**Pro Residential Services, Inc. *and* Gilbert Cuhen.** Cases 28–CA–239775, 28–CA–245265, 28–CA–273854

September 25, 2024

DECISION, ORDER, AND ORDER REMANDING IN PART

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On September 29, 2023, Administrative Law Judge Lisa D. Ross issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision, Order, and Order Remanding in Part.[2]

This case involves complaint allegations that the Respondent has maintained more than a dozen work rules in its employee handbook and provisions in its Employee Agreement that violate Section 8(a)(1) of the National Labor Relations Act because they interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act. In addition, the case presents the alleged unlawful discharge of employee Gilbert Cuhen for filing a Board charge in violation of Section 8(a)(4) and (1).

I.

The Respondent manages approximately ten properties in Tucson, Arizona, where it employs 25-30 employees.[3] The Respondent maintains an employee handbook[4] that includes a provision prohibiting the following conduct:

> …
>
> 13. Failure to obtain permission to leave work for any reason during normal working hours.
>
> …
>
> 15. Causing, creating or participating in a disruption of any kind during working hours on Company/client property.
>
> …
>
> 20. Wearing extreme, unprofessional or inappropriate styles of dress or hair while working.

In addition, the Respondent requires employees to sign an Employee Agreement that includes the following provision:

> *Employee Administrative Manual:* As part of your training and continuing education program with PRO RESIDENTIAL SERVICES we may provide you with a comprehensive Administrative Manual or other training materials. This manual or materials is [sic] an adjunct to your employment agreement and the policies and procedure therein are to be considered part of your job description.
>
> The Administrative Manual or materials is [sic] the property of PRO RESIDENTIAL SERVICES and

[1] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) maintaining facially overbroad handbook rules regarding disclosure of personnel records and information, open-door policy, off-duty conduct, and solicitation; (2) maintaining an Employee Agreement that prohibits discussion of personal preferences concerning religion, politics, and social issues; and (3) prohibiting employees from discussing their gas reimbursements.

In light of these findings—and the judge's unexcepted-to rationale that the Respondent's personnel records/information rule interferes with employees' "Sec[.] 7 right to discuss and/or disclose . . . their individual salaries"—we find it unnecessary to pass on the additional allegation that the Respondent violated Sec. 8(a)(1) by prohibiting employees from discussing their compensation, as any finding of that violation would be cumulative and would not affect the remedy. We disavow, as inconsistent with the unexcepted-to findings, the judge's statement that "I do not find that Respondent maintained/enforced an alleged work rule prohibiting employees from discussing wages."

We also find it unnecessary to pass on the allegation that the Respondent's rule generally prohibiting "violation of any safety, health, security or Company/client policies, rules or procedures" violates Sec. 8(a)(1), as any finding of a violation would not materially affect the remedy.

Furthermore, in the absence of exceptions, we adopt the judge's implicit dismissal of the allegation that the Respondent discharged employee Gilbert Cuhen in retaliation for his discussion of wages and complaints about a supervisor with his coworkers in violation of Sec. 8(a)(1). Although the judge did not expressly rule on the allegation, she effectively dismissed it by discrediting Cuhen's uncorroborated testimony that he discussed wages or complaints about a supervisor with coworkers. No party has excepted to the judge's credibility findings. We also adopt the judge's unexcepted-to dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by threatening Cuhen with discharge for filing a Board charge.

[2] We shall amend the judge's conclusions of law consistent with our findings herein, and we shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[3] It is undisputed and the judge found that the Respondent also manages properties in other parts of Arizona, as well as in California, Oklahoma, and Nevada.

[4] The employee handbook in evidence was issued in March 2019, and Cuhen testified without contradiction that the Respondent provided him an identical handbook shortly after he began working for the Respondent in March 2018.

> should not be copied or shared with any non-employees. …

The case was litigated prior to the issuance of the Board's decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), overruling *Boeing Co.*, 365 NLRB No. 154 (2017), and adopting a modified version of the framework set forth in *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004), for evaluating rules alleged to be facially overbroad. However, the judge applied *Stericycle* in evaluating the rules set forth above.[5] The judge dismissed the allegations concerning these rules, finding that the General Counsel did not meet her initial burden of proof because she failed to provide any arguments "as to why these rules are presumptively unlawful." The General Counsel excepts to these findings, arguing that the judge failed to consider her arguments presented on brief to the judge. We find merit in the General Counsel's exceptions.[6]

The General Counsel argued in her posthearing brief to the judge, and on exceptions to Board, that the prohibitions on leaving work or participating in any kind of disruption during working hours are unlawfully overbroad under pre-*Boeing* precedent applying a *Lutheran Heritage* analysis in finding rules prohibiting "walking off the job" unlawful. See, e.g., *Ambassador Services*, 358 NLRB 1172, 1172–1173 (2012) (rule prohibiting "walking off the job and/or leaving the premises" during working hours would reasonably be construed to prohibit walkouts, hence unlawfully overbroad), incorporated by reference in 361 NLRB 939, 939 (2014), enfd. mem. 622 Fed.Appx. 891 (11th Cir. 2015); see also *Component Bar Products*, 364 NLRB 1901, 1901 & 1910 (2016) (rule prohibiting creating a "disruption" during working hours unlawfully overbroad in that it covered "work stoppages"). The General Counsel further has argued that the dress code rule would be read as interfering with employees' Section 7 right to display union insignia and that the prohibition on sharing the Administrative Manual would be read as a confidentiality rule that interferes with employees' Section 7 right to discuss their terms and conditions of employment with third parties.

In these circumstances, we remand the allegations concerning these rules to the judge so that she may fully consider the arguments raised by the General Counsel and to provide the parties with a full and fair opportunity to litigate the case under *Stericycle,* as appropriate. If the judge concludes on remand that *Stericycle* provides the proper analytical framework to be applied to some or all of the challenged rules and that the General Counsel has satisfied her burden under *Stericycle*, the Respondent must be given the opportunity on remand to establish that the rules "advance[] legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule." *Stericycle*, supra, 372 NLRB No. 113, slip op. at 2. That the Respondent "proffered its rationale" for the challenged rules in its briefing to the judge, as the judge found, does not necessarily mean that the Respondent has had an adequate opportunity to defend the rule as contemplated by *Stericycle*. Thus, on remand, the judge should consider whether reopening the record may be necessary or appropriate to ensure that the parties have had the opportunity to fully and fairly litigate these allegations consistent with *Stericycle*'s analytical framework.

II

The Respondent's employee handbook also includes the following alleged unlawful rules, restricting employee use of its equipment and information technology resources:

> INFORMATION TECHNOLOGY
>
> Employees of the Company are required to take all reasonable measures to safeguard and protect all records, computer equipment and computer-generated information and to use the records, equipment and data only for company business.
>
> PERSONAL USE OF TELEPHONES, EQUIPMENT AND SUPPLIES
>
> Company and client telephones, copiers, postage equipment, and office supplies and the like, are for business use and should not be used for personal matters. While it is recognized that you may occasionally need to use Company materials for personal use (i.e., a necessary personal call, copying a tax return), keep in mind that our policy discourages personal use, and the recognized need for occasional use should not be abused.

We adopt the judge's dismissal of the allegations that the Respondent's maintenance of these rules violates Section 8(a)(1). Contrary to the judge, however, we do not apply *Stericycle*. Rather, we find that this result is compelled by existing Board law reflected in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op. at 6 fn. 39 (2019). Under

[5] The Board's decision in *Stericycle* issued after the close of the hearing and the parties' submission of post-hearing briefs but before the judge issued her decision.

[6] While we disavow the judge's finding that the General Counsel failed to present argument in support of her claim that these rules are unlawfully overbroad, we find it preferable for those arguments under *Stericycle* to be presented at hearing rather than left to post-hearing briefing.

*Caesars*, the Board views rules restricting use of employer equipment and, by extension, rules restricting use of employer electronic communication resources as lawful absent discrimination. There is no evidence of discrimination here.[7]

III.

Alleged discriminatee Gilbert Cuhen worked for the Respondent as an HVAC technician from March 2018 until May 2, 2019,[8] at multiple locations, including The Quails Apartments (the Quails) in Tucson and four other properties. The Respondent's President, Pratik "Sonny" Jogani, and Property Management Director/Supervisor, Jagut "Jag" Patel, are based in Los Angeles, California, where the Respondent's corporate offices are located, and rarely visit the Quails.[9] Regional Manager Nora Medrano, who reports to Jogani and Patel, is based in Phoenix, Arizona, and visits the Quails about once a week. Dominga Gonzales was the property manager at the Quails at the time of Cuhen's discharge.

It is undisputed that Cuhen was a rude, disrespectful, and insubordinate employee who was never disciplined for his misconduct. Although Medrano testified that she progressively disciplined other employees for insubordination, she did not know why she had not disciplined Cuhen. On April 15, Cuhen filed an unfair labor practice charge alleging that the Respondent maintained an unlawful work rule prohibiting employees from discussing wages and other terms and conditions of employment.

On May 2, Property Manager Gonzales, who was new to her position and had never previously met with Cuhen, asked him to come to the leasing office to discuss some outstanding work orders. Cuhen arrived but told Gonzales that he only took instructions from Medrano and Patel. When Gonzales continued her attempt to discuss the outstanding work orders, Cuhen began screaming at her and followed her as she retreated into her office, becoming increasingly aggressive until Gonzales, in tears, called Regional Manager Medrano and President Jogani on speaker phone. Gonzales explained the situation to Medrano and Jogani, who heard Cuhen cursing and yelling in the background, and stated that she was scared and could not work with Cuhen. Medrano told Cuhen to leave the premises, and, when he refused, contacted another employee to escort him out. After the incident, Medrano called Cuhen on his cell phone and terminated him. In explaining her decision to terminate Cuhen, Medrano stated that "[Gonzales] was very frightened" and "didn't want to work with [Cuhen]."

The General Counsel alleges that the Respondent discharged Cuhen because he filed a charge with the Board, in violation of Section 8(a)(4) of the Act. Section 8(a)(4) "is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes." *Filmation Associates, Inc.*, 227 NLRB 1721, 1721 (1977). Applying *Wright Line*,[10] the judge found that the Respondent did not violate Section 8(a)(4) of the Act by discharging Cuhen after his confrontation with Property Manager Gonzales. Under *Wright Line*, the General Counsel bears the initial burden of establishing that an employee's union or other protected activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving "(1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) animus against union or other protected activity on the part of the employer." *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6–7 (2023). An employer's motivation is a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole. Id., slip op. at 7. Once the General Counsel "makes the initial showing, the burden of persuasion shifts to the employer to establish that it would have taken the same action even in the absence of the protected conduct." Id.

No party has excepted to the judge's finding that the General Counsel met her initial burden under *Wright Line* based on the evidence that Cuhen was terminated two-and-a-half weeks after he filed his unfair labor practice charge. As to the Respondent's *Wright Line* defense burden, we agree with the judge that, in the circumstances presented here, the Respondent has demonstrated that it would have taken the same action even absent Cuhen's protected activity. In so finding, we do not rely on the judge's finding that Cuhen's outrageous behavior on May 2 differed in specific ways from his past behavior.[11] It is enough, in our view, that Respondent's President

[7] Then-Member McFerran dissented in *Caesars*. Id. slip op. at 14–23 (dissent). Members Wilcox and Prouty did not participate in *Caesars* and express no opinion about whether it was correctly decided. We decline the General Counsel's invitation to revisit the decision here but would be open to reconsidering it in a future appropriate case.

[8] All dates hereafter are in 2019 unless otherwise indicated.

[9] As the judge stated, Shashikant Jogani, Sonny's father, owns the Respondent. However, references to "Jogani" in our decision are to President Sonny Jogani.

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Board applies *Wright Line* in considering alleged violations of Sec. 8(a)(3) and 8(a)(4). See, e.g., *Freightway Corp*., 299 NLRB 531, 532 fn. 4 (1990).

[11] We disavow the judge's finding that Cuhen "threw a chair" at Gonzales during this confrontation, as it does not appear to be supported by the record.

Jogani, whose infrequent physical presence necessarily limited any exposure to Cuhen's past misconduct, and Regional Manager Medrano directly witnessed Cuhen's outrageous and threatening conduct on May 2 in real time (by speaker phone) and that Medrano, who made the decision to discharge him, distinguished this incident by its extreme effect on Gonzales, who was so scared of Cuhen that she refused to work with him.[12]

## AMENDED CONCLUSIONS OF LAW

1. Respondent Pro Residential Services, Inc., in Tucson, Arizona, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Maintaining a Personnel Records rule in its employee handbook that prohibits employees from disclosing personnel information.

(b) Maintaining an Open Door Policy in its employee handbook that restricts employees' discussion of workplace complaints with coworkers.

(c) Maintaining an Off Duty Conduct/Outside Employment rule in its employee handbook that prohibits employees from engaging in "immoral" off-duty conduct.

(d) Maintaining a Solicitation Policy in its employee handbook that prohibits employees assigned to a client's property from soliciting on the property.

(e) Maintaining a Personal Preferences rule that prohibits employees from discussing their views on unionization or their terms and conditions of employment.

(f) Prohibiting employees from discussing their compensation.

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

## ORDER

The Respondent, Pro Residential Services, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Personnel Records rule in its employee handbook that prohibits employees from disclosing personnel information.

(b) Maintaining an Open Door Policy in its employee handbook that restricts employees' discussion of workplace complaints with coworkers.

(c) Maintaining an Off Duty Conduct/Outside Employment rule in its employee handbook that prohibits employees from engaging in "immoral" off-duty conduct.

(d) Maintaining a Solicitation Policy in its employee handbook that prohibits employees assigned to a client's property from soliciting on the property.

(e) Maintaining a Personal Preferences rule that prohibits employees from discussing their views on unionization or their terms and conditions of employment.

(f) Prohibiting employees from discussing their compensation.

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

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

(a) Rescind or revise its employee handbook rules indicated in 1 (a) through (d) above.

(b) Furnish employees employed by Pro Residential Services, Inc. at its apartment locations in Arizona, California, Oklahoma, and Nevada with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules in their place on adhesive backing that will cover the unlawful rules; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules.

(c) Rescind the Personal Preferences provision of the Employee Agreement or revise it to remove any language that prohibits employees from discussing their views on unionization or their terms and conditions of employment.

(d) Notify all current employees that the Personal Preferences provision of the Employee Agreement has been rescinded or, if it has been revised, provide them with a copy of the Employee Agreement with the revised Personal Preferences provision.

(e) Post at its apartment locations in Arizona, California, Oklahoma, and Nevada, copies of the attached notice marked "Appendix"[13] in both English and Spanish. Cop-

[12] Contrary to her colleagues and the judge, Member Wilcox finds that the Respondent failed to sustain its defense burden under *Wright Line* and therefore concludes that the Respondent violated Sec. 8(a)(4) and (1) by discharging Cuhen. Specifically, Member Wilcox finds that the Respondent did not offer any explanation for abandoning the leniency it had previously showed towards Cuhen's behavior less than three weeks after he filed an unfair labor practice charge. In the absence of any such explanation, Member Wilcox concludes the Respondent did not sustain its defense burden. She therefore finds it unnecessary to rely on the judge's adverse inference against the Respondent—namely, that "it disciplined other employees between May of 2017 and May of 2019 for performance issues and or [sic] insubordination but not Cuhen."

[13] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pan-

ies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at said closed facility or business at any time since September 9, 2020.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

IT IS FURTHER ORDERED that the allegations that the Respondent violated Section 8(a)(1) by maintaining its rules prohibiting unauthorized departures from work and participation in disruptions during working hours and its rules prohibiting inappropriate styles of dress and sharing or copying of the Respondent's Administrative Manual are remanded to Administrative Law Judge Lisa D. Ross for further appropriate action as discussed above.

The judge shall afford the parties an opportunity to present evidence on the remanded issues and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

demic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found or remanded.

Dated, Washington, D.C. September 25, 2024

_____
Lauren McFerran, Chairman

_____
David M. Prouty, Member

_____
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

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

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

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Personnel Records rule in our employee handbook that prohibits you from disclosing personnel information.

WE WILL NOT maintain an Open Door Policy in our employee handbook that restricts your discussion of workplace complaints with coworkers.

WE WILL NOT maintain an Off Duty Conduct/Outside Employment rule in our employee handbook that prohibits you from engaging in "immoral" off-duty conduct.

WE WILL NOT maintain a Solicitation Policy in our employee handbook that prohibits you from soliciting on the clients' property.

WE WILL NOT maintain a Personal Preferences rule that prohibits you from discussing your views on unionization or your terms and conditions of employment.

WE WILL NOT prohibit you from discussing your compensation.

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

WE WILL rescind the unlawful rules contained in our employee handbook.

WE WILL furnish you with inserts for the employee handbook that (1) advise that the unlawful rules, above, have been rescinded or (2) provide the language of lawful policies; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful rules or (2) provides lawfully worded rules.

WE WILL rescind the Personal Preferences provision of the Employee Agreement or revise it to remove any language that prohibits you from discussing your views on unionization or your terms and conditions of employment.

WE WILL notify you that the Personal Preferences provision of the Employee Agreement has been rescinded or, if it has been revised, provide you with a copy of the revised Personal Preferences provision.

PRO RESIDENTIAL SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-239775 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.

*Judith Davila and Nicolas Herr-Kostic, Esqs.* for the General Counsel.

*Christopher Walker and William Liam Welch, Esqs.* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

LISA D. ROSS, Administrative Law Judge. On April 15, 2019, Gilbert Cuhen (Cuhen or Charging Party) filed an unfair labor practice (ULP) charge against Pro Residential Services, Inc. (Respondent).[1] On July 22, 2019, Cuhen filed a second charge against Respondent.[2]

On March 9, 2021, the Charging Party filed a third charge against Respondent.[3]

On April 28, 2022, the National Labor Relations Board's (NLRB or Board) Regional Director for Region 28 consolidated all of the charges and issued a consolidated complaint and notice of hearing.

The consolidated complaint alleges that Respondent violated Sections 8(a)(4) and/or (1) of the National Labor Relations Act (NLRA or the Act) when Respondent: (1) maintained several overly broad and discriminatory rules in Respondent's Employee Handbook and Employee Agreement, (2) maintained and enforced its rule prohibiting employees from discussing wages by reminding them not to discuss their wages, (3) threatened Cuhen with discipline and/or discharge for filing a ULP charge (Case 28–CA–239775) and providing testimony to the Board, and (4) discharged Cuhen for discussing wages and complaining about a supervisor's conduct/harassment. Respondent denied all material allegations, arguing that its actions did not violate the Act in any way.

I conducted a trial virtually using Zoom for Government platform from January 24 through January 26, 2023, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. After the trial, the General Counsel and Respondent timely filed post hearing briefs that I have read and duly considered.

Based on the entire record, including the pleadings, testimony of witnesses, my observations of their demeanor, the documents, and the parties' briefs, I conclude that Respondent:

> (1) Violated the Act as specifically set forth herein when it maintained several overly broad and/or discriminatory rules in its Employee Handbook and Employee Agreement (allegation #1).

However, I conclude that Respondent:

> (2) Violated the Act when Respondent told Cuhen not to discuss his gas reimbursement with anyone but Did Not Violate the Act when Respondent allegedly maintained/enforced a work rule by reminding employees that they were prohibited from discussing wages (allegation #2).
>
> (3) Did Not Violate the Act when Respondent allegedly threatened Cuhen with discipline and/or discharge for filing a ULP charge and providing testimony to the Board (allegation #3), and
>
> (4) Did Not Violate the Act when Respondent discharged Cuhen (allegation #4).

[1] Case No. 28–CA–239775. See also GC Exh. 1(a). Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for Joint Exhibits, "GC Exh." for the General Counsel's exhibits, and "R Exh." for Respondent's Exhibits.

[2] Case 28–CA–245265.

[3] Case 28–CA–273854. GC Exh. 1(s).

## FINDINGS OF FACT[4]

### I. JURISDICTION

Pro Residential Services, Inc. is a corporation with offices and places of business in Tucson, Arizona. Respondent manages operations at several apartment locations, including the property at issue here, known as The Quails Apartments (The Quails).

It is undisputed that, in conducting its operations during 12-month period ending April 15, 2019, Respondent derived gross revenues in excess of $500,000. It also purchased and received at its Tucson offices products, goods and materials in excess of $5,000 directly from points outside of the state of Arizona. Accordingly, Respondent admits, and I find that, it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), (7) of the Act.

Lastly, it is also undisputed, and I find, the following individuals have been supervisors of Respondent as defined in Section 2(11) of the Act and agents of Respondent as defined in Section 2(13) of the Act: President Pratik "Sonny" Jogani (Jogani), Regional Manager Nora Medrano (Medrano), Property Manager Dominga Gonzales (Gonzales), Owner Shashikant Jogani (different from Sonny Jogani) (Shaskikant or Owner Jogani),[5] Property Manager Richard Mendoza (Mendoza), Maintenance Lead Juan Hermosillo (Hermosillo), Property Management Director/Supervisor Jagrut "Jag" Patel (Patel) and Senior Manager Angelica Medina (Medina).

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

##### 1. Respondent's Operations.

Respondent manages approximately 10 properties in Tucson, Arizona.[6] Respondent employs about 25–30 employees in Tucson, including managers, leasing agents, system managers, maintenance men, lead maintenance technicians, and "make ready guys."[7]

Respondent's corporate offices are located in Los Angeles, California. President Jogani, his father, Shashikant Jogani, and Property Manager Patel are all based in Los Angeles, California.[8] While Shashikant visited the Quails either once a month or every three months, President Jogani visited much less than his father.[9]

Regional Manager Medrano, based out of Phoenix, Arizona, was primarily responsible for onboarding employees at Respondent's Phoenix and Tucson properties. Medrano visited the Quails complex about once a week, and in the interim, communicated with the managers via email and/or by telephone.[10] She reported to Patel and President Jogani.

Former Senior Manager Medina, also based in Phoenix, was responsible for managing Respondent's different properties. She mainly addressed any issues with maintenance supervisors and employees, including reviewing work orders to ensure that maintenance and other employees were providing efficient and quality customer service. She visited the Quails once or twice a week when she met with managers and other employees and toured the property. Medina reported to Medrano, Shashikant Jogani, and President Jogani.

Lastly, Gonzales was the Property Manager at the Quails and was responsible for handling rent, leasing, resident, and maintenance issues. She reported to Medrano.[11]

#### *B. Alleged Unfair Labor Practices*

##### 1. Respondent's Employee Handbook and Employment Agreements (allegation #1).

It is undisputed that Respondent maintains an employee handbook and has its employees sign employee agreements.[12]

Specifically, Respondent maintains the following rules in its Employee Handbook:

> (1) PERSONNEL RECORDS (Page 8)
> [. . .] All personnel records and information are the property of the Company which reserves the right to use and disclose this information in accordance with State and Federal regulations and as is necessary in the general course of business.
>
> (2) OPEN-DOOR POLICY (Page 10)
> Suggestions for improving the Company are always welcome. At some time, you may have a complaint, suggestion or question about your job, your working conditions or the treatment you are receiving. Your good-faith complaints, questions and suggestions also are of concern to the Company. We ask that you take your concerns to your immediate supervisor. [. . .]

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[4] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951). Where necessary, specific credibility determinations are set forth below.

[5] Tr. at 35, 193, 244. Respondent stipulated that Shashikant Jogani owns Pro Residential Services, Inc. See Tr. at 336.

[6] Tr. at 37.

[7] Id.

[8] Tr. at 194. Respondent has operations in California, Nevada, Oklahoma and Arizona, managing at least 10 complexes in Arizona. Respondent employs about 25-30 employees in Tucson, Arizona. Employees include on-site managers, leasing agents, system managers, maintenance men, lead mechanical technicians, receptionists, "make ready" employees and cleaning staff. Tr. at 36–37.

[9] Tr. at 56.

[10] Tr. at 92-94.

[11] Tr. at 41, 218, 220.

[12] Tr. at 42, see also GC Exhs. 2–3.

(3) OFF-DUTY CONDUCT/OUTSIDE EMPLOYMENT (Page 11)
[. . .] Employees are expected to conduct their personal affairs in a manner that does not adversely affect the Company's or their own integrity, reputation or credibility. Illegal or immoral off-duty conduct on the part of an employee that adversely affects the Company's legitimate business interests or the employee's ability to perform his or her job will not be tolerated.

While employed by the Company, employees are expected to devote their energies to their jobs with the Company. For this reason, second jobs for fulltime employees are strongly discouraged. The following types of outside employment are strictly prohibited:

[. . .]
2. Employment that creates a conflict of interest or is incompatible with the employee's employment with the Company.

[. . .]
4. Employment that requires the employee to conduct work or related activities on the Company's property during the Company's working hours or using the Company's facilities and/or equipment.

[. . .]
Employees who wish to engage in outside employment that may create a real or apparent conflict of interest must submit a written request to the Company explaining the details of the outside employment. [. . .]

(4) PROHIBITED CONDUCT (Pages 11-12)
The following conduct is prohibited and will not be tolerated by the Company. This list of prohibited conduct is illustrative only; other types of conduct injurious to security, personal safety, employee welfare and the Company's operations also may be prohibited. [. . .]

[. . .]

5. Unauthorized use of Company/client equipment, time, materials, or facilities.

[. . .]
13. Failure to obtain permission to leave work for any reason during normal working hours.

15. Causing, creating or participating in a disruption of any kind during working hours on Company/client property. …

20. Wearing extreme, unprofessional or inappropriate styles of dress or hair while working.

21. Violation of *any* safety, health, security, or Company/client policies, rules or procedures. (emphasis supplied).

(5) INFORMATION TECHNOLOGY (Page 15)
Employees of the Company are required to take all reasonable measures to safeguard and protect all records, computer equipment and computer generated information and to use the records, equipment and data only for company business. [. . .]

(6) PERSONAL USE OF TELEPHONES, EQUIPMENT AND SUPPLIES (Page 15)

Company and client telephones, copiers, postage equipment, and office supplies and the like, are for business use and should not be used for personal matters. While it is recognized that you may occasionally need to use Company materials for personal use (i.e., a necessary personal call, copying a tax return), keep in mind that our policy discourages personal use, and the recognized need for occasional use should not be abused. [. . .], and

(7) SOLICITATION (Page 16)
In order to ensure efficient operation of the Company's business and to prevent annoyance to employees, it is necessary to control solicitations and distribution of literature and/or merchandise on Company property. Employees assigned to a client's property shall not solicit on the property. [. . .][13]

It is further undisputed that Respondent has maintained the following rules in its Employee Agreement:

(1) Employee Administrative Manual (Page 2)
As part of your training and continuing education program with PRO RESIDENTIAL SERVICES we may provide you with a comprehensive Administrative Manual or other training materials. This manual or materials is an adjunct to your employment agreement and the policies and procedures therein are to be considered part of your job description.

The Administrative Manual or materials is the property of PRO RESIDENTIAL SERVICES and should not be copied or shared with any non-employees. [. . .]

Personal Preferences: (Page 3)
PRO RESIDENTIAL SERVICES respects the rights of its employees to maintain preferences with regard to religion, politics and social issues. However it is company policy that these personal preferences not be shared with or in anyway imposed upon the residents of the apartment community being managed or maintained by the employee. This includes signs, literature or artifacts displayed in any manner by the employee, or specific discussion regarding these preferences with the residents.[14]

Although Respondent admitted that it maintains the above rules in its Employee Handbook and Employee Agreement, Respondent denies that these rules are overly broad and/or discriminatory.

2. Respondent Allegedly Maintained and/or Enforced a Work Rule By Reminding Employees Not to Discuss Wages (allegation #2).

*a. Charging Party Cuhen*

Cuhen worked for Respondent as a Heating, Ventilation and Air Conditioning (HVAC) technician for Respondent from March 2018 to May 2, 2019. Cuhen worked at Respondent's Quails and Mountain Lake properties as well as three other of Respondent's properties. His primary duties included maintaining, repairing and replacing the heating and air conditioning units. He would arrive at work, retrieve work orders and prioritize the jobs. When he was hired, Cuhen received the Employee

[13] GC Exh. 2.
[14] GC Exh. 3.

Handbook and signed an Employment Agreement.[15]

Cuhen testified that he attempted to get a union to come down and talk to employees but was told that there were no unions for HVAC workers, only for pipefitters and welders in Arizona. However, other than Cuhen's self-serving testimony, there is no corroborating evidence in the record confirming Cuhen's union efforts. Although Cuhen also explained that he received five signatures from employees expressing interest in unionizing, again, there was no evidence corroborating Cuhen's testimony. Lastly, while Cuhen testified that he told Manager Gonzales that he was "looking into unionizing with employees," Gonzales did not recall this conversation with Cuhen.

Although Senior Manager Medina initially did not recall a conversation with Cuhen about the union, when shown her text messages, Medina admitted that, on April 15, 2019, she texted that, "Ariel and Jocelyn and Gilbert [Cuhen] were there," that Medina called Cuhen to the office and met with Hermosillo. Medina wrote, "Gilbert gave me actitud [sic][attitude] already when I asked him to come in and meet me. Before [Cuhen] left [the] office he stated that if we fired him he's going to sue us, and he already call a place to start a union."[16]

In any event, it is undisputed that Cuhen filed an ULP charge in Case 28–CA–239775 on April 15, 2019, approximately two-and-a-half weeks before he was terminated.

It is also undisputed that Cuhen was a disgruntled, rude, unprofessional and insubordinate employee during his tenure with Respondent. He complained about almost everything, including but not limited to, who supervised him, and was difficult to manage. Medina, Patel and Medrano testified that Cuhen was often violent, used foul language, engaged in disrespectful behavior toward employees and management, often ignored manager's instructions, used physical threats toward employees and female staff, and displayed acts of anger when he did not agree with supervisory instruction.[17]

Manager Gonzales also testified that, in addition to Cuhen making inappropriate comments about management, Cuhen told her that Respondent's managers were "a piece of shit," in an effort to explain why managers were hired then resigned so frequently. According to Gonzales, Cuhen told her that she would be next. Gonzales also explained that Cuhen told her that, "Nora [Medrano] was sleeping with the owner, [so] that's why she had the job title that she does…"[18]

Senior Manager Medina also found Cuhen rude and unprofessional. According to Medina, Cuhen raised his voice to try to intimidate her but she never disciplined him nor asked anyone else to do so. Medina also testified that Cuhen often missed meetings, complained about his salary and asked other employees what they were being paid.[19]

However, it is undisputed that Cuhen was never disciplined for or counseled about his insubordinate and/or obnoxious behavior. Regional Manager Medrano admitted that she typically progressively disciplined employees for insubordinate behavior but "didn't know" why she never disciplined Cuhen given his behavior during his tenure with Respondent. According to Medrano, management tried to talk to Cuhen but never disciplined him or issued any written warnings against him. Medrano testified that, on one occasion, she saw Cuhen using the office computer to send unauthorized warnings to residents who would not pick up after their dogs. While Medrano told Cuhen he was not authorized to use office computers/equipment, it is undisputed that Cuhen was never issued a written warning or other discipline over the computer incident.[20]

It is under this backdrop that the alleged actions occurred.

*b. Discussions about Wages/Reimbursements*

According to Cuhen, in/around May or June 2018, approximately a month or two after he was hired, Cuhen met with Medrano and Owner Jogani in the Quails leasing office. Cuhen asked about a gasoline reimbursement since he was driving back and forth between Respondent's multiple properties. According to Cuhen, he was told that he would be provided with the gas reimbursement but he could not "tell anybody else, because they didn't do that for everyone."[21] It is undisputed that

[15] Tr. at 240–241, see also GC Exhs. 2–3.
[16] Tr. at 60–65, see also GC Exh. 4.
[17] See Tr. at 67–69,
[18] Tr. at 226–227.
[19] Tr. at 67–69.

[20] Tr. at 113-122. During the hearing, I granted counsel for the General Counsel's motion for sanctions due to Respondent's failure to respond to the General Counsel's subpoena duces tecum. Tr. at 162. Specifically, Respondent was asked to produce any/all documents related to employees who were subject to investigation, discipline, suspension, and or discharge for reasons related to Cuhen's discharge. See GC Exh.1(i) at 2, 13.

Respondent's counsel objected to the request on grounds of relevance and did not produce any responsive documents. Tr. at 146, 153-154. According to Respondent's counsel, he was unaware if responsive documents to the subpoena existed. Tr. at 150.

However, during her testimony, Medrano explained that she had a practice of documenting related employee issues and that such documents existed in her email, at least with regard to any documented performance issues. Tr. 134. Since I found that responsive documents to counsel for the General Counsel's subpoena request existed, and Respondent had no legitimate defense for failing to locate and/or produce said documents, as requested by General Counsel, I made several adverse inferences.

First, I precluded Respondent from introducing any documents or other evidence related to the investigation, discipline, suspension, and/or discharge of individuals employed by Respondent at Respondent's facilities between May 2017 and May 2019 due to performance issues or insubordination. Tr. at 162–163.

Second, I precluded Respondent from introducing documents from any employee files (excluding medical records) who were investigated, disciplined, suspended, or discharged between May 2017 and May 2019 because of either performance issues or insubordination. Tr. at 163.

Third, I precluded Respondent from introducing any evidence or documents that related or indicated the work history or disciplinary record for employees who were investigated, disciplined, suspended, or discharged between May of 2017 and May of 2019 for either performance issues and or insubordination. Id.

Lastly, I found that, if Respondent had produced the requested documents, those documents would not be beneficial to its case, i.e., meaning that I would have found that Respondent disciplined other individuals between May of 2017 and May of 2019 for performance issues and or insubordination. Tr. at 164.

[21] Tr. at 246–251.

Cuhen received a $100 per month gas reimbursement. Cuhen's testimony was uncontroverted.

However, based on the testimony of Regional Manager Medrano, I find the following facts:

In mid-April 2019, Medrano, Owner Jogani and Maintenance Lead Juan Hermosillo (Hermosillo) met with Cuhen, where they informed Cuhen that Hermosillo would be Cuhen's new supervisor. Cuhen was angry about this decision. Cuhen told Medrano and Owner Jogani that Hermosillo was not a good supervisor and that Cuhen would not work under him. Cuhen also asked Medrano and Jogani why management promoted Hermosillo over him, arguing that Cuhen was more educated and made more money than Hermosillo. At that point, Medrano told Cuhen "not to say that," meaning for Cuhen not to mention Hermosillo's salary since there were other people in leasing office that overheard their discussion.[22]

For her part, Medrano testified the reason she told Cuhen not to discuss Hermosillo's salary was based on the setting when Cuhen brought up Hermosillo's wages. However, Medrano adamantly denied that Respondent had a policy prohibiting employees from discussing wages.[23]

In making the above findings, I primarily relied on Medrano's testimony on this point. I found Medrano was direct, straightforward and forthcoming in her testimony. For example, as will be discussed later in this Decision, Medrano was honest in testifying that she had no idea why she or Respondent management never previously disciplined Cuhen for his insubordinate and obnoxious behavior. Even when faced with questions that could have had an adverse effect on Respondent, her employer, Medrano was honest and forthcoming in her responses, which gave me the impression that she was committed to telling the truth.

On the other hand, as will be set forth in more detail below, I often found Cuhen's testimony incredible. For example, to support his testimony about Hermosillo, Cuhen testified that he knew that he made more than Hermosillo based on discussions with his coworkers about Hermosillo's salary. However, Cuhen presented no evidence, and none of his coworkers, testified regarding their discussions with Cuhen about Hermosillo or his salary.

Similarly, Cuhen also explained that he knew Hermosillo was not a good supervisor when he claimed he saw Hermosillo "slamming doors and yelling and trying to intimidate other coworkers." While Cuhen stated that he spoke with coworkers Jocelyn (last name unknown) and Arial (last name unknown) about Hermosillo,[24] again, there is no corroborating evidence supporting Cuhen's assertions. Neither Jocelyn nor Arial were called as witness to testify.

Lastly, the record is replete with occasions on how Cuhen was an insubordinate employee who rarely followed management's instructions. Oftentimes, I found Cuhen's testimony farfetched and completely implausible, which gave me the impression that Cuhen had an ulterior motive for his testimony which did not include testifying truthfully. Accordingly, I found Cuhen's overall testimony suspect, which made him less than fully credible.

Accordingly, I find that Respondent did not explicitly set forth or maintain in its Employee Handbook or Employee Agreement an overly broad and/or discriminatory rule that prohibited employees from discussing wages.

However, I find that Cuhen was told that he would be reimbursed for gas and for him not to discuss the reimbursement with anyone.

3. Cuhen Allegedly Threatened with Discharge For Filing ULP charge and Ultimately Terminated (allegations #3 & #4).

Based on the credible testimony of Manager Gonzales and Medrano together with the documentary evidence in the record, I find the following facts:

It is undisputed that Gonzales served as Cuhen's manager but she first met Cuhen on/about May 2, 2019, the day Cuhen was terminated. On the morning of May 2, 2019, Gonzales asked Cuhen to meet her in the Quails leasing office to discuss the status of his outstanding AC unit work orders. When Cuhen arrived around 9:50 a.m., Gonzales asked him to come into the leasing office but Cuhen refused and told Gonzales he would speak to Gonzales in the common area where employees could hear. When Gonzales told Cuhen she wanted to check in with him about the outstanding AC units work orders, Cuhen told her he only took direction from Medrano and Patel.

At that point, Gonzales reiterated that she was his manager and needed to discuss the outstanding AC unit work orders with him so she would be aware of the situation and could explain to the residents when they could expect repairs. At that point, Cuhen began yelling at Gonzales and made inappropriate comments about Respondent and his past management team. When Gonzales told him that his complaints about his past management were irrelevant to their discussion about the AC unit work orders, Cuhen continued yelling at Gonzales.

At that point, Gonzales became nervous, walked away from Cuhen toward the office and called Medrano. Although Cuhen testified that, at that point, he threatened to videotape Gonzales as he became uncomfortable around her, I do not find Cuhen credible as Cuhen was unable to produce any video of the incident. Additionally, Cuhen's testimony conflicted with Gonzales who credibly testified that Cuhen threatened to videotape Gonzales *after* she already walked into the office. Most importantly, I was perplexed about, and Cuhen never explained, why he felt uncomfortable around Gonzales as I observed that Gonzales is a petite, older woman who, Cuhen admitted, was walking away from him toward the office.

In any event, as Gonzales walked toward her desk to call Medrano, Cuhen followed Gonzales to the door of the office, became aggressive with Gonzales, threw a chair at Gonzales, and yelled that he would not take direction from Hermosillo, that he knew his rights and would sue. Gonzales, upset and crying, told Cuhen to leave. Gonzales called Medrano while Cuhen continued cursing and yelling at Gonzales and slamming doors in the office.

Although the record is unclear who called President Jogani, it is undisputed that Gonzales had both Medrano and President Jogani on her speaker phone. Medrano and Jogani overheard

[22] Tr. at 97–98.
[23] Tr. at 109, 203, 257.
[24] Tr. at 250–254.

Cuhen yelling and cussing at Gonzales.[25] Gonzales, while crying, told Medrano and Jogani about the incident and Cuhen's behavior. Gonzales told Medrano and Jogani that Cuhen's behavior was "scaring her," to which Medrano and Jogani instructed Cuhen to leave the building.

When Cuhen did not leave as instructed, and continued yelling at Gonzales, Medrano asked another maintenance employee to assist in escorting Cuhen out of the building. Gonzales hung up the phone with Medrano and Jogani as Cuhen was escorted out of the office. Cuhen ultimately left the building a few minutes later. Gonzales gave her statement about the incident to Respondent on May 2, 2019.[26]

In making the above findings, I primarily relied on Manager Gonzales' testimony as it was direct, straightforward and non-evasive. She had excellent recall of the facts surrounding the May 2, 2019, incident with Cuhen and her demeanor showed she was troubled by the encounter years later. Moreover, Gonzales' testimony was corroborated by Medrano and President Jogani who confirmed Cuhen's aggressive, unprofessional behavior on the day in question. [27]

In any event, Medrano contacted Patel to discuss Cuhen's actions on May 2, 2019, as well as Cuhen's prior incidents of insubordination. Although Medrano admitted that Cuhen often displayed incidents of insubordination and aggressive behavior on prior occasions and was never counseled or disciplined, Medrano determined that the May 2, 2019, incident warranted Cuhen's termination because Cuhen, with other employees in the office, cursed, threw objects, and slammed doors at Gonzales, who was a fairly new manager at the Quails, such that Gonzales was frightened and intimidated by Cuhen and refused to work with him.[28]

Meanwhile, after Cuhen left the leasing office, he arrived at the Quails storage area where he met Painter Andronico (Nico) Arvizu (Arvizu). Cuhen and Arvizu entered the storage area when Medrano called Cuhen on his mobile phone. According to Cuhen, Medrano told him that his "services are no longer needed, because he filed a prior ULP charge." Arvizu overheard Cuhen's conversation with Medrano and confirmed Cuhen's testimony on this point.[29]

However, I do not find either Cuhen's or Arvizu's testimony fully credible on this point. First, Medrano categorically denied ever telling Cuhen that he was being terminated due to his prior ULP charge. Moreover, while Medrano admitted that she called Cuhen to terminate him, she explained that she did so after learning that Cuhen also refused to follow Hermosillo's supervisory instructions that morning.

> Medrano also emailed Cuhen, stating:
>
> We regret to inform you that your employment with Pro Residential is being terminated, effective 05/02/2019. Per our conversation this morning at 10:00 am…Your services are no longer needed. This decision is non-reversible. Please stop by the office and sign your time sheet and return keys. Please reply as received.[30]

Although Cuhen responded to Medrano's email the same day that, "Actually what you said is my services were no longer needed because I filed a charge with the [NLRB]. But nice try!" and Medrano replied, "Thank you," I note the email includes a notation, "[Quoted text hidden]."[31]

Furthermore, I found Arvizu's testimony suspect, because, while Arvizu denied that he held any ulterior motives against Respondent in corroborating Cuhen's testimony, I note that, on cross examination, Arvizu admitted that he stopped working as a vendor for Respondent, because he never received his last paycheck. Moreover, Arvizu admitted that, while living at the Quails during the time of Cuhen's termination, he became homeless after his apartment burned down due to an electrical issue within his apartment. His apartment was ultimately condemned by the Tucson fire department.[32]

Lastly, factoring in Cuhen's overall incredible testimony in this matter, I simply do not believe that Medrano told him that he was being fired because he filed a prior ULP charge against Respondent. Rather, I find that Medrano told Cuhen he was terminated from his employment based solely on his repeated failure to follow supervisory instruction and his aggressive and outrageous behavior toward Gonzales on May 2, 2019.[33]

## DISCUSSION AND ANALYSIS

In this consolidated complaint, the General Counsel essentially alleges that Respondent violated Section 8(a)(1) of the Act when Respondent: (1) maintained several overly broad and discriminatory work rules in its Employee Handbook and Employee Agreement, and (2) enforced an overly broad and/or discriminatory work rule when Respondent reminded employees not to discuss employee wages.

[25] Tr. at 97–100, 349–350.

[26] GC Exh. 9.

[27] I found Cuhen's testimony incredible as it was illogical and beyond belief. For example, Cuhen testified he did not feel comfortable going into Gonzales' office alone but "did not recall" why he felt uncomfortable under the circumstances. Any reasonable person feeling so uncomfortable around their manager would recall the reasons why.

Cuhen further testified that, when Gonzales began crying, he pulled out his phone and videotaped Gonzales, but never explained why he felt the need to record Gonzales. Moreover, the videotape that could have corroborated Cuhen's testimony was never produced or offered into evidence which made Cuhen's testimony less than fully credible. Although Cuhen testified that his conversation with Gonzales occurred in front of Jocelyn and "Percilla the cleaning lady," neither were called to testify as witnesses.

Finally, although Cuhen admitted that Jogani instructed him to leave the building, since he denied that he was disruptive and obnoxious toward Gonzales, he would have the trier of fact believe that he was asked to leave because he recorded Gonzales upset and crying in her office. Accordingly, I found Cuhen's entire testimony regarding the May 2, 2019, incident incredible.

[28] Tr. at 102–103, 324–325. Although there is conflicting testimony on whether Medrano spoke to Patel before or after Cuhen was terminated, it is undisputed that Medrano made the final termination decision. Patel testified that he signed off on the termination decision.

[29] Tr. at 255–258, 273–289, 311–317.

[30] GC Exh. 8 (emphasis added).

[31] Id.

[32] Tr. at 318–319.

[33] I note that, on April 16, 2020, about a year after Cuhen's termination, Respondent asked Manager Medina to write a statement on Cuhen's attitude, poor work performance and his complaints about other maintenance employees and their salary/pay. See GC Exh. 5.

General Counsel also argued that Respondent violated Sections 8(a)(4) and/or (1) of the Act when Respondent: (3) threatened to discipline Cuhen after he filed an ULP charge and gave testimony to the Board, and (4) terminated Cuhen in retaliation for his participation in the Board's processes. I will take each issue in turn.

### I. Respondent Violated Section 8(a)(1) of the Act When it Maintained Several Overly Broad and Discriminatory Rules in its Employee Handbook and Employee Agreement (allegation #1)

#### *A. Legal Standard*

In general, to prove that an employer's work rule discriminates against and/or restricts an employee's Section 7 rights, the Board requires that the General Counsel prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights as set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).[34]

However, in 2017, the Board overruled *Lutheran Heritage* and announced three separate standards to evaluate employer rules: (1) rules that explicitly restrict Section 7 activity or were promulgated in response to union or other protected concerted activity (unlawful), (2) rules that are facially neutral but may be reasonably interpreted to have a coercive effect on Section 7 activity (may be unlawful but must undergo a case-by-case, fact intensive analysis), and (3) rules that are lawful to maintain (lawful).[35]

However, in *Stericycle, Inc*., 372 NLRB No. 113 (Aug 2, 2023), the Board overruled *Boeing Co.*, finding that, with respect to facially neutral work rules that may be reasonably interpreted to restrict Section 7 activity, the Board now interprets these rules "from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected, concerted activity."[36]

Accordingly, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. The employer's intent in maintaining the rule is immaterial.[37] Moreover, any ambiguity in a rule is interpreted against the drafter.[38] Thus, if the General Counsel carries her burden, the rule is presumptively unlawful.

However, the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.[39]

#### *B Discussion*

Applying the *Stericycle* standard here, I note that the General Counsel provided no argument supporting any of her allegations that Respondent's work rules are unlawful.[40] Nevertheless, to provide a full and complete analysis of all of the issues in this case, I conclude the following:

First, with regard to Respondent's rule on handing Personnel Records, it is well settled that employees under the Act have the Section 7 right to discuss and/or disclose things that would be deemed as "confidential information," including their individual salaries and work schedules. As such, the instruction in the Employee Handbook prohibiting the disclosure of personnel records, which includes salary information, is sufficient to satisfy the General Counsel's burden that the provisions in Respondent's Personnel Records policy is presumptively unlawful.

Although Respondent argued that the rule was intended to protect confidential personnel information, it admitted that it could clarify the rule to include an exception for employees sharing information between themselves and other employees. Accordingly, I conclude that Respondent can advance a more narrowly tailored rule that does not restrict employees from engaging in their Section 7 rights.

Next, regarding Respondent's Open Door Policy, again, I find this policy presumptively unlawful based on the policy's plain language. While Respondent averred that the policy was intended to prevent employees from filing "bad-faith" complaints, the rule does not define a "bad-faith" complaint and is not narrowly tailored to clarify to employees that said rule does not restrict employees from bringing concerns that may constitute protected, concerted activity.

Similarly, Respondent's Off Duty Conduct/Outside Employment rule and its accompanying sections, is unlawful, because, again, it is overly broad and could reasonably be interpreted to restrict Section 7 activity. Although Respondent argued that the rule is intended to "ensure that its employees engage in conduct that will not result in ill-will being imputed on Respondent," "ill-will" is not clearly defined. Nor is the rule's prohibition on "immoral" conduct fully defined. Accordingly, since these terms are neither defined nor narrowly tailored, such undefined terms could lead an employee to reasonably interpret this rule as violating their Section 7 rights.

Regarding Respondent's rules on Prohibited Conduct, Information Technology, and Personal Use of Telephones, Equipment and Supplies, since the General Counsel failed, and Respondent's affirmative defenses did not include any arguments from the General Counsel as to why these rules are presumptively unlawful, I conclude that counsel for the General Counsel failed to establish her *prima facie* showing under

[34] 343 NLRB 646 (2004).

[35] See *Boeing Co.,* 365 NLRB No. 154 (2017), revised *in LA Specialty Produce Co*., 368 NLRB No. 93 (2019).

[36] 372 NLRB No. 113, slip op. at 2 (Aug 2, 2023).

[37] Id., slip op. at 2 n. 3.

[38] Id., slip op. at 9–10.

[39] Id., slip op. at 2. Although this case was tried before the issuance of *Stericycle*, there is no need for further evidence to be submitted on the issue of Respondent's legitimate and substantial business interests regarding its Employee Handbook or Employee Agreement since Respondent proffered its rationale in its post-hearing brief.

[40] I also note that the General Counsel did not move to have me decide Respondent's work rules via a motion for a stipulated record. My role, as an Administrative Law Judge (ALJ or judge), is to find facts and issue a recommended decision based on those facts and applicable Board law. It is not to present arguments on behalf of any party. Accordingly, I admonish General Counsel for failing to present any argument on why Respondent's work rules contained in its Employee Handbook and/or Employee Agreement are unlawful.

*Stericycle*.[41]

However, I conclude that Respondent's rule on Solicitation is unlawful. First, the plain reading of the rule makes it presumptively unlawful since it may be reasonably interpreted as limiting solicitation for union or other protected, concerted activities. In its defense, Respondent contended that the rule is intended to discourage employees from engaging in other non-work-related business activities and soliciting residents on its properties as well as prohibiting non-employees from being onsite during working hours.[42] However, the reasonable wording of the rule belies Respondent's intended business rationale. In fact, the rule states:

> In order to ensure efficient operation of the Company's business and to prevent annoyance to employees, it is necessary to control solicitation and distribution of literature and/or merchandise on Company property. Employees assigned to a client's property shall not solicit on the property. [. . .].

Nothing in this rule informs an employee of Respondent's alleged legitimate and substantial business interest. Rather, I conclude that any employee would interpret Respondent's rule as restricting/preventing an employee's ability to engage in lawful Section 7 activity. Without narrowly tailoring this rule to clarify that the rule does not restrict any protected, concerted activity, I conclude that the rule violates the Act.

Regarding Respondent's Employee Administrative Manual set forth in its Employee Agreement, the General Counsel failed, and I cannot find, in reading the rule, any rationale as to why this rule is unlawful. Without an argument from the General Counsel proffering why the rule is presumptively unlawful, I conclude that counsel failed to establish her *prima facie* showing under *Stericycle.*

Lastly, I conclude that Respondent's Personal Preference rule contained in its Employee Agreement is unlawful. First, by the plain reading of the text, the rule is presumptively unlawful since an employee, for example, could reasonably interpret the rule as prohibiting discussion about union affiliation or an employee's preference for a union as a "social issue" since "social issues" are undefined.

Here, Respondent argued that its rule prohibiting employees from discussing their personal preferences on religion, politics and/or social issues is lawful as its rule is akin to the rule upheld in *William Beaumont Hospital,* 363 NLRB 1543 (2016).

In *William Beaumont*, the Board found the hospital's rule that prohibited employees from engaging in rude, condescending or otherwise socially unacceptable behavior lawful. Agreeing with the ALJ, the Board found the rule lawful because the text was unambiguous (as to the type of comments prohibited) and could not be interpreted as prohibiting lawful discussions protected by the Act since it was legitimately directed toward the hospital's duty to provide a safe and healing environment (as a hospital). In making her finding, the judge noted the special circumstances afforded hospitals such that it may be appropriate to permit hospitals greater latitude to restrict union activities in patient-care areas in order to promote a "pleasing and comforting [environment] where patients are principal facets of the day's activities . . . [such that patients and their families] need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."[43]

Unlike in *William Beaumont,* Respondent is not a hospital who has a special interest in prohibiting conduct that would have an adverse impact on patient care. Rather, Respondent manages apartment complexes. More importantly, Respondent's rule targets "speech" by prohibiting discussions about "religion, politics and social" preferences without clearly defining those terms and/or what type of conduct under those terms is prohibited.

In fact, the Board has found similar prohibitions on "negative speech" unlawful. Specifically, in *Claremont Resort & Spa,* 344 NLRB 832 (2005), the Board found the employer's rule prohibiting "negative conversations" about managers, without any additional clarifications, unlawful, since such a rule would "reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing [them] to refrain from engaging in protected activities."[44] Although Respondent claimed to be concerned about employees' interactions with its residents, the rule, as written, prohibits speech and is so overbroad and ambiguous that it reasonably encompasses lawful discussions or complaints that are protected by Section 7 of the Act.

In short, since Respondent has failed to set forth a more narrowly tailored rule that does not restrict employees from engaging in their Section 7 rights, I conclude that Respondent's Personal Preference rule violates the Act.

## II. Respondent Violated Section 8(a)(1) of The Act When it Told Cuhen Not to Discuss His Gas Reimbursement with Anyone But Did Not Violate Section 8(a)(1) of the Act when it Enforced an Alleged Work Rule by Reminding Employees Not to Discuss Employee Wages (allegation #2)

### *A. Legal Standard*

The same legal standard in Section I applies to Section II herein.

### *B. Discussion*

Applying the *Stericycle* standard here, as previously stated in this Decision, employees under the Act have the Section 7 right to discuss things that would be deemed confidential, including wages and reimbursements. As such, Manager Medrano telling Cuhen not to discuss his gas reimbursement with anyone constitutes an oral work rule, and said rule is sufficient to satisfy the General Counsel's burden that the rule is presumptively unlawful.

Other than Respondent arguing that Manager Medrano's statement did not constitute a work rule (which I find other-

[41] See R. Br. at 15–16.

[42] R. Br. at 17.

[43] See *St. John's Hospital and School of Nursing, Inc*., 222 NLRB 1150 (1976), enf. in part 557 F.2d 1368 (10th Cir. 1977); see also, *NLRB v. Beth Israel Hospital,* 437 U.S. 483, 509 (1978).

[44] 344 NLRB at 836 (2005).

wise), Respondent failed to provide any legitimate and substantial business interest for promulgating/implementing Respondent's oral work rule. Accordingly, I conclude that preventing Cuhen from discussing receipt of his gas reimbursement violates Section 8(a)(1) of the Act.

However, I do not find that Respondent maintained/enforced an alleged work rule prohibiting employees from discussing wages and/or reminding them not to discuss their wages.

The record reveals no written policy or rule preventing discussion of employee's wages. Moreover, Respondent did not promulgate, maintain or enforce any such rule when Medrano told Cuhen not to talk about Hermosillo's salary.

Rather, the record shows that Medrano responded to Cuhen's statement, made in the common leasing area in front of others, that Cuhen made more money than Hermosillo. Under the circumstances, I conclude no work rule was created, maintained or enforced preventing any discussion about employee wages.

Therefore, the General Counsel failed to show that an overly broad/discriminatory work rule had been created much less one that restricted employee's Section 7 rights. As such, I conclude that Respondent did not violate the Act as alleged.

## III. RESPONDENT DID NOT VIOLATE SECTION 8(A)(4) AND/OR (1) OF THE ACT WHEN IT ALLEGEDLY THREATENED CUHEN WITH DISCIPLINE FOR FILING AN UNFAIR LABOR PRACTICE CHARGE AGAINST RESPONDENT AND GIVING TESTIMONY TO THE BOARD (ALLEGATION #3)

### *A. Legal Standard*

Under Section 8(a)(4) of the Act, an employer may not discriminate against an employee for participating in the Board's processes, including filing charges, testifying, or being subpoenaed to testify at a Board proceeding. Threatening an employee in retaliation for participating in the Board's processes also violates Section 8(a)(4).

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat."[45] The actual intent of the speaker or the effect on the listener is immaterial.[46] The "threat in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening."[47] Rather, the Board considers the totality of the circumstances in assessing whether the reasonable tendency of an ambiguous statement is a veiled threat to coerce.[48] Accordingly, the basic test to find an 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act.[49]

As you might imagine, determining whether an ambiguous statement is an illegal threat versus an opinion about possible consequences has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employee's right to be free from coercive threats under Section 7.

### *B. Discussion*

Based on the evidence in the record, I conclude that Respondent did not threaten Cuhen with discipline in retaliation for his participation in the Board's processes.

First, I conclude that no one "threatened" Cuhen with anything much less, with discipline. Counsel for the General Counsel points to a conversation between Cuhen and Medrano the morning that Cuhen was terminated where Medrano allegedly told Cuhen that he was being terminated for filing a ULP charge. However, I do not believe Medrano ever made the statement attributed to her as I found both Cuhen's and Arvizu's testimony incredible on this point. Moreover, Medrano credibly denied making such a statement to Cuhen.

Rather, the evidence demonstrates that Medrano told Cuhen that he was terminated, to turn in his keys and leave the premises. Medrano credibly testified that she terminated Cuhen based solely on his behavior toward Manager Gonzales on May 2, 2019.

As such, other than Cuhen's self-serving testimony, there is no credible evidence in the record that Medrano made the statement attributed to her or that Medrano's statement was an unlawful threat due to Cuhen's filing a prior ULP charge. Accordingly, I conclude that Respondent did not violate the Act as alleged.

## IV. RESPONDENT DID NOT VIOLATE SECTION 8(A)(4) AND/OR (1) OF THE ACT WHEN CUHEN WAS TERMINATED FROM HIS EMPLOYMENT AFTER FILING AN UNFAIR LABOR PRACTICE CHARGE AGAINST RESPONDENT (ALLEGATION #4)

### *A. Legal Standard*

Mixed motive cases, like the one in this case, are those where it appears that unlawful considerations were a motivating factor for the adverse action but where the record supports the potential existence of one or more legitimate justifications for the decision. To assess whether an adverse personnel action against an employee was taken in retaliation for participating in the Board's processes, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980).[50]

Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that Cuhen's protected activity – that is, his filing an ULP charge against Respondent and giving affidavit testimony to the Board, was a motivating factor in Respondent's termination decision. The General Counsel satisfies this initial burden by showing: (1) Cuhen's protected activity; (2) Respondent's knowledge of

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

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

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

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

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

[50] *Wright Line*, 251 NLRB 1083, 1088–89 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

such activity; and (3) animus.

Recently, the Board clarified element three of the General Counsel's *prima facie* case, holding that, in order to prove animus sufficient to carry the General Counsel's initial burden, the General Counsel must establish a causal connection "between the employee's protected activity and the employer's adverse action against the employee."[51] This is not an additional element of the General Counsel's *prima facie* case.[52] Rather, in order to demonstrate that Respondent terminated Cuhen because he filed a prior ULP charge and gave testimony to the Board, the General Counsel must establish a link or nexus between Cuhen's protected activity and Respondent's adverse action against Cuhen.[53]

Once the General Counsel meets her initial burden under *Wright Line*, the burden of persuasion shifts to Respondent to prove that it would have terminated Cuhen even absent his protected activity.[54] To do this, Respondent cannot simply present a legitimate reason for its adverse action; rather, it must demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct.[55] If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action regardless of the protected conduct.[56]

On the other hand, further analysis is required if the defense is one of "dual motivation," that is, Respondent defends that, even if an invalid reason might have played some part in its motivation, Respondent would have taken the same action against Cuhen for permissible reasons.[57]

### *B. Discussion*

With regard to Cuhen's termination, I conclude that counsel for the General Counsel established her *prima facie* showing. First, Cuhen engaged in protected concerted activity when he filed a ULP charge in Case 28–CA–239775 against Respondent on/about April 15, 2019 (element one).

Second, other than Cuhen's self-serving statement that Medrano told him that she was terminating his employment because he filed a prior ULP charge, which I did not find credible, the record is unclear that Medrano *specifically* knew about Cuhen's prior ULP charge or *specifically* knew that he gave affidavit testimony to the Board in conjunction with filing his prior ULP charge. Even though Respondent, as a corporation, admitted to receiving Cuhen's charge on April 17, 2019, that does not necessarily prove that *Medrano* knew of the charges against Respondent on that date (element two).

Nevertheless, presuming Medrano's knowledge of Cuhen's prior ULP charge is inputted on her as a supervisor/agent of Respondent, I find that the close timing between Cuhen's ULP charge and his termination – all of which occurred within two-and-a-half weeks – supports an inference that Cuhen's prior participation in the Board's processes was a motivating factor in his termination (element three).[58]

Once the General Counsel satisfies her initial burden that Cuhen's protected activity was a motivating factor in Respondent's decision to terminate his employment, the burden of persuasion shifts to Respondent to prove that it would have terminated Cuhen despite his protected activity. Here, I find that Respondent met its burden.

The evidence clearly demonstrates that Cuhen was terminated for his unprofessional, insubordinate and unacceptable behavior toward Manager Gonzales on May 2, 2019. Specifically, the record is replete with evidence that, on the morning of May 2, 2019, Gonzales asked Cuhen to meet her in the leasing office so they could review his outstanding AC unit work orders. When Cuhen ultimately arrived at the leasing office, Gonzales asked Cuhen to discuss the outstanding AC unit work orders in the leasing office but Cuhen refused to meet with her privately. When Gonzales asked for an accounting of the AC unit work orders, Cuhen told Gonzales that he only took instruction from Patel and Medrano and refused to comply with Gonzales' request for information. Even after Gonzales pressed Cuhen for an accounting of the outstanding AC unit work orders as his manager, he cursed and yelled at Gonzales, threw a chair at her, and refused to follow her instructions. Gonzales told Cuhen to leave the building but he refused.

At that point, Gonzales became so frightened that she contacted Medrano and President Jogani, who overheard Cuhen's loud and outrageous behavior toward Gonzales. Even when Cuhen was told to leave the building by Medrano and/or Jogani, he refused and continued yelling and screaming at Gonzales. Ultimately after Medrano asked another maintenance employee to escort Cuhen out of the building did Cuhen finally leave the premises. Gonzales ultimately wrote a statement detailing the incident, how afraid she was and that she refused to work with Cuhen again.

To show pretext, counsel for the General Counsel argued that Respondent failed to follow its own protocols in dealing with insubordinate employees. Here, counsel pointed to the fact that Cuhen had a history of insubordination as well as rude and obnoxious behavior but was never disciplined until he filed his prior ULP charge and gave affidavit testimony before the Board. However, Medrano credibly testified that, unlike Cuhen's prior displays of insubordination, the May 2, 2019,

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

[52] See *Intertape Polymer Corp*., 372 NLRB No. 133, slip op. at 7–11 (Aug. 25, 2023).

[53] Id.

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

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

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

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

[58] See *LaGloria Oil & Gas Co.,* 337 NLRB 1120 (2002), enfd. 71 Fed.Appx. 441 (5th Cir. 2003)(close timing between protected activity and adverse action can be used to infer animus), see also *Wayne W. Sell Co.,* 281 NLRB No. 82 (1986) (undisputed evidence that employer knew of the discriminatee's charge filing with the Board and the timing between discriminatee's charge and the adverse actions taken gave rise to a strong inference that the Employer's actions against the discriminatee were motivated by those filings).

incident warranted Cuhen's termination because Cuhen, with other employees in the office, cursed, threw objects, and slammed doors at Gonzales, who was a fairly new manager at the Quails, such that Gonzales was so frightened and intimidated by Cuhen, she refused to work with him.

Moreover, even though I drew an adverse inference against Respondent that it disciplined other employees between May of 2017 and May of 2019 for performance issues and or insubordination but not Cuhen, counsel for the General Counsel failed to connect how the adverse inference against Respondent proves that its specific, legitimate, nondiscriminatory reason for terminating Cuhen was pretextual.

Lastly, General Counsel claimed that Respondent gave shifting reasons for why it terminated Cuhen. Here, counsel contended that Medrano testified that she terminated Cuhen due to his actions and behavior toward Gonzales on May 2, 2019. However, in its Answer to the Consolidated Complaint, Respondent defended that Cuhen's termination was lawful "based on documented performance issues and insubordination."

Although the evidence reflects, and Medrano and other management officials admitted, that they never documented Cuhen's insubordinate behavior or disciplined him for it, the evidence fails to suggest any shifting rationale on the part of Respondent. Rather, the totality of the evidence reveals that Cuhen was terminated due to his particularly insubordinate, obnoxious behavior toward Gonzales, a fairly new supervisor, that occurred in a common area in front of other employees. In short, I do not find that counsel for the General Counsel established that Respondent's legitimate, nondiscriminatory reasons for terminating Cuhen were pretextual.

Therefore, based on the credible evidence in the record, I find that Cuhen was discharged for his particularly insubordinate and outrageous behavior toward Gonzales, not in retaliation for engaging in the Board's processes. Accordingly, I conclude that Respondent did not violate the Act when it terminated Cuhen on May 2, 2019.

## CONCLUSIONS OF LAW

1. Respondent Pro Residential Services, Inc., in Tucson, Arizona is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act when it promulgated and/or maintained in its Employee Handbook an overly broad, ambiguous and/or discriminatory work rule regarding the disclosure of Personnel Records.

3. Respondent violated Section 8(a)(1) of the Act when it promulgated and/or maintained in its Employee Handbook an overly broad, ambiguous and/or discriminatory work rule regarding its Open Door Policy.

4. Respondent violated Section 8(a)(1) of the Act when it promulgated and/or maintained in its Employee Handbook an overly broad, ambiguous and/or discriminatory work rule regarding Off Duty Conduct/Outside Employment.

5. Respondent violated Section 8(a)(1) of the Act when it promulgated, and/or maintained in its Employee Handbook an overly broad, ambiguous and/or discriminatory work rule in its Solicitation Policy.

6. Respondent violated Section 8(a)(1) of the Act when it promulgated, and/or maintained in its Employee Agreement an overly broad, ambiguous and/or discriminatory work rule regarding disclosing employee's Personal Preferences.

7. Respondent violated Section 8(a)(1) of the Act when it orally promulgated and/or enforced an overly broad and/or discriminatory work rule that prohibits employees from discussing gas reimbursements.

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

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[59]

## ORDER

Respondent Pro Residential Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining and/or enforcing overly broad and ambiguous work rules in Respondent's Employee Handbook regarding the disclosure of Personnel Records that employees could reasonably interpret as prohibiting them from exercising their Section 7 rights.

(b) Promulgating, maintaining and/or enforcing overly broad and ambiguous work rules in Respondent's Employee Handbook concerning its Open Door policy that employees could reasonably interpret as prohibiting them from exercising their Section 7 rights.

(c) Promulgating, maintaining and/or enforcing overly broad and ambiguous provisions in Respondent's Employee Handbook regarding its Off Duty Conduct/Outside Employment policy that employees could reasonably interpret as prohibiting them from exercising their Section 7 rights.

(d) Promulgating, maintaining and/or enforcing an overly broad and ambiguous provisions in Respondent's Employee Handbook concerning Solicitation that employees could reasonably interpret as prohibiting them from exercising their Section 7 rights.

(e) Promulgating, maintaining and/or enforcing an overly broad and ambiguous provisions in Respondent's Employee Agreement regarding disclosing employee's Personal Preferences that employees could reasonably interpret as prohibiting them from exercising their Section 7 rights.

(f) Promulgating, maintaining and/or enforcing an overly broad and/or discriminatory oral work rule prohibiting employees from discussing or disclosing receipt of gas reimbursements from Respondent.

(g) In any like or related manner interfering with, restraining,

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

or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind or revise Respondent's Employee Handbook to remove any language that prohibits or may be read to prohibit employees from disclosing personnel records in accordance with their rights under Section 7 of the Act;

(b) Rescind or revise Respondent's Employee Handbook to remove any language that prohibits or may be read to prohibit employees from participating in Respondent's Open Door Policy in accordance with their rights under Section 7 of the Act;

(c) Rescind or revise Respondent's Employee Handbook to remove any language that prohibits or may be read to prohibit employees from engaging in Off Duty Conduct/Outside Employment in accordance with their rights under Section 7 of the Act;

(d) Rescind or revise Respondent's Employee Handbook to remove any language that prohibits or may be read to prohibit employees from Solicitations in accordance with their rights under Section 7 of the Act;

(e) Rescind or revise Respondent's Employee Agreement to remove any language that prohibits or may be read to prohibit employees from disclosing Personal Preferences in accordance with their rights under Section 7 of the Act;

(f) Make employees aware, in writing, that Respondent will not promulgate, maintain or enforce any oral or written work rule that prohibits or may be read to prohibit employees from discussing or disclosing receipt of gas reimbursements.

(g) Furnish, publish and/or distribute to all current employees a new Employee Handbook and Employee Agreement that: (1) does not contain the unlawful provisions noted in paragraph (a)-(f) above; (2) advises employees that the unlawful provisions above have been rescinded; or (3) provides lawful language that describes, with specificity, which types of conduct or communication is proscribed by the Handbook/Agreement and the conduct/communication that is protected by the Act. Respondent also may comply with this aspect of my Order by either: (i) rescinding the unlawful provisions noted in paragraphs (a)–(f) above and republishing the new rules without the unlawful language; (ii) supplying employees at its Arizona, California, Oklahoma and Nevada apartment locations with an insert to the Employe Handbook and Employee Agreement stating that the unlawful rules have been rescinded; or (iii) supplying employees at its Arizona, California, Oklahoma and Nevada apartment locations with new and lawfully worded rules on adhesive backing that will cover the unlawful rules until Respondent republish new rules without the unlawful provisions;

(h) Notify all current and former employees in writing at its apartment locations in Arizona, California, Oklahoma and Nevada, that the relevant provisions detailed in paragraphs (a)-(f) above, contained in the Employee Handbook and Employee Agreement, that were promulgated and/or distributed since April 15, 2019, have been rescinded, are void and that Respondent will not prohibit employees from engaging in protected concerted activity as described in paragraphs (a)–(f) above;

(i) Within 14 days after service by the Region, post at all of its apartment locations in Arizona, California, Oklahoma and Nevada, copies of the attached notice marked "Appendix"[60] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2019.

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

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. September 29, 2023.

## APPENDIX

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

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

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to sign our Employee Handbook and/or Employee Agreement with unlawful terms.

WE WILL NOT prohibit you from disclosing your receipt of any gas reimbursements from us.

WE WILL NOT prevent you from exercising your rights to engage in union and/or protected, concerted activity which are

[60] 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."

afforded you under Section 7 of the National Labor Relations Act.

WE WILL rescind the unlawful terms contained in our Employee Handbook regarding our Personnel Records Policy, our Open Door Policy, our Off Duty Conduct/Outside Employment Policy, and our Solicitation Policy.

WE WILL rescind the unlawful terms contained in our Employee Agreement regarding Personal Preferences that you signed.

PRO RESIDENTIAL SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28CA-239775 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.