CSC Holdings, LLC *and* Communications Workers of America. Case 29–CA–190108

November 1, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On April 27, 2018, Administrative Law Judge Kenneth W. Chu issued the attached decision, and on May 3, 2018, he issued an Errata. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The sole issue before the Board is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Michael Wills because of his union and other concerted activities. Contrary to the judge, we find that, even assuming the General Counsel met his *Wright Line*[2] burden of demonstrating unlawful motivation, the Respondent nevertheless met its burden of showing that it would have discharged Wills absent his union and other concerted activities. Accordingly, we reverse the judge and dismiss the complaint in its entirety.[3]

I. FACTS

The Respondent provides subscription television, internet, and telephone services in the greater New York area. It employs sales representatives to go door-to-door to solicit customers to sign up for subscriptions to its services. As relevant to this case, the Respondent maintains a progressive disciplinary practice for its employees. Pursuant to this practice, the Respondent issues employees various levels of disciplinary warnings, the most serious of which is a final warning. Final warnings are considered active, for progressive disciplinary purposes, for a period of 1 year. Beyond a final warning, discharge is the next and final step of progressive discipline under the Respondent's practice.

The Respondent's progressive disciplinary practice entails documenting employee infractions, and addressing them with the offending employee, as the infractions occur. The Respondent, however, does not necessarily impose immediate progressive discipline for each and every infraction that an employee commits. Rather, depending on the severity of the offense, the Respondent often advances an employee to the next level of progressive discipline only once the employee has committed multiple infractions that it deems collectively serious enough to warrant doing so.

Michael Wills was employed by the Respondent as a sales representative from 2011 until his discharge in July 2016. As the judge found, "[i]t is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers." The Respondent issued him a formal written reprimand in September 2013, a final warning in October 2014, a documented verbal warning in November 2015, and a final warning in February 2016.[4] With the exception of the October 2014 warning, each of these disciplines encompassed—among additional infractions—multiple instances of Wills having engaged in activity the Respondent deemed to be insubordinate or disrespectful towards its supervisors and managers. In particular, the February 2016 final warning was issued to Wills for "insubordination and disrespectful behavior" towards various managers on several occasions between December 2015 and February 2016. The final warning counseled Wills to follow the Respondent's policies going forward and informed him that further violations would result in his discharge.

After receiving the February 2016 final warning, Wills was upset and contacted the Union. Over the next several months, Wills engaged in various activities on behalf of the Union, such as speaking to employees about

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

[3] Citing *Lucia v. SEC*, 585 U.S. ___, 138 S.Ct. 2044 (2018), the Respondent argues that the judge's decision should be vacated because the Board's administrative law judges are "Officers of the United States" who have not been properly appointed pursuant to the Appointments Clause in Article II of the United States Constitution. The Board has previously addressed this matter and found that each of the Board's existing administrative law judges, including Judge Chu, has been validly appointed. See *WestRock Services, Inc*., 366 NLRB No. 157 (2018).

[4] Wills did not receive any additional discipline between the October 2014 final warning and November 2015. As noted above, final warnings are considered active, for progressive disciplinary purposes, for a period of one year.

supporting the Union and collecting authorizations cards. He also spoke out in favor of the Union at a meeting on about May 23, 2016, where several of the Respondent's supervisors and managers, including Senior Vice President of Human Resources Paul Hilber, were present. At the same time, there is no dispute that, after his February 2016 final warning, Wills continued to exhibit unprofessional conduct. As the judge found, "[a]fter the February [2016] final warning, Wills was disrespectful and failed to follow company policy on a number of occasions," and supervisors and managers "counsel[ed]" him regarding those infractions as they occurred.[5] For example, on June 6, Wills sent text and email messages to his supervisor, Thomas Farina, and Human Resources Manager Erica Simon, complaining about Farina contacting Wills on his day off.[6] Farina immediately reported Wills' text messages to his manager, who, in turn, immediately reported them to Simon and upper management. Shortly thereafter, on June 16, Simon met with Wills and counseled him that his text messages to Farina were inappropriate and disrespectful.[7] Simon reminded Wills that he was on a final warning and that his unprofessional interactions with management were a recurring problem; she further advised Wills that the Respondent would not tolerate similar continued behavior.

On June 23, about a week after Wills had been counseled by Simon for his inappropriate text messages to Farina, Supervisor Eric Zimmerman observed Wills using his smart phone during a presentation by a representative from the premium television channel Starz. Zimmerman twice leaned toward Wills and told him to pay attention to the presentation. Although it is unclear whether Wills heard Zimmerman's first instruction, he responded on the second occasion by insisting that he was paying attention. Zimmerman expressed his disagreement, and Wills put down his phone. Only a few moments later, however, Wills picked his phone back up, held it out, and used it to video record Zimmerman—who was then using *his* phone—for about 9 seconds.

After investigating this incident, the Respondent discharged Wills on July 6. It cited his insubordinate conduct during the Starz presentation, along with his disciplinary history—including his February 2016 final warning—as well as Wills' other undisputed post-final-warning infractions. The Respondent emphasized that Wills' conduct during the Starz presentation constituted a continuation of his lengthy, documented pattern of conduct deemed by the Respondent to be insubordinate and disrespectful towards the Respondent's supervisors and managers.

Applying *Wright Line*, the judge found that the General Counsel satisfied his initial burden of showing that Wills' union and other concerted activities were a motivating factor in the Respondent's decision to discharge him. The judge further found that the Respondent failed to establish its *Wright Line* burden of proving that it would have discharged Wills even absent his union or other protected activity. Central to this finding was the judge's conclusion that the Respondent's proffered reasons for discharging Wills were pretextual. In its exceptions, the Respondent asserts that the judge erred in finding that the General Counsel met his initial burden and erroneously concluded that its proffered reasons for Wills' discharge were pretextual.

II. ANALYSIS

Under *Wright Line*, the General Counsel has the initial burden of establishing that an employee's union or protected concerted activity was a motivating factor in an employer's decision to take adverse action against the employee. 251 NLRB at 1089. The General Counsel meets this burden by showing that the employee engaged in union and/or protected concerted activity, that the employer had knowledge of that activity, and that the employer harbored animus against union or protected concerted activity. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).[8] If the General Counsel makes this initial showing, the burden then shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, above, 251 NLRB at 1089.

For the purposes of this case, we assume arguendo that the General Counsel met his initial burden under *Wright Line* to prove that Wills' union activity was a motivating factor in his discharge. We nevertheless find, contrary to the judge that the evidence presented by the Respondent establishes that it would have discharged Wills even

[5] All subsequent dates are in 2016, unless otherwise indicated.

[6] In both communications, Wills typed a number of words in all capital letters, and he ended sentences with several consecutive exclamation points. In the text messages to Farina, Wills also otherwise addressed his supervisor in a confrontational and belittling manner, and stated that he did not believe Farina's assertion that a manager had directed Farina to call Wills on his day off, which the Respondent reasonably understood as Wills calling his supervisor a liar. It is uncontested that the Respondent had repeatedly disciplined and counseled Wills for his perceived disrespectful written communications with management, including specifically his use of all capital letters and exclamation points.

[7] Simon had been on vacation on June 6. The June 16 meeting occurred soon after she returned to work.

[8] We do not rely on the judge's recitation of the *Wright Line* standard to the extent it implies that the General Counsel must establish a separate fourth "nexus" element as part of his initial burden.

absent his union activity.[9] Wills engaged in clear misconduct by acting in an insubordinate and disrespectful manner toward Supervisor Zimmerman during the June 23 Starz presentation. This misconduct was a continuation of Wills' undisputed, long-running pattern of insubordinate and disrespectful behavior toward members of management, for which Wills had been repeatedly counseled and disciplined, as explained above. Indeed, at the time of his Starz misconduct, Wills was on an active final warning based in part on his prior insubordinate and disrespectful behavior, and, just 1 week prior to the Starz presentation, the Respondent had counseled Wills regarding other postfinal-warning disrespectful conduct toward a supervisor.[10] Under the Respondent's progressive disciplinary practice, discharge was the only remaining level of discipline to impose on Wills. Given his undisputed disciplinary history and postfinal-warning infractions—particularly his recidivist insubordinate and disrespectful misconduct toward Supervisors Farina and Zimmerman on June 6 and 23—the Respondent's discharge action was wholly consistent with its progressive disciplinary practice, and we are persuaded that it would have taken the same action in the absence of Wills' protected activity.

We nevertheless acknowledge the judge's findings that the Respondent's asserted reasons for Wills' discharge were pretextual and that the Respondent demonstrated disparate treatment in discharging Wills. Having reviewed the record in light of the Respondent's exceptions, however, we disagree with those findings.

As to pretext, of course, where an employer's purported reasons for taking an adverse action against an employee amount to pretext—that is to say, they are false or not actually relied upon—the employer necessarily cannot meet its *Wright Line* rebuttal burden. E.g*., Rood Trucking Co.*, 342 NLRB 895, 898 (2004). Here, although the judge's pretext rationale is less than clear, he appears to have reasoned primarily that, because he credited Wills' testimony that Zimmerman did not expressly reference Wills' phone usage when directing him to pay attention to the Starz presentation, Zimmerman "never instructed" Wills to put away his phone, and, "therefore, [Wills] could not have been insubordinate to Zimmerman." So, in the judge's view, Wills was merely "disrespectful" to Zimmerman when he subsequently raised his phone to video record him.

In our view, the judge's reasoning is erroneous and does not support a finding of pretext. The evidence is clear, and the General Counsel explicitly concedes, that Wills understood (as any reasonable employee would, given the context) that Zimmerman's directive to "pay attention" to the presentation included an implicit instruction to put down his phone. Thus, the fact that Zimmerman did not expressly spell out that aspect of his directive does not reveal as false, or in any way undermine, the Respondent's reasonable assertion that Wills' response was insubordinate—he briefly argued with the supervisor over the directive, and then, after momentarily complying, refused to comply by picking his phone back up and using it to record the supervisor. Moreover, the fact that the judge would characterize Wills' inappropriate behavior using a slightly different verbal formulation—"disrespectful" conduct toward a supervisor, rather than "insubordination"—does not show pretext in the Respondent's use of the latter term. See *Neptco, Inc.*, 346 NLRB 18, 20 (2005) (judge's pretext analysis "proceed[ed] from the erroneous premise that [the employer's] characterization of [the employee's] conduct as 'insubordination' would be accurate only if it comported with the judge's view of the common definition of that term").

The judge seems to have found additional evidence of pretext in the email sent by Human Resources Representative Judy Courtney, who offered her opinion that it was "[h]ard . . . to see" Wills' conduct (as reported by Zimmerman) as warranting a suspension. In the judge's view, this email establishes that Courtney "did not believe the Respondent should suspend Wills, let alone discharge [] him" based on his conduct during the Starz presentation, and therefore tends to show that the Respondent did not truly rely on that conduct in discharging Wills. We again disagree with the judge. His view does not account for the uncontroverted evidence that the Respondent does not use suspensions as part of its progressive disciplinary practice—rather, it uses them only to temporarily bar from work employees who may pose a threat to others. Indeed, Courtney's email was responding to a suggestion to suspend Wills *pending the Respondent's investigation* of the Starz incident—a suggestion that had been offered based on Zimmerman's claim that he felt threatened by Wills' behavior. Courtney's comment disagreeing with the suggestion, therefore, merely shows that she felt Wills did not pose a threat. It does not undermine the legitimacy of the Respondent's assertion that, after having completed its investigation, it decided to discharge Wills based in part on his misconduct during the Starz presentation—not

[9] Member Kaplan would find that the General Counsel failed to meet the initial *Wright Line* burden of proving that union animus motivated Wills' discharge, but he agrees that, assuming this burden was met, the Respondent met its burden of proving it would have discharged Wills in the absence of his union activity.

[10] The General Counsel did not allege that the Respondent's February 2016 final warning or any of the postfinal-warning counselings were unlawful. The sole allegation is that the Respondent's discharge of Wills violated the Act.

because it was threatening, but because it was insubordinate and disrespectful.

Moreover, it appears that the judge further rested his pretext finding, in part, on the Respondent's purported failure to follow its own practice in discharging Wills. Specifically, the judge noted that the Respondent discharged Wills after the Starz incident, but had not discharged or taken other disciplinary action against him based on the other post-final-warning infractions that he committed prior to the Starz incident. Contrary to the judge, however, the record demonstrates that these circumstances are entirely consistent with this particular employer's progressive disciplinary practice. As the judge found, the Respondent counseled Wills regarding the other post-final-warning infractions as they occurred, and as explained above, the Respondent often imposed progressive discipline on an employee only once she had committed several offenses since the time of her last discipline. Of particular relevance here is the fact that merely a week before the Starz incident, Simon reminded Wills that he was on a final warning, counseled him that his unprofessional interactions with management were a recurring problem, and advised him that the Respondent would not tolerate similar continued behavior. In these circumstances, we believe the weight of the evidence demonstrates that, rather than carrying out a pretextual discharge, the Respondent was instead effectuating its progressive disciplinary practice to address ongoing and unresolved poor conduct by one of its employees.

Turning to the evidence of disparate treatment, we do not agree with the judge's finding that the Respondent engaged in disparate treatment by discharging Wills while it failed to discipline sales representative Ulysses Colon. Specifically, we find that Wills and Colon were not similarly situated enough to support a disparate treatment finding. Although Colon, like Wills, engaged in insubordinate and disrespectful conduct in refusing to promptly comply with a supervisor's directive to pay attention (and put down his cell phone) during a July 2016 meeting, the evidence does not establish that Colon exhibited the same level of insubordination and disrespect as Wills. Only Wills, as part of his refusal to comply, held his phone out and video recorded the supervisor who had just given him the directive. See *Waste Management of Arizona*, 345 NLRB 1339, 1341 & fn. 8 (2005) (comparators not similarly situated because their misconduct, although similar in general type, was substantially less severe than that of alleged discriminatee). Moreover, as discussed above, Wills' employment history—including his active final warning—evidenced a long pattern of repeated insubordinate and disrespectful behavior toward members of management, whereas Colon's employment history evidenced no such pattern; Colon's final warning, in particular, dealt exclusively with matters of absenteeism.[11] See *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 16–17 (2018) (disparate treatment not shown where alleged discriminatee exhibited ongoing pattern of failing properly to complete paperwork and had previously been coached and disciplined for such failures, whereas comparators failed properly to complete paperwork only once); *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 859 (2006) (comparators not similarly situated because none had history of misconduct similar to that of alleged discriminatee). In these circumstances, where the Respondent's discharge of Wills was premised both on his pattern of misconduct and the severity of his insubordination at the June 23 meeting, we find that the record falls short of establishing that the Respondent engaged in disparate treatment of Wills.

Accordingly, we conclude on this record, for the reasons explained above, that the Respondent has demonstrated by a preponderance of the evidence that it would have discharged Wills even absent his protected activity. We therefore reverse the judge's finding of a violation and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 1, 2019

Lauren McFerran, Member

[11] In his decision, the judge states that the Respondent did not strictly enforce its policy against employees using phones during boost meetings. As evidence, the judge points to the testimony of two employees, Mario Madrigales and Ann Pacifico, stating that they or others used their phones during these meetings without being disciplined or discharged. To the extent the judge finds that this testimony evidences disparate treatment, we disagree. In discharging Wills, the Respondent did not rely on the mere fact that he had used his phone during the June 23 Starz presentation; rather, it relied on his insubordinate and disrespectful response when a supervisor instructed him to stop using the phone. Madrigales and Pacifico did not testify that they or any other employee had ever exhibited any remotely similar insubordinate or disrespectful behavior when instructed to stop using his or her phone during a meeting. Madrigales testified that he saw employee Chris Hart using his phone during the Starz presentation, but as the judge found, Hart, unlike Wills, complied with a supervisory request to put his phone down. Similarly, Pacifico testified that there were many occasions when she would use her phone during a boost meeting, but that when she did so, Supervisor Zimmerman would instruct her to stop and pay attention to the meeting, and she would then comply with Zimmerman's instruction. Although Madrigales also testified that he used his phone "probably . . . once" during the June 23 Starz presentation, he stated that he "hid it well," and there is no evidence that any supervisor was aware of his phone usage.

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Matthew A. Jackson, Esq., for the General Counsel.
Kenneth A. Margolis, Esq., of New York, New York, for the Respondent.
Nicholas Hanlon, Esq., New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on October 4, November 2, 3, 6, 14 and 29, 2017. The Communications Workers of America (Union) filed a second amended charge on March 15, 2017[1] and the General Counsel issued the complaint on July 27, 2017. The Respondent filed a timely answer in response to the complaint (GC Exh. 1).[2]

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) when the Respondent discharged employee Michael Wills on about July 6, 2016.

On the entire record, including my assessment of the witnesses' credibility[3] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, CSC Holdings, LLC (formerly known as Cablevision), a domestic corporation, with an office located at 1111 Stewart Avenue, Bethpage, New York, and with various facilities in New York, including a facility located at 1500 Motor Parkway, Hauppauge, New York, has been engaged in the business of providing cable television, internet and telecommunications services recycling throughout the United States, where it derives gross annual revenue in excess of $500,000 and purchased and received goods and materials valued in excess of $5000 at its facilities in New York directly from suppliers located outside the State of New York.

The Communications Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Respondent CSC Holdings, LLC provides subscription television, internet, and telephone services to the greater New York area and other areas of the country. The Respondent operates sales offices throughout New York State, including the Hauppauge office, where it hires residential account executives (RAE), otherwise known as residential direct sales representatives (henceforth, sales representatives), to solicit subscriptions for its services by having the sales representatives go door-to-door to sign up customers. The sales representatives would also engage in phone and internet communications with potential customers and follow up the various subscription packages and services with the customers. About June 2016, Altice, USA successfully assumed the subscription sales operations from CSC Holdings.

1. Background

Michael Wills (Wills) was hired in September 2011 at the Freeport office, New York, as a sales representative. In approximately 2013–2014, Wills was reassigned to the Hauppauge office after the Freeport office had closed. Wills remained as a sales representative after his reassignment. Wills' direct supervisor during all relevant time of this complaint was Thomas Farina. Wills stated that 20–40 sales representatives were employed at the Hauppauge office with three supervisors, Steven Spalleta, Eric Zimmermann, and Farina. Although Wills was assigned to Farina, all sales representatives would be responsible to the three supervisors.

The sales manager was and is Carmine Pero. Pero has been a sales manager with the Respondent since 2015 and with the Company for 12 years. Pero directly supervises 35–45 sales representatives, supervisors, and other personnel in the Hauppauge office. Pero ensures that sales are met by the representatives and that policy and procedures are adhered by his staff. Pero reported to Daniel Ferrera and George Sundstorm, identified as a vice president and Colleen Long, the senior vice president in charge of direct sales. Daniel Ferrara was identified as the senior vice president of outbound telemarketing and direct sales since June 2016 and replaced Sundstorm and Long (Tr. 66). Ferrera was formerly the vice president of outbound telemarketing from 2013 until his present position. Ferrera worked out of the Respondent's Jericho office, but also managed the Hauppauge office (Tr. 785).

Wills testified that his workweek was from Tuesday through Friday from 12 noon to 9 p.m. On Saturday, Wills works from 9 a.m. until 6 p.m. Before the start of the day, there is usually a 15–30-minute meeting with all the sales representatives to wrap up any unfinished paperwork and office items that needed to be addressed. Part of this meeting was designed to boost the morale of the sales representatives. Management officials would conduct a boost meeting that lasted from 15 minutes to an hour. Boost meetings were held by the office manager or a supervisor

[1] All dates are in 2016 unless otherwise indicated.

[2] The General Counsel exhibits are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief for the General Counsel is identified as "GC Br." The Respondent's brief is identified as "R. Br." The hearing transcript is referenced as "Tr."

[3] Witnesses testifying at the hearing included Michael Wills, Alexia Agnant, Eric Zimmermann, Elena Esposito, Mario Madrigales, Anne Pacifico, Erica Simon, Thomas Farina, Carmine Pero, Daniel Ferrera, and Paul Hilber.

and were designed to boost the morale of the sales representatives and to allow them to voice any complaints or concerns to management. Some work-related issues dealt with bathroom breaks, sales issues, wages, and the "Find Friends" App.

Wills testified that some of the sales representatives would take their lunch as a group after the boost meetings. During lunch, the sales representatives would discuss personal and work-related matters. After lunch, they would head "out to the field" to solicit subscriptions door-to-door at people's homes. At the end of his workday, Wills would usually not return to the office, but would go directly home (Tr. 50–65).

2. The Find Friends App

Wills testified that Respondent had issued iPads to the sales representatives for various purposes, including sales, contacts, solicitations, and other data used in their work. One item that was installed in the company-issued iPads was a "Find Friends" app. The purpose of the app, once it is turned on, would allow the user's friends and associates to locate your presence. The Find Friends app was used by the supervisors for tracking the sales representatives, and on occasions, the supervisors would show up unannounced at the location where the sales representative was purportedly working. The Find Friends app was on Willis' iPad in 2015 and 2016. Wills was very vocal at the boost meetings in expressing that the Find Friends app was used as a management tool to track the whereabouts of the sales representatives. Wills testified that he started complaining about the app to Pero, Zimmermann, Farina, and Spalleta at boost meetings in January 2015. Wills testified that he was speaking on behalf of the other sales representatives at the boost meetings over the use of the Find Friends app. Wills stated

> This was an invasion of the work time, being watched over our shoulder continuously throughout the workday. It brought severe added pressure—added pressure for someone who was basically following you, in your shadows for the whole day. Many of us were trying to see if there was a way that we could circumvent, meaning talk to someone to see if these rules—or they would stop using the app, based off performance. I objected to the fact that people are trying to get to these levels. The Find Friends app is making it more difficult because people feel that they're being followed all day. And no one else in the room spoke, but myself and Carmine Pero. And the meeting ended with everything staying status quo (Tr. 73–77).

Wills recalled a specific instance in summer 2015 when Supervisor Eric Zimmermann (Zimmermann) appeared in the field just after Wills had finished with a customer. Wills found this as a source of irritation and told Zimmermann that it would have been easier to call then to show up unannounced. Wills recalled raising the issue with the app in another boost meeting during fall 2015. He complained at the boost meeting that the app hinders his performance knowing that someone may be monitoring his whereabouts on an iPad. In response, Pero stated to him and the other sales representatives that the app was to help them make more sales.

Wills testified that he is aware of the Company's iPad policy and usage. A review of the policy statement indicated that sales representatives have no expectations to privacy in using the company iPad and that the Respondent may install a GPS device on its iPads to locate and track the iPad possessed by the representatives (R. Exh. 2). Wills has also been instructed on previous occasions to turn on his Find Friends app by Zimmermann as early as October 2015 (R. Exh 6). Equally so, Wills was adept to respond by criticizing the mistakes and omissions made by Zimmermann (R. Exh. 7). Supervisor Zimmermann criticized Wills in his 2015 performance evaluation for not turning on his Find Friends app (GC Exh. 2). Wills admittedly did not provide a comment in his evaluation to contradict Zimmermann's criticism of Wills for not turning on his Find Friends app (Tr. 312–318). Wills received an overall rating of "valuable contribution" to the Company in his 2015 evaluation.

Eric Zimmermann (Zimmermann) testified he has been a direct sales representative since October 2013 and had worked with Wills at the Freeport office. Zimmermann was promoted in May 2014 as a sales supervisor while at Freeport and moved to Hauppauge with Wills. Zimmermann's supervisor is Carmine Pero. Wills has been supervised by Zimmermann in Freeport and Hauppauge.

Zimmermann characterized Wills as a difficult person to supervise and was not keen on taking instructions or following company policy. Zimmermann specifically testified to Wills' refusal to turn on his Find Friends app and oftentimes, Wills' iPad location was not available because the app was turned off. Zimmermann also complained to Pero that Wills' app was not turned on. Zimmermann also complained to Pero that Wills would unfriend the management team at the end of the day, which would require each supervisor and manager to request that Wills "friend" them back on the app each morning. Zimmermann stated that this was inappropriate and totally a waste of time. In an email to Pero on May 27, 2015, Zimmermann stated that Wills felt he was in compliance with the Find Friends policy when he unfriended the management team each night. Zimmermann stated that "The management team would then need to send a new request (to friend) each day" (Tr. 576–592; R. Exh. 17–19). As noted above, Wills was criticized by Zimmermann in his 2015 performance evaluation for not following company policy with his Find Friends app.

3. The February 17, 2016 boost meeting

Wills testified that he would raise other issues at the boost meetings in support of the sales representatives, including the sales representatives' wages, quality of life issues, such as bathroom breaks and other items. Wills admitted that the other sales representatives would rarely speak at the boost meetings but maintained that he spoke on their behalf on these issues. Wills testified that the sales representatives were particularly upset having to contact a supervisor before they could take a bathroom break. Wills recalled that he complained to Pero at a boost meeting about a new bathroom policy on February 17, 2016. Wills also recalled that Zimmermann, Farina, and Spalleta were present at the meeting, along with 30–40 sales representatives (Tr. 84–89). According to Wills, Pero emphasized at the boost meeting that sales representatives need to have a higher standard of professionalism while at a customer's home and not to discuss company business. Wills also testified that Pero told the sales representatives not to discuss company business in the negative

in public because such conversations could be overheard by other people (Tr. 90, 91).

Wills, at this point, interjected and questioned the high level of professionalism that the Respondent required of its sales representatives when they had to contact a supervisor to attend to a bathroom break. Wills said that Pero wanted to keep the meeting positive and told him to bring it up at another time. Wills responded that it was alright to speak negatively and "we all need to hear the good, bad and ugly" because the boost meetings were for the sales representatives to speak their mind and to speak about issues that may be negative to the Company (Tr. 130). Wills admitted that he was never disciplined for not informing a supervisor that he was taking a bathroom break. Wills denied knowing that this was not a new policy and that it was in place since 2013 (Tr. 309–311).

After the boost meeting, Wills received a call from Farina to return to the office for a meeting. Wills met with Pero and Erica Simon was also present in the office. Erica Simon (Simon) was the director of human resources at the time. Simon informed Wills that the Respondent was looking into whether Wills was disrespectful and insubordinate at the earlier boost meeting. Wills requested to meet with Simon in private and she agreed. At the private meeting, Wills complained that there must be a mistake and Simon interrupted him and said she was only informing Wills that he was under investigation. At this point, Wills admitted to Simon that he was having family problems and was attending counseling for depression. Simon also pointed out to Wills that some of his emails were troubling. According to Wills, Simon referenced an email that Wills sent to Pero in February 2016 regarding if he would be covered by workers' compensation on a nonwork day and was injured when he was actually working on his day off. Wills stated that he raised the issue in his email because Pero had congratulated two sales representatives for securing subscriptions during their days off (GC Exh. 3). According to Wills, Simon found his email to be problematic because Wills had decided to send his email to a group instead of just sending the email to Pero. Wills had tape recorded the entire conversation with Simon on his cell phone. In the transcription of the audio provided by the counsel for the General Counsel, Simon reprimanded Wills, among other items, to not send his email to the group; that Pero and others do not like his emails; that Wills was coming on too strong in his emails and that he should stop and think before sending them out; and that his emails were not acceptable, not respectful and not appropriate (GC Exh. 4).

Carmine Pero testified that boost meetings were designed to boost morale of the sales force and he did not want any negativity expressed during the meetings. Pero generally believed that Wills was causing friction with his complaints about company policy. Pero cited an example where Wills questioned what would happen to a sales representative who is injured while working on his day off after Pero had sent out an email congratulating a sales representative who had secured an installation on his off day. Pero emailed Simon on February 15 and asked her whether it was appropriate for Wills to respond the way he did. Pero believed that Wills was generating negativity with his email comment (GC Exh. 15, 16). Pero reaffirmed the importance of having and maintaining a positive attitude. Pero specifically stated in his email that ". . . the management team will not allow any negativity or criticism spreading through the office" (GC Exh. 17). Pero testified that he addressed the issue of negativity in the February 17 meeting after receiving a call from Bo O'Connor, who was the Hauppauge facility manager on February 16. According to Pero, O'Connor said he had overheard some sales representatives talking negatively about the Company during their lunch. O'Connor did not identify the sales representatives to Pero (Tr. 464–466).

4. The February 22, 2016 final warning

Following the meeting with Simon, the Respondent issued a final warning dated February 22 and received by Wills on February 24 (Tr. 120). The final warning was issued by Pero for Wills' insubordination and disrespectful behavior and referenced a verbal warning given to Wills on November 10, 2015. The final warning (GC Exh. 5) stated the following infractions:

To: Michael Wills #068603
From: Carmine Pero
Date: 2/22/16

Re: Final Warning

Statement of concern: You are being given a Final Warning for insubordination and disrespectful behavior, all of which violate the Direct Sales RAE Standards, Practices & Procedures. You received a Verbal Warning on 11/10/15 for unprofessional behavior.

Since then, the management team has had several conversations with you regarding your unprofessional behavior:

- On 12/16/15, you wrote an email to Manager, Carmine Pero and the Supervisor team as well as Order Entry Supervisor, Lourdes Magboo stating, "Carmine . . . you have got to be kidding me?" because we couldn't let a sale get installed until we received proper competitor bill to substantiate the platinum competitive offer you gave the customer at time of sale.
- On 12/21/15, you were on a non-company related website, during a team Boost.
- On 2/10/l6 Supervisor, Thomas Farina had you come back to the office because Supervisor, Eric Zimmermann could not see your location on the Find Friends App. Thomas confirmed via your iPad that Eric Zimmermann was deleted from your Find Friends App.

On 1/7/16, you placed a sales order with no customer social security number, without a Supervisor's approval. You and Supervisor, Thomas Farina reviewed the policy which you acknowledged and stated you would abide.

- On 2/10/16, Thomas reviewed 11 of your customer sales order forms between 1/5/16 and 2/5/16 with you, only 2 of which had customer social security numbers. On the 2 sales you received the customer's social security number, Order Entry would not let you proceed with the sale without. Thomas .advised you again of the policy and you stated you were not comfortable asking customers for their social security numbers. Thomas -explained how you should ask the customer for this information and you

acknowledged that you understood.

- Later that evening, when you made a sale, you did not get the customer's social security number and failed to get approval from a member of the management team.
- On 2/12/16, Thomas Farina conducted a field coaching with you. During the coaching, you were making a sale and you failed to ask for customer's social security number. Thomas asked the customer, in front of you, and he received the customer's social with no issues.
- On 2/13/16, you did not obtain the customer's social security number without approval from a member of the management team.
- On 2/19/16, Thomas reviewed the instances where you did not obtain the social security numbers as required which occurred on 2/10/16, 2/12/16 and 2/13/16. Once again, you acknowledged the policy and signed the coaching.
- Later that evening, when you made a sale, you did not obtain the customer's social security number and failed to get approval from a member of the management team.
- On 2/20/16, you were spoken to again about failure to follow this policy during the sale made on 2/19/16 by Eric Zimmermann, you acknowledged once again and said you understood the policy .

In a team Boost on 2/17/16, Manager,[sic] Carmine Pero reminded the team that when wearing Optimum badges and Golf shirts, no matter what the venue is, you are representing the company. You raised your hand and said that it is ok to vent with each other, no matter what the venue is, and then you proceeded to stand up and speak directly to the other RAE's. You repeated yourself in a more animated voice, stating that it's ok to speak negatively and ''we all need to hear the good, bad and ugly." You said "I have to boost up Robin Lynch and other RAE's because of the incompetence of the Supervisors ." I told you that this could be discussed in private rather than in front of the group if you these [sic] concerns.

- On 2/18/16, HR Manager, Erica Simon met with you to explain to you that your behavior in the Boost was unacceptable and it was an open issue. You discussed the fact that there have been several instances in the past in which your tone and treatment of others has been addressed as it was considered inappropriate and disrespectful and would no longer be tolerated. You stated that you did not feel your emails were disrespectful, only intended to be straightforward.
  However, you agreed to be more mindful of your conduct in email.

You have violated the following policies under Residential Standards, Practices & Procedures and the Direct Sales Code of Conduct.

- Residential Sales employees are expected to represent Cablevision, (the "Company,") in a professional manner at all times while they execute their daily responsibilities.
- Consistent with Company policy, and as outlined in the Employee Handbook, all persons with whom a Residential Sales Employee comes into contact as a consequence of his/her job must be treated in a professional, courteous and respectful manner at all times. Use of abusive or inappropriate language toward any customer, prospect, colleague or any other individual with whom the Residential Sales Employee may have contact with as a consequence of his/her job is prohibited.
- All sales orders must include the following information : Customer's social security number. A driver's license number, passport number or Tax ID along with a Photo ID may be obtained with the approval of the Direct sales RAE's manager or supervisor.

Going forward you are expected to follow all Company and Direct Sales departmental policies, practices and procedures.

(Final Warning) -This is your final warning that any further violation of Cablevision policies, practices, procedures or values, additional examples of poor judgment or any unsatisfactory work performance will result in termination of your employment with Cablevision.

Pero testified that the final warning issued to Wills was for his insubordination and refusal to follow company policy. Specifically, Pero said that Wills questioned a company policy about the need to verify an installation; Wills was observed on a noncompany website during a boost meeting; Wills could not be located by Zimmermann on his Find Friends app because he had turned it off; Wills failed to obtain the social security number or had not received a supervisor's approval for the SSN number; and complained in a boost meeting that everyone needed to "hear the good, bad and ugly" when Pero was instructing the sales representatives not to negatively speak about the Company in public while wearing company logo shirts (Tr. 733–737; GC Exh. 5).

The verbal warning was issued to Wills on November 10, 2015. The verbal warning was reduced to writing by Pero and made part of Wills' personnel records (GC Exh. 6). In summary, the Respondent found Wills to have violated the Company's direct sales RAE standards, practice, and procedures by failing to treat others in a professional and respectful manner. I allowed the documented verbal warning in the record since it served as background information for the final warning. I further ruled that the issuance of the final warning was not an allegation in the complaint and also served as background information (Tr. 127–129).

Wills testified that he received a copy of his February final warning and decide to post the notice in his workstation. All sales representatives' workstations are three-sided with the entry opened and the interiors may be seen by a passerby. Wills said that his intention was to let coworkers know how he was treated after speaking up at the February 17 boost meeting. Wills stated that a number of coworkers approached him regarding his final warning and he described to them what had led to the warning being issued. Wills repined that Pero took down the warning notice and replaced it with a sticky note informing Wills not to post the warning because it was confidential (Tr. 130–137). Pero confirmed that he removed the final warning from Wills' workstation and told him that the notice was confidential and he should not display the document for everyone to see.

5. Michael Wills decided to contact the Union

Wills testified that he was upset over the final warning and believed it was the "last straw." Wills contacted a colleague sales representative named Mark Shipsmen at the Jericho office

who he had communicated in the past about bringing in the Union. Wills said that he asked Shipsmen for the phone number of the Union after informing Shipsmen that he received a final warning. Wills was given the name of Zelich Stern, who at the time was the chief organizer for the Union. Wills then contacted Stern and told him that he was aware that the Union had organized some workers in the Respondent's Brooklyn, New York office and Wills wanted Stern to start a campaign at Hauppauge. Wills volunteered to help start the union campaign. Wills believed that he met with Stern in April with several sales representatives from the Hauppauge and Jericho offices (Tr. 139–142).

Wills stated that Stern did most of the talking at the meeting. According to Wills, Stern gave a history of the CWA, the union organizing effort in the Respondent's other offices and general information as to what is needed to get to an election. Wills then formed a committee with two other unidentified sales representatives at the Hauppauge office to poll the sales force of their support for the Union. Wills testified that he specifically spoke to a few sales representatives about company policies, such as arbitrary changing wage scales and that the Union would make life easier for them at work. Wills represented that there were several meetings regarding the union organizing after the April contact with Stern until he was discharged by the Respondent in July (Tr. 142–145).

6. Other Alleged Harassment Against Michael Wills

Wills also described other terms and conditions of his employment that he felt were applied differently to him to harass him. He testified to an incident that he had to contact Mike Hagerty, the manager of the Jericho office, on March 17, because he was unable to reach Farina or Pero on a customer installation. Wills said that sales representatives were encouraged to contact Hagerty on a needs basis. Wills said that Hagerty approved the sales installation. Wills said Hagerty never mentioned that he was inappropriately contacted by Wills. Wills repined that on May 3, Pero and Simon met with him and informed him that he should not have contacted Hagerty. Wills insisted that he was never informed of any written or verbal guidelines not to contact Hagerty. Wills also said that he doesn't routinely contact Hagerty and may have called him four or five times per year. According to Wills, Simon reminded Wills that he was still under a final warning. Wills admitted that he was not disciplined for this incident and did not believe he was going to be disciplined over this incident (Tr. 244–256).

Pero testified that he was contacted from Hagerty regarding the call he received from Wills for approving an installation. According to Pero, Hagerty was informed by Wills that he had first attempted to reach all the supervisors at Hauppauge before he had contacted Hagerty. Pero decided to verify this account by asking each of the Hauppauge supervisors if they had received a call from Wills. According to Pero, they did not receive any calls from Wills. Pero concluded that Wills was lying to Hagerty and in a meeting, Wills admitted that he did not contact the supervisors before calling Hagerty (Tr. 737–739; R. Exh. 32).

Simon testified that she met with Wills and Pero in May to discuss the proper protocol in contacting supervisors. Simon explained that Wills had previously been informed to first contact his supervisor and if not reachable, to contact the other supervisors at the Hauppauge office (R. Exh. 1 at 10). Simon said that Wills was aware to contact the Hauppauge manager next before reaching out to Hagerty in Jericho if no supervisors or the manager are available in Hauppauge. Simon said that Wills insisted he had reached out to all the supervisors in Hauppauge before calling Hagerty (R. Exh. 24).

Wills also complained that he was accused of leaving work early in April when he actually was working past his regular work hours to visit a customer until 7 p.m. on a cable subscription. Wills said he told Supervisor Farina at 4:33 p.m. that his iPad battery was dying and he could not be reached. Wills maintained that Farina subsequently realized his error and replied that "okay, I got it" in reference to Wills' explanation of his dead iPad. Wills admitted that he did not contact Farina at the time with his cell phone to inform Farina that his iPad battery was dead (Tr. 258–265, 379).

Wills was also upset that Farina would contact Wills during his off hours from work. Wills insisted to Farina and to others that he did not wish to engage in company business when he was not working and resented that Farina had texted his cell phone at midnight on one occasion. Wills believed that he was being provoked by Farina with being texted during his off hours. Specifically, Wills complained of being contacted on June 6 by Farina while Wills was off from work. Wills was informed by Farina that he was asked to contact him at the direction of Pero regarding a customer who was waiting for an installation and that Wills needed to get back to that customer.

Wills elevated the situation by emailing Simon on June 6 to complain that Farina continued to contact him on his cell phone while on his off hours. Wills emphasized his points in his email by typing certain words in all capital letters, such as CONTINUES (to contact me) and that they had "AGREED" (to an arrangement that Farina would not contact him on his off days) (GC Exh. 13).

Pero testified that Wills' email was disrespectful and insubordinate. Pero said that he directed Farina to contact Wills and that Wills was calling Farina a liar in the email when Wills did not believe Farina was instructed to contact him by Pero. Pero also stated that the email was insubordinate because Wills wrote several words in all capital letters and with five exclamation points (Tr. 739–742; R. Exh. 25). Pero denied knowing of any arrangements between Wills and Farina that he would not contact Wills during off work hours.

Wills' email was handled by Karen O'Neill, who was an assistant to Simon in the HR department. Wills complained that he was being harassed by Farina when there was an understanding with him that he should not be contacted. Wills was informed by O'Neill that such an agreement with Farina was contrary to company policy and that sales representatives could be contacted regarding company business during their off hours. O'Neill suggested to Wills that he could respond to the emails when he returns to work. O'Neill also told Wills that it was not appropriate to send emails with words that were capitalized by him. Wills admitted he was not disciplined for complaining (Tr. 265–273, 330–335, 381; GC Exh. 13).

Simon testified that Wills, as a sales representative, is an exempt employee and may be contacted by the Respondent during

his nonwork hours. Simon said that any arrangements between Farina and Wills as to when Wills could be contacted by the company is inappropriate. Simon believed that Wills was being disrespectful when he capitalized all his letters in his emails to management. Simon said that she spoke to Wills on June 6 and informed that all sales representatives were exempt employees (R. Exh. 26). Simon told Wills that Farina was instructed by Pero to contact him on his off day. Simon reminded Wills that he was still on his final warning. Wills told Simon that he did not believe that Farina was instructed to call Wills by Pero (R. Exh. 25).

Wills also testified to an event in support of another colleague named Alexa Agnant who Wills believed was unfairly denied a free trip to Aruba in April 2016 even though, as a member of the Respondent president's club, Agnant would have been entitled to the free trip. Wills decided to attend the Aruba retreat in support of Agnant and to protest the fact that Agnant, as the only African-American in the club, was denied the trip. While at the Aruba resort, Wills was seen by Colleen Long, Farina, and other supervisors. When Wills returned, he asked Simon whether she saw a picture of Wills while in Aruba (GC Exh. 8). According to Wills, Simon replied that she did not want to discuss the matter. The counsel for the General Counsel argues that Wills' trip to Aruba was a concerted activity in support of Agnant's perceived slight by the Respondent. I allowed the testimony regarding this incident over the objections of the Respondent's counsel (Tr. 180–191).

Alexa Agnant (Agnant) testified that she was and is a direct sales representative for the Respondent at the Jericho office. Agnant said that her responsibility as a representative was to convince former customers to return. Agnant testified that she was aware of a union organizing campaign in Jericho beginning in the February/March timeframe. Agnant also said she knows Wills from working with him at the Freeport office in 2015. Agnant attended at least three or four meetings with union organizer Stern and other sales representatives. Agnant said that Wills was also in attendance and recalled explaining the benefits of a union and ". . . sort of spearheading it" (Tr. 539–542; 566).

Agnant testified that she belonged to the Respondent president's club and believed she was entitled to a free trip to Aruba in April as a benefit for being a member of the club.[4] Agnant repined that she was not given the free trip to Aruba. Agnant was aware that Wills traveled to Aruba to protest the denial of her trip to management.

7. The Hilber meeting on May 23, 2017

Wills stated that there was a routine boost meeting conducted by Pero on or about May 23, and then he turned the meeting to Colleen Long, who then introduced Paul Hilber (Hilber). Hilber was the senior vice president of human resources from March 2010 to June 2016 with the predecessor Cablevision. Hilber holds the same position with Altice, USA from June 21, 2016, until the present. Wills also noticed that other vice presidents of the Company were present at the meeting. Hilber delved right into his relationship in negotiating with the Union in Brooklyn and that it came to his attention that there had been talks about CWA at the Hauppauge office. Hilber had first visited the Jericho office earlier in May regarding the Union's organizing campaign before coming to the Hauppauge office.

According to Wills, Hilber was asked by the local management to speak to the staff regarding the Union and Hilber stated that there were no guarantees that wages would be increased under the Union. Hilber also stated that having the Union would bind the sales representatives to union rules and regulations. Wills stated that Hilber also referred to the union organizing in Brooklyn and that half of the staff was trying to leave the Union.

Wills believed that Hilber spoke about 10 minutes before he raised his hand. Wills was acknowledged by Hilber. Wills told Hilber and the audience that he was 100 percent for the Union and disagreed with what Hilber stated. Wills also stated that the new company that acquired the Respondent was known to lower salaries. Wills stated that Hilber responded by telling the audience that the reason he was here was to inform the staff to do your homework first before signing any union affiliation because the staff may be getting a union without any more money. Wills took issue with that statement and stated that the Respondent was an at-will employer and could discharge employees at any time and that all the vice presidents were present at the meeting because they did not want to lose their power. Wills affirmed that the staff has the right to organize. Wills stated that there were a few back-and-forth exchanges between him and Hilber for about 20 minutes with Hilber always reiterating that the Union was not the answer to their problems (Tr. 148–152).

Wills admitted that he made a vulgar statement by telling Hilber and the audience that the union organizing was because ". . . people are tired of taking it in the ass, and this is why this movement is alive at this point." In response, Hilber told Wills to keep the discussion at a higher level and Wills agreed that he "got caught up in the moment," but wanted to make a point (Tr. 153). Wills stated that other individuals also spoke up in statements that were against having a union. Wills did not recall if anyone else spoke on behalf of having a union.

Elania Esposito (Esposito) is a commission analyst with the Respondent at the time. Her main responsibility was to verify the sales commissions earned by the representatives for the purpose of payroll. She attended the meeting during Hilber's presentation and recalled that Wills was vocal and made the comment "what are we supposed to do? Take it in the ass?" during his exchange with Hilber. Esposito mentioned Wills' remark to her supervisor. Esposito was aware that Wills was subsequently fired because she was informed by Pero by email to take Wills off the sales commission payroll on July 6. Esposito in her email replied to Pero stated, "Shocker! Was it for the union mtg. comment???" (GC Exh. 14.) Esposito did not receive a reply from Pero on her question.

Mario Madrigales (Madrigales) testified that he was a direct sales representative from November 2014 until August 2014 and that Zimmermann was his supervisor. Madrigales testified that he has used his cell phone to text customers depending on the

[4] Sales representatives are inducted into the President's Club after exceeding the volume of sales over and above the other representatives. As part of the club, sales representatives are entitled to BYOB (Be Your Own Boss) and to other perks not afforded to representatives who are not members. A perk of the club in April 2016 was the free trip to Aruba.

preference of the customer. Madrigales admitted that he has used his cell phone to contact customers during boost meetings and has observed other sales representatives doing the same. Madrigales recalled attending a boost meeting when Wills complained about micromanagement and requiring the sales representatives to inform management of their lunch and bathroom breaks.

Madrigales also attended the Hilber presentation and recalled Hilber stating to the group that the Union was not the best option for the Company. He also recalled Wills stating that he did not understand why such a big meeting with high officials was held just to tell the group about the negative things with the Union. Like Esposito, Madrigales recalled Wills asking, "You just expect us to sit here and take it in the ass?" Madrigales recalled Hilber stating that there was no need for such language. Hilber also stated that the meeting was informative and a union is not either right or wrong. Madrigales said that Wills apologized to the audience for his comment.

Agnant testified that she was present when Hilber spoke at the Jericho office (Tr. 546, 547). Agnant recalled that

> He (Hilber) said that the unions were bad. You know, he was saying statements, a whole list of statements that the union wasn't—it wasn't good, it wasn't conducive. This is a sales floor. Why would we put a union on a sales floor? Sales people don't have unions. He mentioned also that the CWA, which is the union that we were using at the time, that Verizon also has, you know, is represented by the CWA, and that why would we even want to use the CWA, when they're Verizon's competitors. He suggested that they're on strike right now. And that the union's not doing Verizon any justice. Why would we—it would be foolish for us to even consider them. He also brought up the Brooklyn contract. Stating that Brooklyn does have a contract with them. And then Brooklyn is not happy and it was a terrible contract. He proceeded to pull the contract out. And sailed it and said we should read it.
>
> Q. You said he sailed it?
> A. Yeah, he tossed it.

Pero testified that he was aware that Hilber visited the Hauppauge office on May 25 to talk about the unionization of the office. Pero said that he noted Wills' comments in his exchange with Hilber on the management's computer daily logs. The daily logs are notes and comments generated by the managers and supervisor on a timeline for review by other supervisors. The timeline is generally known as the "BOSS HISTORY" timeline. On May 25, Pero wrote on the timeline that "During a meeting with Paul Hilber, Mike Wills commented, "what we have to take it in the a**?" (GC Exh. 18 at 4).

8. The union organizing campaign

When the meeting ended, the staff went to lunch and Wills decided to call Chief Union Organizer Stern. Wills described the meeting to Stern and what was said at the meeting. Stern told Wills that he needed to begin having the sales representatives sign union cards. Wills also began wearing a rubber pink wrist band with the CWA logo on the band when he went to work in the office. Wills started collecting union cards within a week after the Hilber meeting. Wills stated that he began collecting union cards beginning on June 2 from his coworkers by approaching them to sign the cards. Wills also stated that he visited the Jericho office on one occasion and set up a table in the cafeteria to solicit the signing of union cards. Wills recalled meeting with 7–10 Jericho sales representatives who were new employees. Wills said that Shipsmen also joined him in explaining the union organizing to them.

Wills recalled that a supervisor was present when he and Shipsmen were talking to the new recruits. Wills also recalled seeing Matthew Hagerty, the manager of the Jericho office, in the parking lot while Wills was talking to a Jericho employee at the time. Wills testified that he exchanged pleasantries with Hagerty and did not discuss the union organizing campaign during their exchange (Tr. 167–171).

Wills also recalled a conversation regarding the union with Thomas Farina. Wills stated that he had tripped on a customer's steps while soliciting subscriptions in early or mid-June and called Farina. The customer had called the police to the house. Farina arrived to investigate the incident and waited in the car with Wills for the arrival of the police. During their wait, Wills explained to Farina the reason for the union campaign that the Union would not only benefit the workers, but also benefit the supervisors because the successor company is known to be a "cut-throat" company. According to Wills, Farina told Wills to wait and see what will transpire (Tr. 172–174).

Wills stated that he was also involved in organizing a meeting between the Hauppauge sales representatives and the CWA in the May–June 2016 time frame. Wills invited the sales representative to a local pizzeria to meet with union organizer Stern. Wills recalled that approximately 15 sales representatives attended that meeting with Stern. Wills further stated that additional meetings were arranged by him to have Stern meet with sales representatives from the Jericho office. Wills believed there were four to six such meetings during the month of April. Wills also spoke to other union representatives in addition to Stern but did not recall their names.

Madrigales also ate his lunch with coworkers after the boost meetings and had lunch with Wills about four or five times. Madrigales testified that the sales representatives would talk about work and the new policies that were in place and complained about being micromanaged. Madrigales recalled a lunch meeting with two union representatives in July 2016 and that Wills had introduced the union representatives to the sales people.

Ann Pacifico was previously employed as a direct sales representative with the Respondent from February 2016 to May 20, 2016. She was also aware of the union organizing and attended a meeting with other sales representatives to talk with the Union. Pacifico said that Wills suggested to Pacifico to attend the union meeting. Pacifico said that Wills lead the discussions during the meeting.

Pero testified that he was aware of the union organizing in Jericho and Hauppauge. He testified to receiving an email from Sales Representative Pat Maras on May 19 asking if it was true that the union started in Jericho. Pero said he did not respond to the email but did forward it to Simon. Pero also testified that he was aware that several employees had spoken about the Union at the Hauppauge office. Pero did not recall specifically, but

testified that he may have informed Ferrera that employees were talking about the Union (Tr. 777).

9. The testimony of Paul Hilber

Paul Hilber (Hilber) is and was the senior vice president for human resources with Altice, USA. He has held this position since June 21, 2016. Prior to that time, Hilber held the same position with the Respondent CSC Holdings, Inc. since March 15, 2010. Among his many responsibilities, Hilber is involved in the human resources matters in the Brooklyn, Jericho, and Hauppauge offices. Hilber was involved in the negotiations of the contract between the Respondent and CWA for the workers at the Brooklyn office.

In May 2016, Hilber visited the Jericho and Hauppauge office to explain the takeover of Cablevision by Altice. He also discussed the workers' views and wanted to educate the workers on the things the Union can and cannot do because there was some interest by the workers over union organizing (Tr. 826). Hilber visited the Jericho office first. Hilber stated that the meeting in Jericho was a free exchange between him and the workers (Tr. 820):

> It was an open discussion. It was an exchange with employees around concerns they had on the pending merger, what we saw the future of the organization to be, people asked specific questions around unions and specifically to this collective bargaining agreement we have in place, or had in place in Brooklyn. It was just an open exchange of information.

Hilber testified that he did not recall any specific comments or remarks, but he gave specific comments on the pros and cons of having a union. He said there were passionate viewpoints for having and not having a union. Hilber denied stating that the Brooklyn contract with the Union was bad. He stated that the contract could be perceived as either bad or good by the employees but denied stating that the contract was bad. He denied stating that the Brooklyn contract was "terrible." He denied throwing a copy of the Brooklyn contract across the meeting floor. He denied stating to the audience that "Even after you come to an agreement, it still wouldn't work out because the Union's not going to benefit the employees." He denied that Colleen Long, the former senior vice president, stated at the meeting that the perks and benefits under the BYOB (Be Your Own Boss) program would end if the Union came in (Tr. 820–824).

Hilber testified that he gave a similar presentation later in May to the sales representatives and other employees at the Hauppauge office. He recalled that Wills was present at that meeting. Hilber did not know Wills before attending the Hauppauge meeting. Hilber testified that (Tr. 823–825).

> Mr. Wills said something along the lines of so you want us to stay here and just take it in the ass at which point I reminded everyone that we need to be respectful. That kind of a statement's inappropriate. If you have certain feelings about something I'm saying or the facts or perspective that's one thing, but there's no reason to use inappropriate language.
>
> Q. And what happened in the meeting after Mr. Wills made his comment?
>
> A. So there was outward statements being made over the statement that was made by Mr. Wills. I simply just tried to calm the meeting down and move forward with getting through the facts and the discussion points of that we had -- were focused on.
>
> Q Did you discipline Mr. Wills for his comment during that meeting?
>
> A No, I did not.
>
> Q. And did you participate in the decision to terminate Mr. Wills' employment in July 2016?
>
> A. I did not.

Hilber also testified that (Tr. 829–831)

> Q. Now the position of the company at that time was that it did not want to have a union representing these groups of employees; is that correct?
>
> A. The position of the company at the time was we always enjoy a direct relationship with our employees.
>
> Q. And that includes not having a union; is that correct?
>
> A. I'd say a direct relationship always includes that.
>
> Q. It was the position of Altice that the company does not believe that having a union or any other third party is productive for either the employee or the company or the customers; is that correct?
>
> A. I think that's a fair statement.

Hilber also testified to the Respondent's disciplinary policy. Hilber stated that an employee may initially receive a documented verbal warning for a non-serious infraction that would remain in effect for 6 months. After 6 months of no additional infractions, the employee would return to the "in good standing" category. The verbal warning would still be in the personnel file and could be referred in the future when the Respondent reviews the disciplinary history of that employee. Hilber also stated that a written warning would be in effect for 12 months before the employee can revert back to the good standing category. Hilber further explained that the written warning would have less weight in a subsequent disciplinary action if it was 5 years ago as opposed to being 13 months ago (Tr. 818–820, 837–839).

10. The Starz vendor meeting

A boost meeting was held on June 23. After the usual matters were discussed, a vendor from Starz made a presentation. Starz is a premium cable station and sales representatives are encouraged to sign customers to the Starz subscription to enhance greater sales commissions and revenue for the Respondent and the Starz channel. Wills testified that he was present at the Starz presentation. Wills said there were approximately 40 sales representatives and managers attending the meeting at the Hauppauge office. Wills said that Pero did not ask the audience to put away their cell phones during the Starz presentation (Tr. 189).

Wills admitted that he was using his cell phone to exchange texts with a customer. Wills said that he was on his cell phone when he heard Supervisor Zimmermann's voice and at the same time, noticed that Zimmermann was leaning over him and said something to Wills. Wills said he did not recall what Zimmermann was saying to him. Wills said he was not attentive to Zimmermann because Wills was busy resolving an issue with a customer via his cell phone texts.

Wills testified that 15–20 seconds later, he heard

Zimmermann called out his name "Mike" and then said, "Mike, I said pay attention." Wills replied, "Eric, I am paying attention" and Zimmermann replied, "No, you're not" (Tr. 193, 194). Nothing more was said and Wills put his phone down. Wills testified that at no point did Zimmermann instruct him to put his phone away. Wills maintained that he put the phone on his lap on his own volition after his second interaction with Zimmermann.

Wills felt that he was being harassed by Zimmermann because he had observed other sales representatives using their cell phone to text and talk during his exchange with Zimmermann and the other representatives were not instructed to stop using their phones. Wills also observed Zimmermann using his own cell phone during the meeting. Wills testified that within a "few seconds later," he decided to use his cell phone to record Zimmermann using his phone. Wills said that he recorded approximately 9 seconds of Zimmermann. Wills recalled that Zimmermann observed Wills recording him and asked Wills whether he should pose for the recording. Wills did not reply back and no other verbal exchanges were made at this point. The video showed that Zimmermann was smiling (perhaps laughing) when Wills was taking his video. In the video, Zimmermann is heard asking Wills, "You're taking a picture. Do you want me to pose for you" (GC Exh. 9). Wills then placed down his phone and continued to listen to the Starz presentation.

It was obvious that Wills was upset that he was required to place his phone down and listen to the Starz presentation while some of the representatives were using their phones and iPad and not cautioned to stop by a supervisor. As a result, Wills decided, approximately 2 minutes later, to take a photograph with his iPad of a sales representative who was busy on his computer while others were paying attention to the presentation (GC Exh. 10).

Wills stated that the sales representative was on the computer during the remainder of the Starz presentation. Wills testified that he is aware that sales representatives are to pay attention to the presenter and insisted that he was able to pay attention even though he was on the phone. Wills denied that Zimmermann initially told him to put away the phone during the presentation. Wills stated that he put the phone away on his own volition. In another photograph taken by Wills of the same subject, the sales representative is seen looking towards the speaker and away from his computer (R. Exh. 15; Tr. 357–359; 530–535). Wills admitted that none of the sales representatives were using their cell phones at the time the pictures were taken by him (GC Exh. 10; R. Exh. 15; Tr. 378).

Wills also denied knowing the company policy that sales representatives were prohibited to text customers with their cell phones (Tr. 367; R. Exh. 1 at 10).[5] Wills has admittedly used his iPad to search an outside website during a boost meeting on about December 21, 2015, and was instructed not to by Pero. Wills apologized and stated that this would not happen again (R. Exh. 14).

Madrigales was present at the Starz vendor meeting in June 2016. Madrigales sat in the main room at his workstation and said that Wills sat in a different room but Madrigales was able to observe him through a cut-out square in the wall panel. Madrigales observed Wills use his cell phone while the vendor was talking. Madrigales also observed Zimmermann approach Wills and tap his shoulder. Madrigales did not hear what was being said but observed that Wills reacted to Zimmermann's tap and acknowledged Zimmermann. Madrigales said that Wills turned around and faced the vendor. Madrigales did not recall any other interactions between Wills and Zimmermann during this meeting.

Madrigales testified that he observed sales representatives listening to the vendor and using their phones at the same time. Madrigales recalled that Sales Representative Chris Hart using his phone for about 2 minutes and observed Farina telling Hart to stop using his phone. Madrigales specifically heard Farina telling Hart to put down his phone and turned it off. Madrigales had also used his phone at least once during the Starz meeting and was instructed to turn off the screen and pay attention to the Starz vendor. Madrigales testified that he observed Zimmermann interact with Wills during the Starz presentation but did not hear what was discussed.

Pacifico testified she did not recall any supervisor telling her to turn off her phone during a boost meeting. Pacifico stated that she was supervised by Farina and he has told her that "If your phone rings (during a meeting), you have a text, and it's a client, or a potential customer, you get up out of that boost meeting, and you excuse yourself" in order to take the call and not lose the sale (Tr. 440). Pacifico has previously been disciplined by Zimmermann for rolling her eyes at him. However, she testified not recalling that any sales representatives were disciplined for using their phones during boost meetings.

Zimmermann testified that he was present during the Starz presentation. Zimmermann recalled that Pero was initially there but had left early from the meeting. Zimmermann stated that the sales representatives were seated in two rooms (A and B) and that he was standing in the doorway. Zimmermann pointed out that he was standing in the doorway and Wills was seated in the third chair to the right of the doorway (R. Exh. 22). Zimmermann stated that the Starz presenter was to the far left of the doorway (out of the picture).

During the presentation, Zimmermann, while still standing by the doorway noticed Wills looking down and watching a video on this cell phone. Zimmermann stated that he leaned over and whispered Wills' name. Zimmermann said that Wills looked up and Zimmermann then told Wills to pay attention to the presentation. Zimmermann insisted that he also told Wills to put down his phone. Zimmermann said he assumed that Wills would follow his instructions but observed him continue watching the video on his phone.

Zimmermann called Wills' name again and whispered "Mike, can you please put your phone down, we're having a meeting." According to Zimmermann, Wills replied that he saw Zimmermann on his phone. Zimmermann replied that "was irrelevant" and that the meeting was for him and to put the phone down and

[5] "From time to time it may become necessary to communicate with customers via email. In the event this becomes necessary, all residential direct sales representatives must communicate through a company provided email account. This policy also prohibits communicating with customers via text messaging."

pay attention. Zimmermann said that Wills spoke in his normal tone of voice.

Zimmermann testified that Wills waited and thought he would put the phone down, but instead Wills held up the phone with the recording light on and recorded Zimmermann standing at the doorway. Zimmermann felt this was insubordination and bizarre behavior. Zimmermann also stated that Wills' actions were disruptive because other sales representatives had turned around to see what was happening.

Zimmermann was afraid that the situation would be escalated and maintained that Wills' voice was very loud. Zimmermann testified that Wills had told him while they both worked at the Freeport office that Wills could be prone to violence. Zimmermann stated that Wills was ". . . speaking loud and it was escalating, voice was very loud and he seemed angry. Then I was concerned about his anger too because he has, you know, professed violence before. He's expressed that he has no qualms about being violent with people."

Zimmermann attempted to defuse the situation by asking Wills if he should pose while being recorded. Zimmermann said he may have also joked about the situation.

Zimmermann said the tipping point was when Wills lowered his phone but continued to stare at Zimmermann and seemed to be angry. Zimmermann believed the other sales representatives were uncomfortable with the situation. Zimmermann then left the meeting to avoid any additional interactions with Wills and sought out Pero. Zimmermann denied that other sales representatives were using their phones or not paying attention during the presentation (Tr. 600–605).

Zimmermann spoke to Pero after leaving the meeting. Pero informed Zimmermann to send him an email over the incident (GC Exh. 22). On the same day, Zimmermann wrote to Pero the following

> From: Eric Zimmermann
> Sent: Thursday, June 23, 2016 1:28 PM
> To: Carmine Pero
> Subject: Mike Wills Issue
>
> During today's presentation by Showtime, I observed RAE Michael Wills watching a video on his cell phone. I waiting [sic] about 60 seconds from that point and then leaned across the desk and whispered to him. "Mike, can you please give us your attention?" He looked at me and then just looked back down at his phone. I waited about 15 seconds and then called his name again, got his eye contact and said something to the effect of "Mike, we have a presentation and I need you to give us your undivided attention." He replied, "I am paying attention" I said, "No, you are l o o k i n g at your phone." Wills said "Well, I just saw you looking at your. phone." I said " That's irrelevant. This presentation is for you and the other reps." Then he put down his phone and proceeded to stare at me in *a* threatening manner for about 20 seconds. Then I said, "Do you need something from me or have questions?" He continued to stare in the same manner. Then he proceeded to tum the light on [s i c] on his phone and held it up as if he was recording me.

Pero then forwarded Zimmermann's email to Jennifer Condoulis and copied Simon and Ferrera. Pero wrote

> From: Carmine Pero
> Sent: Thursday, June 23, 2016 1:38PM
> To: Jennifer Condoulis
> Cc: Erica Simon; Daniel Ferrara
> Subject: FW: Mike Wills Issue
>
> Importance: High
>
> Jen,
>
> Eric would like to speak with you about this below ASAP. Eric states, "I feel threatened by Mike and my safety is in jeopardy."
>
> Eric also asked Farrell and Lawrence to pay attention and they listened and apologized by hand gesture today.
>
> Best Regards,
> Carmine Pero
> Manager - LI East Direct Sales
>
> Simon forwarded the email to Judy Courtney and Courtney responded:
>
> From: Erica Simon
> Sent: Thursday, June 23, 2016 1:54 PM
> To: Judy Courtney
> Subject: FW: Mike Wills Issue
>
> Importance: High
> Dan would like to suspend until further investigation.
> Erica Simon
>
> From: Judy Courtney
> Sent: 6/23/2016 1:57:00 PM-0400
> To: Erica Simon
>
> Subject RE: Mike Wills Issue
>
> Hard for me to see this as a suspension….
> More just being a jerk. We could write him up for unprofessional behavior—but what about Eric also being on his phone?

Pero testified that the Starz meeting was on June 23 at 12:30 p.m. (R. Exh. 33). Pero was present at the meeting but left. Pero said that he was approached by Zimmermann while the presentation was ongoing and Zimmermann looked visibly upset. Pero said that Zimmermann felt threatened by Wills. Pero requested that Zimmermann send him an email about the incident, which Zimmermann did within 30 minutes of the incident.

Pero said that he forwarded the Zimmermann email to Condoulis and Ferrera. Pero said that he and Simon met with Adam Morris (Morris), a sales representative who was present at the Starz meeting. According to Pero, Morris told them that he observed Wills on the phone during the presentation and that Zimmermann told him "to pay attention" (Tr. 744–746). Pero said that he was not involved in any other aspects of the investigation and did not speak to Wills over the incident. Pero said that he was subsequently informed by Ferrera that the Respondent planned to terminate Wills and Pero agreed to that decision.

11. The June 24 meeting with Ferrera and Simon

After the Starz presentation, Wills and the other sales representatives went out to the field to conduct their solicitation of customers. Wills said that none of the supervisors mentioned anything to him for the rest of that day after the presentation. Wills said that on the following day, June 24, he was called into a conference room by Simon and Ferrara before the start of his work day (Tr. 227–229).

Simon testified that Ferrera asked Wills if there was anything that happened at the Starz presentation that he (Ferrera) should know about. Wills replied "probably" but asked that it would be best if Ferrara told him. Ferrera said to Wills that he received a complaint that Wills was being insubordinate and that Zimmermann has asked Wills to put down the phone and Wills refused to do so. Ferrera then asked Wills if Zimmermann told him to pay attention and to put down his phone. Wills replied that he was never told to put down his phone when Zimmermann approached him. Wills insisted that Zimmermann only told him to pay attention. Wills stated to Zimmermann that he was on his phone and listening to the Starz vendor at the same time. Wills said he could listen and still text on his phone like other representatives were doing. Wills told Ferrara and Simon that Zimmermann approached him a second time and stated, "Mike, I said pay attention" and Wills replied that he was paying attention. Wills insisted that Zimmermann only told him to pay attention and never told him to put down the phone. Wills said he put down the phone on his own volition. Wills told Ferrera that everyone was using their phone, computers or iPads and he was being singled out and decided to take a picture of Zimmermann using his phone. Simon interrupted Wills and insisted that Wills was not being singled out.

Ferrera testified that he is only casually familiar with Wills as a direct sales representative before the Starz incident. He stated Pero informed him of the incident and Pero told him Zimmermann told Wills to put the phone down and pay attention on multiple occasions. Ferrera said that the incident escalated when Wills lifted his phone and videotaped Zimmermann during the meeting.

Ferrera became involved in the investigation by initially contacting Simon and telling her about the incident and asked for Wills' personnel file. Ferrera stated that he reviewed the file and noticed that Wills had received multiple warning notices. Ferrera said he also reviewed the Boss Timeline reports that provided him with a history of the events leading to the discipline taken against Wills. Ferrera stated that he did not specifically recall the comment made by Pero on the Boss Timeline on May 25 of Wills asking Hilber, "what we have to take it in the a**?" in their exchange regarding the Union's organizing efforts at the Hauppauge office (GC Exh. 18 at p. 4; Tr. 811).

Ferrera then spoke to Zimmermann following the boost meeting that day. Ferrera related that Zimmermann observed Wills "doing something on his phone" and leaned over to him and asked him to put the phone down and pay attention. Zimmermann told Ferrera that Wills ignored his instructions and Wills started to stare at Zimmermann. Zimmermann then told Ferrera that Wills lifted up his phone and started to video tape Zimmermann, which he felt was disruptive to the meeting. Ferrera believed that Zimmermann was "genuinely scared" by the threatening stare from Wills (Tr. 788–791). Ferrera testified that his preliminary reaction to what he heard was

> Yeah. Yeah, I did. This is bad. You know, the situation was bad. You know, the—forget about everything that happened in the past. Just this—this situation alone was— was really bad and disruptive and—and it was not a good situation (Tr. 794).

Ferrera and Simon then met with Wills. According to Ferrera, Wills denied that Zimmermann told him to put the phone down. Wills told Ferrera that Zimmermann leaned over and, initially, he could not hear what Zimmermann was saying to him. Wills then stated that he heard Zimmermann telling him to pay attention, but insisted he was paying attention. Wills told Ferrera that he is able to text and be attentive at the same time. Wills insisted to Ferrera that Zimmermann never mentioned about putting the phone away; only that he should pay attention. According to Ferrera, Wills then showed them the video on his cell phone of Zimmermann using his cell phone during the Starz presentation and complained that Zimmermann was using his phone while he was singled out to put his phone away (Tr. 795–799).

Ferrera stated that after talking to all the parties involved, the only decision was to terminate Wills. Ferrera testified that termination was warranted because Wills was already on a final warning and there were no other steps to take. Ferrera testified that Wills actions were disruptive to the Starz meeting and to the other sales representatives. Ferrera said that the threat against Zimmermann did not play a role in his determination to terminate Wills because he could not prove there was a threat although Zimmermann was truly scared. Ferrera said he arranged to meet with Wills to inform him of his termination but Wills did not come into the office and so Wills was contacted by phone. Ferrera explained the situation over the phone to Wills and informed him of his termination (Tr. 799–803, 806).

Ferrera denied that he was aware that Wills supported or was involved with the Union. Ferrera also denied that Simon or Pero had spoken to him about Wills' involvement with the Union. Ferrera said that he was only aware of union organizing at the Jericho and not the Hauppauge office (Tr. 804). Ferrera stated that he was aware in May 2016 that the Union was attempting to organize the Jericho office and was aware that Hilber had visited that office at that time. He denied knowing that Hilber also visited the Hauppauge office in May.

12. The discharge of Michael Wills on July 6

Wills testified that on July 6, during his day off, he received a phone conversation from Ferrera around 12 noon. Wills believed that Simon and Pero were also on the conference call. On the call, Ferrera told Wills that he was terminated because of his insubordination towards Zimmermann and that Wills was on a final warning. Wills asked Simon whether he was "given a fair shake." Wills said the call lasted for approximately 10 minutes. Simon asked for Wills' personal email to send him some paperwork. Nothing else was said.[6] Wills testified that at no time did

[6] The counsel for the General Counsel proffered Wills' termination request dated July 5, 2016, for the record. It is undisputed that Wills never saw the document. The counsel for the Respondent objected to the examination of Wills on the document because Wills cannot identify and

Ferrera or Simon mention that he had threatened Zimmermann. Wills said that he shook Ferrera's hand and left. Wills testified that he subsequently contacted Stern that day and informed him of his discharge (Tr. 307).

In a subsequent email to Simon dated July 7, Wills complained to Simon that she allowed Ferrera to "interrogate him" over the Starz incident without interjecting and accused the Respondent of not acting when Simon knew that Ferrera posted sexist and racist comments on his Facebook page. Wills did not receive a response from Simon on his accusations against Ferrera (R. Exh. 3).

Erica Simon testified that she was formerly the human resources manager and a human resources generalist with the Respondent from October 2014 until her departure in April 2017. Simon reported to Jennifer Condoulis, the human resources director.

Simon testified that she was involved in the termination of Wills after the Starz presentation. Simon was informed by Pero to expect an email from Zimmermann regarding the incident. Zimmermann's email (above) was sent to Pero only on June 23. Pero then forwarded the email to Condoulis, Simon, and Ferrara. Pero had informed Condoulis that Zimmermann wanted to speak to her. There is no record that Zimmermann actually spoke to Condoulis. Simon responded less than 30 minutes later to Judy Courtney and said Ferrera would like to suspend Wills (R. Ex. 28). Courtney was identified by Simon as the human resources business partner for the sales department. Courtney replied 3 minutes later by email (GC Exh. 22) and stated to Simon

> "Hard for me to see this as a suspension… More just being a jerk. We could write him up for unprofessional behavior-but what about Eric (Zimmermann) also being on his phone?"

Simon testified that she met with Zimmermann, Adam Morris, and Wills. Adam Morris was a sales representative who was at the Starz meeting. Simon met Morris on June 23. According to Simon's notes on her interview with Morris, Morris observed Wills on his phone and Zimmermann instructing Wills to pay attention. Morris heard Wills reply that Zimmermann was on his phone and questioned why Wills could not also be on his phone. Wills insisted that he was allowed to be on his phone because it was work related. Morris did not observe Wills taking a picture of Zimmermann. According to Simon's notes, Morris did not feel threatened and only moved away from his chair after the presentation in order to stretch his legs. Morris stated to Simon that he did not see any "dirty stares" from Wills during the exchange of words with Zimmermann (R. Exh. 29).

Simon also met with Zimmermann after meeting with Morris. Simon described Zimmermann as very upset and feeling extremely threatened (Tr. 680). Simon did not take any notes at her meeting with Zimmermann.

Simon then met with Wills the following day. Ferrera was present at the meeting. Simon stated that Wills provided contradictory statements as to the incident. Simon said that Ferrera pointed out that Wills insisted he had placed down his phone, but then used his phone again to take a picture of Zimmermann. Ferrera believed that this was inconsistent with Wills' assertion that he had placed down his phone.

Simon said that Ferrera made the final decision to terminate Wills. Simon testified that she only provided guidance to Ferrera and Pero regarding the discharge. Simon did not believe that Wills was a threat based upon one supervisor's belief that he was threatened. Simon stated that Wills was not discharged for being a threat to another employee. Rather, Simon testified (Tr. 689, 690):

> We didn't feel that his behavior was threatening based on the information we got from Adam, which is why we didn't move to suspension. But, he was still insubordinate and still didn't listen to Eric when he was asked to put his phone away, he was still pushing back on him. And that, in addition to all of the other instances that occurred after his final warning was given to him, is why we decided to move to termination.

Simon stated it was appropriate to terminate Wills based upon his repeated behavior of insubordination. Simon said it was appropriate because of the manner Wills spoke to his supervisors and for not following policies and procedures (Tr. 684).

Upon my examination of the witness, Simon stated that Wills' receipt of a final warning on October 22, 2014, was valid for one year and that individual infractions after receiving his 2014 final warning were insufficient or too minor to warrant termination (R. Exh. 5). Simon further stated that after the 1-year period, the final warning is wiped clean ("clean slate") and the next infraction would result in a verbal documented warning unless the infraction is sufficiently severe to warrant greater discipline. Wills received his verbal documented warning on November 9, 2015 (GC Exh. 6). Simon stated that Wills' subsequent infractions in 2015 were not sufficiently severe to elevate his verbal warning. However, Simon stated that the infractions occurring November 9, 2015 through February were sufficiently numerous to warrant a final warning issued to Wills on February 22, 2016 (GC Exh. 5).

Simon stated that the "trigger" for Wills' termination was his insubordination at the Starz presentation and denied that Wills was discharged for speaking his mind about the union during the Hilber meeting. Simon stated that the termination notice was drafted and finalized by Ferrera with her input (GC Exh. 11).

Discussion and Analysis

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole.

testify to a document he never previously received and read. I allowed the document into the record as GC Exh. 11 because the termination request was a business record generated by Ferrera and provided to the General Counsel pursuant to subpoena and there were no issues over the authenticity of the document. I also provided counsel for the General Counsel with the reservation to examine Wills on the document if the document is raised during cross-examination or in the Respondent's case-in-chief (Tr. 239–242).

Double D Construction Group, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

The counsel for the General Counsel argues that the Respondent discharged Michael Wills because he assisted the Union and engaged in concerted activities and to discourage employees from engaging in those activities in violation of Section 8(3) and (1) of the Act. The Respondent argues that Wills was discharged for his refusal to follow company policy and procedures and for his insubordination.

Section 8(3) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." See,*Brighton Retail, Inc*., 354 NLRB 441, 447 (2009). In *Meyers Industries (Meyers 1),* 268 NLRB 493 (1984), and in *Meyers Industries (Meyers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discharge is alleged, the General Counsel has the burden to prove that the discharged employees was motivated by employer antiunion animus.

In assessing Respondent's motive, this case is no different than any other 8(a)(3) case. The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002).

The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the Company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge or refusal to hire and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge and proximity in time between the employees' union activities and their discharge. *W. F. Bolin* Co. *v. NLRB,* 70 F.3d 863, 871 (6th Cir. 1995).

The Respondent Violated Section 8(a)(3) and (1) of the Act when it Discharged Michael Wills

In the matter before me, I find that the General Counsel has made a prima facie showing that Wills' union and concerted activity was a motivating factor in the Respondent' decision to discharge him. In *Tracker Marine, LLC*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action motivated by the employer's animus towards the discriminatee's protected activity.

I find that Wills engaged in concerted activity and in activity in support and on behalf of the Union. I also find that Respondent had knowledge of such activities prior to terminating Wills.

The evidence establishes that Wills engaged in concerted activities when he voiced at the February boost meeting that Pero needed to also discuss the "good, bad and ugly" terms and conditions of employment. Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).[7] If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. Id. at 153, 155–156; *UniQue Personnel Consultants, Inc*, 364 NLRB No. 112 (2016).

The negativity subject came up after Pero was informed by O'Connor that O'Connor overheard several sales representatives talked negativity about the Respondent during lunch in a public area. Wills defended the sales representatives' right to speak negativity about the company. He believed the boost meetings

[7] On the other hand, activity by a single individual for that person's own personal benefit is not construed as concerted activity. *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980) (individual griping about his own overtime pay was not concerted activity); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23 (7th Cir. 1980) (venting of personal grievance not concerted activity). Consequently, I find that Wills' complaint over the Find Friends app and highlighting words with all capital letters in his emails were not concerted activities.

were for the sales representatives to speak their mind and to speak about issues that may not always be positive to the company. Following the boost meeting, Wills met with Pero and Simon and she informed Wills that the Respondent was investigating if Wills was disrespectful and insubordinate at the boost meeting. Wills complained that there must be a mistake and Simon interrupted Wills and said she was only here to tell Wills he was under investigation. Although no disciplinary action was taken against Wills, it is clear that Pero was not happy with Wills' opposition to keep everything positive at the boost meeting and felt the need to inform Simon that Wills was disrespectful and insubordinate.

I also find concerted activity when Agnant sought assistance from Wills when she was denied a free trip to Aruba as a member of the Respondent president's club. Wills decided to visit the hotel where the sales representatives and supervisors were staying in Aruba and made his presence known to them by turning on his Find Friends app. Wills was seen by other supervisors and Wills voiced his support for Agnant to them. Wills also expressed the unfairness of the situation to Colleen Long and Erica Simon and believed that Agnant was subjected to discrimination in the workplace. *Fresh & Easy Neighborhood Market*, above, at 153 (explaining the mutual aid or protection analysis focuses on whether there is a connection between the activity "and matters concerning the workplace or employees' interests as employees.")

More significant, I find that Wills engaged in activity in support and on behalf of the Union. Wills initiated the contract with Union Chief Organizer Stern and arranged several meetings between the Union and the sales representatives. Wills stated that he started collecting union cards within a week after the Hilber meeting. Wills stated that he began collecting union cards beginning on June 2 from his coworkers by approaching them to sign the cards. Wills also stated that he visited the Jericho office on one occasion and set up a table in the cafeteria to solicit the signing of union cards. Wills recalled meeting with 7–10 Jericho sales representatives who were new employees.

Wills recalled that a supervisor was present when he was talking to the new recruits. Wills also recalled seeing Hagerty, the manager of the Jericho office, while he was talking to a Jericho employee at the time. Wills also recalled a conversation regarding the Union with Supervisor Farina. Wills explained to Farina the need for the Union and that the Union would not only benefit the workers, but also benefit the supervisors because Altice is known as a "cut-throat" company.

Wills stated that he was also involved in organizing a meeting between the Hauppauge sales representatives and the CWA in the May–June 2016 time frame. Wills invited the sales representative to a local pizzeria to meet with Stern from the Union. Wills recalled that approximately 15 sales representatives attended that meeting with Stern. Wills further stated that additional meetings were arranged by him to have Stern meet with sales representatives from the Jericho office. Wills believed there were 4–6 such meetings during the month of April.

Madrigales recalled a lunch meeting with two union representatives in July 2016 and that Wills had introduced the union representatives to the sales people. Pacifico was also aware of the union organizing and attended a meeting with other sales representatives to talk with the Union. Pacifico said that Wills suggested that she attend the union meeting. Pacifico said that Wills led the discussions during the meeting.

Pero testified that he was aware of the Union organizing in Jericho and Hauppauge. He testified to receiving an email from Sales Representative Pat Maras on May 19 asking if it was true that the Union started in Jericho. Pero said he did not respond to the email but did forward it to Simon. Pero also testified that he was aware that several employees had spoken about the Union at the Hauppauge office.

Ferrera denied knowledge of Wills' union activities. I do not credit Ferrera's testimony on this point. Ferrera works out of the Jericho office. Wills visited the Jericho office and discussed the Union with several of the new employees. Wills also greeted a supervisor and Hagerty while in Jericho. It is reasonable that Ferrera would have been made aware of Wills' union activity in Jericho by the other supervisors, especially during the time that the Union was organizing the Jericho employees. In addition, Ferrera testified that he reviewed the Boss Timelines regarding the comments and notes made by the supervisors on Wills' behavior for the past several months. One of the comments made by Pero concerned Wills' rhetorical question to Hilber about "what are we supposed to do? Take it in the ass?" (GC Exh. 18 at 4). It is not reasonable to believe that Ferrera would not recall reading this comment that occurred just prior to Wills' termination. Additionally, although Pero did not specifically recall, he nevertheless testified that he may have informed Ferrera that employees were talking about the Union in the Hauppauge office.

Most significantly, Wills voiced his support for the Union at the sales representative meeting attended by Hilber and other supervisors and vice presidents of the Company. Wills told Hilber in front of the audience that he was 100 percent for the Union and disagreed with what Hilber was saying about the Union. Wills also stated that the new company that acquired the Respondent was known to lower salaries. Wills stated that Hilber responded by telling the audience that the reason he was here was to inform the staff to first do their homework about signing any union affiliation because the staff may be getting a union without any more money. Wills affirmed that the staff has the right to organize. Wills admitted that he made a vulgar statement by telling Hilber and the audience that the union organizing was because ". . . people are tired of taking it in the ass, and this is why this movement is alive at this point." Wills stated that other individuals also spoke up in statements that were against having a union.

I find that Wills' discussions with coworkers about the Union and other terms and conditions of employment, such as voicing his opposition to the policy on bathroom breaks; his insistence to Pero to discuss the negative aspects of their job; his protest over Agnant's denial of her trip to Aruba; his work on behalf of the Union by initiating meetings between the sales representatives and the chief union organizer for the Hauppauge office; and his stance in support of the Union in front of Hilber and other Respondent officials constitute protected activity. I also find that the Respondent, through its managers and human resources personnel, were aware of his protected activity prior to terminating him. Additionally, the discharge of Wills was clearly an adverse employment action. The remaining question is whether the

Respondent terminated Wills because of discriminatory animus.

To rebut the presumption established by the General Counsel, the Respondents bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *Durham School Services*, 360 NLRB 694 (2014).

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services—Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn. 12, (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

In assessing the Respondent's defense, I note that the Board has held "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co*, above, 1118–1119 (1993). In order to meet the *Wright Line* burden of persuasion, an employer must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB 730, 736 (2014). In *Septix Waste, Inc.,* 346 NLRB 494 (2006), the Board held that in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly.

Turning to the Respondent's defense, the Respondent contends that Wills was discharged due to his failure or refusal to adhere to company policy and procedures and his insubordination towards supervisors and managers. I find that the alleged nondiscriminatory reasons for the discharge of Wills are without merit.

It is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers. The hearing record shows a formal written reprimand issued on September 23, 2013 (R. Exh. 5); a final warning issued on October 22, 2014 (R. Exh. 6); a documented verbal warning on November 9, 2015 (GC Exh. 6); and a final warning on February 22, 2016 (GC Exh. 5). For each disciplinary notice, there were several infractions attributed to Wills. Many of the infractions were similar in nature, either a violation of company policy and/or disrespect and insubordination towards a supervisor. However, since his discipline in 2013, none of his subsequent infractions warranted more severe discipline until the Respondent discharged Wills on July 6 (GC Exh. 11).

The request to terminate cited Wills with repeatedly being insubordinate and acting in a disrespectful manner towards a supervisor and rehashes most of the infractions attributed to Wills since 2013. Despite this disciplinary history, none of the infractions, taken separately or together since 2013, warranted the discharge of Wills. Simon testified that Wills would have received a "clean slate" after 1 year from his final warning of October 22, 2014. Just after the 1-year period, Wills received a documented verbal warning and on February 22, 2016, he received another final warning. None of his infractions after February 22 warranted his discharge. Simon testified that Wills' behavior at the Starz meeting triggered his discharge.

It is undisputed that the threat to Zimmermann allegedly made by Wills during the Starz presentation did not play a factor in his discharge. Adam Morris was interviewed during Simon's investigation over the incident. Simon's notes of her interview with Morris stated that Morris did not feel threatened by Wills' actions and had only moved away after the Starz presentation in order to stretch his legs. Simon also noted that Morris did not feel ". . . uncomfortable or that the situation between Eric and Mike was going to turn into anything out of control . . ." (R. Exh. 29). As such, testimony provided from the Respondent's witnesses regarding Wills' temperament while working at the Freeport office and Zimmermann's complaint to the police about the Starz threat played no role in the termination of Wills. Consequently, the only reason given for his discharge, as noted in the termination request, was for repeatedly being insubordinate and acting in a disrespectful manner towards his supervisor and failing to adhere to company policy.

Contrary to the Respondent's assertions, I find that Wills' participation in union activities was the triggering factor for his termination. My close review of the investigation taken after the Zimmermann incident shows the reason for his discharge is pretext for the Respondent's animus towards Wills' support and activities on behalf of the Union. The Respondent contends that Wills was instructed to pay attention and to put down his phone during the Starz presentation. Wills asserted that he is able to pay attention to the speaker and to utilize his phone at the same time on a work-related matter. Wills further asserted that Zimmermann never instructed Wills to put away his phone, but he placed the phone down on his lap on his own volition. I credit the testimony of Wills on this point.

It is my opinion that Zimmermann never instructed Wills to put away his phone and therefore, he could not have been insubordinate to Zimmermann. Zimmermann testified that during the presentation, Zimmermann noticed Wills looking down and watching a video on this cell phone. Zimmermann stated that he leaned over and whispered Wills' name. Zimmermann said that Wills looked up and Zimmermann then told Wills to pay attention to the presentation. Zimmermann insisted that he also told Wills to put down his phone. Zimmermann whispered "Mike, can you please put your phone down, we're having a meeting."

I credit the testimony of Wills when he testified that he had in fact placed his phone on his lap and turned to face the Starz vendor. Wills said he only lifted up the phone again to snap a picture when he observed Zimmermann using his phone. In the email sent to Pero on June 23 (R. Exh. 28), Zimmermann never stated to Pero that he had instructed Wills to put away his phone. Further, Erica Simon's interview notes with Adam Morris stated that Zimmermann told Wills to give his attention to the Starz vendor and overheard Wills respond, "you're on your phone, why can't I be on mine." Wills also informed Zimmermann that he was on the phone on a work-related matter. Simon's notes, however, never stated that Morris heard Zimmermann directing Wills to put away his phone (R. Exh. 29).

Zimmermann also testified that Wills was ". . . speaking loud and it was escalating, voice was very loud and he seemed angry" during his interaction with Wills at the Starz presentation. However, Zimmermann never articulated exactly what Wills was saying or how loud was his voice. Mario Madrigales testified that he observed Zimmermann interact with Wills during the Starz presentation but could not hear their voices. Simon's notes of her interview with Morris never stated that Wills was loud and disruptive to the Starz meeting. Morris never stated to Simon that Wills' voice was escalating in his interaction with Zimmermann.

At most Wills was, more likely than not, disrespectful to Zimmermann when he raised his phone to take a picture of Zimmermann allegedly using his phone. Judy Courtney, in her email response of June 23 to Ferrera's request to suspend Wills, stated to Simon that it was "Hard to see this as a suspension. More just being a jerk. We could write him up for unprofessional behavior . . ." (GC Exh. 22).[8] Courtney, after being provided the information on the Starz incident, did not believe the Respondent should suspend Wills, let alone discharged. As such, acting in a disrespectful manner towards a supervisor would not have justified the Respondent discharging Wills. Simon subsequently provided Courtney with additional information over the Starz incident, but there was no reply from Courtney if she had changed her opinion to discipline Wills only for unprofessional behavior (R. Exh. 30).

The Respondent contends that Wills failed to adhere to company policy by using his cell phone during boost meetings, and in this instance, at the Starz presentation. Credible testimony from Madrigales and Pacifico indicated that this policy was not strictly enforced. Pacifico testified that she was previously informed by Supervisor Farina that she should accept calls from customers during the boost meetings and to walk out of the meeting if necessary. Madrigales testified that he had used his phone during the Starz presentation and observed another sales representative, Chris Hart, also using his phone. The counsel for the General Counsel also proffered a picture during the Starz meeting showing another sales representative on his computer during the Starz meeting (GC Exh. 11). Madrigales and Hart complied with a supervisor's instruction to put down their phone. As noted above, I credit that Wills also placed his phone down, but on his own volition.

The Respondent also failed to follow its own practice in disciplining Wills. After the February 22 final warning, Wills was disrespectful and failed to follow company policy on a number of occasions without being subjected to further discipline. Wills continued to capitalize his emails that Simon and other supervisors felt were disrespectful. Simon and Pero felt that Wills was calling Supervisor Farina a liar when he refused to believe Farina called him at the direction of Pero. Wills was also reprimanded for not following company policy when he failed to contact all the supervisors at the Hauppauge office before calling Manager Haggerty in Jericho on two occasions and that his time was unaccounted for because Wills failed to inform Farina by phone that the battery on his iPad was dead (GC Exh. 11). None of these company violations attributed to Wills resulted in any discipline other than counseling by Simon and his supervisors. Yet, when Wills was disrespectful to Zimmermann at the Starz meeting, the Respondent immediately investigated the incident and decided to discharge Wills. *JAMCO*, 294 NLRB 896, 905 (1989) (clear departure from past practice evidence of discriminatory motive).

Further, the disciplinary treatment of Wills was glaringly disparate compared to another sales representative who had continually violated company policy and shown disrespect/insubordination towards a supervisor. The counsel for the General Counsel argued that Ulysses Colon (Colon), also employed at the Hauppauge office, had numerous policy infractions and disrespectful behavior prior to and subsequent to his final warning, but was not discharged by the Respondent. The record shows that Colon received a documented coaching on November 19, 2015 from Zimmermann for being less than professional and respectful (GC Exh. 20). Colon also received a final warning on May 4, 2016 from Pero for violating company attendance policy (GC Exh. 37). Between November 2015 and May 2016, Colon continued to violate company policy on his failure to timely communicate with his supervisor; his continued abuse of attendance; his inappropriate behavior towards a coworker; and other violations. Colon was reminded by Zimmermann that his failure to comply with company policy will subject him to corrective action, up to and including termination of his employment. After Colon received his final warning in May, he was reprimanded by Zimmermann for using his cell phone at a boost meeting; using incorrect emails for a customer; failing to return calls to customers and his supervisor; failing to answer a call from his supervisor; accusing Zimmermann of harassing emails sent to him; abusing the attendance and leave policy; and other company violations (GC Exh. 35). Nevertheless, Colon was still employed by the Respondent at the time of this hearing. Colon, a similarly situated worker, continued to commit violations of company policy before and after his final warning with no severe discipline other than counseling or a coaching memo. In contrast, Wills, with similar behavior, was discharged by the Respondent.

In my opinion, I find that the employer's asserted reason for Wills' discharge was pretextual and that he was treated in disparate treatment compared to a similarly situated employee. *Lucky Cab Co.*, above.

[8] Judy Courtney at the time was the human resources business partner for the sales department and did not testify at the hearing.

In *Mid-States Express*, 353 NLRB 864 (2009), the employer was charged with unlawfully discharging six employees for their support of the union. Employee Steven Wilson's discharge is of particular import. The employer claimed that Wilson was a "substandard employee" with a list of infractions over two years including sexual harassment, damaging freight, excessive absenteeism, and accidents/crashes. At no point over that period did the employer view Wilson's "overall performance/attendance problems to be sufficiently serious as to merit his termination . . . Respondent was not overly troubled by this infraction, at least not to the point of discharging him." As noted, Wills' overall performance in his 2015 evaluation was a "valuable contribution" to the Company (GC Exh. 12). As in *Mid-States Express*, none of Wills' prior infractions led to his termination prior to July. The judge found that it was only Wilson's attendance at a union meeting earlier in the month that could have prompted the company's sudden change of heart. Likewise, here, there is no significant event in the record that seems to have triggered for Wills' discharge except for his support of the Union and his stance towards Hilber during the May and June timeframe, a short 2 months prior to his discharge.[9]

I find that the timing of the discharge, shortly after he voiced support for CWA and began assisting in the Union organizing, at the Jericho and Hauppauge offices, also establishes an inference that the Respondent's discharge was motivated by Wills' union activity in support for the CWA. *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004); *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004) (temporal proximity between union activity and employer's adverse action is evidence of unlawful motivation).

Wills was discharged less than 2 months after he made his support of CWA clear to the Respondent. This timing represents significant evidence of unlawful motivation. Such coincidence in time between Respondent's knowledge of the employee's union activity and his discharge is strong evidence of an unlawful motive for his discharge. *Trader Horn of New Jersey,* 316 NLRB 194, 198 (1995). As stated by the administrative law judge in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 slip op. at 31 (2016), "Indeed, "timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision." *Sawyer of NAPA,* 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1354 (7th Cir. 1984), *NLRB v. Windsor Industries,* 730 F.2d 860, 864 (2d Cir. 1984); *Manor Care Health Services—Easton,* 356 NLRB 202, 204, 226 (2010) (proximity in time between discriminatee's union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil & Gas,* 337 NLRB 1120, 1123, 1132 (2002) (discharge shortly after employer learned of employee's union activities strongly supports a finding that discharge was motivated by union animus).[10]

The Respondent has demonstrated antiunion animus in violation of Section 8 (a)(3) and (1). I find that the discharge of Michael Wills was motivated by his concerted and union activity in support of CWA, and that the Respondent has not met its burden of persuasion to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, above, at 1089. Accordingly, I find that the Respondent violated section 8(a) (3) and (1) of the Act as alleged in the complaint.

Conclusions of Law

1. At all material times, the Respondent, CSC Holdings, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(3) and (1) of the Act on about July 6, 2016, by discriminatorily terminating Michael Wills.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued termination to Michael Wills, I shall order the Respondent to offer Wills full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other employee emoluments, rights, or privileges previously enjoyed, and to make him whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondent to compensate Michael Wills for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey*, 363 NLRB

[9] I do not find that Wills had engaged in opprobrious conduct costing him the Act's protection when he inquired to Hilber if the employees "should take it in the ass". *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[10] The counsel for the General Counsel argues that direct evidence of antiunion animus was shown by Hilber's remarks at the Jericho office and the supervisors' reaction to Wills' statement to Hilber of "taking it in the ass" at the Hauppauge office. Agnant testified that Hilber spoke negatively about the Union during the Jericho meeting. Hilber denied saying that the Union was bad or that he had tossed the Brooklyn contract across the office floor. I would credit Hilber's denial on speaking negativity about the Union at the Jericho office, especially in light of the fact that no such allegations were made against him when he spoke on the same topic at the Hauppauge office. However, it is also clear that the Respondent did not want the Union to organize the workers at the Jericho and Hauppauge offices. Hilber testified that the company preferred a "direct relationship" with its employees. The Respondent was also actively involved in countering the union organizing by educating the employees on the company's values and by highlighting the empty promises made by the Union (GC Exh. 28, 29). Additionally, Pero and others were upset with Wills' remark to Hilber, which they deemed inappropriate and unprofessional. While I find that such circumstances do not demonstrate direct evidence of antiunion animus, I agree with the General Counsel that there is sufficient evidence of indirect animus based upon the manner the Respondent treated Wills' discharge.

No. 143 (2016).

In addition to the remedies ordered, I shall recommend that the Respondent compensate Michael Wills for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. *King Soopers, Inc*., 364 NLRB No. 93 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

It is further recommended that Respondent remove all references to the termination request dated July 5, 2016 from Michael Wills' files and notify him in writing that it has done so and that the discharge will not be used against him in any way.

My recommended order requires the Respondent to expunge from its files any and all references to the unlawful termination of Michael Wills and any notes, documents, or references regarding his termination that were prepared and/or used in his termination and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, CSC Holdings, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees because they engaged in protected concerted and union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Michael Wills whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether he received interim earnings in excess of these expenses, suffered as a result of the unlawful discharge, as set forth in the remedy section of this decision.

(b) Compensate Michael Wills for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Immediately offer full reinstatement to Michael Wills and if the offer is accepted, reinstate Wills to his former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Michael Wills on about July 6, 2016 and thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its existing property at the Hauppauge Office, 1500 Motor Parkway, Hauppauge, New York, facility, a copy of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 2016.

(g) Mail a copy of said notice to Michael Wills at his last known addresses.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 27, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you or otherwise discipline or discriminate against you because you engage in protected concerted and union activities, or to discourage you from engaging in these or other concerted and union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Wills full reinstatement to his former job or, if the job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Wills whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of his discharge date to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether he received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate Michael Wills for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Michael Wills.

WE WILL, within 3 days thereafter, notify Michael Wills in writing that this has been done and that his discharge will not be used against him in any way.

CSC HOLDINGS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-190108 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202)273-1940.