UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PREMIER PRIVATE PHYSICIANS MANAGEMENT COMPANY, LLC

Respondent

Case 07-CA-305866

and

KIMBERLEE MOLNAR, AN INDIVIDUAL

Charging Party

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I. INTRODUCTION

Respondent violated Sections 8(a)(1) and (4) of the Act by: (1) maintaining an unlawful rule in its Employee Handbook that wages are confidential and may not be disclosed to fellow employees or outside of the Respondent's practice, under threat of discipline up to and including discharge; (2) by verbally, and in writing, instructing employees to not discuss wages; (3) by threatening employees with discipline and/or discharge if they discussed wages; and (4) by discharging Charging Party because she discussed wages with other employees and/or because she stated that she would be filing charges with the Board.

Throughout the events of this case, Respondent acted to maintain and enforce the unlawful rule maintained in its handbooks until 2026,[1] that states:

> Individual wages, as well as, information regarding any employee's compensation are considered to be strictly confidential. Accordingly, no information concerning present or former employees may be disclosed to fellow employees inside or outside of the Practice. Any violation of this policy may result in discipline up to and including immediate discharge.

Charging Party was hired as an Administrative Assistant and was later promoted to office manager. The evidence presented by all parties demonstrates, contrary to the arguments of Respondent, that Charging Party is not a supervisor under Section 2(11) of the Act. In early August, co-workers brought wage concerns to Charging Party. She then raised these concerns with Respondent's CEO. This triggered a short chain of events, including an email on August 10, stating that:

> **[W]ages are HIGHLY confidential.** Staff should never be having these conversations regarding pay with one another, please be sure if you do hear these conversations, you remind them of this. This is grounds for termination as stated in our handbook. We do not want any employee feeling offended therefore we should never be discussing specific wages around the office.

[1] All further dates are 2022, unless otherwise noted.

After an interaction with Dr. LoriAnn Washe, the facts of which are disputed, Charging Party submitted her two-week notice of resignation. Charging Party went on vacation and returned to finish her remaining time consistent with her resignation notice. Respondent repeatedly asked Charging Party to reconsider her resignation, and she did, returning from her vacation on August 22, and continuing her employment. The next day, August 23, she received an annual review with no negative ratings. Nine days later, on September 1, she received a raise.

On October 11, Respondent again confronted and blamed Charging Party for wage discussions in the office. Respondent told Charging Party, consistent with the unlawful language in the Handbook, that wages should not be discussed in the office. Respondent told Charging Party that talking about wages is grounds for termination whether she is office manager or not and that discussing wages causes many issues in the office.

The next day, October 12, Charging Party discussed the prior day's conversation with one of Respondent's managers. Charging Party told the manager that she was interrogated about discussing wages and was threatened with discharge. Charging Party said it was illegal for an employer to tell employees not to talk about wages, that most employees do not know their rights, but she does. She said that she would be filing a charge with the NLRB. Two days later, Respondent discharged Charging Party.

Respondent's narrative, to date, has been that Charging Party was only allowed to come back to work in August under a corrective plan, a claim that is unsupported by the evidence. Respondent further claims that Charging Party committed misconduct that resulted in her discharge. Again, a claim not supported by the evidence. Simply put, these claims are false.

The inescapable conclusion is that Respondent discharged Charging Party consistent with Respondent's stated position in its handbook, and consistent with Respondent's threats repeated

on several occasions: that employees are not allowed to discuss wages under penalty of discharge. Respondent's attempts to stop discussions of wages failed, and it retaliated in response. Respondent was apparently also motivated by Charging Party's stated intention to file a charge with the NLRB. Respondent violated the Act as alleged in the Complaint.

Further, the record evidence demonstrates that Respondent held and communicated animus toward its employees' Section 7 activities, specifically the discussion of wages and seeking redress from the Board. Respondent's claimed justifications are without merit. Respondent acted unlawfully as alleged in the Complaint for the reasons further described below, and the Administrative Law Judge (ALJ) should so find.

II. BACKGROUND

A. Respondent's Operations and Involved Persons

Respondent operates a company managing eight medical offices providing concierge medical service to patients that pay directly for the service. (Tr. 30-31)[2] Respondent is part of a larger group of medical providers called SALTA that includes direct primary care practice including Respondent facilities in Troy, Michigan, and also locations in Clarkston, Auburn Hills, Shelby Township. Respondent also operates facilities at United Wholesale Mortgage,[3] and two locations with the University of Michigan in Ann Arbor and Bloomfield Township, Michigan, respectively. (Tr. 30-33)

[2] GCX___ refers to General Counsel Exhibit followed by the exhibit number; RX___ refers to Respondent Exhibit followed by exhibit number; "Tr. _" refers to transcript page of the unfair labor practice hearing held August 31 through September 2, 2026.

[3] No location information was provided at hearing regarding services for United Wholesale Mortgage.

John Blanchard (Blanchard) has been Respondent's CEO for 26 years. (Tr. 30) Blanchard is also CEO for SALTA and 3rd Gen Health. (Tr. 36-37) Dr. LoriAnn Washe (Washe) is a medical provider and was the medical director of Respondent in 2022. (Tr. 472-473) Dr. Keith Christmon, Blanchard, and Washe are the three partners of Respondent. (Tr. 106)

Lauren Wilson (aka Lauren Fuller) has been employed by Respondent for 20 years and was the Director of Human Resources from 2016 or 2017 until 2022. Since then, she's been the Director of Operations. (Tr. 89-90) Laura Holt (Holt) is a nurse practitioner and the Director of Integrations Management. (Tr. 505) Jessica Mazzara is Respondent's current office manager. She began her employment with Respondent after Respondent discharged Charging Party.[4] (Tr. 486-487) Josh Tracz (Tracz) is Director of Finance. (Tr. 108)

Respondent employs three to four Medical Assistants (MAs), and two to three Administrative Assistants (AAs). (Tr. 31) AAs schedule appointments for patients, scan documents from the doctors to go into the patients' charts, get prior approvals, obtain scripts for appointments, answer phones, and handle some patient inquiries. (Tr. 33) MAs see patients, rotate them through physicals, including stress tests and EKGs, take patients to rooms for lab draws, give immunizations, draw blood, perform testing at the direction of the physician, call in prescriptions, handle incoming clinical inquiries from patients and work with the physicians to manage patient care. (Tr. 33-34)

B. Respondent's Handbooks (Complaint Paragraph 14)

In June 2020, Respondent revised its Employee Handbook that, in its Pay Policies section, states:

[4] On this basis, General Counsel voiced a standing objection as to the relevance of Mazzara's testimony. (Tr. 487)

> Individual wages, as well as, information regarding any employee's compensation are considered to be strictly confidential. Accordingly, no information concerning present or former employees may be disclosed to fellow employees inside or outside of the Practice. Any violation of this policy may result in discipline up to and including immediate discharge.

(Tr. 34; GCX 3 at 12)

This provision of the Handbook had not been rescinded or amended as of October 2022. (Tr. 35, 80) When asked why Respondent needed this rule, Blanchard testified that it was a carryover from a prior handbook that was never updated and provided no further justification for the rule. (Tr. 35)

As part of its on-boarding process, Respondent provided a copy of the Handbook and provided employees with access to the Employee Handbook in the workplace including through an HR platform. (GCX 4; Tr. 35-36, 90-93) Respondent required employees to sign that they received the Handbook and that they read and understand the policies even though Respondent spent scant time, if any, with employees going over its handbook policies. (Tr. 93-95; GCX 5) Instead, Respondent addressed specific policies only when employees asked questions. (Tr. 93)

In December 2024, Respondent replaced its Employee Handbook with a SALTA Direct Primary Care Team Member Handbook that included the same confidential wage language as the 2020 Employee Handbook. (Tr. 96, 98; GCX 6 at 12)

In March 2026, Respondent replaced its Team Member Handbook with a SALTA Team Member Handbook that omits the confidential wage language. (Tr. 96, 136; RX 12) Respondent revised its handbooks but never provided notice to employees that the prior wage confidentiality rule had been rescinded. (Tr. 97-98)

Respondent's 2022 Employee Handbook provided progressive discipline consisting of:

> Step 1 – Verbal Coaching and Counseling
> Step 2 – Written Warning

Step 3 – Final Written Warning
Step 4 – Termination

(Tr. 37; GCX 3 at 25-26) Discipline normally starts at a low level and progresses to more severe discipline if conduct does not improve. (Tr. 39) According to Blanchard:

> If [the issue for the staff member to improve on] rises to the level of a higher patient safety issue or a departure from our standards of care, it could involve what we call a step one, which is a formal written reprimand of whatever happened.

(Tr. 53)

C. Charging Party's Employment, Chronologically

Charging Party was hired on November 9, 2021, as an administrative assistant. (Tr. 179; GCX 4, 5) As an administrative assistant, her duties were to schedule patients, scan documents into patient charts, call other offices to set up specialty appointments, and to assist MAs with lab draws and with patients based on her previous experience as an MA. (Tr. 179)

On about February 28, Charging Party was promoted to office manager, working for Washe and Wilson. (Tr. 180, 263, 571) Charging Party described her new responsibilities as:

> I was kind of a go-to for the admin and the clinical staff, so they didn't have to go to Dr. Washe or Lauren all the time. And they would pull me, if need be, in the admin to help scanning if they were backed up, or MAs bringing patients in, if they needed lab draws, filling in for the receptionist, which was still something I did as an admin. There was kind of the admins usually did that, not the medical assistants. And doing lab recs, audits with Labcorp bills and that that Josey, the accountant, would give me just to see if it was a PPP patient, Stellantis patient, SALTA and that to kind of -- so they knew where to bill it out, whether it was under Premier or SALTA.

(Tr. 180)

When asked how her responsibilities changed, if at all, from switching from an AA position to Office Manager, Charging Party testified:

> Just a little bit more clinical items as far as the stuff like with Josey. Doing some of the reports as far as, through Salesforce,[5] if a new patient was signing on to let

[5] A program or networking tool to do reports. (Tr. 181)

> Kyle Bingham and Stephanie know so then they would get a hold of that patient to make sure, for billing purposes, how they were going to pay, if they were seeing PPP or SALTA, because there was like a step down from the concierge part, which was Premier Private Physicians, and SALTA.

(Tr. 180-181)

When she was promoted to office manager, Charging Party was given a document titled Office Manager Tasks that listed her daily, weekly, biweekly, monthly, and additional functions for the job.[6] (Tr. 182-186; GCX 14) Many of the functions on this task list were performed by others on the staff, and those employees continued to perform those tasks. (Tr. 182-186; GCX 14) Charging Party used this tasks list to document where to find items on the shared drive and who performed certain tasks, including : AA Tonya Burton did the first two of the Weekly tasks; admins handled daily lunch coverages; MA Monica Musser or other MA created the daily schedule; MAs oversaw visible checks for the labs and testing room supplies; MA Bethany Hopkins ordered lab supplies; and MAs printed immunization records because they were the ones who saw the patients. (Tr. 182-186; GCX 14) Charging Party met with Washe biweekly to see if there was anything that Washe wanted to be on the agenda. (Tr. 185; GCX 14) This Office Manager task list remained unchanged throughout Charging Party's tenure as office manager, as verified by the Charging Party on September 13 when she printed a new copy of Office Manager Tasks from the shared drive that was last updated on March 14. (Tr. 187-189; GCX 15)

During her employment, Charging Party never saw the document titled Medical Office Manager (MA or LPN) until 2026, when Respondent submitted documents in response to the NLRB charge. (Tr. 189; RX 1)

[6] GCX 14 contains Charging Party's hand-written notes extraneous to the original document.

Charging Party reviewed employees' input for payroll "to make sure nothing was missing, whether it was their time or vacation time put in there. I just made sure that things lined up and then it got sent to Lauren[.]" (Tr. 569-570) Throughout her tenure as office manager, Charging Party was never held accountable or disciplined, or told that she would suffer any consequence for what any of the AAs or MAs did. (Tr. 247-248) Charging Party did not issue discipline, although she received discipline and was present when discipline was issued. (Tr. 237-238)

1. Charging Party is Disciplined by Washe, and Witnesses Disciplines

On May 3, a 20-month-old patient was given the wrong immunization that should only have been given to an adolescent or adult. (Tr. 241-242) Charging Party reported the issue to the Oakland County Health Department, the ordering doctor (Washe) and to Human Resources. (Tr. 241; RX 5 at 130) Washe determined that everyone involved would receive a verbal reprimand, including Charging Party, Shannon Lovelace and Bethany Hopkins. (Tr. 242) Charging Party and Lovelace informed Washe that Hopkins had not been in the room when the vaccines were prepared, and that Hopkins was instead in the patient room. (Tr. 243) Based on this, Washe decided that Charging Party and Lovelace would be disciplined, but not Hopkins. (Tr. 243) Wilson prepared the verbal reprimands for Lovelace and Charging Party and emailed them to Charging Party to print. (Tr. 243; RX 5 at 129; GCX 19) Charging Party printed the verbal reprimands, and she and Lovelace went to Washe's office where Charging Party provided the printed disciplines to Washe. (Tr. 243-246) Washe, not Charging Party, read from the verbal reprimands while simultaneously reprimanding Lovelace and Charging Party. (Tr. 243-246) Washe asked Charging Party to sign her own reprimand as "Employee" and Lovelace's

reprimand as "Office Manager." (Tr. 243-246; RX 19 at 129; GCX 19) Charging Party's role in Lovelace's discipline was solely as witness. (Tr. 247)

On June 14, Charging Party was called to observe and sign as witness when Washe issued a verbal reprimand to employee Sherry Summers for technical mistakes she allegedly made. (Tr. 248-249; RX 5 at 139-140) Charging Party played no role in deciding to discipline Summers; she learned of the coming reprimand when Wilson called and asked if Charging Party "heard any issues going on in the office with Sherry [Summers]." (Tr. 249) Charging Party told Wilson that she was not aware of any issues other than that Summers "was asking things over and over when she should have already taken notes on different things; that that was an aggravation that some of the staff has as far as admin." (Tr. 249) Wilson told Charging Party that Summers would be written up, that she would be sending over a reprimand for Charging Party to print. (Tr. 249-250) Summers, Charging Party and Washe met in Washe's office. (Tr. 250) Washe covered the reprimand with Summers while Charging Party was a silent witness. (Tr. 250-251) As elicited by Respondent counsel on cross-examination, Charging Party had no discretion to avoid the meeting between Washe and Summers. (Tr. 283) Charging Party did not recall ever creating the document titled "Supporting Documentation for Reprimand written by Kimberlee Molnar" or having a discussion with Summers. (Tr. 251, 272-273, 279-281; RX 5 at 140)

2. Charging Party Documents Employee Annual Reviews

On August 8 and 9, Charging Party met individually with AAs Kema Johnson, Kelli Edwards, Tonya Burton, and MAs Shannon Lovelace, Bethany Hopkins, Monica Musser, to document employee annual reviews based on what each employee told her. (Tr. 238-240, 247-248; RX 5 at 128, 131-132, 134-135, 138)

Charging Party described the process as follows:

> Q. So what was done, if anything, for this review? How did that come about?
> A. Lauren Wilson had made me aware that they do reviews, PPP does reviews once a year, and it's in August that she, Lauren Wilson, would be providing me the forms, and that they needed to be back to Lauren Wilson by the end of August for her to do whatever she needed to do with them. I asked how was I to proceed, because I had never did any of this. I asked what this rating thing was on the top because I didn't understand it. She said that you could do like a rating from 1 to 10, hence that's what I wrote on there, and to go over it with the admins and then medical assistants.
> Q. So how did you decide, where it says the ratings it's got an 8, a 10, an 8.5, is that your handwriting?
> A. It is my handwriting.
> Q. How did you decide what numbers would go in each of those ratings?
> A. I asked the employee what they thought, when they read that, where they fit through 1 through 10, 10 being the higher, the best rating, as 1 being the lowest.
> Q. Do you recall or how would you know what Kema Johnson said for, say, the rating of foster meaningful relationships, where did that number come from?
> A. She read it and felt that she was an 8, so I put an 8 there.
> Q. So for the text, did that follow through for the rest of the ratings too, similar process?
> A. Correct. They read the questions and it was in my writing, but their words, the employee's words.
> Q. So when you say their words, you're talking about the rest of the body of the review?
> A. Correct.
> Q. And how did that compare to any other reviews that you covered with any other employees?
> A. It was the same way through the rest of the staff.

(Tr. 239-240)

As far as reviews and their relevance to upcoming wage increases, Wilson testified that any discussion regarding wages was removed from the performance review process:

> [W]e had recently changed the process of removing increases or not in increases. Anything in regards to wages, we removed it from the performance review process so that we could handle it offline so it could specifically specify performance, behavior, attendance during those reviews, and not get caught up in the wage discussion. So employees were just getting used to that, and that's why they were asking the questions of, "Okay, when am I going to expect to know if I do or do not get a wage increase."

(Tr. 102)

Annual peer reviews are typically done in late summer, and annual raises are announced in late August or early September. (Tr. 102)

3. Employees Bring Wage Concerns to Charging Party that She Discusses with CEO Blanchard

In early August 2022, three or four employees approached Charging Party with concerns about their wages. (Tr. 190-193) Charging Party approached CEO Blanchard, met with him alone, and told him that members of the staff were concerned about their wages. (Tr. 192-193) Charging Party told Blanchard about research she performed regarding admin and medical assistants' earnings in the Detroit area, based on whether MAs were certified or not and their years of experience. (Tr. 191) As Charging Party explained:

> And when I told Dr. Blanchard about the staff's concern and them stating that they hadn't had raises in several years, he was visibly frustrated. His tone changed and his face kind of got red, and he said, "Well, they're," whoever that was, "either not telling the truth or they were just lying." And I was kind of taken back by that. And, again, his demeanor after that was not as it was in the beginning; he was more frustrated. And he had stated that even during COVID he didn't lay anybody off, he kept people, and they had gotten raises.
>
> So, again, who had said that, again, they were, I guess I -- that they didn't understand or they were lying, and I was kind of taken back by him saying that we're lying. I said, "Well, I don't think that's the case." He then asked me if I had spoken to Lauren Wilson about it yet, and I said no; I figured I'd come to him, being the CEO, that he's probably the one that makes the ultimate decision of everything and to show the research. That conversation ended abruptly after that.

(Tr. 192-193)

This was the last conversation that Charging Party had with Blanchard before August 10. (Tr. 193) On August 10, Charging Party emailed Blanchard with questions about employee reviews and insurance reimbursement, and asked about the conversation from the previous week. (Tr. 99-100; GCX 7) Blanchard responded that those questions should be directed to Wilson. That same day, Wilson emailed Charging Party:

> Dr. Blanchard and Laura [Holt] have informed me of your conversations with both. To answer your questions, possible merit increases are given altogether at once company wide. Employees getting increases will receive a letter in the mail early September, which is why the reviews are asked to be completed by end of August. SIDE NOTE **-wages are HIGHLY confidential.** Staff should never be having these conversations regarding pay with one another, please be sure if you do hear these conversations, you remind them of this. This is grounds for termination as stated in our handbook. We do not want any employee feeling offended therefore we should never be discussing specific wages around the office.

(Tr. 99-100; GCX 7)

On August 10, immediately after receiving the above email, Charging Party called Wilson. (Tr. 195) Charging Party told Wilson that she did not agree with the email, that employees were not openly discussing their wages with each other, but that several employees came to her, and hence her conversation with Blanchard. (Tr. 195) Charging Party testified regarding the call with Wilson after the email:

> [A]gain, reference that, what she mentioned in the email, about it being highly confidential, that I need to shut down those conversations if they're being had, that it's grounds for termination. I let her know at that point that I wouldn't state that to the employees because I didn't think it was right; if she wanted to have that conversation, that she could.

(Tr. 195-196; see also Tr. 228-229)

Charging Party candidly described the demeanor of the phone call with Wilson as:

> Well, again, I called her because I didn't agree with the email, so I wasn't too happy about jobs being threatened. And then she wasn't too happy about me stating that it's not something that I would openly say to the staff; that it would be something that she would -- need to be addressed.

(Tr. 195-196) When asked what she heard that led her to believe that Wilson was not too happy, Charging Party testified that Wilson said "[y]ou don't tell your boss no when they tell you to do something." (Tr. 196)

Still on August 10, after the conversation between Charging Party and Wilson, Washe called Charging Party to her office. (Tr. 197) On her way to Washe's office, Charging Party saw

MA Bethany Hopkins coming out of Washe's office "visibly upset, kind of mumbling stuff, and headed toward the back." (Tr. 197) Washe told Charging Party that she had a question about a patient that Hopkins had just spoken to. (Tr. 197) A patient of Respondent was out of town, had already received her medical results but wanted her husband to "go to the facility to get those items[, but] there was something with HIPAA that he wasn't on it." (Tr. 198) Charging Party told Washe that:

> "Our hands are tied. We can't do anything." We let the patient know. And then she had said that she had somebody at Beaumont that was willing to do a comparison, but that person was only there that same day. They were going to be going on vacation. So I let her know again, "There's nothing we can do; that's out of our hands unless you can figure that part of it out." I said, "That's why the patient's not happy." And then she, out of nowhere then, because there was that answer, that conversation was kind of done.

(Tr. 198-199) Washe then switched the conversation, saying that she did not want to see employees eating in the lab. Charging Party said that there was an employee with a medical condition in the area, that she was not going to have that conversation again, and was going to leave since they were not getting anywhere. Id.

Charging Party did not slam the door when she left and did not use profane language, yell or create a disturbance; it was "a very matter-of-fact kind of conversation." (Tr. 200, 232) Charging Party left Washe's office and went to check on Hopkins, who was visibly upset and slamming things down in the back. (Tr. 201-203) She did not recall whether she left Washe's door open or closed but she did not slam the door. (Tr. 200) Even if she had tried to slam Washe's door, Washe keeps a device on her door that arguably interferes with the ability to slam the door. (Tr. 114-115; 200; GCX 8)

4. Charging Party Resigns, but Respondent Convinces Her to Continue Working

On August 11, Charging Party submitted her resignation letter by email to Blanchard, Wilson, Holt and Christmon, informing Respondent that she would complete her two-week notice period after returning from vacation on August 22. (Tr. 44-45, 203-204; GCX 9, 10) In her resignation, Charging Party stated:

> I am regretfully giving my resignation here at PPP/SOT, with a two-week notice. Unfortunately, my first week I have a scheduled vacation, I will return on August 22, 2022, to complete my two weeks, with my last day being August 26, 2022. I want to thank you for giving me the opportunities you have here at PPP/SOT, I greatly appreciate it.
>
> However, there is an underlying issue here within the office that has been an issue apparently before me, and more than likely will be after me. I do not believe the issue will be fixed, so I must remove myself from the situation, to maintain my professional relationships. With that being said, I was promoted to be the Office Manager, I do not believe I am allowed to manage the office. I do believe that is what I was doing and trying to do; however, it was made clear to me yesterday, that "I cannot be trusted, and things have only gotten worse since I have taken the position", this according to Dr. Washe.
>
> I need to know that I can come to work, do what I was hired to do, and not worry about if I have a job day-to-day. I cannot walk on eggshells around one person, the direct person over me, wondering if she is going to have a bad day or not, and that day become hostile overall, for the entire staff, not just myself.
>
> I do find it confusing that other management, and I thought her as well, believed I was doing a good job, even with the email, see attached, I received on March 31, 2022, from Dr. Blanchard, along with receiving verbal accolades from Dr. Washe. Though, it seems as of our conversation yesterday afternoon, that if she cannot rely on me to do what she states, then she cannot trust me. Again, I was hired to manage, not to be someone's puppet.

(GCX 9)

Wilson was the first person to talk to Charging Party about her resignation. (Tr. 204) Wilson went into Charging Party's office, asked about her resignation, and briefly went over it before saying that "she felt that it was given prematurely, that there was also something that happened at the same time I gave my resignation letter[.]" (Tr. 205) Wilson "was also

referencing the email that one of the admin, the girl up front, Kelly Edwards, had sent to John Blanchard as soon as I gave my resignation as well, regarding the same issues I was addressing my resignation with." (Tr. 205) Wilson then said that she:

> [A]nd Laura [Holt] would be pulling staff to the concerns in my resignation with Dr. Washe, but also the concerns that were just addressed in the email from Kelly Edwards regarding the staff having issues with Dr. Washe as well. That they were, like, in a crisis; that Dr. Blanchard had Lauren Wilson and Laura Holt come out of the office to start pulling the staff to see what was going on.

(Tr. 206-207)

Wilson had a second conversation with Charging Party on August 11 about her resignation. (Tr. 208) According to Charging Party:

> Wilson came into my office, let me know that her and Laura Holt had started the process of pulling the staff, that it would continue the next day, which was that Friday, and into the following week as well; that the items that I was addressing were some of the same items that the staff were addressing as well; that I had the utmost support from my staff; that they were obviously saying the same things I was saying, and that this was something that they were going to have to address and look into further once Lauren Wilson and Laura Holt finished meeting with the rest of the staff that they hadn't met with yet.

(Tr. 207-208)

Blanchard was aware that there had been a discussion / issue between Charging Party and Washe before he provided his response in the evening of August 11, when he emailed Charging Party:

> Kim we hear you and you have our support. I'd like everyone to take a deep breath step back and explore a path forward that restores the culture at premier. We can get there if we work together and communicate with the love and respect that everyone deserves. Lauren and Laura started the process today and we will keep moving in the right direction together.

(Tr. 44-46, 210; GCX 10)

On August 12, Charging Party had separate discussions with Wilson and later with Blanchard about her resignation. (Tr. 210-211) Wilson came to Charging Party's office, and said that:

> [T]hey were continuing the process, her and Laura, calling staff that day, that some were going to need to be called in the following week and that, again, she knew I would be leaving, Lauren Wilson knew I would be leaving and going on vacation the following week, and that she had conversations with Dr. Blanchard regarding everything as far as her conversation, Lauren Wilson's, and Laura Holt's with the staff. And basically the same thing, she was letting them know that she let me know the day before that things, you know, they were saying the same things and that they were continuing to look into it. That once they were done polling the staff, that she would, Lauren Wilson and Dr. Blanchard and everybody, they would, the upper management would get together to discuss what was going to happen next. But for me to reconsider my resignation again; that she thought it was pretty prematurely, without speaking about the issue at hand on my resignation, and that they were kind of in a crisis at the moment to figure out what was going on because the staff were up in arms with me giving my resignation.

(Tr. 211-212)

Later, still on August 12, Charging Party had a conversation with Blanchard in the conference room for about an hour, mostly about her resignation. (Tr. 212-213) According to Charging Party:

> Dr. Blanchard said that I have the utmost respect from my staff, and that he feels that I can set boundaries with Dr. Washe and handle her very well. He praised me for leaving the situation on August 10th from our conversation, so it would not go into anything. He said that that was a quality that was good in an office manager, especially since there had been issues with her, hence my resignation, and there to -- prior to me even being an office manager in the past, issues that people had had with her, and that she -- that Dr. Blanchard, Dr. Christmon had met with her before about these things. That also she was obviously going through a lot at that time in her personal life, but it wasn't an excuse to bring that into the office, which I agreed at that time because I knew what he was talking about. And I said I agree because you wouldn't want us to do the same.
>
> He did say that they, meaning him, Dr. Blanchard and Dr. Christmon, because they were the partners, would meet with Dr. Washe off-site and discuss what was going on to try to come up with a remedy. Asked where I was going on vacation. Said, you know, with everything going on, to go relax, again, to reconsider my resignation when I came back to let him and/or Lauren know if I would be doing so.

(Tr. 214-215)

On August 12, Respondent had not decided to discharge Charging Party based on her interaction with Washe; instead, as noted above, Respondent repeatedly asked Charging Party to reconsider her resignation. (Tr. 106-107)

Charging Party went on vacation the following week,[7] and returned on August 22 to finish her two-week notice period. (Tr. 107, 216) However, on August 22, Wilson again asked Charging Party to reconsider her resignation. (Tr. 107) Charging Party testified that she:

> [L]et Lauren Wilson know I was back from vacation. She had let me know that they her and Laura Holt had finished meeting with the staff; that they had spoke to Dr. Blanchard, and that they were going to come up with a remedy as far as the issues that the staff, not only myself, were having with Dr. Washe, and had asked if I had considered rescinding my resignation. And I told her yes, especially after hearing what she had said, that there would be some remedy, and everything would be looked into with what myself and the staff were saying with the issues that we were having. And I let her know, I said, "Well, I'll let Dr. Blanchard know as well when I see him." And she said, "Well, I'll let him know, but obviously if you see him, you can as well." And that was that.

(Tr. 216-217)

Nothing was said about Charging Party working for Respondent under a corrective plan; Charging Party would have finished her time and resigned if Respondent had stated any intention of placing her on a corrective plan, especially since she had an open job offer to start on August 29. (Tr. 217) Charging Party rescinded her resignation and continued working for Respondent. (Tr. 107)

5. Charging Party Receives her Review and a Raise

On August 23, Charging Party received her annual review from Washe and Wilson in Washe's office. (Tr. 115-116, 218-220; GCX 11) Of the six rated areas, Charging Party

[7] August 12 was a Friday.

received two plus (+), four plus/minus (+/-), and no minus (-) ratings. (Tr. 115-117; GCX 11) The body of the review, written by Washe, states as follows:

> Strengths and key accomplishments: hardworking "jack of all trades" during times of understaffing working to develop good relationship with staff and improve office procedures/efficiency
>
> Area(s) that need improvement: balance between administrative and clinical duties maintain composure in stressful circumstances, promote professionalism in the office and staff accountability
>
> Plan to get things on track: [blank]
>
> Comments: slow down, process information, reduce "noise"

(Tr. 117; GCX 11) When the review was discussed, nothing was said about Charging Party being placed on a corrective plan, and Charging Party never signed a corrective plan. (Tr. 221)

On September 1, Charging Party received a mailed letter informing her of her salary increase. (Tr. 119-120; GCX 12) The letter included a provision that "[p]lease remember that matters relating to salary are strictly confidential in nature and should not be divulged *to other employees* (emphasis added) inside or outside of the practice."[8] (Tr. 120; GCX 12) Wilson could recall no other employees who had received a raise in the prior two years (between 2020 and 2022) while on a corrective plan. (Tr. 120)

6. For the First Time, Washe Instructed Charging Party to Order Food for Staff

On September 7, Charging Party, with Washe's approval, and for the first and only time, obtained food orders for several employees and placed a food order at a local Coney Island restaurant. (Tr. 252-255; GCX 22)

> Dr. Washe had me ask the staff, restaurants in the area where they would prefer to order as far as getting breakfast ordered and brought in for them.
> * * * *

[8] The statement in the September 1 letter was not alleged as unlawful in the Complaint or at hearing, and no request to amend the Complaint is made herein.

> They all kind of agreed on National Coney Island. I made Dr. Washe aware of it. Dr. Washe told me to make sure I asked everybody in the office. It was not just the admin and medical assistants. We had the accounting department in there, which was Josey and Josh, the other doctors that were present, and anybody that was in the spare offices in the back that they were other people from other areas. Hence, Lauren or Laura or Stephanie and them would sit in those back offices that they were visiting to make sure I asked everybody.

(Tr. 253)

Respondent did not have an established practice of providing breakfast or other rewards for employees. About a week or two earlier, at one of the bi-weekly meetings, Wilson announced that "there was going to be an allowance that each office would be getting based off the amount of people that were in each office because our office wasn't the only location." (Tr. 253-254) Charging Party submitted the receipt and was reimbursed for the expense. (Tr. 252; GCX 22) This was the only time that an order for the office of this type, or any other, was placed while Charging Party was office manager. (Tr. 253-255)

7. Wage Discussions Resurface

On October 5, employee Tonya Burton called Wilson upset about what she heard about a co-worker's pay. (Tr. 121-122; GCX 24) Burton said that there were "several conversations between many people happening all throughout the office since Katie had joined the company. . . and it has caused many upset feelings from select individuals including herself" and that employees were hearing that "she was hired in at a very high rate and it was 'unfair' to other employees." (Tr. 121-122; GCX 24) Burton did not say who was having the conversations, but per Wilson's statement in GCX 24, Wilson specifically stated that the only people who knew the information causing employees to be upset were herself, Washe, and Charging Party. (Tr. 121-122; GCX 24)

8. Charging Party Works a Full Day on October 11, Arriving Late and Leaving Late

Charging Party normally worked 7 a.m. to 3:30 p.m., but varied her work schedule on numerous occasions, including for Respondent's needs in addition to attending to personal matters including appointments, as long as Wilson knew. (Tr. 221-223) If her absence from the office was going to be on PTO or vacation, she would enter it through the payroll software. (Tr. 223) For flex time, including situations where she stayed late one day and wanted to arrive late the next day, Charging Party simply let Wilson know and then updated Wilson when she returned to the office. (Tr. 223-224) On October 11, Charging Party arrived around 8:15 or 8:30 a.m. (Tr. 222-223) Charging Party provided notice in the latter part of the prior week that she would be late by about "an hour, hour-and-a-half" for an appointment; Wilson said "okay." (Tr. 222-224, 570-571) Her appointment was an interview with a prospective employer. (Tr. 224)

After she arrived, Charging Party worked without incident through the rest of her shift and stayed late for an MA interview that started around 3:30 or 4 p.m. (Tr. 225; RX 18 (interview with S. Shellman 330-430 p.m.)) Charging Party said nothing to her coworkers about what she did while away that morning; she told them that she was in the office if they needed her and checked in with them to make sure everything was okay. (Tr. 236, 576-577) Charging Party did not say anything to management about having attended an interview. (Tr. 237) No testimony was offered that Respondent said anything to Charging Party about coming in late that day. No patient emergency occurred that day during Charging Party's absence. (Tr. 75-76)[9]

Charging Party worked a full day on October 11, staying later than her normal hours to observe a scheduled interview that afternoon. In the late afternoon of October 11, Charging

[9] According to Blanchard when pressed to explain what the claimed emergency was, "It's not an emergency occurring. It's an emergency happening because we're short-staffed." (Tr. 75)

Party observed a scheduled interview for a Medical Assistant position along with Washe and Wilson. (Tr. 121-122, 578-579; GCX 24; RX 18) This was the second, and final, interview that Charging Party attended during her tenure as office manager. (Tr. 226, 579-580) One interview was on October 11, and the other was about a month earlier. (Tr. 226, 565-568, 579-580) Before the interview, Wilson sent the applicant's resume to Charging Party, that she printed for Washe. (Tr. 225) The interview was conducted at the office with the candidate, Wilson, and Charging Party in person, and Washe on video. (Tr. 226)

Charging Party did not vote on the adequacy of any candidate, including the candidate on October 11, and was never told anything about any requirement for unanimous support for a candidate. (Tr. 568-569) After the interview, Wilson asked what Washe and Charging Party thought of the applicant. (Tr. 227) Without receiving any response, Wilson then said that "what [the applicant] wanted as far as pay was in the range." (Tr. 227)

> Then before Dr. Washe or I could answer Lauren, Lauren said, "Well, on that note, we wanted to speak to you," to me, "about what she had been hearing from staff." She said that a staff member had came to her, Lauren, and stated that why is the new person, the one that was hired about a month before, that was an admin, making more money than that individual because she's been there longer, she does more things. And she said, Lauren stated that she was shocked that that was being talked about in the office; that, once again, *you can't speak of pay in the office, it's grounds for termination, even if I was the office manager*. She had then said, too, in the same conversation, that, again, she had over -- that a staff member had overheard someone talking about it. And that, I told Lauren at the time, I'm like, "Well, you just kind of did what you said; that you said someone said that I said it, and now you're saying someone said they overheard somebody saying it." Dr. Washe interjected and said whether the person had more experience, more education, or they were just desperate and needed to hire somebody, that *pay should not be talked about in the office because it can offend other people and cause issues*. And then the conversation ended. And Dr. Washe left, and then Lauren and I left the conference room. And basically the office, there was nobody still there basically around that time, except I think there was a doctor up front because it was around 5:00 a little bit after. So I grabbed my purse and that from the office, and I left.

(Tr. 227-228) (emphasis added) See also (Tr. 121-122; GCX 24) (Wilson testimony)

Even with arriving late after her appointment/interview, Charging Party worked a full shift on October 11 by the time that the interview completed. (Tr. 227-228, 578-579; RX 18)

9. Charging Party Asserts Employee Rights under the Act, Informs Respondent that She will file a Charge with the NLRB and is Discharged Two Days Later

On October 12, Charging Party went to Laura Holt's office. (Tr. 230) Charging Party described the conversation:

> [I]t was a general, you know, "Good morning, how are you?" Same thing from Laura to myself. She asked, Laura Holt asked what I thought about our meeting the day before. I said, "Well, which meeting?" Because Laura Holt, Dr. Blanchard, Seidman, and a couple of all of our, we had a basic meeting earlier. And she said, "Well, that one." She's like, "Well, what other one are you talking about?" I said, "Well, that one was great." I said, "But I thought maybe you were asking about the one that Dr. Washe and Laura Wilson had with me later on." She's like, "Well, what are you talking about?" And I let her know that basically they interrogated.
>
> * * * *
>
> I let Laura Holt know that I was basically interrogated about speaking about pay, which did not happen, by Lauren Wilson and Dr. Washe. I did let Laura Holt know that that was illegal to tell somebody that they couldn't do that, that a lot of people may not know that, that I do know that, that it's not something I would tell the staff, and that I also let Laura Holt know at that point that I had looked into it and that I would be filing a charge with the NLRB.
>
> Laura was sitting in her chair at that point, but her mouth just kind of dropped like she was stunned and kind of, she was sitting up and talking to me, but kind of sat back in her chair after kind of in shock. I did let her know that I'm sure that after they find out that I filed the charge that they would probably be firing me.
>
> She, Laura Holt, said, "Well, no one's going to fire you. Everybody likes you here. I have not heard about you getting fired or any talk like that." And I said, "Well, I'm sure it will probably happen because they're not going to be too happy about it once they find the charge comes to them." And that conversation basically ended at that point because she didn't know what else to say to me. Laura Holt didn't.

(Tr. 230-232)

In a signed undated statement, Holt described the events of October 11 and October 12 as follows:

10/11/22

KM alerted me that she was late to work due to attending a job interview at an outside company. When asked if the other staff was aware of her looking elsewhere for employment, she said they are.

10/12/22

KM came to me in the a.m. stating she felt threatened during a meeting on 10/11/22 between Dr. Blanchard, Dr. Washe, Dr. Seidman and myself. The meeting was regarding an interaction between a PPP Provider and an MA. The purpose had been to identify the facts of the issue and to discuss with the manager and medical director possible process and/or culture issues that led to the disagreement. KM stated she felt attacked like she was going to be fired or asked to fire the MA. She stated she felt like getting up and telling Dr. Blanchard off and exiting the meeting.

She explained she "no longer has any respect for the physicians" at PPP.

She admitted to going to 2 other employees (unnamed) following the meeting to fill them in on the meeting details and how she felt.

She then went on to give an update from a meeting she had on 10/11/22 with Lauren Wilson and Dr. Washe where there had been an open discussion about discussing other employees' pay. It was explained to her that this was not in line with our company's core values and promoted a negative culture and feeling amongst staff. KM stated she felt they were making accusations and threatening her. She said that discussing other employees' pay was not against the law and the company could not ensue any sort of reprimand if she discussed employee pay.

She alerted me in the meeting on 10/12/22 that she had placed a call in to the National Labor Relations Board earlier that morning and that she would be filing formal complaints against this company.

When asked what her long-term goal in this was, she was not concerned because legally there can be no retaliation from a company for reporting to the NLRB. She states more than once "they will know it came from me."

She assured me she would either be fired, or she would be leaving upon pending offer from another company. Either way, she had no intention of staying and her staff was all aware.

(RX 14)

At trial, Holt's testimony about the statement included:

Q. So in this document, you state that on October 11th, the very, I think it's two sentences, that Kim had alerted that she was late due to attending a job interview. But you said in your testimony that she was boasting about interviewing on company times. Is that right?

A. She was boasting about coming in for a second interview, yes. I would take that as boastful if she's coming into my office and saying that.

Q. And I think the word gloating might have also come out.

A. I did not use the word gloating.

Q. Okay, so boasting about it?

A. Uh-huh.

Q. So why if she was boasting about it, I mean, you don't say anything in your statement about her boasting about going to an interview, did you?

A. I did not.

Q. But that is something that you mentioned as being an important factor now, isn't it?

A. No. I just said the important factor was that her professionalism of coming into her direct supervisor's office and saying that she was late because she was interviewing on company time was not professional.

Q. Okay, so she was boasting about it. That's not a factor?

A. That is a factor.

Q. Okay, so it is a factor, but it's not a factor that you mentioned when it was closer in time to when this happened. Isn't that right?

A. I didn't type that.

Q. Who did?

A. I mean, I didn't say that in this written -- I didn't say that there.

Q. Who typed it?

A. Me. I typed this.

(Tr. 524-525)

Charging Party worked her full shift without incident on October 12 and 13. (Tr. 237) On October 14, Respondent's Wilson and Holt met with Charging Party and discharged her. (Tr. 126-127, 233-234; GCX 13) Wilson said that they would terminate Charging Party's employment effective immediately, that it "appears that I'm not happy here, and that they would be going in a different direction." (Tr. 234-235) Holt stood nearby, looking uncomfortable as she was "standing and kept shifting" until leaving the room. (Tr. 235) Wilson handed Charging Party the termination paper but Charging Party did not look at it. (Tr. 234-235; GCX 13)

According to Blanchard, Charging Party was discharged for "performance and interviewing on company time and not showing up for work, which created an unsafe patient environment in the practice." (Tr. 57) According to Wilson, Charging Party was discharged for: (1) lack of professionalism; and (2) violating the PTO policy. (Tr. 129) According to Wilson, Charging Party's lack of professionalism was that Charging Party told Holt that she did not care if she was fired, that "everybody's already aware either she's going to get fired or she's going to resign. It was very abrasive. Laura [Holt] felt very intimidated with the conversation. It was aggressive." (Tr. 129)

Wilson confirmed that Charging Party was discharged on October 14, three days after the post-interview discussion on October 11 and two days after the Holt-Charging Party conversation on October 12. Not coincidentally, during the October 12 discussion, Charging Party told Holt that employers cannot prohibit employees from discussing wages, that she was aware of her rights, and that she would be filing a charge with the NLRB. (Tr. 129-130; GCX 13; RX 14)

Respondent does not prohibit employees from going to interviews and would not have discharged Charging Party for the sole reason of going to an interview. (Tr. 131) The May 3 discipline was not a factor in Respondent's decision to discharge Charging Party. (Tr. 131-132) Wilson could not recall any employee discharged in the prior two years for violating the PTO policy in a similar manner that was alleged to have been done by Charging Party. (Tr. 132) Wilson attempted to distinguish Charging Party's situation, asserting that Charging Party showed up late for work without having requested PTO and then "gloated" about having a second interview. (Tr. 132-133) When asked if Charging Party, as a salaried employee, worked

sometimes more and sometimes less than 40 hours per week, Wilson replied "standard 40" before conceding that she did not know if Charging Party's hours varied. (Tr. 133)

III. CREDIBILITY

Significant weight is given to an administrative law judge's credibility determination because the administrative law judge actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the administrative law judge that the witness is testifying truthfully or falsely. Credibility determinations may furthermore be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole, including "not only of what a witness says but of how a witness says it." *Medeco Security Locks*, 322 NLRB 664, 664 (1996), enfd. in material part 142. F.3d 733 (4th Cir. 1998); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) (Administrative Law Judge discussion). Accord *V & W Castings*, 231 NLRB 912, 912-913 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978) (finding, contrary to the Administrative Law Judge, that the employer unlawfully discharged an employee because the testimony of witnesses credited by the judge "is marked by inconsistencies, ambiguities, contradictions, and vague or incredible statements which were totally ignored by the Administrative Law Judge").

A. Credibility Favors Charging Party

Here, Charging Party testified consistently on direct and cross-examination about her duties and responsibilities and about specific events that occurred during her employment. Her testimony on direct examination in response to non-leading questions was straightforward,

detailed and provided no basis to infer that she was attempting to mislead or to spin a tale. Charging Party held up equally well on cross-examination, re-affirming her earlier testimony that, as office manager, she was a go-to person who had to go through Wilson, Washe or upper management to make any decisions. (Tr. 263-264) For example, when Respondent counsel questioned her about her role in Summers' discipline, Charging Party clearly, candidly and repeatedly testified that she signed Summers' discipline, but that she was involved only as a witness. Wilson wrote the reprimand, Washe delivered the reprimand and Charging Party merely signed as office manager pursuant to Washe's directive. (Tr. 266-271) It was not until questioning by Respondent's counsel that it became clear that Charging Party had not been involved in writing the discipline and had not even read the discipline before Washe issued the discipline. (Tr. 269, 282)

Similarly, Respondent counsel attempted to convince Charging Party that she assigned tasks to employees, but Charging Party reinforced her earlier testimony that "[e]verybody already had their protocols to follow." (Tr. 271)

Counsel attempted to establish that Charging Party responsibly directed employees, but Charging Party testified that she oversees individuals, accounts for their daily duties, but that if "there was any issues, they would come to me. I didn't overlook everything and micromanage anything to make sure everything was getting done. They knew what they were to do according to the protocols they had, and if there was (sic) issues, they would let me know. [] If they came to me with something, I was to go to Lauren [Wilson] and/or Dr. Washe." (Tr. 275-276) No testimony or documentary evidence was entered to show that Charging Party was informed, or actually held accountable for the actions of anyone else in the office. To the contrary, on May 3,

Charging Party was disciplined simultaneously with Lovelace, not for her failure to correct Lovelace's conduct, rather, Respondent disciplined her for her own self-reported conduct.

Counsel for Respondent repeatedly attempted to get Charging Party to testify that she issued discipline, but Charging Party repeatedly testified that she did not issue discipline, but only witnessed two disciplines and signed as a witness. (Tr. 266-274, 278-279) Further, as questioned by the ALJ:

> JUDGE MCKINNEY: So did you decide in your role as office manager how to discipline an employee if a performance issue was identified either by you or by Dr. Washe or Ms. Fuller?
> THE WITNESS: No.

(Tr. 278)

Charging Party's testimony that she did not have supervisory responsibility or authority was corroborated by her August 11 resignation wherein she asserted, a full two months before her discharge, that in spite of her job title, she was not allowed to be a manager. "Again, I was hired to manage, not to be someone's puppet." (GCX 9) Charging Party's view, expressed two months before her discharge, that she was being treated as a puppet, was consistent with the lack of authority that she was given as office manager, a lack of authority that continued throughout her time as office manager. This further reinforces Charging Party's testimony that all decisions were made by Wilson and Washe, and not Charging Party as Respondent claims.

Unlike Respondent's attempts to pile on when given the opportunity, Charging Party did not take opportunities to embellish her story. For example, when Charging Party was asked what explanation, if any, that Wilson gave regarding other staff saying the same things on August 11, Charging Party did not take the opportunity to embellish the story, but simply stated that Wilson "didn't tell me specifics what her conversations were with them, but they were having similar issues from what I described; that it wasn't just something I was stating; that things were lining

up as well with what they were saying." (Tr. 209) Charging Party's straightforward testimony is a significant factor in finding that her testimony should be credited.

Charging Party's testimony was unembellished, direct and responsive, and remained consistent during examination by Respondent counsel. She provided foundational and other details to non-leading questions that undercut any claim of guile, deceit, or exaggeration. Throughout her testimony, she did not attempt to dodge questions, provide answers to questions that were not asked, or claim that she did not understand questions that were clearly worded. See, *Medeco Security Locks*, 322 NLRB at 664.

B. The testimony of Respondent's Witnesses Lacks Credibility and is Unsupported by Documentary Evidence, in Part

In contrast to Charging Party's testimony, Respondent's witnesses attempted to tell a story that was contrary to documentary evidence and Respondent's own witness testimony. Respondent witness testimony was, in large part, self-serving, contradictory to Respondent's claims and documentary evidence in the record, and to some extent, incredible (i.e. not credible).

As a preliminary note, Blanchard and Wilson were present for all witnesses' testimony as Blanchard was Respondent's party representative and Wilson was deemed an essential witness. (Tr. 15) Respondent counsel repeatedly used leading questions throughout the examination of Respondent witnesses, that were repeatedly objected to, and that were even noted by the ALJ. (See, e.g., Tr. 50-60)

1. Contrary to Respondent's Repetitive Testimony, it Prohibited Employees from Discussing Wages

On numerous occasions, Respondent's witnesses attempted to portray a distorted reality, asserting that its explicit restrictions on wage discussions only applied to management personnel. Respondent's witnesses repeatedly testified that Respondent does not prohibit employees from

discussing wages. See, e.g., Tr. 71 (Blanchard); Tr. 97-98 (Wilson); Tr. 527-530 (Holt). Wilson testified that the Handbook rule that wages are confidential only applied to management and leadership. (Tr. 98) However, Wilson conceded that nothing in the Handbook excludes employees from the rule. (Tr. 98) This claim that wage discussions were only prohibited as to managers was not true as explicitly demonstrated in Respondent's own documents and communications.

When asked about the language in her August 10 email to Charging Party that **"wages are HIGHLY confidential.** Staff should never be having these conversations regarding pay with one another, please be sure if you do hear these conversations, you remind them of this. This is grounds for termination as stated in our handbook[,]" Wilson unbelievably denied that she instructed Charging Party to tell employees that wages are confidential, and that she only wanted Charging Party to not be involved in any wage discussions. (Tr. 99-102; GCX 7)Wilson additionally testified that it was only against policy for management to discuss wages based on the Handbook. (Tr. 122-123; GCX 24)[10] Wilson's testimony is patently false, is squarely contradictory to the plain language of her August 10 email and demonstrates her and Respondent's willingness to distort the truth, even by attempting to reinterpret its own written evidence into absurdity to try to establish its defense.

Wilson's testimony further ignores the glaring fact that since at least 2020, Respondent maintained language in its Employee Handbook, referenced above, that wages are strictly confidential, and that information about present or former employees could not be disclosed

[10] Respondent initially objected to General Counsel's version of GCX 24. During the time period when Respondent provided evidence in support of the instant charge and when Respondent provided its subpoena production, Wilson corrected her statement regarding the October 5 employee report from stating that the employee contacted her on November 5 to October 5. (Tr. 123-124) As noted by General Counsel at hearing, it is clear by the document, the testimony, and the circumstances, that Wilson was referencing an event that occurred in October and not November regardless of Wilson's error in the document. (Tr. 124-126)

inside or outside of the practice, under penalty of discipline including immediate discharge. (GCX 3 at 12) Moreover, Respondent renewed this identical language in its 2024 Team Member Handbook when it revised the handbook on December 10, 2024, even though the Charging Party had filed the instant charge on October 17, 2022, explicitly alleging that she engaged in protected activities of discussing wages, was threatened, interrogated, and was discharged for discussing wages. (GCX 1(a); GCX 6 at 12) It was not until March 2026 that Respondent revised its Team Member Handbook to remove the unlawful language. (RX 12)

Accordingly, Respondent's repeated assertions that it did not prohibit employees from discussing wages is patently false and is squarely contradicted by the explicit language in its written communications and handbooks that Respondent chose to maintain for over three years *after* Charging Party's discharge. Instead, the documentary evidence shows that Respondent was so committed to its prohibition on discussing wages that it maintained the language even in the face of an NLRB charge that should have made it thoroughly aware of its unlawful prohibition on discussing wages. Respondent's dogged insistence to this unlawful prohibition was demonstrated throughout the events of this case in its repeated reinforcement of the rule in its Handbook – employee discussion about wages was prohibited.

2. Charging Party was not on a Corrective Plan

As noted above, Charging Party received her annual review on August 23 from Washe and Wilson. (Tr. 115-116; GCX 11) Of the six rated areas, Charging Party received no negative ratings. (GCX 11) Wilson testified that, even though a negative (-) rating was explicitly listed as one of the listed possible ratings, and even though Charging Party's review contained no explicit negative (-) ratings, that the Charging Party nonetheless received negative ratings because a "+/-" is not a positive and would need improvement – even though she admitted that there were no

outright negative (-) marks. (Tr. 116-117) Respondent now unbelievably argues that there were negatives noted in her review despite nary a minus mark in the review and the absence of anything listed in the "Plan to get things back on track" portion of the review form.

Wilson testified that when a corrective action is performed, it is normally documented what was observed, and what the Respondent wants the employee to do. (Tr. 117) When pressed on whether there was a corrective action plan for Charging Party, Wilson nonetheless referred to Washe's documentation of the incident (RX 13) before admitting that there was no separate corrective action plan for Charging Party. (Tr. 118-119) However, on cross-examination through leading questions by Respondent's counsel, Wilson testified that the improvement plan was documented in the August 23 annual review of "Area(s) that need improvement." (Tr. 142) The relevant parts of Charging Party's employee review states:

> Area(s) that need improvement: balance between administrative and clinical duties maintain composure in stressful circumstances, promote professionalism in the office and staff accountability
>
> Plan to get things on track: [blank]
>
> Comments: slow down, process information, reduce "noise"

(GCX 11)

It is telling that there was no "Plan to get things on track." (GCX 11) It seems implausible that, if Charging Party was actually placed on a corrective plan, in a review written and conducted by the person (Washe) who had actually been involved in an alleged conflict, that there would have at least been *something* written under a heading so blatantly relevant as the area titled "Plan to get things on track." Washe wrote Charging Party's review. (Tr. 117) There is no rational explanation why, if there had been such a recent negative confrontation between Charging Party and Washe, that Respondent made no reference to this confrontation in Charging

Party's review – especially if, as claimed, the confrontation was the basis for a corrective plan that was allegedly documented in the annual review. (Tr. 117; GCX 11)

When the review was discussed with Charging Party, nothing was said about Charging Party being placed on a corrective plan, and Charging Party never signed a corrective plan. (Tr. 221) Further, as noted above, on September 1, Charging Party received a salary increase even though Wilson could recall no other employees who had received a raise in the prior two years (between 2020 and 2022) while on a corrective plan. (Tr. 119-120; GCX 12) The reason is readily apparent; employees who had been on a corrective plan did not receive raises. Charging Party received a raise because, in part, she was not on a corrective plan. The other obvious factor was that Respondent was satisfied by her performance to date.

Equally troublesome for Respondent's claim that it placed Charging Party on a corrective action plan is the undisputed fact that it asked Charging Party multiple times to rescind her resignation. Respondent essentially begged the Charging Party to continue her employment by requesting multiple times by multiple different levels of management, including by CEO Blanchard, for Charging Party to rescind her resignation. Respondent's claim that Charging Party was on a corrective plan is false and should be rejected by the ALJ.

3. Respondent Witnesses Generalized, Non-Specific Testimony Should not be Credited

After testifying *ad nauseam* as to Charging Party's claimed authority and responsibilities, Respondent's witnesses could provide little, if any, concrete examples where Charging Party actually used these claimed responsibilities or exercised any independent judgment. For example, Respondent's witnesses testified at length about Charging Party's alleged role in setting, preparing, or presenting agendas. Blanchard was asked to identify one of the agendas that Charging Party actually developed but could identify none. (Tr. 78) Blanchard testified at

length in response to Respondent counsel's questions about Charging Party's responsibility to assign tasks, but when asked by General Counsel to identify *one* task that Charging Party assigned, Blanchard conceded that he could not. "I'm not speaking of seeing her directly assigning a task. I wasn't there." (Tr. 78-79) When asked in a variety of ways whether his testimony was based on direct knowledge or generalities, Blanchard provided a variety of responses, including that

> A. My testimony is based on my 26 years of knowledge of how our office managers run and are expected to run our offices, creating Level 10 agendas, assigning tasks, and holding staff accountable for doing that.
> Q. But not based on what you actually saw Ms. Molnar do or not do?
> A. If she weren't doing that, she wouldn't have been our office manager.
> Q. So you're looking at it not as the, "I actually saw her doing it," but, "I just didn't hear about her not doing it." Is that what your testimony is based on?
> A. I would have heard about her not doing that portion of her job because it's so critical to her job.

(Tr. 79)

When presented with an actual meeting agenda from Respondent counsel, Blanchard was able to identify an issue on the agenda that *he* had raised, while also claiming, in response to leading questions, that Charging Party would have identified the issues to be discussed. (Tr. 81, RX 11) Even though Blanchard could only identify an issue that he raised on the agenda, he nonetheless made the unbelievable claim that Charging Party had the discretion on whether to add the idea of Blanchard, the CEO of the company, to the agenda. (Tr. 83)

Wilson testified as to Charging Party's responsibilities regarding scheduling interviews. This included that Charging Party provided Wilson with Charging Party's and Washe's availability for interviews, that Wilson contacted candidates and scheduled interviews. (Tr. 138) According to Wilson, during an interview, Charging Party would describe "a day in the life" as to what expectations of the role would be. (Tr. 140) According to Wilson, after the interview,

she, Washe, and Charging Party would vote on the candidate, with a unanimous vote required in order to hire the candidate. (Tr. 138-139) This was squarely denied by Charging Party when asked how many times she voted, or participated in a vote, on an interviewee: "[t]hat was never discussed with me." (Tr. 568-569)

Wilson testified that Charging Party identified issues for "anybody in the office," including physicians, which would be discussed with Washe, that they would determine the next steps, that Charging Party discussed the concerns with HR, that HR documented the concerns, that HR determined the violations, drafted the corrective actions, gave the corrective actions to Charging Party to cover with the disciplined employees and solicit employee signatures, and then return the signed corrective action to HR. (Tr. 141) Wilson testified in response to several leading questions by Respondent counsel regarding this claimed authority to discipline without providing any factual basis of anything that actually happened. (Tr. 141-142) Instead of being asked for concrete examples of what Charging Party actually did, counsel asked questions such as how something *would* be done instead of *what Charging Party actually did*. (See, e.g., Tr. 142:24) Wilson provided no specific example of Charging Party recommending discipline or discharge. (Tr. 140:24 to 142:20)

Similarly, Wilson provided no examples of actual rewards given by Charging Party. (Tr. 142:21 to 143:12)

When Respondent counsel asked Wilson about Charging Party's responsibilities in the office, Wilson said that Charging Party oversees various schedules, finds coverage, assigns rooms, and that this was "very important in order for the day to run smoothly." (Tr. 151-152) Wilson then testified in the most general terms that Charging Party did HR recruiting, training, onboarding, disciplinary steps, terminations, assigned work including assigning patient rooms,

led meetings, "brought the agenda, created the agenda," and had full authority to assign special projects including soliciting employee interest in doing special projects, without providing any concrete example of where Charging Party performed any of these tasks. (Tr. 153-155)

In contrast, Charging Party did not recall what "ROCs" were, did not recall assigning any special projects to herself or anyone else, and did not recall any projects lasting three months. (Tr. 572) Charging Party did not check on the status of anyone's special projects. (Tr. 573) Charging Party did not recognize the document that Respondent proposed was a Level 10 meeting agenda, was unfamiliar with graphs therein and did not know what "IDS" referenced. (Tr. 574-575; RX 11) Charging Party did not set any priorities for agendas; this was done by Wilson and Washe. (Tr. 575) At the Level 10 Meetings, Charging Party did not check on the status of any special projects. (Tr. 576)

What remains is that Respondent never intended that Charging Party exercise her purported authority, as evidenced by the facts established on the record, above. That is, the question is not whether Charging Party exercised authority she possessed; rather, that she never exercised authority because she never possessed it - despite Respondent's self-serving testimony to the contrary.

Respondent's reliance on generalized testimony as to supervisory indicia, combined with the absolute failure to provide specific examples of indicia that Charging Party actually performed, should be rejected by the ALJ.

C. Credibility Conclusion

Overall, the testimony of Respondent's witnesses was, in large part, not credible, self-serving, generalized, inconsistent with documentary evidence and even other portions of Respondent witnesses' testimony. Respondent's witnesses demonstrated a willingness to

fabricate testimony to cover up the truth of what occurred. The solid evidence introduced at hearing demonstrates that testimony of Respondent's witnesses cannot be wholly accepted and must be rejected, in part, especially where it is contradicted by other established evidence, including testimony of Charging Party or documentary evidence. Respondent's numerous inconsistencies, ambiguities, contradictions, and vague and incredible statements should be rejected by the ALJ. *V & W Castings*, 231 NLRB 912, 912-913 (1977), enfd. 587 F.2d 1005 (9th Cir. 1978) (rejecting testimony that the Board found "marked by inconsistencies, ambiguities, contradictions, and vague or incredible statements")

IV. ARGUMENT – SECTION 8(a)(1) ALLEGATIONS

A. Charging Party was not a Statutory Supervisor

1. Legal Standard

Section 2(11) of the Act states that:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11)

"As a general principle, the Board has exercised caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect'" although "in applying that principle, the Board has occasionally reached too far." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006) (citing *Chevron Shipping Co*., 317 NLRB 379, 381 (1995)) With that past overreach in mind, the *Oakwood* Board adopted definitions for "assign," "responsibly to direct," and "independent judgment." Id. at 688.

The Board construed "the term 'assign' to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment" including that "to 'assign' for purposes of Section 2(11) refers to the [putative supervisor's] designation of significant overall duties to an employee, not to the [putative supervisor's] ad hoc instruction that the employee perform a discrete task." Id. at 689.

The *Oakwood* Board decided that to responsibly direct required that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Id. at 691-692. This requires that "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692.

The *Oakwood* Board found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement" and distinguished this from "actions that are 'of a merely routine or clerical nature.'" Id. at 693.

In *G4S Regulated Security Solutions*, 358 NLRB 1701, 1701-1702 (2012) (two-member decision invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014)), supplemental decision 359 NLRB 947 (2013), incorporated by reference at 362 NLRB 1072, 1072 (2015), enfd. 670 F. Appx. 697, 698 (11th Cir. 2016)), the Board revisited the

2(11) supervisor analysis. To prove that Charging Party was a supervisor, Respondent must prove by a preponderance of the evidence that she:

> (1) [] held authority to engage in any one of the 12 enumerated supervisory functions listed above; (2) that [her] "exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment"; and (3) that [her] authority was held "in the interest of the employer."
>
> The Respondent can prove that [she] had the requisite supervisory authority either by demonstrating that [she] actually performed a supervisory action or by showing that [she] effectively recommended that it be done. *G4S*, above, 358 NLRB 1701 [*Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006)]. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693.
>
> Because the Respondent bears the burden of proving supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish supervisory status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, "mere inferences or conclusionary statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *Alternate Concepts*, *Inc.*, 358 NLRB 292, 294 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Also, job descriptions, job titles, and similar "paper authority," without more, do not demonstrate actual supervisory authority. *Golden Crest*, supra.

G4S Regulated Security Solutions, 358 NLRB at 1701.

The *G4S* Board found, as to discipline, and contrary to the Judge, that the testimony by respondent's project manager was insufficient to carry the respondent's burden where the manager's testimony consisted "chiefly of conclusory responses to leading questions by counsel[,]" and that the manager provided no "single specific instance in which [the prospective supervisor(s)] had used discretion or independent judgment regarding discipline" because "[s]uch generalized testimony is insufficient to establish supervisory status and that "[W]hat the

statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." *G4S*, 358 NLRB at 1702. (internal citations omitted) The Board continued, that "the eight disciplinary notices admitted into evidence do not shed any additional light on the lieutenants' disciplinary authority[, and that] there is simply no detailed, specific evidence in the record as to what role the lieutenants who signed those notices played in making the decision to discipline the security officers." Id.

Simply preparing written evaluations that an employer uses in its promotion policy is insufficient to establish supervisory authority. *G4S*, 358 NLRB 1703 (rejecting the judge's conclusion that lieutenants "independently performed evaluations of their direct subordinates that led to promotions and, by so doing, exercised the power to promote[.] Evaluating employees is not one of the 12 supervisory functions listed in Section 2(11). Authority to 'promote' is.") A party is required to "establish that [the putative supervisor's] evaluations affected [employees'] promotion prospects. In other words, under Board law, an evaluation is evidence of supervisory status only if the evaluation, by itself, affects an employment term or condition." Id. (citing *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423 fn. 13 (2010); *Elmhurst Extended Care Facilities,* 329 NLRB 535, 536 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993), enf. denied 165 F.3d 29 (4th Cir. 1999)).

Further, to the extent that a party "contends that various secondary indicia support a finding of supervisory authority[,] Board law is clear that, without sufficient proof of 2(11) primary indicia, secondary indicia do not establish supervisory authority." (*G4S*, supra, 358 NLRB at 1704 fn. 8)

See also, *Sanctuary at McAuley*, 359 NLRB 1456, 1458 (2013), (citing *G4S* and rejecting the employer's supervisory claim because "the record evidence with respect to most of the

corrective action notices submitted by the Employer was slim to nonexistent.") The Board also noted that some of the recent corrective action notices had been "independently reinvestigated and reevaluated by other officials, and that upper management was heavily involved in some of that corrective action." *Sanctuary at McAuley*, 359 NLRB at 1458. See also, *Frenchtown Acquisition Co. v NLRB,* 683 F.3d 298, 305 (6th Cir. 2012) ("General testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony.")

Respondent is likely to cite cases from various circuits in support of its assertions, including a claim that the existence of supervisory authority, standing alone, is sufficient to prove supervisor status. See Respondent's Answers to Complaint and various motions. (GCX 1(w) at 6 (citing, among others, *Beverly California*, 970 F.2d 1548, 1550 fn. 3 (6th Cir. 1992) and *Caremore, Inc. v. NLRB*, 129 F.3d 365, 369 (6th Cir. 1997)); GCX 1(k) at 5-6 (same); GCX 1(n) at 5-6 (same); GCX 1(o) at 9 (same); GCX 1(p) at 5-6 (same); GCX 1(r) at 9-10 (same)) However, the Board maintains a policy of non-acquiescence to circuit decisions other than accepting an adverse circuit court decision as the law of the case. See, e.g., *Lion Elastomers LLC*, 375 NLRB No. 41, slip op. at 1, 4 (2026). Moreover, Board decisions do not support Respondent's contention that supervisory authority, standing alone, is sufficient to confer supervisor status. *G4S Regulated Security Solutions*, 358 NLRB at 1701. Compare *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1 fn. 1, slip op. at 37-38 (2022) (affirming, in the absence of exceptions, judge's supervisor finding that "[p]ossession of supervisory authority is enough even if not exercised"). Accordingly, Respondent cannot rely upon individual circuit decisions absent a Board decision adopting the underlying reasoning going forward, and not just applying the circuit's decision as the law of the case.

2. Respondent Witnesses Testified Generally as to Claimed Charging Party Responsibilities with Limited or No Concrete Specifics

Respondent's witnesses, at length, described their general expectations of Charging Party and generalizations of what her responsibilities and authorities assertedly were. (See, e.g., Blanchard testimony Tr. 50, 53-56) Respondent witnesses testified at length about its expectations of the Charging Party without providing specific instances of actions actually taken by Charging Party. (Tr. 64-73, 137; RX 1) Respondent's witnesses testified generally as to all office managers of its eight offices, but not specifically to Charging Party, over General Counsel objections. (Tr. 67-68) For example, when Blanchard was pointedly and repeatedly asked to describe the Office Manager's duties in place in 2022, he repeatedly replied with generalities, such as that he was not aware of any revisions, that he "suspects" that he would have been aware if there had been any revisions, that he has "every reason to believe" that the Medical Office Manager responsibilities in RX 1was in effect until finally conceding that "I don't review every single job description every year. I wouldn't know exactly. My assumption would be . . . ." (Tr. 69-70)

In addition to the reasons stated above in Section III Credibility, above, to reject these generalized assertions, the Board has rejected such generalizations as evidence of supervisory indicia. The *G4S* Board rejected testimony by respondent that consisted "chiefly of conclusory responses to leading questions by counsel[,]" and that the manager provided no "single specific instance in which [the prospective supervisor(s)] had used discretion or independent judgment regarding discipline" because "[s]uch generalized testimony is insufficient to establish supervisory status and that "[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." *G4S*, 358 NLRB at 1702 (internal citations omitted) The Board continued, rejecting

"the eight disciplinary notices admitted into evidence [that] do not shed any additional light on the lieutenants' disciplinary authority [, and that] there is simply no detailed, specific evidence in the record as to what role the lieutenants who signed those notices played in making the decision to discipline the security officers." *G4S*, 358 NLRB 1702 Consistent with the Board's holdings in *G4S*, Respondent's generalized and non-specific testimony here was ineffective to show any of the Section 2(11) criteria and should be rejected by the ALJ.

3. Respondent Falsely Claimed that Charging Party Wrote Employee Reviews and Impliedly Made Recommendations Regarding Raises

Charging Party credibly testified that she simply met with the AAs and MAs and asked them for their input in response to the annual review questions that included: (1) ratings of Company Core Values and Current Job Responsibilities; (2) Strengths and accomplishments; (3) Area(s) that need improvement; (4) Plan to get things on track; and (5) Comments. (Tr. 239-240) Charging Party wrote down the employees' responses in each annual review. (RX 5)

Respondent's witnesses testified that Charging Party had the authority and responsibility to write employee annual reviews that was in some way indicative of Section 2(11) authority. In support of this, Respondent offered the annual reviews that were filled out and signed by Charging Party. (RX 5) None of the annual reviews provided by Respondent show in any way that Charging Party made any recommendation regarding employee performance, reward, or raises in any way that affects their terms and conditions of employment. To the contrary, Wilson's testimony undermines such a claim. Wilson testified that any discussion regarding wages had been removed from the performance review process:

> [W]e had recently changed the process of removing increases or not in increases. Anything in regards to wages, we removed it from the performance review process so that we could handle it offline so it could specifically specify performance, behavior, attendance during those reviews, and not get caught up in the wage discussion. So employees were just getting used to that, and that's why they were

> asking the questions of, "Okay, when am I going to expect to know if I do or do not get a wage increase."

(Tr. 102)

Therefore, according to Wilson's testimony, any evaluation of wages was handled offline (i.e. outside of Charging Party's review). Respondent provided no evidence of any further communication from Charging Party that was any factor in determining wages or raises.

Wilson demonstrated her overly zealous obedience to answer affirmatively in support of Respondent counsel's leading questions. This included her rush to agree with counsel's questions, including Wilson's testimony that Respondent Exhibit 5 demonstrates that Charging Party performed annual reviews and issued discipline, even though this included a verbal reprimand that was issued on May 12, 2023, seven months after Charging Party was discharged. (Tr. 155; RX 5 at 133)[11]

Wilson's testimony continued in response to leading questions by Respondent counsel, that Charging Party's written reviews *could* affect the decision of whether merit increases would be awarded, but provided no instance where merit increases were awarded based on Charging Party recommendation, or that the Charging Party *ever* made a recommendation regarding merit increases. (Tr. 155-159) Once again, even according to Respondent's testimony, Charging Party lacked the 2(11) authority upon which Respondent claims supervisory status.

4. Respondent Falsely Claimed that Charging Party Issued Discipline

On numerous occasions, Respondent asserted that Charging Party was responsible for, and issued, discipline. In this vein, Blanchard claimed that the doctors do not manage the day-to-day operations, implying that this falls to the office manager. (Tr. 55) Wilson testified that

[11] In response to General Counsel's objection, RX 5 (133) was admitted while noting that page 133 is not relevant and should be disregarded. (Tr. 174-175)

Charging Party had the authority to issue discipline. (Tr. 140) However, Charging Party observed, but did not issue, discipline. Respondent cannot explain why, if it was Charging Party's responsibility, that it was undisputed that Wilson wrote the disciplines and Washe covered (issued) the disciplines to employees in all of the disciplines admitted at trial. (Tr. 55) In fact, Washe disciplined Charging Party and Shannon Lovelace at the same time on May 3 for an immunization error. (RX 5 at 129-130; GCX 19) Under these circumstances, it is clear that when Charging Party signed Lovelace's discipline, it was as a witness who was herself simultaneously receiving discipline. It is also curious that Charging Party was disciplined for the immunization error, instead of being held accountable for Lovelace's conduct since Respondent asserts that it was Charging Party's responsibility to do so as Lovelace's "supervisor."

Respondent may point to RX 5 at 140, RX 15, and RX 16 to somehow claim that Charging Party effectively recommended discipline or otherwise played a more impactful role in Summers' June 14 discipline. However, in addition to the fact that Charging Party did not recall the document in RX 5 at 140 ("Sherry Summers - Supporting Documentation for Reprimand" copied as the last page of RX 15), these documents show, at most, that Charging Party reported Summers' conduct that was observed without making any recommendation on the outcome, including discipline. Any claim that Charging Party disciplined, effectively recommended discipline, or used independent judgment related to discipline, is unsupported. Compare *Sanctuary at McAuley*, 359 NLRB 1456, 1458 (2013), above.

In addition to the reasons that Respondent's generalized and non-specific testimony should not be credited as covered in Section III Credibility, above, Respondent has utterly failed to prove any of the Section 2(11) supervisory indicia under the Act, including authority and responsibility related to discipline. Charging Party was not given the actual authority or

responsibility to act as a 2(11) supervisor under the Act. This was evidenced by Respondent's complete inability to provide any clear examples of where Charging Party exercised any of the 2(11) indicia, or any of the claimed responsibilities that Respondent relies on in its Medical Office Manager job description (RX 1).

B. Respondent Issued Numerous Overly Broad Directives to Employees, in Violation of Section 8(a)(1) of The Act (Complaint Paragraphs 7-10, 14)

1. Legal Standard

Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. However overbroad rules are conveyed, whether through employee handbooks, arbitration or severance agreements, or other means, "[e]mployees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec[tion] 7 activity for fear of running afoul of a rule whose coverage is unclear." *Whole Foods Market, Inc.*, 363 NLRB 800, 803 fn.11 (2015) (citing *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969)), enfd., 691 F. Appx 49 (2d Cir. 2017) (summary order). Thus, overbroad and/or ambiguous work rules may have a coercive effect on employees. *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 3 (2023). Consequently, the Board has long acknowledged that the regulation of work rules "serves an important prophylactic function: it allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to 'wait[] until that chill is manifest.'" Id. citing *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 549 (D.C. Cir. 2016) (quoting *Flex Frac Logistics*, LLC, 358 NLRB 1131, 1132 (2012), enfd. in relevant part 746 F.3d 205 (5th Cir. 2014)).

In *Stericycle*, above, the Board "buil[t] on and revise[d]" its earlier test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Stericycle, Inc.*, 372 NLRB No. 113,

slip op. at 1. As in *Lutheran Heritage*, the standard in *Stericycle* requires that the General Counsel prove that the challenged rule "has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity." *Stericycle*, 372 NLRB slip op. at 8-9 (overturning *Boeing Company*, 365 NLRB No. 154 (2017)). Specifically, "an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. That is so even if the rule could also reasonably be interpreted *not* to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights." Id., slip op. at 9-10. The *Stericycle* Board noted, however, that "[w]e do not change existing law that an employer's maintenance of a work rule will be deemed unlawful when it explicitly restricts Sec. 7 activity or was promulgated in response to union or other protected concerted activity." Id., slip op. at 2 fn. 3.

"[I]n some circumstances a violation of Section 8(a)(1) may require more than a showing that an employee could reasonably interpret a work rule to restrict or prohibit Section 7 activity. In such cases, the Board must still evaluate the lawfulness of a work rule in the context of the legitimate and substantial business interests of the employer in maintaining a specific work rule under the particular circumstances." Id., slip op. at 10. "[I]f the General Counsel carries her burden of demonstrating that a rule is presumptively unlawful, an employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Id., slip op. at 10.

In analyzing whether an employer has made an unlawful threat, the Board applies an objective standard of whether the statement would reasonably tend to interfere with the free

exercise of rights protected by the Act. *See generally*, *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618-619 (1969); *Midwest Terminals of Toledo*, 365 NLRB 1645, 1664-1665 (2017) (affirming without comment judge discussion of objective standard in evaluating alleged threats and finding that the employer impliedly threatened employee Hubbard that his workers' compensation claim would be delayed because of protected activity); *Divi Carina Bay Resort,* 356 NLRB 316, 319 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011) (judge discussion of objective standard). In assessing such language, the Board considers the totality of the circumstances to determine the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001). A violation does not turn on motive or whether the threat succeeded or failed. *Onsite News*, 359 NLRB 797, 797 fn. 3, 800-801 (2013) (finding, in agreement with the judge, an unlawful threat of stricter enforcement of work rules if employees supported the union).

2. Respondent's Handbook Rules that Wages are Confidential (Complaint Paragraph 14)

Respondent's 2020 Handbook Pay Policies section states:

> Individual wages, as well as, information regarding any employee's compensation are considered to be strictly confidential. Accordingly, no information concerning present or former employees may be disclosed to fellow employees inside or outside of the Practice. Any violation of this policy may result in discipline up to and including immediate discharge.

(Tr. 34; GCX 3 at 12)

This provision of the Handbook had not been repealed as of October, and the 2024 Team Member Handbook retained the same language. (Tr. 35; GCX 6 at 12) Respondent's claimed justification for why this rule was necessary was that it was a carryover from a prior handbook that was never updated. (Tr. 35) Respondent obviously was aware that there was no cognizable

business justification for the rule, as it was only able to articulate the dubious defense of that it hadn't gotten around to it yet - six years later and four years after an NLRB charge was filed.

This rule, that wages are confidential, and may not be disclosed, under penalty of discipline or discharge, is a hallmark violation of the Act under numerous variations in Board law interpreting the legality of rules. The Board has repeatedly, under multiple different standards across the decades, held that it is unlawful to maintain rules that interfere with employees' ability to discuss wages.

- *Tinley Park Hotel & Convention Center*, 367 NLRB No. 60, slip op. at 1, 7 (2019) (unlawful rule in the employee handbook prohibiting employees from discussing confidential information including wages and other terms and conditions of employment without prior employer authorization; "This rule is a textbook example of one which explicitly prohibits employees from engaging in the protected activity of discussing their wages and other working conditions with one another or members of the public") (citing *Parexel International*, 356 NLRB 516, 519 (2011); *Double Eagle Hotel & Casino*, supra, 341 NLRB 112, 113-115 (2004))
- *Boeing Co.*, 365 NLRB 1494, 1497 (2017), overruled by *Stericycle, Inc.,* 372 NLRB No. 113 (2023) ("*Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another")
- *Aerotek, Inc.*, 365 NLRB 8, 8 (2016) (finding that the employer "unlawfully told employees that wages were confidential and were not to be discussed with other employees")
- *Lily Transportation Corp.*, 362 NLRB 406, 406 fn. 3 (2015) (agreeing with the judge that the employer "unlawfully maintained a handbook provision prohibiting the disclosure of 'confidential information,' which the provision defined as including 'employee information maintained in confidential personnel files,' because employees would reasonably conclude that this language barred them from disclosing information about wages and other terms and conditions of employment.")
- *Asheville School*, 347 NLRB 877, 877, 880 (2006) (finding, in agreement with the Administrative Law Judge, an unlawful rule that "[y]our compensation is a matter of the strictest confidence and concern only to you and to me" was the maintenance and enforcement of a rule prohibiting employees from discussing wages)

- *Leather Center, Inc.*, 312 NLRB 521, 521, 527 (1993) (adopting, in the absence of exceptions, the judge's findings that Respondent promulgated and maintained confidentiality of wage policies)
- *Radison Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (finding, contrary to the judge, an unlawful rule in the employee handbook that "Your salary is determined individually, is confidential, and shouldn't be discussed with anyone other than your supervisor or the Personnel Department.")
- *Highland Superstores*, 301 NLRB 199, 199, 201, 206 (1991) (affirming without comment the judge's finding unlawful statements that wages were confidential)
- *Waco, Inc.*, 273 NLRB 746, 748 (1984) ("There can be little question that the Respondent's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment") (citing *Jeannette Corp.*, 217 NLRB 653 (1975), enfd. F.2d 916 (3d Cir. 1976), *Triana Industries, Inc.*, 245 NLRB 1258 (1979))
- *Triana Industries, Inc.*, 245 NLRB 1258, 1258 (1979) (finding unlawful, contrary to the judge, that telling employees "not to go around asking the other employees how much they were making, because some of them were making more than others." [] "Section 7, which grants employees the unfettered right to engage in concerted activities for mutual aid and protection, encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment.")
- *Jeannette Corp.*, 217 NLRB 653, 653-654, 656 (1975) (affirming without comment the judge's finding that the employer, for years, "maintained in effect an unwritten rule prohibiting employees from discussing wage rates with other employees" and rejecting the employer's claim that the rule was "designed to preserve the confidential nature of the salaries paid the clerical employees and thus to avoid a disruptive situation and unhappiness from developing among those employees which disclosure of the varying salaries would necessarily produce")
- See also, *Pro Residential Services, Inc.*, 373 NLRB No. 100, slip op. at 1 fn.1 (2024) ("We disavow, as inconsistent with the unexcepted-to findings, the judge's statement that 'I do not find that Respondent maintained/enforced an alleged work rule prohibiting employees from discussing wages.'")

The preceding case law makes clear that Respondent's 2020 Employee Handbook language that wages are confidential and may not be disclosed under penalty of discipline up to and including discharge, interferes, restrains, and coerces employees in their ability to exercise their rights under Section 7, including the right to discuss wages. See, e.g., *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2 fn. 3 (maintenance of a rule that is unlawful on its face when it

explicitly restricts Section 7 activity); *Tinley Park Hotel & Convention Center*, 367 NLRB No. 60, slip op. at 1, 7 (2019) (employee handbook rule prohibiting employees from discussing confidential information including wages); *Aerotek, Inc.*, 365 NLRB 8, 8 (2016) (employer "unlawfully told employees that wages were confidential and were not to be discussed with other employees"); *Lily Transportation Corp.*, 362 NLRB 406, 406 fn. 3 (2015) (unlawful handbook provision prohibiting the disclosure of 'confidential information,' because employees would reasonably conclude that this language barred them from disclosing information about wages and other terms and conditions of employment).

We have no ambiguity here, nor do we have a veiled threat. The rule is overbroad under *Boeing* as a Category 3 rule: a rule unlawful to maintain because it would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. "An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another." *Boeing Co.*, 365 NLRB 1494, 1497 (2017), overruled by *Stericycle, Inc.,* 372 NLRB No. 113 (2023). No evaluation of any claimed legitimate and substantial business interests of the rule is required because the rule is unlawful on its face. Further, the rule was not, as claimed by Respondent, something that was intended for or distributed to supervisors and managers only - this policy existed for *all employees* and was required to be signed by *all employees* with a blanket prohibition on the discussion of wages. Accordingly, Respondent's promulgation and enforcement of the rule was unlawful, as alleged in Complaint Paragraph 14, and it is respectfully recommended that the ALJ should so find.

3. August 10 Wilson Email and Phone Call to Not Discuss Wages (Complaint Paragraph 7-8)

As noted above, in early August, Charging Party informed Blanchard that employees approached her with concerns about whether they would receive wages. On August 10, Wilson emailed Charging Party, referencing Charging Party's conversation with Blanchard, and stated that:

> **[W]ages are HIGHLY confidential.** Staff should never be having these conversations regarding pay with one another, please be sure if you do hear these conversations, you remind them of this. This is grounds for termination as stated in our handbook. We do not want any employee feeling offended therefore we should never be discussing specific wages around the office.

(GCX 7)

On August 10, in a phone call between Charging Party and Wilson that followed the email, Wilson reinforced her earlier unlawful statements, by again telling Charging Party that discussing wages in the office is grounds for termination. Consistent with her earlier email, Wilson also told Charging Party to instruct employees not to discuss wages in the office.

Respondent falsely claims that its prohibition on discussing wages only applies to supervisors and not to employees. However, Wilson's email states "staff" should never be discussing wages, makes no exclusion allowing non-supervisory employees to discuss wages, and goes even further by instructing Charging Party that, if she hears any wage discussions, she is to remind coworkers that wages are highly confidential, that staff should never have these conversations, and doing so is grounds for termination under the Handbook. Wilson repeated and reinforced this point in the phone conversation that same day. Contrary to Respondent's fictional claim that its rule does not apply to employees, it is undisputed that there is no exception to the rule that allows employees to discuss wages. Wilson's email and the subsequent conversation both conveyed Respondent's view on employee discussion of wages as also

explicitly stated in the Handbook – they are confidential, and discussion of wages is forbidden under penalty of discipline or discharge.

These directives, although consistent with the Employee Handbook, were promulgated in direct response to protected concerted activity of employees discussing their concerns about wages and these concerns being raised directly with Respondent through Charging Party's discussion with Blanchard. Wilson's email and verbal statements are unlawful on their face for the same reasons noted above regarding the Employee Handbook. Wilson's directives are unlawful for the additional reason that they were issued in response to protected concerted activity. *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2 fn. 3 (maintenance of a rule that is unlawful on its face when it explicitly restricts Section 7 activity and because it was promulgated in response to protected activity).

It is respectfully requested that the ALJ find that Wilson's email and verbal statement, each on its face, and each because it is a rule that was promulgated in response to protected activity, were unlawful.

4. October 11 Wilson Directive to Not Discuss Wages (Complaint Paragraph 9-10)

As noted above, on October 11, after attending a late-afternoon interview, Wilson told Charging Party that a staff member came to her and said that employees were discussing wages and told Charging Party that "you can't speak of pay in the office, it's grounds for termination, even if I was the office manager." Further, Washe also said that pay should not be discussed in the office because it can offend other people and cause issues.[12] (Tr. 227-228) See also (Tr. 121-122; GCX 24) (Wilson testimony)

[12] The Complaint does not allege, and no motion was made at trial or herein to amend to include, an unlawful statement by Washe.

For the same reasons mentioned above regarding the August 10 Wilson email and statements, Wilson's statements were unlawful directives that employees were not allowed to engage in the protected concerted activity of discussing wages, under threat of termination, as alleged in Complaint Paragraph 9 and 10. In addition to the statements being unlawful on their face, the statements are also unlawful for the same reasons mentioned above because they were directives issued in response to protected concerted activity of employees discussing wages in the office. It is respectfully requested that the ALJ find that Wilson's October 11 statements are unlawful both on their face, and because they are directives promulgated in response to protected activity, as alleged in Complaint Paragraph 9 and 10. *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2 fn. 3 (maintenance of a rule that is unlawful on its face when it explicitly restricts Section 7 activity and because it was promulgated in response to protected activity).

IV. THE BOARD SHOULD OVERTURN STERICYCLE

1. The Board Should Overturn *Stericycle* in Favor of a Balanced and Common-Sense Approach[13]

While the mere maintenance of the rules in this case is unlawful under the current controlling precedent set in *Stericycle*, that standard is fundamentally flawed. Instead of striking the congressionally mandated balance between safeguarding the rights of employees and rights of employers, the Board in *Stericycle* presumed unlawful interference whenever employer policies potentially interacted with even the most excessively broad interpretations of Section 7.

[13] In order to maintain rights on exception, General Counsel intends by way of this and other cases to overturn *Stericycle* in favor of a revised standard based on *Boeing* described herein. General Counsel acknowledges that the ALJ cannot deviate from extant Board law, and that the ability to overturn *Stericycle* is not before the ALJ, although the Board may decide the issue before the ALJ issues her decision. For the reasons cited above and within, a rule prohibiting employees from engaging in wage discussions is unlawful under either a *Stericycle* or modified *Boeing* standard.

Reinstating the balancing framework from *Boeing Co.*, 365 NLRB 1494 (2017), together with its practical assessment of whether a rule impacts employee rights under Section 7, would restrict only those rules that demonstrably coerce employees while allowing employers to maintain order, comply with legal obligations, and promote productive workplaces.

a. The Act Requires a Balance Between the Rights of Employees Under Section 7 and the Rights and Duties of Employers

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. Specifically, the rights guaranteed by Section 7, while vital to the achievement of the national labor policy established by Congress, are not absolute. As the Supreme Court held in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945), the law requires "an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." Where necessary, the Board has a "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967). *See also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). *Compare Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (emphasizing the Board's responsibility to balance the effect on Section 7 rights and the employer's asserted business justification). However, the Board abandoned its duty to balance

or adjust these rights and interests when it overturned *Boeing* in favor of the current *Stericycle* standard.

b. The Board's Decision in *Stericycle* Failed to Strike the Required Balance and Compounded that Failure by Adopting an Excessively Broad Interpretation of Section 7

In *Stericycle*, the Board held that when analyzing work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. *Stericycle*, 372 NLRB No. 113, slip op. at 2, 9–10. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, could reasonably interpret the rule to be coercive, the General Counsel has carried their burden and the rule is presumptively unlawful even if there is a reasonable non-coercive interpretation. Id. Although the employer's intent in creating the rule is immaterial, it may rebut the presumption of illegality by proving the rule advances legitimate and substantial business interests that the employer is unable to advance with a more narrowly tailored rule. Id., slip op. at 2, 10.

Instead of striking a balance between employee rights and employer rights as required by the Court, the Board in *Stericycle* opted to find the former presumptively outweighs the latter except in very narrow situations. Regardless of the magnitude of the business interest, legal duty, or even the need to protect employees undergirding a rule, any potential interference with Section 7 rights will render that rule presumptively unlawful. This is not a standard that fairly balances competing legitimate interests; it is a standard that values the most attenuated Section 7 interest over the strongest of business or societal concerns. Congress never intended the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. *See Republic Aviation*, 324 U.S. at 797 ("The Act, of course, does not prevent an

employer from making and enforcing reasonable rules covering the conduct of employees on company time."). By stretching the scope of Section 7 beyond its intended boundaries—and common sense—the *Stericycle* framework undermines employers' ability to establish essential policies that foster productivity, protect employees' safety, and maintain a respectful work environment.

Indeed, even the mere possibility of being able to rebut the presumption of illegality under *Stericycle* is largely illusory. As Member Kaplan pointed out in his dissent in *West Shore Home, LLC*, 372 NLRB No. 143, slip op. at 2 (2023), "no matter how narrowly tailored the rule, there could always be a rule that is ever so slightly more narrowly tailored."[14] Such a demand for linguistic perfection also fails to recognize the practicalities of designing the myriad rules, policies, and handbooks needed to run a business. The experience of the Board has been that it is largely impossible to craft reasonable rules and policies addressing a range of issues without having some ambiguity and overlap with one or more types of possible NLRA-protected conduct. *Boeing*, 365 NLRB at 1502, 1513 n.92.

Stericycle's failure to genuinely balance employer interests and the exercise of Section 7 rights undermines employers' statutory and legal duties under federal and state laws to maintain safe environments, investigate allegations of harassment, uphold respectful workplace standards, and safeguard confidential and proprietary information. *See Stericycle*, 372 NLRB No. 113, slip op. at 32 (Member Kaplan, dissenting). The *Stericycle* framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having

[14] Even in *Lutheran Heritage Village-Livonia*, the Board observed that work rules are necessarily general in nature and thus employers should not be required "to anticipate and catalogue in their work rules every instance in which [prohibited conduct] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB 646, 648 (2004). Regrettably, the Board in later cases under the *Lutheran Heritage* standard lost its bearing and began requiring something close to linguistic perfection. *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1 (2019).

every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The *Stericycle* framework has also made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand scrutiny under the broadest possible interpretation of Section 7. Such uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure experienced labor counsel. *See* Anna Musquera & Scott Brennen, *Regulatory Uncertainty Is What Actually Holds Back Innovation*, Brookings (Apr. 20, 2026), https://www.brookings.edu/articles/ regulatory-uncertainty-is-what-actually-holds-back-innovation ("[O]ne of the clearest and most consistent findings is that regulatory uncertainty discourages investment and innovation, especially among smaller firms.").

Compounding *Stericycle*'s failure to balance employee and employer rights, the decision also adopts an excessively broad interpretation of potential interference with Section 7 rights. As Member Kaplan noted in his dissent, *Stericycle*'s version of the "reasonable employee" is an individual who is "predisposed to read into their employer's work-rules references to Section 7 activity where none exists, and who would not engage in protected concerted activity without first minutely examining each such rule set forth in their employee handbook." *Stericycle*, 372 NLRB No. 113, slip op. at 17. Moreover, *Stericycle's* version of the reasonable employee reads workplace rules in a vacuum. Thus, regardless of the context or evident purpose of a rule, or even basic common sense, the *Stericycle* standard presumes a rule unlawful anytime "an

individual could possibly suspect that any isolated word or phrase in a rule that does not prohibit Section 7 activity might be interpreted to do so." Id.

2. The Board Should Overturn Stericycle in Favor of a New Standard Based on *Boeing*.

Accordingly, the Board should overturn *Stericycle* and return to the objectively reasonable-employee and balancing elements of the *Boeing* test for determining when the mere maintenance of a facially neutral rule is unlawful.[15] As a threshold matter, the General Counsel must first prove that a facially neutral rule would in context be interpreted by an objectively reasonable employee to potentially interfere with the exercise of a Section 7 right. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019). This standard is an objective one and looks solely at the wording of the rule or policy at issue. *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 fn.14 (2019). Rules must be read from the perspective of "an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citation modified). Only if the General Counsel meets this burden should the Board determine whether the nature and extent of the rule's potential reasonable effect on the exercise of NLRA rights outweighs the legitimate justifications associated with the rule. *See Boeing*, 365 NLRB at 1496. In conducting this evaluation, the Board should balance the employer's legitimate business justifications, along with societal interests or regulatory requirements

[15] This new standard should also apply to the interpretation of arbitration agreements, *see Wendy's Restaurant,* 368 NLRB No. 72 (2019), and to rules and oral directives relating to keeping investigations confidential. *See Apogee Retail*, 368 NLRB No. 26 (2020).

underpinning the rule, against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. *See id.*

a. Rules must be read in context from the perspective of an objectively reasonable employee

Importantly, a challenged rule should not be found unlawful merely because it could hypothetically be interpreted to potentially limit Section 7 activity or because the employer failed to eliminate all ambiguities from the rule. *See LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citing *Boeing*, 365 NLRB at 1502). A requirement for perfection in rules drafting creates unnecessary conflict between the rights of employees and those of employers just by the shear breadth of rules that would be implicated. Linguistic precision is neither legally necessary nor realistic for every rule. Id. Simply because a rule or policy *could* reasonably be read to interfere with Section 7 rights does not mean an objectively reasonable employee *would* so interpret it. *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 2 (2020). How an objective, reasonable employee would interpret a rule or policy is largely dictated by the context of the rule. To analyze the context of a rule the Board "must refrain from reading particular phrases in isolation." *LA Specialty*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage*, 343 NLRB at 646). Instead, the Board must look to the context of a rule or policy in order to understand how an objectively reasonable employee would read it. This context can come from the explicit or implicit purpose of a rule as it appears to an employee, from surrounding or similar sections, from examples given in the rule, from the rest of the rule at issue, from the industry or work setting, or from savings clauses.

One of the simplest ways a rule can make clear it does not reach Section 7 conduct is when the legitimate purpose of the rule is reasonably understandable upon reading, either because it is clearly stated or because the purpose can be readily inferred. For instance, in

Interstate Management Co. LLC, 369 NLRB No. 84, slip op. at 4 (2020), the Board, applying *Boeing*, found that a rule listing employee names and contact information as types of confidential information would be understood as applying to the protection of the employer's private records, since both the preamble and concluding paragraph of the rule made clear its purpose was to safeguard the employer's information and information systems. An objectively reasonable employee would thus not read the rule as applying to their own use of names or contact information for Section 7 purposes. Id. In *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 3 (2021), the Board also applying *Boeing* held that because a policy against using the employer's name on social media clearly explained its purpose as attempting to control who spoke for the company, objectively reasonable employees would read the rule as applying to that purpose only, and not applying to employee use of the employer's name as part of Section 7 activity.

Broad statements can also be clarified by specific language or examples given elsewhere in the rule. For example, in *Motor City Pawn Brokers Inc.,* 369 NLRB No. 132, slip op. at 5 (2020), the Board applying *Boeing* held that an objectively reasonable employee would not read a rule's reference to "proprietary information . . . of employees" without taking into account the specific examples of confidential information listed in the document, none of which implicated Section 7. Likewise, in *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2, the Board held that a broad rule against "inappropriate communications" was objectively reasonable because it fell in an introductory paragraph that was followed by multiple lawful guidelines, and employees would not read the introduction in isolation. Also in *Medic Ambulance*, slip op. at 2–3, the Board held that a rule against disclosing "confidential or proprietary information regarding the company or your coworkers" would not be read by an objectively reasonable employee as

applying to wages or terms and conditions of employment because the rule also gave examples of the types of information to which it referred, such as trade secrets and copyrights, none of which implicated wages or Section 7 matters.

Additionally, objectively reasonable employees would read a rule as a whole, not parse out a single clause or section and read it out of context with the broader rule, or purpose. *LA Specialty*, 368 NLRB No. 93, slip op. at 5. If an interpretation of a sentence would render other sentences in that rule superfluous or meaningless, that interpretation is not reasonable. *See id.* For example, in *Medic Ambulance*, 370 NLRB No. 65, slip op. at 4, a rule that only certain named human resources workers could give out information regarding "current or former employee compensation" was immediately preceded by a sentence regarding how to handle "[a]ll telephone calls regarding a current or former employee's position." The Board held that an objectively reasonable employee would put the two sentences together and understand that the policy refers to when someone calls the company to ask about particular employees, and not to the discussion of wages more generally.

Relevant context would also include the employer's industry or work setting because objectively reasonable employees would be familiar with heightened security, confidentiality, safety, or other concerns prevalent in a particular industry. See *Boeing*, 365 NLRB at 1508. For example, in *Argos USA LLC*, 369 NLRB No. 26, slip op. at 4 (2020), the Board applying *Boeing* found that concrete truck drivers, applying the "everydayness of their job" to understanding the purpose of a cell-phone ban, would reasonably recognize the dangers associated with talking or texting while driving a 70,000-pound truck, and would not read the rule as a ban on discussing, taking photos, or recording their terms and conditions of employment while away from the

facility. Notably, this rule would also generally align with state regulations on the use of a cell phone while operating a vehicle, and comply with federal DOT regulations.[16]

Finally, savings clauses included in rules or policies are extremely important in determining, and clarifying, whether a given rule interferes with Section 7 rights. Where a facially neutral rule clearly applies to protected conduct, a savings clause that is sufficiently prominent and specific can still save the rule. The savings clause need not explain "the broad panoply of rights" that employees enjoy under the Act to be effective, as the point of a savings clause is not to remove all ambiguity from a rule, but rather to simply clarify that regardless of what the rule says, it does not apply to the affected Section 7 activity. *See Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op. at 3 n.8 (2020) (quoting *First Transit, Inc.*, 360 NLRB 619 (2014)).

Where a facially neutral rule clearly forbids protected conduct, the savings clause must be sufficiently specific to be effective. This is where clear, plain language is important. Vague savings clauses, or those full of legalese, that would require employees to "meticulously determine the state of the law" themselves are likely insufficient to prevent the rule's interference with the exercise of NLRA rights. *Everglades College, Inc.*, 368 NLRB No. 123, slip op. at 3 (2019) (finding exception to arbitration agreement "where specifically prohibited by law" insufficient to save otherwise clear ban on filing claims with Board); *accord Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 3–4 (2019); *see also Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.").

[16] *See* Limiting the Use of Electronic Devices, 49 C.F.R. §§ 392.80–.82 (2026).

Savings clauses also must be "sufficiently prominent" to save a rule that otherwise clearly applies to protected conduct. *Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019). The prominence of a savings clause is judged by several factors, and does not necessarily require bolding, underlining, or other exceptional measures. For example, the prominence of a savings clause is increased if it is incorporated or referenced in the rule it saves,[17] immediately follows the rule it saves,[18] is in a relatively short document,[19] appears in its own paragraph,[20] or appears at the end of the document, right before the signature line.[21]

And while a less prominent or less specific savings clause may not be sufficient, alone, it should be considered along with other contextual information when determining how an objectively reasonable employee would read the rule. *See Shamrock Foods Co.*, 369 NLRB No. 140, slip op. at 1, 6–7 (2020) (holding that while savings clause was insufficiently prominent by itself to find a rule lawful, it was still a relevant consideration in interpreting the rule).

In sum, the Board should revert to the reasonable-employee standard articulated in *Boeing* and *LA Specialty* and apply a common-sense, contextual analysis that takes into consideration the purpose of a rule as it would be understood by an employee in that industry or work setting reading it, looks at surrounding or similar sections, includes examples given in the rule, does not read the rule in isolation, and takes into account any savings clauses. The ultimate

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17 *See id.* (clause referenced in same paragraph).

18 *See Royal Motor Sales*, 369 NLRB No. 70, slip op. at 3 (2020).

19 *See San Rafael Healthcare & Wellness, LLC,* 369 NLRB No. 105, slip op. at 3 (2020) (document only three pages); *Four Seasons Healthcare & Wellness Center, LP*, 370 NLRB No. 8, slip op. at 3 (2020) (two-page and three-page documents).

20 *See id.*

21 *See id*.

question is not whether a trained labor lawyer reads the rule as limiting or prohibiting Section 7 activity, it is whether the reasonable employee reads it in that way.

b. The Board must strike a careful balance to safeguard both employer and employee rights and interests

Where a rule, as read by an objectively reasonable employee, interferes with Section 7 rights, the Board should strike a careful balance between that right and the rights and duties of the employer. Unlike the standard articulated in *Stericycle*, a balance that properly weighs the rights and needs of employers will necessarily entail the possibility that in a particular case, a challenged rule may be lawful to maintain even though it limits the exercise of Section 7 rights to some extent because the legitimate employer interests it advances outweigh that limitation. *Stericycle*, 372 NLRB No. 113, slip op. at 17 (Member Kaplan, dissenting). The Board frequently balances legitimate employer needs against Section 7 rights in other situations. *See Our Way, Inc.*, 268 NLRB 394, 394–95 (1983) (balancing the rights of employees, employers, and unions to find ban on soliciting during working time lawful); *GTE Lenkurt, Inc.*, 204 NLRB 921, 921–922 (1973) (holding lawful no-access rule after balancing employer and employee rights). Similarly, when analyzing a rule, the Board must balance the employer's legitimate business justification for the rule against the rule's potential chilling effect on the exercise of Section 7 rights at issue.

Indeed, as discussed above, the Supreme Court has recognized on multiple occasions that employers have a legitimate right to discipline employees and control their businesses. *See Republic Aviation*, 324 U.S. at 797–98; *Great Dane Trailers*, 388 U.S. at 33–34; *Erie Resistor*, 373 U.S. at 229. Societal interests should also play a role, as they did in *Flagstaff Medical Center*, where the Board applying *Lutheran Heritage* upheld a no-photography rule at a hospital in part because the rule implicated "weighty" patient confidentiality interests. *See Flagstaff*

Medical Center, 357 NLRB 659, 663 (2011), *petition for review granted in part and denied in part*, 715 F.3d 928 (D.C. Cir. 2013). Those societal interests are also served by rules or policies that seek to comply with an employer's legal or regulatory duties. It is well established that the Board may not "wholly ignore other and equally important Congressional objectives," as the "entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). This should be especially true when the legal or regulatory scheme the rule seeks to enforce is for the benefit of the employees themselves. *See Apogee*, 368 NLRB No. 26, slip op. at 6 (applying *Boeing*, balancing Section 7 with EEOC policies against harassment).

c. However, the Board should dispense with *Boeing*'s categories

Although the Board should re-adopt the balancing and reasonable-employee standards articulated in *Boeing* and its progeny, the attempt to categorize rules should be abandoned. While *Boeing*'s classification of rules into three or four categories[22] was a laudable effort to bring predictability and clarity to an area of law rife with the disorder and inconsistency prevalent under the *Lutheran Heritage* standard, the *Boeing* categories ultimately caused their own confusion among the labor-management bar. Moreover, while some rules lend themselves to broad categorization—like rules banning discussion of wages—other rules do not. For instance, the Board has variously categorized rules making salary information confidential as Category 1 or Category 3, depending on the specific context of the rule at issue. *Contrast Medic*

[22] While the Board initially adopted three categories—(1) rules that are always lawful, (2) rules warranting individual scrutiny, and (3) rules that are always unlawful—in *LA Specialty* the Board further divided Category 1 into Category 1(a) rules that are always lawful because they have no impact on Section 7 rights, and Category 1(b) rules that are always lawful despite having an impact on Section 7 because compelling employer interests will always outweigh the implicated Section 7 rights. *Boeing*, 365 NLRB at 1496–97; *LA Specialty*, 368 NLRB No. 93, slip op. at 2 n.2; *cf. Boeing*, 365 NLRB at 1508 n.77 (Member Kaplan, in concurrence, stating he would have preferred a four-part framework).

Ambulance, 370 NLRB No. 65, slip op. at 4 (finding rule banning sharing compensation information lawful), *and Shamrock Foods Co.,* 369 NLRB No. 140, slip op. at 5 (holding lawful rule making compensation schedules confidential), *with Lowe's Home Center*, *LLC*, 368 NLRB No. 133, slip op. at 1 n.1 (2019) (finding unlawful rule listing "salary information"), *enforced*, 850 F. Appx 886 (5th Cir. 2021). As these cases illustrate, because the *Boeing* standard rightly puts such emphasis on the specific context of a given rule in determining whether it interferes with Section 7 rights, any attempt to categorize many types of rules will either require ignoring the specific context of that rule or result in extremely narrow categories that include a rule's specific context and are thus not generally useful. Thus, the Board should dispense with categories and analyze rules on their own merits.

3. Under the Proposed New Standard, the Rules and Directives are Unlawful

Applying the proposed modified *Boeing* standard to the rules here, the handbook rules and the directives are unlawful. First, none of the above rules or directives involves a facially neutral rule which was untouched by *Stericycle*. *Stericycle*, 372 NLRB No. 113, slip op. at 2 fn. 3. ("[w]e do not change existing law that an employer's maintenance of a work rule will be deemed unlawful when it explicitly restricts Sec. 7 activity or was promulgated in response to union or other protected concerted activity.") Here, the handbook rules and the directives explicitly restrict the hallmark Section 7 right to discuss wages. The directives are unlawful, even outside of *Stericycle*, for the additional reason that they were issued in response to protected activity.

The rules and directives at issue here are not facially neutral rules and are unlawful even if the proposed balancing approach is used. An objectively reasonable employee would interpret the rules and directives as prohibiting wage discussions. Initially, there should be no doubt that a

rule would have a reasonable tendency to chill employees from exercising their Section 7 right to discuss wages when that rule explicitly states that wages are strictly confidential, may not be disclosed to employees, and that violation may result in discipline up to discharge. There is no other way to interpret such an explicit rule or directive.

Rules should not be interpreted in a vacuum, and context should be taken into account. However, this is not some rule that could hypothetically be interpreted to potentially limit Section 7 activity or is somehow ambiguous. Here, the only context for the handbook rules and directives is wages. The handbook rules are contained within the handbook section titled "Pay Policies" and subheading of "Wage and Salary Policies." The directives were each issued in direct response to protected activity of employees discussing wages. Hence, there is no other context to consider. This is not a situation similar in any way to the scenario that the Board addressed in *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 3 (2021); here, the confidential wage rules and directives are not in any way part of a broader prohibition on sharing confidential copyrighted or trademarked company information, but instead the rules in the handbooks and the directives are all solely limited to explicitly restricting the hallmark Section 7 activity of discussing wages.

Further, there is nothing in any of the rules or directives that provide some context other than the prohibition on wage discussions; there are no examples provided with the rules or directives, and there is no other legitimate purpose described within to provide any other reasonable interpretation other than prohibiting wage discussions. Compare *Medic Ambulance*, 370 NLRB No. 65, slip op. at 2-3 (2021) (rule against disclosing confidential or proprietary information would not be interpreted as applying to wages where examples were provided referencing trade secrets and copyrights)

As noted above, employees' ability to discuss wages is one of the hallmark rights under Section 7 of the Act. In contrast, there is no legitimate Respondent business justification for the rules and directives. The only justification provided by Respondent on why it needed the confidential wage rules was that it was merely a carryover from a prior handbook, with no further asserted business justification.

4. Conclusion Regarding Stericycle

In sum, when determining whether the mere maintenance of a facially neutral rule is unlawful, the Board should overturn *Stericycle* and return to the common-sense standards articulated in *Boeing* and its progeny. However, in keeping with the contextually specific analysis of the *Boeing* standard, the Board should abandon the attempt to create broad categories of rules as always lawful or unlawful. Applying that new standard here, the cited rules and directives are unlawful on their face and are not facially neutral rules or directives for the reasons stated herein. Accordingly, those rules are unlawful even outside of the analysis under *Stericycle*. The rules and directives at issue here are unlawful regardless of whether *Stericycle* is replaced with the balancing approach described above. It is respectfully requested that the ALJ find the rules and directives unlawful under extant Board law, and that the Board, if it has not already done so, consider the approach referenced herein.

V. ARGUMENT – DISCRIMINATION ALLEGATIONS

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), and subsequent cases, to prove unlawful discrimination, the General Counsel must show that: (1) the employee engaged in protected activity; (2) the employer was aware of the protected activity; and (3) the employer had animus (was motivated by (i.e., displayed animus)) of that protected activity. See

Lion Elastomers LLC, 375 NLRB No. 41, slip op. at 2 fn. 5 (2026)) The employer can successfully defend such action if it proves that it would have taken the same action in the absence of protected activity. Id.

A. Charging Party Engaged in Protected Activities and Respondent was Aware (Complaint Paragraphs 6, 11)

The Board has long held that employee communications about their working conditions are protected when directed to other employees. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 fn. 6 (1990) (employee communication about working conditions has been found protected when direct to other employees, citing *Waco, Inc.*, 273 NLRB 746 (1984); *Heck's, Inc.*, 293 NLRB 1111, 1121 (1989); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986)).

The undisputed testimony and documentary evidence in this case, including by Respondent exhibits and testimony, establishes that employees approached Charging Party with their concerns about whether they would receive raises and that Respondent was aware of these conversations. As noted in the cases cited above, the discussion of wages between employees is a hallmark of protected concerted activity. See, e.g., *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 fn. 6 (1990).

Respondent was undisputedly aware of these conversations because, as established at trial through Respondent witnesses and documentary evidence, employees approached Respondent about the wage discussions, and Charging Party informed Respondent, through multiple managers including Blanchard and Wilson, that she discussed these issues with employees. Charging Party engaged in further protected concerted activities when she informed Holt that an employer cannot prohibit employees from discussing wages and that she would be filing a charge with the Board. Charging Party engaged in protected concerted activities that Respondent was aware of, and it is respectfully submitted that the ALJ should so find.

B. Respondent Displayed Animus and Discharged Charging Party Because She Engaged in Protected Activities (Complaint Paragraphs 12, 13)

Respondent's claimed reliance on any Charging Party misconduct to justify its discharge is entirely unsupported by the evidence. The obvious reason Respondent discharged Charging Party, based on the record, is because she engaged in the protected concerted activities of discussing wages with other employees, because she stated that employers cannot prohibit employees from discussing wages, and because she said that she contacted the NLRB and would be filing a charge with the NLRB.

1. Respondent Demonstrated Animus Toward Charging Party's Protected Activities

Respondent demonstrated animus toward employee protected activities in a number of ways. Respondent, for years, maintained clearly unlawful language in its Employee Handbook that discussion of wages would not be tolerated under penalty of discipline and discharge. Although Employee Handbook confidential wage rules, standing alone, may be insufficient to establish animus, any doubt of Respondent's animosity toward employees' ability to discuss wages immediately evaporated after Charging Party informed Respondent of employees' concerns regarding wages and raises. In that regard, Wilson emailed Charging Party that wages are highly confidential, that staff "should never be having these conversations regarding pay with one another," told Charging Party to remind them of this, and that having these conversations was grounds for termination as stated in the Handbook. See *Tschiggfrie Properties* 368 NLRB No. 120, slip op. at 3 (2019) (proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole)

Respondent's claim that Respondent only prohibits managers from discussing wages is pure fiction. Wilson's email to Charging Party did not tell her to avoid engaging in these

discussions; it is explicitly clear from Wilson's email that *staff* should never have these conversations regarding pay with one another. Charging Party was not directed to refrain from having these conversations limited only to herself; she was explicitly told to violate Section 8(a)(1) and remind the staff that wages are highly confidential, and discussions about wages should never happen under penalty of discharge. If there was any doubt as to the hostility toward employees discussing wages, Wilson made it explicitly clear in bold and capitalized wording that "**wages are HIGHLY confidential.**" (GCX 7) Wilson's following language was equally clear in her animosity towards employees' concerted activities of discussing wages:

> *Staff* should *never* be having these conversations regarding pay *with one another*, please be sure if you do hear these conversations, *you remind them of this*. *This is grounds for termination* as stated in our handbook. We do not want any employee feeling offended therefore *we* should *never* be discussing specific wages around the office.

(GCX 7) (emphasis added)

This animosity toward concerted activity was repeatedly demonstrated in conversations, email, and documentary evidence as described in more detail for the additional violations, above. It is no surprise that Respondent demonstrated animus toward this protected activity since the demonstrated animus throughout the events of this case was also consistent with the unlawful rule within the Employee Handbook that wages are confidential and violating this prohibition could result in discipline or discharge. Respondent demonstrated animus toward employee protected activity, and the ALJ should so find.

2. Testimony and Documentary Evidence Established Disparate Treatment and Pretext as Further Evidence of Animus

After Blanchard testified that Respondent uses progressive discipline as a corrective measure to correct employee conduct, he was asked "what kind of infraction would be severe

enough that an employee would skip right to termination even if they had no prior discipline in your experience?" (Tr. 38) He responded that:

> If it involves a patient safety issue, for example, if people didn't show up for work and we found out they were interviewing during that time that they were supposed to be working, that's a direct patient safety issue. Especially if it's involving one of our managers who's held accountable and responsible for day-to-day operations of the practice.

(Tr. 38)

Violating patient safety was the only example that Blanchard referenced to justify immediate discharge. He did not cite theft, violence, medical malpractice, or any other of the expected answers that might justify immediate discharge. Further, Blanchard tried to make the tenuous connection between being away from the workplace and patient safety in an attempt to show that Charging Party's absence from the office, and specifically for an interview, created a patient safety issue. He asserted that not working creates a staffing shortage and loss of supervisory ability to reassign work to make sure that patients have proper staffing to support care. (Tr. 39)

However, Blanchard's claim is undermined by his own testimony. In spite of several questions, Blanchard could not identify any actual patient safety issue that developed on October 11 as a result of Charging Party arriving to work later than her normal start time. Moreover, after Blanchard asserted the patient safety issue, but while testifying as to Charging Party's responsibilities, he said that a *higher* patient safety issue would result in a step one discipline.

> If [the issue for the staff member to improve on] rises to the level of a higher patient safety issue or a departure from our standards of care, it could involve what we call a step one, which is a formal written reprimand of whatever happened.

(Tr. 53)

Thus, according to Blanchard, even if Charging Party was truly believed to have created a patient safety issue, or even a *higher* patient safety issue, Blanchard's testimony establishes that

the response would have been a step one verbal coaching and counseling that would have been consistent with the Employee Handbook. (Tr. 53; GCX 3 at 26) Further, Respondent demonstrated that a step one verbal reprimand was its response for an actual patient safety issue, including in the horrifying situation when a 20-month-old was mistakenly given an adolescent and adult immunization - even though this mistake required: (1) notification to the Oakland County Health Department: (2) informing the ordering doctor; and (3) a review with "all clinical staff to go over the immunization process again, how serious this error could have been and what needs to happen at every immunization ordered. Also, that she, the ordering doc, wanted there to be a write-up to reflect the above." (RX 5 at 129-130; GCX 19)

Similarly, although the alleged "patient safety" issue centers around Charging Party's delayed start on October 11, Respondent has not discharged anyone else for allegedly creating a patient safety issue by failing to show for work, and even an office manager would not be discharged solely for being late to work on one day. (Tr. 76-77)

If Charging Party was actually believed to have created a patient safety issue by arriving later than her normal start time, Respondent has demonstrated that its response would have been a verbal coaching and counseling, not a discharge. Respondent's claimed reliance on a patient safety issue is pure fiction.

Holt's signed undated hearsay statement regarding October 10 and 11, if partially accepted as true to the extent that it contains admissions, demonstrated what was important. Holt wrote two sentences describing Charging Party's late arrival on October 11. Holt then wrote seven paragraphs regarding October 12, that focused on the discussion of employee pay, that this was "not in line with our company's core values and promoted a negative culture and feeling amongst staff," that Charging Party asserted that discussing employee pay is not against the law

and that Respondent could not retaliate if employee pay was discussed, informed Holt that she called the NLRB and would be filing a charge with the NLRB and that Respondent would know that the charge came from her.

Contrary to Respondent's claimed unprofessional conduct, Holt's statement contains nothing about Charging Party boasting or gloating by telling employees that she went to a second interview or anything that justifies any such claim. This admission instead establishes Respondent's true concern: employees discussed wages yet again in spite of the handbook language and numerous warnings, and Charging Party asserted employee rights under the Act including that she contacted the NLRB and would file a charge with the NLRB. The length of time spent documenting these facts demonstrated what was truly important when it discharged Charging Party, and not because of some pretextual claim that she engaged in a lack of professionalism or violated the PTO policy.

Similarly, Respondent's claim that Charging Party violated its PTO policy in a way that justified discharge is also false. The unrefuted evidence, including through Respondent exhibits, showed that Charging Party stayed late on October 11 to attend an interview, and that Charging Party worked a full day on October 11. Moreover, Charging Party did not arrive late without notice as she credibly testified that she informed Respondent the week before that she would be late on October 11 for an appointment. Further, Respondent provide no testimony that it confronted Charging Party on October 11 about any type of patient safety issue caused by her late arrival. This further demonstrates that there was no actual or believed patient safety issue. See *New York Paving, Inc.*, 371 NLRB No. 139, slip op. at 3-5 (2022) (finding animus based on shifting justifications and pretext); *Nestlé USA, Inc.*, 370 NLRB No. 53, slip op. at 16 (2020)

(judge discussion finding animus and shifting explanations; pretext may be demonstrated by "asserting a reason that is false or providing shifting explanations for an adverse action.")

3. Respondent Piled on and Shifted Defenses to Justify Discharging the Charging Party

Wilson was asked during direct examination by General Counsel "[w]hat were the reasons why you discharged or made the decision to discharge Ms. Molnar[,]" she responded that Charging Party was discharged for: (1) lack of professionalism; and (2) violating the PTO policy. Respondent asserts that the alleged lack of professionalism was Charging Party's alleged statement to Holt that she did not care if she was fired, that "everybody's already aware either she's going to get fired or she's going to resign. It was very abrasive. Laura [Holt] felt very intimidated with the conversation. It was aggressive." (Tr. 129) However, on cross-examination by Respondent's counsel's leading questions,[23] Wilson then expanded the reasons for Charging Party's discharge to include an "obscenity-laden blow up with Dr. Washe." (Tr. 146) Nothing in Holt's signed undated statement about October 12 indicates that she was in any way intimidated by a conversation with Charging Party. Further, Charging Party worked a full shift on October 12 and 13. It would seem inconsistent with an intimidation claim to allow Charging Party to do so if she had been acting outside the normal bounds of office professionalism.

As noted above, at some, but not all times, Respondent claimed that Charging Party's conversation with Washe contributed to Charging Party's alleged unprofessional conduct. Wilson testified that Respondent did not decide to discharge Charging Party after the Charging Party - Washe interaction. Wilson acknowledged that Charging Party had never previously raised her voice in the office or used obscenities in the office. (Tr. 110) Wilson even testified

[23] Counsel asked Wilson "do you believe that her termination ties back to the other time when she had this obscenity-laden blow up with Dr. Washe?" (Tr. 146)

that Charging Party's conduct had been consistent with Respondent's concierge medical service that provides a "very smooth, very quiet, Zen vibe in that office." (Tr. 111-112) Respondent did not discharge Charging Party for yelling or profanities allegedly used on August 10; Charging Party did not yell and did not use profanity during the conversation. Further, even if Charging Party had wanted to slam Washe's door, Washe keeps a device on her door that arguably interferes with the ability to slam the door. (Tr. 114-115; GCX 8) According to Wilson, if Charging Party had attempted to slam Washe's door on August 10, it also would have been a first for Charging Party. (Tr. 115) Regardless, Wilson testified initially that the claimed reasons justifying Charging Party's discharge did *not* include the August 10 interaction between Charging Party and Washe. Respondent's later attempts to pile on additional reasons to support the discharge is evidence of shifting defenses and further demonstrate pretext. Compare, *Lucky Cab Co.*, 360 NLRB 271, 274-275 (2014), enfd. 621 Fed. Appx 9 (D.C. Cir. 2015)(finding pretextual discharges based on: (1) disparate treatment where other employees were not discharged for the same infractions; (2) shifting and new explanations provided at hearing; (3) discriminatees were not allowed a chance to respond to the allegations of misconduct; (4) falsified documents and abruptly changed discipline; (5) false reasons given for the discharge that were also discredited by the judge because the manager's testimony was unreliable, "facile, self-serving, and sometimes improbable[.]")) (internal citations omitted).

This was not the only time that Wilson attempted to expand the reasons justifying discharge. When asked by Respondent counsel the issues with Charging Party's absence on October 12, Wilson responded that it was a "lack of leadership," "a very bad example," "is a snowball effect," that the person who knows what is going on each day, knows how the office is staffed, knows the patient schedule and that "typically when there's no management on site, it's

a little more chaotic." (Tr. 151) It is telling that, in spite of being present when Blanchard testified, Wilson made no claim that Charging Party's late arrival created a patient safety issue.

Respondent's attempts to pile on new reasons why it discharged Charging Party is further evidence that the claimed reasons are pretextual. This includes Blanchard's claim that Charging Party created a patient safety issue when she came in late on October 11 – even though there were no other staffing issues and no identifiable circumstances that occurred where a patient actually had a safety issue.

Similarly, Wilson initially testified that Charging Party's claimed lack of professionalism was only related to the alleged late arrival on October 11 and then "gloating" about having had a second interview. This is clearly false for at least two reasons. First, Holt, when she wrote her statement on the issue at some unknown date prior to testifying nearly four years later, never mentioned in her written statement that Charging Party engaged in any activity that could be considered gloating. Second, Respondent later attempted to reach back to the August 10 conversation between Charging Party and Washe to add a new claim that the conversation with Washe was now also a reason to justify the claimed reason of unprofessionalism by Charging Party. Respondent's attempts to shift its defenses and pile on new claims is further evidence that Respondent's claimed reasons are false.

What remains is that Respondent engaged in a continuous pattern of actions that demonstrated its animus toward employees' rights to engage in protected activities, including discussing wages. The events that culminated in Charging Party's discharge were not that she arrived late on October 11 or that she had gloated about going on a second interview. Instead, the terminal events that led to Charging Party's discharge was that the wage discussion issue resurfaced, Charging Party was blamed for the ongoing wage discussions, Charging Party

informed Holt that employers cannot prohibit employees from discussing wages, and that she knows her rights and would be filing a charge with the NLRB. She was discharged just two days later. This timing, in combination with the plethora of evidence demonstrating animus toward employee rights to discuss wages, demonstrated the real reason that Respondent discharged Charging Party – her protected concerted activities.

C. Respondent Would not have Discharged Charging Party in the Absence of Her Protected Activities

Respondent asserted that it would have discharged Charging Party for violating its PTO policy and for a lack of professionalism. Respondent embellished these reasons during witness testimony. For the reasons discussed above, these reasons are false pretexts in an attempt to justify the discharge. Respondent was directly aware of Charging Party's protected activities. Respondent displayed animus toward the protected activities of discussing wages in its Employee Handbook, and by several statements including the August 10 Wilson email, August 10 discussion with Wilson, the October 11 post-interview discussion with Wilson and Washe. Respondent further demonstrated animus by discharging Charging Party just two days after she discussed employee rights to discuss wages, informed Respondent that she had contacted the NLRB and would be filing a charge. As discussed above, Respondent demonstrated that it would not have discharged Charging Party for a patient safety issue, or even a *higher* patient safety issue. Respondent also failed to demonstrate that it would have discharged Charging Party for failing to use leave on a day in which she worked a full eight hours.

Respondent would not have discharged Charging Party in the absence of her protected activity. In several ways, Respondent demonstrated the pretextual nature of its decision to discharge the Charging Party. Compare, *Lucky Cab Co.*, 360 NLRB 271, 274-275, above (pretextual discharges involving disparate treatment, shifting and new explanations, false reasons

for the discharge that were discredited by the judge). See also, *Nestlé USA, Inc.*, 370 NLRB No. 53, slip op. at 16 (2020) (citing *Affinity Medical Center*, 362 NLRB 654, 654 fn.4 (2015), *Windsor Convalescent Center*, 351 NLRB 975, 983-984 (2007)); enfd. in relevant part 570 F.3d 354 (DC Cir. 2009).

Here, the inescapable conclusion is that Respondent discharged Charging Party because she engaged in protected activities, including discussing wages, discussing employee rights, and informing Respondent that she contacted the NLRB and would file a charge with the NLRB. Respondent cannot show that it would have discharged her in the absence of her protected activity. It is respectfully requested that the ALJ should so find.

VI. CONCLUSION

In light of the record as a whole, it is clear that Respondent violated the Act, as alleged in the General Counsel's Complaint. Respondent violated Sections 8(a)(1) and (4) of the Act by: maintaining an unlawful rule in its Employee Handbook that wages are confidential and may not be disclosed to fellow employees or outside of the Respondent's practice, under threat of discipline up to and including discharge; by instructing employees verbally and in writing to not discuss wages; by threatening employees with discipline and/or discharge if they discussed wages; and by discharging Charging Party because she discussed wages with other employees and/or because she stated that she contacted the NLRB and would be filing a charge with the Board. For the reasons explained herein, in reaching these conclusions, the ALJ should also find that Respondent's witnesses lack credibility, in part. The ALJ should so find and recommend that the Board fashion an appropriate remedy, which includes an appropriate notice, a proposed

copy of which is attached. The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Dated at Detroit, Michigan, this 8th day of October 2026.

Respectfully submitted,

/s/ Larry A. Smith

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PROPOSED NOTICE

(To be printed and posted on official Board notice form)

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, A FEDERAL LAW, GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to freely bring wage issues and complaints to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT stop you from discussing wages and **WE WILL** rescind in writing the Wage and Salary Policies rule in our Team Member Handbook on that subject.

WE WILL NOT maintain, enforce, or give effect to overly broad policies in our Team Member Handbook that restrict your ability to exercise the rights set forth above and **WE WILL** rescind the overly broad Wage and Salary Policies in the Team Member Handbook described above that were maintained, executed, enforced, or in effect at any time since August 10, 2022, and advise each employee and former employee, in writing, that the Wage and Salary Policy has been rescinded and they are released from its obligations.

WE WILL NOT threaten you with discipline or discharge if you engage in activity with other employees regarding your wages, hours, and working conditions including talking about your wages.

WE WILL NOT fire you because you exercise your right to discuss wages, hours and working conditions with other employees.

WE WILL NOT fire you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT fire you because you have stated your intention to file a charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Kimberlee Molnar her job back along with her seniority and all other rights or privileges.

WE WILL pay Kimberlee Molnar for the lost wages, and benefits and other expenses she incurred because we unlawfully fired her.

WE WILL compensate Kimberlee Molnar for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region Seven, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL remove from our files all references to the discharge of Kimberlee Molnar and **WE WILL** notify her in writing that this has been done and that the discharge will not be used as a basis for any future personnel action or made reference to in response to any inquiry by any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker or otherwise used against her in any way.

Premier Private Physicians Management Company, LLC

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Callers who are deaf or hard of hearing who wish to speak to an NLRB representative should send an email to relay.service@nlrb.gov. An NLRB representative will email the requestor with instructions on how to schedule a relay service call.

Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 05-200
Detroit, MI 48226

Telephone: (313)226-3200
Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I certify that on the 8th day of October, 2026, I electronically filed with the Administrative Law Judge's Division and electronically served copies of **COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** on the following parties of record:

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/s/ Larry A. Smith
Larry A. "Tony" Smith
Counsel for the General Counsel