UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

APEX FINTECH SERVICES, LLC
D/B/A APEX FINTECH SOLUTIONS

and **Case No. 12-CA-325317**

JOHN D. RICHARDSON
An Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF

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Contents

I. INTRODUCTION AND STATEMENT OF THE CASE 1

II. STATEMENT OF FACTS 2

a. Richardson Encounters Perceived Sexism and Racism at Respondent 2

b. Richardson Reports Perceived Sexism and Racism to Respondent 4

c. Richardson Reports Perceived Sexism and Racism at Respondent To His Coworkers. 5

d. Respondent, by Michael Walters, Unlawfully Threatened Richardson, and Unlawfully Demanded that He Remove Portions of his Protected Concerted August 25 and 30 LinkedIn Posts, and Discharged Him When He Refused 8

e. Respondent Files an Unlawful Baseless Defamation Lawsuit Against Richardson, and Subsequently Serves Him with Unlawful Interrogatories and Requests for Production 10

III. ARGUMENT 10

a. The ALJ Applied *Wright Line* and Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act by Discharging Richardson Because He Engaged in Protected Concerted Activity (Respondent Exceptions 1-7, 18, 27, 29-34, and 42-43) 10

i. Richardson's Slack and LinkedIn posts constitute protected concerted activity . 11

ii. Respondent was aware of Richardson's protected concerted Slack and LinkedIn posts and discharged him in retaliation for making the posts 13

b. The ALJ correctly concluded that Respondent did not meet its Wright Line burden of establishing that it would have discharged Richardson even in the absence of protected concerted activity. (Exceptions 12-17, 19-23, 25-26 28, 35-41, 54) 14

i. The ALJ correctly applied the *Wright Line* test to shift the burden to Respondent to establish that Richardson's posts were false or defamatory 14

ii. The ALJ correctly found that Respondent was unable to establish its Wright Line defense that Richardson's posts were false or defamatory 15

iii. The ALJ correctly credited Richardson regarding the DEI Panels 18

c. The ALJ did not err in finding that Respondent violated the Act by filing the defamation lawsuit against Richardson and by engaging in pre-trial discovery (Respondent exception 24, 28, 45 – 48) 20

d. The ALJ did not err by finding that Richardson's Post-Discharge Conduct Did Not Warrant Denying Richardson Reinstatement and Backpay (Exception 63) 23

e. The ALJ did not err denying Respondent's Motion to Bifurcate the Hearing (Exceptions 26 and 64) 24

f. The ALJ did not err by requiring Respondent to cease and desist from taking certain actions and by requiring Respondent to undertake affirmative actions, to remedy the unfair labor practice (Exceptions 55-62) 25

g. The National Labor Relations Act is Constitutional, (Exceptions 65-77) 27

i. NLRB Board Members are not unconstitutionally insulated from removal, and Board Members and ALJs are not unconstitutionally appointed. 28

ii. The NLRB does not improperly combine prosecutorial and adjudicatory functions 30

IV. Conclusion 31

Table of Authorities

Cases — Pages

Aakash, Inc.,

371 NLRB No. 46, (2021)…….29

Abramson LLC,

345 NLRB 171, (2005)……..12

AdvoServe of New Jersey, Inc.,

363 NLRB No. 143, (2016)……...26

Amazon.com Services LLC,

Case 29-CA-261755, (2024)……..31

Anheuser-Busch, LLC,

347 NLRB No. 133, (2026)……...27

Army Aviation Heritage Foundation & Museum v. Buis,

504 F. Supp. 2d 1254, (N.D. Fla 2007)……..21

Beverly Health & Rehabilitation Services,

331 NLRB 960, (2000)……..21

Bhatti v. FHFA,

97 F.4th 556, (8th Cir. 2024)…….28

Bill Johnson's Restaurants., Inc. v. NLRB,

461 U.S. 731 (1983)……...20, 21, 27

Burnup & Sims,

379 U.S. 21 (1964)……...16, 17

C-Town,

281 NLRB 459, (1986)……..23

CFPB v. CashCall, Inc.,

35 F.4th 734, (9th Cir. 2022)……28, 29

CFPB v. L. Offs. of Crystal Moroney, P.C.,
63 F.4th 174, (2d Cir. 2023)…….28, 29
CFPB v. Nat'l Collegiate Master Student Loan Tr.,
96 F.4th 599, (3d Cir. 2024)…….28, 29
Calcutt v. FDIC,
37 F.4th 293, (6th Cir. 2022)……..28
Carlton College v. NLRB,
230 F.3d 1075, (8th Cir. 2000)……..15,16
Casa San Miguel, Inc.,
320 NLRB 534, (1995)……..23
Commonwealth Flats Dev. Corp.,
373 NLRB No. 142, (2024)……...28
Cortes v. NLRB, No.
1:23-cv-02954, 2024 WL 1555877, (D.D.C. Apr. 10, 2024)…….29
Crushin' It LLC,
372 NLRB 100 (June 29, 2023)…….27
Director, Office of Workers' Comp. Programs v. Greenwich Collieries,
512 U.S. 267 (1994)……...11
Don Chavas LLC d/b/a Tortillas Don Chavas,
361 NLRB 101, (2014)……..26
Exela Enter. Sols. v. NLRB,
32 F.4th 436, (5th Cir. 2022),……...……..31
FTC v. Cement Institute,
333 U.S. 683, (1948)……..30
F. W. Woolworth Co.,
90 NLRB 289, (1950)……...…….26

Fund the Public Interest,

360 NLRB 877 (2014)……...23

Greenhouse Group, LLC,

Case 13-CA-304261, JD-46-25, (May 22, 2025)……27, 28

Guess?, Inc.,

339 NLRB 432, (2003)……..22

Hadco Aluminum & Metal Corp.,

331 NLRB 518, (2000)……..23

Hillside Ave. Pharmacy, Inc.,

265 NLRB 1653, (1982)……23

Illumina, *Inc.*,

88 F.4th 1036, (5th Cir 2023)……30, 31

Intercity Maint. Co. v. Local 254, SEIU,

241 F.3d 82, (1st Cir. 2001)…….21, 22

Jones Lang Lasalle Americas, Inc.,

373 NLRB No. 37, (2024)…….30

K & R Contractors, LLC v. Keene,

86 F.4th 135, (4th Cir. 2023)……28, 29

Kentucky River Medical Center,

356 NLRB No. 8, (2010)…….26, 27

King Soopers Inc.,

364 NLRB 1153, (2016)……27

Latino Express, Inc.,

359 NLRB No. 44, (2012)…….26

Leachco, Inc. v. CPSC,

103 F.4th 748, (10th Cir. 2024)……..28

Lear-Siegler Management Services,

306 NLRB 393, (1992)……..23

Linn,

383 U.S. 53, (1966)……..21, 22

Marshall Engineered Products Co., LLC,

351 NLRB No. 47, (2007)……...16, 17

NLRB v. FLRA,

613 F.3d 275, (D.C. Cir. 2010)……..31

NLRB v. United Food & Com. Workers Union, Loc. 23,

484 U.S. 112, (1987)……..31

New Horizons,

283 NLRB 1173, (1987)……..26, 27

Pain Relief Centers, P.A.,

371 NLRB No. 143, (2022)……...22

Pepsi-Cola Company,

333 NLRB 87, (2001……..16

330 NLRB 474, (2000)……16, 17

SJT Holdings, Inc.,

372 NLRB No. 82, (2023)……...28, 29

Starbucks Corp.,

Case 18-CA-299560, JD-23-23, (Apr. 6, 2023)……...27, 28

Case 29-CA-309779, JD(NY)-21-24 (Sept. 18, 2024) ……...27, 28

Case 13-CA-316407, JD-37-24, (June 14, 2024) ……...27, 28

Case 14-CA-306625, JD-24-24, (Apr. 25, 2024) ……27, 28

Case 27-CA-294617, JD(SF)-04-24, (Feb. 6, 2024) ……...27, 28

Case 19-CA-295708, JD-02-24, (Jan. 4, 2024) ……..27, 28

Case 19-CA-296765, JD(SF)-37-23, (Nov. 27, 2023) ……27, 28

Starbucks Corp., (Continued)

Case 20-CA-298282, JD(SF)-18-23, (July 31, 2023) ……27, 28

Case 22-CA-305726, JD(NY)-14-23, (July 14, 2023) ……...27, 28

Steam Press Holdings, Inc. v. Haw. Teamsters and Allied Workers Union, Local 996,

302 F.3d 998, (9th Cir. 2002)……..21

TCI Cablevision of Montana d/b/a AT&T Broadband,

335 NLRB 63, (2001)……17

Thryv, *Inc*.,

372 NLRB No. 22, (2022)…….27

Tracer Protection Service,

328 NLRB 734 (1999) ……..17

Trader Joe's East Inc.,

Case 01-CA-296847, JD-70-24, (Nov. 8, 2024)……....28

Trump v. Slaughter,

No. 25-332, 2026 WL 1855612 (U.S June 29, 2026)……29

Trus Joist MacMillan,

341 NLRB 369, (2004)……15, 16

Wilcox v. Trump,

775 F. Supp. 3d 215, (D.D.C. 2025)……29, 30

Withrow v. Larkin,

421 U.S. 35, (1975)……30

Wright Line,

251 NLRB 1083, (1980)……10, 11, 14, 15, 18

I. INTRODUCTION AND STATEMENT OF THE CASE[1]

Charging Party John D. Richardson (Richardson) engaged in protected concerted activity by publicly protesting Respondent's DEI policies because he believed that Respondent was treating employees differently based on their gender and race. Instead, of investigating and addressing Richardson's concerted complaints, Respondent asserted that Richardson's protected concerted activity was defamatory and seized on that assertion as a pretext to discharge Richardson for engaging in protected concerted activity.

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, the undersigned Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Supporting Brief.

The hearing in the above-captioned proceeding was held on May 5 through 7, 2026, in Tampa, Florida, before the Honorable Arther J. Amchan (the ALJ). On July 24, 2026, the ALJ issued his Decision and Order (ALJD) finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by unlawfully discharging John Richardson for engaging in protected concerted activity, by filing an unlawful baseless defamation lawsuit against Richardson for engaging in protected concerted activity, and by serving Richardson with unlawful interrogatories and requests for production in furtherance of its baseless lawsuit. ALJ Amchan's Decision also found that Respondent, by Kayla Nassiri and Michael Walters, made unlawful statements prohibiting employees from engaging in protected concerted activity, and maintained unlawful work rules restricting employees from engaging in protected concerted activity.

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[1] The ALJ's decision will be identified as "ALJD (page number:line)." The hearing transcript is cited as "Tr. (page number)." The parties' Joint Exhibits, General Counsel's Exhibits, and Respondent's Exhibits are cited as "JX (number)," "GCX (number)," and "RX (page number)," respectively. Respondent's brief in support of Exceptions will be referred to as "RB (page number)."

On October 5, 2026, Respondent and Counsel for the General Counsel filed exceptions to the ALJD. In the exceptions, and despite offering a differing basis for doing so, Respondent and Counsel for the General Counsel both urge the Board to find that the rules are lawfully maintained, and that the statements by Kayla Nassiri were also lawful. However, contrary to Respondent's contentions, the ALJ correctly concluded that Respondent, by Michael Walters, made unlawful statements prohibiting Richardson from engaging in protected concerted activities, that Respondent unlawfully discharged Richardson, filed a baseless defamation lawsuit against him, and issued him unlawful interrogatories and requests for production, in retaliation for engaging in protected concerted activity.

II. STATEMENT OF FACTS

a. Richardson Encounters Perceived Sexism and Racism at Respondent

Respondent, a financial technical company, hired Charging Party John D. Richardson to work remotely from his home in Winter Springs as a data engineer beginning November 1, 2021. (ALJD 1-2:11, Tr. 62-64, 91). While onboarding, Richardson encountered a task that required employees who "identify as female" to enroll in the Poker Powher course and for employees who "identify as male" to invite women to join the Poker Powher course.[2] (ALJD 2:12-13, GCX 4, Tr. 64-66). Richardson believed this work requirement was unlawful and discriminatory based on gender and promptly emailed Human Resources (HR) to complain, and Richardson was informed he could participate if he was accompanied by someone who identified as female. (ALJD 2:17-20, GCX 5, 7, 10, 13, Tr. 298). On January 7, 2022, after some back and forth, HR Representative Brianna Rodgers (Rodgers) made a public Slack post announcing that Respondent's DEI Council

[2] Poker Powher is a program that teaches, "women [to play] poker, which gives them the high-value skills they need to compete and succeed in business." (GCX 4). In addition to teaching women to play poker during working hours, Poker Powher helps advance their careers.

made certain recommendations regarding Respondent's Poker Powher policies.[3] (GCX 11, Tr. 74-75). However, Respondent continued to exclude Richardson and other males from the Poker Powher program, including from its Poker Powher trainings (ALJD 2:26, GCX 12, Tr. 76-80), and in its invitations to Poker Powher events (GCX 13, 14). (Tr. 74-80).

Throughout the course of his employment Richardson viewed Respondent's various Slack channels, and found what he perceived to be discriminatory jokes, practices, and comments based on sex and race. (ALJD 2:30-33, Tr. 91, GCX 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 30, 31, 32, 33, 34, 35, 36, 111). Some of the issues that Richardson viewed as discriminatory included mentorships, alliances, work groups, and activities that were only available to women. (ALJD 2:28-32, GCX 15, 16, 17, 18, 19, 20, 21, 22 Tr. 80-81, 93-101). Richardson also found instances of what he perceived to be Respondent discriminating based on race and gender in hiring in Respondent's Slack channels. For example, Richardson noted posts in which Respondent's supervisors discussed increasing the referral bonus only for women candidates and trying to specifically hire more women candidates (GCX 23, Tr. 108-109), that Respondent's supervisors considered, and may have followed through with, offering a weaker candidate a position in whole or in part because she was a "black woman" (GCX 25), and that Respondent was suggesting that CapMan (a sister company) hire at least 2 individuals who are black or brown and that, "… training should be performed by a non-white, non-male person." (GCX 27).

Richardson encountered jokes and memes that he found to be sexist, and which were interacted with, and supported, by coworkers, Human Resources, members on Respondent's DEI Panel, and supervisors. (ALJD 2:32-33, GCX 30, 32, 33, 34, 35, 111). Still further, Richardson

[3] The recommendations included removing the Poker Powher onboarding task, and inviting new hires to all employee resource groups (ERGs), not just Poker Powher. (GCX 11).

attended Diversity Equity and Inclusion (DEI) Panels (GCX 28, JX 2) wherein Respondent's panelists, supervisors, and Human Resources made and supported remarks that Richardson perceived as sexist and racist. (ALJD 4:26-28, Tr. 272-275, 297, GCX 28 pages 41-43, JX 2).

b. Richardson Reports Perceived Sexism and Racism to Respondent

Richardson repeatedly protested the policies and communications that he viewed as discriminatory. Richardson filed a complaint protesting the Poker Powher policies with the Equal Employment Opportunity Commission and was issued a right to sue letter. (ALJD 2:22-23, Tr. 281). On July 12, 2023, Richardson contacted his supervisors, Tom Warner and Sudha Guttula, and Human Resources to raise his concerns regarding sexism in Respondent's Slack channels, and Respondent's disparate treatment of men (including the Poker Powher policies and the other activities that were only open to women). (ALJD 2:33-3:27, GCX 37). Richardson included examples of some of the content he perceived to be sexist in his email. (GCX 37). Richardson raised further complaints regarding Respondent's policies to his supervisors and HR on July 13, 2023. (GCX 39, 40).

Respondent retained counsel in response to Richardson's email protesting Respondent's work policies and tacit acceptance sexism by not removing content that he viewed as sexist, and forced Richardson to meet and be interviewed by their attorneys. (ALJD 3:29-30, GCX 41). Despite his reluctance to meet, and be interviewed by, Respondent's counsel, Richardson cooperated and provided Respondent's counsel with examples of sexism in the workplace. (GCX 38, 44, 45, 46). The underlying investigation did not reveal anything relevant to the case (ALJD 3:29-31), but the fact that Richardson continued to raise his concerns to Respondent's agents demonstrates that these were sincerely held beliefs, and that Respondent had multiple opportunities to address Richardson's assertions but did not dispute the veracity of his statements. In response

to Richardson's continued complaints, Respondent's attorney sent Richardson an email, copying his supervisor, chastising him for raising his concerns. (Tr. 158-159). Richardson complained about the disparagement from Respondent's attorneys to Human Resources. (GCX 47).

c. Richardson Reports Perceived Sexism and Racism at Respondent To His Coworkers.

On or about August 21, 2023, after years of raising his complaints internally directly through the chain of command, Richardson made a post on Respondent's Data and Engineering Team Slack channel. (GCX 48, Tr. 161-162). Richardson's post seeks to induce his coworkers to take action, encouraging them to contact the EEOC, to "get vocal and begin talking about discrimination," and "Share what happened with coworkers so we can take an active stance against a creeping culture of sexism within the company." (GCX 48).

Richardson's supervisor Tom Warner contacted Richardson in response to the post. Richardson told Warner that the post was protected under the National Labor Relations Act, and Warner replied he understood and supported Richardson. (GCX 50). Respondent, by HR Business Partner Kayla Nassiri, also contacted Richardson following his Slack post, and stated, in part, "To that end, it is essential that everyone involved in this investigation maintain confidentiality and avoid naming specific employees or discussing details related to the ongoing investigation." (ALJD 3:33-43, GCX 54). When Richardson asked for clarification, Nassiri replied reiterating the confidentiality requirement for the ongoing investigation, "Moving forward, we expect you to refrain from posting details related to the ongoing investigation and naming specific employees in Company messaging channels, as well as discussing details related to the ongoing investigation with anyone outside of HR or your leadership team." (GCX 56).

Richardson's coworker, Robert Burrage, contacted him on LinkedIn after seeing Richardson's Slack post to join, support, and continue conversations regarding Respondent's

policies with Richardson, including by phone. (GCX 52, 59, Tr. 165-166). Richardson contacted coworkers on LinkedIn to further disseminate his protected concerted Slack post. (GCX 53).

After corresponding with Nassiri, Richardson opted to raise his concerns on his personal LinkedIn social media, instead of utilizing Respondent's computer systems. (Tr. 176). On August 25, 2023, Richardson made a LinkedIn post reiterating several of the complaints that he had previously raised with Human Resources, his supervisors, and the attorneys Respondent retained. (ALJD 4:11-24, GCX 57). Richardson explained in the first paragraph of his post that he his post was intended to inform his coworkers of what was happening and asked them to take group action, "I will start by getting you looped in on some of what has been going on, I'll explain why I am using social media to do this, and I will end with some ways we can see real change if we work together." (GCX 57).

Richardson went on to raise specific concerns, including identifying the basis for his protest. For example, Richardson's LinkedIn post quotes Chief of Staff Stephen Lach as stating during a DEI Panel (GCX 28 page 41) that ". . . if you are hiring for a position find somebody that doesn't look like everybody else, right." (GCX 57). Richardson then noted that during another recorded meeting (DEI Panel) someone admitted to hiring someone that was "diverse" over someone who was known to be a good fit. (JX 2, 12:23 seconds to 14:02 seconds, GCX 57). Richardson included in his post that he believed portions of the DEI Panel containing the racist statements had been altered or deleted. (ALJD 4:11-40, GCX 57, Tr. 274-275). Richardson also cited to a Slack post where supervisors recommended hiring a weaker candidate because of their demographics in his LinkedIn post. (GCX 57, GCX 25). Richardson also identified some of the jokes he perceived to be sexist referencing "… an objectively offensive and discriminatory 'joke' about it taking two people of one sex to do the job of another sex, a director [Palak Jain] who is

currently several levels directly above this employee responded with a laughing emoji." (GCX 35, 57). In his post, Richardson also cited to other jokes he perceived as sexist (avoid men, follow women) (GCX 30, 57), and "Women like men only cheaper" (GCX 33, 57), and "how do we train grown men to empathize," (GCX 57, 111). Building on these themes, Richardson's post also argues that in his opinion,

> The company has allowed outright hate to proliferate as a demonstration of what they think DEI is. For example, at one point in a recoded meeting, someone from HR went on a tirade about "white males" making them feel uncomfortable, defensive, and guarded simply for existing and doing their jobs or even being part of a discussion with them. Core parts of the tirade would later disappear from the transcript of the meeting, but the tirade wasn't about those feelings being bigoted. The tirade was about that being a reason we need fewer "white males" doing specific things in the company. (GCX 57).

ALJ Amchan credited Richardson's assertion in the August 25 statement (GCX 57) and at the hearing (Tr. 273-275) that the transcript was altered, drew a negative inference from Respondent's failure to establish what occurred at the DEI Panel. (ALJD 5:14-26, FN 4). Of note, on page 41 of the DEI Panel Transcript (GCX 28), Stephen Lach, Chief of Staff to Respondent's CEO, recommends among other things, "If you're hiring for a position find somebody that doesn't look like everybody else, right?" HR Representative Tobenna Egwu adopted Lach's statement, and added that she is guarded when "… interviewing with an all-White panel or all-White males." (GCX 28, page 42). Rodgers, in turn, adopts Egwu's statement, "I love what you said," and provides examples of her being more cautious when interviewing with white males instead of minorities. (GCX 28, pages 42-43). Richardson testified that he thought Rodgers went on the tirade, and recalled that the tirade used the phrase "white males" which is contained in the DEI Panel transcript. (Tr. 275-276, GCX 28, pages 41-43).

Richardson disseminated his protected concerted LinkedIn post to his coworkers, and at least one coworker, Rafael Castillo, publicly supported Richardson's post by liking it. (GCX 59, 60, 61, 62, 63).

A few days later, on or about August 29, 2023, Richardson learned that Brianna Rodgers was being promoted to a more "impactful role" for company culture, despite Richardson's view, and repeated assertions, that Rodgers was condoning Respondent's race and gender discrimination at best, and championing it at worst. (Tr. 190-191, GCX 65).

On August 30, 2023, Richardson made a second LinkedIn post, linked it to his first post, and he reiterated his concerns that Respondent was allowing sexism and racism to proliferate at Respondent. (ALJD 6:1-16, GCX 64). Richardson protested Respondent's working conditions, complained that the jokes he found to be offensive were still posted on Respondent's Slack channels, protested that Rodgers was promoted despite making racist/sexist statements. (ALJD 6:1-16, GCX. 64). Richardson further noted his protected activity in the post, "I am in communication with several other employees and I am voicing our shared concern here to get management's attention and attract other employees to join the discussion." (GCX 64). Richardson disseminated this LinkedIn post to his coworkers. (GCX 66).

d. Respondent, by Michael Walters, Unlawfully Threatened Richardson, and Unlawfully Demanded that He Remove Portions of his Protected Concerted August 25 and 30 LinkedIn Posts, and Discharged Him When He Refused

On or about August 30, Respondent became aware of Richardson's protected concerted August 25 and August 30 LinkedIn posts. The evening of August 30, Respondent, by Senior Director of Human Resources Michael Walters, emailed Richardson that Respondent believed Richardson's post contained false and defamatory information, and asked Richardson to "remove

these types of comments and do so as soon as possible, but no later than Aug. 31, 2023." (ALJD 6:18-25, GCX 67). Richardson responded that evening seeking clarification on what, specifically, Respondent was asserting was problematic noting that, "Being overly broad is a threat and affront to the free exercise of my rights." (ALJD 6:27-32, GCX 67).

On August 31, Walters emailed Richardson again, reiterating his demand, "We do not intend to engage in a back-and-forth with you on this issue. We are not threatening you, but merely requesting that you modify your posts to remove the types of remarks described below." (GCX 69). This email constitutes a separate and distinct communication from Respondent, by Walters, to Richardson demanding that he remove his protected concerted LinkedIn posts. Richardson replied yet again, advising that he was willing to work with Walters, if Walters pointed to specific issues in Richardson's posts. (GCX 69). However, Respondent did not identify what it was alleging was defamatory. (ALJD 5:11-12). Of note, Richardson believed that everything in his statements were true and accurate, and Respondent had never communicated to Richardson that any of the information he had previously raised in his correspondence with Respondent (through his various emailed complaints) was inaccurate. (TR. 193-194, 196). Respondent refused to provide Richardson with specifics, and he did not amend his LinkedIn posts. (Tr. 197).

On September 1, Respondent terminated Richardson's employment specifically noting that it was discharging Richardson because Richardson's August 25 and 30 LinkedIn posts were "disparaging, and defamatory." (ALJD 5:11-12, 6:34 - 7:5, GCX 73). Respondent relied on the "Non-Disparagement, Public Profiles" clause in its Employee Agreement Regarding Confidentiality, Non-Competition and Non-Solicitation policy to support its discharge decision. (GCX 2, 73). Richardson continued to disseminate his LinkedIn posts to his coworkers, and continued to engage in protected concerted activity, following his discharge. (GCX 70, 71, 72, 74).

As pled in Respondent's defamation lawsuit (GCX 81), Richardson viewed a LinkedIn post by Respondent about future proofing the company on September 8, and he replied by posting a 1-page comment protesting his discharge and Respondent's policies. (GCX 79, Tr. 212-214). Respondent deleted Richardson's LinkedIn comment, so he reposted Respondent's post to his own LinkedIn page along with his comment. (GCX 80, Tr. 212-214).

e. Respondent Files an Unlawful Baseless Defamation Lawsuit Against Richardson, and Subsequently Serves Him with Unlawful Interrogatories and Requests for Production

On October 17, 2023, Respondent filed a lawsuit in Seminole County, Florida, alleging that Richardson's August 25 and 30, and September 8 LinkedIn posts were defamatory. (ALJD 8:20-28, GCX 81). Respondent subsequently served Richardson with interrogatories and requests for productions, and amended interrogatories and requests for productions, which Richardson was required to answer. (ALJD 8:30-31, GCX 82, 83, 84, 85, Tr. 237-240).[4] Respondent subsequently abandoned its defamation lawsuit. (ALJD 8:31-32).

III. ARGUMENT

a. The ALJ Applied *Wright Line*[5] and Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act by Discharging Richardson Because He Engaged in Protected Concerted Activity (Respondent Exceptions 1-7, 18, 27, 29-34, and 42-43)

[4] Respondent did not object during the hearing or otherwise raise that General Counsel Exhibit 83 was incomplete, only containing the odd pages until filing its exceptions. (RB FN 17). Further, this is not an actual basis to disregard ALJ Amchan's findings that the Request for Production (GCX 83), was unlawful as Respondent cites no cases or authority to support this claim. Counsel for the General Counsel also repeatedly raised during the hearing that additional time was needed to review subpoena records and mark them for exhibit, which was denied, but that should not be held against the General Counsel. (Tr. 18-21, 142-143).

[5] Respondent examined the facts of the instant case under the test *Pier Sixty, LLC*, 362 NLRB 505 (2015), but as was explained in the General Counsel's Brief in Support of Exceptions, *Wright Line* and *General Motors*, not *Pier Sixty, LLC* is controlling. (RB 20-29)

i. Richardson's Slack and LinkedIn posts constitute protected concerted activity

To establish unlawful discrimination under Section 8(a)(1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).[6]

The ALJ correctly found that Respondent employed numerous employees remotely throughout the United States, including John Richardson who worked remotely from Winter Springs, Florida. (ALJD 1 – 2:1-2, Tr. 63, GCX 1(o)). During on-boarding, Richardson observed a Poker Powher program, which required employees to identify as female to participate. (ALJD 2:12-13, GCX 4, 93, Tr. 43). Richardson was told that he could attend the Poker Powher event, if accompanied someone who identified as female. (ALJD 2:19-29, Tr. 298). Thereafter, Richardson looked in Respondent's Slack channels and found messages promoting Women in Tech Alliance programs that were only open to women. (ALJD 2:30-32, Tr. 82, GCX 15, 20, 21, 22). Richardson also found jokes that he considered feminist, sexist, and/or anti-male. (ALJD 2:32-33, GCX 30, 32, 33, 34, 35, 111, Tr. 115). Richardson raised his concerns with Respondent's policies to HR and his supervisors. (ALJD 2:33-3:27, GCX 37, 39, 40). In response to Respondent forced Richardson

[6] Regarding Respondent exception 33 and 34, for the reasons set forth in the General Counsel's exceptions, the ALJ should have only analyzed Richardson's discharge under *Wright Line* and *General Motors* regardless of whether the comments were made face to face or in person.

to meet with Respondent's attorneys for an investigation, which did not appear to reveal relevant information.[7] (ALJD 3:29-31).

ALJ Amchan reviewed and considered Richardson' posts and correctly found, contrary to Respondent's exception 27 and 30, that there was no question that Richardson was engaged in protected concerted activity because, he "sought to enlist his coworkers in his crusade against what he perceived as Respondent's discrimination against males, GC. Exhs. 53, 57 and 64." (ALJD 9:3-10). ALJ Amchan confirmed that Richardson's posts were protected and concerted, regardless of whether other employees agreed with Richardson. (ALJD 9:20-26). In finding that Richardson's posts were concerted, ALJ Amchan specifically noted that on the last page of Richardson's August 30 LinkedIn post (GCX 64) Richardson encouraged other employees to file EEOC claims. (ALJD 9:6-11). As such, and contrary to Respondent's exception 31, ALJ Amchan correctly found that Richardson engaged in protected concerted activity by encouraging his coworkers to file a claim with the EEOC which was one example of Richardson's protected concerted activity. (ALJD 9:10-11). Richardson's LinkedIn posts repeatedly asked his coworkers to get involved and to speak with Respondent as a group to effect change in the workforce. (GCX 57, 64, 79, 80).

Respondent cites to *Abramson LLC*, 345 NLRB 171, 173-174 (2005), for the prospect that individual EEOC claims do not constitute protected concerted activity. (RB 31). However, in that case, the alleged discriminatee did not discuss his work concerns with coworkers or seek to enlist their assistance in remedying the alleged discrimination, whereas Richardson repeatedly sought his coworker's assistance in remedying Respondent's alleged discrimination. *Abramson LLC*, 345 NLRB 171, 173-174 (2005), (GCX 57, 64, 79, 80).

[7] Respondent does not assert in its Brief in Support of Exceptions that any relevant information was revealed during this investigation.

ii. Respondent was aware of Richardson's protected concerted Slack and LinkedIn posts and discharged him in retaliation for making the posts

Respondent, by Michael Walters, contacted Richardson on August 30, informed him that Respondent believed portions of Richardson's posts were defamatory, and demanded that Richardson remove those portions of the post, without specifying what they were. (GCX 67). The ALJ correctly found, contrary to Respondent exception 18, that Respondent, by Michael Walters, did not identify which of Richardson's statements it was ordering Richardson to remove. (ALJD 5:9-12). Furthermore, ALJ Amchan correctly found in his Analysis, and contrary to Respondent exception 32, that Respondent's reaction to Richardson's posts (i.e. demanding removal of the posts and suing him for defamation), supports a finding that Respondent was not only aware of the posts, but of their concerted nature. (ALJD 9:13-18). If Respondent only wanted the allegedly false or defamatory statements removed, it would have specifically identified the purportedly defamatory content to expedite its removal and ensure all of Respondent's concerns were addressed. Instead, Respondent tasked Richardson with policing his own posts on Respondent's behalf without giving him any indication of what it was asserting to be false, in the hopes that Richardson would remove his entire protected concerted posts. Accordingly, the ALJ correctly found, that Respondent was aware of Richardson's protected concerted posts, and that Respondent was aware of the concerted nature of Richardson's posts. (ALJD 9:13-14).

There is also no doubt that Respondent harbored animus towards Richardson's protected concerted posts and discharged him for making the protected concerted posts. Respondent, by Michael Walters, specifically cited to Richardson's LinkedIn posts in his August 30 and 31 correspondence. (GCX 67, 69). Further, Respondent identified Richardson's August 25 and 30 LinkedIn posts as the "Basis for Termination" in Richardson's termination letter. (GCX 73).

Accordingly, and contrary to respondent exception 29, the ALJ correctly found that, "There is no question that John Richardson engaged in protected concerted activity of which Respondent was aware and terminated his employment for conduct that was at least related to protected activity." (ALJD 9:6-8). Counsel for the General Counsel met its burden of persuasion establishing a prima facie case of discrimination under *Wright Line*, and the burden shifted to Respondent to establish a valid defense.

ALJ Amchan did not err by finding that Respondent, by Michael Walters violated Section 8(a)(1) by ordering John Richardson to cease engaging in protected activity and by finding that Walter's communications interfered with Richardson's Section 7 rights. (ALJD 10:35-40).[8] Richardson's August 30 and 31 emails instructing Richardson to remove false information, without articulating what Respondent believed to be false, when Respondent had no reason to believe that any of the statements in Richardson's posts were false, constitutes unlawful threats and orders to Richardson to cease engaging in protected activity, as found by ALJ Amchan. (ALJD 10:35-36, GCX 67, 69).

b. The ALJ correctly concluded that Respondent did not meet its Wright Line burden of establishing that it would have discharged Richardson even in the absence of protected concerted activity. (Exceptions 12-17, 19-23, 25-26 28, 35-41, 54)

i. The ALJ correctly applied the *Wright Line* test to shift the burden to Respondent to establish that Richardson's posts were false or defamatory

Respondent repeatedly asserted in its exceptions that ALJ Amchan incorrectly placed the burden on Respondent to show that Richardson's statements were maliciously false or defamatory. (RB 3-4). However, Respondent misconstrues ALJ Amchan's analysis under *Wright Line*. In his

[8] Counsel for the General Counsel addressed the exception that ALJ Amchan erred in finding that Kayla Nassiri violated the Act in Counsel for the General Counsel's Exceptions.

Analysis section, ALJ Amchan correctly recognized that under *Wright Line* the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that Respondent's "animus against protected conduct was a motivating factor in the adverse employment action." (ALJD 9:38-40). In his Order, ALJ Amchan's explained the burden shifting mechanism under *Wright Line*, "If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity." (ALJD 9:40-10:2).

As was stated above, ALJ Amchan found in his Order that the Counsel for the General Counsel met the burden under *Wright Line* and established that Richardson engaged in protected concerted activity, that Respondent was aware of that activity, and that Respondent's discharge of Richardson was motivated by animus toward that activity. (ALJD 9:6-40). Having concluded that the General Counsel met the burden under *Wright Line*, ALJ Amchan correctly found that the only question to be resolved was whether Richardson's conduct forfeited the protections of the Act. (ALJD 10:4-5).

ii. The ALJ correctly found that Respondent was unable to establish its Wright Line defense that Richardson's posts were false or defamatory

Respondent contends that it lawfully discharged Richardson for making false and defamatory statements.[9] Respondent asserts in its brief in support of exceptions that Richardson

[9] The burden shifting analysis and test under *Wright Line*, is the same to determine whether Respondent would have discharged Richardson irrespective of his protected concerted activity, or to determine whether Richardson lost the protections of the Act. If Richardson's statements were defamatory, or reckless or maliciously false, then they would not constitute protected concerted activity, and Respondent would have been permitted to discharge Richardson for making unprotected the posts.

may have lost the protections of the Act, citing *Trus Joist MacMillan*, 341 NLRB 369, 371 (2004) and *Carlton College v. NLRB,* 230 F.3d 1075 (8th Cir. 2000), but these cases are distinguishable. In *Trus Joist MacMillan,* the employee lost the protection of the Act when he, "launched into a vituperative personal attack on Booker, replete with obscene language and gesture," whereas Richardson did not use profane language during his employment. *Id* at 370. Further, in *Carlton College v. NLRB*, the alleged discriminatee disparaged the employer's product (its school) as a "laughingstock" and used vulgarities in a meeting with the dean, but again Richardson did not broadly disparage Respondent's products, but rather took issue with specific identifiable issues, that he was seeking to correct. *Carlton College,* 230 F.3d 1075 (8th Cir. 2000)

In his decision, ALJ Amchan explained that, "The key question is whether the conduct for which Richardson was terminated was protected, or whether he lost the protection of the Act by making statements that were false or otherwise justified his termination." (ALJD 9:26-28). ALJ Amchan answered that question be finding that Respondent failed to establish that the remarks in Richardson's LinkedIn posts were false or factually incorrect and went on to find that Respondent could not justify its discharge of Richardson based on alleged false statements. (ALJD 5:23-24, 10:11-15, 10:30-33).

In its brief in support of exceptions, Respondent argues that the ALJ should have applied *Burnup & Sims* to find that the discharge of Richardson did not violate the Act. In *Burnup & Sims*, 379 U.S. 21 (1964), the United States Supreme Court found that an employer violates the Act by discharging an employee based on a good faith but mistaken belief that the employee engaged in misconduct during the course of protected concerted activity. See *Marshall Engineered Products Co., LLC*, 351 NLRB No. 47 (2007), citing *Burnup & Sims*; See also, *Pepsi-Cola Company*, 333 NLRB 87 (2001); *Pepsi-Cola Company*, 330 NLRB 474 (2000). Under that analysis, the Act is

violated if it is shown that the discharged employee was at the time engaged in protected activity, that the employer knew it was protected activity, and that the employee did not in fact engage in misconduct. *Marshall Engineered Products Co., LLC*, 351 NLRB No. 47 (2007). No specific showing of a prohibited motive is required to find such a discharge unlawful. *Tracer Protection Service*, 328 NLRB 734 (1999). The employer has the initial burden of showing that it had an honest belief that serious misconduct occurred. *TCI Cablevision of Montana d/b/a AT&T Broadband*, 335 NLRB 63, 67 (2001). If the employer meets that burden, then General Counsel must establish that in fact the employee did not engage in misconduct. *Pepsi-Cola Company*, 330 NLRB 474 (2000).

Here, ALJ Amchan properly found that *Burnup & Sims* is not relevant because Respondent cannot establish that Richardson engaged in misconduct, or that it even had a good faith belief that he did so. (ALJD 9:fn 8). ALJ Amchan continued, and correctly found, contrary to Respondent's exceptions 37 and 41, that Respondent did not rebut the General Counsel's showing of discrimination as Respondent did not establish that Richardson made maliciously false statements, or even that it had a good faith belief that Richardson made false factual statements. (ALJD 10:11-15). The ALJ further explained some of his rationale for finding Richardson's statements were factual. (ALJD 5:24-26, 10:15-33).

Contrary to Respondent's exception 40, the ALJ properly found that Richardson did not lose the protections of the Act by making hyperbolic statements, which are not deliberately, maliciously, or recklessly false. (ALJD 10:24-28).[10] In support of his finding, ALJ Amchan cited

[10] Respondent notes in its Brief in support of exceptions that Richardson's posts consist largely of Richardson's opinions which are, "not the type of discrete factual assertions that readily lend themselves to a binary determination of truth or falsity." (RB 36). But Respondent still sued Richardson baselessly asserting that his statements were facts, not opinions, and false.

to *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976) for the prospect that employees do not lose the protection of the Act by protesting employer's policies while not disparaging its product. ALJ Amchan also properly cited to *El San Juan Hotel*, 289 NLRB 1453, 1455 (1988), for the prospect that "… false, misleading, or inaccurate, as well as rhetorical hyperbole that is recognized for what it is," explains several of Richardson's comments. Contrary to exception 39, the ALJ correctly found that, "Respondent cannot justify Richardson's termination on the basis of his expressed negative opinions about the company's DEI policies or its managers, or his characterization of the atmosphere at Apex Fintech." (ALJD 10:21-23).[11]

Accordingly, contrary to Respondent exception 54, the ALJ did not err in concluding that Respondent violated Section 8(a)(1) by terminating Richardson on September 1, 2023. (ALJD 11:41-42).

iii. The ALJ correctly credited Richardson regarding the DEI Panels

Contrary to Respondent exception 25, the ALJ did not err in finding that Richardson's testimony and the documentary evidence are the only relevant evidence in this case. (ALJD 8:34-35). ALJ Amchan specifically noted in his Decision that Respondent's only witness, Laura Agharkar, was hired in 2024, and had no personal knowledge relating to Richardson's discharge, and Respondent's subsequent lawsuit against him. (ALJD 8:36-37, Tr. 215).

Contrary to Respondent's exception 17, the record does not establish how often Respondent held DEI Panels between July and August 2023. (ALJD 5:6-7). Respondent cites to Richardson attending "various" DEI Panels in its brief in support of exceptions (RB 8-9), but it cites to no record evidence establishing how frequently Respondent held DEI Panels.

[11] The ALJ's decision is correct, but as was stated above, ALJ Amchan should only rely on Wright Line and General Motors, and should not have relied on *Triple Play Sports Bar & Grill,* 361 NLRB 308 (2014); *Thor Power Tool Co,* 351 F. 2d 584 (7th Cir. 1965).

Furthermore, ALJ Amchan correctly found that there is no testimony or other documentary evidence showing how Respondent created or maintained the DEI Panel transcript, that Respondent was unaware of its progeny, despite compiling it, or whether portions of the meeting were not transcribed. (ALJD 4:35-37, Tr. 241-242). Richardson disputed the veracity of the DEI Panel recording in his LinkedIn posts and during the hearing, and contrary to Respondent's exception 14 and 15, Respondent did not establish that there were no edits to, or deletions from, the DEI Transcript or recording, or show that they are complete and accurate. (ALJD 4:37-38, Tr. 241-242, 274-275, GCX 28, 57, JX 2). Further, the ALJ did not err in finding that because Richardson had previously asserted that the transcript was altered Respondent, which maintained the evidence in its possession, had a greater burden of proving the accuracy of the transcript, and that Respondent did not meet that burden. (ALJD 5:16-17, citing evidence preservation clause). Respondent offered no reason for failing to call witnesses, and contrary to Respondent exceptions 20, 22, 23, 26, and 38 the ALJ did not err in construing Respondent's inability to establish what occurred at the DEI Panels through accurate recordings and/or witness testimony against Respondent, and drawing an adverse inference from Respondent's failure to call witnesses to prove what occurred at the DEI Panels. (ALJD 5:23-26 and n.4, 10:15-18). Also contrary to Respondent's exception 12, Richardson testified that he believed Brianna Rodgers was the HR representative who went on a tirade. (ALJD 4:26-27, Tr. 272).

Respondent argues in exception 16 that the ALJ erred by finding that Richardson and other white males could take offense to statement set forth at pages 41-43 of the DEI Panel transcript in evidence as GCX 28. That DEI panel includes statements by Stephen Lach, recommending, "If you're hiring for a position, find somebody that doesn't look like everybody else, right?" as well as comments by HR Representative Tobenna Egwu, that she feels uncomfortable and guarded

interviewing with white people and white males. Brianna Rodgers adopted Egwu's statement, commenting, "I love what you said," and explaining that she felt like she felt like she had fighting chance only when there were non-white interviewers. (GCX 28, pages 41-43). The ALJ correctly found, contrary to Respondent exception 16, that these are statements that Richardson, or other white males, may have found offensive. (ALJD 4:42-45). Respondent even concedes in their Brief in support of exceptions that Richardson took offense to the statements in the DEI Panel. (RB 9).

Finally, Respondent notes in support of its contention that Richardson made false statements and that the ALJ found "The transcript does not contain what would generally be considered a tirade by Ms. Rodgers." However, Respondent ignores the next sentence in which the ALJ states, "However, it has not been established that the transcript is complete and accurate." (ALJD 4:38-40).

Accordingly, ALJ Amchan correctly found that, contrary to Respondent exceptions and argument that Respondent did not establish that Richardson's comments were false, and that Richardson's comments did not forfeit the protection of the Act. (ALJD 5:23-24, 9:4).

c. The ALJ did not err in finding that Respondent violated the Act by filing the defamation lawsuit against Richardson and by engaging in pre-trial discovery (Respondent exception 24, 28, 45 – 48)

Contrary to Respondent exceptions 45 and 46, ALJ Amchan did not err in finding that Respondent violated the Act by filing a lawsuit against Richardson and by engaging in pre-trial discovery, or by finding that these actions would have the likely consequences of discouraging any employee from engaging in protected concerted activities. (ALJD 11:2-8). Contrary to Respondent's exceptions 47 and 48, ALJ Amchan appropriately analyzed Respondent's actions

under *Bill Johnson's Restaurants., Inc. v. NLRB*, 461 U.S. 731 (1983)[12], and found that Respondent's defamation lawsuit against Richardson "lacks a reasonable basis in law or fact; and was commenced with a retaliatory motive," which was supported by the fact that Richadson's statements were not false and that contrary to Respondent exception 24, Respondent abandoned the defamation lawsuit without explanation. (ALJD 11:8-12, 8:31-32, Tr. 282).[13]

Respondent contends in its brief in support of exceptions that Florida state law permitted the filing and prosecution of its defamation lawsuit, which also absolved the need to prove specific damages. (RB 53-54). However, to avoid possible interference with national labor policy, a plaintiff pursuing a state-law defamation claim predicated on a statement made during a labor dispute must prove, in addition to any other state-law elements, (1) that the allegedly defamatory statement asserts a fact or implies an assertion of objective fact; (2) that the factual assertion is false; (3) that the speaker published the challenged statement with actual malice; and (4) that the plaintiff was injured thereby. *Linn*, 383 U.S. 53, 64-66 (1966); *Steam Press Holdings, Inc. v. Haw. Teamsters and Allied Workers Union, Local 996*, 302 F.3d 998, 1004 (9th Cir. 2002). Actual malice is established where there is "clear and convincing proof" that the defendant acted with knowledge of the statement's falsity or with reckless disregard for the truth. *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 963 (2000) (quoting *Dunn v. Air Line Pilots Assn.*, 193 F.3d 1185, 1192 (11th Cir. 1999)); see also *Linn*, 383 U.S. at 65. Additionally, a plaintiff that alleges harm to its reputation must prove actual loss due to reputational harm. See *Linn*, 383 U.S. at 65; *Intercity*

[12] Respondent asserts in its Brief in support of exceptions that the ALJ's analysis is incomplete and stops mid-sentence after the comma, "Before the test of reckless or knowing falsity can be met, there must be a statement of fact," (ALJD 11:12-13), however, this is a complete sentence, that appears to mistakenly end with a comma instead of a period. (RB 14).

[13] Respondent cites to Army *Aviation Heritage Foundation & Museum v. Buis*, 504 F. Supp. 2d 1254 (N.D. Fla 2007) for the prospect that corporations can maintain defamation actions under Florida law. (RB 54). However, that case does not implicate the NLRA in any aspect. *Id.*

Maint. Co. v. Local 254, SEIU, 241 F.3d 82, 89-90 (1st Cir. 2001) (plaintiff alleging defamation in labor dispute "could not rest on the common law presumption of damages" and failed to show "evidence of actual loss due to reputational harm and consequent lost profits").

Here, Richardson's Slack and LinkedIn posts generally reflect his opinion that Respondent's policies are discriminatory. (ALJD 9:6-12, GCX 48, 57, 64). Richardson included statements and quotes made by managers and supervisors to support his opinions. (GCX 48, 57, 64). As discussed above, the ALJ found that Respondent failed to establish that any statements made by Richardson were false or caused him to lose the protections of the Act. (ALJD 10:21-33). Further, Respondent did not show that Richardson made the statements with malice or establish that it suffered injury or actual loss due to reputational harm as a result of Richardson's statements and pleas for support. (ALJD 10:11-15, 10:30-33). Thus, Respondent cannot establish that it had a legitimate basis for filing the lawsuit and, in the absence of a legitimate basis, the ALJ correctly found that the filing of the lawsuit against Richardson was retaliatory and that doing so violated the Act.

Where, as here, the maintenance of a lawsuit violates the Act, the proffer and enforcement of the discovery requests in furtherance of that lawsuit are part of the unlawful conduct. See *Pain Relief Centers, P.A.*, 371 NLRB No. 143, slip op. at 2 (2022) (discovery requests founded on preempted claims were themselves preempted). It is therefore unnecessary to consider whether some of the employer's discovery requests would also violate Section 8(a)(1) under the framework in *Guess?, Inc.*, 339 NLRB 432 (2003). Accordingly, the ALJ did not err in finding that the interrogatories and requests for production served on Richardson by Respondent would have the likely consequences of discouraging employees from exercising their Section 7 rights.

d. The ALJ did not err by finding that Richardson's Post-Discharge Conduct Did Not Warrant Denying Richardson Reinstatement and Backpay (Exception 63)

Respondent asserts in its Questions Presented that the ALJ "erred in failing to decide whether Richardson engaged in post-discharge misconduct that rendered him unsuitable for reinstatement to employment." (RB 4). However, ALJ Amchan did evaluate the limited evidence Respondent presented during the hearing, noting that on an uncertain date Richardson posted, "For example, Suda "ratfuck" Guttula (his boss' boss) at one point instructed subordinate employees to rat on concerted activity. (ALJD 7:9-13). The ALJ specifically found, contrary to the assertion in Respondent exception 63 that, "Respondent has not established facts which would warrant denying Richardson reinstatement and backpay." (ALJD 12: FN 9).

Respondent cites *Fund the Public Interest*, 360 NLRB 877, (2014), for the prospect that misconduct can render an employee so unfit that reinstatement is denied. (RB 57). The Board in *Fund the Public Interest*, 360 NLRB 877, (2014) did explore instances where an employee's conduct could preclude their reinstatement and backpay, which is a high standard. The Board noted in *Fund the Public* found that discriminatees forfeited reinstatement and backpay when they threatened to kill someone (citing *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 520-521 (2000)), struck a supervisor with an automobile (citing to *Hillside Ave. Pharmacy, Inc.*, 265 NLRB 1653 (1982)), or threatened to report a probation violation to influence testimony during a Board proceeding (citing to *Lear-Siegler Management Services*, 306 NLRB 393, 394 (1992)), while finding that making disparaging statements do not render an employee ineligible for reinstatement and backpay despite that the discriminatee attempted to assault a supervisor (citing to *Casa San Miguel, Inc.*, 320 NLRB 534, 534 fn. 2 (1995)), and that uttering ethnic slurs did not forfeit a discriminatees right to reinstatement (citing to *C-Town*, 281 NLRB 459) (1986). Accordingly, the

case cited by Respondent do not support its contention that Richardson forfeited the right to reinstatement by calling a supervisor "ratfuck" in two off-hand LinkedIn posts that protested an instruction to divulge employees' protected concerted activity. Rather, the cases support ALJ Amchan's finding that Richardson is entitled to reinstatement and backpay.

e. The ALJ did not err denying Respondent's Motion to Bifurcate the Hearing (Exceptions 26 and 64)

Respondent asserts that ALJ Amchan committed reversable error by denying its Motion to Bifurcate the hearing, which was filed on April 29, 2026. (GCX 1(p)). The Complaint in the instant case issued on December 29, 2025, and included a Notice of Hearing stating, in part, "PLEASE TAKE NOTICE THAT **on May 5, 2026, at 9:30 a.m., at 201 E. Kennedy Blvd., Suite 530, Tampa, Florida** and on consecutive days thereafter until concluded a hearing will be conducted before an administrative law judge of the National Labor Relations Board." (GCX 1(g)). As such, Respondent knew in December 2025, that the hearing was scheduled to be held in Tampa, Florida beginning on May 5, 2026, but Respondent nonetheless waited until less than a week before the hearing opened to file a motion to bifurcate. (GCX 1(p)). Respondent asserts in its motion that it was logistically difficult to litigate a case in Florida, when some of Respondent's witnesses live elsewhere. (GCX 1(p)). Respondent was undoubtedly aware well before April 29, 2026, that some of its witnesses lived outside of the State Florida and it must have anticipated that it might want to call those witnesses during the hearing. Thus, Respondent had ample time to arrange for its witnesses to be present in Tampa, Florida for the hearing on May 5, 2026. Furthermore, Respondent fails to explain how litigating the unfair labor practice in Tampa, Florida was prejudicial to its case, when it was fully prepared to litigate a baseless defamation lawsuit against Richardson in Florida. (GCX 81).

Further, during the hearing, Counsel for the General Counsel accommodated Respondent's only witness, Laura Agharkar, by agreeing to interrupt Richardson's direct testimony to allow Respondent to call Agharkar as a witness to accommodate her schedule. (Tr. 214). Respondent did not assert that it intended to call other witnesses, request time to allow witnesses to travel to the hearing, or request that witnesses be permitted to testify telephonically or through video conference. In fact, Respondent counsel informed the ALJ at the end of the second day of the hearing that it did not have other witnesses to present. (Tr. 303). Accordingly, ALJ Amchan's finding that Respondent offered no reason for failing to call other witnesses, such as Brianna Rodgers, Sudha Guttula, Tobenna Egwu and Michael Walters is supported by the record. (ALJD 8:37-39). Respondent is merely trying to get another opportunity to litigate the unfair labor practice, and Respondent exceptions 26 and 64 should be denied for the reasons stated above.

f. The ALJ did not err by requiring Respondent to cease and desist from taking certain actions and by requiring Respondent to undertake affirmative actions, to remedy the unfair labor practice (Exceptions 55-62)

As discussed above, the ALJ correctly found that Respondent, by Michael Walters, unlawfully instructed employees to cease engaging in protected concerted activity,[14] and discharged Richardson for engaging in protected concerted activity. (ALJD 10:35-36, 11:41-42). Further, ALJ Amchan correctly found that Respondent violated the Act by filing an unlawful defamation lawsuit against Richardson, and by serving Richardson with unlawful discovery requests (i.e., the request for production and interrogatories). (ALJD 11:1-13). To remedy these unfair labor practices, ALJ Amchan properly ordered Respondent to cease and desist engaging in certain conduct and to undertake certain affirmative actions, to include posting and distributing a

[14] As set forth in the General Counsel's Exceptions and discussed in the Brief in Support, Respondent also violated Section 8(a)(1) of the Act by threatening employees with reprisal if they did not remove protected concerted posts.

Notice to Employees. (ALJD 12-16).[15] Respondent protests ALJ Amchan's requirement that Respondent physically post the Notice to Employees, and distribute the Notice electronically and by mail. However, as was correctly found by ALJ Amchan, many of Respondent's employees work remotely, and as such, electronic and mail dissemination is the only way to ensure that all employees receive the Notice. Further it is likely that several employees who were employed when the unfair labor practices occurred are no longer employed by Respondent, and electronic and mailing dissemination of the Notice is the only method to contact these individuals.

ALJ Amchan correctly ordered Respondent offer Richardson reinstatement, and make him whole for loss of earnings and benefits, with backpay calculated "… in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010)." ALJD 12:3-7). Furthermore, the ALJ appropriately recommended that Respondent be required to compensate Richadson for "search for work and interim employment expenses regardless of whether those expenses exceeded his interim earnings, computed as described above." (ALJD 12:7-9).[16] However, these cases are controlling, and Respondent provided no argument in its brief in support of exceptions explaining why this remedy is inappropriate.

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[15] Counsel for the General Counsel filed exceptions asserting that Remedy, Order, and Notice to Employees should be expanded to achieve a full remedy, so only Respondent's assertions regarding the existing order will be addressed in these exceptions.

[16] In exception 59, Respondent excepts to the ALJ's requirement that Respondent compensate Richardson for excess tax liabilities, citing *Latino Express, Inc.,* 359 NLRB No. 44 (2012). As asserted in General Counsel's exceptions, Richardson is entitled to compensation for excess tax liabilities, but ALJ Amchan should have relied on *AdvoServe of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Contrary to Respondent's contention, the ALJ did not err by requiring Respondent to compensate Richardson for "… all direct or foreseeable pecuniary harms that he suffered as a result of Respondent's unfair labor practices, regardless of whether these expenses exceed interim earnings, *Thrryv* [sic], *Inc*., 372 NLRB No. 22 (2022), This shall be calculated separately from taxable backpay with the rate of interest prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), *Crushin' It LLC*, 372 NLRB 100 (June 29, 2023)." (ALJD 12:11-16). *Thryv* is controlling Board law, but even if it were not, Richardson would be entitled to recover interim search for work expenses. *King Soopers Inc.,* 364 NLRB 1153. Richardson is also entitled to reimbursement for the cost incurred in responding to discovery and defending against the baseless lawsuit.[17] *King Bill Johnson's Restaurants Inc., v. NLRB*, 461 U.S. 731 (1983), *Anheuser-Busch, LLC*, 347 NLRB No. 133 (2026). The ALJ did not err in requiring Respondent to file reports with the Region Director to ensure Respondent allocated the backpay to the appropriate calendar quarters. (ALJD 12:18-19). Respondent exceptions 55 through 62 should be denied**.** (ALJD 12:18-19).

g. The National Labor Relations Act is Constitutional, (Exceptions 65-77)

Respondent exception 65 through 77, raises a litany of constitutional arguments. These arguments were not developed in Respondent's post-hearing brief, or in its exceptions, and as such, they have been forfeited and should be summarily rejected on that basis.[18] And even if the arguments are adequately raised and preserved, they lack merit.

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[17] The General Counsel disagrees with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024), and will be urging the Board to reconsider the policy in a future, appropriate case.

[18] A respondent "fail[s] to meet its burden" to establish affirmative defenses—including those "based on alleged violations of its rights under the U.S. Constitution"—if it neglects to "present evidence or argument regarding those defenses" at the hearing or in its post-hearing brief. *Starbucks Corp.*, Case 18-CA-299560, JD-23-23 slip op. at 2 n.2 (Apr. 6, 2023); *accord*

i. NLRB Board Members are not unconstitutionally insulated from removal, and Board Members and ALJs are not unconstitutionally appointed.

Following the lead of many courts, the Board has applied the "causal-harm" principle to reject challenges to statutory removal restrictions where "there is no evidence that the Respondent suffered any harm from the Board members' and administrative law judges' removal protections." *Commonwealth Flats Dev. Corp*., 373 NLRB No. 142, slip op. at 1 n.1 (2024); see *SJT Holdings, Inc*., 372 NLRB No. 82, slip op. at 1 n.4 (2023) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021), and *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022), rev'd per curiam on other grounds, 598 U.S. 623 (2023)). The causal-harm requirement sets a very high bar: to obtain any relief, a removal-restriction challenger "must demonstrate that the unconstitutional removal provision actually affected the agency's decision or conduct against him." *Leachco, Inc. v. CPSC*, 103 F.4th 748, 756 (10th Cir. 2024), cert. denied, 145 1047 (2025); see also *Calcutt*, 37 F.4th at 318 (rejecting "vague assertions" and "generalized allegation[s]" about what officials might have done had challenged removal restrictions not been in place). Other circuits agree with this analytical framework. See *Bhatti v. FHFA*, 97 F.4th 556, 561 (8th Cir. 2024); *CFPB v. Nat'l Collegiate Master Student Loan Tr*., 96 F.4th 599, 613-16 (3d Cir. 2024), cert. denied, 145 S. Ct. 984 (2024); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *CFPB v. L. Offs. of Crystal Moroney,*

Greenhouse Group, LLC, Case 13-CA-304261, JD-46-25 slip op. at 2 n.2 (May 22, 2025); *Trader Joe's East Inc.*, Case 01-CA-296847, JD-70-24 slip op. at 65 n.160 (Nov. 8, 2024); *Starbucks Corp.*, Case 29-CA-309779, JD(NY)-21-24 slip op. at n.3 (Sept. 18, 2024); *Starbucks Corp.*, Case 13-CA-316407, JD-37-24 slip op. at 2 n.2 (June 14, 2024); *Starbucks Corp.*, Case 14-CA-306625, JD-24-24 slip op. at 18 n.7 (Apr. 25, 2024); *Starbucks Corp.*, Case 27-CA-294617, JD(SF)-04-24 slip op. at 2 n.1 (Feb. 6, 2024); *Starbucks Corp.*, Case 19-CA-295708, JD-02-24 slip op. at 26 n.33 (Jan. 4, 2024); *Starbucks Corp.*, Case 19-CA-296765, JD(SF)-37-23 slip op. at 43 (Nov. 27, 2023); *Starbucks Corp.*, Case 20-CA-298282, JD(SF)-18-23 slip op. at 2 n.2 (July 31, 2023); *Starbucks Corp.*, Case 22-CA-305726, JD(NY)-14-23 slip op. at 15 n.6 (July 14, 2023).

P.C., 63 F.4th 174, 180 (2d Cir. 2023), cert. denied, 144 S. Ct. 2579 (2024); *CFPB v. CashCall, Inc.*, 35 F.4th 734, 742-43 (9th Cir. 2022). Because Respondent cannot make—and indeed, has not even tried to make—the required showing of harm here, the Board can reject Respondent's removal-restrictions arguments on lack-of-harm grounds without addressing the merits of these challenges. Cf. *Cortes v. NLRB*, No. 1:23-cv-02954, 2024 WL 1555877, at *7 (D.D.C. Apr. 10, 2024) (declining to address the constitutionality of Board members' removal protections because "the Court could 'dispose of the case' on the harm requirement" (quoting *Bond v. United States*, 572 U.S. 844, 855 (2014))), affirmed on other grounds, 145 F.4th 57 (D.C. Cir. 2025).

The Board should not address the merits of Respondent's removability challenges, in any event. To be sure, in *SJT Holdings*, a Board majority rejected a challenge to Board members' removal protections based on its interpretation of "Supreme Court precedent recognizing that Congress may establish expert agencies like the Board, led by a group of principal officers and removable by the President only for good cause." *SJT Holdings*, above, at 1 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). Notably, then-Member Kaplan did not join the majority "in reaching the merits of the constitutional issue." Id. at 2 n.5. Rather, consistent with his and former Member Ring's earlier concurring opinion in *Aakash, Inc.*, 371 NLRB No. 46 (2021) (addressing the President's authority to remove the General Counsel), then-Member Kaplan thought it was "for the courts, not the Board, to make the initial and final determinations on the issues presented here." *SJT Holdings*, above, at 2 n.5 (quoting Aakash, 371 NLRB No. 46, at 4-5). The Supreme Court's subsequent overruling of Humphrey's Executor in *Trump v. Slaughter*, No. 25-332, 2026 WL 1855612 (U.S June 29, 2026), as well as the President's removal of former Member Wilcox, which is now the subject of active litigation, see *Wilcox v. Trump*, 775 F. Supp. 3d 215 (D.D.C. 2025), reversed sub nom. *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025),

petition for cert. filed, No. 26-5 (U.S. June 27, 2026), demonstrates the wisdom of then-Member Kaplan's approach. Accordingly, the General Counsel urges the Board to resolve these issues solely on causal-harm grounds. Accordingly, and contrary to Respondent exception 72, Respondent will not suffer irreparable harm by participating in the NLRB proceedings. Contrary to Respondent exception 71, NLRB Board members are not unconstitutionally insulated from removal. For the same reasons, and contrary to Respondent exception 70, ALJs and Board Members are not unconstitutionally appointed.

ii. The NLRB does not improperly combine prosecutorial and adjudicatory functions

Contrary to Respondent exceptions 65, 66, 67, 68, and 69, the National Labor Relations Board is constitutional as interpreted and applied, the NLRB decision-making process is constitutional, and the NLRB does not act as investigator, prosecutor, judge, jury, and appellate court. Respondent's combined-functions argument lacks merit. This contention overlooks the NLRA's explicit separation of functions, c*ompare* 29 U.S.C. § 160(a)-(d) (setting forth the Board's functions in unfair-labor-practice cases), *with id.* § 153(d) (setting forth the independent General Counsel's functions in such cases), *id.* § 154(a) (giving effect to administrative law judges' decisional independence), *and id.* § 160(e)-(f) (empowering courts of appeals to review final Board orders). It is also unavailing even as to administrative agencies lacking such internal separation. *See Withrow v. Larkin*, 421 U.S. 35, 57 (1975); *see also FTC v. Cement Institute*, 333 U.S. 683, 702 (1948); *Illumina*, 88 F.4th at 1047. Indeed, the Board just recently rejected the argument that "the agency wields a structurally unconstitutional combination of prosecutorial and adjudicatory functions." *Jones Lang Lasalle Americas, Inc.*, 373 NLRB No. 37, slip op. at 1 n.1 (2024) (citing *Illumina*, 88 F.4th at 1047), *enforced*, 128 F.4th 1288 (D.C. Cir. 2025).

Respondent's argument ignores that by congressional design "[t]he NLRA creates a stark division of labor between the General Counsel and the Board," *Exela Enter. Sols. v. NLRB*, 32 F.4th 436, 444 (5th Cir. 2022), that runs "along a prosecutorial versus adjudicatory line," *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 124 (1987). The General Counsel carries out the functions assigned to that position under Section 3(d) of the Act "independent of the Board's supervision and review," *id.* at 118, so Respondent's structural challenge is inapt. *See NLRB v. FLRA*, 613 F.3d 275, 281 n.* (D.C. Cir. 2010) (observing that "the statutory separation mandated by § 3(d) is unique" among federal agencies). Thus, the Board has rejected the argument that "the agency wields a structurally unconstitutional combination of prosecutorial and adjudicatory functions." *Jones Lang Lasalle Americas, Inc.*, 373 NLRB No. 37, slip op. at 1 n.1 (2024) (citing *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023)), *enforced*, 128 F.4th 1288 (D.C. Cir. 2025); *accord Amazon.com Services LLC*, Case 29-CA-261755, slip op. at 1 n.2 (2024) (not reported in Board volumes).

IV. Conclusion

Contrary to Respondent's assertions, the Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) of the Act by unlawfully demanding that Richardson remove protected concerted posts and threatening him with reprisal if he did not do so, and by unlawfully discharging Richardson for refusing to remove his protected concerted LinkedIn posts. The ALJ also correctly found that Respondent violated Section 8(a)(1) of the Act by unlawfully filing a defamation lawsuit against Richardson for engaging in protected concerted activity, and by unlawfully filing discovery requests (i.e., interrogatories and request for production) on Richardson.

Dated: October 19, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Supporting Brief, was served on October 19, 2026, as follows:

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