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

AMERICAN CIVIL LIBERTIES UNION, INC.

and

Cases 05-CA-300367
05-CA-302762

NONPROFIT PROFESSIONAL EMPLOYEES UNION (NPEU), INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS (IFPTE) LOCAL 70 A/W INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, AFL-CIO, CLC

Katherine Leung, Esq., for the General Counsel
Kenneth Margolis, Esq. (Kauff, McGuire & Margolis LLP),
New York, NY, *William B. Gould IV, Esq. (Stanford Law School)* for the Respondent
Richard Bialczak, Esq., Long Island City, NY, for the Charging Party

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried over nine days between August 15, 2023 and April 5, 2024 in Washington, D.C. On March 13, 2023, the General Counsel issued a Consolidated Complaint and Notice of Hearing (the complaint) based on timely filed charges by the Nonprofit Professional Employees Union (NPEU), International Federation of Professional & Technical Engineers (IFPTE) Local 70 A/W International Federation of Professional & Technical Engineers, AFL-CIO, CLC (the Union). The complaint alleges that the American Civil Liberties Union, Inc. (the Respondent or ACLU): (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by denying employee Katherine Oh (she/her) a transfer on March 14, 2022,[2] and discharging her on May 5 because she engaged in protected concerted activities; and (2) violated Section 8(a)(5) and (1) of the Act[3] by engaging in the aforementioned conduct without providing notice to the Charging Party and affording it an opportunity to bargain with the Respondent.

The Respondent denied the material allegations in the complaint and asserted several affirmative defenses: (1) the complaint failed to state a cause of action; (2) the complaint was time barred; (3) Oh was terminated for cause; (4) the complaint should be deferred, in whole or in part, to

[1] 29 U.S.C. § 158(a) 1).
[2] All dates are in 2022 unless stated otherwise.
[3] 29 U.S.C. § 158(a)(5).

binding arbitration;[4] and (5) the General Counsel lacked the statutory authority to prosecute the complaint.[5]

The Respondent asserts that Oh was terminated because she exhibited a tendency to cast her complaints using hyperbolic and exaggerated language. The Respondent allegedly tolerated that kind of conduct until she took it to an entirely different level and demonstrated a disregard for the well-being of other Respondent's employees, particularly black colleagues. It also alleges that she persisted in that misbehavior and flatly rejected the Respondent's efforts to remedy it.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[6]

I. JURISDICTION

The Respondent, a nonprofit corporation with an office and place of business in Washington, D.C. is engaged in social and political advocacy related to the protection of civil liberties throughout the United States. In conducting its operations, the Respondent annually derives gross revenues in excess of $250,000 and purchases and receives at its Washington, D.C. facility products, goods, and materials valued in excess of $5,000 directly from points outside the District of Columbia. By conducting its business operations in Washington, D.C., the National Labor Relations Board (the Board) has plenary jurisdiction over it. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Organizational Structure

The Respondent is one of the premier civil liberties organizations in the United States. The organization's basic mission is to preserve the civil rights and civil liberties of all citizens, including those who fall within legally protected and underrepresented groups. The Respondent "fights for liberty and justice in the courts, in the legislatures, in the streets, and at the ballot box" in the following issue areas: criminal justice reform, immigration, reproductive freedom, voting rights, capital punishment, freedom of religion, national security, prison conditions, speech, privacy, technology, disability rights, human rights, LGBTQ+ rights, and women's rights.

The Respondent employs approximately 650 employees in seven departments. From June 2019 to June 2022, the Respondent employed approximately 500-550 employees. Its Executive

[4] On August 7, 2023, I denied the Respondent motion to defer this action to the pending grievance and arbitration proceedings. On August 9, 2023, I denied the Respondent's motion for reconsideration. On March 6, 2024, the National Labor Relations Board (the Board) denied the special appeal.

[5] The Respondent withdrew this affirmative defense in its amended answer, filed September 14, 2023.

[6] The parties entered into 12 "Factual Stipulations" (GC Exh. 59.)

Director is hired by, and serves at the pleasure of, the Board of Directors. The Executive Director hires and fires the Respondent's National Staff but may delegate that responsibility. National Staff consist of Senior Staff and Non-Senior Staff. Senior Staff are senior managers who report directly to the Executive Director and are "at-will" employees. They include the Legal Director, National Political Advocacy Director, Deputy Executive Director, Chief of Staff, Chief Operating Officer/General Counsel, Chief Communications Officer, Chief Development Officer, and Director of Affiliate Support and Nationwide Initiatives. All other employees are considered Non-Senior Staff and may not be terminated without just cause as defined at ACLU Policy No. 527.[7]

This dispute primarily concerns the operations within the National Political Action Department's (NPAD). NPAD, led by the National Political Advocacy Director, is the Respondent's chief advocacy department. Its staff members formulate and implement policy positions, undertake campaigns to change certain laws, and lobby elected officials. In 2019, there were five NPAD divisions, each led by a deputy political director. In 2023, NPAD consolidated several divisions.

Anthony Romero (he/him) is the Executive Director. Senior staff report directly to Romero. At the relevant times, senior staff included: Terrance Dougherty (he/him), General Counsel; Sophie Kim Goldmacher (she/her), Chief People Officer; Amber Hikes (she/they), currently the Deputy Executive Director for Strategy and Culture, was served as the Chief Officer of Equity, Diversity, Inclusion, and Belonging (EDIB) at the relevant times. Ronald Newman (he/him), the National Political Director until he was terminated on February 17, 2022. In December of 2021, Newman hired Ben Needham as the Director of the Democracy Division. Lucinda Ware was one of two deputy directors of the Democracy Division.

B. The Relevant Policies

1. Mission, Values & Culture Statement

The Respondent's *Mission, Values & Culture Statement* expresses the organization's mission statement to "create a more perfect union – beyond one person, party or side . . . [and] realize this promise of the United States Constitution for all and expand the reach of its guarantees."[8] The organization's values statement declares its commitment to strive for America to "[live] up to its promise of equality, liberty, and justice for all." Highlighted is the Respondent's belief that "everyone has the right to express themselves openly."[9] The culture statement sets forth staff's responsibility to "foster a culture of belonging in the organization" by:

- Assuming best intentions and accepting responsibility for impact.
- Committing to honesty and transparency.
- Empowering each other to try new things and learning from mistakes.
- Exercising humility and grace.
- Interrogating our own privilege and biases.

[7] R. Exh. 20.

[8] GC Exh. 3; R. Exh. 40.

[9] Hikes explained that the Respondent's Systemic Equality Program has an internal component that mirror its external work in addressing equity, diversity and inclusion in addressing "America's legacy and history of - - of racism." (Tr. 611-612.)

- Showing up for each other and showing up for the work.

2. Workplace Free of Discrimination, Harassment, and Retaliation

The Respondent's policy on *Maintaining a Workplace Free from Discrimination, Harassment and Retaliation* (the workplace policy) is routinely updated to comply with federal, state and local requirements.[10] The workplace policy does not, however, "capture the ACLU's commitment to, investment in, or prioritization of equity, diversity, inclusion, and belonging. Our EDIB principles and practices continue to be the unending work of our institution, internally and externally."

In addition to conduct in the workplace or any other locations where the Respondent's work is being conducted, the policy also applies to "calls, texts, emails, and social media usage" by employees. "Any employee covered by this policy who engages in conduct prohibited by this policy will be subject to remedial and/or disciplinary action (e.g. counseling, suspension, termination, etc.)." The pertinent portions of the policy relate to harassment and retaliation:

> Harassment based on a Protected Class is unlawful and will not be tolerated.
>
> The ACLU prohibits unwelcome verbal, non-verbal or physical conduct that denigrates or shows differential treatment towards an individual because of the individual's membership or perceived membership in a Protected Class, or that of the individual's relatives, friends or associates. Harassment may take many forms, and may occur in person, through written letters, e-mail or other electronic communications, or by phone.
>
> Examples of harassment prohibited by this policy, include, but are not limited to:
>
> - epithets, slurs, quips, or negative stereotyping that relate to a Protected Class;
> - threatening, intimidating or hostile acts that relate to a Protected Class;
> - written, graphic, or other audio or visual material that denigrates an individual or group because of a Protected Class and that is placed on walls, bulletin boards, computer screens, or elsewhere on the ACLU's premises, or circulated or displayed in the workplace; or comments, jokes, innuendos, gestures, pranks or other forms of humor that are demeaning or hostile with regard to a Protected Class.
>
> * * *
>
> Retaliation is Prohibited
>
> Retaliation is a serious violation of the ACLU's policy. It is also a violation of federal, state and local law.
>
> The ACLU will not retaliate against an individual for engaging in protected activities such as: (i) making a complaint of harassment, including but not limited to sexual harassment, discrimination, or retaliation, either internally or externally (by filing a lawsuit in court or with a fair employment practices government agency); (ii) seeking a reasonable

[10] GC Exh. 4; R. Exh. 30.

accommodation (see sections 3 and 4 above); (iii) testifying, cooperating with, providing assistance in an internal or external proceeding involving claims of harassment, including but not limited to sexual harassment, discrimination, or retaliation under federal, state, or local anti-discrimination laws; (iv) opposing harassment, including but not limited to sexual harassment, discrimination, or retaliation (e.g., making a complaint of harassment regarding yourself or another individual); or (v) encouraging another individual to report harassment, including but not limited to sexual harassment, discrimination, or retaliation.

The prohibition against retaliation includes any acts that could be reasonably likely to dissuade or deter a person from pursuing any of the protected activities described above. In certain situations, retaliatory actions may also include actions that are not job-related or actions that do not occur in the workplace (e.g., threats of physical violence outside of work hours). None of these actions are tolerated by the ACLU.

Retaliation is prohibited even if the individual's underlying complaint or other protected activity had no merit, so long as the individual acted in good faith.

* * *

3. Employee Speech

The workplace and public speech rights of the Respondent's employees are set forth in Respondent's Board Policy 528 which states:[11]

As an organization that is dedicated to protecting freedom of expression from government interference, the ACLU is particularly sensitive to the need to guard the free speech rights of members of its own governing board, staff and other lay leaders against unwarranted interference by the institution itself. The ACLU welcomes the expression of a diversity of views within the organization and supports the right of such persons to express their personal views on whatever topics they wish to discuss. However, when it is reasonably foreseeable that the public expression of individual views will be perceived as statements of ACLU policy, and when the views expressed diverge from those of the ACLU or deal with controversial matters not covered by ACLU policy, care should be exercised to distinguish that individual's views from those of the ACLU. Special care (such as an express disclaimer) is appropriate in instances where the expression of personal views might appear to commit the ACLU to positions on candidates for appointive or elective office. We expect the exercise of good judgment in recognizing such circumstances and in making distinctions between personal views and those of the ACLU.

4. . Social Media Policy

The Respondent's Social Media Policy incorporates the aforementioned free speech policy and is stated at Section VII.C. of the Employee Handbook:[12]

[11] GC Exh. 5 at 00580-00581.
[12] Id. at 00581-00582.

ACLU employees and volunteers, acting in their personal capacities and outside the scope of their employment, are free to create and operate personal social media accounts. See Board Policy 528, "Free Speech for ACLU National and Affiliate Employees and Lay Leaders," for general guidance on the topic of employee speech.

There are, however, three ways in which employees and volunteers using personal social media must be mindful of how that activity could affect the ACLU.

First, as discussed in Board Policy 528, employees are required to distinguish their own views from those of the ACLU. As a matter of practice, this policy extends to volunteers as well. If anything about your personal social media pages or posts could cause confusion in that regard, then you must also provide a disclaimer clearly explaining that the account is a personal one and conveys your individual views rather than those of the ACLU. For example, if you provide your ACLU title or otherwise identify yourself as an ACLU employee or volunteer on a Twitter profile, then you should also include "Personal acct, views my own" in that profile. On a personal Facebook profile, it is not necessary to use a disclaimer simply because you have listed the ACLU as your current employer in the space provided for that information, but it may become necessary to do so if you are using the account in a way that is not clearly personal.

No personal account or profile on any social media platform may display the ACLU logo or other distinctive ACLU marks, such as the blue or red block logos used in ACLU communications, as part of the account's graphic identity. Neither should any personal account have a handle or other identifier incorporating the letters "aclu." However, it is ok to repost content from the ACLU or any other organization, including any logos and names as they are normally displayed in the reposting function, and it is ok for your own posted content to refer to the ACLU in any way that does not confuse the personal nature of the account (and is otherwise consistent with this policy).

Second, and as would be the case with any other form of personal communication, an employee or volunteer must not use social media to disclose confidential information gained in the course of their employment by the ACLU, or to violate any other duty the ACLU has to individuals such as a clients or members. Please contact your department head if you have questions regarding these duties.

Finally, non-incidental personal social media activities should be conducted on personal time and using personal rather than ACLU equipment and other resources. See Employee Handbook Section VII (H), Use of ACLU Facilities and Resources for Non-ACLU Purposes, for guidance on when some exceptions may be allowed for incidental activities. You may not assign other ACLU staff to do any work on your personal social media accounts. However, the ACLU may provide some professional support to an outside social media account of value to the ACLU, potentially including an account maintained personally by an ACLU employee, at the discretion of the Chief Digital Officer.

The ACLU operates its own social media accounts. These are for the exclusive purpose of organizational communications and are centrally managed through the Communications Department. No individual employee or volunteer may create any social media account on

behalf of the ACLU without approval of the Director of Online Engagement, post content to any ACLU social media account without approval from the Communications team, or use any ACLU social media account for any purpose other than to make authorized communications on behalf of the ACLU.

Contact the Chief Digital Officer if you have questions about operating any personal or organizational account pursuant to this policy.

5. Employment Rights of Non-Senior Staff

The Respondent's "Organizational Policies – Personnel Policies" are set forth in Policy 527. Section III.A. sets forth the grounds for terminating the employment rights of Non-Senior National Staff.[13]

III. A. Grounds For Termination

Non-senior staff may not be terminated in the absence of just cause. Just cause means misconduct or inadequate job performance based upon a rule or standard that was known or which should have been known by the employee.

Misconduct includes, but is not limited to, the following:

1. Misappropriation of ACLU property;
2. Fraud or falsification of records;
3. Continued absence or lateness after due warning;
4. Significant insubordination;
5. Serious misbehavior while on the job;
6. Refusal to perform assigned tasks;
7. Wrongful use or theft of property or services;
8. Unauthorized disclosure of confidential or proprietary information;
9. Physical aggression;
10. Conduct prohibited by ACLU policy (See footnote 2 page 622 of the ACLU Policy Guide);
11. Endangering the health or safety of another employee.

Inadequate job performance is the serious or repeated failure to meet a known job standard. In cases of inadequate job performance, the supervisor should make a reasonable effort to resolve the problem informally. This shall include notifying the employee of the problem and proposing ways to remedy it. If, after a reasonable period for correction, the problem persists, employment may be terminated pursuant to the procedures set forth in ACLU Policy 527.

[13] Footnote in original: "This policy does not apply to employees covered by a collective bargaining agreement or probationary employees." (R. Exh. 20 at 00051.)

C. The Union

The following employees of the Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of Respondent in the classifications listed in Appendix A to the Letter of Understanding Voluntary Recognition through Card Check Between Respondent and the Charging Party; but excluding managerial employees, temporary employees, confidential employees, guards, supervisors as defined in the Act, all employees represented by another labor organization, and all other employees of Respondent.[14]

Since May 11, 2021, the Respondent has voluntarily recognized the Union as the exclusive collective-bargaining representative of the Unit based on Section 9(a) of the Act.[15] This recognition has been embodied in a recognition agreement dated April 30, 2021.

D. Katherine Oh

1. Oh Was Considered A Competent Employee

Katherine Oh was employed as a member of the Respondent's Washington, D.C. office. She was hired by the Respondent as a political researcher and strategist on May 1, 2017. In June 2018, she was promoted to senior political researcher and strategist. In July 2019, Oh was promoted to Policy Counsel. Subsequently, she became a Senior Policy Counsel.[16]

Ronald Newman, then the Director of Strategic Initiatives, was Oh's initial supervisor until he was promoted to National Political Advocacy Director. Subsequent supervisors included Karthik Ganapathy, Chris Anders, and Lucinda Ware. In January 2022, Oh's direct supervisor was Democracy Division Deputy Director Ware. Her second-level supervisor during this same period was Democracy Division Director Needham.

Throughout her employment, Oh was assigned to NPAD, was considered a competent employee, and there were never any issues with her work.[17] In 2020 and 2021, Oh reported to Deputy Political Director Chris Anders.

2. Oh Was An Outspoken Employee

During her five years with the organization, Oh was an outspoken employee and advocate for her colleagues. She raised numerous complaints about the organization's policies and its

[14] Factual Stipulation 1 (GC Exhs. 59-60.)

[15] Factual Stipulation 2.

[16] Oh was promoted to Senior Policy Counsel, following a leveling evaluation for employees who worked in NPAD. (GC Exhs. 8, 78, 79.)

[17] GC Exh. 33 at 00212.

leadership, her work assignments, and the verbal abuse of employees by managers. Oh was also very active in the Union.[18]

Oh maintained a personal Twitter account which she used to connect with about 50 coworkers and ACLU affiliate staff members about workplace issues. She utilized that account to engage in discussions about organizing efforts, managers, and concerns that Romero and senior managers were shielding bad managers from any accountability. Oh also used Twitter to convey to her coworkers information about her own experiences as a victim of domestic violence.[19]

3. Oh Consistently Complained About Workplace Issues

Oh began complaining about workplace issues during her first year with the organization. On October 31, 2017, she complained to Human Resources that attending staff and management training "would be a poor use of my time." On December 31, 2017, Oh complained that the organization's sexual harassment training was "likely to be ineffective or possibly counterproductive."[20] The following year, in June 2018, she complained to Deputy Executive Director Dorothy Ehrlich regarding training, manager hiring and conduct, pay practices, and "loopholes in ACLU workplace policies."[21]

Between 2019 and 2022, there were serious workplace culture challenges in NPAD. Beginning in 2019, Oh complained about issues of sexism, disparate treatment of female employees, the failure to promote qualified, experienced women of color in the department, and the culture of public shaming and verbal abuse from then National Political Director Ronald Newman. By early 2020, other employees had joined Oh in complaining about Newman's behavior and what they characterized as a toxic culture in NPAD. Over the next two years, Oh repeatedly expressed her concerns while Newman remained in place as National Political Director.

During this period, there was significant attrition in NPAD which resulted in dramatically increased workloads for the remaining employees, including Oh. Oh constantly asked for management to address the ballooning and unmanageable workloads for the remaining staff.

E. Ronald Newman

1. Oh's March 2019 Performance Review

Newman was Director of Strategic Initiatives when Oh joined the organization. In February 2019, the National Political Director left and Newman was appointed Acting National Political Director. Initially, Oh had a good relationship with Newman. She found him to be "funny, brilliant, considerate," and enjoyed working with him. However, the relationship deteriorated around the time that numerous NPAD employees were laid-off. Newman did not respond to Oh's emails and became

[18] It is not alleged, however, that Oh's union activity contributed to her eventual discharge. (Tr. 56.)

[19] Oh's frequent use of her Twitter account to post about workplace issues, as well as "follow" and be "followed" by coworkers about the same issues, was not disputed. (GC Exh. 36; Tr. 154-155.)

[20] In its position statement, the Respondent noted, "[s]ince that time, for a variety of reasons, that training has been substantially revised. (GC Exh. 80 at 4; R. Exh. 50.)

[21] R. Exh. 60.

unpredictable. Some days, Newman would praise Oh as an outstanding employee, while other days he would berate her over insignificant workplace issues.

In March 2019, Oh's concerns about Newman worsened when they met in his office for her performance review. The meeting took place shortly after there had been layoffs in the communications department and many employees were concerned about job security. During the meeting, Newman ridiculed NPAD staff for seeking lifetime job security and told Oh she was useless. However, he told her not to worry because most NPAD employees were useless. Oh shared those comments with coworkers, who confirmed that he made similar comments to them.[22]

On March 30, 2019, Oh emailed Chief People Officer Goldmacher regarding her performance review. She explained that she filled-out her portion of the form before the meeting and was supposed to complete the remaining sections with Newman at the meeting.[23] Oh explained that, instead, Newman brought her a completed form, did not take the form she completed, and wrapped up after partially discussing the first section. Oh asked if she should still send Newman her form or file it with Human Resources. Goldmacher suggested Oh send Newman the form she filled out, and added:

> PS – have you spoken with Ronnie directly about some of the conversations you and [Faiz Shakir] had with respect to your title and/role? I would like to be sure that you and Ronnie have that conversation, too. I know he's been thinking very intentionally about NPAD as a whole.

On April 25, 2019, Oh informed Goldmacher that she decided not to send her 2x2 form to Newman because "[t]he whole exercise and my self-advocacy seemed to annoy him, so I decided to just keep quiet about it instead of provoking more resentment."[24] Oh also offered suggestions to Human Resources regarding the 2x2 form process within NPAD's current reporting structure and expressed interest in following up with Goldmacher regarding "[Shakir's] promise to change [her] job title" and where she fit within the organization's "salary structure."

Goldmacher replied on May 7, 2019 and acknowledged there had been "shifts in reporting structure" due to Newman's transition, adding:

> I don't want you to be in a position of having to "just keep quiet" about matters, so let me know please if there are things you would like to raise/address with me personally? If there are things you can/have already conveyed already via Shayna, I can respect that too.

2. Oh Requests Gender-Bias Training and Managerial Coaching for Newman

[22] Oh's credible account about how Newman treated her, as well as her recollection of the March 2019 meeting was not refuted by Newman's vague explanations to Goldmacher during the subsequent investigation. (Tr. 57-62; GC Exh. 9.)

[23] GC Exh. 9 at 02430-02431.

[24] Id. at 02429-02430.

On June 20, 2019, Oh asked Goldmacher to "discreetly work on requiring some kind of in-depth gender bias and managerial coaching for [Newman]."[25] She asserted that Newman and Shakir "conspicuously blew off the gender bias training when it was held in person," even though "they [were] the ones who needed it the most." Oh then shared a common thread she identified in conversations with "half a dozen colleagues" who expressed concerns about their interactions with Newman: "at his worst, [Newman] behaves like a harsh asshole who lashes out and makes them feel disrespected, devalued, and heartsick—with strong sexist undercurrents."

Oh also suggested that despite Newman's potential to "be a great colleague when 'at his best,' the Respondent should still address his behavior, because it falls outside of 'the usual boss gripes.'" She explained that her request was due to employees' concerns for "being berated for outcomes out of our control, being punished for self-advocacy, and being straight up told we are useless." Goldmacher replied shortly thereafter, acknowledged the seriousness of those concerns, and asked for Oh's patience in order to "respond more fully."[26]

3. Goldmacher Investigates Newman's Conduct

On July 18, 2019, Goldmacher met in-person with Oh in the Washington, D.C. office "in response to the series of emails and matters brought to HR's attention." She also coordinated a meeting between Oh, Newman, and Shayna Strom.[27] The meeting resulted in agreement on a title change for Oh as policy counsel focusing on democracy reform issues.

Another outcome was Goldmacher's recommendation that "[Newman] continue to work with executive leadership coach." Goldmacher also reported that she "spoke 1:1 with [Newman] to convey outcome/conclusion and spoke specifically about "useless" comments, which [Newman] did not recall using specifically."

A reorganization of NPAD later that summer delayed implementation of Oh's title change, but reports from Strom in the weeks/months following indicated that Oh was pleased with her current work situation.

4. Oh Complains About Misogyny in the Workplace

However, Oh's concerns with abusive treatment by management did not end there. On October 4, 2019, she contributed to a discussion on that subject by posting the following comments on the EDI Slack Channel:[28]

> [For what it's worth], I experienced the most misogynist and humiliating incident of my entire 20+ years in the workforce at the ACLU, which is saying something because I've worked at a tech company where the men routinely joked to my face about my giving them b-jobs . . . by the way, this is partly why I keep speaking up, the other is that I grew up in a home racked

[25] Id. at 02429.
[26] GC Exh. 12 at 3.
[27] Shayna Strom was the Chief Deputy National Political Director at the time.
[28] GC Exh. 12 at 00132.

> by a physically violent misogynist, which has basically pushed my tolerance for abusive men down to nothing.
>
> If you don't stand up for yourself, even at the cost of being branded a troublemaker for HR, that is how you keep getting punched in the face - literally and metaphorically.
>
> I think a "don't hire assholes" and "don't promote assholes into positions of power" rule would be good, but I am convinced more than ever that power tends to corrupt even good people. Leadership needs to grapple with that.
>
> I do want to say that I still do have hope. That's why I'm opening up and airing my thoughts here. My own experience with Sophie has been positive, and I believe that she and many at the top -- and as crucially, many many of my colleagues -- sincerely want the ACLU to be a humane place to work that lives its values.

Goldmacher was notified of Oh's comments on the EDI Slack Channel and spoke with her by telephone on October 7.[29] Asked to explain her reference to misogyny, Oh recounted the following: Newman stated that Oh was "useless" to the department, which made her sad, because when she first started working for Newman he was "honorable" and "went to bat" for her. Oh clarified that she was not reporting "misconduct" to Goldmacher because Newman was "not a sexual harasser," rather she just wished "he had a softer touch" and was less "dismissive." She explained how she saw "a lot of things through a racial and gender-based prism" that was "not in [Newman's] mind," which was her primary frustration. She wished he "was more enlightened about this issue" and understood that he "[held] the most powerful position in the department."

Regarding office space, Oh explained that she was displeased with her office space assignment made by Newman. When she attempted to "appeal" the decision, [Deputy National Political Director] Shakir said she was "ungrateful." Because she "thought [she] was going to get punished," she accepted another space that opened up. Oh explained how her office location impeded her work by separating her from NPAD staff. She did, however, express excitement about her promotion and her work in the Democracy Division under Chris Anders. In that regarding, Goldmacher informed Oh that her title change would wrap up within the week.

On October 9, 2019, Goldmacher spoke with Oh by telephone regarding Newman's comment that Oh was "useless," Oh's dissatisfaction with her office space, and her job title and job description. Goldmacher also spoke with Newman, who did not recall what he said, but did not believe he made such a comment; he speculated that he "could have said that the reports she may have been focused on were not as valuable." Goldmacher told Newman to be "mindful of the impact of his words, given his position of authority, and rephrase such a message." For example, saying a line of work "may not be a priority," instead of using terms like "useless."

Regarding Oh's office complaint, Newman explained that he assigned offices based on "position, seniority, leveling play into the criteria." In the absence of an accommodation request, Goldmacher deferred to Newman "as department head, working with the Operations department, to determine space." Regarding Oh's title change and job description, Newman "agreed to effectuate

[29] Id. at 00133.

asap." On October 11, 2019, Goldmacher notified Oh of the formal change in her title to policy counsel.[30]

5. Oh's November 20, 2019 Complaint

On November 19, 2019, Newman was contacted by Mark Stringer, a representative of the ACLU Iowa affiliate, questioning the accuracy of the Respondent's informational flyer containing a 2020 presidential candidate's response regarding the decriminalization of marijuana as a "NO."[31] Newman forwarded that email to Udi Ofer and copied Oh, asking: "Were we right? Or is Mark right? Oh replied a short while later, explaining that the candidate's organization did not answer that question, but she "transferred that answer and any flags from Taylor (none for this instance) to the tracker." Oh explained that her "role ended there, although [she] did offer [her] two cents that the ACLU should not record blank answers as 'NO' answers." Newman's response, which copied several other employees, insinuated that Oh's reply sought to "absolve [herself] of responsibility," and clarified that his "only question is whether Sanders' answer is better read as an unequivocal YES. I'm in meetings, so I'd appreciate a considered take on that . "[32]

On November 20, Oh forwarded Newman's email to Goldmacher and Hikes. She explained that his criticism was misplaced and elaborated on his treatment of women in the workplace:

> Please see Ronnie's shitty comment below accusing me of "sprint[ing] to absolve oneself of responsibility" when all I did was tried to answer his bare-bones [question] with an explanation of my very limited role. (I had no involvement whatsoever in the creation of this flyer in question because I had left the Rights for All team months ago.) One of the men on the thread independently contacted me to let me know he also thought Ronnie's comment was uncalled for and out of line.

Oh identified Newman's email as "part of an overall pattern of abuse, bullying, active contempt, and other forms of random punching down from [Newman] that [she had] not done anything to deserve." She cited her "physically violent father" and "abusive male managers throughout [her] 20+ years career" as reasons for her "know[ing] what a bully who likes to pick on women looks like." Oh asserted that "whatever coaching" Newman was being offered was not working, and that she saw no evidence that he would be "held accountable for mistreating his employees." She declared that she had "not yet decided whether to file a formal complaint," but had begun to "systematically document the pattern." She asserted that "MULTIPLE WOMEN" were upset about Newman's behavior in the workplace, and that Romero was aware of this fact.[33]

[30] GC Exh. 12.

[31] GC Exh. 10 at 02449-02450.

[32] Id. at 02448-02449.

[33] Similar complaints were made in 2021 about Newman's leadership of NPAD and a culture of misogyny and sexism in the department by other NPAD employees, including Jessica Arons, Marissa Bramlett-Wild, Lisa Guraya. (Id. at 02447-02448; R. Exh. 155; Tr. 40, 406-408.)

6. The December 5, 2019 Meeting

In response to Oh's November 20 email, Goldmacher and Hikes met with her on December 5. Goldmacher documented the meeting in her subsequent report (January 31, 2020), as a "formal inquiry" regarding Oh's complaints against Newman: the deterioration of their working relationship, his proactive contempt and lack of concern for her welfare; being bullied, and "afraid to respond to Newman because of a potential terrible response in return;" Oh explained that she started "speaking up because I don't think I'm alone–This is broader problem than me–Something needs to be done."[34] Oh provided Hikes and Goldmacher with several examples of bullying and demeaning comments by Newman:

- Newman's November 19, 2019 email "felt like a slap to [her] face." A coworker reached out to Oh to say Newman's response was "out of line" and "uncalled" for.
- On October 2, 2019, Newman responded to Oh's complaint about her office space by "[going] out of his way to violate his own system" in order to deny Oh space.
- During her March 2019 performance review, Newman told Oh she was "useless" to NPAD.
- In early 2018, Newman offered a white man with Oh's same title the job of writing a "public facing blog post" while Oh was given "admin support work."
- Newman reached out to Oh because she was not smiling, which is a "classic criticism of women."
- Newman often referred to Oh as "so young" compared to him, even though she was older than him. Oh felt that Newman viewed her "as a young woman he can just push around."[35]

Oh feared retaliation. She said the situation was "heartbreaking," because she liked her work, but Newman being "robotic," "abrasive," and "a fucking asshole" was "affecting [her] in a particularly bad way." Oh described her immediate supervisor, Chris Anders, as a "wonderful" supervisor and "buffer," but felt her that her situation was "personalized" because Newman was disrespectful and dismissive. She also noted that she was "under constant threat" from Deputy National Political Director Faiz Shakir. In contrast, Oh insisted that Newman was nice to Shayna Strom, a "high status white woman."

Oh also expressed her concern that Newman would dismiss her as a "disgruntled employee," and that she felt "so disrespected" it made her "feel physically sick." She explained that she was undergoing this inquiry process to try to "drive . . . change," and that she continued speaking up because she knew she was not the only one with complaints about Newman. Oh stated that "if [she feels] abused, [she] won't not do anything" about it.

Oh expressed her faith in Goldmacher and the organization to remedy the situation. She insisted that she was "acting in good faith; not because [she wanted] to get back at [Newman]," but because she wanted the "toxic interactions to stop." Oh's intended outcome of the inquiry process was for Newman to be more respectful and be nice to her like he once did. When asked if she wanted

[34] As was the case with nearly all of the record testimony, Oh's recollection of statements made at this meeting was merely a snapshot of what was recorded or credibly documented in emails and reports. (Tr. 67; GC Exh. 12 at 00136.)

[35] Id. at 00136-00137.

a facilitated conversation with Newman, Oh replied that it would only work if she could bring up concrete examples and he was "willing to take constructive criticism."[36]

7. Goldmacher and Hikes Meet With Newman Regarding November 2019 Complaint

On December 20, 2019, Goldmacher and Hikes met with Newman regarding Oh's concerns.[37] When asked about the feedback he gave Oh during her March 2019 performance review, Newman said that he told Oh that he wanted her to do work that was "ACLU-useful" and that she had "demonstrated at times a real ability to add value." Regarding her office space complaints, Newman explained that he assigned her sixth-floor office space, although NPAD staff were mostly on the ninth and tenth floors. After a period of construction, Newman refused Oh's request for space again on the sixth floor because NPAD was planning to use it as "a swing space" and he was concerned about the implications if [he] made an exception" to "an established rule."

Regarding his November 19 email exchange with Oh, Newman explained that Oh responded "in an odd way," and he wanted to "establish a norm of being useful and constructive." He characterized his professional relationship with Oh as being "a little checked out" and conceded that his "goal" was to "limit [his] professional interaction" with Oh. Newman explained that he "moved on" from their relationship because Oh had "a series of things [she was] dealing with . . . that [he could not] help resolve."

8. Oh's January 12, 2020 "Feedback about Anthony"

On January 12, 2020, Oh emailed Hikes with "Feedback about Anthony [Romero]."[38] Oh stated that she "had been doing [her] own discreet 'listening tour' regarding the ACLU's leadership and general approach to rank-and-file employees," including "concerns that are based on direct interactions" with Romero. She laid them out in detail for Hikes:

- Romero was warned about Newman when he was first announced as acting head of NPAD, but dismissed away the concerns.
- Romero views rank-and-file complaints about abusive/poor management as a "routine" or "natural occurrence" at the ACLU.
- Romero will not do anything meaningful about abusive managers.
- Romero does not care about the welfare of rank-and-file employees and sees them as disposable at the ACLU.
- Romero does not care about women rank-and-file employees complaining about "sexist assholes terrorizing employees" because "he is one of them."
- Romero does not "care about diversity efforts." He believes the ACLU should promote and hire "based solely on merit," often deriding or dismissing internal applications from people of color or women for higher positions.
- Romero cares immensely about senior employees who can bring in "big donor bucks" to the ACLU.

[36] Id. at 00137-00140.
[37] GC Exh. 12 at 00140-00142.
[38] GC Exh. 11 at 01034-01036.

- Romero "cares about seeming like the good guy" and being given the opportunity to fix problems, so following the chain of command is important in his eyes (even though that chain of command puts rank-and-file workers at a serious power disadvantage).
- Human Resources is not anybody's friend. HR works for management.
- No matter HR's protestations to the contrary, retaliation is a legitimate concern.

On January 15, 2020, Hikes responded to Oh, expressed their intention to follow-up regarding Oh's concerns about Romero and Newman, and alluded to their continued efforts for change but offered no immediate solution. Oh replied on January 22 and thanked Hikes for their "ability to combine candor with humanity and compassion." She referred to the "public exodus since [Newman] took power," which she felt "[spoke] volumes" about employees' perceptions of Newman, and lamented that "many of the people who could attest to [Newman's] problematic behavior" had already been "pushed out" of the organization. She listed the names of 14 former employees and instead that "many" of them had grievances against Newman.[39]

Describing the challenge with Newman, Oh explained that he was not a "monster who engage[d] in overtly illegal or monstrous conduct," which would be "easier" to handle, but that he "blithely engage[d] in microaggressions." Oh asserted that "[s]ome of [Newman's] behaviors [were] in fact blatantly racist and sexist in themselves," while "others required more nuanced understanding of gender bias, structural sexism, and power dynamics to recognize." She added that Newman "fundamentally [lacked]" the "humility and self-awareness" necessary to fix these less overt manifestations of bias and power dynamics.

Oh explained that she had "been treated like shit by the ACLU—and by men of color," like Newman. She detested and found "deeply demoralizing" the "tiny, noisy, uncomfortable office on the 8th floor" that Newman assigned her to after she advocated for two years to return from the 6th floor—"unlike the offices that virtually every other policy counsel in DC has."

Finally, Oh lamented Human Resources' "hands-off approach" due to Newman's capacity for retaliation. She also expressed her refusal to quit, because "it would be conceding defeat to what [she felt] to [her] bones [was] an injustice." Oh concluded by explaining her resilience in the face of adversity:

> When my father broke my teeth when I was a kid defending my brothers against him, I went to the hospital to get patched up and then got into Stanford on academic merit. That's what I'm going to try to do here, even though I don't think at all that I deserve to have to put up with this bullshit and abuse and drain on m time.[40]

9. Goldmacher's January 31, 2020 Report

On January 31, 2020, Goldmacher briefed Oh on her "Findings, Conclusions, Recommendations" regarding Oh's "repeated comments . . . about work conditions and management. Hikes also attended. During this meeting,[41] Oh shared that "[p]eople just openly talk about like,

[39] Id. at 01033-01034.
[40] Id. at 01033-01034.
[41] GC Exhs. 46, 46A; Tr. 206.

'Yeah, there is sexism in the ACLU, we need to address it.' I do think it's part of the problem."[42] She explained that there had been a pattern of assignments over the course of two years. However, a recent assignment—being relegated to administrative tasks organizing a staff summit, while a "promising young white man" was assigned to draft a report about the CIA Director nomination and "hobnob with the national security team"—was the "straw breaking the camel's back." Oh resented that a relatively junior staffer was given a more prestigious assignment instead of a female with extensive experience, including having worked for the Senate majority leader and possessing a law degree. Oh also repeated her complaints about the location of her assigned office space, Newman's dismissive comments, and his need for managerial coaching.[43]

Goldmacher and Hikes did not disagree with any of Oh's comments. However, they explained that Newman did not behave in a "discriminatory manner." Instead, they believed that there was a problem with how he interacted with a "cross-section" of employees that went beyond protected class individuals. They advised Oh to bring any "new evidence or new incidences" about Newman "directly" to them rather than voicing them in "open forums."[44]

Less than a week later, on February 5, 2020, the problems with Newman's leadership of NPAD surfaced at a contentious NPAD department-wide meeting. The following day, Lisa Guraya, Assistant to NPAD, emailed Hikes about her conversation with Newman after the February 5 meeting.[45] She said that Newman "lost his cool and got defensive" in response to employee frustrations raised in the meeting, Afterwards, Guraya spoke with him and suggested he apologize to the team for his behavior. She suggested that he "need[ed] to show that he has emotional capacity for the people who work under him." However, Newman disagreed, insisted that "multiple management styles can work (including management by intimidation)," adding that "he did not believe that he should have emotional capacity for his employees." Guraya was "super discouraged by this conversation," and her "lose all faith in and respect for" Newman.

On March 2, 2020, Goldmacher emailed Hikes a "Summary and Data Points re NPAD Matters."[46] Her findings addressed Newman's "style of leadership/management" in several areas: decision making, disempowerment, defensiveness, dismissiveness, respect, and emotional intelligence. Based on the information collected, Goldmacher concluded that Newman's approach and conduct was "impacting culture/morale" in NPAD and possibly the entire organization:

- Between February 2019 and February 2020, 37+ people (over 50% of the department) in NPAD spoke with Hikes and Goldmacher regarding concerns with NPAD leadership. These staff were nearly 50/50 male/female.
- Newman's decision making is centralized, unilateral and not inclusive.
- There exists deliberate and/or inadvertent disempowerment of staff at all levels; there is no true delegation of authority; NPAD staff members feel "powerless, undermined, and micromanaged."

[42] GC Exh. 46A at 5..
[43] Id. at 11-18.
[44] Id. at 8-10.
[45] GC Exh. 13.
[46] GC Exhs. 63-64.

- Conversations with Newman are interrogatory and defensive rather than open, especially if Newman holds a different opinion.
- Newman's choice of language and tone in both written and oral communication is "condescending, mocking, exaggerated, hyperbolic." Newman demonstrates "imperiousness."
- Newman's reorienting of NPAD's work to a campaign-centric approach has made staff feel that their work and passions are unimportant.
- There is a lack of respect for processes and people; dismissive language/tone conveys lack of respect; Newman does not listen to understand.
- Newman does not seem to care about how people feel/how they are doing; interactions feel "transactional and not relational;" empathy is missing from Newman's responses.

10. Newman Is Assigned An Executive Coach

By January 2020, the Respondent had arranged for Ana Perea, an executive coach, to work with Newman in addressing the issues surrounding him. Hikes informed NPAD Deputy Directors Chris Anders and Jesselyn McCurdy that they wanted Perea to get a "firsthand understanding" of the issues by sharing NPAD concerns with her. Both agreed but Anders noted that he was "not confident that some of the concerns could be alleviated that way. So much of it seems ingrained in personality (including motivation) and approach. But might at least be helpful."[47]

On March 8, 2020, Goldmacher emailed Perea to check in about next steps in supporting Newman and NPAD leadership from the executive level. Perea replied the following day saying that progress was being made. She encouraged Goldmacher to be "patient and open" to next steps. Goldmacher replied that day, sharing her concerns about possible tensions between Newman and NPAD staff that could manifest in an upcoming meeting. Perea responded on March 11, recommending that Goldmacher be "an ear" for people who reached out and "[hold] off on further intervention at the team level" at that point in time.[48]

On November 4, 2020, Romero provided Perea with a "Summary of NPAD Conversations" with employees, including Romero, listing Newman's strengths and weaknesses. Many of the comments provided a mixed picture of Newman: brilliant, high expectations, decisive, a vision and strategy leader, laser-focused on the goals, pushes me and praises me, meticulous, blunt, impersonal, idiosyncratic, tumultuous, inconsistent, evasive, lack of engagement and communication, authoritarian, micromanager, does not delegate, distant, lack of transparency or speed in decision making, missing in action, not valuing expertise and knowledge, not open to feedback, lack of trust, dismissive, and bullying.[49]

11. Oh's November 16, 2020 Complaint Asserting Retaliation

On November 16, 2020, Oh complained to Goldmacher that Newman retaliated against her by excluding her work from his "priorities deck" which would have provided her with additional

[47] GC Exhs. 61-62.
[48] GC Exh. 65.
[49] GC Exh. 66.

resources and recognition.[50] On November 18, Amanda Romagnano, Director of Benefits and Wellness, followed-up by asking if there was anything else to include. On November 20, Oh responded with examples of Newman's "year-long exclusion" of her work from the priorities deck.

Oh asserted that Newman never "deemed any of [her] work as meriting additional support, resources, or recognition." In support, Oh provided statistics indicating that she was the only one "among 39 similarly-situated staffers" whose projects or campaign proposals had never been designated as a "departmental or division priority over the past year." She also rejected potential excuses, deeming them "implausible, unreasonable, or refuted" by the evidence:

- It was an accidental random omission.
- All of Oh's issues were uniquely irrelevant or unimportant to the ACLU.
- There is no more space for additional Democracy Division priorities.
- All of Oh's issues were going nowhere and had no prospects of moving.
- Newman was unaware of Oh's campaign priority proposals or work efforts over the past year.
- This was Oh's fault because she is uniquely deficient and has been excluded for valid substantive reasons.

Oh also recounted a February 26, 2020 Office Hours meeting when Oh and other NPAD employees vented their frustrations.[51] Oh said that "many people in NPAD [felt] like they [were] being treated 'like shit' by [Newman]" and that their professional expertise was "disregarded" and "actively insulted" by him. Newman took offense with this characterization. She claimed that his conduct continued through the year and prompted a "mass exodus of staffers from NPAD."

Oh said that NPAD employees continued raising concerns, most recently during the October 14, 2020 NPAD meeting. During that meeting, Romero "unexpectedly popped up to address the concerns" because Board members contacted him about "NPAD's serious internal woes." He also announced that he would conduct one-on-one meetings to receive direct input from NPAD staffers.

Oh concluded by questioning the value of the Respondent's anti-retaliation policy if it allowed "powerful managers" to "brush violations under the rug." She acknowledged the gravity of raising concerns with Human Resources, but maintained that she was "morally and professionally bound to take action."[52]

[50] Newman created the priorities deck system as a way of designating which certain Democracy Division campaigns and projects would be given more greater recognition and resources. The priorities deck was circulated to staff every one to two months. (Tr. 78-79.)

[51] The Respondent conducts monthly organization-wide meetings called "Office Hours." Employees were not provided with any written rules or guidance regarding employee participation or the use of cameras during video conference or virtual meetings. (Tr. 56-57.)

[52] GC Exh. 15.

12. Romero Conducts One-on-One Meetings With NPAD Staff

On October 29, 2020, Oh met with Romero.[53] She described Newman as "abusive" and a "bully," and his behavior as "attack[ing]" coworkers. Oh voiced concerns that staff had been called "useless" and their complaints had been "dismissed" and "discredited." She also questioned Romero's commitment to due process for Newman by asking how that worked for employees who did not have direct access to him. Romero replied, "you have due process, you're not incarcerated. You have agency as you are employed here."[54]

On November 2, 2020, Romero followed-up with Goldmacher and Hikes regarding Oh's complaints about Newman. He asked Goldmacher to check how many complaints Oh had filed with Human Resources and sought clarification on whether Newman was found to be "a bully and abusive," as Oh claimed. Goldmacher replied that Oh's account of Human Resources' findings was inaccurate and provided Romero with her "internal report" from January 31, 2020.[55]

13. Romero Concludes One-on-One Meetings

On December 9, 2020, Romero disseminated a memorandum with the results of his one-on-one meetings with 23 NPAD staff members and "ongoing conversations" with Newman.[56] The memorandum stunned many employees. It acknowledged their complaints—high turnover, lack of long-term strategy, and low morale—but made it clear that Newman was not going anywhere: "The ACLU I admire is one that doesn't treat talented, well-intentioned people as if they were disposable." He noted that Newman agreed "that there are clear areas for improvement" but rejected employee requests for a leadership change.

Addressing the "obvious undercurrent" of disappointment with his decision, Romero emphasized that getting NPAD on a "better track is not entirely in [Newman's] hands." He asserted that the solution required the "good faith efforts of employees to engage and try their best to make NPAD a place everyone feels better about." If employees were unable to "give this another shot" and their "best efforts," he urged them to leave the organization:

> If the answer is honestly "no," then you owe it to yourself, to the organization, and to your colleagues to be real and to make a change that allows you to engage in some other part of the ACLU or at another organization with the skill and talent you can bring to a job that Is right for you. These last several years – and the last 9 months in particular – have been really hard on all of us. There is no judgment In choosing to make a change. We are committed to helping you in that process if that Is your path.
>
> But if you choose to stay, I need you to commit again. I believe this organization and the people who populate it are capable of almost anything !f they set their minds to It. Let's give It our best shot to reboot and create an NPAD that we all feel good about and are proud of.

[53] GC Exh. 47.

[54] I credit Oh's credible and undisputed account of this meeting. (Tr. 25-28.)

[55] The record is devoid of evidence that Romero typically asked about individual complaints filed with Human Resources. (GC Exh. 14.)

[56] R. Exh. 440.

14. NPAD Leadership/Management Complaints Continued in 2021

NPAD's issues did not go away in 2021 and numerous employees chose to leave, including Deputy Organizing Director Jameka Hodnett. On September 17, 2021, Hodnett informed Goldmacher and Hikes of her resignation.[57] She attributed her departure to the "blaring issues that keep the ACLU and the [NPAD] Department from thriving." Hodnett listed many of the same complaints that had been raised for nearly two years: staff did not feel valued despite decades of experience; a lack of morale due to a lack of transformational leadership within the department; staff concerns being dismissed; projects with no heart or long-term potential; staff members saying "no" to supporting new projects or initiatives; no "invigoration to do something positive and worthwhile;" lack of collaboration and teamwork; job descriptions were not being produced, even after employees requested them; employees' desires for proper titles and pay increases because they were short staffed and overworked; a lack of respect for employees' well-being; and Hodnett's inability to take time off after she contracted COVID-19 because there was no one to fill in for her.

Hodnett also attached two tweets. One tweet "[w]ondered how much the angry [black woman] stereotype in the office is due to the fact that black women are often the only ones willing to speak up and state the plain truth." The other tweet surmised whether NPAD's problems had been ignored due to a "WASP" culture prohibiting public discussion of "anything that could be the source of conflict (no politics or religion at the dinner table)." In closing, Hodnett explained that she shared her concerns hoping the "organization and department can take a deep look at itself and change the conditions for its staff."

Later that day, Goldmacher responded to Hodnett's email on behalf of herself, Hikes, and Chief of Staff KP Trueblood.[58] She acknowledged that there were consistent themes to the significant challenges raised about NPAD by Hodnett and others. Goldmacher explained that "[t]his has also been a consuming priority" for Romero, who "has been and will continue to be engaged on this issue going forward and will be following up with a response in the coming week."

With Hodnett's permission and at the request of several NPAD staff, Staff Attorney Lindsey Kaley shared Hodnett's email with the Respondent's National Staff on September 20, 2021. Newman replied to the email with a request to staff—"please tell your leadership team to keep the 'chess moves' coming"—but otherwise ignored the accusations.[59]

F. Oh's Relationship with Chris Anders

Oh had a good working relationship with Chris Anders, the Deputy Political Director of the Democracy Division, while he was her direct supervisor. She considered him "very good at giving advice and other feedback." She appreciated his insights, as well as the balance he struck between giving his supervisors autonomy but gently managing them. Oh described Anders as "a great manager who makes it easy for [Oh] to enjoy [her] work and feel like [she is] thriving in [her]

[57] GC Exh. 68 at 02200-0205.
[58] GC Exh. 69.
[59] Id. at 02199-02200.

division."[60] Additional descriptions included: "an effective 1-1 manager" and "excellent performance coach and problem troubleshooter;" "an effective team leader who promote[d] a high-trust, high-expectations, low-stress work environment;" "genuinely want[ed] everyone in his team to be successful," and took "concrete actions to enable that success."[61]

In her 2020 and 2021 performance evaluations—"Feedback and Reflections"—Oh described Anders as an effective manager, but reported that he failed to respond to certain emails or requests for input, and needed to divert the time spent "on administrative tasks towards the higher-level strategy and leadership tasks that the ACLU really pays him to do."[62]

Notwithstanding the generally positive relationship between Anders and Oh, Anders did not escape her criticism. In an email exchange on February 24, 2021 regarding a leave request by Oh after she and her dog were randomly attacked by a stranger, Oh criticized Anders' comments at the February 22 staff meeting:[63]

> On Monday, I started talking about this attack for the first time at work, outside of Slack conversations. I was trying to explain that I am concerned about getting screwed over in the issues allocation process – because of a longstanding perception that I don't have enough on my plate and because higher-ups don't care about my personal welfare – and that I am completely exhausted.
>
> At this point, you cut me off and told me to focus on "positive things." And nobody -- everyone else in that meeting was white - even acknowledged that I had been the victim of a random violent attack amid a surge of anti-Asian violence. I have to tell you, that had a particular impact on me.

Anders apologized for not realizing "the severity of the impact of the attack on [Oh] and [her] dog." He also addressed Oh's concerns about her issues portfolio and told her to take the time she needed to recuperate. Oh appreciated Anders' response, made a final plug for more projects and assignments instead of "becoming a sort of dumping ground for disconnected issues that are both time-consuming but relatively unimportant to the ACLU/NPAD (e.g., spending lots of time on something only for [Newman] to ignore it."

G. Oh's Promotion To Senior Policy Counsel

On May 5, 2021, Anders emailed NPAD's Democracy Division to explain the process for requesting a level review for one's role.[64] He attached the necessary forms for staff to submit to have their leveling formally reviewed. He explained that anyone who felt they were incorrectly leveled

[60] GC Exh. 6 at 3-4; Tr. 205-206.

[61] Oh's comments about Anders in her performance evaluation also reflected her frustration Newman: "Also, if/when I ask for necessary approvals from higher-ups…it would be good to get an answer… in a reasonable time frame. (GC Exh. 6 at 2-3.)

[62] GC Exh. 6 at 00532-00533; GC Exh. 7 at 00535.

[63] GC Exh. 76.

[64] GC Exh. 78.

should submit the attached forms by June 1, and that he would review them before sending them to Newman, who would send them to Human Resources for final approval.

Oh submitted a position leveling request on June 1, 2021.[65] On November 19, 2021, she was promoted to Senior Policy Counsel, retroactive to June 1, 2021. Lucinda Ware was listed as her supervisor.[66]

H. The Newman Investigation

In the Fall of 2021, the Respondent engaged MRW Consulting Group International, LLC (MRW Consulting Group) "in response to a number of staff complaints about NPAD's attrition, culture, leadership and management. There were additional concerns about potentially sexist and misogynistic behaviors exhibited by the National Political Director, Ronald Newman."

On January 24, 2022, MRW Consulting Group issued its assessment of NPAD and a report on its findings (the MRW Report).[67] While the report found problematic behaviors with Newman's management style, it "did not find that the behaviors described were sexist and/or misogynistic" because there was "no indication that the behaviors were particularly targeted toward women." The report also did not find "behaviors directed at an individual because of another protected characteristic such as being a member of the BIPOC community." Although the report affirmed that Newman exhibited "flippant and sarcastic" behavior that was "dismissive of other perspectives," these examples "were given across a wide range of classifications."[68]

Regarding the overall culture of NPAD, the report found that there had been an increase in "negative sentiments, a decrease in morale, as well as an increase in attrition." However, rather than solely attributing these issues to Newman, the report stated that these issues could be "viewed through a People and Program lens." The following are the report's findings regarding the People and the Program of NPAD:

> The *People* lens focuses on the style of leadership in the department, specifically at the senior level with Ronnie, who is described as harsh, disrespectful, inappropriate, and lacking appreciation for the knowledge and contributions of many seasoned staff members. The *Program* lens focuses on personal reactions and grievances towards a philosophical shift in the strategic vision and approach to the work, as well as the overwhelming feeling that there are no growth opportunities.[69]

Even with these harsh characterizations of Newman, many employees "were quick to point out that [Newman was] an intelligent and charming individual." However, his "skillset" lay in being "analytical," leading him to "demonstrate little empathy or emotional intelligence as a leader." Newman also often "cancel[ed] meetings or simply [did] not attend," giving staff the impression that he was "not open to communication."

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[65] GC Exh. 79.
[66] GC Exh. 8.
[67] GC Exh. 16.
[68] Id. at 00619.
[69] Id. at 00619-00620.

Employees also viewed Newman as "a leader who create[d] competition within and across teams," who did "not consider the power dynamic" he had with junior staff members. He was "viewed by many" as "lacking trust" in his staff and distancing himself from them. Although Newman was "described as someone who abruptly interrupts people, raises his voice on occasion, and has a harsh and disrespectful tone," he was described as an "equal opportunity offender." The report did acknowledge that while his tone was similar with everyone, it may have resonated more negatively with women, or women of color.[70]

In addition to Newman's interpersonal deficiencies, the report found that multiple staff members expressed concerns over things like delayed job descriptions, delayed approvals of urgent work, lack of reactions to women of color leaving due to poor treatment, and "inexplicable hiring decisions." While Newman was seen by staffers as "ultimately responsible" for these organizational issues, the report found that they were also attributable to the Respondent's leadership generally. Staff felt that Human Resources lacked an ability to effect change.

The report noted that staff felt that the restructuring of NPAD shortly after Newman was appointed was "not executed well." There seemed to have been "little room for staff voices and input to help shape the strategy" in this restructuring. While the report deemed Newman partially culpable for the tensions in NPAD, it acknowledged that in part, the tension was "understandable and follow[ed] the typical course that many organizations face whenever there is a significant change, such as a shift in strategic direction." The report attributed "much of the . . . programmatic tension in NPAD" to "a fundamental gap" in how NPAD staffers viewed their work; either aligning with the new short-term campaign approach, or continuing to "operate in a long-term mindset." While Newman was a proponent of the shift to prioritizing short-term campaigns, many staffers disagreed and did not feel that their voices were heard, leading them to feel "discounted and demoralized."[71]

The report identified a view among employees, particularly women employees, that NPAD "lack[ed] transparency in promotions, hiring, and salaries." Many of the women interviewed "believe[d] that men [had] better visibility and upward mobility prospects" than themselves. Newman's lack of communication and ineffectiveness in distributing job descriptions contributed to this sentiment.[72]

Lastly, regarding attrition, the report stated that staff perceived a "lack of acknowledgement from the ACLU leadership (Romero) about NPAD staff sentiments," which added to the "feeling that staff [was] undervalued and seen as disposable." Ultimately, this when combined with leadership's "if you aren't happy, you can leave" mentality contributed to the "department's high turnover."[73]

The report offered several recommendations. The first urged an improvement in NPAD's leadership and culture to facilitate organizational change. NPAD's "current culture [was] unsustainable," and Newman's "leadership style [would] need to significantly change in order to

[70] Id. at 00620-00621.
[71] Id. at 00621-00622.
[72] Id. at 00623.
[73] Id. at 00624.

stem the level of turnover and reduce the degree of discontent in the department." To change, NPAD needed a leader who "focus[ed] on building team morale and a culture where staff feel valued and respected." However, many employees were "skeptical that [Newman would] have the desire or capability" to make these necessary leadership changes. Even his supporters "question[ed] whether he [had] the capability and/or personality to rebuild the level of trust."[74]

The report recommended empowering the Deputy Directors, allowing them to "participate in decisions that impact staff" to "bridge" the gap between Newman and NPAD employees. It suggested "initiating team engagement activities" that "focus[ed] on healing relationships," "creat[ing] a development plan that sets clear expectations for the National Political Director's leadership accountabilities," "foster[ing] greater transparency" in decisions, and "strengthen[ing] the partnership between NPAD leadership and Human Resources."[75]

The report recommended that NPAD "begin a Strategy and Vision refinement process that is collaborative, inclusive, transparent and engages staff in setting long-term as well as short-term priorities and goals." The process should include: an "alignment between ACLU leadership and NPAD leadership on the strategy and vision for the department; the introduction of an "internal communications and roll-out process" to engage staff in strategy-shaping discussions; identification of areas of "support and resistance" to further inform strategy/vision; and making "necessary changes to support the new strategy and vision."[76]

In mid-February, less than a month after the publication of the report, Newman was fired. The decision to terminate him was announced after the Respondent received a request for comment on February 17, 2022, from Huffington Post reporter Molly Redden, who was writing a story about the work environment in NPAD. In his place, Kary Moss, the Director for Affiliate Support and Nationwide Initiatives, filled in as Acting National Political Director.

I. Ben Needham

In December 2021, the Respondent hired Ben Needham as Deputy National Political Director. On January 5, 2022, Oh and Needham met for the first time. In the meeting, Needham described himself as "extremely aggressive. And I just like to say that to people. It is a benefit and a curse from time to time." Asked by Oh to elaborate, Needham used a sports analogy to relate his aggressiveness to strategy and taking "the more aggressive path." He added that "people's expressions tell me when I need to back up a little bit or if I can go a little bit faster."[77]

Later in the meeting, Oh said she "[shared Needham's belief] that we should be aggressive in going after our goals, but I also . . . prefer being soft on people. I like being nice. Unless they're mean to me , then in which case I will punch back." Needham replied that he "noticed that when I used 'aggressive' and 'conflict, I noticed a change in your demeanor." He asked Oh not to latch onto the "traditional definition" of aggression and, instead, talk to him if she had any questions. He

[74] Id. at 00624-00625.
[75] Id. at 00643-00626.
[76] Id. at 00626.
[77] Oh credibly testified how Needham's description of himself as "aggressive" negatively impacted her based on her past experiences of domestic abuse. (GC Exh. 48A at 2-3; Tr. 82-85.)

reiterated, however, that he wanted "to be upfront about who I am and I play the politics with my team around like, 'Hey, well this is who I am.' No, I'm an aggressive person. And so, people should know that."[78]

Needham also briefed Oh on his managerial approach. Following up on earlier comments that he "believe[d] in a chain of command" and did not like "surprises in the workplace," Needham clarified that he "welcome[d] feedback" in an individual setting.[79]

On February 2, Needham convened the Democracy Division's policy staff—Oh, Chad Marlow, and Kristen Lee—as part of his "listening tour." Towards the end of the meeting, Needham announced that he and Newman would be making "structural changes" to prevent the policy staff from spending time on work that was not part of Needham's "tiered campaigns list."[80]

J. Oh's February 2022 Management Complaints

On February 4, 2022, Oh began a two-week long period of complaints to Goldmacher, copying General Counsel Dougherty, about management's decisions and treatment of employees. In an email entitled, "Request for an internal PSA," Oh requested that Goldmacher "put out guidance to supervisors" telling them that they "cannot order rank-and-file staffers to not "go over their head" about "persisting personnel problems."[81]

Goldmacher replied that she would have Human Resources employee Amanda Romagnano follow-up with Oh. Oh agreed to speak with Romagnano but predicted that her lack of confidence in the Respondent's anti-retaliation policy would prevent her from sharing specific information. On February 8, Oh informed Goldmacher that she would not be pursuing her complaint:

> In the spirit of continuing candor, I recognize the untenably tough spot you're in. The candor tempered by that fact, I will also say I think we all know the two problem leaders – the sources of so much pain, misery, hypocrisy, outrage, career wreckage, and countless hours of wasted time – aren't others in the HR team.
>
> I've been down this road before. As the training repeatedly warns us, HR or senior management cannot promise us confidentiality when we report problems. Therefore, I withdraw my request.

On February 18, Oh emailed Goldmacher and Dougherty requesting that "senior leadership and Board . . . undertake a comprehensive review and reform of the middle management hires and structures put in place by [Newman] with [Needham's] blessing." She urged that "incompetent or abusive middle managers be fired or moved into more appropriate roles, adding:

[78] Id. at 20-21.
[79] Id. at 4, 20.
[80] Needham did not dispute Oh's account of the meeting. (Tr. 85-86, 521-579.)
[81] GC Exh. 18 at 00428.

> I'm sure you've heard at least some of the unceasing complaints about [Newman] clones like Julie Sweet. Here I will focus on the two in my division.[82]

Oh stated that Lucinda Ware "[did] not bring any expertise to the job" and had never offered Oh any "substantive feedback." She referred to a conversation she had with Ware, in which Ware admitted that she did "not know anything about the policy of any of [their] issues."

Oh also asserted that Needham brought "no policy expertise in any of the division's issue areas." She referenced their individual meeting in which Needham characterized himself as an "aggressive person," and in response to Oh's shocked facial expression, "lectured" Oh about "not import[ing] in cultural assumptions around that word." Oh believed that in doing so, Needham was "implicitly accusing [her] of racism." She also stated that in this "disturbing 1-1," Needham "ordered" her to "not go above his head if there [was] ever a problem in the division." Oh characterized this order as a "menacing threat" that would "be met with retaliation."

Lastly, she referenced a comment Needham made about his "#1 priority" being to "[keep Newman] happy," as opposed to "advancing civil liberties," "producing a well-run thriving team," or "making the ACLU look good." She asserted that neither Needham or Ware "seem[ed] to have any meaningful interest in civil liberties or civil rights," and asked, "what the hell kind of people is the ACLU putting in these senior positions of substantial power over us and our work?"

Oh also expressed concern about Needham's February 2 announcement regarding "structural changes" to the work the policy team would be doing. She worried that the "structural changes" would "affect the terms and conditions of [the policy team's job," thereby requiring consultation with the union before proceeding or risk violating the law. She also explained that these changes, as well as Needham and Newman's "leadership failures" to redistribute work after staff attrition, would put her in a "deeply unfair and untenable position" of increased workload.

K. Oh Requests Transfer To Anders' Division

On February 14, 2022, Chris Anders called Oh and asked if she would be interested in transferring to his relatively new section, the Federal Policy Division. Anderts told her that he already discussed the matter with Newman who supported the transfer. At the time, it was common for NPAD employees to transfer from one division to another without a job posting and application process.[83]

Frustrated working in the Democracy Division, Oh enthusiastically expressed her interest. Anders suggested Oh follow-up with an email memorializing their conversation to NPAD Chief Political Advisor Esete Assefa and Newman.[84]

[82] Id. at 00424—00426.

[83] Kary Moss, Newman's eventual replacement in an acting capacity, testified that transfer requests were routinely approved "arbitrarily," without a "clearly defined process" consisting of a "posting and application process." (Tr. 498-500.)

[84] Oh's credible rendition of these discussions was not disputed. (Tr. 87-88.) Anders did not testify.

On February 15, Oh emailed Assefa and Newman and asked to "follow up with one or both of [them] whenever [it was] convenient" to "make [her] pitch on how it would benefit NPAD (including the Democracy Division) and the ACLU." Newman replied the next day that Anders was working on a job description and "[i]t may be the case that the contours of that role are shaped based, in part, on your skill set/interests." He said he would "defer to [Anders] on that, in the first instance" and suggested they "chat once [the job description has] been formally teed up." Oh replied that she would follow up with Anders.[85]

A few days later, Newman was fired and replaced by Kary Moss in an acting capacity. Not having heard further about a transfer to Anders' division, Oh emailed Moss on March 8. Oh restated her desire to transfer to Anders' team. Moss replied later that day to ask if Oh had discussed the transfer with Needham. Oh stated that she spoke with Needham about the transfer and he expressed his legitimate concern about the Democracy Division losing more policy staff. He noted, however, "transfer details could be worked out so that I continue providing the same policy work for the Democracy Division but under [Anders'] direct supervision." Oh explained that such an arrangement would enable her "to work on federal issues that need attention," but regardless of what Needham ultimately decided, Oh was "very much opposed to the idea of continuing to report to [Ware] given her dishonesty with me, not just her lack of familiarity with literally all the Division's issues."[86]

L.. Oh's Comments During February 23, 2022 Office Hours

On February 23, 2022, the Respondent held an organization-wide Office Hours meeting in which Acting National Political Director Kary Moss spoke about the change in leadership and her intent to improve NPAD's culture. During the meeting, which Oh recorded,[87] Oh posted the following questions to Moss in the Zoom chat:

> [W]hy should we trust that NPAD won't have the same problems under a new permanent director if nothing else changes? Why shouldn't we simply expect that the beatings shall continue until morale improves?"[88]

Moss sought to assure Oh that Romero asked her to lead NPAD during the transition because he trusted that Moss had a "definite perspective about how we should do this." Moss concluded by

[85] GC Exh. 17, GC Exh. 44 at 2-3.
[86] GC Exh. 44 at 1-2.
[87] GC Exhs. 49, 49A.
[88] Oh's testimony regarding the focus of her "beatings" comment was not entirely credible. She insisted that the remark was aimed at Executive Director Romero, not Newman. The first part of her statement referred to "changes" that needed to be made beyond simply installing a new National Political Director. The second part connected that point to the need to improve morale. (GC Exhs. 49 at 12, 50 at 5; R. Exh. 180; Tr. 116-117.) As the MRW Report found, there had been an increase in "negative sentiments, a decrease in morale, as well as an increase in attrition" in NPAD. Rather than solely attributing these issues to Newman, the report stated that these issues could be "viewed through a People and Program lens." (GC Exh. 16 at 3.) Nevertheless, injecting the "beatings" comment into the meeting chat as employees were criticizing Newman could be reasonably construed as referring to him. Moreover, although Oh explained the reasons for her comment, and apologized for the harm and impact it tended to have on black men, she never attributed it to Romero in her communications with Hikes or Goldmacher. (Tr. 196-199.)

stating that she looked forward to hearing from Oh. At that point, Goldmacher commented about Oh's use of language:

> I also feel very obligated to address the phrasing here, any reference to quote, unquote, beatings. That is metaphorical, I am going to presume here, but I just want to be very clear that there is no room and no space in our organization for anything that would echo something like this. I'm sorry, it's so stark that I am just a little stunned by the characterization, but there could be nothing... And thank you for clarifying the metaphorical nature of that. But there is no space and no room for anything that would harm staff in such ways. And I know that we have channels here at the ACLU for both reporting and resolving matters of complex workplace challenges, dynamics. We will always s have a process in place for that. So, one, Kate, thank you for your question and for the transparency that it lends.

As Goldmacher spoke, Oh clarified on the chat log, "Yes, definitely metaphorical. And thank you." After the session, Hikes emailed Oh about her inappropriate language during the meeting:[89] She thanked Oh for her "willingness to engage" on "hard issues" before noting the "dangerous and damaging" effect of the insinuation that Newman "physically assaulted" her. Hikes encouraged Oh to consider how that "characterization may be experienced by Black staff specifically." Hikes affirmed that the "crux" of Oh's question—why employees should trust that NPAD culture will change under new management—was a "fair and welcome question," and hoped that hyperbolic language would not distract from Oh's future concerns.

Oh replied shortly thereafter, agreeing with Hike's criticism, and offering to express her regret to those who attended the meeting. She acknowledged that her language could have been interpreted as Newman having "engaged in physical assault against [her] or others," which was "a line . . his emotional abuse, bullying, and retaliation . . . never crossed." She also admitted that the language she used "contribute[d] to harmful anti-Black racist stereotypes about Black men" and apologized for the impact on her black coworkers.

Hikes replied shortly thereafter and thanked Oh for her apology and "accepting the call in . . . the spirit with which it was intended." However, Hikes, "[did not] think it [was] necessary to communicate a broader apology to other attendees." Rather she "just wanted to ensure that the impact was on [Oh's] radar."[90]

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[89] GC Exh. 20.

[90] This was not the first time that Oh expressed regret to Hikes about the impacted of her conduct on her black colleagues. On January 27, 2021, she apologized to Hikes for "diverting attention away from you and the work of ACLU's Black employees during today's Office Hours by typing unrelated items into the chat." Oh explained that she was "confused" by Dougherty's earlier answer regarding leave time and "quickly tried to slip" in "important corrective information" before the "Black leaders inspire us" segment began. She conceded it was not an excuse and "still rudely diverted the spotlight away" from the important work of her black colleagues. Oh stated she would "try to be more considerate and mindful of this going forward." A few hours later, Oh realized that she typed unrelated items into the chat box earlier in the meeting while a black colleague was presenting and also apologized to her. She also acknowledged "a similar interaction a while ago about my extraneous chats detracting from the spotlight on discussions of black pain," She acknowledged that she tended to "multitask work projects due on deadline" during Office Hours but "recognize[d] & [took] responsibility for [her] inadvertent but nonetheless harmful part in [her] Black

On February 24, Oh returned the compliment for Hike's correction of her use of language and the appropriateness of an apology, and redirected the focus to her mistreatment by managers. In her email, Oh asked when staff could expect a "full-throated apology from [Newman] for his mistreatment and mismanagement of NPAD," and from Romero "for backing him every step along the way." Oh complained about never receiving an apology from Karthik, Shakir, Newman, Romero, or "any of their female enablers" like Strom, and explained why she deserved an apology from each of them. She noted that if she could "accept with humility and remorse that repeating a famous satirical saying with absolutely no inkling of anti-Black sentiment . . . had harmful impacts," then those managers "should be able to accept that their actions had harmful impacts, however unintended they were."

On March 8, Goldmacher, on behalf of herself and Hikes, replied to Oh's February 24 email by thanking her for her candor and engagement.[91] Goldmacher expressed a commitment to "learning more" from Oh and other NPAD staffers regarding how to "heal," in order to incorporate that feedback into a "community and culture plan moving forward."

M. Oh Accuses Lucinda Ware Of Lying

1. Ware Directs Staff to Develop a Campaign Plan

On March 1, 2022, Ware, Oh, and Daniel Marks, a Democracy Division campaign strategist, were scheduled to meet for their bi-weekly call regarding the "Apple Encryption Campaign." However, Marks had a headache and suggested the group exchange updates by email. Ware and Oh agreed. Oh began by urging a delay in the campaign:

> With the federal policy work that used to go to Kate Ruane coming to me now, I've been buried. And so I need to cry uncle at this point and notify you that I'm not going to be able to draft the open letter to Apple in time for it to be used by this Friday, March 4, when Apple is holding its annual shareholder meeting.[92]

On March 2, Marks agreed and was "happy to delay the sign-on letter and focus [their] attention on the long-game." On March 3, Ware replied that she would schedule a meeting with Needham for the following week – "so we can talk all of this out" and give Marks enough "time to write the plan . . . ." Oh replied later that afternoon, disagreeing with that approach and suggested that Marks hold off on all the work. She also recommended that Ware and Needham "indefinitely suspend" the campaign to be revisited in six months. Oh explained that the "purely proactive campaign" would "eat up a lot of [the] Division's staff time and energy," as they were already "understaffed and exhausted." Ware replied a few minutes later:

> Thanks, Kate – I greatly appreciate your recommendations and look forward to discussing with Ben. The ask from leadership is to have a campaign plan – Daniel, please submit. At this

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colleagues feeling disrespected during these staff meetings." Oh concluded by thanking Hikes "for holding us accountable." (R. Exh. 500.)

[91] GC Exh. 30 at 00400.

[92] GC Exh. 21 at 00373-00374.

> time, until we get the OKAY from leadership, not myself or Ben, to "indefinitely suspend this campaign" this campaign is still a go.

Oh, however, was not satisfied with Ware's response and asked if her reference to "leadership" meant "Anthony and Kary." Ware's response indicated that the "ask" for a "campaign plan" came from Romero and Moss, the Executive Director and National Political Director, respectively:

> I do – the same process that has always been – Nothing has changed. We still have to get approvals, the green light, etc. from the National Political Director – Kary and our Executive Director, Anthony. This is my understanding.[93]

Marks responded shortly thereafter, agreeing with Oh on following the lead of an affiliate regarding the Apple campaign. He planned to draft recommendations on how to proceed by March 4 and suggested that the team meet to discuss it with Needham.

Ware replied the next day, March 4, clarifying that "[t]he campaign [plan] does not have to be super robust. A page or two is just fine." She also alluded to the affiliate position but reminded Oh and Marks that "our guidance comes from [Needham], then [Moss] and then [Romero]. We are meeting with [Needham] to share with him what the affiliate said to us, so that he can go back and speak with [Moss] who may need to speak with [Needham]. I'm not sure. It is my goal and desire to make sure that we are prepared and have provided [Needham] with all the necessary and important information he may need."[94]

2. Oh Disagrees with Ware's Directive and Reaches Out to Moss

Curious for the reasons behind Ware's directive, Oh reached out less than a half hour later to Acting National Political Director Moss:[95]

> I recommended to Lucinda today that the Apple campaign be suspended based on yesterday's conversation with the affiliates…
>
> Lucinda's response was to reject the recommendations, because the ask from leadership -- you and Anthony -- is to have a campaign plan on Apple.
>
> May I ask what the reason is for this insistence? I am trying to understand the rationale for moving this particular campaign forward despite the changed circumstances.[96]

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[93] Contrary to the Respondent's interpretation, Ware's response to Oh clearly indicated that the " ask" was from "leadership," and "leadership" meant Romero and Moss, "not [Ware] or {Needham]. (Id. at 00371-00372.)

[94] R. Exh. 205 at 00340.

[95] GC Exh. 22 at 00375.

[96] Contrary to the Respondent's contention, Oh did not give Moss an inaccurate account of Ware's directive. Ware's initial response to Oh was that "the ask from leadership is to have a campaign plan." She further clarified that "leadership" was "*not myself or [Needham]*."Oh then asked if, by "leadership," Ware was referring to Romero and Moss. Ware responded, "I do." (Tr. 244.) (emphasis provided)

Responding the following day, March 4, Moss asked Oh to consult with Needham, as she did not want to "get in the middle of the process" and cause any "misunderstandings or miscommunications." However, she stated: "Neither Anthony [Romero] or I have been consulted on an [A]pple campaign as of yet."

N. Oh Continues Her Efforts to Transfer to Anders' Division

1. Oh Meets With Moss on March 3

On March 3, Oh met with Moss to express concerns regarding her workload and NPAD's management structure.[97] She outlined her frustrations with Lucinda Ware, her supervisor, and Needham, Ware's supervisor. Oh was frustrated by Ware's lack of policy knowledge. She thought that Needham had "strong leadership skills" but was "disturb[ed]" and her "heart stopped," when he told staff that "[that he prides himself] on being . . . aggressive." Oh was also concerned with Needham's intention to make structural changes without bargaining with the Union.[98]

Moss listened and told Oh that she "totally [made] sense" and wanted to get her "insights into the politics of this," but asked if Oh would agree "that our conversation stays with us?" With Oh's assent, and indicating her own concerns about Needham, Moss posed the following question:

> Okay. So, I'm trying to get the lay of the land in terms of how much resistance there is going to be to new ways of working. What's your sense about Ben's openness to . . . I don't know, to hearing how the rest of the organization has been experiencing the status quo? Do you feel like he really has a very strong and flexible point of view, or do you think it may just be he doesn't know and a lot of conversations that he can move?

Oh replied that Needham took his "cues from whoever is above him" and his "number one priority was to make Newman "happy." She suggested that if Needham was resistant to change, there might be smaller things you might be able to do." Oh suggested that Ware was better suited to be "a campaign strategist rather than the boss of the entire campaign and policy team, aside from voting rights." Moss acknowledged that Needham tended to "dig his heels in" and she needed to work with him on finding "middle ground" with policy staff because "[r]ight now, people still seem . . . They're either exhausted, they're traumatized, or they're defensive."[99]

2. Oh Requests to Meet with Needham

Also on March 3, Needham, at Oh's request, scheduled to meet with Oh on March 9, with a note to "share anything that will help prepare for the meeting."[100] Oh added the following:

[97] Oh incorrectly recalled the date of her meeting with Moss as March 1, 2022. (GC Exhs. 22 at 00375, 51 at 4; Tr. 120-121.).

[98] Id. at 2-5.

[99] Id. at 5-7.

[100] GC Exh. 23.

> In the interest of candor and the division's welfare, I think I should take a deep breath and tell you a few of my other reasons why I strongly would like to be moved into Chris's division -- i.e., revert to reporting to him as all Democracy Division policy staff used to until his transfer -- and why I worry those broader concerns will continue to plague you if when you get the green light to hire more policy counsels for this division.[101]

O. The March 8 Meeting

1. Needham Prohibits Criticism of Newman

On March 8, Needham met with Democracy Division staffers. At some point during the meeting, the conversation turned to Newman's departure. Employees began to criticize Newman, but Needham shut down that discussion. He stated that he considered Newman a friend and did not feel it was appropriate to engage in "personal attacks" and "kick someone when they're down."[102] That remark upset Oh; she reacted by text messaging coworkers about it and cautioned them to watch out.[103]

2. Oh Complains to Goldmacher

On March 9, Oh followed-up Goldmacher's March 8 email ("Office Hours follow-up"), copying Moss and Hikes, to recount Needham's statements at the March 8 meeting:

> Yesterday, at our weekly Democracy Division meeting, Ben Needham . . . said that he liked Ronnie, he would've been good friends with him, and he doesn't believe in "kicking anyone when they're down," so if anyone criticizes Ronnie personally, they will be harshly shut down.
>
> This powerful man made a cursory mention of "trauma" in NPAD but made it very clear that his foremost priority and loyalty is shielding the feelings and name of another powerful man who is not even at the ACLU anymore. . .
>
> It's not clear who Ben even thought his audience was . . . But it felt like Ben was directing his "or else" warnings to me. Ben also announced that he was issuing those warnings to us after extensive discussions with Kary, who he said agrees with him on everything he said.

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[101] Oh mistakenly testified that she requested the March 9 meeting with Needham to discuss Ware's statements about the Apple campaign. (Tr. 120.) However, her clarification to Needham about the purpose of her meeting request indicates that it was focused on her desire to transfer.

[102] Oh's credible and detailed account of the March 8 meeting was essentially corroborated by Needham. (Tr. 124-126.) Needham expressed his reluctance to answer questions regarding the decision to terminate Newman, and "referred the team back to some of the points . . . that the organization does not discuss personnel issues." He also "felt the meeting . . . started to go down a path of personal attacks of [Newman] that I did not feel appropriate for the call . . . had nothing to do with the job . . . [i]t was more so dealing . . .with the personalities of people." He recalled referring to the criticism as "personal attacks" and "kicking someone when they're down," and warning that he would "shut . . . down" any such discussion. (Tr. 536-540.)

[103] A charge was filed in Case 05-CA-302357, alleging that Needham violated Section 8(a)(1) by "instructing employees to only discuss complaints about working conditions with him," but was withdrawn.

> For broader context, you all should also be aware that in my first 1-1 with Ben, he told me that he prides himself on being an "aggressive" person, said that he strongly believes in the "chain of command," and warned me against "going over his head" about Division problems. As a lawyer who handles accountability and abuses of power issues -- and as a domestic violence survivor -- let me tell you that this should sound all sorts of alarms for you. I am having deja vu of Ronnie telling me to my face that I am "useless"…a moment that I view as kicking off an era of tyranny in NPAD…
>
> So, with all due respect, it is difficult to believe some of the claims made by management about constructively fixing NPAD's problems or giving a damn about rank-and-file staffers' welfare because I see what they do. The ACLU will continue to struggle with the disaster in NPAD if you cannot figure out a way to quickly weed out unfit managers from their positions of power, especially Ronnie's hiring mistakes.

P. The March 9 Meeting

1. Oh Complains to Needham About Ware

On March 9, 2022—the day following the March 8 Democracy Division meeting and shortly after responding to Goldmacher's March 8 email—Needham met with Oh to discuss her transfer request. During that contentious meeting, however, Oh focused on her email exchange with Ware. She explained that Ware lied about Moss and Romero having directed—"the ask from leadership"—that Ware's section proceed with the Apple campaign. As a result, Oh told Newman that she had lost all trust in Ware and that it was "the culmination of a painful year-long process where there has just been no substance."

Needham characterized Ware's statement about the "ask from leadership" as a "mischaracterization" by Ware, which he addressed with her. He insisted there was fault on both sides and he was "addressing [Oh's] miscalculation" in bypassing him and going directly to Moss. He criticized Oh for that action and said that she lost his trust, as well as that of the team. Because he did not see an avenue for improvement in their relationship, Needham stated that he was "supportive of [Oh] moving" to another team.[104]

Oh responded that she was "afraid" of going directly to Needham because he "made, like a whole announcement during the [March 8 Democracy Division] meeting, you made, like, a whole announcement about how [Newman] is your friend and . . ." At that point, Needham interrupted Oh: "He is my friend. . . .I am just saying that I like [Newman], I find him to be a good friend. I find him to be someone who was willing to have a thought of the mind."

Oh rejected Needham's assertion that she was trying "to associate me with whatever you hold against [Newman]. She clarified that her "issue [was] that you said you would not broach any criticisms of him." Needham insisted that he merely stated that he was "not going to have a Ronnie-bashing thing.." He explained that criticism about Newman's policies was acceptable but he was "not about kicking a person when they're down and I'm not going to let people bash someone just

[104] GC Exh. 52 at 1-5

for the sake of bashing." Needham considered the criticism's by staff members about their treatment by Newman as unrelated to "issues" appropriate for discussion:

> And so, if people want to talk about what their issues were and how we can do those better. I've always been open to that. But that is not the conversation that happened on a previous call. And I'm setting the tone for like, I have no place for that on my team.

The meeting concluded with Needham confirming that Oh wanted to move to Anders' Federal Policy Division and his intention to "be advocating for . . . that."[105]

2. Oh Complains About Needham's Statements

About two hours later, at 1:21 p.m., Oh complained to Goldmacher, copying Hikes and Moss, about Needham's statements.[106] She described the meeting as "the most contentious meeting [she's] ever had at the ACLU." Oh reported that Needham "turned it around on [her] when she brought up Ware's "dishonesty" when she "falsely claimed" about the "ask from leadership" about regarding the Apple campaign. Instead, he accused Oh of violating his trust by "going directly to [Moss] about the incident . . . He bluntly said I was the one who committed the error of violating the chain of command and being surprised when Moss asked him about it."

Oh also mentioned that Needham criticized her for skirting the chain of command regarding her transfer request. She concluded by being "very clear" that she would not be silenced if she "[witnessed] serious problems that [she] did not trust those directly above me to resolve."

3. Needham Complains About Oh's Statements

At 2:42 p.m., Needham submitted his own complaint to Moss and Assefa, copying Goldmacher and Hikes, about Oh's language during their meeting:[107] He reported that Oh asserted that Ware "lied to her," Oh "didn't trust [Ware], Ware did not know what she was doing," Oh did not [want] to report to [Ware]," and that she "liked the old structure of her reporting directly to [Anders]." Needham explained how he "tried to address her concerns;" He asked why Oh did not come to him about a conversation where "she thought [Ware] misrepresented something. She corrected me and said [Ware] lied."

Referring to Oh's decision to communicate with Moss, Needham "restated his desire" that staff "always follow a chain of command, but that staff could connect with anyone." He claimed that it was after asking why he was not given a chance to "clear things up" with Ware that "the conversation turned and language was used that [he was] very uncomfortable with."

Needham recalled Oh stating that she didn't trust him and was "afraid to talk to [him]." When Needham pushed back on that characterization, Oh said she appreciated his "open door policy," but never gave a reason why he "should be labeled as untrustworthy or someone people should be afraid of." Needham explained why Oh's statement was disconcerting:

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[105] Id. at 11-12

[106] GC Exhs. 28 at 00295-00296, 82 at 00293; R. Exh. 180 at 00356-00357.

[107] GC Exh. 24 at 00291-00292.

> As a Black male, language like "afraid" generally is code word for me. It is triggering…It also is how a false narrative starts about a person. I am uncomfortable with that language and maybe oversensitive to that language because of the recent changes in NPAD. I also know from Kate personally that she used the same language previously about a Black male in leadership.

Needham also shared that the call ended with him expressing support for Oh's transfer request. He concluded with a request to "to have someone on all calls with [Oh] who [could] be a witness to [their] conversations moving forward."

4. Moss and Hikes Respond To Needham's Complaint

Moss responded to Needham a few hours later. Copying Anders and Assefa, she stated that Oh's transfer request presented process and transparency issues that should be addressed at their meeting scheduled for the next day. Moss also expressed her "sensitiv[ity] to the need to resolve [the] situation" in the most efficient manner possible.[108]

On March 11, Hikes replied to Needham's March 9 email by commending him for "flagging this for us," expressing support for the "real, hurtful impacts" the experience had on him, concern for Oh's characterization of Ware as a "liar," and the need to address Oh's use of language.[109] Hikes was "very concerned" about Oh's characterizations of being "afraid to talk to Needham and referring to Ware as a "liar." They opined that Oh's language was "deeply problematic" and needed to be addressed.

Hikes proposed to arrange a meeting with Oh to "address the loaded, hyperbolic, harmful language she has used and the impacts of such language on many, but on Black people in particular." They asked Needham if he would like them to give Oh space to "elevate anything" he might have done that would lead to her not trusting you." Hikes also expressed their desire "to be responsive to [Needham's] very generous approach to receive feedback about your management and leadership to this point."[110] They made no mention in the email of the concerns expressed by Oh to them a few hours earlier.

Needham replied to Hikes a few hours later, copying Moss, Goldmacher, and Assefa. He "welcome[d] . . . the a (sic). . . check-in with my staff to just see how things are going" and "make sure this is an isolated evaluation of [him] rather than something that is under the surface that [he is] missing." He also requested guidance from Hikes on how he and Ware should "manage" Oh moving forward, especially in one-on-one meetings.

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[108] It is reasonably inferred from Moss' statement that Anders still had an opening in his division. (GC Exh. 25 at 02487.)

[109] GC Exh. 26 and R. Exh. 190, at 00439.

[110] Hikes testified that they suggested the March 23 meeting with Oh based on the Respondent's "restorative practice . . . that allows people opportunities . . . to speak to their experience, but also hear from their colleagues when they've hurt them." They "wanted to creat a space to be able to heal some of that harm and give [Oh] the space , once again, to be able to understand how . . . the impact of her actions, once again, on black staff." (Tr. 632-633.)

5. Hikes Insists on Meeting with Oh Regarding Her Statements About Needham and Ware

About four hours later, Hikes, copying Goldmacher and Moss, replied to Oh's March 9 email asserting that Ware lied to her. They thanked Oh for "outlining [her] experience and "looping us in." Hikes wanted "to hear more about [Oh's] conversation with [Needham] and chat with you about a path forward." They told Oh an invitation to meet the following week would be forthcoming.[111]

The following day, March 12, Oh had a change of heart. At 7:33 a.m., she emailed Hikes that she had "given this further thought" and "concluded . . . that there is no good outcome for me here and the best thing to do here is let this discussion fade away." Oh followed with a remark that she was "so underwater right now," and the "proposed time wouldn't work for me anyway." She proposed "that we forgo this follow-up meeting, especially given how busy you are as well."[112]

On March 14, Needham notified Oh, copying Anders and Assefa that her transfer request was being put on hold while NPAD leaders considered staffing needs.[113] The email clarified that the discussion was being "paused," not ended. About six hours later, Hikes insisted that Oh meet with them sometime that week because they were "interested in talking about some language you used to describe [Needham] and [Ware] and I wanted to understand more about your intention/experience and help chart a path forward."

On March 15, Oh replied to Hikes, stating if the meeting was "mandatory," she would "invoke her right to bring [a Union] representative." She asked for clarification in order to "reach out to the union to coordinate schedules." A short while later, Hikes asked Goldmacher for guidance, stating they were "comfortable giving Kate feedback about the way she's engaging with a union rep present but I imagine I'll need to have an HR rep present as well."[114]

Q. The March 23 Meeting

1. Hikes and Goldmacher Reveal that Oh is Under Investigation

On March 23, Goldmacher and Hikes met with Oh and Alejandro Ortiz, Oh's union representative.[115] It soon became evident that Hikes and Goldmacher were investigating Oh for stating that she was afraid of Needham and Ware lied. Hikes was "troubled by this characterization

[111] GC Exh. 28 at 00295; R. Exh. 180 at 00356.
[112] R. Exh. 180 at 00355-00356.
[113] GC Exh. 27.
[114] GC Exh. 28 at 00294.
[115] Hikes initially testified that they organized the March 23 meeting pursuant to the Respondent's "restorative practice" of allowing employees to "speak their experience," but also hear from their colleagues when they've hurt them. . . . to create a safe space to be able to heal some of that harm and . . . [have Oh] understand . . . the impact of her actions on black staff." (Tr. 630-633.) On cross-examination, Hikes clarified that the restorative practice "was not a disciplinary process" and, thus, "[i]t would not be typical to have HR present" at such a session. Asked why "there was an HR presence" at the March 23 meeting, Hikes backtracked on their earlier testimony—"That's correct, because we were *not* engaging in a restorative process. [Oh] never requested one." (emphasis added) (Tr. 649-653.) In fact, it was Hikes, not Needham, that requested the March 23 meeting with Oh. (Tr. 632-633.)

and the implications of using this language." They added that Needham and Ware were "also troubled by the characterization and the way that these conversations have been playing out." Hikes then asked if Oh "[had] any context that you would like to give regarding these two instances."[116]

Oh explained her reasoning for being "afraid" of going to Needham and referring to Ware as a "liar." She attributed her fear to Needham's "aggressive" self-characterization and felt he "attacked" her when she complained about Ware. Oh also worried that by being "unwilling to broach criticism" or engage in "badmouthing" of Newman, Needham was "imposing a free speech restriction." With respect to Ware, Oh explained that Ware lied to her by clarifying that Romero and Moss "ask[ed]" the Democracy Division to develop the Apple campaign plan, which Moss confirmed was not true.[117]

Hikes followed by referring to Oh's concerns as a "miscommunication" between Oh, Needham, and Ware. They "[understood] why [Oh] would have some reservations about going to [Needham] for the conversation that you had." Hikes then addressed the impact Oh's "hyperbolic" and "inflammatory language that is violent, when referring to your colleagues, is harmful, and the impact if significant" on Needham and Ware.

Unsure about complaining about management without seeming racist, Oh explained she feared retaliation if she approached management with a concern and asked, "how else do you think I should say it?" Hikes acknowledged Oh's "discomfort" about Needham's comments regarding the "chain of command . . . [b]ut saying you are afraid of him, and he being a Black man as well, saying that you were afraid of him when he has given you not a reason to be afraid of him, that's concerning." Oh "push[ed] back" on that assertion, referred to Needham's comment that she violated his trust and the chain of command, noted that he "went to you or [Goldmacher] about it," and she saw the meeting "as a disciplinary action." Hikes then defended Needham's comments as "a reasonable piece of feedback to give to you to then say that made you feel fearful. That's what I'm concerned about."[118]

Ortiz then interjected to defend Oh's right to complain about managers and warned of a potential violation of the Act if the Respondent insisted on chilling her protected speech in the workplace. Hikes denied that they were seeking to "sanction" Oh's speech, noted that "this is offered with some grace to say, '[w]hat you said impacted your colleague in a way that maybe you were not aware of."[119]

Oh then asked whether Hikes or Goldmacher had followed-up regarding her complaints concerning Needham's statements "or is the entirety of [Human Resources'] response this meeting with me?" Goldmacher replied that Oh's complaints to Human Resources had been either "fully investigated" or rescind[ed]" by Oh. Oh, however, was reluctant to pursue a "formal investigation" that would "go directly to [Needham]," because "that's probably not going to end well for me."[120]

[116] GC Exh. 53A at 1.
[117] Id. at 1-3.
[118] Id. at 4.
[119] Id. at 4-8.
[120] Id. at 8-9.

Goldmacher turned the focus to "chart a path forward because . . . the most important thing here is that we have productive working relationships, that among managers and direct reports, there is not a sense of fear when it comes to the working relationship, and that we are constructive about how we are able to clarify, right?" She expressed her interest in ascertaining what occurred and "correct anything in the process." Oh reiterated her reluctance to engage in a formal investigation. Goldmacher clarified that "we take any forms of retaliation very seriously."[121]

Before the meeting concluded, Oh made two requests. The first was to point out that, as an "Asian American woman [we] expected to act a certain way culturally and when we violate those norms, the backlash is harsh. So I would just put that on the table as well." Hikes never met with anyone other than Oh about these concerns. The second point was that Needham "put a pause on [the] discussions" about her "possibly transferring" to Anders' division. Oh asked "that special attention be paid to [her] not facing retaliatory actions in that context." Goldmacher replied that Moss was "actively assessing Oh's transfer request" but it was "not something that I can't or we can't institutionally commit to at this time because we're always evaluating any changes to structure based on the organizational and programmatic need."[122]

2. Oh Provides Goldmacher And Hikes With Detailed Information

On March 25, Goldmacher emailed Oh, thanked her and Ortiz for meeting with her on March 23, and requested the Apple campaign-related emails and "any/all other relevant emails [etc.] that would be helpful as [they did their] due diligence."[123] On March 28, copying Ortiz, Oh provided Goldmacher and Hikes with a detailed chronology:

- Oh's January 5, 2022 one-on-one meeting with Needham
- The February 2 meeting in which Needham announced "structural changes" to NPAD policy staff
- The February 23 Office Hours meeting in which Oh referred to the "beatings" under former leadership
- Hikes' February 23 follow-up email with Oh about her language in the Office Hours meeting
- Oh's March 3 email exchange with Ware and Marks regarding the Apple campaign and orders from leadership (which ultimately led Oh to feeling like Ware lied to her)
- Oh's March 3 email with Moss asking about the Apple campaign instructions
- Oh's March 3 confirmation that she scheduled a meeting with Needham at his earliest availability: March 9
- Moss's March 4 reply to Oh's email expressing a lack of involvement in the Apple campaign
- The March 8 Democracy Division meeting in which Needham referred to Newman as a friend and barred criticism of him
- Oh's March 9 meeting with Needham to discuss the Ware incident, which became the "most contentious" meeting Oh had ever experienced at the ACLU

[121] Id. at 12-15.

[122] Hikes conceded that Oh shared those concerns, but they never met with anyone about them. (Id. at 15; Tr. 656.)

[123] GC Exh. 32 at 00413.

Oh also noted that, in the emails exchanged, neither Hikes nor Goldmacher engaged in "other workplace dynamics and biases in play, such as the power imbalance between management & non-management and misogynist racism against Asian American women."[124]

On March 31, Goldmacher asked Oh "to share subsequent emails exchanged relating to the "Apple Encryption Campaign Bi-Weekly Call." On April 1, Oh sent the following:[125]

- The final email she received on the Apple campaign email thread
- Emails showing "subsequent interactions" with Ware and Needham on the Apple campaign
- The "Abusive Passenger Legislation" email thread to illustrate "how the Democracy Division" was functioning under Ware and Needham's management
- The "Request for an internal PSA" email chain showing Oh's attempts to notify Goldmacher and Dougherty in February of the problems in the Democracy Division under Ware and Needham
- The "Office Hours follow up" email chain between Oh and Hikes showing that the March 23 meeting with Goldmacher and Hikes was "effectively mandatory" and for the purpose of Hikes "disciplin[ing]" Oh

Oh also referred to her "concerns about multiple incidents that potentially constitute violations of rules governing labor unions and employees' free speech rights." She concluded by alluding to her past work regarding whistleblowers and knowledge of the "laws and rules prohibiting retaliation for good faith reporting of such concerns."

3. Hikes Criticizes Oh's "Troubling" Statements

At 11:58 a.m. on April 4, 2022, Hikes replied to Oh's March 28 and April 1 emails.[126] They expressed "[deep concern]" for Oh's characterizations of Hikes' work as Chief Equity and Inclusion Officer in the emails. Hikes asserted that her efforts to speak with Oh about the harm she caused her black colleagues were met with "deflection, dismissiveness, and defensiveness." Hikes affirmed that she would continue to do her job of having these difficult conversations with staff. They rejected Oh's characterization of their "check-in" as "chastising" or "reprimanding," characterizing it as a "willful mischaracterization in order to continue the stream of anti-Black rhetoric [she had] been using throughout the organization."[127] Lastly, Hikes asked for clarification about Oh's assertion that neither she nor Goldmacher had engaged with "other workplace dynamics and biases . . . such as . . . misogynistic racism against Asian American women." Hikes found this accusation "deeply troubling."

R. Goldmacher and Hikes Meet With Needham and Ware on April 4

About four hours later, Goldmacher and Hikes met with Needham and Ware regarding Oh's statements. Goldmacher left after five minutes but Hikes continued speaking with Needham and

[124] Id. at 00411.
[125] Id. at 00410-00412.
[126] Id. at 00409.
[127] Hikes testified that Oh's characterization of [Hikes'] efforts as reprimanding and chastising" . . . when it [came] to . . . Needham . . . and Ware, it was a slap in the face." (Tr. 640.)

Ware.[128] After that discussion ended, Hikes reported to Goldmacher that Needham was "comfortable" with Hikes "engaging in check-ins via email with [Oh] as long as it's on an interim basis and did not last more than a month." Ware, on the other hand, felt "very uncomfortable being in spaces with [Oh] and wish[ed Oh] could report to someone else like Bobby Hoffman."[129] Ware "began to cry" and became "visibly distraught" about being "called a liar when she hasn't lied and to have a colleague treat her like this for no reason." She asked whether she should retain an attorney and reiterated that Oh should report to someone else. Needham "understood [Ware's] feelings and shared some of them but did not want to 'reward [Oh's] bad behavior." He felt that "changing [Oh's] reporting structure" would reward her "bad behavior" of "harassing her colleagues." Therefore, he wanted to keep the reporting lines "intact," and offered to supervise Oh himself if necessary.

S. Employees Continue to Voice Concerns at April 6 Staff Meetings

Meanwhile, on April 6, 2022, Oh attended two virtual meetings of NPAD staff regarding the findings of the Newman investigation. During the first meeting, Oh used the chat feature to express concerns about "certain leaders & managers" appointed by Newman who exhibited "similar management styles" and "attitudes toward staff." She asked if senior management had any plans to address this concern shared by many NPAD rank-and-file staffers?"[130]

Jessica Arons, Senior Policy Counsel in the Liberty Division, expressed similar concerns, stating: "I appreciate the recommendations that have been made but many sound like adopting certain norms, which is a good lace to start but we know can be easily broken without appropriate accountability mechanisms in place. I'm curious to hear about whether any new authority will be granted to HR and EDIB to better address issues as they arise and be able to more directly influence decisions and outcomes." Another employee, Gillian Ganeson, attributed part of the problem to "[t]he loss of trust between HR and NPAD staff because of the lengthy and difficult processes of the last couple of years."

In the second meeting, Oh followed Lila Zannell's comment about "gaslighting that happens" with the claim that "gaslighting, retaliation, counterattacks [etc.] against staffers who raise concerns are STILL GOING ON." That comment was followed by eight employees signaling their approval.[131] Oh also criticized "managers and/or new staffers" who "condescendingly spoke to workers voicing our concerns as being the real obstacles to NPAD healing, claiming that NPAD

[128] Ware testified that "it was brought to her attention from other coworkers and colleagues within NPD" that Oh accused her of lying about "the Apple encryption campaign and the process in which . . . myself, [Marks] and Ms. Oh would receive feedback from leadership." However, I find that vague testimony insufficient to establish that Oh disseminated that accusation to anyone other than Needham and Moss. (Tr. 593-596; GC Exh. 31.)

[129] Oh also considered Bobby Hoffman, another Deputy Director in the Democracy Division, to be a great manager. Like Anders, Hoffman was white. (GC Exh. 54 at 2; Tr. 206.)

[130] GC Exh. 54 at 2; Tr. 140-141.

[131] The five employees reacted by posting the same emoji, once, twice, or three times. In the transcription process, however, the actual emojis only appeared only as "+", "++", or "+++"). Based on the context of the dialogue that preceded and followed them, I find that the emojis signaled approval with the Oh and Zannell's (GC Exh. 55 at 1; Tr. 141-142.)

would be better of the malcontents would just leave, etc., you have NO IDEA what people went through for the past THREE+ YEARS."[132]

T. Needham Requests Corrective Action for Oh

On April 19, Needham emailed Goldmacher and Hikes requesting that Oh be disciplined by being placed on a performance improvement plan (PIP). He emphasized the need "set a better expectation" of how Oh should engage on his team and "hold her accountable for her actions."[133]

A few minutes later, Goldmacher explained that PIPs are used for "matters related to "performance/delivery of substantive work product that you want to focus," which was separate from the ongoing investigation of Oh. Goldmacher said she would have Amanda Romagnano review the PIP template with Needham to "ascertain if a PIP is the best course for us to pursue." She also mentioned that the investigation would "be wrapping up" within the next two weeks, at which point Goldmacher and Hikes would share their conclusions.[134]

On April 20, Romagnano briefed Goldmacher on her discussion with Needham. Based on the following concerns expressed by Needham, Romagnano concluded that Needham's concerns were not about Oh's performance, but rather her attitude and behavior:

- Ben wants to set parameters on how team to operate within the team
- Kate is weaponizing words and bringing a bad culture to the team
- Kate can perform job duties in job description
- Kate asks questions so that there can be a "gotcha" moment
- Kate tries to work around management structure. Needs to be corrected quickly
- Kary agrees that she is toxic to the team
- Kate didn't show up to last two team meetings. Didn't communicate that she wasn't planning to join meetings. Her attitude seems to be that she will do her job but not anything else
- Doesn't engage with team and it's not fair to team. If the behavior is allowed to continue it will work through team
- Ben will say something in a meeting and Kate will try to create some tension on team – hears things differently. Kate is trying to engage tension within team. Ben is trying to create a team environment of peace and kindness instead of distrust
- Kate is showing up in ways that are not healthy for the team
- Need to keep as a healthy team. Need to set expectations on behavior and change culture

U. Goldmacher's April 21 Report

1. Oh's Statements About Needham And Ware

[132] GC Exh. 55 at 2.
[133] GC Exh. 33 at 00213.
[134] Id. at 00212.

On April 21, 2022, Goldmacher concluded her investigation regarding Oh's statements that Ware "lied" about the Apple campaign and she was "afraid" of Needham. Her report included findings and recommendations that were to be presented on April 25.[135]

Goldmacher found "there [was] nothing extraordinary about the judgment calls made" by Ware stating that "leadership" requested a plan regarding the Apple campaign. She confirmed that Oh's statement was correct—neither Moss nor Romero "specifically ask[ed] for a campaign plan." Goldmacher noted, however, that Needham "also a part of 'leadership,'" and Ware, "as another member of leadership was asking for a campaign plan to be produced so the matter could be properly vetted and presented."

Goldmacher also found that Oh's decision to go to Moss directly was "undermining of [Ware] (and by extension [Needham's]) leadership and authority." She asserted that Ware made a "reasonable and understandable request" of her staff, and Oh "essentially refused, disregarding her manager's request," "questioning her," and "escalating the matter." Ultimately, "Ware did not lie to Oh," and Oh's accusing Ware of lying was an "incredibly damaging assertion to make."

Goldmacher characterized Needham's insistence on following the "chain of command" in the Democracy Division as "both a courtesy and a norm." She noted Needham's acknowledgment that declaring Newman was his friend was inappropriate under the circumstances—"he could have chosen his words better." As for prohibiting staff from "attacking colleagues" or "[tearing] people down," Goldmacher endorsed Needham's explanation that he merely "provide[d] a space to heal and talk through things."

Finally, Goldmacher consulted with Bobby Hoffman, another Deputy Director in the Democracy Division, who also attended the March 8 meeting. Goldmacher reported his belief that Needham did not prohibit staff from speaking about Newman or limit their speech. Hoffman also opined that that Needham's statements insisting that employees follow the chain of command simply "conveyed a management philosophy (like asking for agenda prior to meetings)" that "was reasonable and . . . was shared in the context of wanting awareness."

Goldmacher recognized that Needham's use of the term "chain of command" evoked a sense of "command and control," which was "not culturally aligned with the ACLU." However, she found that the concept was "not profound" and was not "offensive." Goldmacher also found that Needham's desire to "foster a culture of respect and collegiality" by preventing "personal attacks" on other colleagues was "not unreasonable."

Oh's explanations were not afforded the same deference. Goldmacher acknowledged that Oh was "entitled to her opinions and views of being afraid of [Needham]," but found that the "impact of her words" was "pervasive." She concluded, however, that Oh repeatedly used "super charged" language without recognizing the "damaging and hurtful impacts," and she "extrapolate[d] (ungenerously)" about Needham threatening to "harshly shut down" anyone who criticized Newman. Goldmacher concluded that Oh's characterization of Needham's "comments as 'or else warnings' [were] without merit or substantiation." She made no mention

[135] GC Exh. 34 at 00219-00223.

of Oh's background as a domestic abuse victim and how Needham's "word choices" impacted her.[136]

Similarly, Goldmacher concluded that Oh's statements to Goldmacher and Hikes that Needham was an "unfit" manager was "an opinion, but one that appears Oh holds." Moreover, she asserted that "[s]tatements like this disregard a leader and impugn their character," and were "not a constructive way to address issues with management." However, Goldmacher also found fault with the use of language by Ware and Needham:

> Lucinda and Ben as managers can be continuously mindful of their word choices (of a different nature/purpose). Lucinda could have been more precise in defining 'who' in leadership was asking for 'what' in her exchange with Kate. Again, emails can be inadvertently misleading and a 1:1 conversation can be more productive to discuss any disagreements in the future. Ben can acknowledge to Kate what he has already acknowledged to SKG and AH that he regrets invoking his friendship with Ronnie in the Division meeting where he was trying to convey that we can disagree on substance, but the culture he wants to foster is one where we are not making personal attacks on people.

2. Oh's Statements to Hikes

Regarding Oh's March 28, 2022 email to Hikes, Goldmacher found that Oh's characterization of Hikes' check-in as "[chastising]" was "charged language once again." She did not interpret Hikes' effort to counsel Oh about her language as "punishing, rebuking, or reprimanding [Oh] in a severe fashion," but rather, "illuminating" how Oh's words "caused harmed to her colleagues, particularly Black colleagues." Goldmacher concluded that "characterizing Black colleagues' words and actions in such a manner is damaging and had become a pattern of problematic behavior from Oh that needed to stop. She outlined several recommendations:[137]

- Oh "should bring future concerns directly to the person with whom clarity needs to be sought (e.g., Kate and Lucinda should have had a 1:1 conversation)."

- Oh "needs to be more cognizant of her choice of words, expressions, and recounting of certain interactions," as her "exaggerated or hyperbolic" words were "offensive to the party on the other side."

- There should be a "facilitated conversation" by HR between Oh, Ware and Needham to "establish working norms to improve productive working relationships."

[136] The Respondent contends that Goldmacher's report convincingly rejected the canards put forth by Oh and undermined her credibility: Needham's "aggressive in pursuing policy," "chain of command," and "Ronnie friend" comments; and Ware's "lie" comment. As previously found, however, it is undisputed that Newman the first three statements, and in Ware's case, the statement in question was proven to be false.

[137] Id. at 00223-00224.

Goldmacher ended the report with the following "offer" to Needham: "You're a harmed party and you can initiate a restorative inclusion process, if desired."

V. The April 25, 2022 Meeting

On April 25, 2022, Goldmacher and Hikes reported to Oh and Alejandro Ortiz the results of the investigation. The meeting was recorded at Oh's request. Goldmacher explained that the investigation resulted from Oh's request for a "PSA" and her complaints to Goldmacher and Hikes on March 23, 2022 concerning statements by Ware and Needham. Oh asked if Goldmacher investigated her complaints that (1) Needham told employees not to criticize Newman, and (2) "he and [Newman] would be imposing structural changes to crack down on policy staff." Goldmacher replied that the investigation addressed Oh's assertion that Needham stifled criticism of Newman, but the complaints about structural changes were outside the scope of the inquiry.[138]

1. Ware's Statement About the Apple Campaign

Goldmacher reported her conclusions that Ware did not lie to Oh about the Apple campaign and Needham's language was not as intense as Oh claimed. She opined that Ware's statement about the "ask from leadership," was not a lie, but "a lack of specificity" by both Oh and Ware "in precisely answering which part of [Oh's] question." Goldmacher then shared Ware's explanation that neither Romero nor Moss asked for the campaign plan: "[w]hat [she] said, and what we discovered is that she was saying, 'Yes, leadership as Ben Needham was asking for a campaign plan.'" When asked about Romero and Moss, Ware replied, "Yes, [Romero] and [Moss]. We need to continue with this campaign until we're told to suspend the campaign, basically.'"

Notwithstanding Ware's misstatement (neither Romero nor Moss asked for an Apple campaign plan), Goldmacher relied on her after-the-fact explanation—"That was what she was *trying* to convey." (emphasis added) Goldmacher found nothing "extraordinary" about Ware's "judgment call" to request "staff involved in this campaign to produce a plan, as asked by [Needham]." She also found that Oh had not given Ware "the benefit of the doubt," and her action to go directly to Moss had "an undermining effect on the leadership within the division." In Goldmacher's view, this was a situation where Oh should have sought "clarity. . . to ascertain who in leadership was asking for a plan." She was "[certain]" "there was not any intention for [Ware] to lie to [Oh]," adding, "accusing someone of lying is an incredibly damaging assertion to make. I think, on one's character, their integrity, their professionalism, and it has impacts on them personally."[139]

2. Needham's Statements Prohibiting Criticism of Newman

Goldmacher followed with her findings regarding Needham's statements forbidding criticism of Newman and Oh's statement that she was afraid to go to Needham. She stated that Needham was entitled to instruct staff to follow the chain-of-command because he was entitled to have "substantive work matters . . elevated to him as a division head, both as a courtesy and as a norm that he wants to establish."

[138] GC Exhs. 56, 56A at 1-3.
[139] GC Exh. 56A at 3-7, 12.

Goldmacher shared that Needham regretted calling Newman his friend but did not know why his statements or actions caused Oh to fear him or lose his trust. She suggested that Needham's March 9, 2022 statements curbing criticism of colleagues was also about Vikram Iyer, another NPAD deputy director who "was being, some might say, [s]ort of, you know, **attacked** on public forum spaces . . ." Goldmacher also alluded to a "third party['s]" statement that Needham was merely "conveying a management philosophy, like asking for agendas prior to meetings."[140] She was referring to Deputy Director Bobby Hoffman, the only other person interviewed.[141]

Oh explained why she believed Needham would react poorly if she brought him sensitive matters. It was not just Needham's repeated chain-of-command directives, she said, but also his announcement that he and Newman "would be imposing structural changes, the crackdown policy cell, which [Oh] had raised with [Dougherty]." Goldmacher countered by asking if there was any proof that Needham ever prevented her "from escalating matters of concern?" Oh replied by citing the example of Needham's negative reaction upon learning that she went to Moss, and accusing her of breaching the chain-of-command and losing his and Ware's trust.[142]

Goldmacher acknowledged that how Oh [felt] about [Needham] and what you articulated about being afraid cannot be invalidated." She then transitioned the discussion to Hikes to explain what they "found in speaking with [Needham] about . . . the impact of that exchange" on him. Hikes told Oh that Needham found their March 9 exchange "to be a harmful conversation for him." They stressed that "the impact of [Oh's] words and [her] characterization of [Needham] was . . . was pervasive." Needham told them that "[b]eing afraid of me screams being afraid of the big Black man." They also shared that Needham was very concerned about the career implications of having a subordinate say that they were afraid to bring concerns to him.[143]

Goldmacher then shared that a conversation she had with Needham and a "third party . . . present in [the March 9] meeting . . . show[ed] that [Needham] did not say verbatim the things that [Oh] characterized him as saying." Based on that information, Goldmacher found Oh's recount of Needham's statement to be an "extrapolation and interpretation." Although she did not "want to invalidate" how Oh "received" and "experienced" Needham's comment, Goldmacher proceeded to do just that: ". . . but characterizing [Needham's] comments as, quote, or else warnings without the substantiation or merit, again, is troublesome, right?"

Hikes reinforced similar concerns. They shared that Needham felt Oh's exaggerated and hyperbolic characterizations of him were "rooted in racism" and were "very harmful and damaging." Hikes stated that Oh's comments had "pretty serious impacts on your colleagues," and instructed her to be "more thoughtful and mindful of [her] language." For example, "calling [Needham] an unfit manager in a private exchange with [Goldmacher] and [Hikes]."[144]

[140] Id. at 7-9.
[141] Hoffman did not testify. (Tr. 430-435, 473.)
[142] GC Exh. 56A at 9-10.
[143] Id. at 11-12.
[144] Id. at 11-13.

After Goldmacher and Hikes finished, Oh asked, "what specific policies or documents" Goldmacher relied on in "saying people on social media on their personal accounts shouldn't be criticizing Vikram [Iyer], or not even [Newman]. Where does that fall?" Goldmacher replied that the Respondent "stands by free speech rights," reiterated her disagreement with Oh's version of the facts, and stated the impacts of Oh's unsubstantiated statements: "tearing people down," "impugning character," "personal attacks," "name calling," and "slanderous."

Oh disagreed with Goldmacher's depiction of her "wording choices," insisting it was "extremely unfair to brand somebody as an anti-Black racist based on the particular wording choices that I've made." She asserted that Needham's statements may have violated the "[Respondent's] policy or federal law" because it "kill[ed] her speech and "chilled the speech of others." Goldmacher repeated that Needham and a "third party" in the meeting did not see it that way and, therefore, her characterization of Needham's comment had not been corroborated.

Responding to Oh's question whether the report would "affect [her] personnel file and performance reviews," Goldmacher explained that investigation reports are kept in a separate file and Oh would not get a copy, but noted, "[a]lthough it's not in your employee file . . . it is something noted in your file, the complaints that you brought forward." Oh then asked if "senior management" could access the report. Goldmacher replied that Human Resources leadership had access, as well as General Counsel Dougherty and labor counsel, but only if relevant to a relevant matter. Romero, however, would not be able to access the report unless "we're in litigation of if there's a relevant issue, . . . confidentiality on a need-to-know basis . . . we may relax that."[145]

W. The April 26 Meeting

1. Oh Criticizes "Bosses" on Her Social Media Account

On April 26, 2022, Needham conducted a Democracy Division meeting via videoconference. Most staff attended. Uncharacteristically, Oh kept her video camera off and did not speak or type in the chat during the meeting.[146] Early on, Needham expressed an interest in tracking legislation regarding privacy rights and other issues.[147] He acknowledged that NPAD was short-staffed, but suggested interns could handle such a project and asked for the views of staff.[148] As staff debated the merits of such a proposal, Kristin Lee detailed all the work that went into drafting a "relevant document" relating to the "January 6th attacks," and suggested it "would probably be better to speak to [Oh] if it was actually helpful for anything. I don't think so." She opined that it "might not just

[145] Id. at 15-18.

[146] Oh credibly testified that she did not participate in the meeting because of the "events leading up to that day had me convinced that the ACLU had imposed an overbroad, vague censorship rule on me that it was determined to enforce in an arbitrary and unpredictable manner in order to force me out." Oh explained the outrage she felt in being silenced, as a "bullying victim who had just went through this five-year nightmare ordeal working under Ronnie Newman. Any now I was dealing with his nightmare middle managers. And having grown up with a violent father who beat me into breaking my teeth. And who beat my mother so often, my mother miscarried seven times before she had me. I found this censorship rule reprehensible." (Tr. 148-149; GC Exhs. 57, 57A.)

[147] Needham had used legislative tracking in his previous public policy positions. (Tr. 560-561.)

[148] GC Exh. 57A at 3-4.

be that simple to track" legislation with a "sense of consistency" given the available software and constant intern turnover. After additional feedback from Chad Marlow about how labor intensive such a project would be, Needham maintained that staff would "probably need to come up with a plan, test it out for a week, come back and have that conversation around what's working, what's not working . . ."[149]

Oh strongly disagreed Needham's determination to proceed with the legislative tracking project. Needham ended the meeting at "00:21:48," i.e., 3:21 p.m. Immediately thereafter, Oh posted the following messages on her personal Twitter account:[150]

> I can't overstate just how physically repulsed I feel working under incompetent/abusive bosses. Just the waves of physical revulsion washing over me and making me nauseated…"[151]

Two of Oh's followers "liked" her tweets before she supplemented the initial comment with a scathing assessment of Needham's bill tracking project:[152]

> "[W]hy don't we all start doing this extremely time intensive thing that would be a total waste of our time because it sounds good to me, someone with zero expertise on those issue areas and apparently understanding of this process already works"

2. Needham Complains to Goldmacher and Hikes about Oh's Tweets

On April 27, 2022 at 10:36 p.m., Needham emailed Goldmacher, copying Moss, Hikes, and Esete Assefa that "colleagues brought to [his] attention" Oh's tweets "during" the April 26 Democracy Division meeting."[153] He recounted that staff had discussed the "pros and cons of doing [his legislative tracking project] and we haven't made a decision about the way forward."[154]

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[149] Jade Williams and Molly McGrath also commented about the bill tracking initiative. (Id. at 3-7.)

[150] Oh initially testified that she posted the messages "after the meeting was over." (GC Exh. 35; Tr. 150.) On cross-examination, she acknowledged stating in her sworn Board affidavit: "towards the end of the staff meeting. As I heard [Needham wrap up this meeting, I went on my personal computer." (Tr. 189-194.) In any event, her testimony was corroborated by Needham's testimony and the transcript of the recording which showed that he ended the scheduled meeting, which started at 3:00 p.m., just before 3:22 p.m. (GC Exhs. 37 at 00418, 57A at 7, 144-150, 555-558.)

[151] Oh conceded that she considered Needham's directive in the April 26 meeting to be abusive. (Tr. 256-258.) However, she credibly explained that she was referring to managers generally, not just Needham, and "was trying to spark that discussion, get the attention of my coworkers. And specifically, reach folks like Chad Marlow, who had been part of that division meeting." (Tr. 152-156.)

[152] In addition to Chad Marlow, other coworkers who followed Oh on Twitter included Gillian Ganeson, Paige Fernandez, Chris Hampton, Linda Morris, Alejandro Ortiz, as well as the Union's Twitter account. (Tr. 152-155.)

[153] Oh's tweets, however, were posted just after the meeting ended. (GC Exh. 35; GC Exh. 37 and R. Exh. 250, at 00419-00420.)

[154] Needham had, in fact, stated his intention to have staff "probably need to come up with a plan, test it out for a week, come back and have that conversation around what's working, what's not working . ." (GC Exh. 57A at 6.)

Needham also reported that Oh "never turned on her camera and never commented" during the team's discussion of Needham's proposal.

Although not named individually, Needham found Oh's tweet "problematic" and "clear" that she was "talking about [him]." He asserted Oh "uses words like incompetent and abusive which continue to weaponize who she perceives me to be, but is now doing so in the public." Needham lamented the damage Oh's behavior was doing to "his reputation within the ACLU" and its capacity to "undermine [his] leadership." He expressed uncertainty about "how or if I can survive these kinds of attacks," which he felt undermined his leadership of the team. Referring to the previous discussion that he and Ware had with Goldmacher, Needham characterized Oh's behavior as that of someone who did not want "to move forward," but would rather "prefer to tear down anything and anyone they find to be a perceived threat."

A little over an hour later, Moss instructed Needham to document the tweet "along with any other behavioral incidents of [that] nature." Moss also believed that the incident was an "appropriate cause for intervention" by Hikes or Goldmacher. She expressed the expectation that Oh would be "fully present and positively engaged" in team meetings. Moss offered to speak with Oh but would defer to Needham.

On April 28, Goldmacher followed-up and asked Needham for the details of the April 26 division meeting. She assured him that she would seek to speak with Oh the next day "in order to understand the context more fully," but assured him that she considered this deeply concerning.[155]

Needham's reply a short while later thanked Goldmacher and Hikes "for the quick response and your attention to this matter." He reported learning about Oh's tweets on April 27 at 5:30 p.m. from a "colleague" who "felt it was targeting me." He asserted "[i]t was then [he] notice[d] that [Oh] sent this tweet during our meeting (close to the end of the meeting). . . [implying] the lack of expertise of the person asking these questions and reference[d] that a process was already working. Our division meeting takes [place] from 3:00 to 3:30 on Tuesdays."[156]

X. Oh's Discharge

1. Goldmacher Opens Investigation into Oh's April 26 Tweets

Goldmacher immediately launched an investigation into Oh's April 26 tweets. She concluded that the tweets, if true, amounted to serious misconduct of insubordination because of the language Oh used just one day after being counseled to be mindful of her word choices. After

[155] GC Exh. 37 and R. 250, at 00418-00419.

[156] Needham testified that he found Oh's tweet references to "incompetent/abusive bosses" to be false, career threatening, "triggering," and "racially motivated." (Tr. 564-567.) On April 27-28, however, he expressed different concerns to Goldmacher, Moss, and Hikes: damage to his "reputation within the ACLU;" the "undermining of his leadership;" and the behavior indicative of someone who "preferred to tear down anything and anyone they find to be a perceived threat to them." (Id. at 00418-00420).

receiving confirmation that Oh sent the April 26 tweets and consulting with Hikes,[157] Goldmacher recommended that she be terminated. The Respondent's senior leadership concurred with her recommendation and a meeting was scheduled for May 5 to notify Oh of that decision.[158]

2. Oh is Discharged on May 5

On May 5, 2022, Oh, accompanied by Shop Steward Ortiz, met with Goldmacher and Hikes.[159] Goldmacher explained that the meeting dealt with Oh's April 26 tweets. Oh responded that the investigation was retaliatory and accused "senior management" of "policing their non-managers' personal tweets." She explained that she had made similar posts in the past and was not confronted until her recent attempts to raise "good faith allegations" against her employers. Oh explained that coworkers, including "white or the male employees," previously posted "incendiary tweets" about the organization without being investigated by management, and proceeded to rehash her arguments from the previous encounters. She also asserted that the tweets were concerted in nature because they connected with concerns expressed during the meeting by Chad Marlow and Kristen Lee and reiterated previous complaints about "incompetent and abusive bosses"[160]

Goldmacher disagreed and found that by making these public statements the day after the April 25 meeting, Oh's tweets blatantly ignored her recommendations. She explained that the tweets "[could] only reasonably be connected to [Needham]" and when combined with previous actions, "demonstrated a hostility toward people of color, particularly Black men and men of color," violating the ACLU's anti-harassment and discrimination policy.[161]

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[157] Hikes was clearly involved in the decision to terminate Oh and was present at the May 5 meeting. (Tr. 346.) They equivocated and was vague regarding their involvement in that process, merely recalling that they "remember[ed] being told a little while after [Needham's April 27 email] that [Oh] was . . . going to be terminated. However, Needham's April 28 email thanked Goldmacher *and* Hikes for the "quick response" to his complaint regarding the April 26 tweets. Moreover, Hikes strongly agreed with the decision to terminate Oh. Hikes testified that they were "at a total loss" after reading the April 26 tweets because of the "conversations" and "coachings" about the "impact of her actions" on "marginalized people in particular." In Needham's case, they stressed that "it's hard enough being a black man in this country, . . . in the workplace, . . . without someone use their work time while you're facilitating a meeting to call you names, call you incompetent, publicly humiliate you on Twitter." They "[did not] know what [Needham] every did to her . . . to deserve it," but felt that Oh "was so committed to harassing, bullying, and publicly humiliating her black colleague" and "no one should have this experience, especially not at work." Noting that their "primary and almost sole job was to once again counsel about word choice, counsel about the importance and impact on colleagues," Hikes believed Oh's conduct "was just escalating and getting worse and more targeted." (Tr. 326, 644-647.)

[158] Goldmacher testified that she recommended termination because Oh, beginning with the "beatings" comment at the February 23 meeting, engaged in "a pattern of hostility towards people of color, black people in particular. It was a complete rejection of any other attempts at progressive discipline. . . . And there was harm. Continued harm to our other staff members." Goldmacher considered, but rejected, lesser discipline because Oh's behavior after apologizing for the comment during the February 23 Office Hours meeting—"the beatings shall continue until morale improves"—did not improve . . . [Oh's] behavior and conduct, subsequent to that, did not uphold that apology." (Tr. 390, 450-453.)

[159] Hikes did not typically attend termination meetings but made an exception because they had been "engaged" with Oh for some time . . . around this issue." (Tr. 326.)

[160] GC Exh. 58A at 1-5; R. Exhs 250, 260.

[161] Id. at 5-7.

Goldmacher then informed Oh that she was being terminated but was being offered the opportunity to resign and provided with "severance under the formula that would apply in any less egregious situation." Oh would be given 21 days to sign the separation agreement that Goldmacher would email to Oh after the meeting.

After Ortiz asked for the grounds that the Respondent was basing the termination, Goldmacher cited "misconduct" according to the Respondent's Board Policy 527 and violating the Respondent's policies against discrimination and harassment in the workplace. She elaborated that the misconduct was "pervasive, repeated" misconduct that "caused harm," with respect to which Oh was counseled. Goldmacher alluded to "unwelcome verbal conduct that denigrate[d]" Ware and Needham and revealed "a pattern of … demeaning and hostile behavior towards people of color, and in particular, Black men and men of color." She also asserted that Oh's misbehavior constituted "significant insubordination" because it occurred "while she should have been participating in a division meeting and contributing productively to the discussion. . . . thereby being dismissive of the division leadership."[162]

Oh asked if the Respondent would agree to put her on a performance improvement plan if she apologized.[163] After Goldmacher denied that request, Ortiz sought confirmation that the April 26 tweets "contributed" to the termination decision. Goldmacher cited Oh's "repeated behavior" as "the motivation for this meeting," and clarified that the tweets were "one expression of the conduct and behavior, yes."[164]

3. The Termination Letter

Shortly after the meeting, Oh received a letter, dated May 5, 2022, terminating her employment but offering her the opportunity to resign:

> [D]ue to misconduct on your part, consisting of a pattern of serious misbehavior inconsistent with ACLU policies requiring all employees to maintain a workplace free of harassment, including your engaging in repeated hurtful and inciteful conduct towards colleagues that impugns their reputations and your demonstration of a pattern of hostility toward people of color, particularly Black men, and your significant insubordination, you are being terminated, effective today. You will also have the option to resign, effective today.

The letter explained, in pertinent part, that Oh was not entitled to severance payments because she violated Board Policy No. 527 but could contest the termination. However, if Oh accepted the offer to resign by signing the "Separation and Release Agreement" and "Acknowledgment of Preference for Confidentiality" provided, the Respondent would pay her severance amounting to $12,456.61 and would not contest her application for unemployment benefits. In addition to releasing the Respondent from all claims and liabilities relating to Oh's employment, the proposed agreement included a non-admission of liability and confidentiality provisions.[165]

[162] Id. at 7-8.
[163] Prior to her discharge, Oh was never issued a warning, placed on a performance plan, or suspended.
[164] Id. at 9.
[165] GC Exhs. 39-40.

Y. The Respondent Does Not Notify the Union About Oh's Termination

The Respondent neither provided notice to, nor bargained with, the Union over Oh's termination.[166] On May 6, Oh informed the Union of her termination, explaining that she was fired without notice and without the opportunity to be placed on a performance improvement plan or other probationary period.

On May 13, the Union emailed Dougherty, Goldmacher, and Hikes, asserting that the Respondent terminated Oh without giving the Union and "without an opportunity to be placed on a performance improvement plan (PIP) or other probationary period short of termination."[167] The email referred to management's representations to Oh at the April 25 and May 25 meetings, and the April 26 tweets. The Union questioned the "lack of process precipitating the decision to fire [Oh] and ask[ed] the [Respondent] to reconsider that decision."

The Union also requested the following information within two weeks: all tweets, documents, and communications relating to Oh's termination and previous discipline or counseling; Oh's complete personal file; and all policies alleged to be violated by Oh and evidence of her alleged violations. Additionally, the Union requested a meeting to discuss alternatives to terminating Oh, including voluntary meditation, binding arbitration, reassignment to a different supervisory chain, and additional training regarding polices related to the use of social media. The Union believed that the parties needed to discuss and clarify the "policies related to employee speech rights and responsibilities." Finally, the Union asked for an extension of time for Oh to appeal her termination to the Executive Director pursuant to Policy 527.

On May 18, Goldmacher responded that the Respondent would "provide the requested information and documents as soon as we are able." Additionally, the Respondent agreed to extend Oh's time to appeal the termination for a period of two weeks after the Respondent provided the Union with the requested information.[168] On May 19, Goldmacher followed-up with a request of Oh's recordings of the March 23, April 25, and May 5 meetings. On May 23, the Union provided the Respondent with the audio files for the three meetings.

On June 13, the Union requested an update regarding the outstanding information request, restated its desire to meet with management to discuss Oh's firing, and requested a response by the end of that week. On June 15, Dougherty responded that all of the requested information would be provided by June 24. He also proposed they meet with the Union on that date.[169]

The meeting was eventually scheduled for June 24. On June 23, Goldmacher informed the Union that the information requested would be provided prior to the June 24 meeting. Realizing, however, that the Union might not have enough time to review the information prior to the meeting, Goldmacher offered to move the meeting to the following week if the Union preferred. The Union

[166] Factual Stipulations 4-5.
[167] GC Exh. 41; Factual Stipulation 6.
[168] GC Exh. 42 at 00059-00060.
[169] Id. at 00058-00059.

suggested the meeting proceed on June 24 and, later that evening, the Respondent provided the information requested.[170]

Z. Oh's Objects to Her Termination

1. Oh's Internal Appeal is Denied

The meeting requested by the Union eventually took place on July 11. Four days earlier, on July 7, Oh filed an internal appeal of the termination. On July 18, the Respondent, by General Counsel Dougherty, determined that Oh's appeal ("Objection") lacked merit and affirmed the decision to terminate her.[171]

Dougherty rejected Oh's assertion that her employment was terminated "for posting a thread consisting of two tweets on [her] personal Twitter account." He reiterated the grounds for termination in the May 5 letter: "misconduct . . . a pattern of serious misbehavior . . . harassment . . .repeated hurtful and inciteful conduct towards colleagues that impugns their reputations and . . . a pattern of hostility toward people of color, particularly Black men, and your significant insubordination."

Dougherty acknowledged that the Respondent's policy protected "the right of employees to criticize the organization and its policies, practices, and leadership, as well as working conditions." He asserted, however, that Oh completely disregarded the Respondent's policies against discrimination, harassment, and retaliation, as well as fostering a culture of belonging. Dougherty rejected Oh's justification of her behavior as concerted complaints. Instead, he characterized it as "personal attacks" against colleagues, "using language that impugned their character, that was super-charged, inciteful, and damaging, and that failed to acknowledge the impact on the affected individuals."

Finally, Dougherty asserted that regardless of Oh's intent, her language was "reasonably perceived" by its targets as "racist tropes and allusions, . . . demonstrated a pattern of hostility to employees of color . . . [and] "denigrate[d] or show[ed] differential treatment towards an individual because of the individual's membership or perceived membership in a Protected Class."

2. The Parties' Enter Into Mediation and then Arbitration

On various dates in or about August 2022, Oh, represented by the Union, and the Respondent conducted a mediation regarding her termination before a mutually agreed upon outside mediator. When the mediation did not result in a resolution of the matter, Oh requested arbitration before a mutually agreed-upon outside arbitrator in accordance with the Respondent's Board Policy 527.

Arbitration proceedings between Oh and the Respondent were conducted on six dates between March 6, 2023 and January 10, 2024 before Arbitrator Alan Symonette. As of this date, no arbitration decision has been rendered.[172]

[170] Id. at 00056-00058.
[171] GC Exh. 43; Factual Stipulations 7-8.
[172] Factual Stipulations 9-11.

LEGAL ANALYSIS

I. THE PARTIES' LEGAL ARGUMENTS

The General Counsel contends that the Respondent unlawfully denied Oh a transfer and discharged her because she, along with other employees, was an outspoken critic of working conditions in NPAD and the Respondent's treatment of employees. The alleged protected activity included complaints of a toxic culture, misogyny, verbal abuse, public humiliation, unilateral changes to the staffing structures while the parties were still bargaining for a first contract, and prohibiting employees from criticizing managers.

The Respondent denies that Oh's April 26 tweets constituted protected concerted activity. It contends that she was lawfully terminated for "misconduct" because she harassed colleagues "by engaging in repeated hurtful and inciteful conduct toward colleagues that impugn[ed] their reputations and [her] demonstration of a pattern of hostility toward people of color, particularly Black men, and [her] significant insubordination." Alternatively, the Respondent contends that even if Oh's tweets constituted protected concerted activity, it did not have knowledge of their concertedness at the time the decision was made to terminate her. Nor did the Respondent harbor animus towards Oh's activities. Moreover, even if Oh's tweets would otherwise be protected, the Respondent contends she lost the protection of the Act and would have been terminated anyway for her ongoing and continued use of demeaning language and insubordination. In any event, the Respondent denies that it applied disparate treatment to Oh and Newman.

The Respondent advances several arguments regarding Oh's contention that she was unlawfully denied a transfer. It contends that there was no opening on Anders' team at that time, nor was the Respondent actively seeking applicants. Also, even if a *prima facia* case is established, it asserts that Moss paused consideration of the transfer for legitimate, non-discriminatory reasons.

Finally, the Respondent denies that it refused to bargain with the Union over the decision to terminate Oh. It contends that the termination was carried out pursuant to its pre-existing policy, Board Policy 527. Additionally, it asserts that Ortiz, the Union's shop steward, was involved in every step of the sequence of events leading to Oh's discharge and never requested to bargain. Finally, the Respondent asserts that it provided information requested by the Union. The parties then met to discuss potential alternatives to termination and subsequently engaged in an unsuccessful mediation, followed by a lengthy arbitration proceeding.

II. THE RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY TERMINATING OH IN RETALIATION FOR HER SECTION 7 ACTIVITY

A. Applicable Law

In proving that an employer unlawfully discriminated against an employee to hinder Section 7 activity, the General Counsel must make a prima facie case that the employee's protected activity was a motivating factor in the adverse employment action. That burden is satisfied with proof that the employee engaged in protected concerted activity, the employer knew of that activity, and the employer bore animus towards that activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation*

Management Corp., 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002). If and when the General Counsel makes that 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. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004).

The causal link may be established by direct evidence or "inferred from circumstantial evidence based on the record as a whole." *DHL Express (USA), Inc.,* 360 NLRB 730, 730 fn. 1 (2014) (inferring animus where employer discharged employee one day after employee engaged in union activity); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003) (employers' actions were motivated by union animus where union supporters were suspended less than two weeks after a second election was ordered and discharged a few weeks after union was certified).

Circumstantial evidence which might support a finding of discriminatory intent might include the timing of the adverse action in relation to the employee's protected activity, the presence of other unfair labor practices, disparate treatment of the discriminatees, the employer's perfunctory investigation, shifting defenses by the employer, and evidence of pretext. *Lucky Cab Co*., 360 NLRB 271, 274 (2014), enfd. Mem. 621 Fed.Appx. 9 (D.C. Cir. 2015) (animus evident from discharge of union supporter two weeks after organizing effort intensified, contemporaneous Section 8(a)(1) violations, disparate disciplinary treatment, shifting defenses, failure to allow discriminatees to respond to allegations of misconduct, falsified documentation and abrupt changes in discipline, and false reasons for discharges); *ManorCare Health Services–Easton,* 356 NLRB 202, 204 (2010) (final written warning to union supporter established by close proximity of time to protected union activities, employer's unlawful interrogation, threats, failure to investigate, departure from past disciplinary policy in basing discipline on an outdated prior warning, and confiscation of union literature); *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009) (unlawful motivation for suspensions and terminations of employees for protected and union activities indicated by disparate disciplinary treatment, false or pretextual reasons for the discipline, failure to investigate or ask employees' for their versions of incident before imposing discipline).

If the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

B. Oh Consistently Engaged in Protected Concerted Activity

1. The April 26 Tweets Were Preceded By a History of Protected Concerted Conduct

Oh consistently engaged in protected concerted activity during her last three years with the organization. On June 20, 2019, she reached out to Goldmacher requesting that Newman received "in-depth gender bias and managerial coaching." She shared "common thread" with "half a dozen colleagues" concerned that Newman "lash[ed] out and [made] them feel disrespected, devalued, and heartsick—with strong sexist undercurrents." *Meyers Industries, Inc. (Meyers I),* 268 NLRB 493, 497 (1984) (concerted activities must be "engaged in with the authority of other employees, and not solely by and on behalf of the employee himself"); *Fresh & Easy neighborhood Market, Inc.,* 361

NLRB , 151, 152 (2023) (Section 7 activity must be both concerted and engaged in for the purpose of "mutual aid or protection"). However, Oh's concerns—and those of her colleagues—did not end there. Over the course of the next two and a half years, she and others continued to complain about various forms of abusive treatment by managers.

On October 4, 2019, Oh contributed to a work group discussion regarding abusive treatment of employees by management by posting that she "experienced the most misogynistic and humiliating incident of [her]" career and would "keep speaking up" because she grew up in a home racked by a physically violent misogynist, which has basically pushed [her] tolerance for abusive men down to nothing." She added that colleagues needed to "stand up" for themselves, "even at the cost of being branded a troublemaker for HR," otherwise, "that is how you keep getting punched in the face – literally and metaphorically."

On November 20, 2019, Oh complained to Goldmacher about a "shitty comment" by Newman and his "overall pattern of abuse, bullying, active contempt, and other forms of random punching down . . . that [she had] not done anything to deserve." She also explained that she knew what "a bully who likes to pick on women looks like" because of her "physically violent father" and "abusive male managers throughout [her] 20+ years career." Oh also incorporated previously expressed group concerns. She insisted that Newman's "coaching" was not working, she saw no evidence that he would be "held accountable for mistreating his employees," and "MULTIPLE WOMEN" were upset about his behavior, and Romero knew it. (emphasis in original).

On December 5, 2019, Goldmacher and Hikes conducted a "formal inquiry" into Oh's complaints against Newman. Oh detailed her personal complaints and explained that they were a continuation of the group concerns that she previously expressed—"This is a broader problem than me—Something needs to be done." See *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) ("individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group"), supplemented by 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995); *Salisbury Hotel, Inc.,* 283 NLRB 685, 687 (1987) (an employee's call to the Department of Labor was a logical continuation of concerted activity regarding the employer's change in lunch hour policy); *Montgomery Ward & Co.*, 156 NLRB 7, 9–10 (1965) (employee engaged in protected concerted activity when she engaged her coworkers in discussions about whether their employer was violating the Equal Pay Act by paying women less than men with similar prior work experience). Her concerted activity continued.

On January 12, 2020, Oh, having conducted a "listening tour," reported to Hikes the concerns of "rank-and-file employees" about Romero. The complaints echoed previously expressed group concerns about Newman, as well as concerns that Romero considered complaints about abusive and/or poor managers as "routine" or a "natural occurrence" and would not do anything "meaningful about them; did not care about the welfare of rank-and-file employees complaining about sexist "terrorizing" of employees because he "was one of them; "did not care about diversity efforts" and believed the organization should promote and hire "based solely on merit, often deriding or dismissing applications from people of color or women for higher positions;" prioritized the "chain of command . . . (even though that chain of command puts rank-and-file workers at a serious power disadvantage)." She added that "[Human Resources] works for management . . . No matter HR's protestations to the contrary, retaliation is a legitimate concern." See *Home Depot USA, Inc.,* 373 NLRB No. 25, slip op. at 1 (2024) ("The Board has long recognized that the Act's protection of

concerted activities for mutual aid and protection includes efforts by employees to protest and redress racial discrimination in the workplace), citing *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1404 (1964) (employee protests of unfair hiring policies were within their Section 7 right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"), affd. in relevant part 349 F.2d 1 (9th Cir. 1965). *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710 fn. 33 (1999) ("it can hardly be argued, given the history of race relations in this country, that alleviating racial discrimination is not of interest to all employees in the workplace, irrespective of [the] race or ethnicity of the person bringing the charge."

On January 31, 2020, Goldmacher reported her findings regarding Oh's individual and group complaints concerning Newman. Hikes also attended. Goldmacher and Hikes did not dispute any of Oh's past complaints, except to rule out discriminatory behavior, and expressed the belief that Newman had problems interacting with a "cross-section" of employees that went beyond protected class individuals. They also advised Oh to bring any new incidents about Newman directly to them rather than reporting them in open forums.

On February 26, 2020, Oh and other NPAD employees vented their frustrations to Newman at an Office Hours meeting, accusing him of treating them "like shit," disregarding their professional expertise, and insulting them. On March 2, 2020, Goldmacher provided Hikes an assessment of Newman's management approach and conduct, concluding that it was "impacting culture/morale" in NPAD and possibly the entire organization.

On October 14, 2020, Oh and other employees continued raising concerns about "NPAD's internal woes." Romero was present and responded that he would follow-up with one-on-one meetings with staff.

On October 29, 2020, Oh had her one-on-one meeting with Romero. She said that Newman abused, bullied, attacked, and called employees useless, but their complaints had been dismissed and discredited. She also asked about "due process" for employees who did not have direct access to Romero. He replied that Oh had due process because she was "not incarcerated" and had "agency" because she was "employed here." A few days later, Romero asked Goldmacher how many complaints Oh had filed with Human Resources and whether Newman had been found to be a "bully and abusive." Goldmacher replied that Oh's claim was inaccurate and provided Romero with her January 31, 2020 report.

On December 9, 2020, Romero disseminated a memorandum with the results of his one-on-one meetings with employees. He acknowledged complaints of high employee turnover, a lack of long-term strategy, and low morale, as "clear areas for improvement." However, Romero rejected employees' requests for a leadership change and advised employees who disagreed to "make a change" to another part of the organization or just leave.

In 2021, the problems raised by Oh and other NPAD staff about Newman did not go away. On September 17, 2021, Deputy Organizing Director Jameka Hodnett informed Goldmacher and Hikes that she was resigning. She hoped the "organization and department can take a deep look at itself and change the conditions for its staff" and attributed her resignation to many of the same complaints that had been raised for nearly two years: short-staffing and overworked employees, the devaluation of staff, a lack of morale, staff concerns routinely dismissed, a lack of collaboration and

teamwork; and a lack of respect for employees' well-being. Hodnett "[w]ondered how much the angry [black woman] stereotype in the office is due to the fact that black women are often the only ones willing to speak up and state the plain truth," and whether NPAD's problems had been ignored due to a "WASP" culture prohibiting public discussion of "anything that could be the source of conflict (no politics or religion at the dinner table)." Later that day, Goldmacher acknowledged that Hodnett's concerns had been shared by other employees. On September 20, 2021, another employee distributed Hodnett's email to "National Staff." An employer's Equal Employment practices come under the penumbra of "terms and conditions of employment," and concerted activity protesting racism or sexism is protected. See, e.g., *Continental Pet Technologies,* 291 NLRB 290, 291 (1988); *Diagnostic Center Hospital Corp.,* 228 NLRB 1215, 1217 (1977).

In Fall 2021, staff complaints about NPAD's attrition, culture, leadership and management, including concerns about potentially sexist and misogynistic behaviors exhibited by Newman, were investigated by the MRW Consulting Group. On January 24, 2022, MRW Consulting Group reported on its findings. The MRW Report confirmed problems with Newman's management approach, but ruled-out sexist and/or misogynistic behavior or other protected class individuals.

On February 4, 2022, Oh requested that Goldmacher "put out guidance to supervisors" telling them that they "cannot order rank-and-file staffers to not "go over their head" about "persisting personnel problems." Oh subsequently withdrew that request but revealed on February 18 that she had been referring to Needham's remark on January 5 that he wanted staff to respect the chain of command and not go over his head about problems in the division.

On February 18, Oh also urged Goldmacher and Dougherty to request that "senior leadership and Board . . . undertake a comprehensive review and reform of the middle management hires and structures put in place by [Newman] with [Needham's] blessing." Although "focus[ing] on the two [Needham and Ware] in my division," she urged that "incompetent or abusive middle managers be fired or moved into more appropriate roles, citing the "unceasing complaints about [Newman] clones like Julie Sweet." Oh also expressed concern about the "structural changes" announced by Needham on February 2 without bargaining with the Union.

By objecting to her employer's proposed changes to working conditions in the presence of other employees, Oh continued to engage in concerted activity. See *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 840 (1984) ("[A]n honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated"); see also *King Soopers, Inc*., 364 NLRB 1153, 1154-1155 (2016) (an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity "'regardless of whether the employee turns out to have been correct in his belief that his right was violated'") (citing *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *Enterprise Products*, 264 NLRB 946 (1982) (employee was engaged in concerted activity by objecting, during a group meeting, to employer's proposal that employees increase their productivity in exchange for event tickets instead of higher wages); *Whittaker Corp*., 289 NLRB at 934 (finding concerted activity when an employee raised his hand and complained about his employer's refusal to increase wages, even where no other employees commented at the meeting).

On February 23, Moss spoke about the leadership change and her intent to improve NPAD's culture. During the meeting, Oh asked why employees should "trust that NPAD won't have the same problems under a new permanent director if nothing else changes?" Metaphorically referring those "problems" as "beatings," Oh asked, why employees should not expect that those problems would continue until morale improved. Moss explained that Romero trusted her "perspective about how we should do this," and she looked forward to hearing from Oh. Afterwards, Hikes counseled Oh about her reference to "beatings, but acknowledged that Oh's question—why employees should trust that NPAD culture will change under new management—was a "fair and welcome question."

On March 3, Oh expressed concerns to Moss regarding her workload and NPAD's management structure. She complained about Ware's lack of policy knowledge, and Needham's "aggressive" leadership approach and intention to make structural changes without bargaining with the union. Acknowledging employees' continuing concerns with management, Moss asked Oh for her "sense about Ben's openness to . . . hearing how the rest of the organization has been experiencing the status quo? Do you feel like he really has a very strong and flexible point of view, or do you think it may just be he doesn't know and a lot of conversations that he can move?" Moss felt that Needham tended to "dig his heels in" and she needed to work with him on finding "middle ground" with policy staff because "[r]ight now, people still seem . . . They're either exhausted, they're traumatized, or they're defensive."

On March 8, Oh, upset by Needham's statement during the division meeting that day in which he "shut-down" employees' criticism of Newman's treatment of employees and called Newman his friend, text messaged coworkers about it and cautioned them to watch out. The Board has long recognized that when employees gather to discuss working conditions, a single employee may then choose to act based on those discussions, without any kind of authorization from their coworkers. *Mike Yurosek & Son, Inc.*, 306 NLRB at 1038–1039. The Board treats such action as a "logical outgrowth" of the employees' earlier discussions or actions. *Every Woman's Place*, 282 NLRB 413 (1986) (employee's telephone call to Department of Labor, related to and was a "logical outgrowth" of a prior complaint made by three employees to employer about overtime compensation for holidays).

On March 9, Oh met with Needham to discuss her transfer request but turned the focus to her exchange with Ware. Oh complained that Ware lied to her about the Apple campaign, lost her trust, and questioned her competence ("the culmination of a painful year-long process where there has just been no substance."). Needham disagreed, insisted there was fault on both sides, criticized Oh for going over his head directly to Moss, and said that she lost his trust, as well as that of the team. At that point Oh responded that she was "afraid" of going directly to Needham because of his statement at the March 8 division meeting that he would "broach any criticisms" of Newman. Needham denied Oh's interpretation of his statement and asserted that the criticism was unrelated to "issues" appropriate for discussion: "I have no place for that on my team." The meeting concluded with Needham agreeing to "be advocating" and "supportive" of Oh's transfer request. About two hours later, Oh complained to Goldmacher, Hikes, and Moss about Needham's statements that she violated his trust by violating the chain of command by "going directly to [Moss] about the [Ware] incident," as well as her transfer request.

On April 6, Oh expressed concerns at two NPAD meetings convened to brief staff on the findings of the Newman investigation. During the first meeting, Oh complained about "certain

leaders & managers" appointed by Newman who exhibited "similar management styles" and "attitudes toward staff, and asked if senior management had any plans to address this concern shared by many NPAD rank-and-file staffers?" In the second meeting, Oh followed a colleague's comment about "gaslighting that happens" with the claim that "gaslighting, retaliation, counterattacks [etc.] against staffers who raise concerns are STILL GOING ON." Eight employees signaled their approval. Oh also criticized "managers and/or new staffers" who "condescendingly spoke to workers" who voiced their concerns.

On April 26, 2022, Needham requested feedback regarding his initiative to develop a bill tracking plan on privacy rights and other issues. Oh was present at the virtual meeting but did not participate and turned her video off. Staff debated the merits of such a proposal, including two others on Oh's team—Kristen Lee and Chad Marlow. Lee suggested they speak with Oh to see if all the work that went into drafting a "relevant document" relating to the "January 6th attacks" was actually helpful. She also felt it "might not just be that simple to track" legislation with a "sense of consistency" given the available software and constant intern turnover. Marlow spoke about how labor intensive such a project would be. Needham, however, maintained that staff would need to come up with a plan and test it for a week. Oh strongly disagreed with Needham's directive to proceed with the legislative tracking project. Immediately after the meeting ended, Oh tweeted sharp criticism about working under "incompetent/abusive" bosses and expressed what she felt—physically repulsed and nauseated. Two coworkers "liked" Oh's post[173] before she supplemented the initial comment with criticism of this "extremely time intensive" bill tracking project "that would be a total waste of our time," as well as Needham's competence—"someone with zero expertise on those issue areas and apparently understanding of this process already works." See *Parkview Lounge, LLC,* 366 NLRB No. 71, slip op, at 2 (2018) (employee engaged in protected concerted when she voiced a number of group workplace concerns" during a staff meeting, "which were met by nods of approval from the assembled employees).

From Oh's initial communication with Goldmacher on June 20, 2019 to her April 26 tweets, there were common and consistent elements or themes between her concerns and those shared by coworkers about the mistreatment of employees by managers, the impact on them, as well systemic issues: sexism, misogyny, disrespect, gaslighting, incompetence, harassment, low morale, understaffing and overworked.

The Respondent's contention that Oh targeted people of color in the workplace is not borne out by the facts. Oh was clearly impacted when Anders, with whom she worked well, moved from the Democracy Division to head the new Federal Policy Division. She was left to be supervised by Ware, who had no previous policy experience. However, Oh was an outspoken employee who criticized numerous managers, including white managers, referring to Shayna Strom, as a "high status white woman," and Julie Sweet, as a Newman "clone." She complained on several occasions about the treatment of women of color, including herself, by Newman and other managers—an allegation supported by Jameka Hartnett, also a woman of color. Oh, an attorney with significant policy experience, also expressed concerns about being relegated to administrative tasks on a campaign while "a promising young white man" was given the role of drafting the policy statement and "hobnobbing" with national security experts. She even criticized Anders for failing to respond

[173] Further evidence of the concertedness of Oh's personal tweets is established by the fact that other employees saw the tweets and forwarded them to Needham.

to her emails and in one instance when he displayed insensitivity when she tried to discuss a physical assault that she endured.

2. Oh's Language Was Not Egregious Enough To Fall Outside the Protection of the Act

The Respondent also contends that, even if Oh's tweets were otherwise protected, she forfeited the Act's protections by her ongoing and continued use of demeaning language and insubordination. Specifically, the Respondent asserts that Oh engaged in unprotected conduct by her insubordinate boycotting of the Needham's April 25 division meeting, tweeting defamatory characterizations of him and sarcastically misrepresenting what occurred in that meeting, and rejecting the instructions given to her by Goldmacher and Hikes the day before.

Recognizing that employees may resort to strong language when expressing their concerns to their employers in order to improve their working conditions, the Board has long sanctioned the use of harsh, insulting, offensive, and even racially offensive comments in the course of protected speech under the Act. See *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (Section 7 rights can be exercised by employees without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes; misconduct in the course of Section 7 activity is treated differently than misconduct in the ordinary workplace setting); *Pier Sixty, LLC,* 362 NLRB 505, (2015 (profanity-laced Facebook tirade, which also mentioned the supervisor's mother and family, reflected language regularly used in the workplace and was found to be protected); *Cooper Tire & Rubber Co v. NLRB,* 866 F.3d 885 (8th Circ. 2017) (enforcing Board order reinstating striker who directed racist taunts at van carrying replacement workers without creating a hostile work environment, and rejecting argument that the order conflicted with the employer's duty under the Civil Rights Act of 1964); *Desert Springs Hosp. Med. Ctr.,* 363 NLRB 1824, 1824, fn. 3 (2016) (pro-union employee did not lose the protection of the Act by using profane language in expressing her frustration and anger to rumored anti-union employee, even though the latter reported feeling threatened); *Neff-Perkins Co.,* 315 NLRB 1229, 1233-1234 (1994) (employees' statements describing training and equipment maintenance as "shitty" and "sucks" in front of customer were not so egregious as to loss the protection of the Act).

Based on the preponderance of the evidence, I find that Oh's April 26 tweets were not so egregious as to lose the protection of the Act. In doing so, I do not rely on *Atlantic Steel Co.,* 245 NLRB 814 (1979), since the parties disagree as to whether Oh's April 26 tweets, as well as her prior conduct that resulted in coaching, amounted to protected conduct. Moreover, the tweets were made very shortly after the April 26 meeting ended and, thus, in a nonwork setting. Nor did they occur during a conversation with a manager. See generally *Triple Play Sports Bar & Grille*, 361 NLRB 308, 310 (2014) ("as a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties"). Rather, I find that Oh's activity did not lose its protected character under the totality of the circumstances. See, e.g., *Richmond District Neighborhood Center*, 361 NLRB 833, 834 fn. 6 (2014) (in the absence of exceptions, the Board, without deciding the appropriateness of the judge's test for analyzing private Facebook conversations, examined the egregiousness of the conduct under all the circumstances).

In evaluating Oh's April 26 tweets under the totality of the circumstances, I considered the following factors: (1) whether the record contained any evidence of the Respondent's hostility

toward Oh's activity; (2) whether the Respondent provoked Oh's conduct; (3) whether Oh's conduct was impulsive or deliberate; (4) the location of Oh's tweets; (5) the subject matter of the tweets; (6) the nature of the tweets; (7) whether the Respondent considered language similar to that used by Oh to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Oh was typical of that imposed for similar violations or disproportionate to her conduct. An objective review of the evidence under the foregoing factors establishes that only one of them weighs in favor of finding that Oh's comments were so egregious as to take them outside the protection of the Act.

Goldmacher and Hikes demonstrated their hostility towards Oh's protected tweets complaining about incompetent and abusive bosses, and the impact on employees of Needham's bill tracking initiative, by disregarding the merits of her tweets and expediting discipline in order to protect his reputation. The tweets were impulsive and provoked by Needham's insistence that the team plow ahead with his initiative, notwithstanding feedback from Oh's coworkers about the labor intensity involved at a time when they were short-staffed. They were posted after the meeting ended, did not interrupt the meeting, and mirrored Oh's previous protected complaints about abusive and incompetent managers. While harsh, Oh's language was typical of heated commentary by employees in many a workplace criticizing their managers or working conditions.

The Respondent previously coached Oh about her "word choices" when criticizing managers, so she was on notice to refrain from using "hyperbolic" and "exaggerated" language in those instances. It maintained policies against discrimination, harassment, and retaliation, as well as fostering a work culture of belonging. However, the Respondent did not maintain a specific rule prohibiting the language Oh used in criticizing Needham and incompetent/abusive managers in general. Nor is there proof that the discipline imposed upon Oh, termination, was typical of that imposed for similar violations or disproportionate to her conduct.

C. The Respondent Was Aware of Oh's Protected Concerted Activity

The Respondent denies that it was aware of Oh's concerted activity on two grounds. First, it contends that Oh was silent during the April 25 meeting and, thus, did not engage with colleagues when they discussed Needham's bill tracking initiative. It also argues that neither tweet indicated that Oh was looking toward any form of collective action and were cynical distortions. The Respondent does concede, however, that Oh explained to Goldmacher on April 26 meeting that her tweets were connected to comments in the April 25 meeting by Marlow and Lee.[174]

It is clear that the General Counsel established the requisite knowledge on the part of the Respondent that Oh engaged in protected concerted activity on April 26 when it terminated her on May 5. As previously stated, Oh engaged in protected concerted activity when she posted the tweets immediately after the April 25 meeting ended. The first tweet criticized "incompetent/abusive bosses." The second tweet criticized Needham's bill tracking initiative and connected with the comments made by Marlow and Lee about the labor intensity involved and, again, referred to Needham's competence. Moreover, Oh's comments were part of a three-year long pattern of

[174] The Respondent's assertion that it had already decided to terminate Oh before she mentioned comments by Marlow and Lee in the meeting is irrelevant. The evidence clearly indicates that the Respondent intended to terminate Oh on the basis of the language used in the tweets regardless of their concertedness.

criticism of managers by Oh and her coworkers. See *Manimark Corp.*, 307 NLRB 1059, 1059 (1992) (knowledge shown where employee was airing previously discussed complaints about working conditions and employer had "reason to believe" that employee was not acting alone), enf. denied on other grounds 7 F.3d 547 (6th Cir. 1993).

D. The Respondent's Disciplinary Action Was Motivated By Unlawful Animus

1. The Adverse Action was Directly Tied to the Concerned Protected Activity

It is undisputed that Oh was terminated on May 5 because of the sharp words she used in criticizing managers on April 26 after being told by Goldmacher and Hikes on April 25 to refrain from using similar language in the future. On April 25, Goldmacher and Hikes described the inappropriateness of Oh's past criticisms of Needham and Ware, and the impact the comments had on them as: tearing people down; impugning character, integrity, and professionalism; personal attacks and name calling; slanderous; rooted in racism; and very harmful, and damaging language. However, they gave short shrift to, and disagreed with, Oh's explanations for her accusations against Needham and Ware.[175] Goldmacher parsed through Oh's accusations, construing each one as either a misunderstanding on Oh's part or managerial prerogative on the part of Needham and Ware. Goldmacher and Hikes also disregarded Oh's explanations about how Needham's statements impacted her, the protected concerted nature of her criticism, and her past complaints about Needham telling employees not to criticize Newman and his intent to unilaterally enact structural changes.

The Respondent advances several reasons why animus is absent in this case: Oh raised numerous complaints throughout her employment, was reassured about the Respondent's no-retaliation policy, received no disciplinary action or negative consequences in response, and was even promoted twice in the midst of that activity. It contends that Oh was terminated for insubordinate conduct by rejecting the Respondent's repeated counseling about her repeated, outrageous, and harmful language toward her black colleagues. The "colleagues" to whom Goldmacher and Hikes consistently referred, however, were not coworkers, but managers.[176]

While the Respondent asserts that it never disciplined Oh for engaging in protected concerted activity prior to April 26, it considered previous discussions that Goldmacher and Hikes had with Oh about her language in criticizing managers when it decided to terminate her. Each of those discussions involved protected concerted activity. The tide began to turn on April 19 when Needham asked Goldmacher to issue Oh corrective action (performance improvement plan) "to hold [her] accountable for her actions." His request was denied because it was unrelated to Oh's performance.

Oh's sharp criticism in the April 26 tweets of Needham's bill tracking initiative, and incompetent and abusive bosses, was the last straw. Needham, worried that the tweets might damage

[175] This is not the first time that Goldmacher invalidated Oh's legitimate workplace concerns. See Goldmacher's January 31,2020 report rejecting Oh's complaints of abuse by Newman as a problem with how he interacted with a "cross-section" of employees that went beyond protected class individuals. See also Goldmacher's rejection of Oh's concerns about Needham and Ware in her April 21, 2022, report and the April 21, 2022 meeting.

[176] "Colleague: an associate or coworker typically in a profession or in a civil or ecclesiastical office and often of similar rank or status; a fellow worker or professional." *Merriam Webster Dictionary.*

his reputation within the organization and undermine his leadership, expected his "employer [to have his] back" and protect him. He sent the tweets, which were forwarded by employees who followed Oh on Twitter, to Moss, Goldmacher, and Hikes. Needham mentioned only that the tweets, which constituted protected concerted activity, could damage his reputation and undermine his leadership. He referred to Oh as someone who did not want "to move forward" and "prefer[ed] to tear down anything and anyone they find to be a perceived threat."

Moss replied that the tweets "along with any other behavioral incidents of [that] nature," required "intervention" by Hikes or Goldmacher. On April 28, Goldmacher proceeded to gather all the details and context, but immediately made it clear that the tweets were deeply concerning. The investigation was over in a flash. Once she reviewed Oh's tweets and Needham's email forwarding the tweets, Goldmacher determined that Oh should be discharged. She did not consider less severe discipline because Oh rejected "the counseling she received . . . to be mindful of her word choices, her conduct, the way that she is describing people and things, and really, in potentially less than a 24-hour period, completely rejected that guidance that she was provided." She also concluded that the tweets, along with Oh's previous actions, "demonstrated a hostility toward people of color, particularly black men and men of color," in violation of the Respondent's anti-harassment and discrimination policy.

Hikes, having expressed their significant concerns on several prior occasions about Oh's word choices in the course of her protected concerted activity, was involved in, and strongly supported, the decision to terminate Oh. They believed that Oh's characterization of Needham as incompetent publicly humiliated, harassed, and bullied a black colleague. In taking such a position, Hikes was fulfilling their role as the Respondent's Chief Officer of Equity, Diversity, Inclusion, and Belonging. That role sought to advance the Respondent's legitimate business purpose in promoting and administering its policies relating to a work culture free of discrimination, harassment, and retaliation. In doing so, however, they also invalidated the legitimate workplace concerns expressed by Oh in the April 26 tweets**.**

In conclusion, it is the clear that the Respondent was terminated based on its animus toward Oh's protected concerted conduct on April 26 in criticizing "incompetent" and "abusive bosses"—a concern she expressed on previous occasions—and Needham's questionable and labor-intensive bill tracking initiative. Goldmacher and Hikes reacted to the tweets with immediate concern for Needham's concerns about his reputation within the organization.[177] However, he did not assert that Oh's criticism was in any way racist, rooted in racism, or otherwise targeted him as a black man. Goldmacher and Hikes were outright dismissive of Oh's concerns as expressed in the tweets and gave them no credence during the expedited, streamlined investigation that ensued. See *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 227-228 (1963) (proof of employer's [c]onduct which on its face, appears to serve legitimate business ends . . . is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled").[178]

[177] Goldmacher and Hikes previously expressed their disdain for Oh's concerted activity in criticizing managers or the organization. On January 31, 2020, they urged Oh to bring any "new evidence or new incidences" about Newman "directly" to them rather than voicing them in "open forums."

[178] I do not concur with the General Counsel's argument that the Respondent's exhibited animus by including a confidentiality clause as a condition of its proposed severance agreement. Citing Board precedent

E. The Respondent Failed to Demonstrate that Oh Would Have Been Terminated in the Absence of Her Protected Concerted Tweets

Since the General Counsel established a *prima facie* showing that Oh's termination was discriminatorily motivated, the burden shifted to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.,* supra. The Respondent, however, is unable to do so because Oh's termination *ipso facto* violated the Act since it was the Respondent's animus toward Oh's protected tweets that caused her termination.

Moreover, the Respondent presented no proof relating to the discipline of any other employee for using hyperbolic language in a manner that harmed members of protected classes or violating its policies relating to a work culture free of discrimination, harassment, and retaliation. The General Counsel, on the other hand, presented an abundance of evidence demonstrating that Oh was treated disparately from Newman. Oh and other female employees in NPAD complained about Newman's disrespectful, sexist, and misogynistic behaviors for over two years. An outside investigation produced a report that validated employee complaints about a toxic work culture under Newman. The MRW Report ruled-out sexism and misogyny on Newman's part because the investigator found that the complaints, although widespread throughout NPAD, were not limited to protected-class individuals. In any event, the report was a devastating evaluation of the workplace within NPAD under Newman. Yet, the Respondent did not take any steps to separate him from the organization until *Vanity Fair Magazine* inquired about the MRW Report.[179]

Based on the preponderance of the evidence, the Respondent violated Section 8(a)(1) of the Act by discharging Oh on May 5, 2022.

III. THE RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY DENYING OH'S REQUEST FOR A TRANSFER

On February 14, 2022, Anders, with Newman's approval, called Oh and asked if she would be interested in transferring to his division. At the time, transfer requests were routinely granted without a job posting and application process. Oh expressed her interest and, at Anders' suggestion, followed-up with an email memorializing their conversation to Newman. On February 16, Newman informed Oh that Anders preparing a job description for the transfer and suggested they "chat" once the job description was "teed-up."

A few days later, Newman left the organization and was replaced by Moss. Not having heard anything further about a transfer to Anders' division, Oh followed-up with Moss on March 8. She

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for the proposition that confidentiality clauses are inherently antithetical toward protected concerted activity, none apply to post-employment situations.

[179] The Respondent asserts that it is inappropriate to compare the Respondent's tolerance for Newman's behaviors with Oh's case because Newman was a member of senior staff, had unique responsibilities, and reported to Romero. That argument is meritless because it undisputed that the Respondent's policies against discrimination, harassment, and retaliation applied to everyone in the organization.

informed Moss that Needham was amenable to working out "transfer details" so Oh "continue[d] providing the same policy work for the Democracy Division but under [Anders'] direct supervision." Oh explained that she was amenable to such an arrangement.

The following day, May 9, Oh had a contentious meeting with Needham about Ware's representations about the Apple campaign. During that meeting, Needham criticized Oh for skirting the chain of command by going directly to Moss about Ware and the transfer request. However, Needham did mention that he supported Oh's request. Reacting to Needham's own complaints about Oh's accusations that Oh was "afraid" to go to him with complaints, Moss replied a few hours later putting a "pause" on the transfer request.

The suspicious timing of Moss' decision to delay Oh's transfer was directly connected to and retaliatory for Oh's protected concerted activity on March 9. Needham confirmed as much when he told Hikes on April 4 that he "understood [Ware's] feelings [about removing Oh from her supervision] and shared some of them but did not want to 'reward [Oh's] bad behavior" of "harassing her colleagues" by "changing [Oh's] reporting structure." By effectively denying Oh a transfer to a position in Anders division that she was qualified for and was still available because she engaged in protected concerted activity on March 9, the Respondent violated Section 8(a)(1).

IV. THE RESPONDENT WAS NOT OBLIGATED TO NOTIFY OR GIVE THE UNION THE OPPORTUNITY TO BARGAIN BEFORE DISCHARGING OH

It is undisputed that the Respondent failed to provide the Union with notice or an opportunity to bargain before discharging Oh, but did bargain over the effects of the discharge.[180] At the time, the Union was certified as the bargaining unit's labor representative and the parties were in the bargaining stages of a first contract.

Under extant Board law, however, the Respondent "did not have an obligation under Section 8(d) and 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy of practice." *Care One,* 369 NLRB No. 109, slip op. at 7 (2020). *Care One* effectively overruled *Total Security Management, Inc.* 364 NLRB 1532 (2016), which held that an employer has a statutory duty to bargain before imposing discretionary serious discipline on unit employees when a union has been certified or lawfully voluntarily recognized but has not yet entered into a collective-bargaining agreement with the employer.

The General Counsel contends, however, that *Care One* misconstrued the general unilateral-change doctrine established in *NLRB v. Katz,* 369 NLRB 736 (1962) because "discretionary aspects of a policy or practice are as much a part of the status quo as the non-discretionary aspects." Accordingly, she urges the Board to overrule *Care One* and adopt a new standard that fully comports with the requirements of Section 8(a)(5) and (d). As that request is beyond my purview, the allegation that the Respondent failed to bargain with or notify the Union before discharging Oh is dismissed.

[180] The Respondent's contention that shop steward Alejandro Ortiz did not request bargaining at the May 5 meeting is inconsequential since the decision to discharge Oh had already been made.

CONCLUSIONS

1. The Respondent, American Civil Liberties Union, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Nonprofit Professional Employees Union (NPEU), International Federation of Professional & Technical Engineers (IFPTE) Local 70 A/W International Federation of Professional & Technical Engineers, AFL-CIO, CLC (the Union). labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Katherine Oh (Oh) because she engaged in protected concerted activity the Respondent has violated Section 8(a)(1) of the Act.

4. By denying Oh's transfer request because of her protected concerted activity the Respondent has violated Section 8(a)(1) of the Act.

5. The above violations constitute unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act except as set forth above.

REMEDY

The Respondent, having discriminatorily denied Katherine Oh and discharged her, must offer her reinstatement and make her 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 No. 8 (2010). The Respondent shall also compensate Oh for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

The Respondent shall reimburse Oh in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. The Respondent shall also take whatever steps are necessary to ensure that the Social Security Administration credits Oh's backpay to the proper quarters on her Social Security earnings record. To this end, Respondent shall file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[181]

[181] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the

ORDER

The Respondent, American Civil Liberties Union, Inc., its officers, agents, successors, and assigns, be ordered to:

1. Cease and desist from:

(a) Denying employees' transfer requests because of their protected concerted activities.

(b) Discharging employees because of their 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.

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

(a) Within 14 days from the date of the Board's Order, offer Katherine Oh reinstatement to her position as Senior Policy Counsel or, if that position no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges to which she would have been entitled.

(b) Within 14 days from the date of the Board's Order, offer Katherine Oh a transfer to a Senior Policy Counsel position in the Federal Policy Division, which she requested in February 2022, or, if that position no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges to which she would have been entitled.

(c) Within 14 days from the date of this Order make Katherine Oh whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, including direct and foreseeable consequential harm she incurred as a result of the Respondent's unlawful conduct.

(d) Within 14 days from the date of this Order, compensate Katherine Oh for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Katherine Oh, and notify her in writing that this has been done, and that the discharge will not be used against her in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the

findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

refusal to transfer Katherine Oh, and notify her in writing that this has been done, and that the initial refusal to transfer her will not be used against her in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facilities in Washington, D.C., and New York, N.Y. copies of the attached notice marked "Appendix."[182] Copies of the notice, on forms provided by the Regional Director for Region 5, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, by text message and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(i) Within 14 days after service by the Region, e-mail copies of the attached notice marked Appendix to all current and former employees who were employed by Respondent at any time since March 9, 2022.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

[182] If the Respondent's office 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 Respondent's office 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 office 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 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."

Dated, Washington, D.C., August 7, 2024

Michael A. Rosas
Administrative Law Judge

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.

The Nonprofit Professional Employees Union (NPEU), International Federation of Professional & Technical Engineers (IFPTE) Local 70 a/w International Federation of Professional & Technical Engineers, AFL-CIO, CLC (the Union) is the employees' representative in dealing with us regarding wages, hours, and other working conditions of our employees in the following appropriate unit (the Unit):

> All full-time and regular part-time employees of the Employer in the classifications listed in Appendix A to the May 3, 2021 letter of understanding voluntary recognition through card check between the Union and Employer; but excluding managerial employees, temporary employees, confidential employees, guards, supervisors as defined in the National Labor Relations Act, all employees represented by another labor organization, and all other employees of the Employer.

While we are negotiating an initial contract with any labor organization, including the Union, **WE WILL NOT** impose discretionary discipline or discharge upon Unit employees without first providing that labor organization with notice and an opportunity to bargain regarding that discipline or discharge.

WE WILL NOT refuse to bargain on request with the Union concerning our decisions to impose discretionary discipline or discharge on Unit employees.

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

WE WILL NOT deny transfer requests, discipline, or discharge you because you exercised your right to discuss wages, hours, and working conditions with other employees.

WE WILL remove from our files all references to the denied transfer request and discharge of Katherine Oh**,** and **WE WILL** notify her in writing that this has been done and that the denied transfer request and discharge will not be used against her in any way.

WE WILL offer Katherine Oh immediate and full reinstatement to the position of senior policy counsel in the National Political Advocacy Department, Federal Policy Division, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL pay Katherine Oh for the wages and other benefits she lost because we fired her, less any net interim earnings, with interest.

WE WILL reimburse Katherine Oh for any search-for-work expenses, interim expenses, and consequential economic harm that she incurred because we fired her, with interest.

WE WILL compensate Katherine Oh for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file with the Regional Director for Region 5, a report allocating her backpay award to the appropriate calendar year(s).

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

AMERICAN CIVIL LIBERTIES UNION, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Bank of America, Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201-2700

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-300367 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.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (410) 962-2880.