Cintas Corporation No. 2 *and* Benjamin H. Heidenreich. Case 28–CA–258167

December 16, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On December 27, 2021, Administrative Law Judge Lisa D. Ross issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and a combined answering brief to the Respondent's exceptions and brief in support of cross-exception, and the Respondent filed a combined reply brief in support of its exceptions and answering brief to the General Counsel's cross-exception.

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,[1] and conclusions[2] and to adopt the recommended Order as modified[3] and set forth in full below.

Background

Respondent Cintas sells and rents first aid and safety supplies and services out of offices in Phoenix, Arizona, among other locations. The Phoenix business operates with two teams working collaboratively. The sales team generates new clients, and the service team manages new client accounts and refers additional clients to the sales representatives.

Charging Party Benjamin Heidenreich was one of Cintas's most productive sales representatives in the Phoenix office from April 2018 until his employment ended on March 16, 2020. Heidenreich was directly supervised by Sales Manager Sylvestre Ayoh. Ayoh, in turn, reported to First Aid and Safety Division Western Region Director Irene Cabrer, who had transferred to the Phoenix office 3 years earlier.

Heidenreich excelled at sales from the outset. Within 8 months of his employment, he was selected as a sales captain, an unofficial leader in the sales department tasked with helping to train and mentor new sales employees. Heidenreich's superiors repeatedly lauded his success as a salesman and, as sales captain, sought to groom him for promotion into a future leadership position.[4] He achieved the top 5-percent dollar amount of sales among all sales representatives at Cintas, went on to achieve the top 1 percent of sales, and was selected for "Diamond Club," the highest sales level distinction. In addition to his high sales numbers, Heidenreich was known for his aggressive, no-nonsense attitude and his outspokenness.[5]

In the fall of 2019, Heidenreich began meeting with a group of employees every month at a cigar club where they discussed their workplace concerns. One such

[1] There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(1) by: (1) failing to promote Heidenreich to sales manager; (2) threatening him with the loss of promotional opportunities because he did not have the right "brand" for leadership; and (3) allegedly issuing him a disciplinary coaching on March 16, 2020. In addition, we note that, in its reply brief, the Respondent has withdrawn certain exceptions largely relating to those dismissed allegations.

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. We find that the judge's error in evaluating Matt Ritter's credibility as a current, instead of former, employee, is insufficient to call her conclusion into question. See *Flexsteel Industries,* 316 NLRB 745, 745, 749 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). The judge found Ritter credible based on multiple factors including demeanor, the quality of his testimony, and corroborating testimony of other witnesses, and only considered his employee status as an additional ground.

[2] The General Counsel excepts to the judge's refusal to draw an adverse inference against the Respondent for failing to call First Aid and Safety Division Vice President Jim Bunkers as a witness concerning his role in Gesualdo's decision to refuse to allow Heidenreich to rescind his purported resignation. We find it unnecessary to pass on this exception as the adverse inference would not affect our resolution of the case. We note, however, that the judge erred in relying on *Wayne Construction*, 259 NLRB 571, 571 fn. 1 (1981), for the proposition that an adverse inference was inappropriate because the General Counsel also could have called Vice President Bunkers. This reasoning has been rejected. See, e.g., *International Automated Machines,* 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). Chairman McFerran further notes that an adverse inference would have been appropriate for the reasons stated in *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 366 NLRB No. 97, slip op. at 10 (2018), enfd. 805 Fed.Appx. 2 (D.C. Cir. 2019).

[3] We grant the Respondent's unopposed exception and modify the judge's recommended Order to remove the remedy based on *Mimbres Memorial Hospital & Nursing Home,* 361 NLRB 333 (2014), as inapplicable. We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Thryv, Inc.*, 372 NLRB No. 22_(2022), *Paragon Systems, Inc.,* 371 NLRB No. 104, slip op. at 3–4 (2022), *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[4] This grooming took the form of a Development Plan created in September 2019, setting goals for Heidenreich, such as attending an emotional intelligence seminar. The plan was created to improve Heidenreich's scores on his performance evaluation in the area of leadership, which indicated that he was "being groomed for being a leader in the future."

[5] The judge found that many of Heidenreich's colleagues "were put off by his tone."

concern was the tension in the workplace caused by Cabrera's micromanagement and intimidating and abrasive manner. The workplace tension was further fueled by a suspicion that one of the sales representatives was relaying information to Cabrera because she knew everything that was going on. Another concern was the Respondent's nepotism or favoritism towards employees with a family or other connection to someone in upper management, and its effect on promotional opportunity.[6] Among those who attended these meetings—which were open to all—were sales representatives Matt Ritter and Kevin Johnson, service representative Chad Harrison, and occasionally a few others, including Warehouse/Inventory Manager Greg Salisbury, who complained about being written up several times in 1 day, and not receiving overtime and a monetary incentive for his mentoring activities despite the Respondent's policy providing for such payments. By February, Heidenreich, Johnson, and Ritter had decided to bring their concerns about the tense working environment to the next "coffee chat," periodic meetings held by the Respondent's human resources department (HR) to learn of employees' concerns.

In January 2020,[7] Ayoh announced that he would be transferring to another location within Cintas. Heidenreich and another sales captain, Lindsay Summers, applied for the resulting managerial vacancy. Their excessive competitiveness increased workplace tensions to the point that their schedules were adjusted to separate them. During inventory day around February 22, Kevin Johnson privately told Summers that her competition with Heidenreich was "toxic on both ends." On Heidenreich's end, Johnson stated that he was acting like a "tyrant" and was being "sneaky" in competing for the job. On Summers' end, Johnson told her that she was believed to be Cabrera's "spy" and warned her to be careful about "snitching to Cabrera" and that she should "clear the air with Ayoh" and build trust with the sales team employees if she intended to supervise them. Summers then reported this conversation to Ayoh, who told General Manager Brad Baker, who, in turn, told Regional HR Director Mark Little and National HR Director Frances Gesualdo in a February 22 email.[8] On February 23, Summers withdrew her job application and filed a complaint against Heidenreich, alleging that he was talking badly about her and manipulating incidents to win the sales manager position. As examples of "manipulation," she described him coaching Harrison on his exit interview, and coaching a "disgruntled warehouse partner," presumably Salisbury, to encourage complaints about favoritism to management.

Heidenreich's interview for the sales manager position took place on February 26, consisting of separate interviews with Baker, Little, and Cabrera. Immediately afterwards, he was told to go to HR representative Kristen Stevens' office, where Stevens and Little informed him of Summers' complaint against him. In what became the investigatory interview, Heidenreich explained to Stevens and Little that he had merely told Harrison to be truthful about why he was leaving Cintas, and "clarified what Salisbury told [him] about being slighted for mentoring."[9]

Soon after his interviews, Heidenreich learned from Ayoh that Cabrera had been soliciting additional applicants even though Heidenreich was the only sales representative that applied. A few days later, when Heidenreich had not heard anything about the promotion, he contacted First Aid and Safety Division Vice President Jim Bunkers for advice.[10] Because the investigation of Summers' complaint against Heidenreich was ongoing, Bunkers suggested that Heidenreich call Cabrera to explain his side of the story. But when Heidenreich followed Bunkers' guidance and contacted Cabrera, she was not interested in talking to him.

At the March 4 "coffee chats" held by the Respondent's human resources department, Heidenreich was assigned to a group led by Frances Gesualdo and Kristen Stevens. Heidenreich raised the issue of Salisbury not receiving his incentive for mentoring, as well as the tense work environment caused by Cabrera and the possible "spy" in their

[6] For example, Chad Harrison credibly testified that the Respondent "favored those employees who either knew or were related to someone in upper management". Harrison explained that Lindsay Summers, who was Harrison's assigned sales representative, and Summers' husband Kevin Ross, who was Harrison's supervisor, actively prevented him from getting client referrals and he felt he had no prospect of commissions, bonuses, or promotion. Harrison left Cintas in November 2019 after 3 months of employment. Prior to his departure, Heidenreich told Harrison to tell management the truth about his reasons for leaving in his exit interview so that the next sales representative would not have the same frustration.

[7] All subsequent dates are in 2020 unless otherwise indicated.

[8] The judge credited Johnson's account of his conversation with Summers over the substance of Baker's account of his interview with Johnson on February 22, as described in his email to Little and Gesualdo, which the judge found "less than fully credible." The judge found that "Heidenreich *and* Summers were being unnecessarily competitive with *one another* which created a toxic work environment on both sides." The judge also discredited Summers' version of events essentially blaming Heidenreich for the dysfunctional relationship, which was contradicted, in part, by both Johnson and Ritter's testimony. Our dissenting colleague, however, recounts only Summers' self-serving version of events without acknowledging why he would question the judge's credibility analysis in order to substitute a different version of the facts.

[9] The Respondent withdrew its exception to the judge's findings regarding what Heidenreich told Little.

[10] Heidenreich testified that his mentor suggested contacting Bunkers.

midst. Other employees endorsed Heidenreich's concerns and stated their own.[11]

On March 16, Cabrera and Little (by phone) met Heidenreich in Cabrera's office to discuss the resolution of HR's investigation into Summers' complaint against Heidenreich and the outcome of Heidenreich's application to be sales manager. Cabrera first told Heidenreich that they were dismissing Summers' complaint because Little had concluded that her allegations were unsubstantiated, and that Heidenreich was thus cleared of any alleged misconduct. In the same meeting, after Little hung up the phone, Cabrera told Heidenreich that he had not been selected for the sales manager position because he did not have the "brand for management or leadership."[12] Heidenreich expressed disagreement with her reasons and then told Cabrera that he had known he would not be selected because "people in leadership talk" and "this is a tight community." Cabrera responded: "That's part of your problem—you talk to too many people." Heidenreich made several statements to the effect that he would be seeking other opportunities for promotion within or possibly outside of Cintas, which Cabrera reported to VP Bunkers, adding that Heidenreich said, "I do not intend to work underneath whoever you bring in."

As more fully set forth in the judge's decision, in which she analyzed and resolved multiple credibility issues, Heidenreich left Cabrera's office around 11:20 a.m. "visibly upset" after learning he was not selected for the sales manager position. He ran into Ayoh, who inquired how the meeting went. "Not good," he replied, describing the outcome, followed by, "I am f**king done with this man, do you want my tablet now or later? I am done and you will have my resignation—cannot believe this." Ayoh told him to calm down and enlisted the help of Johnson and Ritter, who were within earshot. Ayoh told Heidenreich to go home and take the afternoon off, and that they could discuss promotional opportunities the next day. Ayoh did not believe that Heidenreich had resigned. On his way home, taking his tablet with him, Heidenreich called his mentor and asked about opportunities to relocate within Cintas. The mentor replied, "Let me see what I can do, we'll find something for you."

Meanwhile, at a meeting with Baker and Cabrera to discuss his successor, Ayoh described the earlier events and was told to restrict Heidenreich's IT access. Ayoh also told Little that he believed Heidenreich had simply made an "off the cuff remark about resigning in the heat of the moment." About an hour after Heidenreich left the office, Little called him to ask if he had resigned, which Heidenreich denied. Little said he would have to investigate conflicting reports. Heidenreich told him that was not necessary because, "I'm telling you I didn't resign." Heidenreich then called Ayoh for an update and explained that he had been upset but had not resigned. He texted and emailed this clarification to Ayoh, who at 4:22 p.m. memorialized the sequence of events with evidence that Heidenreich had not quit in an email to Little. (GC Exh. 12).[13] After speaking with Heidenreich, Little called Gesualdo to report what had transpired. Despite her knowledge that Heidenreich had not resigned, Gesualdo told Little to accept Heidenreich's "resignation" effective immediately on March 16.[14]

The judge found that the Respondent violated Section 8(a)(1) by threatening Heidenreich with the loss of promotional opportunities because he "talked to too many people," a euphemism for his protected concerted activities. The judge also found that the Respondent violated Section 8(a)(1) when it refused to rescind Heidenreich's perceived resignation, effectively terminating his employment on March 16. We affirm the judge's findings of both violations for the reasons stated and as further explained below.

Discussion

(1) Cabrera's threat to Heidenreich's future promotional opportunities

We agree with the judge that the Respondent violated the Act by threatening Heidenreich with the loss of promotional opportunities when Cabrera told Heidenreich (during the meeting in which she informed him that he was not selected for the sales manager position) "that's part of your problem—you talk to too many people."[15]

[11] Although Johnson and Ritter had expected to be in the same group, Johnson was assigned to a different group, and Ritter did not attend due to illness.

[12] The judge, crediting Cabrera's explanation, found no violation in this statement or in the failure to promote Heidenreich, and as noted above, there are no exceptions to either finding.

[13] Among the judge's extensive credibility findings in footnote 48 of her decision and the subsequent text in the body of her decision, the judge credited Ayoh's account of events over Little's and Gesualdo's contrary testimony.

[14] The judge found that Gesualdo was the sole decisionmaker and discredited one of the several shifting claims in her testimony that VP Bunkers played a role in the decision to refuse to allow Heidenreich to rescind his purported resignation. As noted above, we find it unnecessary to pass on the judge's refusal to draw an adverse inference against the Respondent for failing to call Bunkers as a witness.

[15] We reject the Respondent's argument that due process required the complaint to set forth the exact words of the threat. The relevant complaint paragraphs met the pleading requirements set forth in Sec. 102.15 of the Board's Rules and Regulations and were sufficient to put the Respondent on notice of the allegations. See, e.g., *Dal-Tex Optical Co.,* 130 NLRB 1313–1314 fn. 1 (1961). In addition, the record establishes that the parties fully litigated the threat allegation at the hearing and both parties addressed the matter in their posthearing briefs.

The Board's standard for determining whether an unlawful threat was made is "whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D. Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003). The possible existence of a benign interpretation is not the test, and it is irrelevant whether Cabrera intended to reference protected concerted activity or Heidenreich's future prospects at Cintas. See *Smithers Tire*, 308 NLRB 72, 72 (1992) ("The test is *not* the actual intent of the speaker or the actual effect on the listener."). Accordingly, the context in which the alleged threat was communicated is critical to determine how a reasonable employee could interpret the particular words spoken.

Considering the events leading up to the March 16 meeting in Cabrera's office, a reasonable employee could find the credited statement coercive given its timing. Specifically, the statement was delivered during a meeting with the dual purpose of discussing the resolution of HR's investigation of the Summers complaint against Heidenreich in tandem with informing Heidenreich that he was not selected for the sales manager position. Cabrera made her statement shortly after informing Heidenreich of his non-selection. Thus, the words "that's part of your problem" could appear to be closely related to his failure to win the promotion, and an inherent warning that he would not be promoted if he continued to "talk to too many people." From an employee's perspective, one could reasonably assume that "talking to too many people" referred to Heidenreich's outspokenness about raising workplace concerns, because they had just finished discussing Summers' complaint, which referred to his protected concerted activity in coaching other employees to raise their concerns with management in order to improve working conditions for the sales force as a whole. Moreover, less than 2 weeks before, at the March 4 "coffee chat," Heidenreich had engaged in protected concerted activity by raising to HR concerns shared among multiple members of the sales team that were specific to Cabrera, including the tense working environment Cabrera fostered and her suspected informant.[16] In this context, an employee in Heidenreich's position could reasonably construe Cabrera's reference to "talking to too many people" as a euphemism for his protected concerted activity, especially when referred to as "part of your problem" in an interview in which he was told that he was not selected for a promotion. See *Rainbow Garment Contracting*, 314 NLRB, 929, 937 (1994) (finding excessive talking to be euphemism for "union activity").

The Respondent initially takes issue with the judge's crediting of Heidenreich's testimony concerning Cabrera's threat over Cabrera's denial that she responded to Heidenreich saying he knew in advance that he would not be selected for the job. But the Respondent fails to clear the Board's high bar for overturning an administrative law judge's credibility resolutions given the judge's ability to observe the witness testimony firsthand. Thus, it is insufficient for the Respondent to claim that the judge's credibility resolution between Heidenreich and Cabrera was suspect simply because the judge only specifically pointed to the alleged statement as being "consistent with Cabrera's generally abrasive tone." The judge heard testimony from other witnesses concerning Cabrera's abrupt communication style and noted that communication style was consistent with what she observed in Cabrera's own hearing testimony. Moreover, in the judge's initial explanation of her credibility determinations (made in connection with her crediting testimony about the tense working environment that Cabrera fostered), she listed the multiple factors from *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. mem. 56 Fed.Appx. 516 (D.C. Cir. 2003), that guided her findings, including witness demeanor. The judge also explained that credibility need not be an all-or-nothing proposition, effectively rebutting the Respondent's related suggestion that the judge's credibility determination should be viewed skeptically because she also credited Cabrera on other points. Accordingly, we do not second-guess the judge's choice that it was more likely that Cabrera (whom the judge found "lacked empathy") told Heidenreich what she thought his "problem" was rather than credit Cabrera's explanation that she said nothing because Heidenreich "was visually upset, and . . . [she] did not want to be confrontational."

Our dissenting colleague does not challenge the judge's credibility determinations on this issue and, rather than relying on Cabrera's denial that she made the statement at all (as the Respondent seeks to do), our colleague has instead fashioned several competing interpretations of how Heidenreich should have interpreted Cabrera's words.

[16] Our dissenting colleague claims that there is no evidence that Cabrera knew what Heidenreich said at the March 4 "coffee chat" that he attended. Yet our colleague relies on Heidenreich's testimony that Cabrera told him "that in coffee chats it came up that I was unapproachable and egotistical." (Tr. 85). Moreover, Cabrera testified that she had specifically requested the "coffee chats," which she termed an "HR . . . investigation to find out . . . what's going on" between Heidenreich and Summers. (Tr. 455.) And Little's memorandum summarizing his investigation into the Summers complaint memorializes that "[r]esults [of the coffee chats] were shared with the leadership team." (R Exh. 7 p. 8.) All of this suggests that Cabrera had heard of the unflattering criticism of her management style, raised by Heidenreich and endorsed by other employees during the "coffee chats," and also cuts against our dissenting colleague's unsupported notion that issues raised in meetings intended to learn about employees' concerns would not engender a negative response when they reached the ears of management.

First, our colleague posits that "[t]he more reasonable interpretation of Cabrera's remark" was that it signaled her displeasure with Heidenreich's gossiping about her anticipated hiring decision behind her back. Then, our colleague asserts that Heidenreich should have "guessed" that Cabrera was referencing his seeking advice from Vice President Bunkers as to whether to communicate with Cabrera directly about the Summers complaint against him. Finally, our colleague envisages that a reasonable employee would have understood that Cabrera's warning against talking to too many people was really a reference to the allegations of the Summers complaint against Heidenreich that they discussed moments earlier in the same meeting.[17]

But in spinning out this variety of meanings that Heidenreich might have attributed to Cabrera's words, our colleague only emphasizes that Cabrera's remark was subject to different interpretations, including, as explained above, as a coercive threat in response to his protected concreted activity. Applying the controlling legal standard—"whether the words could reasonably be construed as coercive," *Double D. Construction Group*, 339 NLRB at 303—304—we are unpersuaded by our dissenting colleague's manufacture of one or more alternative possible interpretations of Cabrera's labeling Heidenreich's problem as talking to too many people. The fact remains that Heidenreich had, less than 2 weeks before, made the momentous decision (after extensively talking to his coworkers about their workplace concerns) to formally raise shared concerns about Cabrera's management style directly to the Respondent's national HR director. We do not strain to infer that taking such a risk would have been fresh in Heidenreich's mind when meeting with Cabrera to discuss his nonselection as sales manager. And by coupling discussions of his nonpromotion together with the investigation into Summers' complaint that, among other things, involved negative spins on other instances of Heidenreich's protected concerted activity, the Respondent only made it more likely that Cabrera's words could reasonably take on a coercive cast. In short, an employee in Heidenreich's position could reasonably have interpreted his protected concerted activity as the "talk" that was a "problem" in Cabrera's view, and to further reasonably interpret it as a warning not to indulge in such talk if he wished next time to win a promotion.[18]

(2) The Respondent's refusal to rescind purported resignation or termination of Heidenreich's employment

The judge found that the Respondent's purported reason for discharging Heidenreich—that he resigned – was false. Heidenreich did not resign. Discrediting Little and Gesualdo, the judge found that the Respondent's refusal to rescind Heidenreich's "resignation" was unlawful, based on timing and pretext. We adopt the judge's conclusion, as clarified below, that the General Counsel met her initial burden under *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 (1983), and *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120 (2019).[19] Once the initial burden is met, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the employee's protected activity. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (*Wright Line* defense burden not met by employer merely showing a legitimate reason).

(a) Heidenreich's protected concerted activity and the Respondent's knowledge

We agree with the judge that the General Counsel met her initial burden of proving that Heidenreich engaged in protected concerted activity and that the Respondent had knowledge of such activity. There is virtually no dispute on these points. The Respondent does not except to the judge's finding that Heidenreich engaged in protected concerted activity by raising employee concerns in the March 4 "coffee chat," and by counseling Harrison and

[17] Of course, on this front, our colleague cherry-picks the unsubstantiated complaint allegations that Cabrera might have been referencing—only those concerning Heidenreich saying negative things about Summers. He pointedly does not imagine that Cabrera was referencing the instances of Heidenreich's protected concerted activity (advising coworkers to raise complaints about shared workplace concerns with management) that were bound up in the Summers complaint. Indeed, despite the lack of exceptions to the judge's finding that Heidenreich was engaged in protected concerted activity when he so advised his coworkers, our colleague registers his disagreement that those instances constituted concerted activity by labeling the employees' concerns as individualized. Suffice it to say, we are unpersuaded by our colleague's seeming willingness to overlook the judge's crediting that the employees' workplace concerns were widely shared, and action was being taken on multiple fronts by multiple employees (Heidenreich chief among them) to bring those concerns to the fore.

[18] This interpretation is not inconsistent with the judge's unexcepted-to finding that the Respondent's failure to select Heidenreich as Sales Manager was lawful, or that the Summers complaint was dismissed for insufficient evidence, as it is a warning about future conduct, and, under the Board's standard, is not dependent upon the actual intent of the speaker. *Smithers Tire,* above at 72. We do not take issue with the Respondent's discretion to choose another applicant over Heidenreich due to his current deficiencies in attributes it deemed necessary for leadership, only the warning that his protected concerted activity was a separate problem that, if not curtailed, could negatively impact future promotional opportunities.

[19] The General Counsel meets her initial burden by showing (1) union or protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. *Tschiggfrie Properties,* supra, slip op. at 6.

Salisbury to raise their workplace concerns with management in order to improve working conditions for other sales employees.[20] Nor does the Respondent except to the judge's finding that Gesualdo, the ultimate decisionmaker concerning Heidenreich's termination, had firsthand knowledge of Heidenreich's protected concerted activity by virtue of her presence at the March 4 "coffee chat."

Instead, the Respondent makes the nuanced argument that Gesualdo lacked knowledge of other instances of Heidenreich's protected concerted activity explored during the Respondent's investigation of the Summers complaint. The Respondent bases its argument on the lack of evidence that Little specifically briefed Gesualdo about the Summers investigation, which included allegations of Heidenreich's protected activity.[21] However, General Manager Baker's February 22 email to Gesualdo and Little, relating a conversation between Johnson and Summers about Heidenreich encouraging other employees to voice their workplace complaints, proves that Gesualdo had already been alerted to the examples of Heidenreich's protected concerted activity that resurfaced in the Summers complaint.[22] Thus, Gesualdo's direct knowledge of the range of Heidenreich's protected concerted activity is well supported in the record, regardless of the Respondent's quibbling.[23]

(b) Animus

We also agree that the General Counsel proved the Respondent's animus towards Heidenreich's protected concerted activity and adopt the judge's conclusion that Heidenreich's discharge was motivated by animus against his protected concerted activity based, in part, on the timing of the discharge. *Bannum Place of Saginaw, LLC,* 370 NLRB No. 117, slip op. at 3 & fn. 12 (2021), enfd. 41 F.4th 518 (6th Cir. 2022). The Respondent accepted Heidenreich's "resignation" less than 2 weeks after the March 4 "coffee chat" during which Gesualdo personally observed his protected concerted activity and a little more than 3 weeks after Baker's email to Gesualdo maligning Heidenreich's protected concerted activity relating to Harrison and Salisbury.

Our dissenting colleague observes that the Respondent's termination of Heidenreich was closer in time to his heated remarks on March 16 in response to not receiving the desired promotion than it was to any of Heidenreich's protected concerted activity.[24] However, it was still closer in time to Heidenreich's rescission of his purported resignation, and clarification from him, Ayoh, and Little, that he did not resign. The judge discredited Gesualdo's testimony that she was unaware that Heidenreich had not resigned before she made the decision to accept his resignation, and instead credited Ayoh's and Little's testimony that Little had so informed her before her decision. Little also clarified to Gesualdo that Heidenreich said he would be looking for a position either within or outside of Cintas, putting any reference to resignation squarely in the future. Gesualdo chose to ignore what Ayoh and Little told her without further investigation, which the judge rightly found suspect. The Board has held that "an employer's

[20] As noted above, our dissenting colleague disagrees with the judge's unexcepted-to finding that Heidenreich's counseling of Harrison and Salisbury was concerted activity. However, at the cigar club meetings, all three discussed Salisbury's complaints and the issue of nepotism, the essence of Harrison's complaints, and ultimately planned to, and in fact, did raise them at the "coffee chat." Harrison also testified that the reason Heidenreich advised him to tell management of his reasons for leaving was "so the next rep coming in isn't going to have those frustrations." These were actions planned in the interest of improving working conditions for all employees.

[21] We correct two factual errors regarding the source of the Respondent's knowledge of Heidenreich's protected concerted activity which do not affect our agreement with the judge's conclusion that the Respondent knew of this activity, as further explained below. The record reflects that it was employee Kevin Johnson and General Manager Brad Baker, not Heidenreich, who told Regional HR Director Mark Little, during his investigation of the Summers complaint, about Heidenreich's role in encouraging Salisbury and Harrison to raise their workplace complaints to management. In addition, it was Director Little and HR Representative Stevens, not National HR Director Gesualdo, who conducted the investigative interviews for the Summers complaint.

[22] See R Exh. 4 (email stating "Ben [Heidenreich] orchestrated and told Chad Harrison what to say on his exit interview" and "Ben told Greg Salisbury what to write in his email to HR. . . ."). As the judge discredited the substance of the February 22 email from Baker to Gesualdo as incomplete, biased toward the Respondent, and "less than fully credible," we rely on this email only to show that Gesualdo had notice about Heidenreich's protected concerted activity.

[23] Even if the Respondent's claimed distinction as to the degree of Gesualdo's first-hand knowledge were dispositive as to whether the General Counsel carried her initial burden, which we find it was not, in order to embrace the Respondent's position one would have to believe that as national HR director, Little's boss, and the sole decisionmaker concerning Heidenreich's discharge, Gesualdo would not have asked Little about the results of his recently concluded investigation into the Summers complaint against Heidenreich. We find this possibility farfetched and would instead find these facts to warrant the Board's traditional imputation of Little's knowledge concerning Heidenreich's protected concerted activity to Gesualdo, particularly since the Respondent has not shown a basis for negating such imputation. See *G4S Solutions (USA), Inc.*, 364 NLRB 1327, 1330 (2016), enfd. mem. 707 Fed.Appx. 610 (11th Cir. 2017).

[24] Our colleague also takes the position that an absence of animus is shown by the Respondent not seizing on the opportunity to discipline Heidenreich for allegations against him in the Summers complaint that it was unable to substantiate. But animus is not disproven by a Respondent's unwillingness to embrace any and every possible excuse to retaliate against an outspoken employee. Nor is our colleague any more convincing in his claim that Cabrera failed to display animus against Heidenreich's protected concerted activity in her March 16 meeting. To the contrary, as explained above, a reasonable interpretation of Cabrera's meeting remarks is that she coupled her message about Heidenreich's future promotional prospects with a coercive warning that continuing to engage in protected concerted activity would be a problem.

failure to conduct a fair and full investigation into the incident causing the employee's discharge and to give the employee the opportunity to explain his action before imposing discipline is a significant factor in finding discriminatory motivation." See *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 16, 17 (2018), enfd. mem. 805 Fed.Appx. 65 (2d Cir. 2020); see also *BS&B Safety Systems, LLC,* 370 NLRB No. 90, slip op. at 2 fn. 6 (2021) ("unwillingness . . . to get at the truth" signals pretext) (quoting *Inter-Disciplinary Advantage, Inc.,* 349 NLRB 480, 509 (2007)). The Respondent did not tell Heidenreich that he was being terminated for any other reason than that he had resigned. Upon receiving information from multiple sources that Heidenreich had not resigned, Gesualdo would have done best to investigate rather than to fabricate a new reason for terminating him. See *Grand Canyon University*, 359 NLRB 1481, 1516 (2013) (inference of discriminatory motive available when employer makes up reason to terminate employee), affd. 362 NLRB 57 (2015).

We find the judge's analysis of pretext to be further evidence of animus, based on the Respondent's shifting and discredited rationalizations for the discharge. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014), enfd. mem. 621 Fed.Appx. 9 (D.C. Cir. 2015). In particular, we find pretextual the Respondent's *post hoc* claim that Heidenreich's lack of emotional intelligence was a lawful reason for discharging him, given that emotional intelligence was an intangible skill that the Respondent found key to management, but not sales (concerning which Cabrera testified that acumen could be simply shown through achieving a dollar goal). Respondent specifically admitted on brief that "[t]he skillsets important to the sales representative position [Heidenreich's current job] differed from the skillset needed to excel in the sales manager position." And Heidenreich was recognized as among the very best of the Respondent's sales work force through his selection for the Respondent's "Diamond Club" distinction.[25] Among the variety of reasons Gesualdo raised for the first time at hearing, other than Heidenreich's purported resignation, were unspecified negative comments about Heidenreich raised by employees at the "coffee chat." Gesualdo also exaggerated Heidenreich's conduct on March 16 by claiming that he "stormed out" of Cabrera's office, which the judge discredited, as it was not corroborated in any testimony or report by Cabrera, Ayoh, or Little. Significantly, it was not mentioned in the March 16 email from Ayoh (the only person who saw Heidenreich leave Cabrera's office) memorializing the relevant events and was described merely as "Ben exited the office," in Little's account of the events (in his investigative report of the Summers complaint).

In addition to timing and pretext, we find that other circumstances surrounding Heidenreich's termination constitute additional evidence of animus. In particular, our finding that Cabrera unlawfully threatened Heidenreich with the loss of promotional opportunities if he continued his protected concerted activity adds to the likelihood that animus motivated Respondent's termination of Heidenreich. Moreover, General Manager Baker's negative (and discredited) characterization of Heidenreich's concerted activities as a cause of the toxic work environment in his February 22 email to Gesualdo lends further support to the inference that animus colored Gesualdo's refusal to allow Heidenreich to rescind his purported resignation. We further reject the Respondent's assertion that the General Counsel did not show a causal nexus between Heidenreich's discharge and his protected concerted activity.[26]

[25] Our dissenting colleague attempts to find reasons for the Respondent's sudden and unexplained termination by showing a rating of "2 - Needs Improvement" (with 4 for Excellent) on Heidenreich's July 2019 performance review of Corporate Character Traits. This, however, is consistent with the Development Plan that Cintas created to groom him for a leadership position. The comment accompanying the rating indicates that the traits he needed to develop were related to leadership, and not to sales: "Ben has all the intangible to become a great leader for Cintas; however must work on a few key areas to blossom into the leader we all know he can truly become . . . Great job on leading from the front in results, let's work on flexing the other leadership traits: executive acumen, emotional intelligence, visionary and motivation leadership." Accordingly, the rating helps explain the Respondent's failure to promote Heidenreich into a managerial position, but not its decision to suddenly terminate one of its most productive sales representatives.

[26] Member Wilcox notes her agreement with Chairman McFerran's concurring opinion in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 10-14, wherein she found the majority's "clarification" of *Wright Line* principles was unnecessary as the causal relationship "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." Id., slip op. at 10. See, e.g., *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1 fn.1 (2022) (same).

Although neither the judge nor the parties cite this case, our dissenting colleague would find that pretext, on its own, is insufficient to establish animus under *Electrolux Home Products*, 368 NLRB No. 34 (2019). This case does not change our conclusions, as we, unlike our colleague, have found that the surrounding facts reinforce the inference of animus. Pretext does not stand alone in our analysis.

In particular, the timing at issue here is distinguishable from *Electrolux.* Heidenreich's termination came within 2 weeks after his most significant protected concerted activity at a March 4 coffee chat, a far cry from the intervening 7 months from the respondent in *Electrolux* telling that charging party to "shut up" when attempting to speak at a captive audience meeting. 368 NLRB No. 34, slip op. at 4. In addition, unlike the intervening good faith bargaining that the *Electrolux* majority found to cut against an inference of animus in that case, see id., here we have a close-in-time email among managers casting a negative light on Heidenreich's protected concerted activity, and a coercive threat made on the same day of his termination that Heidenreich should cease his

Our dissenting colleague appears to disagree with the judge's many credibility findings, especially regarding Gesualdo, which were soundly analyzed and checked against corroborating testimony and documentary evidence following the guidelines set forth in *Daikichi Sushi*, 335 NLRB at 623. He also supports his view of the case with allegations contained in the Summers complaint, which was dismissed as unsubstantiated, and GM Baker's secondhand account of Johnson's conversation with Summers, which the judge discredited in favor of Johnson's direct testimony, concluding that the fierce competition between Summers and Heidenreich was a two-way street. We find no reason to overrule any of the judge's credibility determinations; most pointedly her discrediting of Gesualdo, whose testimony, even without the benefit of demeanor, reads as evasive and internally inconsistent. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

(c) The Respondent's Wright Line defense burden

Having found that the General Counsel met her initial burden, we agree with the judge that the Respondent has not met its defense burden under *Wright Line* to prove that it would have made the decision to terminate Heidenreich's employment regardless of his protected concerted activity. The Respondent claims that it discharged Heidenreich because he resigned. No other reason or explanation was given to Heidenreich. His supervisor, Ayoh, who was the only person in management who witnessed the events after Heidenreich left Cabrera's office on March 16, did not believe that Heidenreich had resigned, understood that Heidenreich was simply upset and blowing off steam, and reported his observations to Little and Stevens along with Heidenreich's confirmation that he did not resign. Little, in turn, talked to Heidenreich, confirmed that his account was consistent with Ayoh's summary, and told as much to Gesualdo, who did nothing further to investigate the truth of the matter.

In support of its *Wright Line* defense burden, at the hearing, the Respondent primarily offered Gesualdo's testimony, which as noted above, the judge found "completely incredible and unworthy of belief." Specifically, Gesualdo gave differing accounts of whether she made the decision or whether she received VP Bunkers' approval. She also claimed for the first time at hearing that she based the decision on comments other employees had made about Heidenreich during the "coffee chats" (the same forum in which Heidenreich had engaged in protected concerted activity less than 2 weeks earlier). And the judge fully explained her skepticism of the portion of Gesualdo's testimony, embraced by our dissenting colleague, that Gesualdo decided to accept Heidenreich's "resignation" based on exaggerated accounts of his words and behavior surrounding his meeting with Cabrera. As we have already explained, we find no basis to reverse the judge's credibility findings.

As the judge found that Heidenreich did not resign, the Respondent's initial justification, followed by shifting and discredited reasons, was false. Where an employer's reasons "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." See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 5 (2021); see also *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.,* 255 NLRB 722 (1981)). Thus, we need not determine whether the Respondent has "show[n] that it would have taken the same action even in the absence of the employee's protected activity." *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

AMENDED REMEDY

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), in addition to the remedies provided by the judge, the Respondent shall also compensate Benjamin Heidenreich for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of his employment, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms 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).

ORDER

The National Labor Relations Board orders that the Respondent, Cintas Corporation No. 2, Phoenix, Arizona, its officers, agents, successors, assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of promotional opportunities if they engage in protected concerted activities.

(b) Discharging employees because they engage in protected concerted activities.

(c) 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.

protected concerted activities. Even if, as our colleague opines, it is possible that Cabrera did not intend to coerce Heidenreich, that is hardly a circumstance that cuts against the judge's finding that timing and pretext point to animus as the motivating factor for Heidenreich's termination.

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

(a) Within 14 days from the date of this Order, offer Benjamin Heidenreich full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Benjamin Heidenreich whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Benjamin Heidenreich for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, 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 year(s).

(d) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Benjamin Heidenreich's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Benjamin Heidenreich, and, within 3 days thereafter, notify Benjamin Heidenreich in writing that this has been done and that the discharge will not be used against him in any way.

(f) 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 due under the terms of this Order.

(g) Post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, 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, 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. If 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 March 16, 2020.[27]

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 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. December 16, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

Benjamin Heidenreich worked as a sales representative out of the Respondent's Phoenix office. By all accounts, he was an excellent salesman. By other accounts, however, Heidenreich's temperament and interpersonal skills—termed emotional intelligence by the Respondent—left much to be desired. One coworker referred to him as a tyrant. Another described him as a bully and filed an internal complaint against him alleging disparagement

[27] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

and misconduct. Heidenreich's shortcomings were evident enough to management that his first performance evaluation—after less than a year in the job—stated that he needed to improve, among other things, his self-discipline, control of emotional reactions and decision-making. In connection with the performance review, Heidenreich's boss told him that he needed to improve his emotional intelligence. Soon thereafter, Heidenreich was placed on a development plan aimed at improving these skills.

When a vacancy was posted a few months later for the sales manager job, Heidenreich applied but was rejected for the promotion based on his lack of emotional intelligence.[1] When Heidenreich was given the news, he reacted completely outside the bounds of basic professionalism but in a manner fully in keeping with his interpersonal shortcomings. Showing no control over his emotions, he angrily spouted off that he would be looking for another job and would refuse to work for whatever manager the Respondent eventually hired. A short time later, he told his supervisor, "I am fucking done with this, man," asked about turning in his company-issued equipment, and said he would be resigning. Heidenreich later tried to say he had not meant to resign, but the Respondent chose to accept his statements as a resignation and terminated him.

Despite Heidenreich's conduct, my colleagues find that the Respondent violated Section 8(a)(1) of the Act by accepting his resignation or refusing to allow him to rescind it. To find such a violation, they point to isolated instances of Heidenreich's prior protected concerted activity, including a statement he made at a meeting arranged for the express purpose of encouraging employees to raise workplace concerns.[2] The majority also relies on a single, offhand comment made by a management employee to Heidenreich when he was told he did not get the promotion to the sales manager position, a comment my colleagues find to be an unlawful threat and a separate violation. I disagree. The statement my colleagues find unlawful cannot reasonably be construed as a threat, and the General Counsel failed to prove that Heidenreich's protected concerted activity was a motivating factor in the Respondent's decision to terminate his employment. Accordingly, I respectfully dissent.

Facts

The Respondent provides businesses a variety of goods and services, including by selling, renting, and maintaining first aid and safety supplies out of a facility located in Phoenix, Arizona. It employs, among others at this facility, sales representatives, sales captains, and account executives, all of whom work as a team in a cluster of cubicles known as the "sales pit."

In April 2018, Benjamin Heidenreich began working for the Respondent out of the Phoenix office as a sales representative. He quickly became one of the top sales representatives in the office, and he was made a sales captain in December 2018. Heidenreich reported to Sales Manager Sylvestre Ayoh. Ayoh reported to the western region director of the first aid and safety division. Sometime in 2019, Irene Cabrera became the western region director. Cabrera took a "hands on" approach to management, whereas her predecessor had taken a "hands off" approach and had deferred to Ayoh. She could also be abrupt and abrasive. Because of her management style, Cabrera was regarded as a source of tension in the workplace. Beginning in the fall of 2019, a few employees, including Heidenreich, occasionally met after work at a cigar club. During these outings, the employees discussed work-related matters, including their views regarding Cabrera's negative impact on the workplace. These informal gatherings continued, with greater frequency, in the first 2 months of 2020. There is no evidence that the Respondent was aware of what the employees discussed at the cigar club.

Although the Respondent recognized Heidenreich's excellent skills as a salesman, it also saw his serious shortcomings within the first year of his employment. In Heidenreich's initial performance appraisal on July 31, 2019, Ayoh observed that Heidenreich needed to improve his self-discipline, control his emotional reactions, and keep personal biases out of his decision-making process. Additionally, the Respondent wanted Heidenreich to improve his emotional intelligence, executive acumen, and motivational leadership skills. Cabrera told Heidenreich that to obtain a management position, he had to make these improvements. To that end, Heidenreich was placed on a Development Plan in September 2019. The purpose of the Plan was to help Heidenreich improve these skills as well as better understand how his behavior impacted those around him. However, the Respondent determined that he was not making sufficient progress under the Plan.

Heidenreich also lacked any awareness of his shortcomings. While he described himself as having a "straightforward conversation style," others used less charitable terms. Cabrera told him that others said he was unapproachable and egotistical. Heidenreich's fellow sales captain, Lindsay Summers, characterized him as a bully.

[1] The judge dismissed allegations that the Respondent violated Sec. 8(a)(1) of Act by failing to promote Heidenreich to sales manager, by telling him that he did not have the right "brand" for leadership, and by issuing him a disciplinary coaching on March 16, 2020. There are no exceptions to these dismissals. Indeed, the judge granted a directed verdict on the disciplinary-coaching allegation, observing that the General Counsel had not introduced any supporting evidence.

[2] The majority also relies on advice Heidenreich offered to two coworkers, Chad Harrison and Greg Salisbury. As explained below, I disagree that this advice constituted concerted activity. See fn. 7, infra.

Sales representative Kevin Johnson referred to him as a tyrant. On his 2019 appraisal, for the category of "Corporate Character Traits," Ayoh rated him "2—needs improvement." Heidenreich rated himself "4—excellent." This revealed his lack of self-awareness, as did the following incident. At Ayoh's first meeting with Cabrera as his new boss, Heidenreich interrupted the meeting and demanded Ayoh's immediate attention. When Ayoh pointed out that he was speaking with his (new) supervisor, Heidenreich responded, "But I need you now."

In January 2020,[3] Ayoh announced that he was transferring to Dallas. In February, Heidenreich applied for the position Ayoh was vacating.[4] Lindsay Summers also applied for the position. The competition between Heidenreich and Summers was intense. Indeed, it became so disruptive that the Respondent had them come into the office on separate days. Later that month, Kevin Johnson told Summers that the competition between Heidenreich and Summers was toxic and that Heidenreich was behaving like a tyrant in competing for the job and was doing things in a sneaky way to come out on top. Johnson also spoke with Brad Baker, the general manager of the Phoenix office, about his conversation with Summers, and Baker emailed Regional Human Resources Director Mark Little and National Human Resources Director Frances Gesualdo to tell them that Johnson had expressed serious concerns about Heidenreich, including that Heidenreich was a "tyrant" and a "terrible person" and was "orchestrating his way to a promotion."

On February 23, Summers withdrew her application for the sales manager position and filed an internal complaint against Heidenreich. She alleged that Heidenreich was saying negative things about her to other team members and was "manipulating incidents" to make her look bad. As part of the Respondent's investigation into the allegations, Little and human resources representative Kristen Stevens met with Johnson, who repeated what he had told Summers.

On February 26, Little, Cabrera, and Baker interviewed Heidenreich (separately) for the sales manager position. Afterwards, they agreed that Heidenreich was not ready for the position and was not the best candidate. Cabrera testified that even prior to her interview, she believed that Heidenreich lacked the emotional intelligence for the position. She also testified that Heidenreich was still on a development plan to improve his interpersonal and communication skills.

Following Heidenreich's interview for the sales manager position, Little and Stevens met with Heidenreich regarding Summers' complaint. Heidenreich admitted that he and Summers were professionally competitive, but he denied ever disparaging her. Little's notes of the meeting show that when he was asked about a certain conversation, Heidenreich answered that "when they [i.e., employees] are out they do not talk about work." This was untrue: when employees, including Heidenreich, met at the cigar club, they did talk about work.[5] Little noted that Heidenreich's legs were shaking and that he was "extremely nervous" during the entire meeting.

After that meeting, Heidenreich learned from Ayoh that Cabrera had sought out other applicants for the sales manager position. This confirmed to Heidenreich that the Respondent would not select him. Cabrera testified that because of Heidenreich's deficient emotional intelligence, she encouraged others to apply for the position.

A few days later, Heidenreich called Cabrera's supervisor, First Aid Sales Vice President Jim Bunkers. Heidenreich told Bunkers that he believed Cabrera had no intention of promoting him, and he asked Bunkers for advice. Bunkers, who was aware of the ongoing investigation of Summers' complaint, suggested that Heidenreich reach out to Cabrera and offer his side of the story. When Heidenreich did so, Cabrera abruptly cut him off, saying that she was not interested in talking to him about it.

At least twice a year, the Respondent's human resources personnel conduct "coffee chats" with employees to promote frank discussion about employees' concerns. During a March 4 coffee chat at which Gesualdo and Little were present, Heidenreich brought up his concerns about Cabrera's management style. Another employee at the coffee chat confirmed that everyone shared Heidenreich's concerns. Thus, Heidenreich engaged in protected concerted activity at the March 4 coffee chat by bringing a group complaint to the attention of management.[6] Gesualdo took notes during the coffee chat, although there is no evidence that she reacted to any of the comments made during the meeting.

Around the same time, Little determined that Summers' allegations about Heidenreich could not be substantiated. In his investigative report, he concluded that the information he had obtained was "mostly hearsay of

[3] All subsequent dates refer to 2020 unless otherwise indicated.

[4] Although Ayoh was transferring to Dallas, he remained in Phoenix and as Heidenreich's immediate supervisor during the course of the relevant events.

[5] The judge, in assessing Heidenreich's credibility, did not take into consideration that Heidenreich lied during his meeting with Little and Stevens.

[6] *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

unprofessional behavior" by Heidenreich. Little did not conclude, however, that Summers' complaint was meritless. To the contrary, he recommended that Heidenreich "be advised that his behavior is not of a nature conducive to the Cintas culture." Little briefed Cabrera and Gesualdo about this result.

On March 16, Cabrera informed Heidenreich that he had been cleared of misconduct relating to Summers' complaint. Cabrera then told Heidenreich that he had been making positive strides in the past 2 months and that he had reason to be hopeful about his prospects for promotion in the future. However, because he did not presently have "brand for management or leadership," he would not get the sales manager position now. By this, Cabrera meant that Heidenreich needed to have excellent emotional intelligence and interpersonal skills to be a sales manager, and he still had work to do in that regard. Heidenreich disagreed with Cabrera's assessment and stated that he knew he would not get the promotion because "[a]ll the captains talk. All the sales managers talk. People at the organization talk." Cabrera responded, "That's part of your problem. You talk to too many people." Heidenreich stated that he would be looking for other opportunities both within Cintas and possibly outside and that he "d[id] not intend to work underneath whoever you bring in." Immediately after Heidenreich left her office, Cabrera emailed Little and Bunkers to document what Heidenreich had just said to her.

After the meeting, Heidenreich, visibly upset, returned to his desk. Ayoh asked him what was wrong; Heidenreich answered that he was not selected. Soon after, Heidenreich told Ayoh, "I am fucking done with this, man. Do you want my tablet now or later?" (referring to his Cintas-supplied electronic device). "I am done," he repeated to Ayoh, adding: "You will have my resignation." Ayoh told Heidenreich not to do anything rash and to take the afternoon off. Heidenreich left the office and went home. Later that afternoon, Little telephoned Heidenreich and asked him if he had resigned. Heidenreich told Little he had not resigned. Little responded that there were conflicting accounts and that he needed to investigate the matter. Subsequently, Little told Gesualdo what had happened, including Heidenreich's denial that he had resigned. Gesualdo, who was the sole decisionmaker on the matter, told Little to accept Heidenreich's resignation effective immediately, and Little did so.

Discussion

1. The Respondent did not unlawfully threaten Heidenreich with the loss of future promotional opportunities

When Cabrera informed Heidenreich that he would not get the promotion because he lacked the necessary emotional intelligence, Heidenreich told Cabrera that he knew he would not get the promotion because "[a]ll the captains talk. All the sales managers talk. People at the organization talk." Cabrera responded, "That's part of your problem—you talk to too many people." My colleagues find, in agreement with the judge, that by this statement, the Respondent violated Section 8(a)(1) by threatening Heidenreich with the loss of future promotional opportunities because he engaged in protected concerted activity.

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Section 7 gives 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," and it also gives them the right "to refrain from any or all such activities." In analyzing whether a statement constitutes an unlawful threat under Section 8(a)(1), the Board must determine whether the statement "had a reasonable tendency, under all the circumstances, to interfere with, restrain, or coerce employees in the exercise of their Sec[tion] 7 rights in violation of Sec[tion] 8(a)(1)." *Roemer Industries*, 367 NLRB 133, 133 fn. 3 (2019); see also *KSM Industries*, 336 NLRB 133, 133 (2001) ("[T]he standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. . . . The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement . . . .").

When viewed under the totality of the circumstances, Cabrera's statement did not have the requisite reasonable tendency. It cannot reasonably be viewed as a euphemism for telling Heidenreich that he would not be promoted in the future because he had raised employees' concerns about their terms and conditions of employment. For one thing, the statement was far too ambiguous to suggest that it referred to protected concerted activity. For another, there is no evidence that Cabrera knew what Heidenreich had said at the March 4 coffee chat.[7] The more reasonable

[7] My colleagues suggest an inconsistency between my saying there is no evidence that Cabrera knew what Heidenreich had said at the March 4 coffee chat he attended, and my reliance on Heidenreich's testimony that Cabrera told him that it had come up in coffee chats that Heidenreich was unapproachable and egotistical. There is no inconsistency. As the judge found, there were multiple coffee chats. See JD sec. II,B,3:

interpretation of Cabrera's remark is that she was reacting to Heidenreich sharing with her all the people he talked with about his application to be promoted to sales manager. Heidenreich testified that immediately before Cabrera made her alleged unlawful statement, he said to her: "All the captains talk. All the sales managers talk. People at the organization talk. I knew you had—I told her I knew you had no intentions of promoting me." (Tr. 84:20-85:3.) Cabrera's response strikes me as a perfectly natural reaction to Heidenreich's revelation that he had been indulging in gossip about her anticipated decision behind her back.

Moreover, Heidenreich—in what can only be described as yet another example of his complete lack of emotional intelligence—had gone over Cabrera's head to her boss, Vice President of First Aid Sales Bunkers, to discuss his promotion application while it was pending before Cabrera. Bunkers advised Heidenreich to reach out to Cabrera to explain his side of the Summers situation, but when he did so, Cabrera abruptly cut him off. A reasonable employee in Heidenreich's position would have guessed that Bunkers had told Cabrera about the call and would have understood that going over his boss's head would surely qualify as "talk[ing] to too many people" in her book.

Additionally or alternatively, a reasonable employee in Heidenreich's position would have understood Cabrera's remark as a reference to the subject that opened their meeting: Summers' unsubstantiated but also unrefuted allegation that Heidenreich was saying negative things about Summers to other members of the sales team—i.e., talking to too many people—in order to undermine her candidacy for the sales manager position and "come out on top," as Johnson put it. At the very least, Cabrera, having been briefed by Little on the results of his investigation, knew Little had concluded that Heidenreich's behavior in relation to Summers was "not of a nature conducive to the Cintas culture." And this, of course, was just the latest manifestation of Heidenreich's longstanding problem with what Cabrera and Ayoh called "emotional intelligence," but what most people would simply call unkindness—or worse, bullying, as Summers called it—which had created friction and tension in the sales office, and which tied directly to the main reason Cabrera was meeting with Heidenreich: to tell him that he was not getting promoted to sales manager. By reaching beyond the surrounding circumstances of Cabrera's remark and linking it to the March 4 coffee chat, the majority prefers the remote and the speculative over the immediate and obvious.[8]

The so-called threat, as found by the judge and my colleagues, is that the Respondent would deny Heidenreich *future* promotions because he had engaged in protected concerted activity. But such a conclusion is directly contrary to the judge's other finding that, at the March 16 meeting, "Cabrera was trying to give Heidenreich positive hope on future promotions, conveying to Heidenreich that he needed to improve his interpersonal skills (or 'brand') in order to promote into management." Yet the judge and the majority conclude that Cabrera uttered a threat that conveyed the complete opposite message about his future promotional opportunities: that he had none. That does not make sense.

Moreover, nothing in Cabrera's statement can reasonably be interpreted as indicating that Heidenreich's protected concerted activity—as opposed to his continuing emotional intelligence deficiencies—would stand in the way of Heidenreich obtaining a promotion. As the judge emphasized elsewhere in her decision, Cabrera credibly testified that Heidenreich lacked the necessary emotional intelligence to obtain a promotion and had not made the necessary progress under the Development Plan. Further, in dismissing the allegation that the Respondent failed to promote Heidenreich because he engaged in protected concerted activity, the judge found that ample record evidence established that the Respondent lawfully denied Heidenreich the promotion to the sales manager position Ayoh was vacating because he lacked the necessary

"Although Heidenreich, Ritter and Johnson thought they would be in the same coffee chat group, the team was separated into more than one coffee chat." It is hardly likely that Heidenreich's coworkers would say he was unapproachable and egotistical in the coffee chat Heidenreich attended.

The Respondent has not excepted to the judge's finding that Heidenreich engaged in protected concerted activity by, among other things, raising employees' shared concerns about Cabrera's impact on the workplace during the March 4 coffee chat. There are also no exceptions to the judge's finding that Heidenreich engaged in protected concerted activity by advising two employees, Chad Harrison and Greg Salisbury, to raise their individual workplace concerns with management. However, I disagree that this constitutes concerted activity. See *Daly Park Nursing Home*, 287 NLRB 710, 710–711 (1987) ("'Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity . . . .'") (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

[8] In finding Cabrera's statement unlawful, my colleagues focus exclusively on the remote possibility that Heidenreich might have linked it to his having coached other employees and to what he had said about Cabrera at a March 4 coffee chat. Heidenreich's coaching of other employees was not concerted activity—see supra fn. 7—and by focusing on the possibility that Heidenreich might have speculated a linkage to what he had said about Cabrera on March 4, while disregarding other surrounding circumstances, the majority fails to consider the totality of the circumstances as the applicable standard requires. See *Roemer Industries*, supra; *KSM Industries*, supra.

emotional intelligence.[9] It is reasonable to assume that absent Heidenreich's showing improvement in that area, the Respondent would not promote him in the future for precisely the same reason. There is no reasonable basis for inferring anything else from Cabrera's statement. In sum, I would dismiss this allegation.[10]

2. The Respondent did not unlawfully terminate Heidenreich

My colleagues also incorrectly determine that the Respondent unlawfully terminated Heidenreich by accepting his resignation or refusing to allow him to rescind it. Under *Wright Line*,[11] the General Counsel has the burden to prove that an employee's Section 7 activity was a motivating factor in the employer's adverse employment action against the employee. The General Counsel makes her initial showing by establishing that the employee engaged in union or other protected activity, the employer was aware of it, and the employer harbored animus against union or other protected activity "sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019). If the General Counsel makes the required initial showing, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

In my view, the General Counsel failed to meet her initial *Wright Line* burden with respect to Heidenreich's termination. Preliminarily, there is no dispute that Heidenreich engaged in protected concerted activity—the Respondent does not except to the judge's finding that he did—and that the Respondent was aware of Heidenreich's protected concerted activity through Gesualdo's presence at the March 4 coffee chat when Heidenreich raised group complaints about Cabrera's effect on the workplace.[12]

Beyond this point, however, the General Counsel's case unravels. Critically, the General Counsel has failed to show that the Respondent harbored animus toward Heidenreich's protected concerted activity. As explained above, Cabrera did not unlawfully threaten Heidenreich.[13] Nor is there any basis for inferring unlawful motivation based on timing, that is, the temporal proximity between the March 4 coffee chat where Heidenreich engaged in protected concerted activity and Gesualdo's March 16 decision to accept Heidenreich's resignation. The coffee chat was an open forum for employees to discuss their workplace concerns in a frank and honest manner. Indeed, the very purpose of the coffee chat was for Human Resources personnel to elicit employees' complaints about their working conditions. This undermines any suggestion

[9] The judge, in analyzing the alleged threat, stated that "Cabrera's remark meant that Heidenreich did not promote to the sales manager position because he engaged in concerted activities by talking to too many of his coworkers and raising their concerns to management." However, this statement is contradicted by the judge's unexcepted-to conclusion that the Respondent denied Heidenreich that promotion for a lawful reason, specifically, his lack of the necessary emotional intelligence.

[10] My colleagues' reliance on *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994), does nothing to advance their position that Cabrera's statement was an unlawful threat. In *Rainbow Garment Contracting*, the Board found, in relevant part, that the employer, which displayed hostility to employees' union activity, seized on their "excessive talking"—which did not actually occur—as a "euphemistic" reason for discharging them. Here, as I have described, Cabrera's statement, viewed in the totality of the circumstances, was not a "euphemism" for protected concerted activity.

[11] 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 (1983).

[12] The Respondent essentially concedes this point. I find it unnecessary to rely on any additional basis for inferring that the Respondent was aware of Heidenreich's protected concerted activity. I note, however, that my colleagues impute to Gesualdo Little's knowledge of other protected concerted activity by Heidenreich. As noted above, I disagree that this other activity was concerted. See supra fn. 7. But even if it was, this step in the majority's analysis may prove problematic, since several courts of appeals have rejected the Board's view that knowledge of protected activity may be imputed. See *Gestamp v. NLRB*, 769 F.3d 254 (4th Cir. 2014); *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685 (7th Cir. 2000); *Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94 (5th Cir. 1978); *Jim Walter Resources, Inc. v. NLRB*, 177 F.3d 961, 963 (11th Cir. 1999); *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 731-732 (9th Cir. 1969). Since the Respondent does business nationwide, it will have its pick of appellate courts in which to file a petition for review. See NLRA Sec. 10(f) (providing that an aggrieved party may obtain review in a federal court of appeals "in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides *or transacts business*, or in the United States Court of Appeals for the District of Columbia") (emphasis added).

I accept the majority's finding that Gesualdo was the sole decisionmaker responsible for directing Little to accept Heidenreich's resignation. Thus, like my colleagues, I find it unnecessary to pass on the General Counsel's exception to the judge's refusal to draw an adverse inference against the Respondent for failing to call First Aid and Safety Division Vice President Bunkers as a witness concerning his role in Gesualdo's decision.

[13] My colleagues, of course, find to the contrary, but even they do not rely on Cabrera's "you talk to too many people" remark as evidence of animus. Since their rationale for finding that statement an unfair labor practice is merely that Cabrera *could* have been referring to Heidenreich's concerted activity at his March 4 coffee chat, the most they can say is that their finding "adds to the likelihood" of animus. In my view, it does not contribute even that feather weight.

My colleagues also say that General Manager Baker's negative characterization of Heidenreich's concerted activities in his February 22 email to Gesualdo "lends further support" to an inference of animus. But the so-called concerted activities Baker mentioned in that email consisted of Heidenreich's advice to coworkers Chad Harrison and Greg Salisbury regarding what each of them could do *on his own* to address his workplace concerns. As noted, that was not concerted activity. See supra fn. 7.

that the Respondent would harbor animus against Heidenreich for raising group complaints about a workplace matter during that meeting.

Moreover, Gesualdo's decision to accept Heidenreich's resignation was much closer in time to Heidenreich's statements to Cabrera on March 16—that he would be looking for other opportunities and that he "d[id] not intend to work underneath whoever you bring in"—than to the March 4 coffee chat. Moreover, the coffee chat and Heidenreich's discharge were separated by intervening events in which the Respondent displayed a decided absence of animus. If the Respondent harbored animus toward Heidenreich's protected concerted statements at the March 4 coffee chat, it did not exhibit itself in the Respondent's decision not to discipline Heidenreich in connection with the internal complaint investigation but rather to clear him of the charges. Nor did Cabrera display animus during the March 16 meeting with Heidenreich, where, according to the judge, she conveyed to Heidenreich a positive message about his future with the Respondent.[14]

That leaves pretext as the only possible basis for inferring animus against Heidenreich's protected concerted activity. In her decision, the judge found that the "Respondent's justification for discharging Heidenreich—that he resigned—is false, and a pretext for the real reason," which she concludes was Heidenreich's prior Section 7 activity.[15] This finding is based primarily on what the judge characterized as Gesualdo's "shifting" rationales and "incredible" testimony. My colleagues agree with that finding and further find that pretext provides additional evidence of animus.

For the purpose of establishing animus, I would not find the Respondent's justifications for terminating Heidenreich pretextual, and I believe the judge's assessment of Gesualdo's testimony to find pretext is seriously flawed. This is not a case of an employer proffering reasons for termination that are false or not actually relied on. There is no dispute about what Heidenreich said and did, and the Respondent promptly reacted to those statements and that conduct by deciding—reasonably, in my view—to terminate his employment by accepting his resignation. The judge's pretext analysis focuses on irrelevant issues surrounding the resignation: whether Heidenreich actually resigned or intended to do so; whether the Respondent, particularly Gesualdo, believed he had resigned; and whether the Respondent accepted, or refused to permit Heidenreich to rescind, the statement of resignation.[16] The judge's criticism of Gesualdo's testimony relates primarily to these superfluous issues.[17] Her material findings are that Gesualdo alone made the decision to terminate Heidenreich, and that Gesualdo explained that "[w]e just made the decision" to terminate Heidenreich following his unacceptable reaction to the promotion decision. Setting aside the distraction created by the judge's focus on irrelevant resignation issues, Gesualdo's explanation of the termination decision is reasonable and aligns with all the other facts in this case.

[14] As the judge described the March 16 meeting, "[w]hile Cabrera may not have used the best terminology, and despite her abrasive tone, the totality of the evidence shows that Cabrera was trying to give Heidenreich positive hope on future promotions, conveying to Heidenreich that he needed to improve his interpersonal skills (or 'brand') in order to promote into management."

[15] The judge makes sweeping statements suggesting Heidenreich's protected concerted activity was extensive and constant. The judge says, for example, that Gesualdo terminated Heidenreich after concluding that he was a "troublemaker" who engaged in concerted activities by constantly challenging management and complaining about his and the sales team's terms and conditions of employment. In her analysis for concluding that the Respondent's rationale for discharging Heidenreich was pretextual, the judge states that "the evidence clearly establishes that Heidenreich had repeatedly engaged in concerted activities by challenging management's policies and practices when he thought them ineffective as well as raising complaints on behalf of himself and his coworkers about Cabrera, the tense working environment, and concerns about their terms/conditions of employment." Beyond the March 4 coffee chat at which Heidenreich made statements about Cabrera to management, the record does not reflect that the Respondent was aware of such extensive protected concerted activity (assuming it was such). Nor does the record demonstrate a link or nexus between Heidenreich's limited protected activity and his separation from employment. *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 8.

[16] The judge, for example, concluded that Heidenreich never resigned his employment—that he only made "angry, in the heat of the moment, statements about resigning, but had not officially resigned." The judge also concluded neither Ayoh nor Little believed Heidenreich had resigned, and accordingly she afforded little weight to Gesualdo's testimony that she believed Heidenreich had resigned. The judge also was critical of Gesualdo's failure to investigate whether Heidenreich had actually resigned. Whether Heidenreich actually resigned, or who believed or did not believe he had resigned, is simply irrelevant. There's no dispute about what Heidenreich said to Cabrera and Ayoh, and it was objectively reasonable for Gesualdo to react to Heidenreich's undisputed statements and terminate him on that basis.

[17] The judge is critical of many points in Gesualdo's testimony that might warrant giving it less weight in support of a *Wright Line* defense, but the issue here is whether an inference of animus in support of the General Counsel's *Wright Line* case may be based on pretext, and most of the judge's criticisms are inconsequential to a pretext analysis. According to the judge, Gesualdo was inconsistent in her testimony about whether she learned that Heidenreich resigned on March 16 or March 17, and whether and when she sought Bunkers' approval. The judge criticizes Gesualdo's testimony that she heard that Heidenreich told his manager, "[D]o you want my laptop now or later and do you want my resignation now or later," Tr. at 309-310, because there was no testimonial or documentary evidence that Heidenreich told anyone "do you want my *resignation* now or later." In talking about reasons for the decision to accept his resignation, Gesualdo testified about some of Heidenreich's prior interpersonal shortcomings, noting the prior complaints made by his coworkers. The judge faulted Gesualdo for not recalling the specifics of the complaints, although there obviously is no question that there had been allegations made against Heidenreich.

Even assuming the judge's pretext finding is sound and the Respondent did not act on Heidenreich's resignation statements to terminate him, I would find that pretext, by itself, furnishes an insufficient basis for inferring that the Respondent, in accepting Heidenreich's resignation, acted with an unlawful motive. The Board "may infer from the pretextual nature of an employer's proffered justification that the employer acted out of . . . animus, '*at least where . . . the surrounding facts tend to reinforce that inference*.'" *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (emphasis in *Electrolux*)). Here, the surrounding facts do not tend to reinforce an inference that the Respondent acted out of animus toward Heidenreich's protected concerted activity.

If anything, the surrounding facts tend to support an inference that the Respondent accepted Heidenreich's resignation because, despite his value to the business as a salesman, Heidenreich's well-documented and unabated shortcomings made him an undesirable employee. His lack of emotional intelligence contributed significantly to creating a toxic work environment.[18] He co-created so much conflict with Summers that the Respondent took the extraordinary step of ensuring they would not be in the office at the same time. And while Heidenreich was not disciplined for misconduct in relation to Summers' complaint, this was because Little was unable to corroborate her account, not because the evidence established that her complaint was without merit. To the contrary, what did come to light tended to support Summers' account. When Little and Stevens interviewed Johnson in the course of the Summers investigation, Johnson reiterated what he had previously said to General Manager Baker—that Heidenreich was a "tyrant" and was "doing things in a sneaky way to ensure he gets on top."[19] In addition to everything else, there was Heidenreich's utter lack of self-awareness.

As a final matter, we have Heidenreich's declaration to Cabrera—which she reported to other managers immediately after her meeting with Heidenreich ended—that he would not work under "whoever you bring in" and would be looking for another position. Based on these statements, the Respondent was entitled to believe that Heidenreich no longer wished to work for Cintas, at least not in the Phoenix office, and that what he said to Ayoh—that he was "fucking done with this . . . . and you will have my resignation"—was a more reliable indication of his sentiments than his subsequent disavowals, which did *not* include any retraction of what he said to Cabrera.

In sum, neither timing nor Cabrera's lawful "you talk to too many people" statement supports a finding of animus, and nothing in the surrounding facts so much as hints at evidence of unlawful motive. Thus pretext, standing alone, is not a sufficient basis for finding that animus against protected concerted activity was a motivating factor in the Respondent's decision to accept Heidenreich's resignation. The General Counsel failed to sustain her initial *Wright Line* burden, and the burden of proof never shifted to the Respondent to establish a *Wright Line* defense.

Conclusion

The majority's decision today is divorced from reality. An employer with concerns about an employee's temperament and interpersonal skills—concerns sufficient to have raised them with the employee and to withhold a management promotion because of them—should be able to terminate that employee when, displaying these very shortcomings, he becomes unhinged in response to a disappointing professional development. That's what happened here. But my colleagues declare Heidenreich's termination "sudden and unexplained," pretending there was no reason for the Respondent to terminate him after his childish outbursts because he was an exemplary salesperson, and his lack of emotional intelligence (just exhibited in spades) was only a concern for a future management position—despite the fact that he had just declared he would not work under whoever was selected for the sales manager position. Unfortunately, in the real world, employers sometimes must make the difficult decision to terminate a high-performing employee who behaves unacceptably. Unwilling to see this case for what it is, my colleagues find pretext by focusing myopically on whether Heidenreich did or did not resign, and they say the Respondent should have investigated whether it truly was a resignation. They miss the point entirely. There is no question why Heidenreich was terminated, and no employer should be forced to reinstate an individual who behaves like Heidenreich behaved.

The Board is charged with the important responsibility of protecting the exercise by employees of their rights

[18] My colleagues find the Respondent's reliance on Heidenreich's lack of emotional intelligence to be pretextual because the Respondent "admi[tted]" in its exceptions brief that the emotional intelligence needed for a sales representative position differed from the skillset needed to excel in a management position. The majority places too much weight on this statement. It cannot reasonably be interpreted as suggesting that Heidenreich's lack of emotional intelligence was not adversely affecting the work environment. Moreover, we know it was adversely affecting his performance as a sales representative: his rating of "2—needs improvement" on "corporate character traits" evidences that it was.

[19] After Little got off the call, Johnson told Stevens that he wished he had never said anything because he was afraid Heidenreich would retaliate against him for doing so. He said he was so nervous that he considered giving notice. This further confirms that Heidenreich was, indeed, a tyrant in the workplace.

under Section 7. We should use our resources wisely to ensure those rights are protected. But we should not allow our zeal to enforce the Act to blind us to the obvious and extend the Act's protection to unacceptable behavior. I am afraid that is what my colleagues have done today. Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 16, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

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.

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 benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with the loss of promotional opportunities if you engage in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL make Benjamin Heidenreich whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Benjamin Heidenreich for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, 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 year(s).

WE WILL file the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Benjamin Heidenreich's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Benjamin Heidenreich, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CINTAS CORPORATION NO. 2

The Board's decision can be found at www.nlrb.gov/case/28-CA-258167 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.

David Reeves, Esq., for the General Counsel.
Jeffrey Toppel, Esq. (Jackson Lewis, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

LISA D. ROSS, Administrative Law Judge. On March 18, 2020, Benjamin Heidenreich (Heidenreich or the Charging Party) filed an unfair labor practice (ULP) charge against Cintas Corporation No. 2 (Respondent or Cintas). The charge was amended on July 6, 2020. On July 17, 2020, the National Labor Relations Board's (NLRB or Board) Regional Director for

Region 28 issued the instant complaint and notice of hearing.[1]

The complaint alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) when, on March 16, 2020: (1) Respondent issued a disciplinary coaching to Heidenreich, (2) Respondent's First Aid and Safety Division Western Region Director Irene Cabrera (Cabrera) failed to promote Heidenreich to sales manager, (3) Cabrera threatened Heidenreich with the loss of promotional opportunities when she told him that his protected concerted activities adversely affected Respondent's "brand," (4) Cabrera threatened Heidenreich with the loss of promotional opportunities when she told him that his problem was that he engaged in concerted activities, and (5) Respondent accepted/refused to rescind Heidenreich's statement of resignation which effectively terminated Heidenreich.[2]

Respondent filed its answer, denying all material allegations and setting forth multiple affirmative defenses to the complaint. On January 15, 2021, in order to effectively manage the workload among regions, the Board's General Counsel transferred this case from Region 28 to Region 20.

Because of the continuing risks associated with the COVID-19 coronavirus pandemic, this case was tried via Zoom for Government videoconferencing from May 3 to May 5, 2021. Counsels for the General Counsel and Respondent presented witness testimony along with documentary evidence.

After the close of counsel for the General Counsel's case, Respondent moved for a directed verdict on the entire complaint, arguing that counsel failed to prove a *prima facie* case on any of the complaint allegations. Counsel for the General Counsel opposed said motion. After reviewing the evidence and the parties' arguments on the record, I denied Respondent's motion as to allegations 2 through 5 but granted a directed verdict on allegation 1, because counsel for the General Counsel presented absolutely no testimonial or documentary evidence to prove this allegation. Accordingly, I hereby dismiss this allegation and will not address it in this Decision.

After the trial, counsel timely filed extensive post-hearing briefs, which I have read and carefully considered. Based upon the entire record, including the testimony of the witnesses, my observation of their demeanor, and the parties' briefs, I conclude that Respondent did not violate the Act when it: failed to promote Charging Party to sales manager (allegation 2), and threatened Charging Party with the loss of promotional opportunities by telling him that his protected concerted activities adversely affected Respondent's "brand" (allegation 3).[3]

However, I conclude that Respondent violated the Act when it: threatened Heidenreich with the loss of promotional opportunities by telling him his problem was he engaged in concerted activities (allegation 4) and accepted/refused to rescind Heidenreich's statement of "resignation" which effectively terminated his employment (allegation 5).

FINDINGS OF FACT[4]

I. JURISDICTION

Cintas has been a corporation with an office and place of business in Phoenix, Arizona. Respondent sells, maintains, and rents first aid and safety supplies and services.

It is undisputed that, during the 12-month period ending July 6, 2020, Respondent sold and shipped from its Phoenix facility goods valued in excess of $50,000 directly to points outside of the state of Arizona. Accordingly, I find that Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also undisputed, and I find, that the following individuals have been supervisors of Respondent as defined in Section 2(11) of the Act: Sales Manager Sylvestre Ayoh (Ayoh), Phoenix General Manager (GM) Brad Baker (Baker), First Aid and Safety Division Vice President Jim Bunkers (Bunkers), First Aid and Safety Division Western Region Director Cabrera, First Aid and Safety Division President Mark Carter (Carter), National Human Resources Director Frances Gesualdo (Gesualdo), Regional Human Resources Director Mark Little (Little), and Human Resources Representative Kristen Stevens (Stevens). I further find that the above listed individuals are agents of Respondent as defined in Section 2(13) of the Act.

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[1] GC Exh. 1(e). Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for the Joint Exhibits, "GC Exh." for the General Counsel's exhibits, "R Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R Br." for Respondent's brief.

[2] The Regional Director withdrew complaint allegations that: Respondent created an impression of surveillance among employees by telling them that management discussed employee interviews with other employees (GC Exh. 1(e), ¶ 4(a)(1)); Respondent's Regional Human Resources Director Mark Little threatened employees with reprisals by telling employees that their protected concerted activities would be the subject of an investigation (Id., at ¶ 4(a)(2)); Cabrera threatened employees with unspecified reprisals when she told employees that they were egotistical and unapproachable because they engaged in concerted activities (Id. at ¶ 4(b)(3)); between February 26 and March 16, 2020, Respondent failed to consider Heidenreich for promotion to a sales manager position (Id. at ¶ 5(c)); and Respondent willfully destroyed Heidenreich's personal belongings (Id. at ¶ 5(f)). See also Order Withdrawing Portions of Complaint and Notice of Hearing and Approving Partial Withdrawal of Charge: Order Rescheduling Hearing dated April 1, 2021. These allegations will not be addressed in this Decision.

[3] Respondent argues that this complaint allegation should be dismissed because counsel for the General Counsel presented no evidence at trial to prove this contention. Specifically, par. 4(b)(1) of the complaint alleges that Charging Party was threatened with the loss of promotional opportunities when Cabrera told Heidenreich his protected concerted activities adversely affected *Respondent's* "brand." See GC Exh. 1(e).

However, at trial, Heidenreich testified that Cabrera threatened him with the loss of promotional opportunities when she told him *he* (not Respondent) "didn't have the right brand" for leadership/management. See Tr. at 84. Two different allegations.

In his Brief, counsel for the General Counsel essentially concedes this error (see GC Br. at 6, sec. C—"CP Not Selected for Sales Manager: Not the Right Brand and Talked to Too Many People," and GC Br. at 27, Section B.3(b)—"Cabrera Told CP He Did Not Get Promotion Because of *his* Brand." (emphasis added).

In light of the error, this Decision will find the facts and ultimately determine that Respondent did not violate Sec. 8(a)(1) of the Act when Respondent, by Cabrera, threatened Charging Party with the loss of promotional opportunities when she told him that he did not promote because of *his* brand.

[4] Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

1. Respondent's Phoenix First Aid Sales Office

Heidenreich worked for Respondent as a sales representative in its First Aid and Sales division. Heidenreich sold first aid and safety equipment to businesses in Phoenix, Tempe and Mesa, Arizona.

First Aid/Safety Sales Manager Ayoh was Heidenreich's immediate supervisor. As sales manager, Ayoh was responsible for hiring, training, developing and supervising a team of sales representatives, sales captains and account executives. They all worked as the sales team in a cluster of small cubicles in an area known as the "sales pit."

In addition to the sales team, there is also a service team in the Phoenix Office. Service representatives managed a client account after the sales representatives sold to the client. Both the sales and service representatives manage the client account for the first seven months, and as such, they must work cooperatively with one another in order to properly service an account.[5]

Cabrera was Ayoh's immediate supervisor who joined the First Aid/Safety Division as the Western Region Sales Director. Cabrera reported to First Aid Division Vice President Bunkers who was located elsewhere. Western First Aid Division General Manager Brad Baker worked out of the Phoenix office, and he oversaw the service employees, service managers, and warehouse employees.

It is undisputed that, while Heidenreich was an aggressive, "go-getter" sales representative, he was also known to challenge the status quo with his coworkers and upper management. Heidenreich had an "it-is-what-it-is," straightforward, no-nonsense attitude and many service and sales representatives were put off by his tone.[6]

Moreover, Heidenreich often challenged management's directives and pushed back when those instructions appeared counterproductive to him.[7] As will be discussed below, Heidenreich's attitude did not bode well for him with upper management.

2. Charging Party's performance

Heidenreich began working for Respondent in April 2018, and it is undisputed that Heidenreich quickly became one of Respondent's best sales representatives. He rose to sales captain in December 2018, where he helped train and mentor new sales employees, was considered the unofficial leader in the sales department and was being groomed for future promotion into management.

Heidenreich received a base pay plus commission and bonuses depending on how much he sold. He was in the top 5 percent in dollar amount of new sales made for all sales representatives within Cintas and became a member of Respondent's president's club. Heidenreich ultimately achieved the top 1 percent of sales performance and was selected for the Diamond club – the highest sales level within Cintas.

However, despite Heidenreich' sales success, it is undisputed that he had certain performance issues that needed to be addressed before he could promote into management. Specifically, on July 31, 2019, Ayoh issued a FY 2019 Performance Review to Heidenreich where Ayoh rated Heidenreich as "good" (excellent was the highest rating). Although Ayoh noted that Heidenreich was, "one of [his] top sales reps," Heidenreich needed improvement in the "Professional" category, which meant he need to improve his self-discipline, control his emotional reactions and keep personal biases out of his decision-making process.[8]

In addition, Ayoh explained that Heidenreich needed to work on his executive acumen, emotional intelligence, and his visionary and motivational leadership.[9] Ayoh noted that, while Heidenreich was a passionate and successful sales representative, his passion was sometimes misperceived by co-workers as being "negative." By improving on these skills, Ayoh believed Heidenreich would have all the necessary tools to become a future leader within Cintas.[10]

It is also undisputed that Heidenreich was placed on a Development Plan (Plan) in September 2019 to help improve his emotional intelligence, executive acumen and professionalism.[11] Cabrera developed the plan with feedback from Ayoh after hearing and observing Heidenreich's conduct. The purpose of the Plan was to help Heidenreich better understand how his work and behavior impacted those around him. Thus, Heidenreich needed to improve his executive acumen, management of change, and positive discontent skills.[12] In September 2019, neither Ayoh nor Cabrera thought Heidenreich was ready for management.

3. Respondent's work environment

It is undisputed that the work environment became extremely tense upon Cabrera's arrival. Prior to Cabrera, the former Director took a more "hands-off" management approach, deferring to Ayoh to handle the day-to-day operations in the sales pit. The former director also served as a "buffer" between employees and upper management.[13]

However, Cabrera took more of a "hands-on" approach in that she came into the sales office and micromanaged everything. Cabrera also took on Ayoh's duties, instructing the sales team on tasks that they typically received instruction from Ayoh.[14] Cabrera appeared very rigid, abrupt and matter of fact in her communication style, which I observed in her testimony during the hearing.

Cabrera also lacked empathy or understanding toward employee's personal situations. Heidenreich recalled an occasion where Sales Representative Kim Baker told him that Cabrera often inserted herself when staff wanted to leave the office to take care of their kids. Baker often felt like she could not request leave from Cabrera and/or was being penalized by Cabrera for having

[5] Tr. at 370–372.
[6] Tr. at 152.
[7] Id.
[8] Tr. at 395–401, R. Exh. 1, at 10.
[9] Id.
[10] Tr. at 400–401.
[11] R. Exh. 2.
[12] Tr. at 403–405, 449–453; see also R. Exh. 2.
[13] Tr. at 60–61.
[14] Id.

to do things out of the office.[15]

Cabrera seemed to know everything that was going on in the sales office so employees suspected someone was "snitching" to her. Heidenreich testified that employees had to be careful about what was said because employees never knew if someone would take something another employee said back to Cabrera. According to Heidenreich, working in the office felt like "you were walking on eggshells."[16] I found Heidenreich's uncontroverted testimony credible as it was corroborated by Ritter and Harrison.[17]

Ritter confirmed that Cabrera was very intimidating to be around. When Cabrera walked into the office, "everyone stopped talking" and employees felt "like [they were] walking on eggshells."[18] I found Ritter's uncontroverted testimony credible on this point.

Harrison also agreed that the work environment was tense and that nepotism ran rampant in the sales office. In explaining the nepotism, Harrison testified that the company favored those employees who either knew or were related to someone in upper management or came through Cintas' training program.[19] According to Harrison, he wanted to promote but never felt supported in his position and accused Sales Captain Lindsay Summers (Summers) and Service Manager Kevin Ross (Ross), Harrison's supervisor, of preventing him from promotional opportunities.[20]

Summers was Harrison's assigned sales representative. Ross was Summers' husband. As such, Harrison explained that Ross and Summers actively prevented Harrison from getting numerous client referrals. Without client referrals, Harrison was blocked from earning bonuses and commissions and could not promote within Cintas. With Harrison remaining as Summers' service representative, Summers could continue to work Harrison's territory with him.[21]

Harrison told Heidenreich about his concerns and that he wanted to resign his employment. Although Heidenreich tried to convince him to stay with Respondent, Harrison ultimately resigned. Heidenreich was disappointed to see Harrison leave but instructed Harrison to be truthful to management about why he was resigning.[22]

I found Harrison's uncontroverted testimony credible on this point. Specifically, Harrison was clear, articulate and straightforward in his testimony, and as a former employee of Respondent, Harrison was free to speak truthfully.

Overall, I find that a tense work environment existed in the Phoenix sales office. On the one hand, I find that some sales pit employees felt uncomfortable approaching Heidenreich as he was an excellent but aggressive, matter-of-fact sales representative. On the other hand, it was Cabrera's abrupt, intimidating management and communication style that kept employees on edge and made the work environment unnecessarily hostile in the sales pit.

4. Cigar club meetings

In light of the tense work environment, it is undisputed that, sometime beginning in the fall of 2019, but more often in January and February 2020, several of the sales pit employees met outside of work at a cigar club on the third Thursday of the month. Invariably, they discussed their working conditions.

Although all sales pit employees were invited, typically Heidenreich, Sales Representative Matt Ritter (Ritter), Service Representative Chad Harrison (Harrison), Sales Representative Anthony Marino (Marino), Account Executive Janet Frogge Stetson (Stetson) and former Sales Representative Kevin Johnson (Johnson) got together where they complained about/discussed Cabrera's abrasive communications and managerial style, the tense work environment they believed Cabrera created (as set forth above), the existence of nepotism or favoritism in the workplace, and the effect that had on promotional opportunities.

On one occasion, Warehouse/Inventory Manager Greg Salisbury (Salisbury) participated and complained that he was being "short changed." Specifically, Salisbury had not been paid overtime and was written up several times in a day. Salisbury also reported that he was slighted when management had not given him credit or any monetary incentive per Respondent's policy, for mentoring someone that was promoted into sales. Ultimately, management gave the monetary incentive to someone else although Salisbury mentored the employee.

B. Specific Incidents of Alleged Unlawful Conduct

1. Charging Party applies for sales manager position

In January 2020, Ayoh announced that he was transferring from Respondent's Phoenix sales office to Respondent's sales office in Dallas, Texas. His transfer created a sales manager opening in the Phoenix sales office. Heidenreich applied for the sales manager position in early February 2020 around the same time that he and his coworkers complained about their working environment at their cigar club meetings.

Sales Captain Summers also applied for the position, and many witnesses testified that their competition for the promotion created more tension in the Phoenix sales office. In fact, the tension became so disruptive between Summers and Heidenreich that Respondent separated them and had them come into the office on separate days.[23]

At this point, I must address a separate incident, which is

[15] Tr. at 62.

[16] Tr. at 60.

[17] See Tr. at 154, 172–173. I have based my credibility findings on multiple factors, including, but not limited to, the consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Corp.,* supra at 622.

[18] Tr. at 154.

[19] Tr. at 155, 172–173, 182.

[20] No familial relationship between me and Kevin Ross.

[21] Tr. at 172–174.

[22] Tr. at 174–175.

[23] Tr. at 163, 261, 374, 429, 454.

unrelated to the allegations in this complaint, but must be detailed here since it provides further background as to how the events unfolded in this ULP matter. Although there are conflicting accounts of who said what to whom, I find the following facts:

On or about February 21 or 22, 2020, during Respondent's quarterly inventory, Johnson pulled Summers aside to speak with her informally. Johnson complained that the competition between she and Heidenreich to become sales manager was toxic on both ends. Johnson told Summers that Heidenreich was acting like a "tyrant" in competing for the sales manager position and "was doing things in a sneaky way" to ensure he got on top. Johnson also told Summers that some sales pit employees believed that Summers was the "spy" going behind Ayoh's back reporting the issues in the sales pit to Cabrera. Johnson told Summers that, since she was interested in applying for the sales manager promotion, she should be careful about "snitching" to Cabrera, that she should "clear the air" with Ayoh and reach out to other sales team employees to build trust with them if she intended to supervise them as the future sales manager.

Summers immediately reported her concerns to Ayoh, who then told GM Baker. Baker then told Regional Human Resources Director Little about the allegations.

On February 23, 2020, Summers told Little she was withdrawing her candidacy for the sales manager position and filed an internal complaint against Heidenreich.[24] In her complaint, and despite what Johnson told her, Summers alleged that Heidenreich had been disparaging Summers, talking badly about her to other team members and manipulating incidents that she did not do in order to forge his way into getting the sales manager position.[25] To support her allegations that Heidenreich "manipulated incidents," Summers explained how Heidenreich supposedly negatively influenced Harrison to resign his employment and supposedly encouraged Salisbury's complaints about favoritism.[26]

When Little, Human Resources Representative Stevens and National Human Resources Director Gesualdo interviewed Johnson about Summers' allegations, Johnson confirmed what he told Summers—that the way Heidenreich *handled the situation* (competing for promotions) was like a "tyrant" and Heidenreich "was doing things in a sneaky way to ensure he [got] on top." Johnson confirmed that the relationship between Heidenreich and Summers was "toxic on both ends" because of the competition between them and that sales pit employees believed Summers was the "spy" taking information back to Cabrera.[28][27]

Accordingly, I find that Johnson told Summers, GM Baker and Little that: (1) the competition between Summers and Heidenreich made the work environment in the sales pit "toxic on

[24] R. Exh. 5, at 3, R. Exh. 7. at 2.

[25] Id., at 3-7.

[26] Id.

[27] [28]In making the above finding, although Johnson testified at trial that Heidenreich's name never came up in his conversation with Summers (Tr. at 259-60), I nevertheless credit Johnson's version of events as set forth above regarding what he told Summers during their conversation. First, as a former employee who gave favorable *and* unfavorable testimony regarding Heidenreich and Respondent, Johnson's testimony lacked bias or prejudice. See *Flexsteel Industries,* 316 NLRB 745, 749 (1995) (judge found that a former employee witness had no reason to lie or nothing to gain by fabricating his testimony, and as such, found the witness credible).

Johnson's version of events is further corroborated by Ritter's testimony at trial. Ritter explained that, while the competitive tension between Heidenreich and Summers was widely known in the sales pit, *Summers*, not Heidenreich, instigated it. In fact, Ritter testified that Summers routinely sought to outdo Heidenreich and make Heidenreich "look bad." According to Ritter, it was *Heidenreich* who often tried to make amends with Summers and smooth out the tension between them. (Tr. at 163–163). I found Ritter's testimony open, direct, non-evasive and detailed regarding his recollection of Summers' character and behavior in the sales pit.

Ritter's testimony was further corroborated by Johnson's and Harrison's testimony about how upper management favored those sales members who were somehow related to or connected with upper management (i.e., Summers' husband) (Tr. at 172–173, 182, 255–257). It is undisputed that Summers is married to Kevin Ross, a management official, and as such, I posit that Summers may have accused Heidenreich of backbiting behavior against her that, in reality, she, herself, engaged in in order to disparage Heidenreich. Since Summers is connected with upper management, through her husband, her complaint allegations would likely be believed by management, which would eliminate Heidenreich, her rival, from competition, and further her chances of becoming sales manager.

I also found Ritter's testimony credible because of his status as current employee. Under these circumstances, his testimony has a special guarantee of reliability, because, by offering evidence that essentially supports Charging Party over Respondent, he puts his economic security at risk. As such, Ritter struck me as committed to speaking the truth. See *Gold Standard Enterprises,* 234 NLRB 618, 619 (1978)(testimony of current employees, particularly while management representatives are present, that accuses Respondent of wrongdoing has inherent reliability because these witnesses are testifying adversely to their pecuniary interests).

Lastly, and most importantly, Ritter's account of Summers' competitive behavior with Heidenreich supports Johnson's testimony as to why he suspected she was the "spy," advised her to stop carrying messages about the sales pit to Cabrera and to "clear the air" with her Ayoh and her coworkers if she intended to manage them as the future sales manager. Indeed, Summers' need to outdo Heidenreich might explain why she filed her complaint against Charging Party in the first place.

Although GM Baker, in an email, stated that Johnson complained that Heidenreich was "targeting" Summers, accusing her of doing things she had not done and acting like a tyrant trying to orchestrate his way into a promotion, (R. Exhs. 4–5), Baker may not have captured the entirety of Johnson's concerns and explanations—that Heidenreich *and* Summers were being unnecessarily competitive with *one another* which created a toxic work environment "on both sides." Furthermore, because Baker is a current management official, who could be biased toward Respondent, coupled with the environment to favor sales members who are related to people in upper management, I find his testimony and contemporaneous email less than fully credible.

Summers' version of events is equally problematic. Although she filed her complaint alleging that Heidenreich was disparaging her in order to advance his candidacy as sales manager, Ritter contradicted Summers' testimony in that regard (as stated above).

both ends," (2) Heidenreich's behavior, in trying to promote within Cintas was "sneaky," but also that, (3) in her zeal to promote, Johnson believed Summers was the "spy" taking information about the sales pit back to Cabrera, and (4) Summers should "clear the air" with Ayoh and reach out to other sales team employees to build trust with them if she intended to supervise them as the future sales manager. I also find that both Summers and Heidenreich were unnecessarily competitive with one another and would try to outdo each other in order to promote into management and advance their careers.

2. Charging Party interviews for sales manager position

Returning to the sales manager position, Heidenreich was interviewed separately by GM Baker, Little and Cabrera on February 26, 2020, while Summers' complaint was being investigated.

GM Baker thought Heidenreich was "an amazing sales representative," but he still "had some work to do in the management side" and was not yet ready to become the sales manager.[28] He shared his concerns with Cabrera.

Little thought Heidenreich was a talented sales captain, but he was not ready for management as Heidenreich lacked experience effectively managing people or other direct reports, which, according to Little, was a primary duty of the sales manager.[29]

Finally, during his interview with Cabrera, Heidenreich gave her a stack of letters from other of Cabrera's management counterparts for whom Heidenreich had worked, who recommended Heidenreich for the promotion.

However, even prior to the interview, Cabrera did not believe Heidenreich was the best candidate, because he needed improvement in emotional intelligence – in other words, maintaining relationships with partners in other sales offices and with leadership to ensure a positive and efficient working relationship between sales, operations and service departments.[30] Cabrera testified that, prior to the sales manager vacancy and at the time of the interview, Heidenreich was still on a development plan to improve his interpersonal skills and communication with others.[31] Cabrera noted that Heidenreich was often quick to blame someone else for the problem versus asking why the problem existed in the first place.

Cabrera gave another example where Heidenreich lacked self-awareness/emotional intelligence. On this occasion, Cabrera recalled coming into the sales office for the first time to meet with Ayoh. Cabrera sat at Ayoh's desk. When Heidenreich interrupted their discussion to ask for Ayoh, Ayoh told Heidenreich he was speaking with his supervisor. Cabrera explained that, instead of recognizing the situation and waiting until Ayoh and Cabrera concluded their discussion, Heidenreich replied "but I need you now" lacking any awareness that Ayoh should not be interrupted at that moment.

In any event, while Cabrera acknowledged that Heidenreich had been working consistently to improve his emotional intelligence skills, he had not progressed enough to take on a leadership role as sales manager at the time of his interview. I found Cabrera's testimony credible on this point since her testimony is corroborated by Heidenreich's 2019 performance evaluation and Development Plan.[32]

Immediately after leaving his interview with Cabrera, Heidenreich returned to the sales pit where Ayoh told Heidenreich to immediately go to HR Representative Stevens office. Heidenreich met with Stevens and Little who informed him that Summers filed an internal complaint against him.

During the complaint interview, Heidenreich admitted that there was tension between he and Summers since they were both top sales captains and were professionally competitive with one another, but he vehemently denied ever disparaging Summers in any way. Heidenreich also told Little what he told Harrison (i.e., that Harrison should be truthful with management about why he was resigning–because Harrison was being blocked by upper management from receiving client leads) and clarified what Salisbury told Heidenreich about being slighted for mentoring.

Almost immediately after meeting about Summers' complaint, Heidenreich learned from Ayoh that Cabrera sought out other applicants for the position even though Heidenreich was the only sales representative that applied for the promotion. Learning this information confirmed for Heidenreich that Cabrera was not interested in hiring him for the position. For her part, Cabrera admitted she encouraged other applicants to apply for the sales manager position but did so because she knew Heidenreich needed improvement with his emotional intelligence skills.

A few days later, when Heidenreich had not heard anything about the promotion, he contacted First Aid Sales Vice President Bunkers for advice. Heidenreich told Bunkers that he believed Cabrera "had no intention of promoting" him and sought Bunkers' advice on how he could advance in his career with Respondent. When Bunkers inquired about why Heidenreich thought he would not get the promotion, Heidenreich replied that Ayoh previously told him that when Cabrera saw that Heidenreich was the only person who applied for the position, Cabrera began soliciting others to apply.

Upon learning this information, and since the investigation into Summers' complaint was ongoing, Bunkers recommended that Heidenreich reach out to Cabrera to explain the situation so that Cabrera could have Heidenreich's side of the story and, hopefully, bolster Heidenreich's chances at the promotion. However, when Heidenreich contacted Cabrera to follow Bunkers' recommendation, Cabrera was not interested in talking to Heidenreich about it.

Although the selection date is not contained in the record, Cabrera ultimately selected Don Coles, a Sales Representative from outside the Phoenix sales office.[33]

3. Coffee chat

At their Thursday, February 20, 2020 cigar club meeting, Heidenreich, Ritter, and Johnson decided to raise their concerns about the working environment at an upcoming coffee chat—a twice a year to quarterly meeting held by Respondent's Human Resources personnel in order for employees to voice concerns. In order to promote frank, honest discussion among employees,

[28] Tr. at 334, 377–378.
[29] Tr. at 334–336.
[30] R. Exh. 6.
[31] R. Exh. 2.
[32] See R. Exhs. 2–3.
[33] Tr. at 461.

supervisors and managers were not permitted to attend coffee chats.

It is undisputed that, on March 4, 2020, Heidenreich raised with Human Resources the sales teams' concerns regarding the tense working environment. Although Heidenreich, Ritter and Johnson thought they would be in the same coffee chat group, the team was separated into more than one coffee chat. Johnson was assigned to a different chat, and Ritter was sick that day and unable to attend. Stevens and Gesualdo attended Charging Party's coffee chat.

Heidenreich told Stevens and Gesualdo about how Salisbury felt "short changed" when he was not rewarded for mentoring someone. Heidenreich also described the tense working environment in the sales pit, that Cabrera made everyone feel like they were walking on eggshells, that Cabrera seemed to overstep Ayoh's authority, that there was an insufficient barrier between the sales team and Cabrera, and that Cabrera seemed to know "everything" about what was being discussed amongst the sales team such that the sales team believed there was a spy leaking information to Cabrera. Sales member Kim Baker mentioned her concerns that she was being penalized for being a parent, and Marino confirmed that everyone shared the concerns raised by Heidenreich and that the sales team needed these issues addressed.

I note that, although Stevens and Gesualdo both denied taking notes during all of the coffee chats, I do not find their testimony credible as it was directly contradicted by Heidenreich and Johnson who both saw Gesualdo taking notes during their separate chats. Although Gesualdo testified that she had a notebook and papers in front of her during the chats but she never took notes, I find her testimony wholly incredible that she would bring a notebook to the chats but not write anything in it. In sum, I conclude that Gesualdo took notes during the chat sessions.

In any event, after attending the coffee chat, Heidenreich went on a previously scheduled vacation and awaited word whether he would be selected as Respondent's first aid sales manager.

4. Charging Party Not Selected as Sales Manager.

On or about March 4, 2020, Little concluded his investigation into Summers' complaint and determined that Summers' allegations could not be substantiated. Heidenreich was cleared of any misconduct. Little briefed Cabrera on the results of the investigation on March 6. Little also told Gesualdo about the results on March 6, and Gesualdo discussed the results with Bunkers.[34]

Meanwhile, Cabrera notified Heidenreich of his non-selection in her office on March 16, 2020.[35] Little was conferenced in by phone during the meeting.

5. Charging Party told he did not promote because he did not have the right "Brand"[36]

Cabrera and Little first told Heidenreich that he was cleared of any misconduct relating to Summers' complaint. Turning to the selection decision, after Little hung up with Cabrera and Heidenreich, Cabrera thanked Heidenreich for traveling to other markets to meet/assist other sales representatives, told Heidenreich that he had the ability to help diagnose and address problems and had been making positive strides in the past two months on doing everything she asked of him. However, Cabrera told Heidenreich that he would not get the promotion because she "[didn't] believe [Charging Party had] the brand for management or leadership."[37]

For her part Cabrera did not explicitly deny making this remark but, when asked about it at trial, Cabrera, referring to why it was necessary for Heidenreich to have excellent emotional intelligence skills, explained that she "wanted [Heidenreich] to just protect his brand…that was my messaging. You have to protect your brand. You have to exude those kind of emotional intelligence [and] work on that because your brain (court reporter typographical error, should say "brand") speaks louder than any awards, or any results."[38]

Accordingly, I believe Cabrera told Heidenreich that he was not being selected as sales manager because he did not have the right "brand" for leadership. However, I also credit Cabrera's explanation for making the remark.

6. Charging Party told he talked to too many people

Heidenreich disagreed with Cabrera's assessment and told her he knew he would not get the promotion, since "people in leadership talk" and that "this is a tight community," to which Cabrera replied, "That's part of your problem – you talk to too many people."[39] Cabrera denied telling Heidenreich that he talked to too many people.

I credit Heidenreich's testimony that Cabrera told him "that's part of your problem – you talk to too many people" as I find it consistent with Cabrera's generally abrasive tone.

At that point, Heidenreich told Cabrera that he did not intend to stay in his current position and he would be "look[ing] at other opportunities to promote." Although Cabrera wrote in an email to Little and Bunkers that Heidenreich told her that he was, "…open and looking for other opportunities. This may or may not be at Cintas. I'm not sure yet. I do not intend to work underneath whoever you bring in,"[40] Heidenreich testified that he told Cabrera that he would be looking for opportunities to promote *within* Cintas. Regardless of what specifically Heidenreich said, it is undisputed that Heidenreich never told Cabrera that he was resigning or quitting during their meeting. In fact, even Gesualdo admitted that Heidenreich's statement to Cabrera was benign, pointing out that, "I guess he's just saying that he's going to seek and find a position elsewhere."[41] Ultimately, the meeting ended and Heidenreich left Cabrera's office.

7. Respondent effectively terminates Charging Party's employment

The substance of what transpired after Heidenreich learned he was not selected as sales manager on March 16, 2020 varied widely both in substance and credibility. However, after reviewing the record, I find the following facts:

Around 11:20 a.m., Heidenreich returned to his desk visibly

[34] Tr. at 317, 358.
[35] Tr. at 84.
[36] See n. 3, supra.
[37] Tr. at 84.
[38] Tr. at 402–404.
[39] Tr. at 84–85.
[40] R. Exh. 10.
[41] Tr. at 312.

upset after learning he was not selected as sales manager. He ran into Ayoh in the hallway. Ayoh asked Heidenreich, "what's wrong, how'd [the meeting] go?" Heidenreich replied, "not good" and told Ayoh he was not selected. Johnson and Ritter overheard the discussion.

One minute later, around 11:21 a.m., Cabrera emailed Little and Bunkers telling them that Heidenreich told her he would be looking for other opportunities both within Cintas and possibly outside of Respondent and that he "did not intend to work underneath whoever you bring in."[42]

Meanwhile, back in the hallway, Heidenreich, frustrated and agitated, told Ayoh, "I am f**king done with this man, do you want my tablet now or later? I am done and you will have my resignation—cannot believe this."[43] Ayoh told Heidenreich to calm down while Heidenreich walked to his cubicle and packed up his backpack to leave as it was lunchtime. Since Ayoh was about to hold a conference call, Ayoh asked Johnson and Ritter to try to calm Heidenreich down.

Ultimately, Ayoh told Heidenreich not to do anything rash, to take the afternoon off, go home, that there were other things they could do (meaning, other promotional opportunities to look into), and that they would talk about it the next day. Ayoh did not believe Heidenreich intended to resign; rather made the remark in the heat of the moment.

Heidenreich left the facility. As he drove home, Heidenreich called his mentor for advice on how to proceed. Heidenreich asked his mentor about opportunities to relocate to another office or a different branch, to which the mentor replied, "let me see what I can do, we'll find something for you." It is undisputed that Heidenreich never told his mentor during their conversation he had quit or resigned.

Meanwhile, Ayoh met with GM Baker and Cabrera for a debriefing on whom had been selected as Ayoh's replacement. During their conversation, Ayoh voluntarily told Baker and Cabrera what transpired with Heidenreich. After learning what Heidenreich told Ayoh, Baker and Cabrera told Ayoh to restrict Heidenreich's IT access.

Ayoh also told Little what occurred, which Little confirmed, including that Ayoh told Heidenreich to calm down/cool off, go home, that they would discuss what happened the next day and that Ayoh believed Heidenreich made the off the cuff remark about resigning in the heat of the moment.

Meanwhile, around 12:15 p.m., Little called Heidenreich, told him Little heard from Ayoh that he quit and asked Heidenreich whether he resigned. Heidenreich denied resigning. Little responded that he had heard different accounts of what happened in the sales pit and that Heidenreich had, in fact, resigned. Heidenreich reiterated to Little that he was upset about not being selected as sales manager but he did not resign and had not resigned. Little replied again that, due to the conflicting accounts, he would have to investigate what happened, to which Heidenreich responded, "you don't have to talk to anyone, I'm telling you I didn't resign." Little told Heidenreich he would call him back.

At this point, Heidenreich called Ayoh to learn what was happening at the office. Ayoh told Heidenreich that Ayoh reported to GM Baker and Cabrera exactly what Heidenreich told him – including that he said he was resigning. Heidenreich replied that he was upset but had not resigned. Thereafter, Heidenreich texted and emailed Ayoh saying he had not quit "and issued no such message to anyone at Cintas."[44] Ayoh immediately emailed Little and Stevens at 4:22 p.m. with what transpired and reiterated that Heidenreich said he had not resigned.[45]

At this point, none of Respondent's witnesses credibly explained why they presumed Heidenreich quit/resigned and why they accepted a resignation that did not formally exist.

First, Little's testimony that he had to accept Heidenreich's resignation since Cabrera told Little Heidenreich resigned is wholly beyond belief since, in reality, *Ayoh* told Little that Heidenreich made a frustrated, off-the-cuff remark that he was resigning. In fact, Little's testimony is further contradicted by his own admission that *Heidenreich himself* told Little he had not quit.

Moreover, Little acknowledged that Ayoh, who was the only management official who participated in the exchange with Heidenreich, told Little that Heidenreich left the facility upset but had not resigned. In fact, Ayoh voluntarily wrote an email to Little summarizing the events in question[46] and stated that Heidenreich was very upset at not being selected for the promotion but had not quit.

Lastly, I note that Little was evasive in his testimony during the General Counsel's cross examination, appearing not to understand counsel's questions and/or withholding testimony if the answer did not support his narrative—why Respondent accepted Heidenreich's statement of resignation. He gave guarded testimony on cross examination that presented as less than forthright. However, when questioned by Respondent counsel on direct, he seemed to recall almost everything that occurred during the hours/days leading up to accepting Heidenreich's resignation. As such, I was left with the impression that Little was biased and not committed to telling the complete truth, which made his testimony less than fully credible. Accordingly, Little's testimony cannot be believed, and I gave it little to no weight.

In any event, immediately after conversing with Heidenreich, Little told Gesualdo what transpired with Heidenreich, including that Little spoke to Heidenreich who told him he had not quit.[47] However, despite learning that Heidenreich did not resign, Gesualdo, on her own, told Little to accept Heidenreich's resignation effective immediately.[48] Little called Heidenreich back and told him, "Unfortunately, there are conflicting accounts—I have

[42] R. Exh. 10.
[43] GC Exh. 12.
[44] GC Exh. 12.
[45] Id.
[46] GC Exh. 12.
[47] Tr. at 219.
[48] R. Exh. 7 at 10. I found Gesualdo's testimony completely incredible and unworthy of belief. When asked who made the decision to accept Heidenreich's statement of resignation, Gesualdo changed her story several times. First, she testified that she alone made the decision to accept Heidenreich's resignation, then she indicated that she needed Bunkers' approval in order to accept Heidenreich's resignation. However, when I asked why she did not get Bunkers' approval, she replied, "I don't know why I did that." Tr. at 324. Gesualdo changed her story again, explaining that she had gotten Bunkers' approval, (albeit after she already told Little to accept Heidenreich's resignation), then later, testified that she and

to accept your resignation—You are officially no longer a Cintas partner."[49]

In making the above findings, I credit Heidenreich's and Ayoh's testimony since both of their version of events were corroborated by one another, by Little (where consistent) and by the testimony of Ritter and Johnson. Moreover, Ayoh's testimony was corroborated by the documentary evidence in the record.[50]

Lastly, and most importantly, I credit Ayoh's testimony over Little's and Gesualdo's due to his status as a current management employee. Under these circumstances, his testimony has a special guarantee of reliability, because, by offering evidence that essentially accuses Respondent of wrongdoing, he places his economic security at risk.[51]

In any event, Respondent processed Heidenreich's "resignation," and he was relieved of his position on March 16, 2020. As counsel for the General Counsel aptly noted in his Brief, the issue in this case is "why?"

Analysis

In the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of Act when: (1) Cabrera failed to promote Heidenreich to sales manager, (2) Cabrera threatened Heidenreich with the loss of promotional opportunities by telling him he would not promote because he did not have the right "brand" for management/leadership, (3) Cabrera threatened Heidenreich with the loss of promotional opportunities when she told him that his problem was that he talked to too many people, and (4) Respondent accepted/refused to rescind Heidenreich's statement of resignation, which, in reality, Charging Party never tendered, which effectively terminated his employment. I will take each issue in turn.

I. RESPONDENT DID NOT VIOLATE THE ACT WHEN IT FAILED TO PROMOTE CHARGING PARTY TO SALES MANAGER

A. Legal Standard

Mixed motive cases, like the one in this case, are those where it appears that unlawful considerations were a motivating factor for the adverse action but where the record supports the potential existence of one or more legitimate justifications for the decision. To assess whether a non-selection/failure to promote is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980).[52]

Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that Heidenreich's protected activity was a motivating factor in his non-selection/failure to promote. The General Counsel satisfies this initial burden by showing: (1) Heidenreich's protected activity; (2) Respondent's knowledge of such activity; and (3) animus.

Recently, the Board clarified element three of the General Counsel's *prima facie* case, holding that, in order to prove animus sufficient to carry the General Counsel's initial burden, the General Counsel must establish a causal connection "between the employee's protected activity and the employer's adverse

Bunkers both decided to accept Heidenreich's resignation. Her changing stories made her testimony less than fully credible and I find she *alone* decided to accept Heidenreich's statement of resignation.

Gesualdo's testimony that she learned Heidenreich resigned on March 17 is directly contradicted by Little's testimony that he told Gesualdo, on *March 16*, that Heidenreich had not resigned. Moreover, even when Gesualdo said she learned that Heidenreich had not resigned, she offered no explanation as to why she did not further investigate the situation; but rather just accepted Heidenreich's resignation. Tr. at 317. When I asked Gesualdo why she accepted Heidenreich's resignation when she knew Heidenreich claimed he never resigned, she failed to explain her rationale, but instead, replied, "*We* just made the decision." See Tr. at 319-320.

Gesualdo's reasons for refusing to rescind Heidenreich's "resignation" also lack belief. Specifically, Gesualdo testified that she based *her* decision to accept Heidenreich's resignation because she heard that Heidenreich told Cabrera he would not work for someone else and told his manager, "do you want my laptop now or later and do you want my resignation now or later." Tr. at 309-310. However, there is no testimonial or documentary evidence that Heidenreich told anyone "do you want my *resignation* now or later." Moreover, when confronted with what Heidenreich actually said – that he was "…open and looking for other opportunities. This may or may not be at Cintas. I'm not sure yet," Gesualdo conceded that what Heidenreich said was benign. See Tr. at 312.

Gesualdo said she accepted Heidenreich's resignation when she learned that Heidenreich stormed out of Cabrera's office and stormed out of the sales office when he went home. However, neither Cabrera's, Ayoh's or Little's emails or reports indicated that Heidenreich "stormed out" of Cabrera's office or the facility and no one testified as such. See GC Exh. 12, R. Exh. 7 at 10.

Gesualdo testified that she accepted Heidenreich's resignation based on two partners' complaints about Heidenreich. However, initially, Gesualdo could not recall what those partners said about Heidenreich. Then later in her testimony, Gesualdo recalled the partners' comments about Heidenreich: one being that Heidenreich acted superior to the service representatives; the other, that, at times, Heidenreich could be sneaky to get what he wanted done. Thus, Gesualdo expects the trier of fact to believe these two comments formed the basis for her accepting Heidenreich's resignation statement.

Finally, Gesualdo testified that she accepted Heidenreich's resignation because Little told her that Cabrera told Little that Heidenreich told her he would not work under anyone else and he would pursue other opportunities either within the company or outside of Respondent. However, Gesualdo's testimony is double hearsay (what Little told Gesualdo that Cabrera told Little), which made her testimony less reliable. Even assuming Heidenreich made the statements attributed to him, Gesualdo admitted she never squared Heidenreich's statement with the fact that Little specifically told her Heidenreich did not resign. Overall, Gesualdo's inconsistent explanations and unreliable rationale made her testimony unbelievable, and as such, I give it no weight.

[49] Tr. at 90. I note that Gesualdo testified that Bunkers had some role in deciding to accept/not rescind Heidenreich's statement of resignation (which I did not believe). Based on that testimony, counsel for the General Counsel moved for sanctions against Respondent, requesting that I draw an adverse inference against Respondent since it never called Bunkers as a witness. However, I decline to sanction Respondent or make an adverse inference because counsel for the General Counsel could have called Bunkers as a witness as well. He declined to do so.

[50] See GC Exh. 12.

[51] See *Flexsteel Industries*, supra; *Gold Standard Enterprises,* 234 NLRB at 619 (testimony of current employees, particularly while management representatives are present, that accuses Respondent of wrongdoing has inherent reliability because these witnesses are testifying adversely to their pecuniary interests).

[52] *Wright Line*, 251 NLRB 1083, 1088–1089 (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 (1983).

action against the employee."[53] This means, that, in order to demonstrate that Respondent's failure to promote was motivated by his protected concerted activity, the General Counsel must establish a link or nexus between Heidenreich's protected activity and Respondent's non-selection.[54]

Once the General Counsel meets his initial burden under *Wright Line*, the burden of persuasion shifts to Respondent to prove that it would not have promoted Heidenreich to sales manager even absent his protected activity.[55] To do this, Respondent cannot simply present a legitimate reason for its adverse action; rather, it must demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct.[56] If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action regardless of the protected conduct.[57]

On the other hand, further analysis is required if the defense is one of "dual motivation," that is, Respondent defends that, even if an invalid reason might have played some part in its motivation, Respondent would have taken the same action against Heidenreich for permissible reasons.[58]

B. Discussion

Here, I conclude that counsel for the General Counsel established his prima facie showing. First, Heidenreich engaged in protected concerted activity when: (1) Heidenreich challenged management's policies and practices that he found ineffective throughout his employment with Respondent, (2) Harrison and Heidenreich told Little, during Little's investigation of Summers' complaint, that Heidenreich counseled Harrison about the resistance Harrison faced from other service representatives and urged him to "tell [management] the truth" about why Harrison was resigning, and (3) Heidenreich told Little, again during Little's investigation of Summers' complaint, about Salisbury's concerns about the favoritism in the sales office.

Second, Cabrera knew about Heidenreich's protected activity because Little told Cabrera, around March 6, 2020, about the findings of Summers' complaint—including what Harrison and Heidenreich told Little about Harrison's favoritism concerns and what Heidenreich told Little about Salisbury's concerns. Therefore, technically, Cabrera knew about Heidenreich's protected concerted activity prior to officially not selecting Heidenreich as sales manager.

Finally, the record contains evidence of Cabrera's general animus—that is, Cabrera's statement on March 16 that Heidenreich's problem is that he talked to too many people—which I find is a euphemism for her animus against Heidenreich's concerted activity (i.e., discussing with his coworkers and management their displeasure with their terms and conditions of employment (discussed further below).[59]

Third, the close timing between Heidenreich's protected activity and Cabrera's decision not to promote Heidenreich to sales manager—all of which occurred within the same month—further supports the inference of unlawful discrimination.[60]

Once the General Counsel meets his initial burden that Heidenreich's protected activity was a motivating factor in Respondent's decision not to promote him to sales manager, the burden of persuasion shifts to Respondent to prove that it would have not selected Heidenreich despite his protected activity. Here, I find that Respondent met its burden.

Specifically, the record is replete with evidence that Heidenreich was not selected as sales manager because he needed to improve his emotional intelligence—or the way he communicated with other sales team members. Ayoh, Cabrera and other management officials credibly testified that they recognized that Heidenreich needed to improve his self-discipline, control his emotional reactions and keep personal biases out of his decision-making process.

Heidenreich also needed to work on his executive acumen, and his visionary and motivational leadership. In fact, Ayoh noted that, while Heidenreich was a passionate and successful sales representative, his passion was sometimes misperceived by coworkers as being "negative."

Ayoh noted these issues in Heidenreich's 2019 performance evaluation and, as a result, Heidenreich had been placed on a development plan, long before the sales manager vacancy occurred, to improve his skills in these areas.

Cabrera also credibly testified that she observed that Heidenreich needed improvement in his executive acumen, emotional intelligence and his professionalism, and as such, knew that Heidenreich was not ready to be the sales manager before he interviewed for the position because throughout 2019 and into the early part of 2020, Heidenreich had not progressed far enough on the issues raised in his Development Plan to be ready to become sales manager.

Furthermore, the documentary evidence revealed how management attempted to work with Heidenreich to improve his emotional intelligence skills prior to the sales manager vacancy. I credited Ayoh's testimony which confirmed Heidenreich's need to improve his emotional intelligence skills and Cabrera's testimony that she based her non-selection decision on Heidenreich's need to improve his emotional intelligence skills primarily because it is corroborated in time and substance by the documentary evidence in the record.

Lastly, Heidenreich's own colleagues testified that Heidenreich maintained an "it-is-what-it-is" attitude in the sales pit which rubbed certain sales team members the wrong way. Moreover, it is clear from the record that Heidenreich was overly

[53] See, *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120 at 1 (2019).

[54] Id.

[55] See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Wright Line,* 251 NLRB at 1089.

[56] *Bruce Packing Co*., 357 NLRB 1084, 1086–1087 (2011), enfd. in relevant part, 795 F.3d 18 (D.C. Cir. 2015); see also *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

[57] *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

[58] See *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

[59] See *Affiliated Foods, Inc.,* 328 NLRB 1107, 1107 (1999)(statements, even if lawful, can serve as background evidence of anti-union animus);

[60] See *LaGloria Oil & Gas Co.,* 337 NLRB 1120 (2002), enfd. 71 Fed.Appx. 441 (5th Cir. 2003)(close timing between protected activity and adverse action can be used to infer animus).

competitive in the way he tried to promote into management, which corroborates what Ayoh and Cabrera found in his 2019 performance evaluation.

Counsel for the General Counsel argues that Respondent's proffered reasons for not promoting Heidenreich—his lack of emotional intelligence—are pretextual to cover up the fact that Cabrera simply did not want Heidenreich, a top selling representative, in a leadership position since she viewed him as a "troublemaker" who "stirred the pot too much" with his complaints and concerns about what was going on in the sales pit.[61] However, the documentary evidence proves Heidenreich's long standing problems with emotional intelligence, executive acumen and professionalism *preceded* the vacancy announcement and his non-selection. In sum, I am persuaded that Respondent's reasons for not promoting Heidenreich to sales manager were *not* motivated by his prior concerted activity.

Accordingly, I conclude that Respondent did not violate the Act when it failed to promote Heidenreich to sales manager.

II. RESPONDENT DID NOT VIOLATE THE ACT WHEN IT THREATENED CHARGING PARTY WITH THE LOSS OF PROMOTIONAL OPPORTUNITIES BY TELLING HIM HE WOULD NOT PROMOTE BECAUSE HE DID NOT HAVE THE RIGHT "BRAND" FOR MANAGEMENT/LEADERSHIP

A. Legal Standard

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat."[62] The actual intent of the speaker or the effect on the listener is immaterial.[63] The "threat in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening."[64] Rather, the Board considers the totality of the circumstances in assessing whether the reasonable tendency of an ambiguous statement is a veiled threat to coerce.[65] Accordingly, the basic test to find an 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act.[66]

As you might imagine, determining whether an ambiguous statement is an illegal threat versus an opinion about possible consequences has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employee's right to be free from coercive threats under Section 7. In balancing these competing interests, the Board has held that threats of job loss or loss of hours in retaliation for engaging in union activities violate Section 8(a)(1) of the Act.[67] Likewise, threats not to promote employees due to their protected activities also violates the Act.[68]

B. Discussion

As I stated earlier in this Decision, the issue is whether Respondent violated the Act when, on March 16, 2020, Cabrera threatened Heidenreich with the loss of promotional opportunities by telling him that he would not promote because he did not have the right "brand" for leadership.

First, Respondent argues that Cabrera never made the statement attributed to her. However, I disagree and credited Heidenreich's testimony that Cabrera made the comment attributed to her. As such, the issue here is what did Cabrera mean when she told Heidenreich he did not have the right "brand" for leadership?

Respondent contends that, based on Cabrera's trial testimony, that Cabrera never used the term "brand" in a derogatory manner, rather Cabrera was referring to Heidenreich's brand in a positive manner. I agree.

Specifically, the record reveals that, in stating that Heidenreich did not have the "right brand," Cabrera was explaining to Heidenreich *why* he did not promote to sales manager – because Heidenreich needed to improve his emotional intelligence and professionalism (i.e., the way he talked to his coworkers and management). Cabrera further explained to Heidenreich that, while his sales skills were outstanding, he needed to improve his professionalism, or *interpersonal skills*, since those skills "speak louder than any awards or [sales] results." While Cabrera may not have used the best terminology, and despite her abrasive tone, the totality of the evidence shows that Cabrera was trying to give Heidenreich positive hope on future promotions, conveying to Heidenreich that he needed to improve his interpersonal skills (or "brand") in order to promote into management.

Counsel for the General Counsel argues that Cabrera's term "brand" is a euphemism used as veiled reference to Heidenreich's concerted activity. Citing *Pacific Green Trucking Inc.*, 368 NLRB No. 14 (2020) where an administrative law judge (Judge or ALJ) cited a number of cases where the Board found various terms used by the employer were euphemisms for anti-union animus, see *Schaumberg Hyundai, Inc*., 318 NLRB 449, 458 (1995)(employee described as not "work[ing] well with his team and has a bad attitude"); *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994)(employee described as "excessive talking"), counsel argues that Cabrera's reference to Heidenreich not being promotable because of his "brand" is a veiled reference to his concerted activity. In other words, counsel argues that Cabrera is actually saying that the reason Heidenreich

[61] GC Br. at 37.

[62] *Smithers Tire & Auto. Testing of Tex.*, 308 NLRB 72 (1992).

[63] *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee).

[64] *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970).

[65] *KSM Industries*, 336 NLRB 133, 133 (2001).

[66] *American Freightways Co.,* 124 NLRB 146 (1959) (basic test is whether the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Sec. 7 of the Act).

[67] *United/Bender Exposition Service*, 293 NLRB 728, 732 (1989); *Middletown Hospital Asn.*, 282 NLRB 541 (1986); *Air Express International*, 281 NLRB 932 (1986); *Fiber Glass Systems*, 278 NLRB 1255 (1986); *Foundation of California State University*, 255 NLRB 202 (1981); *Louis Gallet, Inc*., 247 NLRB 63 at fn. 1 (1980).

[68] *QSI, Inc.*, 346 NLRB 1117, 1118 (2006); *Hospital Shared Services, Inc.*, 330 NLRB 317, 318 (1999); *Prudential Ins. Co. of Am*., 317 NLRB 357 (1995); *Marmon Transmotive*, 219 NLRB 102, 113–114 (1975); *Ford Motor Co*., 251 NLRB 413, 422 (1980).

did not promote is because of his concerted activity, or his "brand."[69]

While I could not locate any Board precedent where the Board found that someone's "brand" is a euphemism for their concerted activities, in light of the totality of the conversation between Cabrera and Heidenreich, I agree with Respondent that, to the extent Cabrera's statement is a euphemism, her statement refers to Heidenreich's *poor interpersonal skills*, not his protected concerted activity. As such, I conclude that Cabrera's remark cannot reasonably be interpreted as an unlawful threat violative of the Act.

III. RESPONDENT VIOLATED THE ACT WHEN IT THREATENED CHARGING PARTY WITH THE LOSS OF PROMOTIONAL OPPORTUNITIES BY TELLING HIM HIS PROBLEM WAS THAT HE TALKED TO TOO MANY PEOPLE

A. Discussion

However, I conclude that Cabrera threatened Heidenreich with loss of promotional opportunities when she told him the reason he did not promote was because "he talked to too many people."

Although Cabrera denied making the statement attributed to her, I found otherwise. Rather, in viewing the totality of the conversation, the evidence shows that Heidenreich told Cabrera that he knew he would not promote, because "people talk," to which Cabrera replied, "that's your problem you talk to too many people."

Additionally, Cabrera's statement, coupled with her abrasive, abrupt tone and lack of tact, which is supported by the testimonial evidence, leads me to conclude that Cabrera's remark meant that Heidenreich did not promote to the sales manager position because he engaged in concerted activities by talking to too many of his coworkers and raising their concerns to management. As such, I agree with counsel for the General Counsel that, based on the totality of the conversation between Heidenreich and Cabrera, Cabrera's statement is a euphemism for telling Heidenreich that he would not promote because he continued to raise employee concerns about their terms/conditions of employment.[70]

Accordingly, I conclude that Cabrera's statement must reasonably be interpreted as an unlawful threat violative of the Act.

IV. RESPONDENT VIOLATED THE ACT WHEN IT ACCEPTED/REFUSED TO RESCIND CHARGING PARTY'S STATEMENT OF RESIGNATION WHICH EFFECTIVELY TERMINATED HIS EMPLOYMENT

A. Legal Standard

The same *Wright Line* mixed motive analysis used to evaluate whether Respondent unlawfully failed to promote Heidenreich is applicable in analyzing whether Respondent violated the Act when it accepted/refused to rescind Heidenreich's statement of resignation which effectively terminated his employment.

B. Discussion

Based on the totality of the evidence in the record, I conclude that Respondent violated the Act when it accepted/refused to rescind Heidenreich's statement of resignation which effectively terminated his employment because Respondent's reasons for its actions are pretextual.

Following the *Wright Line* burden shifting framework, I find that counsel for the General Counsel proved his *prima facie* case. Here, the record clearly shows that Heidenreich engaged in protected activity when: (1) Little told Gesualdo about the results of Summers' investigation, including that Harrison told Little how Heidenreich counseled Harrison about the resistance Harrison faced from other service representatives and urged him to "tell [management] the truth" about why Harrison was resigning, (2) Little told Gesualdo that Heidenreich told Little about Salisbury's concerns about the favoritism in the sales office, and (3) Gesualdo learned from Heidenreich, during the coffee chats, about his and other sales team members' complaints about Cabrera and the tense work environment in the sales pit.

Second, Gesualdo knew about Heidenreich's concerted activities as set forth above.

Third, I find the close proximity between Heidenreich's concerted complaints during the coffee chat on March 4, when, on March 6, Little briefed Cabrera and Gesualdo about the results of Summers' complaint (which included telling them about Heidenreich's concerted activity), and when, 10 days later on March 16, Gesualdo, accepted/refused to rescind Heidenreich's statement of resignation raised a clear inference that Heidenreich's discharge was motivated by his protected concerted activity.

Turning to Respondent's burden of persuasion, Respondent defends that it discharged Heidenreich because he resigned. However, the evidence proves otherwise, and I find Respondent's rationale pretextual.

First, I conclude that Heidenreich never resigned his employment. Specifically, the evidence demonstrates that Ayoh told Cabrera and GM Baker that Heidenreich was upset about not being selected as sales manager, made the angry, in the heat of the moment, statement about resigning but had not officially resigned.

Ayoh also told Little that he believed Heidenreich was upset about not being selected as sales manager but made the "resignation" statement out of frustration, and Little told Gesualdo that he spoke to Heidenreich who confirmed Ayoh's version of events. I gave little weight to Gesualdo's testimony that, in light of the surrounding circumstances, she nevertheless believed Heidenreich resigned.[71]

Second, the record supports the fact that Gesualdo did nothing to investigate the supposedly "conflicting accounts" of whether Heidenreich resigned; rather, she only accepted the reports that Heidenreich resigned, when she *knew* Heidenreich had not quit. In fact, Gesualdo admitted that she never investigated the differing accounts of what Heidenreich purportedly said to Ayoh or

[69] See GC Br. at 28.

[70] See *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994)(employee described as "excessive talking" was found to be a euphemism for his concerted activities).

[71] See *Grand Canyon University*, 359 NLRB 1481, 1516 (2013) (Board determined that it is appropriate for the trier of fact to infer the employer's true motive was unlawful when the evidence proves that the employer manufactured "something out of virtually nothing" (". . . in an effort to terminate the employee."), affd. 362 NLRB 57 (2015).

what Little told her–that Heidenreich, *himself*, denied resigning.

Gesualdo also misrepresented when she learned that Heidenreich had not resigned, where she testified she learned on March 17 but the evidence proves she was told on March 16.

Third, Gesualdo's inconsistent testimony about who made the decision to accept Heidenreich's resignation statement made her less than fully credible and unworthy of belief. Rather, I find, and Gesualdo admitted, that she *alone* took "the opportunity to accept" Heidenreich's resignation statement after concluding that Heidenreich was a "troublemaker" who engaged in concerted activities by constantly challenging management and complaining about his and his sales teams' terms/conditions of employment. The only problem is her action was unlawful.

Gesualdo's after the fact testimony that she based her decision to accept Heidenreich's resignation statement on Heidenreich's March 16 behavior and the complaints about Heidenreich from two "partners" also lacks credibility. Rather, record evidence shows that Heidenreich never said "do you want my resignation now or later?" and no one ever told her Heidenreich made the remark. Nor was there any documentary or testimonial evidence that Heidenreich' stormed out of Cabrera's office or the facility when he learned he was not selected as sales manager.

Next, it stretches the bounds of reality that Gesualdo would discharge one of Respondent's top sales representative over two partners' alleged statements that Heidenreich acted superior to the service representatives and that he could be sneaky to get what he wanted. Even if the partners made the remarks attributed to them, the evidence demonstrates Gesualdo never investigated these complaints either. Rather, the record reveals that the only complaints about Heidenreich were raised through Summers' complaint which ultimately proved inconclusive.

Finally, even when Gesualdo said she learned that Heidenreich did not resign his employment, she inexplicably refused to allow him to rescind it. Refusing to allow an employee to timely rescind a resignation constitutes a discharge.[72]

Therefore, for the foregoing reasons, I find that Respondent's rationale for discharging Heidenreich—that he resigned – is false, and a pretext for the real reason. Rather, the evidence clearly establishes that Heidenreich had repeatedly engaged in concerted activities by challenging management's policies and practices when he thought them ineffective as well as raising complaints on behalf of himself and his coworkers about Cabrera, the tense working environment, and concerns about their terms/conditions of employment. Respondent knew about Heidenreich's concerted activities and no longer intended to tolerate his ambitious, overly aggressive attitude or his concerted activities. Since Summers' allegations against Heidenreich proved inconclusive, Respondent took advantage of Heidenreich's angry, off the cuff statement of resignation when he was not selected as sales manager and terminated him at the first "opportunity" without conducting any substantive investigation despite knowing that Heidenreich never intended to resign. Fortunately, the only thing standing in Respondent's way of effectuating Heidenreich's discharge is Section 8(a)(1) of the Act.

Accordingly, based on the credited evidence in the record, I conclude that Respondent violated Section 8(a)(1) of the Act when it accepted/refused to rescind Heidenreich's statement of resignation which effectively terminated his employment.

CONCLUSIONS OF LAW

1. Respondent Cintas Corporation No. 2 in Phoenix, Arizona is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act when it threatened Charging Party Benjamin Heidenreich with the loss of promotional opportunities by telling him that, by engaging in concerted activities, he would not promote because he talked to too many people.

3. Respondent violated Section 8(a)(1) of the Act when it accepted/refused to rescind Charging Party Benjamin Heidenreich's statement of resignation, which effectively terminated his employment.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that 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.

Respondent is ordered to cease and desist from threatening employees with the loss of promotional opportunities by saying that they talk to too many people if they engaged in concerted activities to support or for the mutual aid of other employees.

Respondent is ordered to cease and desist from terminating employees because they engaged in concerted activities to support or for the mutual aid of other employees.

Respondent, having discriminatorily terminated and/or accepted/refused to rescind Benjamin Heidenreich's statement of resignation, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall compensate Benjamin Heidenreich for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. See *King Soopers,* 364 NLRB 1153 (2016).

Respondent shall file a report with the Regional Director for Region 20 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Benjamin Heidenreich for the adverse tax consequences, if any, of receiving one or more lump sum backpay awards covering periods longer than one (1) year. See *AdvoServ of New Jersey,* 363 NLRB No. 143 (2016).

Respondent is further ordered to preserve and, within 14 days of a request, or such additional time as the Regional Director may

[72] See *Center Service System Division*, 345 NLRB 729, 750 (2005), *Merrow Machine Co.,* 337 NLRB 421, 421 fn. 1 (2002), *Paramount Parks,* 334 NLRB 246, 247–248 (2001).

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 due under the terms of this Order.

Within 14 days from the date of the Board's Order, Respondent is ordered to remove from its files any and all references to its unlawful termination of, and its unlawful decision to accept and/or refuse to rescind Benjamin Heidenreich's statement of resignation, and, within three (3) days thereafter, notify Benjamin Heidenreich in writing that this has been done and that the unlawful termination, and/or the unlawful decision to accept/refuse to rescind Benjamin Heidenreich's statement of resignation will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[73]

ORDER

Respondent, Cintas Corporation No. 2, in Phoenix, Arizona, its officers, agents, successors, assigns and representatives, shall

1. Cease and desist from

(a) Threatening employees with the loss of promotional opportunities by saying that they talk to too many people if they engaged in concerted activities to support or for the mutual aid of other employees.

(b) Terminating employees because they engaged in concerted activities to support or for the mutual aid of other employees.

(c) 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) Within 14 days from the date of the Board's Order, offer Benjamin Heidenreich full reinstatement to his former position as a Diamond Level Sales Captain/ Representative, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Benjamin Heidenreich whole for any loss of earnings and other benefits suffered as a result of the discrimination against him for exercising his Section 7 rights. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987))(adopting the Internal Revenue Service rate for underpayment of Federal taxes), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Backpay due should not be reduced by any interim earnings the employees may have generated during the backpay period pursuant to *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital & Nursing Home*, 361 NLRB 333 (2014).

(c) Compensate Benjamin Heidenreich for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one (1) year and compensate Benjamin Heidenreich for his search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. See *King Soopers,* 364 NLRB 1153 (2016).

(d) File a report with the Regional Director for Region 20 allocating backpay to the appropriate calendar quarters. See *AdvoServ of New Jersey,* 363 NLRB 1324 (2016).

(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 due under the terms of this Order.

(f) Within 14 days from the date of the Board's Order, Respondent shall be required to remove from its files any and all references to its unlawful termination of, and its unlawful decision to accept and/or refuse to rescind Benjamin Heidenreich's statement of resignation, and, within three (3) days thereafter, notify Benjamin Heidenreich in writing that this has been done and that the unlawful termination, and/or the unlawful decision to accept/refuse to rescind Benjamin Heidenreich's statement of resignation will not be used against them in any way.

(g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix"[74] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, 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, 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 and former 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, Respondent has gone out of business or closed the facility involved in these proceedings, 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 January 1, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 27, 2021

[73] 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.

[74] 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."

APPENDIX

NOTICE TO MEMBERS AND 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.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain on your behalf with your employer.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT expressly or impliedly, threaten you with the loss of promotional opportunities by telling you that, by engaging in protected concerted activities to support or for the mutual aid of other employees, you will not promote because you talk to too many people.

WE WILL NOT accept and/or refuse to rescind a statement of resignation made as an off the cuff, frustrated remark because you engaged in protected concerted activities to support or for the mutual aid of other employees.

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

WE WILL reinstate Benjamin Heidenreich to his former position as a Diamond Level Sales Captain/Representative, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Benjamin Heidenreich whole for any loss of earnings and other benefits suffered as a result of the discrimination against him for exercising his Section 7 rights, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Benjamin Heidenreich for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one (1) year and compensate Benjamin Heidenreich for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

WE WILL remove or expunge all records of and references to Benjamin Heidenreich's statement of resignation and/or our unlawful decision to accept and refuse to rescind Benjamin Heidenreich's statement of resignation effective March 16, 2020.

CINTAS CORPORATION NO. 2

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/28-CA-258167 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.