. 31. This did not come as a surprise. The stated reason for Weisinger's termination - gross misconduct - was not a pretext and was not connected to concerted activity. However, even if this tribunal finds a connection between the termination and some protected concerted activity, it is clear that Respondent would have terminated Weisinger for this gross misconduct - violation of company policies and diversion of a client - even in the absence of such activity. As Thomas testified, gross misconduct “can go straight to termination because it’s a flagrant violation.” Tr. 405:4-405:25.

B. Megan Weisinger was Not Engaged in Protected Concerted Activity Leading up to Her Termination on January 28, 2021.

Weisinger's alleged concerns were regarding her own discomfort with Christy Nino's legally protected activities, not with a matter of group concern. Each of Hall, Raney, Nino, Bryce, and Thomas testified that Weisinger was simply uncomfortable with Nino’s breaks and breast-pumping. Tr. 237:17-238:2; 251:18-252:8; 453:22-456:7; 463:23-464:1; 470:19-470:25; 524:24-252:8. This was not a complaint about working conditions or company policy - it was a complaint about a problem with a coworker. As Raney put it, employees “could take a break” but some chose not to because Nino was pumping. Tr. 255:21-256:2.
i. **Even if Weisinger Was Engaged in Protected Concerted Activity Regarding Her Concerns About Christy Nino’s Breaks, Management Addressed the Concerns.**

Hall spoke with Nino regarding Weisinger’s complaints about Nino’s breaks - she did not ignore Weisinger’s concerns or punish Weisinger for such concerns. Tr. 473:9-473:18. The outcome was likely not what Weisinger desired, but Nino’s right to express breast milk is clear under state and federal law, so, beyond the conversation that did occur between Nino and Hall, it is hard to understand what action could have been taken to address these concerns. See 29 U.S.C. § 207(r); 42 U.S.C. § 1786(a); 42 U.S.C. § 1790; TEX. HEALTH & SAFETY CODE §165.002.

ii. **Megan Weisinger's Alleged Concerns Were Not Health and Safety Related.**

The General Counsel is expected to argue that Weisinger’s concerns about breaks were health and safety related because they allegedly concerned Weisinger’s own health or pregnancy. The overwhelming weight of the evidence before this tribunal proves that assertion to be false. The evidence before this tribunal establishes that Weisinger’s concerns were about Christy Nino’s breaks - not Weisinger’s breaks - and that they were concerns about Weisinger’s personal discomfort with a postpartum woman’s actions, not her own or anyone else’s health. Tr. 237:17-238:2; 251:18-252:8; 453:22-456:7; 463:23-464:1; 470:19-470:25; 524:24-252:8. The record also establishes that Weisinger did not inform anyone in management that she needed additional breaks due to her pregnancy or for any other reason. The closest we have to any evidence that management may have know is from Hall, who testified:

Q: Ms. Hall, the question again was, were you aware that Megan was experiencing morning sickness because of her pregnancy?
A: I was not aware it was morning sickness. Once she sent me the pictures of her pregnancy test, she said, “This explains why I have been sick.” So at that point before -- I mean, she was experiencing flu-like symptoms, but I waited for her to say, when we talked about it, that that would be a good reason why.
Q: So you don’t recall her sending text messages, and her stating that she had
morning sickness?  
A: No. Before -- text messages about being sick, not about morning sickness. But that didn’t come until after I got the text about her pregnancy test where she said that now with her being sick, it makes sense. Tr. 552:5-552:19.

And the text messages presented by the General Counsel confirm this testimony. GC Ex. 4; 16. Weisinger did not convey the alleged need for additional breaks, so there is no connection between Weisinger’s behavior and any health and safety concern of which management was made aware.

iii. The Respondent Has No Affirmative Duty to Inform an Employee About Interactions With Other Employees.

Respondent has been unable to find any support for the assertion that Hall was somehow required to tell Weisinger the details of her conversation with Nino. Hall did not ignore Weisinger’s concerns and spoke with Nino about Weisinger’s concerns and Hall confirmed to Weisinger that Hall had spoken to Nino. Hall did not owe Weisinger a duty to report back in detail or give any accounting of her interaction with Nino to Weisinger.

C. Respondent objects to any finding relating to any alleged instruction regarding the discussion of Weisinger’s January 26, 2021 discipline with others because the matter was not fully litigated at the hearing.

"It is settled law that the Board may find an unfair labor practice when the issue has been fully litigated even though it had not been specifically pleaded in the complaint. " N.L.R.B. v. Bighorn Beverage, 614 F.2d 1238, 1241 (9th Cir. 1980) ("The issue of the use of the application forms was fully litigated at the hearing. A substantial amount of testimony was presented at the hearing concerning the application forms and their use by Maykuth during the interviews. In addition, the forms were introduced into evidence as exhibits. Maykuth testified concerning his use of the forms."). The text message containing reference to such instruction was only introduced by the General Counsel with the second to last witness, Stacy Hall, on cross-examination near the end.
of the final day of the hearing. GC Ex. 26. This alleged instruction was given by either Thomas or Rodriguez, as they were the only two present in the January 26 discipline with Weisinger, yet neither was able to give testimony in light of GC Exhibit 26 to either confirm or deny the hearsay statement in the text message about the instruction.

That the General Counsel chose not to introduce this evidence until the very end of the hearing indicates that the General Counsel did not want to give Respondent the opportunity to fully litigate the issue and wished to slide the issue in at the last minute. While it is hard to see how the General Counsel could have offered GC Exhibit 26 earlier than day four of the hearing without calling another witness, the General Counsel could have easily offered this exhibit during Christy Nino's testimony, which would have allowed Respondent to at least question Barbara Rodriguez about the evidence, offering a fuller, though yet incomplete, record for this tribunal's consideration. Instead, we are left with cursory testimony about what did not seem to be at issue in the hearing. Had the Respondent known such issue was presented, Respondent would have investigated the alleged instruction and attempted to secure any further text messages or other evidence regarding the instruction and Respondent would have specifically elicited testimony from Thomas and Rodriguez with actual detail on this instruction.

Respondent, therefore, objects to any finding relating to any alleged instruction regarding the discussion of Weisinger's January 26, 2021 discipline because such issue was not fully litigated at the hearing and respectfully requests that this tribunal disregard the partial evidence and testimony offered on this issue at trial. Should this tribunal consider the instruction, Respondent asserts that such an instruction was not a restriction of Weisinger's protected rights under the NLRA but rather a reasonable instruction regarding conversations with customers while Weisinger was in a work area.
V. REQUESTED REMEDIES

Respondent objects to the remedies requested by the General Counsel because they are both punitive and impractical. "The make-whole statutory scheme established by the Act is exclusively remedial. The Board may not use its processes to punish anyone." Kenmore Contracting Co., 303 NLRB 1, 5 (1991). While most of the remedies requested by the General Counsel seem to be average remedies for the NLRB, the request for the apology letter in paragraph (e) of the requested remedies seems both unnecessary and punitive. No such letter would ever be a sincere apology - it is merely meant to humiliate the Respondent because the General Counsel does not like Respondent. There is no business or personal value to such an apology.

Respondent further objects that it cannot rehire Weisinger as requested in paragraph (a) of the remedies requested. The last year of TWC, EEOC, and NLRB proceedings have made a further working relationship between Respondent and Weisinger impossible.

Respondent objects to paying backpay to Weisinger, particularly as Weisinger has opened a new salon since her termination, but understands that, should such a request by the General Counsel be granted, there will be further proceedings regarding the extent of the back pay required. Respondent additionally objects that, as no protected concerted activity occurred, no consequential damages have been suffered.

Respondent finally objects that the request for expunged records is vague and requests that, should such action be required, this tribunal specify the extent to which "all references to the discharge" applies. For instance, does this mean that Respondent is not allowed to retain its records of this proceeding? The TWC proceeding? The EEOC? What of the itemized attorney bills and records? Expungement of the personnel file seems reasonably connected to the desired result, but
beyond that, expungement does not seem reasonable.

VI. CONCLUSION

There is always a final straw that breaks the camel's back. Weisinger was counseled and disciplined repeatedly regarding her conduct on the shop floor work area while customers were present. In May 2020, when Weisinger was counseled after an incident with another employee, she was advised that "clients will not return if they do not enjoy the experience," (R. Ex. 50, p. 30) advice that rings even more true in light of the fact that, ultimately, Weisinger's failure to conduct herself in a professional manner in compliance with company policy directly led to a client declining services. This was the clear, non-pretextual reason for Weisinger's termination.

The termination of Megan Weisinger violated no provisions of the NLRA and Respondent respectfully requests that this tribunal dismiss the charges and claims against it.
Respectfully submitted,

s/ J. Randal Bays
J. Randal Bays, Attorney in Charge
randy@baysfirm.com
Texas Bar No.: 01943900
Federal ID No. (SDTX): 13169
The Bays Firm
1503 Hailey Street
Conroe, Texas 77301
Tel: (936) 760-7670
Fax: (936) 760-7671

and

Katherine R. Grosskopf
katie@baysfirm.com
State Bar No.: 24106668
Federal ID No. (SDTX): 3619547
The Bays Firm
1503 Hailey Street
Conroe, Texas 77301
Tel: (936) 760-7670
Fax: (936) 760-7671

ATTORNEYS FOR BONANZA VENTURES, LLC

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Respondent’s Post-Hearing Brief has been served on the N.L.R.B. via e-service and upon the following counsel of record on March 23, 2022 pursuant to N.L.R.B. procedure:

Suzanne Lehman-Johnson
325 Heights Blvd.
Houston, TX 77007
suzi@lehmanjohnson.com
ATTORNEY FOR MEGAN WEISINGER

s/ J. Randal Bays
J. Randal Bays