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

IMLAY PLUMBING, INC.,

Respondent

Cases 27-CA-314575

and

TRISTAN PATNODE, an individual

Charging Party

Nathan Higley, Esq.,
for the General Counsel.
Adam Dunn, Esq. (Dunn Law Firm),
for the Respondent.

DECISION

STATEMENT OF THE CASE

LISA FRIEDHEIM-WEIS, Administrative Law Judge. This case was tried in Parowan, Utah, before me on March 4, 2025, during which time I afforded all parties a full opportunity to be heard, to examine and cross examine witnesses, to make motions, and to introduce evidence.[1]

[1] References throughout the decision shall read as: Tr. is transcript; GC Exh. is General Counsel's exhibit; and R. Exh. is Respondent's exhibit. The Act refers to the National Labor Relations Act. The Board refers to the National Labor Relations Board.

Tristan Patnode (Charging Party or Patnode) filed the charge, amended charge, and second amended charge against (Respondent) on March 22, 2023, May 10, 2023, and August 15, 2024, respectively and the General Counsel[2] issued the complaint on August 27, 2024. Respondent filed its answer to the complaint on October 11, 2024. The complaint alleged that Imlay violated Sections 8(a)(1) of the Act. (GC Exh. 1.)

ISSUES

Specifically, the complaint alleges that:

1. Respondent violated Section 8(a)(1) of the Act by interrogating its employees about the concerted activities of other employees around early January 2023;[3]

2. Respondent, by its owner Kadin Imlay (Imlay):

    a. Violated Section 8(a)(1) in a conference room and by text, by promulgating and maintaining a rule prohibiting employees from discussing wages;
    b. Violated Section 8(a)(1) by text, by threatening employees with discharge for discussing wages;
    c. Violated Section 8(a)(1) by text, by instructing employees to discuss wage concerns with him;

3. Respondent violated Section 8(a)(1) of the Act by firing the Charging Party on January 11.

Respondent denied all these allegations, with the exception that it admitted:

1. Respondent discharged the Charging Party on January 11. (GC Exh. 1(g), para. 5(a)); and
2. Respondent, by Imlay, instructed Respondent's employees by text on January 11 that if they had an "issue with your wage, come talk to me [Imlay]." (GC Exh. 1(g), para. 4(b)(iii).)

In its affirmative defenses, inter alia, Respondent admits that the Charging Party spoke with other employees about his wages and that this upset the other employees. Respondent admits that Imlay then personally investigated the situation by speaking with these other employees and asking them what the Charging Party had told them about his wages. However, Respondent asserts that it fired the Charging Party because he lied to his coworkers about the wage he was making, that lying violated company policy, and the lying was the reason it discharged the Charging Party. (GC Exh. 1(i), para. 2.)

Based on the entire record, including my observation of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following proposed report, together with a recommended order to the Board. 29 U.S.C. Section 160(c):

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[2] Note that at the time of issuance of this decision, there is an Acting General Counsel in place as chief prosecutor of the NLRB, while at the time the consolidated complaint issued and briefs were filed, there was a General Counsel in place. All references to the prosecutor herein for ease of reference shall be to General Counsel.

[3] All dates hereinafter occurred in 2023 unless otherwise indicated.

I. FINDINGS OF FACT

A. JURISDICTION

Respondent admits, and I find, that it is a corporation with an office and place of business in Cedar City, Utah, and is engaged in the business of residential and commercial plumbing. Respondent admits that, in the 12-month period ending March 22, it derived gross revenues in excess of $500,000 and that, during the same time period, it purchased and received at its Cedar City, Utah facility products, good, and materials valued in excess of $5000 directly from points outside the State of Utah. Respondent admits that it was and is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and I so find. (GC Exh. 1).

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (Board) has jurisdiction over this case pursuant to Section 10(a) of the Act.

B. BACKGROUND

1. Imlay's operations and relevant policies.

At all relevant times during 2022 and 2023, Imlay was and is the owner of Respondent. (Tr. 11.) Respondent has been in business for at least the last ten (10) years.[4] Respondent performs plumbing work on new construction sites and does plumbing service calls in residential and commercial settings. (Tr. 109–110.)

Imlay testified that Respondent's Handbook[5] is provided to all new employees. (Tr. 142.) Among other topics, Respondent's Handbook, which has been in effect since July 1, 2016, covers:

> Section 2.3. Open Door Policy
> The company has an open-door policy and takes employee concerns and problems seriously. The company values each employee and strives to provide a positive work experience. Employees are encouraged to bring any workplace concerns or problems they might have or know about to their supervisor or some other member of management.
>
> Section 3.3. Payday (in relevant part)
> The paycheck will reflect work performed for the pay period. Paychecks include salary or wages earned less any mandatory or elected deductions…Notify a supervisor if the paycheck appears to be inaccurate or if it has been misplaced.
>
> Section 6. Discipline Policy
> Section 6.1. Grounds for Disciplinary Action
> The company reserves the right to discipline and/or terminate any employee who violates company policies, practices, or rules of conduct…

[4] Neither party explored in depth the history of Respondent's business, so I rely on Manager Lex Neilson's testimony that he has worked for Respondent for ten (10) years. (Tr. 109.)

[5] See R Exh. 7 for Respondent's handbook in its entirety.

> The following actions are unacceptable and considered grounds for disciplinary action. This list is not comprehensive; rather, it is meant merely as an example of the types of conduct that this company does not tolerate. These actions include, but are not limited to:
>
> --- Falsification, misrepresentation, or omission of information, documents, or records;
> --- Lying
>
> 6.2. Procedures
> The course of [disciplinary] action will be determined by the company at its sole discretion as it deems appropriate. (R. Exh. 7.)

2. Patnode's hiring.

Imlay first interviewed Patnode in April 2022 in person in his office. No one else was present. Imlay testified that he had no recollection of a discussion of wages during this interview. (Tr. 12.) Patnode, who had been working in a what he characterized as a higher scale area of Utah doing plumbing for $28 per hour, testified that he and Imlay did discuss wages during the April 2022 interview, and specifically that Imlay was to pay Patnode $20 per hour for the first 30 days and then raise his hourly rate to $26 per hour assuming Imlay liked Patnode's work and wanted to retain him. (Tr. 51, 52, 71.)

It is undisputed that, after the April 2022 interview, Imlay offered Patnode a job (which Imlay characterized as a laborer who did plumbing, and which Patnode characterized as an apprentice plumber), and that Patnode declined at that time to pursue a higher wage at another company in another part of Utah. (Tr. 12, 62, 71–72.) The evidence shows that on April 19, 2022, Imlay and Patnode texted, wherein Imlay stated that Patnode would be a great fit and that he has to meet with a few people in the company before he made concrete decisions on hiring. Imlay texted back, thanking Imlay but informing him that he received "too nice of an offer" in another town in Utah, so he was going to give that a try. He added that if things fell through, he'd reach back out. (R Exh. 2.) Patnode testified that he considered this text chain on April 19, 2022; to be a confirmation of the verbal agreement he received from Imlay for $20 per hour to start, and moving up to $26 per hour after 30 days of employment. (Tr. 74.)

It is also undisputed that Patnode did change his mind. Patnode texted Imlay around the beginning of July and stated that he was likely going to apply for a job again in 1 week or 2, to which Imlay responded, "we would love to have you." (R. Exh. 3.) There was no discussion of Patnode's wages in this text communication. Id. Patnode then called Imlay on July 21, 2022, for a job, and Imlay hired him on August 15, 2022, for an August 29, 2022, start date. (Tr. 13–14, 71–72.)

Patnode testified that he and Imlay never verbally discussed wages during the July phone call for a position or at any other time until Patnode was fired in January 2023. (Tr. 52, 71–72, 81, 142.) Imlay testified that he did not discuss wages with Patnode when he hired him, that he usually starts employees out at $16–$20 per hour, and that though there is no set schedule for raises, it is generally pretty quick. (Tr. 142.)

3. October 2022 wage communications.

On October 2, 2022, which was soon after his first thirty (30) days of employment with Respondent had passed, Patnode texted Imlay, stating:

> "I keep realizing that we haven't discussed my pay since I think I interviewed with you lol.[6] It was $20/hr for the first 30 days and then $26/hr. after that if you liked my work, right?"

To which Imlay responded the same day:

> "Oh crap I honestly never had a conversation with the office and I am sure they just started you at what we normally start people at and it has never even crossed my mind. Let me talk to Angie and have her make some changes. I am so sorry. You should have mentioned something earlier." (GC Exh. 3; Tr. 38–39, 52, 76.)

Patnode testified that Imlay never got back to Patnode about his wages or his October text request but that he thought the October 2, 2022 text chain was clear that he was being moved up to $26 per hour. (Tr. 71–76.) To the contrary, Imlay testified that he and Patnode had a few more conversations about a raise, but he had absolutely no recollection of when those conversations took place or what was said. (Tr. 39–40.) Patnode testified that if he thought his hourly rate was not being moved up to $26 per hour after this text exchange, he would have quit his job with Respondent. (Tr. 76.)

C. ALLEGED ULP's

1. Discussions about wages.

a. Patnode's Testimony

Patnode testified that he spoke to several of Respondent's employees about wages from late October through November 2022. Patnode testified that he listened to other employees complain about not getting a raise and that Imlay was changing the requirements to get a raise. (Tr. 105.) Patnode asserts that he never discussed his wage with other employees first and that it was other employees who initially raised wages with him. (Tr. 96.)

For example, Patnode testified that he discussed wages with employee Austin Adams (Adams). Patnode testified that on the way to a job in either New Castle, Utah, or Old Iron Town, Utah, Adams asked him how much he was making, and Patnode replied that he was making $26 per hour.[7] Patnode denied telling Adams that he was making $27 per hour or that they discussed wages on October 20 or 21, 2022. (Tr. 94–95.)

On another occasion between October and December 2022, Patnode testified that another employee[8] asked him how much he made just after receiving his journeyman plumbing license.

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[6] Lol is shorthand for laugh out loud.

[7] Patnode did not offer a date as to when this conversation took place.

[8] Employees who were not called to testify were not named by any party to respect their Sec. 7 rights

Patnode told him $26 per hour, and reassured the employee that he would hopefully get what was coming to him. (Tr. 95–96.) Patnode testified that he spoke about wages to five or six employees total while he was employed by Respondent. (Tr. 56, 61.)

Patnode testified on direct and cross examination that he did not recall talking about wages with Manager Lex Nielson or anyone else on the way to or from a job in Mt. Carmel, Utah, in December 2022, or ever telling Nielson that he was making $28 per hour. (Tr. 94, 104.)

Patnode testified that he believed he was making $26 per hour as of October 2022 based on the text exchange between him and Imlay and also based on his direct deposit paychecks. (Tr. 54–55; GC Exh. 3, GC Exh. 5.) Patnode testified that he did not receive written documentation about his pay each pay period. Rather, he testified that he received a check for $0 each pay period, which was available to pick up by the office where the daily log sheets were kept. Patnode testified that the checks were voided to $0 because the employees were paid by direct deposit into their bank accounts, so the paper checks reflected $0. (Tr. 54, 66; GC Exh. 5.)

Patnode further testified that he kept track of his wages and what he believed to be his raise to around $26 per hour in October 2022 by doing handwritten calculations on his bank statements (Tr. 54–55; GC Exh. 5.) Patnode testified to the calculations he did on his bank statement for the pay period ending October 7, 2022, and November 7, 2022, showing his wage (according to Patnode's calculations) to be $25.91 per hour. (GC Exh. 5, pp. 2 and 4.) Patnode testified that, based on his bank statements, he believed he was making $26 per hour as of October 2022 and up until the time he was fired on January 11. (Tr. 55–56.)

Patnode testified that he was unaware Respondent was only paying him $20 per hour[9] until after he was fired and he made a wage claim with the State of Utah in May.[10] Patnode testified that the voided paychecks available near the office were in the shape of a check and did not have a full page of detailed wage information and withholdings beneath it. Patnode testified that he only saw full page paystubs showing the hourly rate, overtime rate, and other financial information after he filed the wage claim in May. (Tr. 66–70; R. Exh. 1, pp. 6–18.) Patnode testified that he was not concerned that the paychecks themselves were voided to $0 each pay period because he knew he was receiving his pay through direct deposit and because he trusted Imlay. (Tr. 80.)

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under the Act.

[9] In fact, Respondent was paying Patnode $18 per hour for his first two pay periods before bumping him up to $20 per hour. (Tr. 79, R. Exh. 1, pp. 18 (September 9, 2022 pay period) and 17 (September 23, 2022 pay period).)

[10] Respondent makes much of the fact that Patnode filed a wage claim with the State of Utah, which was denied, appealed, and denied again. I admitted these state documents and cautioned the parties I would give them the weight they deserve. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67 (1997). As state agency documents, these wage claims and are admissible in this proceeding but they are certainly not controlling. Moreover, these state wage claim documents all post-date Patnode's discharge and other alleged 8(a)(1) allegations, so they are irrelevant as to the allegations before me. If anything, the only weight I give these wage claim documents is that Patnode believed and advocated that he was or should have been making $26 per hour as of October 2022. (R. Exh. 1, 4, 5, 6; Tr. 79, 87–92, 101–102.)

It is undisputed that Patnode never received any verbal or written discipline from Respondent during his employment until the day he was fired on January 11. (Tr. 104.)

b. Adams' testimony.

Adams, who is currently employed by Respondent as a journeyman plumber,[11] testified that he worked with Patnode only a handful of times. On one of those occasions, Adams testified that he and Patnode were driving from a job in Beaver, Utah, on Airport Road, and that Patnode stated he felt he should be paid more than $27 per hour. Adams testified that he did not recall what led to Patnode's statement and could not recall any context for Patnode's statement. (Tr. 122–123.) Adams further testified that he was upset by Patnode's statement because he (Adams) was making $22 per hour at that time and he felt that he (Adams) should be making more if Patnode was making $27 per hour.

Adams testified that he went straight to Imlay[12] to report the conversation he had with Patnode and told Imlay he should be making more if Patnode was making $27 per hour. Imlay told Adams he would have a talk with Patnode. Adams testified that he went to Imlay to report this conversation with Patnode about three weeks before Patnode was fired. (Tr. 127.) Adams testified that he did not threaten to quit after having this conversation about wages with Patnode, and that he did not believe Patnode was actually making $27 per hour. (Tr. 128).

Adams testified that he got along with Patnode "enough," and that he did not dislike him, but that he preferred not to work with him because Patnode liked to do things his own way. (Tr. 121–122, 129.)

c. Nielson's testimony.

Nielson testified that he is the plumbing manager for Respondent. As the plumbing manager for Respondent, Nielson testified that he oversees other employees, installs plumbing equipment and makes sure everyone stays on task, and teaches plumbing to the apprentices. (Tr. 109.) Nielson further testified that while he needs Imlay's approval for hiring, he needs no approval for firing. (Tr. 113.)

Nielson testified that he worked with Patnode on a couple of occasions on new construction jobs and a couple of occasions on service calls, and that Patnode often did the work "in his own way," resulting in work needing to be redone. (Tr. 110.) Nielson testified that he reported Patnode's performance to Imlay, but that he (Nielson) never disciplined Patnode. (Tr. 110–111, 114.)

Nielson testified that Patnode told him he was making $28 per hour while they were driving to a service call in Mt. Carmel, Utah. Nielson did not recall the date or context of this conversation, but he testified that he reported it to Imlay and told Imlay that he figured Patnode was lying because

[11] Adams testified that he has no authority to: hire, fire, direct, discipline, transfer, promote, or assign work to Respondent's employees. (Tr. 125–126.) Adams also testified that, at the time of the trial, he had been a journeyman plumber for 6 months. (Tr. 119.)

[12] Adams testified that it was Imlay who he spoke to about wages and Patnode's wages. (Tr. 122–123.)

he could not figure out why Patnode would be making that much money. (Tr. 111–112, 114.) Nielson testified that he could not recall when this wage conversation with Patnode took place. (Tr. 114–115.)

Nielson testified that "it really wasn't long after he started with us that he started telling everyone he was making a high amount of money." (Tr. 115.) Nielson testified that, at some point after he (Nielson) and Patnode had their conversation about wages in Mt. Carmel, Adams came to Nielson "and say he was wanting to quit" because Patnode told him (Adams) he was making a high amount of money which was more than Adams made, and Adams did not think it was fair. (Tr. 112, 116.) Nielson testified he went to Imlay to report that Adams told him he was threatening to quit based off what Patnode told Adams about his wage. (Tr. 112, 115–116.) Nielson acknowledged that he did not know Adams' wage at the time Nielson asserts Adams came to him to complain and threaten to quit. (Tr. 116–117.)

d. Imlay's Testimony

Imlay testified that no employees came directly to him to report or complain that Patnode was talking to them about wages generally or Patnode's wages. Imlay testified that he learned about these complaints from Nielson but that he could not recall the conversations or ballpark the dates. (Tr. 15, 21–23.)

Imlay, whose recall of dates and conversations was independently exhausted at the outset of his testimony, gave a sworn declaration ("Declaration") to his own counsel about these events on August 30, 2024. (GC Exh. 2.)[13] According to Imlay's Declaration, in relevant part:

> 7. Toward the latter part of 2022, an Imlay supervisor approached me telling me there was a problem amongst employees that was caused by Patnode.
>
> 8. The supervisor told me that (i) Patnode had been telling employees that he was making a high hourly wage, (ii) the statements seemed to be false, and (iii) that other plumbing employees were upset because the wage that Patnode said he was making made their wages feel unfair in comparison to the alleged wage.
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> 9. I personally investigated the allegations made by the supervisor.[14]
>
> 10. I reached out to the employees individually and asked them what Patnode had told them.
>
> 11. The first employee told me that, while driving home from a job in Beaver, Utah on approximately October 20, 2022 or October 21, 2022, Patnode told this plumbing employee that Patnode was making twenty-seven ($27.00) per hour.

[13] I note that Imlay's Declaration was prepared well after Patnode filed his charge with the Board as opposed to in response to the purported allegations by employees that Patnode was lying about his wages to his coworkers.

[14] Paragraphs 9, 10, 11, 13, and 14 of Imlay's Declaration bear directly on the General Counsel's complaint allegation 4(a) that Imlay interrogated employees about the concerted activities of other employees.

12. This statement by Patnode was patently false.

13. I was told that this statement was made in the context of Patnode claiming that all plumbers should be making at least as much as him (which he falsely claimed was $27.00 per hour) and that plumbers at Imlay do not make enough money.

14. The second employee told me that on the ride traveling back from a job in Mt. Carmel doing an outdoor gas line, Patnode told the employee that Patnode was making twenty-eight dollars ($28.00) per hour, and then asked how much this employee was making.

15. This statement was patently false.

19. Based on this investigation and statements from two (2) employees that verified that Patnode had lied to them, I terminated Patnode from his employment with Imlay because of his lying and deceit. (GC Exh. 2.)

Imlay testified that paragraphs 11 and 13 of his Declaration were in reference to Adams and that paragraphs 8 and 14 were in reference to Nielson. (Tr. 16–25, 48.)

According to Imlay, Neilson came to him in his office and advised that he deal with a problem with Patnode sooner rather than later in that Patnode was telling the guys that he was making a bunch more money than he probably was. (Tr. 17.)

Imlay testified that he then reached out to Adams, who told Imlay the statements recorded in paragraphs 11 and 13 of Imlay's Declaration. Imlay acknowledged his Declaration and testified that he had no reason to disagree with it, but he had no present recollection if Adams reported that Patnode said all plumbers should make as much as him. (Tr. 18–21.) Imlay did recall that when he reached out to Adams, it was after October 20, 2022. (Tr. 19.) Imlay also recalled that Adams told him Patnode told him (Adams) that the plumbers at Imlay did not make enough money. (Tr. 22.)

After reviewing his Declaration, Imlay testified that he recalled Neilson told him that Patnode told Nielson that he was making $28 per hour. (Tr. 25.) Imlay testified that he recalled little more than what he wrote in his Declaration other than Nielson telling him that the guys were getting upset because Patnode was telling them he was making high wages, and the guys were mad about it. (Tr. 30–31.) Imlay testified that he did not know for sure what Patnode's wage was in October 2022, but he believed it was $20 per hour. (Tr. 150.) Imlay testified that he did not know if there were any employees earning less than Patnode in October 2022. (Tr. 155.) Imlay stated, "To this day, I couldn't tell you what all the employees were making." (Tr. 38.)

Imlay testified that he remembers that after talking to Adams and Nielson about Patnode, he decided to fire Patnode. (Tr. 34.)

Imlay testified that Nielson had neither the authority to hire nor fire employees. Imlay surmised that Nielson "probably could" issue discipline. (Tr. 25–26, 30.) Imlay testified that he "does not know" if Adams was a supervisor at the time of Patnode's employment or if he had supervisory authority. (Tr. 17–18.) Imlay testified that Adams could not hire, fire, transfer, reward, promote, or

assign employees. Imlay further testified that any employee could write up any other employee or recommend another employee for a spot award. Imlay testified that all final decisions had to be cleared through him or his wife, Office Manager Angie Imlay.[15] (Tr. 26–28.) Imlay testified that Adams or Nielson could direct work, but Imlay himself makes the ultimate determinations as to how the work is to be done, and employees who do not follow directions are given a chance to explain themselves or to make corrections to their work. (Tr. 28–30.) Imlay testified that a plumbing supervisor is the same thing as a plumbing lead employee. Imlay testified that Adams and Nielson were Respondent's plumbing leads,[16] and they make more money than the other employees. (Tr. 30–31.)

Imlay testified that, after he was alerted by Nielson and talked to Adams and Nielson, he was concerned that these wage conversations Patnode was having was causing contention—that quite a few employees[17] were very upset to hear the amount Patnode told them he was making. (Tr. 32.)

e. Deal's Testimony

Spencer Deal (Deal) is a service plumber for Respondent and has been employed by Respondent for 7 years. For the last 2-plus years, Deal has been a journeyman plumber.

Deal testified that he worked with Patnode quite a bit from August 2022 through January. Deal testified that he was pleased with Patnode's work for the most part and that he did pretty decent work. (Tr. 131.)

Deal testified that he had his own private conversation with Imlay about wages in winter 2022–2023, shortly before Patnode was fired in January. Deal, a witness for Respondent, testified that Imlay told him not to talk about wages "because it can create hard feelings between other employees."[18] (Tr. 132, 134.) Deal further testified that when he came out of Imlay's office, Patnode asked him what the conversation with Imlay was about, and Deal told him what Imlay said. (Tr. 132.) Patnode then told Deal that he was making $26 per hour. Deal testified that he did not reveal his hourly wage to Patnode. (Tr. 132.) Deal testified that he only came forward to Imlay about his conversation with Patnode about 3 weeks prior to trial. (Tr. 133.)

[15] Angie Imlay testified that, as office manager, she receives the employees' paystubs from the accountant in full-page format with the hourly rate, hours worked, overtime, and all deductions printed on the full page. Angie Imlay testified that she prints out the full page and puts them in an envelope for each employee in the office and that she does not ever put just the voided check portion in the envelopes. Angie Imlay further testified that employees all get direct deposit, but they can also come to the office for the printout each pay period. (Tr. 137.) Angie Imlay also testified that Nielson is her brother-in-law and is married to her sister. (Tr. 138.) None of the employees (all called by Respondent) were asked questions about the condition of their paychecks upon receipt.

[16] A third lead, D'var Bulloch, was also a lead who worked in the shop and did not regularly interact with Patnode. (Tr. 31.)

[17] Aside from Adams and Nielson, Imlay did not recall the names of these other employees. (Tr. 32.)

[18] Imlay testified that he did not recall the conversation with Deal about wages or about not discussing wages. (Tr. 149.)

2. January 11 discharge and other alleged 8(a)(1)'s.

On January 11, Imlay called Patnode into the office**.** Patnode testified that he was getting ready to go out on a call when Imlay called him into the conference room alone. According to Patnode, Imlay told him that he did good work and people like having him around, but that some employees had come to him a few months ago to tell him that he (Patnode) was discussing wages. Imlay said, "we don't do that here." (Tr. 58–59.) Patnode testified that Imlay told him there was a strict company policy against discussing wages. Patnode further testified that Imlay told him he let the first two slide, but that recently, another employee had come to Imlay to tell him that Patnode was discussing wages, and Imlay said, "I can't let that go." (Tr. 59.) Imlay told Patnode "We have a strict company policy against discussing wages. It only breeds negativity." (Tr. 59.) Patnode testified that he then asked if he was being fired for discussing wages, to which Imlay replied Yes. Patnode stated that this was illegal. (Tr. 59.) Patnode testified that Imlay never said he was being fired for lying or because he talked to employees about making a higher wage than his actual rate. Rather, Imlay only told Patnode he was being fired for discussing wages. (Tr. 96–97.)

Imlay acknowledges that he alone made the decision to fire Patnode. (Tr. 14–15, 38.) Imlay testified that, after he called Patnode into the conference room on January 11, he told Patnode "I'm going to have to let you go for lying and for causing problems." (Tr. 145.) Imlay testified that the "causing problems" referred to the employees being upset because Patnode was discussing wages. (Tr. 152–153.) When asked if the conversations he had with Adams and Nielson were the basis for Imlay deciding to fire Patnode, Imlay testified "Yes . . . well, that was my *final reason*." When asked if there were more reasons, Imlay testified that he did not think it was relevant to the case, but that Patnode was not the greatest employee. (Tr. 34.)

Imlay then testified that while the main reason for firing Patnode was lying, his performance was also a contributing factor. (Tr. 34–36, 146.) Imlay testified that Patnode was not the greatest employee because he did things his own way and some of his work had to be redone. Regarding Patnode's work performance, Imlay testified that:

- He never documented Patnode's poor work performance anywhere;
- He never saw Patnode's "poor" work performance himself—it was reported to him by Nielson;
- He had no idea when or where these occasions of poor work performance occurred; and
- He never mentioned poor work performance or failure to follow instructions to Patnode at any time during his employment or during the January 11 discharge conversation. (Tr. 34–35, 146, 154.)

Moreover, Imlay testified that he had a poor memory of the discharge conversation with Patnode, but he remembers that he told Patnode he was being fired for lying. (Tr. 149.) Imlay never asked Patnode either during the January 11 discharge conversation or at any time prior if he was having wage conversations with anyone or if Patnode was telling people that he was making any particular wage. (Tr. 37.) Further, Imlay testified that he never considered the possibility that Adams or Nielson were mistaken or misheard Patnode or misunderstood Patnode. Rather, Imlay relied on Adams' and Nielson's reports exclusively to discharge Patnode for lying, though Imlay acknowledged that neither Adams nor Nielson would have had a reason to know Patnode's wage. (Tr. 37.)

According to Imlay, all he knew was that the employees were upset because Patnode was reporting that he was making a higher wage, and that "if he [Patnode] had told them his real wage, they would have had no reason to be angry." (Tr. 37–38.) However, Imlay also testified that "to this day, I couldn't tell you what all the employees were making." (Tr. 38.) Imlay maintained "I think it's not a great idea that everyone runs around touting their wages all the time, but I have no policy against talking about it." (Tr. 42–43.)

Immediately after Imlay fired Patnode, he sent out a Slack[19] message (GC Exh. 4) to all of Respondent's employees so they would know what had happened. Patnode also texted the Slack message to Patnode with an explanation that he sent the message to all the guys. (GC Exh. 3, pp. 3–4, Tr. 41–42.) Imlay's January 11 8:39 a.m. Slack message to all Respondent's employees stated:

> Hi it's me again.
> This morning I had to do something that I didn't like to do. I had to let someone go that I like very much as a person and love to have around. My policy on talking about wages has always been in place for a good reason from the beginning. Nothing but negative comes from it and it causes problems. Unfortunately this person felt like he is not the only problem and others may have been involved but he was the one who got the specific blame so I didn't have much of a choice to let him go unless I went back on my word which I cannot do with the company. I have to be fair across the board. This situation sucks and I hope it never happens again. Please if you have an issue with your wage come and talk to be. I promise I won't bite. Thanks[.] (GC Exh. 4.)

Patnode replied the same morning in relevant part to Imlay's text of the Slack message, stating "Actually it's positive to pay fair wages, because people wouldn't have complained in the first place . . ." (GC Exh. 3, p. 4.)

Imlay testified that he has never had a policy about talking about wages, but he acknowledged that his Slack message references his "policy on talking about wages has always been in place for a good reason" and that nothing but negative comes from it. (Tr. 42–43, GC Exh. 4.) Imlay also acknowledged that his Slack message to his workforce does not reference lying. Imlay testified that he is "bad at communicating" and that he used "horrible wording" in his Slack message. (Tr. 42, 44.)

Imlay testified that he never shuts people down when they come to him with a concern. (Tr. 143, 151.) Further, Imlay testified that he was upset that Patnode talked to other employees about wages instead of going directly to him. (Tr. 152.)

II. ANALYSIS

A. CREDIBILITY

[19] Slack is a communications method similar to texting.

Evaluating certain issues of fact in this case requires an assessment of witness credibility. Credibility determinations involve a consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C.Cir. 2003); see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Pain Relief Centers, P.A.*, 371 NLRB No. 70 at p. 2, fn. 4, 14 (2022), enf'd. 2023 WL 5380232 (4th Cir. 2023) ("detailed account" of meeting provided by employee witnesses credited where Respondent witnesses "skipped almost all of the moment-by-moment details" except for legally significant statements); *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In addition, the Board has developed general evidentiary principles for evaluating witness testimony and documentary evidence. For example, the Board has determined that the testimony of an employer respondent's current employee which is contrary to the respondent's contentions in the case may be considered particularly reliable, in that it is potentially adverse to the employee's own pecuniary interests. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152, fn. 2 (2014); *Flexsteel Industries*, 316 NLRB 745 (1995), *aff'd*, 83 F.3d 419 (5th Cir. 1996); *Shop-Rite Supermarket*, 231 NLRB 500 (1977).

As a general matter, in making credibility resolutions here I have considered the demeanor of the witnesses, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are addressed and incorporated into my analysis herein.

I find that Patnode was an overall generally credible witness. He provided detailed testimony about conversations he had with his coworkers and with Imlay. I credit his explanation that he relied on his bank statements and direct deposits for his understanding of what his wages were from the time he was hired and that he trusted Imlay. To the extent that Patnode was mistaken about his wages, I find that it was just that—a mistake—as opposed to a lie or a malicious attempt to mislead his coworkers. Respondent presented no evidence that Patnode acted with malice, and I find none.

I find that Deal and Adams were overall generally credible witnesses. Deal, in particular, provided detailed, specific testimony, which was consistent on direct and cross-examination. He candidly answered questions about his own conversation with Imlay about wages, even though Imlay was in the hearing room. In addition, as a current employee of Respondent who testified in a manner adverse to Respondent's interests, and to his own economic interests, his testimony is considered particularly reliable pursuant to the caselaw discussed above. *Avenue Care & Rehabilitation Center*, 360 NLRB at 152, fn. 2; *Flexsteel Industries*, 316 NLRB at 745; *Shop-Rite Supermarket*, 231 NLRB 500 (1977).

I found Adams to be a partially reliable witness. He provided clear testimony about a conversation he had with Patnode about wages, but he could not provide any context for the conversation. Adams also failed to testify regarding a part of the conversation which Imlay recalled, which was that Patnode told Adams that he felt that all the plumbers at Respondent did not make enough money. Therefore, I find that Adams' testimony had a modicum of reliability, but I also find it was intentionally incomplete.

I did not find Nielson to be a credible witness. Nielson's testimony that Adams reported to him that he was threatening to quit because of Patnode's discussion about his wage was directly refuted by Adams himself. Moreover, Nielson's testimony that he reported Adams' concerns about Patnode's wage to Imlay was refuted by Adams, who testified that he went directly to Imlay to report the conversation he had with Patnode about wages. Moreover, as Imlay's brother-in-law, Nielson had reason to testify in lockstep with Imlay.

That leaves Imlay. Imlay's testimony was replete with general information, third-hand information, and an extremely poor recollection of events. Almost all of Imlay's testimony was not from his firsthand knowledge or involvement, making it unreliable. Imlay could not recall what led him to believe that Patnode "lied" about his wages and he relied almost entirely on his Declaration for his version of the events which led to Patnode's discharge. Imlay, the owner of Respondent, testified he was unsure of company policies, uncertain of the wages he paid to his employees, and uncertain of the conversations he purportedly had with employees which led to Patnode's discharge. Such testimony is inherently unreliable. Much of Imlay's testimony had to be elicited from Imlay's Declaration after his recollection of events was exhausted, and the Declaration itself was recorded fifteen to eighteen (15–18) months after the events in question took place, so the written declaration itself is not wholly reliable.

In addition, Imlay contradicted himself throughout his testimony regarding the reason(s) he discharged Patnode. Respondent's answer to the complaint, Imlay's Declaration and Imlay's initial testimony all focused on Patnode lying about his wage to other employees as the sole reason for the discharge. However, Imlay then pivoted while he was on the witness stand and testified that while "lying" was the main reason, he also fired Patnode for poor work performance. Imlay provided no support for this new reason for firing Patnode. Imlay testified that he never witnessed or documented any poor work performance by Patnode himself, or mentioned it to Patnode verbally or in writing either during his employment or during the discharge conversation.

Moreover, Imlay's Slack message that he sent to the entire workforce right after he discharged Patnode contradicted his reasoning about both lying and poor work performance. Imlay's Slack message about Patnode specifically states that he has a policy about wages, that employees are not to discuss wages, that nothing but negative comes from it and it causes problems, and to come to him if there is an issue with wages. The Slack message does not mention lying. The Slack message does not mention poor work performance. The Slack message does mention discussion about wages and that it is a bad idea. Imlay's Slack message flatly contradicts all of his testimony about his policies, his conversations with employees, and his purported legitimate non-discriminatory reason(s) for Patnode's discharge.

When spurred by counsel to explain the disparities involved, Imlay attempted several impromptu revisions of conversations, interpretations of his prior testimony, and the "true" meaning of the pertinent Slack message. Such circumstances cast substantial doubt on the reliability of Imlay's testimony.

B. SUPERVISORY STATUS

Though Respondent does not argue on brief that Adams was a supervisor under the Act, I find it necessary to pass on whether Adams was a statutory supervisor from August 2022 through January 2023 based on the evidence presented. Individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the supervisory functions listed in Section 2(11) of the Act (i.e., the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust grievances of other employees); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. The party asserting supervisory status has the burden of establishing such status by a preponderance of the evidence. Conclusory evidence does not satisfy that burden. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 888–889 (2014); see also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006).

During trial, Imlay testified that a supervisor was the same as a lead and that all final authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline vested in him alone or in he and his wife to make work assignments. (Tr. 25–30, 104.) The record failed to show that Adams could make any final decision or even recommendations free from Imlay's final decision, and Imlay testified that all final decisions were his. (Tr. 30.) As to Adams, Imlay testified that he "does not remember" if Adams had supervisory authority and does not know if Adams was a supervisor during the time in question. (Tr. 17–18.) Imlay also testified that any employee could issue discipline to any other employee. (Tr. 26.)

Based on the evidence, Respondent failed to argue or carry its burden to show that Adams was a supervisor under the Act during the relevant time period of August 2022 through January 2023. I find that Adams was an employee under the Act.

C. INDEPENDENT 8(a)(1) VIOLATIONS

1. 8(a)(1) case law.

Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Among those rights is the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .." The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and

condition of employment." *Triana Industries,* 245 NLRB 1258, 1258 (1979). In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most critical element in employment," are "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988).

The Board applies a totality-of-the-circumstances test to determine whether an interrogation is coercive of employees' rights under the Act. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 17 (2021), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom; *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under this test, the Board considers a variety of factors including, among other things, the nature of the information sought (especially if it could result in action against individual employees), the position of the questioner in the company hierarchy, the place and method of interrogation, and the truthfulness of the employee's reply. *Rossmore House*, supra; *Vista Del Sol Healthcare*, 363 NLRB 1193, 1208 (2016); *Parts Depot, Inc.*, 332 NLRB 670, 673 (2000), enfd. 24 Fed.Appx. 1 (2001). The Board's test utilizes an objective standard and is not based on the subjective reaction of the employee. *Multi-Ad Services, Inc.*, 331 NLRB 1226 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

An employer unlawfully threatens employees by statements that reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *KSM Industries*, 336 NLRB 133, 133 (2001). The Board's standard for determining whether an unlawful threat was made is "whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D. Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003). The intent of the speaker in making the statement and the actual effect the statement has on the listener are immaterial. *Smithers Tire*, 308 NLRB 72, 72 (1992); *Puritech Industries*, 246 NLRB 618, 622–623 (1979). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *Concepts & Designs*, 318 NLRB 948, 954–955 (1995). Accordingly, the context in which the alleged threat was communicated is critical to determining how a reasonable employee could interpret the particular words spoken. *Cintas Corp. No. 2*, 372 NLRB No. 34, slip op. at 4 (2022). This includes instructions to report terms and conditions of employment or work-related concerns to supervisors. "The Board has long held that it is unlawful for employers to prohibit employees from discussing wages among themselves." *Alternative Energy Applications, Inc.*, 361 NLRB 1203 (2014).

Likewise, the Board's standard for assessing challenges to work rules is set forth in *Stericycle, Inc.*, 372 NLRB No. 113 (2023). The General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. Id. slip op. at 2. The Board interprets the rule "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." Id. The employer's intent is immaterial. Id. "Rather, 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." Id. Even a facially neutral rule is unlawful where it is promulgated in response—or applied—to restrict the exercise of Section 7 rights. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

An employer's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 rights to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment and is a violation of Section

8(a)(1) of the Act. See *Automatic Screw Products Co.*, 306 NLRB 1072 (1992) (respondent violated Sec. 8(a)(1) by verbally promulgating and maintaining rule prohibiting employees from discussing their salaries and by disciplining them for violating the rule); *Leather Center, Inc.*, 312 NLRB 521, 527 (1993) (rule barring employees from any discussion of wages unlawful). The Board and courts have routinely held that whether a rule prohibiting wage discussion "was promulgated orally rather than written in an employee handbook, for example, makes no difference to the Section 8(a)(1) analysis." *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 538 (6th Cir. 1996), (finding the employer prohibited wage discussion via solely orally promulgated rule).

2. Interrogation of Adams

I find that Respondent violated Section 8(a)(1) of the Act when Imlay interrogated Adams about the wage discussion he had with Patnode. Imlay's Declaration makes clear that Imlay questioned Adams about what Patnode told Adams about wages. Adams admitted that he spoke with Imlay about his wage conversation with Patnode. Imlay testified that Adams also told him Patnode said that Respondent's plumbers did not make enough money. (Tr. 22.) Whether Imlay approached Adams or Adams approached Imlay is not central to the inquiry. What is central is that, when they spoke privately, the owner of Respondent questioned an employee about what another employee (Patnode) told him about a core term and condition of employment-wages. Discussion of wages is protected concerted activity "even if only one employee is the speaker while the other is merely a listener." *Belle of Sioux City, L.P.*, 333 NLRB 98, 101 (2001) (emphasis added). Imlay spoke alone with Adams to collect information about what Patnode said about wages. This meets the objective *Rossmore House* test of interrogation under the Act, supra. I credit Adams that the interrogation took place around January, a few weeks before Patnode was fired, rather than in October 2021, since Imlay had no independent recollection of the events and Imlay's Declaration was taken over a year after the events in question.

3. Slack message.

I find consistent with the facts and my credibility findings and Board law set forth supra, that when Imlay sent out the Slack message on January 11 to all of Respondent's employees and texted a copy to Patnode, Respondent (by Imlay) violated Section 8(a)(1) of the Act by:

a. promulgating and maintaining a rule prohibiting employees from talking about wages;
b. threatened employees with discharge for discussing wages; and
c. instructed employees to discuss wage concerns only with Imlay.

Imlay's Slack message promulgated and maintained a rule prohibiting employees from talking about wages: "My policy on talking about wages has always been in place for a good reason from the beginning. Nothing good comes from it and it causes problems."[20]

Imlay's entire Slack message also objectively threatened employees for discussing wages. It was sent immediately after Imlay fired Patnode, mentions his policy that employees are not to discuss

[20] Complaint para 4(b)(i).

wages, emphasizes that it is negative and causes problems, and then ends with "This sucks and I hope it never happens again."[21]

Imlay's Slack message also objectively instructed employees to discuss their wage concerns only with him: "Please if you have an issue with your wage come and talk to me. I promise I won't bite."[22]

The Board finds that an employer statement even just *requesting* or *admonishing* employees not to discuss wages with one another, without a compelling business justification, is a clear violation of the Act. Respondent provided no business justification for Imlay's statements. See *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993) (finding an employer's warning that employees "shouldn't" discuss wages among one another violated Sec. 8(a)(1) of the Act); *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989) (finding rule "requesting" that employees not discuss their wages with each other unlawful); *Waco, Inc.*, 273 NLRB 746, 747–748 (1984) (finding that "admonishing" employees not to discuss wages among themselves violates the Act).

The Slack message reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. For all of the reasons set forth above, I find that Respondent violated Section 8(a)(1) of the Act as alleged by the General Counsel by sending the January 11 Slack message to its employees.

D. JANUARY 11 DISCHARGE OF PATNODE AND PROMULGATION OF PROHIBITION AGAINST DISCUSSING WAGES

1. 8(a)(1) discharge case law.

It is a violation of Section 8(a)(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. Section 158(a)(1). The framework for analyzing Section 8(a)(1) discharges is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that the employee's protected activity was a motivating factor in the employer's decision. The requisite elements to support a finding of discriminatory motivation are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019).

To support its initial burden under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that animus was a substantial or motivating factor in the adverse employment action. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d. Cir. 2009).

Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of

[21] Complaint para 4(b)(ii).

[22] Complaint para 4(b)(iii). Respondent admits to this statement in its answer but denies that it violates the Act. I disagree.

discriminatory motivation may include evidence of: suspicious timing; false or shifting reasons provided for the adverse employment action; deviating from a regular practice of adequately investigating alleged employee misconduct; tolerance of behavior for which the employee was allegedly fired; and/or disparate treatment of the employee. See *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 3 (2020); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). The evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019).

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316, NLRB 771 (1995); *Manno Electric, Inc*. 321 NLRB 278, at 280 fn. 12 (1996).

The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. "[W]here an employer's purported reasons for taking an adverse action against an employee amount to a pretext—that is to say, they are false or not actually relied upon—the employer necessarily cannot meet its *Wright Line* rebuttal burden." *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails, by definition, to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services,* 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," i.e., the employer avers that, even if an invalid reason played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB,* 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Patnode's discharge and promulgation of rule against discussion of wages.

Initially, the General Counsel has shown that Patnode participated in protected concerted activity when he discussed wages with his coworkers. The Board has long held that employee wage discussions are "inherently concerted," and as such are protected, regardless of whether they are engaged in with the express object of inducing group action. *Alternative Energy Applications*, 361 NLRB 1203, 1206 fn. 10 (2014) (wage discussions between employees are "inherently concerted" and therefore protected, regardless of whether the discussions are with the express object of inducing group action); *Automatic Screw Products Co.*, 306 NLRB 1071 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); See also *Trayco of S.C., Inc.,* 297 NLRB 630, 634–635 (1990), enfd. denied mem. 927 F.2d 597 (4th Cir. 1991) (contemplation of group action not required when employee discussion is about wages); *Whittaker Corp.,* 289 NLRB 933, 933 (1988) (particularly with respect to wage discussions, "object of inducing group action need not be express").

The General Counsel has shown that Respondent was aware of Patnode's protected concerted activity, as Imlay admitted that Adams and Nielson came to him around winter 2022 to tell him that Patnode was discussing his wage. Imlay also admitted Adams told Imlay that Patnode told him that all of Respondent's plumbers should be making more money. (Tr. 22.)

The General Counsel has also shown by direct and circumstantial evidence that Imlay had animus toward Patnode's discussion of wages in any form. When Imlay fired Patnode on January 11, he told him there was a strict company policy against discussing wages and that it only breeds negativity. (Tr. 59.) Imlay then sent out a company-wide Slack message consistent with what he told Patnode—that there is a company policy on discussing wages and that doing so only cause problems and nothing but negativity comes from it. These verbal and written statements evidence Respondent's animus and unlawful motive. Furthermore, Deal testified that just a few weeks before Imlay fired Patnode, Imlay told Deal not to talk about wages "because it can create hard feelings between other employees." (Tr. 132, 134.) This provides circumstantial evidence that Imlay did not want any employees discussing wages with anyone but him.

> [D]issatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action. The possibility that ordinary speech and discussions over wages on an employee's own time may cause 'jealousies and strife among employees' is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights.
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> *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976), enf. 217 NLRB 653 (1975).

In light of all the above, I find that the General Counsel established a prima facie case of discrimination when Respondent fired Patnode. Further, I find that, in the course of the discharge conversation with Patnode, Imlay also promulgated a rule prohibiting employees from discussing wages.

Thus, the burden shifts to Respondent. In its defense, Respondent asserts that it did not fire Patnode because of his discussion of wages, or even of his wage, but because he lied about his wage to other employees. Respondent asserts that lying is not protected by the Act, and Patnode told Adams he was making $27 per hour, and he told Nielson he was making $28 per hour. Respondent contends that Patnode owed it a duty of truthfulness and violated that duty by lying.[23] For that proposition it cited *Earle Indus., Inc. v. NLRB* 75, F. 3d 400 (8th Cir. 1996). This case is inapposite to the facts here. In *Earle*, the 8th Circuit denied enforcement of the Board's order to reinstate a discharged employee on the grounds that the employee engaged in manipulative and calculated dishonesty that removed her protection from the Act. I have already found that Patnode did not deliberately lie about his wages, nor has any party asserted that this discharge be analyzed pursuant to

[23] Though it attempts to distinguish an ALJ Decision in *Executive Press*, 2024 WL 4869235 (2024) (JD 34-24), Respondent misses the mark. That ALJD was very comparable to the instant case, wherein the judge found that Respondent's reliance on the employee's lying was misplaced and instead demonstrated false reasons for the adverse action.

an *Atlantic Steel* outburst theory akin to what the court did in the *Earle* analysis, and I decline to do so here. Patnode was not discharged while during a discussion of his wages or during an outburst.[24]

I find that Respondent abjectly failed to meet its burden under the Act.[25] Respondent's body of evidence proves to be a pretext for discharging Patnode for discussing wages. Imlay provided false reasons for the discharge, a failure to investigate whether Patnode engaged in the alleged misconduct, and shifting explanations as to why he discharged Patnode. See *ManorCare Health Services-Easton*, 356 NLRB 202, 204 (2010); *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

First, as discussed above, I find that Patnode was mistaken about his wages[26]. I credit Patnode that he did not maliciously lie to his coworkers about his wage rate. Imlay testified that he was upset with Patnode for discussing his wages because he was "pissing off" other employees and causing a disruption by talking about making more than other employees and lying about his wages. (Tr. 37.) Board law is clear that an employee's Section 7 activity does not lose the protection of the Act merely because it angers fellow employees or superiors. *St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB 761, 762 (2000), enf. denied 268 F.3d 575 (8th Cir. 2001); see also *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) ("[l]egitimate managerial concerns to prevent harassment do not justify discipline on the basis of the subjective reactions of others to [employees'] protected activity"). An employee's statements do not lose the Act's protection as long as they are not said in an offensive or threatening manner. *Frazier Industrial Co.*, 328 NLRB 717, 718–719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). There is no evidence that Patnode engaged in any offensive or threatening conduct that would remove his statements that he was making $26 per hour from the protection of the Act.

Second, the record evidence shows that Imlay did not conduct any independent investigation about Patnode's belief that he was making $26 per hour or that he had even spoken to other employees about wages. To the contrary, Imlay admitted that he relied solely on the word of Nielson, which then led him to speak to Adams. Adams, however, contradicted Imlay's testimony on this point and testified that he went directly to Imlay after talking about wages with Patnode—including a discussion wherein Patnode stated he believed all of Respondent's plumbers should be making more money. Furthermore, Imlay admitted that he did not talk to Patnode about these alleged conversations before he made the decision to fire him. Imlay also admitted that he had no idea what

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[24] In *Atlantic Steel*, the Board stated that whether otherwise protected activity is sufficiently egregious to lose the Act's protection depends on a balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, supra; see also *Lion Elastomers LLC*, 371 NLRB No. 83 (2001), overruling *General Motors*, 369 NLRB No. 127 (2020); *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 fn. 2 (2018), enfd. 763 Fed.Appx. 5 (2nd Cir. 2019), *Postal Service*, 360 NLRB 677, 677 fn. 2 and 683 (2014).

[25] In its brief, Respondent fails to address or even mention Imlay's January 11 Slack communication.

[26] I credit Patnode over Adams and Neilson, but even if Patnode did "talk up" his hourly rate by $1–2 dollars per hour, Respondent still failed to present evidence that he did so in an objectively offensive or threatening manner even if his coworkers subjectively may not have reacted well to it. See *Consolidated Diesel*, supra.

any of his employees were actually making as an hourly rate during the October 2022 through January 2023 time period, so his insistence that Patnode was lying is based on hearsay and is otherwise unpersuasive.

Third, Imlay engaged in shifting defenses for Patnode's firing while he was on the witness stand. Patnode testified that Imlay never mentioned lying during the discharge conversation—only the discussion of wages with other employees. Imlay testified that he did tell Patnode he was lying and that he was fired for lying about his wages. However, lying was not mentioned in the Slack message he sent to all employees immediately after he discharged Patnode. Imlay's only explanation of this omission during his testimony was that he is a poor communicator. On the witness stand, Imlay blamed, at least in part, Patnode's purported poor work performance as a contributing factor to his discharge. However, there no record evidence of Patnode's poor work performance, no verbal or written warnings issued to Patnode for poor performance, no mention of Patnode's performance in the Slack message, and Imlay's testimony admitting that he never raised this issue to Patnode or at any time before trial. Respondent's proffered reason(s) for Patnode's discharge on January 11 fails and instead proves pretext.[27]

The General Counsel proved, and I find, that on January 11, Respondent violated Section 8(a)(1) by discharging Patnode for discussing wages with his coworkers, and that Respondent violated Section 8(a)(1) by promulgating the rule to Patnode not to discuss wages with coworkers.

E. RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent contends that the complaint should be dismissed in its entirety for a variety of reasons, including untimely charges under Section 10(b) of the Act, that reinstatement and backpay are not to be ordered under Section 10(c) of the Act because the discharge was for cause, and that the complaint violates Respondent's free speech under Section 8(c) of the Act.

No evidence was presented that the charge was untimely filed in violation of Section 10(b) of the Act. Moreover, in that I have found that Respondent promulgated and maintained a rule prohibiting the discussion of wages in violation of Section 8(a)(1) of the Act, interrogated, threatened, instructed employees not to discuss wages or only to discuss wages with Imlay in violation of Section 8(a)(1) of the Act, and fired Patnode in violation of Section 8(a)(1) of the Act, there can be no valid Section 8(c) or 10(c) defenses to those actions and I therefore deny those affirmative defenses.

Moreover, Respondent asserts on brief, though there was no evidence presented at trial and no caselaw to support its proposition, that "it is impossible" that I order reinstatement or backpay because Patnode and Respondent did not have a meeting of the minds on Patnode's wage. I reject this argument and defense. Patnode was employed by Respondent from August 2022 through January 2023. Imlay admits that Patnode was an employee of Respondent during that time period, and that he performed work during that time period, and that he was paid by Respondent during that

[27] Since Respondent's defenses are pretextual, the legal inquiry ends. However, even in examining Respondent's burden under *Wright Line*, I find that Respondent presented no evidence that it would have fired Patnode in the absence of his discussion of wages. Respondent presented no comparator evidence for any other discipline or discharge that it issued for any reason.

time period. All of the record evidence substantiates that Patnode was employed by Respondent. Respondent's attempt to assert that Patnode cannot be reinstated or awarded backpay because there was no employment agreement, or because Patnode believed he was making a higher wage than he was actually making, is unavailing. As with any discriminatee, backpay is to be calculated based on the hourly rate Patnode was making on the date he was unlawfully discharged.

III. CONCLUSIONS OF LAW

1. Respondent Imlay is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Owner Kadin Imlay is a supervisor within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.
3. Around January 2023, Respondent, by Owner Kadin Imlay, violated Section 8(a)(1) by interrogating employees about wages.
4. On January 11, 2023, by Owner Kadin Imlay, Respondent violated Section 8(a)(1) by promulgating and maintaining a rule in writing by text that employees cannot discuss wages.
5. On January 11, 2023, by Owner Kadin Imlay, Respondent violated Section 8(a)(1) by threatening employees by text with discharge for discussing wages.
6. On January 11, 2023, by Owner Kadin Imlay, Respondent violated Section 8(a)(1) by instructing employees by text to discuss wages only with him.
7. On January 11, 2023, by Owner Kadin Imlay, Respondent violated Section 8(a)(1) by promulgating and maintaining a rule verbally that employees cannot discuss wages.
8. On January 11, 2023, by Owner Kadin Imlay, Respondent violated Section 8(a)(1) by discharging employee Tristan Patnode for talking about wages.
9. The above unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.
10. No other violations are found.

IV. REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER[29]

Respondent Imlay Plumbing, Inc., its officers, agents, successors, and assigns, shall:

[28] 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.

1. Cease and desist from

a. Discharging employees for discussing wages with other employees.
b. Interrogating employees about their discussion of wages with other employees.
c. Promulgating and maintaining a rule prohibiting employees from discussing wages with other employees.
d. Threatening employees for discussing wages with other employees.
e. Instructing employees to discuss wages or other protected concerted activities only with Respondent's owner.
f. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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

b. Make whole Tristan Patnode for any loss of earnings and other benefits in the manner set forth in the Remedy section of this decision.

c. Compensate Tristan Patnode for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for Tristan Patnode.

d. File with the Regional Director for Region 27, within 21 days of the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 form reflecting the backpay award.

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

f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designed by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

g. Post at its Cedar City, Utah facility copies of the attached notice marked "Appendix." Copies of the Notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by Respondent, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, in a manner that can be accessed by Respondent's employees. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

employees and former employees employed by Respondent at its Cedar City, Utah facility at any time since January 11, 2023.

h. Notify the Regional Director in writing within 21 days from the date of this Order what steps Respondent has taken to comply.

Dated, Washington D.C. April 10, 2025

Lisa Friedheim-Weis

Lisa Friedheim-Weis
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

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

WE WILL NOT tell you verbally or in writing that we have a policy against talking about wages.

WE WILL NOT ask you whether you or other employees have discussed wages.

WE WILL NOT threaten you with discharge if you engage in activity with other employees regarding your wages, hours, and working conditions.

WE WILL NOT coercively encourage you to discuss with us problems you have about your wages or other terms and conditions of employment.

WE WILL NOT discharge employees because they exercise their right to discuss wages, hours and working conditions with other employees and **WE WILL NOT** advise employees that the reason an employee was discharged was because he talked about wages.

WE WILL offer **TRISTAN PATNODE** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL remove from our files all references to the discharge of **TRISTAN PATNODE** and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL pay **TRISTAN PATNODE** for the wages and other benefits he lost because we discharged him.

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

IMLAY PLUMBING, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

Bryon Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-314575 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (720) 598-7398.