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

AMAZON.COM SERVICES LLC		
and	**Case No.**	**29-CA-296817**
		29-CA-297398
AMAZON LABOR UNION		**29-CA-298749**
		29-CA-300805
and		**29-CA-307076**
		29-CA-307366
YACKISHA NEBOT LOPEZ, an Individual		**29-CA-307667**
		29-CA-308068
and		**29-CA-308071**
		29-CA-308509
CONNER SPENCE, an Individual		**29-CA-311756**
		29-CA-312516
Brent Childerhose, Esq. and		**29-CA-317210**
Matthew Jackson, Esq.		**29-CA-331028**
for the General Counsel		
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for the Charging Party Union.		

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. In late-March 2022,[1] the Amazon Labor Union (the "Union" or "ALU") won an election to represent a bargaining unit of employees employed by Amazon.com Services LLC (the "Respondent" or "Amazon") at the JFK8 facility in Staten Island, New York. The Respondent filed objections to the election and has refused to bargain with the Union. (Jt. Exh. 1) The Board rejected the Respondent's objections and denied review of the Union's certification. *Amazon.com Services LLC*, 373 NLRB No. 92 (2024). The Second Amended Consolidated Complaint (the "complaint") alleges that the Respondent violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the "Act"). The Respondent allegedly violated 8(a)(1) by refusing to honor the *Weingarten* requests of certain unit employees. The Respondent allegedly violated 8(a)(3) by suspending and discharging Pasquale Cioffi and suspending Derrick Palmer because of their union support and activities. The Respondent allegedly violated 8(a)(5) by unilaterally changing certain terms and conditions of employment of unit employees without providing the Union notice and an opportunity to bargain over those changes, refusing to bargain over certain disciplinary actions upon request by the Union, and failing to furnish the Union with requested information.

[1] All dates herein refer to 2022, unless otherwise stated.

The Respondent initially contends that the complaint should be dismissed in its entirety because Board members and administrative law judges are unconstitutionally insulated from removal. However, the Board has rejected such defenses. *See Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel Boston*, 373 NLRB No. 142, slip op. at 1, fn. 1 (2024).

I recommend dismissal of certain allegations without lengthy discussion herein. In a posthearing brief, the General Counsel represented that they are no longer pursuing the allegation that the Respondent eliminated paid leave for unit employees who tested positive for Covid. (G.C. Brf. p. 44, fn. 15) I recommend dismissal of that allegation. The General Counsel urges me to recommend that the Board overrule *800 River Road Operating Company, LLC d/b/a Care One at Milford*, 369 NLRB No. 109 (2020) ("*Care One*") and find that the Respondent violated 8(a)(5) by unilaterally disciplining and/or discharging employees Cioffi, Simone Peele, Sharon Bogat-Weathley, Connor Spence, and Michelle Valentin Nieves. However, I have no authority to overturn Board law and recommend dismissal of those allegations.

I recommend dismissal of certain allegations for reasons discussed at length below. The Respondent did not violate 8(a)(1) by denying *Weingarten* rights to Spence on about October 23, 2023. The Respondent did not violate 8(a)(3) by suspending and discharging Cioffi because of his union support and activities. The Respondent did not violate 8(a)(5) by unilaterally changing its Mobile Phone Policy and eliminating time off for unit employees awaiting Covid test results.

I do not rule herein on the General Counsel's contention, as raised in its posthearing brief, that the Respondent refused to bargain over the discharge of Cioffi and Bogat-Weathley after the Union requested such bargaining.[2] In my opinion, the Respondent did not have sufficient notice of these allegations, which are better addressed, if at all, upon exception.

I recommend the finding of certain violations for reasons discussed at length below. The Respondent violated 8(a)(1) by denying *Weingarten* rights to Spence (on about October 14), Danielle Hayden, Yackisha Nebot Lopez, and Palmer. The Respondent violated 8(a)(3) by suspending Palmer with pay pending investigation for 10 weeks from December 7 to February 15, 2023, because of his union position, support, and activities. The Respondent violated 8(a)(5) by unilaterally terminating its policy and practice of notifying JFK8 employees of positive Covid tests and implementing an Off-Duty Access Policy. The Respondent also violated 8(a)(5) by failing to furnish information requested by the Union on October 5 and February 19, 2023.

The charges were filed in this case between August 2022 and November 2023. The Regional Director for Region 29 issued the complaint on February 1, 2024, and the Respondent filed an answer thereto on February 15, 2024. The hearing was tried before me in Brooklyn, New York on April 9-11, 15-18, and June 6, 2024. At hearing, the parties also introduced into evidence a Joint Stipulation of Facts. (Jt. Exhs. 1-5)

[2] The complaint does not allege that the Union requested bargaining over the discharges of Cioffi or Bogat-Weathley. (G.C. Exh. 1(AAA) ¶¶ 25-26) The complaint does allege that the Union requested bargaining and the Respondent refused to bargain over disciplines issued to Spence and Michelle Valentin Nieves and the discharge of Simone Peel. (G.C. Exh. 1(AAA) ¶¶ 30-32, 39-40) The General Counsel did not argue in its brief that the Respondent failed to honor Union requests to bargain over the actions taken against Spence, Valentin Nieves, and Peel, and I do not recommend a finding of such violations herein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by the General Counsel, the Respondent, and the Union, I render these

FINDINGS OF FACT[3]

JURISDICTION & LABOR ORGANIZATION STATUS

The Respondent admits it satisfies the commerce requirements for jurisdiction and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, I find that this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

In its answer to the complaint, the Respondent claimed it was without sufficient information to admit or deny the allegation that the ALU is a labor organization within the meaning of Section 2(5) of the Act. The Respondent did not assert or argue in its posthearing brief that the ALU is not a labor organization. Based upon evidence in the record of this case and additional factual findings in *Amazon.com Services LLC*, 373 NLRB 136, slip op. at 24, 43 (2024), of which I take administrative notice, and for reasons stated in that decision, I find that the ALU is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

The Respondent's Staten Island Facilities

The Respondent operates two facilities, JFK8 and LDJ5, across the street from each other in Staten Island, New York. JFK8 is a fulfillment center warehouse and LDJ5 is a sortation center. (Tr. 237, 677)

In 2022, the general manager of JFK8 was Felipe Santos and his assistant general manager was Zachary Marc. The general manager is the highest ranking manager at the facility. (Tr. 682) The Respondent categorizes personnel in a hierarchy of tiers or levels. The higher the tier the higher the person is in the organizational structure. Rank-and-file associates are tier 1 and process assistants ("PAs") are tier 3. Area managers referenced herein are tier 4 or 5 and operations managers referenced herein are tier 6 or 7. (Tr. 220, 255, 356-357, 517-518, 605, 627, 677, 682, 824)

The Respondent tracks the production rates of employees, who can be disciplined for low production. (Tr. 198-199, 202-203) Employees' production rates can be affected by the product they work with as small items are generally processed faster than larger items. (Tr. 258)

[3] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent evidence of a fact is trustworthy and uncontested, the fact is generally stated without reference to the underlying evidence. A credibility determination may be based on various factors, including demeanor, internal testimonial consistency, testimonial consistency with other evidence, the weight of the respective evidence, established or admitted facts, inherent probabilities, capacity for accurate recollection, bias, 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).

The Union and Representation Cases 29-RC-288020 and 29-RC-290053

On April 21, 2021, the Union was established and began an organizing campaign at JFK8. *Amazon.com Services Inc.*, 29-CA-277198, slip op. at 8 (Nov. 21, 2023).[4] The Union founders included JFK8 employees Christian Smalls, Derrick Palmer, and Connor Spence. Id. The Union later began an organizing campaign at LDJ5. (Tr. 237) In October 2021, an internal Union election was conducted to appoint Union officers. Id. Smalls was elected president, Palmer was elected vice president of organizing, and Spence was elected vice president of membership. Id. Palmer remained the Union vice president of organizing until May 2023. (Tr. 62) During the organizing campaigns, the Union erected a tent at the bus stop on the street between JFK8 and LDJ5 for organizing activities, including handing out union literature, talking to employees in support of the Union, and holding rallies. Id. slip op. at 8-9. (Tr. 63-64, 99-100, 161, 220, 242, 366, 769)

On December 22, 2021, the Union filed a petition for representation in Case 29-RC-288020, seeking to represent a bargaining unit of "[a]ll hourly full-time and regular part-time fulfillment center associates employed at the [Respondent's] JFK8 Building located at 546 Gulf Avenue, Staten Island, NY 10314." (J. Exh. 1 ¶ 1) The unit includes tier 1 associates and tier 3 PAs. (Tr. 206) On March 25,26, 28, 29, and 30, an election was conducted in Case 29-RC-288020 at JFK8. (J. Exh. 1 ¶ 2) On April 1, Region 29 issued a tally of ballots indicating that, out of approximately 8,325 eligible voters, 2,654 voters cast ballots for representation by the Union and 2,131 voters cast ballots against representation, with 67 non-determinative challenges (J. Exh. 1 ¶ 3) On January 11, 2023, in Case 29-CA-288020, Regional Director Cornele Overstreet issued a Certification of Representative. (Jt. Exh. 1 ¶ 4) The Respondent objected to the results of the election and subsequent Certification of Representative. (Jt. Exh. 1 ¶ 5) On August 29, 2024, the Board issued an order denying the Respondent's Request for Review of the Regional Director's Decision and Certification of Representative in Case 29-RC-288020. *Amazon.com Services LLC*, 373 NLRB No. 92 (2024).

I take administrative notice of the following facts regarding representation Case 29-RC-290053: On February 4, the Union filed a petition to represent a unit of employees at the LJD5 facility. (Tr. 235-236) (G.C. Exh. 8-10) On April 26 and 27-29, an election was conducted. A tally of ballots dated May 2 reflects that ballots were cast 380-618 against representation by the Union. On May 11, the Regional Director for Region 29 issued a Certification of Results of Election.

I take administrative notice that Hunton Andrews Kurth LLP ("Hunton") attorneys Kurt Larkin and Amber Rodgers made appearances for Amazon in representation Cases 29-RC-288020 and 29-RC-290053. Larkin and Rodgers filed notices of appearance dated December 22, 2021 in Case 29-RC-288020 and notices of appearance dated February 4 in Case 29-RC-290053. Further, I take administrative notice that Larkin and Rodgers represented Amazon as counsel of record in the hearing on objections held between June 13 and July 18 in Case 29-RC-288020. Finally, I take administrative notice that, prior to October 5, Larkin and Rodgers filed documents and were served with documents as counsel for Amazon in Cases 29-RC-288020 and 29-RC-290053.

[4] The decision in Case 29-CA-277198 was written by Administrative Law Judge Lauren Esposito. A judge may rely on factual findings made by a judge in a prior case between the same parties. See *Grand Rapids Press Booth Newspapers*, 327 NLRB 393, 394-395 (1998). To a limited degree, I do so herein.

Workplace Violence Policies and Suspensions With Pay Pending Investigation

The Respondent maintains policies which define categories of misconduct, including workplace violence. Category 1 violations are the most serious. The NAFC Security Standards of Conduct ("NAFC Standards") inform staff "of actions that may result in risks to safety, property damage or financial loss and the potential resulting actions." (R. Exh. 42) NAFC Standards include category 1 infractions "that directly expose the site to immediate risk of severe injury or financial loss" and, "[b]ecause of the severe threat these behaviors create, a confirmed Category 1 Security Infraction generally results in corrective action up to and including immediate termination." Category 1 infractions include "[a]ll physical altercations (fights) regardless of severity or causation" (Rule 4.3) and "[a]ny physical threatening behavior including vocalized threats, written threats and implied threatening gestures" (Rule 4.9). (R. Exh. 42)

The GSO - Workplace Incident Standard – Global ("WIM Standards") "provides the baseline global requirements for managing workplace violence or threat incidents or concerns." (R. Exh. 32) (Tr. 743) Section 6 of the WIM Standards states in part that "Amazon will not tolerate violence, threats of violence, domestic violence, or other conduct by anyone that harms or threatens safety of their associates or others." Section 6.1.1 of the WIM Standards describes unacceptable physically or psychologically aggressive behaviors as including "[h]itting, kicking, punching, pushing, shoving, slapping, pinching, grabbing, and biting." (R. Exh. 32)

The Owner's Manual and Guide to Employment includes Standards of Conduct ("Owner's Manual Standards") "are a list of examples of infractions that may result in corrective action, up to and including termination of employment." (R. Exh. 41) Owner's Manual Standards category 1 "infractions are regarded as extremely serious, and termination of employment may result following one offence[.]" Category 1 infractions include "[a]ssaulting, threatening, intimidating, coercing, or interfering with supervisors or fellow associates."

The Respondent's Loss Prevention and Human Resources ("HR") (also called the People Experience Team or "PXT") departments participate in the investigation of workplace violence incidents. Loss Prevention generally leads these investigations, which include interviewing witnesses, soliciting written statements, and collecting video recordings. HR generally assists Loss Prevention in the investigations by taking notes of Loss Prevention interviews and conducting supplemental interviews. HR ultimately determines whether misconduct has occurred and administers appropriate corrective action. (Tr. 741, 744, 849)

The Respondent maintains a practice of placing individuals suspected of workplace violence on paid suspension pending investigation. The suspensions are not recorded in the Respondent's records or kept on file as discipline for potential use in future corrective action. If the investigation does not reveal misconduct warranting discipline or termination, the employee is placed back to work without any further action taken against them. The Respondent does not suspend employees with or without pay as a step in progressive discipline. (Tr. 754, 841)

Covid Policies

Early in the Covid pandemic, Amazon established the policies and practices of notifying employees of a positive test in the JFK8 facility and allowing the local JFK8 HR team to automatically excuse personnel who think they may have Covid for up to 5 days to obtain a Covid test. (Tr. 957, 959-960)

On April 30, the Respondent circulated a "Manager Update" which stated the following regarding the Respondent's Covid policies (R. Exh. 57):

> The sustained easing of the pandemic, ongoing availability of COVID-19 vaccines and treatments, and updated guidance from public health authorities, all signal we can continue to safely adjust our pre-COVID policies. As a result, like many companies and communities, we're continuing our safe return to normal where we can. Below, please find important updates to our temporary COVID-19 policies and procedures. These changes are effective May 2, and apply to all U.S. employees, unless otherwise required by federal, state, or local law.
>
> . . .
>
> - **COVID-19 notifications:** Following the decisions of state governments across the country to reduce or end their own COVID-19 reporting, we will no longer send site-wide notifications of positive cases in our facilities, unless required by law. As with any communicable disease, we encourage everyone to continue taking the necessary precautions to protect themselves, their loved ones, and their communities.
>
> - **Returning to standard sick leave policies:** All employees in the U.S. will now get up to five days of excused, unpaid time for a confirmed COVID-19 diagnosis regardless of vaccination status. Additionally, with rapid testing widely available, we will no longer excuse time while waiting for a test result. Accrued time may be used to cover a COVID-19 related absence and should be reported in A to Z per our stand sick leave policy. Leave requests should be submitted through DLS Portal or on A to Z. As a reminder, you should always stay home if you are sick to protect yourself and others.

HR Business Partner Robert Greene confirmed that the Respondent no longer notifies JFK8 personnel when there is a positive Covid test in the facility. (Tr. 957) Greene also testified that, as of the April 30 Manager Update, onsite local JFK8 HR no longer had discretion to excuse an employee for up to 5 days to obtain a test. Instead, according to Greene, "associates were directed to report the needed absences to the DLS team and not the site HR team." (Tr. 960) Greene testified that "[i]t's just where they need to report their needed days off. But they were still able to get the days off. The policy in and of itself, so to say, of how much time they get, for what reasons, remain the same." (Tr. 960)

The Respondent's Structured Productivity Review Policy

The Respondent has had a Structured Productivity Performance Review (SPPR) policy in effect since before April 1. (Jt. Exh. 1 ¶ 11) (R. Exh. 59) "SPPR . . . compare[s] eligible Associates to their peers based on their performance from the previous week and recommends recognition for the top 10% and progressive discipline for the bottom 5% for productivity (as of 3/2/2022). . .." (R. Exh. 59) This discipline is computer generated subject to manager review and validation. (Tr. 961) The SPPR policy describes progressive discipline resulting from this process as follows (R. Exh. 59):

> **Written Warning Progression:** An associate receives a written warning when they meet eligibility requirements and are in the bottom five percent of performers for quality, or bottom five percent of performers for productivity. Productivity corrective coaching begins at a First Written Warning . . ..
>
> Each written warning has an active period and if eligibility requirements are met while a written warning is active, it will progress. The First Written Warning is

> active for 30 days. A Second Written Warning is active for 60 days. The Third Written Warning will be delivered as a Final Written Warning and can progress to Termination within the active period of 90 days. Associates are subject to termination on the 6th Warnings within a rolling 12 months. The warnings must fall within the same category, productivity or quality.
>
> To ensure we are providing Associate with support, when an associate receives a Second Written Warning in productivity or quality, retraining in the process path is mandatory. The associate and progression cannot move to a Final Written Warning until the retrain is completed.

HR Business Partner Greene testified that discipline or "feedback" is delivered to an employee after management has validated that the SPPR is accurate. An SPPR final written warning or termination can be overturned through an appeals process whereby the employee appeals the disciplinary action to a manager or a panel of peers. According to Greene, he has never withdrawn a termination during the meeting with an employee to administer the discipline. (Tr. 961-964)

The Respondent's Off-Duty Access Policy

On June 30, the Respondent posted an Off-Duty Access Policy on Inside Amazon, which included the following (Jt. Exh. 1 ¶ 25):

> **Policy: Off Duty Access — CAN and US**
>
> **Purpose**
>
> Employee safety and security is important to Amazon, and this policy describes the safe and secure access to Amazon buildings and working areas outside of buildings. This policy allows Amazon to more easily ascertain who is present and enables Amazon to plan our support staffing, services, maintenance and related functions accordingly.
>
> . . .
>
> **Overview**
>
> During their off-duty periods (that is, on their days off and before and after their shifts), employees are not permitted inside the building or in working areas outside the building.

On the same day, June 30, the Respondent also posted the Off-Duty Access Policy on its A-to-Z application, except with a different introductory paragraph under the "Purpose" heading, which read: "As the safety and security of our employees is paramount to Amazon, this policy describes the safe and secure access to Amazon buildings and working areas outside of buildings. This policy allows Amazon to more easily ascertain who is present and enables Amazon to plan our support staffing, services, maintenance and related functions accordingly." (Jt. Exh. 1 ¶ 26)

At the bottom of the webpage hosting the policy, as viewed on A-to-Z, the following language appeared in a white box: "This policy may change time to time, with or without advance notice and Amazon reserves the right to depart from the policy when deemed appropriate." (Jt. Exh. 1 ¶ 27) As noted below, this reservation of right language was later removed from the policy on July 8. (Jt. Exh. 1 ¶ 29)

On June 30, the Respondent notified all employees about the Off-Duty Access Policy via A-to-Z, providing them with a hyperlink to the policy so they could read it. (Jt. Exh. 1 ¶ 28)

On July 8, the Respondent sent a message to all employees on A-to-Z, informing them as follows (Jt. Exh. 1 ¶ 30):

> **An important note about the new Off Duty Access Policy**
>
> Fri, Jul 8 2022
>
> We recently shared our new Off Duty Access Policy. The mobile A to Z webpage where the policy was hosted inadvertently included additional language, which has since been removed. The substance of the policy has not changed, and you can review it ***here***.
>
> Please note, this policy will not be enforced discriminatorily against employees engaging in protected activity.

The July 8 notification, which included a hyperlink (at the word "here") to view the policy without the disclaimer, was sent to all employees, including all those who would have had access to A-to-Z to view the original version reflecting the disclaimer. (Jt. Exh. 1 ¶ 31)

The Respondent did not provide the Union notice or an opportunity to bargain over any of its above-described actions in connection with the Off-Duty Access Policy. (Jt. Exh. 1 ¶ 32)

Mobile Phone Use Policy

The Respondent's Mobile Phone Use Policy indicates that it was last revised on August 26, and includes the following (R. Exh. 58):

> To promote employee safety while working, mobile phones should remain in a pocket or stored. Mobile phones may not be left out on working surfaces or on the floor. Mobile phones usage must be limited to approved rest breaks, meal periods, and when site leadership gives explicit permission. Mobile phone usage must be limited to non-working areas. If you receive an emergency call or text, you should appropriately stop what you are doing, move to a safe area, and respond.
>
> . . .
>
> Category 1: The following infractions are considered gross misconduct and may result in termination following one offense:
>
> - Mobile phone use while driving
> - Mobile phone use while on the truck dock, in the truck yard, ramp, or tarmac.
> - Mobile phone use in PIT lanes or while on or operating PIT.
> - Use of a mobile phone or other device to photograph, live-stream, and/or make audio or video recordings.
>
> Category 2: The following infractions are considered serious and generally result in progressive discipline:
>
> - Mobile phone use while performing work tasks and walking.
> - Use of earbuds or headphones.

- Use of mobile phone to play games, music videos, etc. outside of approved break areas.

HR Business Partner Greene testified that this Mobile Phone Use Policy has been in place as long as he could remember. Greene further testified that the policy was not changed in August to prohibit the use of mobile phones on non-work times or in non-work areas. (Tr. 919-920)

Spence testified that employees "very obviously" and consistently recorded meetings with management "for many months during our election campaign and before that." (Tr. 178) For example, employees held up their phones in a conspicuous manner and recorded captive audience speeches. Those recordings were posted on social media and entered into evidence in Board proceedings. (Tr. 177-178)

Connor Spence – Weingarten, Mobile Phone Use Policy, and Off-Duty Access Policy

Spence was a tier 1 associate at JFK 8 who worked mostly as a packer. (Tr. 174) He was also a founding organizer and officer of the Union. (Tr. 175)

On October 3, Union organizers, including Spence, learned of a fire in the JFK8 trash compactor. Spence was apparently off duty at the time, but he and other organizers went to the facility to see what happened. Day shift employees were released to go home an hour early at about 4:45-5 p.m. Night shift workers arrived, but many did not feel safe in the building because it had flooded and smelled of smoke. Accordingly, Union organizers called a spontaneous work stoppage which lasted until about 12 a.m. During the work stoppage, Spence was present at JFK8 and had conversations with HR representatives. (Tr. 175-176)

On October 4, at 12:41 a.m., Greene sent Spence an email which stated, "We are reaching out to you to inform you that your badge has been suspended pending an investigation. [Y]ou should not return to the site at this time. We will contact you in the near future." (R. Exh. 7) Spence saw the email after he arrived home. On October 4, at 8:27 p.m., Spence emailed a reply to Green, "I would like to have a peer or coworker accompany me during the investigative interview." (R. Exh. 7) (Tr. 175-176, 183, 185-189)

On about October 14, while on suspension, Spence received a phone call from a female HR representative regarding his involvement in the October 3 work stoppage. Spence testified that he could not recall the name of the woman who called him. Spence asked to have a "coworker representative present for the conversation." (Tr. 176) The HR representative declined the request and stated that "the meeting was confidential."[5] (Tr. 176) A conversation ensued for about 20 minutes in which the HR representative asked Spence questions concerning events that occurred during the work stoppage, his conversations with HR managers that day, and the Off-Duty Access Policy. (Tr. 176-177, 183-184)

On October 22, at 6:14 a.m., Greene sent Spence an email which stated, "STU conducted via phone."[6] (R. Exh. 7) Greene testified that he conducted such a STU of Spence

[5] Greene testified that, in September 2021, HR representatives received guidance that the Respondent did not need to allow union representatives to be present during interviews because the Union was not "established" and all interviews are voluntary. (Tr. 885-889)

[6] A "STU" refers to a "seek to understand" interview in which management attempts to determine the details of an incident. (Tr. 586, 639)

by phone that day. According to Greene, Spence did not request a *Weingarten* representative during the call. (Tr. 889-890) For his part, Spence did not recall having a phone conversation with Greene on October 22. (Tr. 189-190)

On November 6, Spence's suspension was lifted and he returned to work. (Tr. 183)

On November 19, Spence was called into a meeting to receive feedback from HR Business Partner Greene. At the start of the meeting, Greene asked Spence not to record the conversation because doing so would be a violation of the Respondent's cell phone policy. (Tr. 177, 919-920) Green suspected Spence was recording the conversation because his phone was out. Greene testified that such STU interviews are conducted in working areas and on working time. (Tr. 920) The Respondent issued a documented coaching and first written warning to Spence, citing the Off-Duty Access Policy. (Jt. Exh. 1 ¶ 19-20)

On about October 23, 2023, Spence was brought to HR to speak with Greene about being in JFK8 while not scheduled to work in violation of the Off-Duty Access Policy. Spence admittedly requested a union representative. According to Spence, Greene "flatly said no" and "then we proceeded with the investigation. " (Tr. 179) According to Greene, he told Spence, "at this time we are not granting that request. This is a conversation we'd seek to have with him one-on-one. If . . . he would like to continue, he can do so." (Tr. 890-891)

On October 25, 2023, the Respondent placed Spence on a paid administrative suspension pending investigation. (Jt. Exh. 1 ¶ 22)

On November 30, 2023, the Respondent discharged Spence, citing its Off-Duty Access policy. (Jt. Exh. 1 ¶ 22). The Respondent suspended and discharged Spence without providing the Union with notice or an opportunity to bargain prior to taking those actions. (Jt. Exh. 1 ¶ 24)

Daniel Hayden - Weingarten

In January 2023, Daniel Hayden was employed at inbound shop dock B camp, where she opened boxes, scanned the items inside, placed the items in bins, and sent them down a conveyor belt for packing, processing, and picking. Hayden had a physical accommodation limiting the amount she could lift to 10 pounds. Hayden reported to inbound area manager Yessenia Moffat. (Tr. 138-140)

On January 20, 2023, Moffat asked Hayden about 3 or 3 ½ hours of time off task or "TOT" (i.e., time an employee is not working). Excessive TOT can result in discipline. Hayden denied she had that much TOT, but said employees were told to "stand down" for a time (likely the result of an equipment malfunction). Hayden also told Moffat about her accommodation. Moffat told Hayden she would speak to HR regarding the matter. Hayden asked to come with Moffat to HR, but Moffat refused that request. (Tr. 140-145, 570) (R. Exh. 16)

Later that day, at quitting time, Moffat told Hayden HR agreed she (Hayden) should be written up for excessive TOT. Hayden objected to this as unfair because she did not know what Moffat told HR and the decision was made without hearing her (Hayden's) side of the story. Accordingly, Hayden told Moffat she would go to HR directly because she did not agree with the decision and was "done wrong." (Tr. 145)

After speaking with Moffat and logging out of her station, Hayden went to the HR desk and spoke to HR Partner Aaron Muller. (Tr. 145-146, 579, 861) (R. Exh. 18) Hayden testified that she explained to Muller the TOT issue and why she should not be written up for it.

According to Hayden, she asked that video footage be used to determine whether she had excessive TOT. Hayden further said that, based on her behavior, Moffat "needs to be hung." Hayden testified that, by this, she meant Moffat needed to be disciplined (not physically hung). (Tr. 146-147) Muller excused himself and left. Shortly thereafter, HR Partner Rayna Powell came over and brought Heyden into an office. Hayden told Powell about her interaction with Moffat. (Tr. 148-149, 577, 579) Powell asked Hayden to write a statement. (Tr. 148, 581) Hayden testified that, when she was writing the statement, she twice asked for union representation and *Weingarten* rights. (Tr. 148) Hayden testified that Powell said, "no." (Tr. 148) Hayden further testified that Powell told her she would receive a copy of the statement and there would be an investigation. (Tr. 148-150) Hayden was then escorted from the building and suspended pending investigation. (Tr. 150-151)

HR Associate Partner Adina Goriva testified that she was present when Hayden came to the desk to complain about feedback she received from a manager who "was picking at her." (Tr. 570-572) Goriva testified that Heydan became increasingly upset and Muller came over to help because it was Goriva's first day at the desk. Ultimately, according to Goriva, Hayden said the manager "is going to hang for this." Goriva denied that Hayden asked for a union representative or otherwise asserted *Weingarten* rights. (Tr. 572) After Hayden left, Goriva provided a written statement regarding the incident. (Tr. 573-575) (R. Exh. 16)

Powell testified that, on January 20, 2023, Muller informed him of a workplace violence incident at the HR desk. Powell went to the desk and asked Goriva what happened. Powell then brought Hayden to an office and asked her what happened. Hayden described her interaction with Moffat. Powell testified that he asked Hayden whether she said she "wanted to end Yessenia" and Hayden "said yes because she wanted her to feel the same pain as the associates." (Tr. 581) Powell asked Hayden to write a statement and Hayden did so. (R. Exh. 6) Powell denied that Hayden requested union representation or *Weingarten* rights. (Tr. 585-586). Powell claimed he would have stopped the STU interview and escalated the matter to a more senior manager if Hayden had done so. (Tr. 586) When Powell was asked why he would have stopped the interview and escalated the matter, he testified as follows (Tr. 586):

> A. Because she was trying to request someone, so I -- at the moment I did not know what to do at that time, so I would just escalate to my manager to get some guidance on that situation.
>
> Q. Okay. And as you reflect back on that day, did she ask, make any sort of request similar to -- and again, she may not have used the exact words that I'm using, but any sort of request like that that another person be present to aid her in answering your questions or aiding her in the investigation?
>
> A. No.

During the January 20, 2023, STU interview, Powell typed notes which, in part, described the conversation as follows (R. Exh. 17) (Tr. 584):

> [Hayden]: Yessenia picks on every [decent] associates for everything. Like for example delivering cell phone feedback and she's always on her phone.
>
> [Hayden]: Like why she wants to hang me like that? Why?
>
> [Powell]: What do you mean by "she wants to hang you"?

[Hayden]: She's just always targeting me for no reason and I'm sick of it.

[Powell]: Earlier you mentioned to HR that you wanted "to hang Yessenia"?

[Hayden]: Yes! I want her to feel the pain that associates are feeling when she does this to us

In February 2023, about 2-3 weeks after being suspended, Hayden received a call from Loss Prevention Specialist Sarah Funaro. Funaro asked Hayden what happened on the date of the incident and a conversation ensued. About 3 or 4 minutes into the call, Hayden asked for union representation and *Weingarten* rights to ensure there was no miscommunication or misunderstanding. Funaro refused and told Hayden there was no need for her to do that. Hayden again asked for union representation, but Funaro said, "no." Although Hayden did not feel comfortable, she wanted to provide her version of events and continued. (Tr. 151-155, 159) At hearing, Hayden initially testified that she could not recall whether Funaro asked any questions after Hayden requested union representation. (Tr. 155-156) The General Counsel showed Hayden a copy of her affidavit and asked the following questions (Tr. 158-159):

Q. Okay. . . . does reading that portion of your affidavit refresh your recollection about whether Ms. Funaro[ ] asked you questions after you requested union representation?

A. Like I sated, Mr. Jackson, I had asked twice for union representation, I had asked twice, whereas I wanted to exercise the *Weingarten* rights. And I was vehemently denied that.

Q. That's not what I'm asking you.

A. Okay.

Q. I'm asking you if you recall whether Ms. Funaro[ ] asked you any questions after you had requested union representation?

A. She had asked me about the day of the incident and what occurred.

Yackisha Nebot Lopez - Weingarten

Yackisha Nebot Lopez was a tier 1 associate who, in April 2023, worked in the pack department. Her direct manager was Devon Jones. (Tr. 28) (R. Exh. 2)

As noted above, the Respondent has an SPPR policy of electronically generating recommended performance discipline to employees who are in the bottom 5 percent of performers for productivity during each 1 week period. Employees are subject to termination upon receipt of 6 SPPR warnings in a 12-month rolling period. (R. Exh. 59) (Tr. 923-925) Lopez admittedly received six such warnings for low productivity during the 12-month period prior to her termination on April 26, 2023. (Tr. 28, 35-38)

On April 26, 2023, at the end of Lopez's shift, Jones called her into a meeting with him and HR Partner Tiffany Ocampo. (Tr. 28, 35-38) Lopez recorded the meeting. (G.C. Exh. 2) Jones was in possession of a previously prepared feedback document for the termination of Lopez. (R. Exh. 2, 62) Jones began to read the termination notice under "Areas of Improvement Required by Associate." (G.C. Exh. 2 at 0:50) Lopez interjected, "oh, wait, hold

on, I'd like my union rep." (G.C. Exh. 2 at 0:55-1:00) Ocampo responded, "No, as of right now, we don't have any representation of the union." Lopez asked, "Really?" Ocampo said, "So we're still going through the appeals process. No representation right now. In the STUs, no." Lopez said, "ok, good to know." (G.C. Exh. 2 at 1:00-1:17)

Jones read the termination notice and Ocampo asked whether Lopez had any questions. Lopez said she had a defense. (G.C. Exh. 2 at 1:17-2:10) Lopez said, regarding the last warning, the "pod gaps" affected her productivity rate. "Pod gaps" are the time it takes for work to reach an employee's station. (Tr. 31-32) Lopez further stated that she was not retrained after a February write up and she had an accommodation from her therapist. (G.C. Exh. 2 at 2:10-3:35) Ocampo noted that Lopez received a "retrain" following a second written warning on August 30. Lopez noted that she requested to be retrained after the February write up. Ocampo asked whether Lopez asked a manager for retraining and Lopez confirmed that she had. (G.C. Exh. 2 at 3:35-4:10) Lopez also noted that she asked not to be placed in pick because she has struggled and has only received writeups in pick. (G.C. Exh. 2 at 4:10-4:30)

Ocampo asked whether Lopez had an accommodation. Lopez said her therapist had written one up and she could bring it tomorrow. Ocampo asked when Lopez spoke to her therapist because the accommodation must be open. Lopez said she spoke to her therapist last week. (G.C. Exh. 2 at 5:40-6:25) Lopez asserted that she should not be fired for the most recent write up because she is always on time, does not take days off, and is a team player who works in pick even though she asked not to work there. (G.C. Exh. 2 at 6:25-6:50)

Ocampo asked whether certain pod gap numbers which Lopez provided were responsible for Lopez's productivity rate. Lopez confirmed that they were and said she also had to wait a couple minutes for a tech to come get an item from the floor which was blocking and preventing her from working. Ocampo asked whether Lopez showed the pod gap numbers to a manager. Lopez said she had not, but that the PA for QB saw it. Jones and Ocampo indicated that they could have someone else review the information, but could not promise anything. (G.C. Exh. 2 at 6:50-8:00, 12:20-13:10) Jones left the interview to do this.

Lopez told Ocampo she was transferred from ICQA to pick without her consent. Ocampo asked whether Lopez was cross trained in ICQA. Lopez said she started in stow, transferred to ICQA, and never received a write up in those two departments. Ocampo asked whether her move to pick was an internal transfer. Lopez said it was. Lopez said, on July 5, 2021, she was trained for and transferred to pick without her consent. (G.C. Exh. 2 at 8:00-9:50)

Ocampo again raised the issue of an accommodation and noted that Lopez did not have one which was open. Ocampo asked whether Lopez's therapist gave her a document reflecting an accommodation or just spoke to her about it. Lopez said her therapist prepared a document reflecting the accommodation but had not yet given it to her. Ocampo said Lopez needed to have an open accommodation prior to this meeting. (G.C. Exh. 2 at 11:00-12:20)

Upon reentering the room, Jones told Lopez he spoke to someone who said more people would have been impacted by pod gaps if it was a significant problem that day. Ocampo then confirmed the decision to discharge Lopez. However, Ocampo noted that Lopez was eligible for rehire. (G.C. Exh. 2 at 14:20-18:00)

Following her termination on April 26, 2023, Lopez filed an appeal. The Respondent has a policy of allowing certain discharged employees to appeal their terminations to their manager or a committee of employees. Lopez appealed to a committee of employees and the committee granted her appeal. Thus, Lopez returned to work on May 4, 2023. (Tr. 33, 960-964)

Derrick Palmer – Weingarten, Mobile Phone Policy, and Suspension

Derrick Palmer and Chrisian Smalls were among the founders of the ALU. In December, Palmer was the Union vice president and Smalls was the Union president. (Tr. 61-62, 74, 99) Smalls was not employed by Amazon at the time. *Amazon.com Services LLC*, 29-CA-261755, slip op. 3 (April 18, 2022).

On December 5, at about 4 or 5 p.m., Palmer, Smalls, and other Union organizers went to the bus stop between JFK8 and LDJ5 to engage in organizing activity. Palmer was not scheduled to work that day or the next day. (Tr. 87) JFK8 employee Most Daley was at the bus stop. An argument and physical scuffle ensued between smalls and Daley. Palmer and other Union organizers attempted to separate them and were ultimately successful. Everyone left the area. Palmer did not know what started the argument or what it concerned. (Tr. 64-67) A video of a portion of the incident was recorded by a witness and later collected by the Respondent during an investigation of the matter. (Tr. 764-768) (R. Exh. 36) Immediately after the incident, Daley went to the HR desk and reported that he had been "ganged up on or jumped." (Tr. 939-940) Daley provided the following statement to HR (G.C. Exh. 20):

> I was getting off the Bus around 6:07 PM[.] I was talking to an A.L.U member Tristan[.] The[n] I had word with Chirstian Smalls then we started fighting[.] While we was fighting Derrick Palmer jump in to aid Christian Smalls[.] We was fighting for like 15-20 minutes then all the A.L.U. members left and my glasses was gone. I was a member of A.L.U. But I left because I saw that Chris was using the A.L.U. for his personal gain so when he saw me he walk up saying that we need to talk. I told him we have nothing to talk about you['re] a f[r]aud and I don't back f[r]auds[.] My left shoulder is hurting to the point I am in pain lifting my arm, my right hand is locking up and in pain[.]

After receiving this report from Daley, HR and Loss prevention launched an investigation of the incident. The investigation included a review of video recordings and interviews of witnesses. HR Business Partner Greene oversaw the investigation and participated in the interviews of certain witnesses, including Palmer and Daley. (Tr. 939-940)

On December 7, Palmer was called to the main office to speak with Greene and Loss Prevention Manager Henry Carbajal. (Tr. 67-70, 87, 892-893) Palmer recorded the conversation. (G.C. Exhs. 5-6) Carbajal said they were investigating a matter of associate safety and asked Palmer what happened on December 5. Palmer asked what they wanted to know. Carbajal asked whether Palmer was involved in an incident with Daley. (G.C. Exh. 5 at 1:20–2:30) The conversation continued as follows (G.C. Exh. 5 at 3:10-4:46):

> **Palmer:** First of all, you know, whenever there is – is there an investigation going on?
> …
> **Palmer:** Cause I would want to have *Weingarten* rights right now. So, are you gonna accept *Weingarten* rights or are you gonna deny them?
> …
> **Carbajal**: You can ask and make any request, you know, that you, you know, want to, right.
>
> **Palmer:** So I do want to.

Carbajal: Perfect. So my response to that is right now we are not in a current union environment so we would rather have a direct conversation …

Palmer: We are.

. . .

Carbajal: here and with you… so let me finish, right, cause we are having a respectful conversation and appreciate you, and if you have something to say, then I'll let you finish. So, you know, currently right now, you know, we are not, you know, in a union environment, right, and we want to have a direct conversation with you so we can get, you know, some information regarding this incident. So, you know, ultimately that is on you. You know that is my response so if you have anything to say, … [unintelligible] happy to hear it.

Palmer: Well, there's no… there's nothing involving me. If anything I'm just… So you are denying *Weingarten* rights. Ok, cool. Alright. Just for the record. So whatever incident you are referring to, you gotta just be more specific. You gotta say what you heard and then just ask me. Be straight up with me… because you're saying like associates safety. And it's like, what do you mean? That's what I'm trying to figure out.

Carbajal said there was reportedly an incident involving physical contact near the bus stop and Palmer might have personal knowledge of the incident. Carbajal asked Palmer what happened. Palmer denied he was involved in any physical altercation and said he tried to deescalate the situation by getting in the middle and breaking it up. Carbajal asked Palmer whether anyone was hurt or if there was any physical contact such as someone throwing a punch. Palmer said it was just "tussling" and repeated that he got in the middle to stop it. Carbajal asked who was involved other than Daley, if anyone else was hurt, and whether there was any history among the people involved. Palmer denied anyone was hurt or that he was aware of any history. Palmer said he preferred not to identify those involved, noting that one person might not work for Amazon. (G.C. Exh. 5 at 4:46-7:00) Greene told Palmer that "we don't consent to a recording of this conversation and doing so would violate Amazon's cell phone policy." (G.C. Exh. 5 at 7:05-7:10) Palmer declined Carbajal's request to write a voluntary statement regarding the incident. (G.C. Exh. 5 at 7:10-7:30)

Carbajal and Greene left the room for about 10 minutes. (Tr. 69) When they returned, Carbajal told Palmer he was being suspended with pay pending investigation. (G.C. Exh. 6) Palmer said he did not understand why he was suspended because he told them what happened, he was not involved in the altercation, and the incident occurred on his day off on public property. Palmer accused Amazon of suspending him because of his union activity. Carbajal said he expected Palmer to be suspended for "less than 7 days." (G.C. 6 at 2:07-2:18)

Palmer remained on paid suspension from December 7 to February 15, 2023. During that time, Palmer was not contacted by the Respondent and received no updates. (Tr. 69, 71) At least five employees were interviewed during the Respondent's investigation of the December 5 incident. Those interviews were all conducted within a week of December 5. Accordingly, within a week, Greene had collected the facts and sent his findings to Senior HR Manager Tyler Grabowski and HR Manager Adam Smith. Greene did not include any recommendation regarding a proposed course of action. Greene did not know what, if any, additional investigation occurred after the matter was referred up the chain to higher HR management. Greene testified that Regional HR Manager Christopher Howard was involved. Howard, Grabowski, and Smith did not testify at the hearing. (Tr. 939-945)

According to Greene, it was common for the Respondent to complete an investigation of a potential disciplinary matter of someone on paid suspension in 7 days or less. However, Greene testified that some JFK8 employees have been suspended with pay pending investigation for over a month. The Respondent introduced records of such investigations. (R. Exh. 53) (Tr. 896-907) All of those employees, upon completion of the investigations, were terminated for workplace violence. (Tr. 906, 945) Greene was not aware of any suspension pending investigation which lasted as long as Palmer's suspension and did not ultimately result in discipline. (Tr. 956)

Pasquale Cioffi – Suspension and Discharge

Cioffi's Work History and Union Activity

Pasquali Cioffi was hired as a temporary seasonal inbound associate in about May 2020 and converted to a permanent full-time tier 1 inbound associate in about June 2020. (Tr. 193-194) In about late-2020 or early-2021, Cioffi worked as a seasonal PA for 3 or 4 weeks. Later in 2021, Cioffi was promoted to full-time permanent PA. (Tr. 194-195, 218, 390) Cioffi began as a "problem solve" PA responsible for trouble shooting production problems. (Tr. 196-197) After about 6 months, Cioffi switched to "running force." Running force involves assigning employees to workstations, ensuring they maintain adequate production rates, completing written audits of incidents (e.g., station malfunctions), and meeting with a senior operations manager at the end of a shift to submit audits, discuss productivity rates, and identify work left for the incoming shift. (Tr. 196-206). Unlike tier 1 associates whose production rates are tracked individually, PAs who run the floor are evaluated by the aggregate production rates of the associates on their floors. (Tr. 203) Cioffi worked overnight shifts Sunday to Wednesday from 5:45 p.m. to 4:30 a.m. and regularly worked additional overtime shifts. (Tr. 200-201, 357, 365)

Beginning about February, Cioffi was an open Union supporter who engaged in union activity on a daily basis. (Tr. 206-214, 218-229, 236-243, 248-252, 340-341) (G.C. Exh. 8-10) Cioffi affixed an "ALU" sticker to his work vest before the JFK8 election and a "Recognize" sticker after the Union won that election. (Tr. 207, 218-229) Inside and outside the JFK8 facility, Cioffi spoke to associates in support of the Union and distributed Union flyers. (Tr. 207-213) For example, Cioffi told associates the Union could negotiate over subjects like pay rates, job security, and accommodations. (Tr. 211-214) On April 24, at a Union rally held shortly before the LDJ5 election, Cioffi spoke publicly and gave media interviews. The rally was attended by Senator Bernie Sanders, Representative Alexandria Ocasio-Cortez, and Union President Smalls. (Tr. 236-243, 248-252) Two news articles quoted Cioffi's comments at the rally and one contained pictures of him. More specifically, the articles quoted Cioffi as accusing Amazon of putting pressure on workers by taking them to the office to ask if they were coerced to vote for unionization. (G.C. Exh. 9-10) While introducing Cioffi as a speaker, Smalls said Cioffi "flipped everybody" and "is probably the reason we won." In his speech, Cioffi claimed that, in about 3 ½ or 4 weeks, he flipped 400-500 votes from no to yes. (G.C. Exh. 8 at 23:25-27:18) (Tr. 250-252)

Cioffi testified that managers often called him "presidente" as a joke about his purported desire to become Union president. (Tr. 230-234) Senior Operation Managers Michael Sanicola, Operations Manager Aaron Parsons, and HR Business Partner Greene all testified that they heard Cioffi say he was going to be Union president. (Tr. 563-565, 640-641, 979-982) However, Santos testified that he never called Cioffi "presidente" or heard anyone else refer to him that way. (Tr. 679) Area Manager Fatima Ficci testified that she heard Cioffi refer to himself and associates refer to him as "presidente," but never heard a manager refer to Cioffi "presidente." (Tr. 831, 839)

Cioffi testified that several managers commented on the union stickers he wore on his work vest. (Tr. 218-229) According to Cioffi, Area Manager Kevin Goldstein said, "What are you doing with that thing? Don't be like those clowns out there." (Tr. 219) Cioffi noted that he and Goldstein were "pretty much friendly." (Tr. 219) Senior Operations Manager Frank Lugo said to Cioffi, "I heard about that. Just be careful. You got a target on your back." (Tr. 220-222, 305) Cioffi had a good relationship with Lugo (who Cioffi described as a "good guy") and still speaks to him. (Tr. 305) Area Manager Imaane Carolina allegedly told Cioffi, "With that sticker on your back, you're never going to become a permanent PA."[7] (Tr. 222-224) Referring to the "ALU" sticker, General Manager Santos said, "I like the sign you put on your back." (Tr. 224) Regarding the "Recognize" sticker, Santos said, "What's with the new sticker?" Cioffi replied, "we won the election, it's time for you to recognize that we won the election." Santos said, "we'll see about that." (Tr. 229) Upon seeing the "Recognize" sticker, Assistant General Manager Marc asked Cioffi, "We got a new sign, huh presidente?" (Tr. 228-229) Regarding the same sticker, Area Manager Ficci said, "what are you doing with that thing on? It's never going to happen." (Tr. 227-228)

According to Cioffi, about 2 weeks prior to the election,[8] he talked to Santos and Marc regarding a promotion. Cioffi testified as follows regarding the conversation: Cioffi went to the office on his break to say hello to a friend and Santos called him into his office. Santos said he was hearing good things about Cioffi from associates and managers. Marc came in shortly after the conversation began. Santos asked Cioffi whether he was looking to move up in the company. Cioffi said, right now, he was not interested. Santos said there was an area manager position open, but Cioffi reiterated that he was not interested at the moment. Marc said Cioffi was very good with people and more people were leaning toward the Union since Cioffi got involved. Cioffi said, if they had done the right thing with people by worrying more about the people than profit, this would not have happened and could have been avoided. Cioffi said he thought they were talking to him about a promotion because they were afraid of what he was doing to convince employees to be pro-union and wanted him to stop organizing. They told Cioffi he had a week to think about it just in case he changed his mind. Cioffi said he was going to stick to what he knew. (Tr. 297-303)

Santos testified that, within a few days of the JFK8 election, Sanicola told him Cioffi asked to meet with Santos and Marc. Sanicola told Santos that Cioffi claimed to have an "outsized influence" with associates regarding whether they would vote for or against the Union. Santos testified that he and Marc talked to Cioffi about this on the floor and, as Sanicola had mentioned, Cioffi said he had an outsized influence on how people felt about the Union. According to Santos, he told Cioffi that Amazon supported employees' decision on whether to vote for the Union. Santos denied any recollection of a conversation with Cioffi regarding promotion opportunities. Santos further testified that he never promised to promote Cioffi if he stopped supporting the Union.[9] (Tr. 679-682)

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[7] I do not credit Cioffi regarding this alleged comment by Carolina. As discussed below, I did not find Cioffi particularly credible because his testimony conflicted with video evidence regarding the incident which led to his discharge. For her part, Carolina denied making any negative or derogatory comments to Cioffi about his involvement in the Union. Further, although there was perhaps some confusion among area managers about Cioffi's status as permanent or seasonal, Cioffi testified that he was already permanent when he affixed the stickers to his vest. (Tr. 607, 824)

[8] Cioffi appeared to be referring to the JFK8 election, but it is not entirely clear.

[9] I credit Santos' denial that he promised to promote Cioffi if he agreed to stop supporting the Union. As described below, I did not find Cioffi particularly credible because his testimony conflicted

Events Leading to the Suspension of Cioffi

In late May, the managers Cioffi normally reported to (Operations Manager Aaron Parsons and Area Manager Quierand Bently) were both on leave. With Parsons and Bently out, Area Manager Carolina was in charge of four floors (1-4 West). However, Cioffi did not report directly to Carolina, who had a different PA working directly for her. Rather, Cioffi reported to Area Manager Kevin Diaz who was acting as operations manager for Parsons. (Tr. 253-256, 356, 609, 659, 663-664, 671-672) Carolina testified that, while Bentley was out, Cioffi did not do certain things she asked him to do and gave her backtalk. (Tr. 659-664)

On about May 24, Carolina and Cioffi argued after she told him it was unsafe to stack certain pallets rather than send them to other floors. (Tr. 671-672) (R. Exh. 27)

On May 25, in discovery during the 10(j) case *King v. Amazon*, 1:22-cv-01479 (E.D.N.Y), an attorney for Amazon deposed Union president and former JFK8 employee Smalls. During the deposition, Amazon's counsel asked Smalls to confirm that Cioffi claimed to have flipped about 400-500 votes from no to yes during a 3 ½-4 week period prior to the JFK8 election. Smalls confirmed that Cioffi made such a claim. (G.C. Exh. 17) (Tr. 471-472)

During the May 25-26 overnight shift, Cioffi ran floors 1-2 West and Carolina ran floors 3-4 West. However, Carolina oversaw the operation of all four floors. (Tr. 254, 356, 659) Cioffi testified that Carolina came downstairs and was "yelling and screaming" at him about the workflow. Carolina accused Cioffi of taking all the good work for himself (e.g., all the totes with small items which can be processed quickly). Cioffi raised his voice in return and denied he was taking all the good work. Cioffi testified that he raised his voice because Carolina was very aggressive and it was necessary to be heard over the production noise. An argument ensued. Cioffi testified that he called Area Manager Diaz over and Diaz agreed with him. Carolina said this is "fucked up" and went back upstairs. Otherwise, neither Cioffi nor Carolina cursed or used any derogatory language during the argument.[10] (Tr. 256-262, 356-358, 360-362)

Later during the shift, at about 9 p.m., Carolina called Cioffi on the radio regarding an associate who was having difficulty stowing. Carolina and Cioffi did not argue during the conversation or reference the earlier argument. Cioffi testified that he thought they had "gotten over that." (Tr. 262-265, 357)

At the end of the shift, at about 5 a.m., the inbound area managers and PAs met at the inbound dock desk to review their daily reports and productivity rates. (Tr. 265-269, 659) Those

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with video evidence regarding the incident which led to his discharge. Conversely, Santos was generally credible and I did not find his account of the conversation inherently less likely than Cioffi's. It is possible Cioffi talked to management about his influence with voters in the hopes he would be offered a promotion to stop his union activity or simply took pride in his organizing efforts. Since Cioffi gave a public speech in which he claimed to have flipped 400-500 votes from no to yes, it would not be overly surprising if he said something similar to Santos and Marc.

[10] Carolina denied she had such an argument with Cioffi. In fact, Carolina testified that she avoided talking to Cioffi until the end of the shift because she was having difficulty with him earlier in the week. (Tr. 659, 663) However, at hearing and in contemporaneous written statements, other witnesses (Kevin Goldstein, Caleb Guerrier, and Fatima Ficci) confirmed that the argument occurred. (Tr. 608-609) (R. Exhs. 25, 30) Accordingly, I credit Cioffi's testimony regarding the argument he had with Carolina on May 25.

present included Cioffi, Carolina, PA Anastasio Kalogeropoulos, Area Manager Goldstein, Area Manager Diaz, Area Manager Ficci, and PA Caleb Vixama.[11] (Tr. 269-271, 362) Cioffi testified that he had the top productivity rate that night and Carolina was close behind with the second best productivity rate. (Tr. 266, 362)

Carolina testified that, during this May 26 meeting at the dock desk, Cioffi "came up to me, … called me a bitch, smacked his hand on my . . . neck firmly." (Tr. 659-660) Carolina further testified that she "[g]ave him a look like . . . I'm not joking. And then he kicked the trash can and walked away." (Tr. 659-660) Carolina did not think Cioffi was joking because she was not well acquainted with him and never previously had such an encounter with him or anybody else at work. (Tr. 660) Carolina testified that Cioffi's conduct came "out of nowhere" and that she and Cioffi were not, at the time, congratulating each other on having a great day. (Tr. 664)

The record contains two videos (no audio) of this incident with one from an angle to the side of the desk (G.C. Exh. 11) and the other from an angle above the desk (G.C. Exh. 12). (Tr. 265-269, 274-280) In the overhead video, Cioffi can be seen speaking to Ficci before Carolina called him over. (G.C. Exh. 12 at 0:00-0:55) (Tr. 274) Carolina was looking at her laptop computer and Cioffi put his own laptop next to hers to show her some numbers and audits. (Tr. 274-275) Cioffi ultimately moved away to talk with two people on the other side of the table, touching one on the arm and the other on the back. (G.C. Exh. 11 at 0:00-0:07) (G.C. Exh. 12 at 1:55-2.07) Cioffi then moved back next to Carolina and reached out to shake her hand. Immediately after shaking Carolina's hand, Cioffi reached over Carolina's shoulder with his right hand and pushed or shoved her in the neck or face.[12] (G.C. Exh. 11 at 0:07-0:13) (G.C. Exh. 12 at 2:07-213) Although the contact did not appear to be extremely forceful, it did move Carolina's head and shoulders slightly to the right. (G.C. Exh. 11 at 0:05-0:13) Cioffi then moved away to the left. Carolina waived her left hand at Cioffi's right hand as he moved away and rocked back and forth while appearing to say something and laugh. (R. Exh. 27) Cioffi moved back to stand next to Carolina and they appeared to continue a conversation. (G.C. Exh. 11 at 0:13-0:18) (G.C. Exh. 12 at 2:09-2:15) As they spoke, Carolina reached out with her left arm to touch or nudge Cioffi's right arm. (G.C. Exh. 11 at 0:16-0:34) (G.C. Exh. 12 at 2:15-2:35) (Tr. 278) Tier 1 associate Caleb Gurrier then walked past Carolina and Cioffi. On the way, Gurrier tapped Carolina on the arm and back and tapped Cioffi on the arm before giving him a fist bump. (G.C. Exh. 11 at 0:22-0:29) (G.C. Exh. 12 at 2:23-2:28) (Tr. 535-536) (R. Exh. 24) After speaking with Carolina, Cioffi moved to the other side of the desk, passing a small garbage can on the ground. (G.C. Exh. 11 at 0:33-0:38) Although the video is somewhat blocked by a white board in front of Cioffi, it appears that, while standing in place and looking at Carolina, Cioffi lifted his right foot and kicked the garbage can over in Carolina's direction. (Tr. 807-809) Some paper balls fell out of the garbage onto the floor. Cioffi kicked those paper balls back in the garbage and picked up the garbage can. (G.C. Exh. 11 at 0:37-1:01)

Regarding his physical contact with Carolina, Cioffi testified, "I went up to her and I went to go tap her on her shoulder and I accidentally hit her. I think it was by her neck."[13] (Tr. 267-268, 364, 383) Cioffi claimed he was congratulating Carolina on doing a good job during the shift

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[11] Vixama's last name is spelled incorrectly in the transcript as "Zixama."

[12] There was significant discussion at hearing among counsel and witnesses as to whether this contact was a slap, touch, tap, push, shove, etc. In my opinion, upon review of the video, Cioffi's contact with Carolina can best be described as a push or shove.

[13] As discussed below, I do not credit Cioffi's testimony that he intended to tap Carolina on the shoulder and accidentally made contact with her neck. In my opinion, the video shows that he intentionally reached over her shoulder and pushed her in the neck or face. (G.C. Exh. 11)

and this was a "congratulatory shove" as if to say we did great. (Tr. 268, 363, 383) According to Cioffi, such contact was common at JFK8 (like patting someone on the back). (Tr. 267-268) Cioffi further testified that nobody, including Carolina, said anything to him about it. (Tr. 279)

Cioffi denied he called Carolina a "bitch" or used the word "bitch." (Tr. 395) Cioffi testified that he and Carolina talked only about work matters such as productivity rates, workflow, audits, and setting up the floors for the next day. (Tr. 267-268, 275-276)

Cioffi claimed he knocked the garbage can over by mistake and started "playing soccer" with the paper balls which fell out onto the floor. (Tr. 279, 364-365) However, Cioffi also testified, in the alternative, that the garbage could have been knocked over by somebody else. (Tr. 364-365) Cioffi further testified as follows (Tr. 381):

> I probably hit the garbage pail. I was probably playing around with whoever that person was. I don't remember if it was Caleb or another PA that was there, because I can't make out -- right now, I cannot make out with the hood. So I was probably messing and I hit the garbage pail. And if it was out of [anger], I would've left the garbage pail on the floor and walked away.

Cioffi noted that "it wasn't malicious because I was playing around like [the garbage can] was a soccer goal, a soccer post[.]" (Tr. 381-382) Cioffi testified that he and Carolina were in a good mood at the end of his May 25-26 shift because they had a good day. In fact, according to Cioffi, he went out to breakfast that morning with some of the area managers. At breakfast, nobody mentioned Cioffi's interaction with Carolina or anything about him engaging in inappropriate conduct at the dock desk. (Tr. 362-363, 388-389)

PA Kalogeropoulos, who could be seen in the side view video wearing a black cap, testified that he was working on his shift report across the desk from Carolina and glanced up to see Cioffi's "hand on her face," but he did not "see the full motion." (Tr. 497, 501) (G.C. Exh. 11) Kalogeropoulos understood the Respondent to have a zero tolerance policy for violence and that associates were required to report such incidents. Kalogeropoulos did not report the incident involving Cioffi and Carolina because they "were having a discussion" and "laughing at the time." Therefore, he did not see any threat or anything contrary to company policy. (Tr. 509, 511) Kalogeropoulos further testified as follows regarding the incident at the dock desk (Tr. 497-499):

> So while I was doing my new shift report, they did have a disagreement and they were overcoming their differences with trying to maintain workflow throughout the shift. It was also ongoing for the week out. They were trying to balance and they were having issues where the teammates were favoring other workers to try to make it an easier day for them and that morning of they settled their differences, they came to an agreement, they were laughing and I just went about doing my new shift report. And I just happened to glance up and I see his hand on her face. (Tr. 497)
>
> …
>
> She was very calm, she didn't raise any hysteria, but she kept very calm about it. She did not escalate the situation and then we just proceeded about our night and we closed the shift until the next following shift is when she went to make her report and we went in to give our statements with the witnesses that were around. (Tr. 498)
>
> …
>
> I wasn't really paying close attention, but did hear [Cioffi say to Carolina] the words, you are still my bitch. (Tr. 499)

Regarding Cioffi's comment that "you are still my bitch," Kalogeropoulos testified, "It wasn't threatening. The body language, they were laughing, joking . . .." (Tr. 513)

Area Manager Goldstein was standing across the dock desk when he heard Cioffi apologize to Carolina for their argument getting "to that level." (Tr. 609) Goldstein testified that "they were going back and forth again, and then he playfully smacked her across the face[.]" (Tr. 609) Goldstein characterized the contact as "a tap, but he didn't raise his hand back . . . to hit her . . . maliciously[.]" (Tr. 610) Goldstein never saw someone do that before and testified that "you don't put your on hand on someone's face[.]" (Tr. 610) Goldstein testified that "they were both like laughing a little bit and then he said under his breath around her, … acting like a bitch or something like that." (Tr. 609) Goldstein did not think Cioffi "meant it meanly towards her" when he used the word "bitch." (Tr. 609-610)

PA Vixama, who was wearing a hood and standing to Cioffi's left, testified that "Pasquale was apologizing for a prior incident and then the last thing he did after apologized was slap Imaane in the face and he walked off." (Tr. 520, 525) (G.C. Exh. 11) According to Vixama, when Cioffi apologized, Carolina cordially responded, "I got you, everything's all good." (Tr. 537) Vixama testified that Carolina and Cioffi were laughing and joking until Cioffi slapped her, and then everything became serious and not cordial. (Tr. 534, 537) Vixama testified that Cioffi "did call her a bitch when he slapped her and walked off," kicking a garbage can on his way out. (Tr. 520, 523)

Area Manager Ficci testified that she did not see an altercation between Cioffi and Carolina at the dock desk, but she did hear Cioffi say the word "bitch." (Tr. 825-826) Ficci testified that Cioffi did not use the word "bitch" in a friendly way. (Tr. 826, 834) Ficci testified on direct examination that she saw the garbage can fall on the floor, but later testified on cross examination that she only heard the garbage can fall and saw it on the floor. (Tr. 825, 838)

After finishing his May 25-26 shift, Cioffi next returned to work for an overtime shift beginning the night of May 26. Cioffi worked the full shift without anybody saying anything to him about an incident involving Carolina on the previous shift. Following his May 26-27 overtime shift, Cioffi's next day of work began on May 29. (Tr. 280)

The Respondent's Suspension, Investigation, and Discharge of Cioffi

On May 29, at the start of her shift, Carolina spoke to then Senior HR Assistant Danny Klassen to report the May 26 incident with Cioffi.[14] (Tr. 662, 686) Carolina told HR that, leading up to the incident, Cioffi was not following her directives. Carolina told HR these were "little issues" and "nothing extreme." Carolina testified that she told HR she was not speaking with Cioffi that day and then, out of nowhere, Cioffi "said something, called me a bitch, and then put his hand firmly on my neck." (Tr. 663-664) Carolino also told HR Cioffi kicked over a garbage can. (Tr. 663) Klassen testified that Carolina told him Cioffi slapped her in the face and called her a bitch. (Tr. 687)

On May 29, after speaking with Klassen, Carolina provided HR with the following statement (Tr. 865) (R. Exh. 22):

[14] Carolina testified that she spoke to HR on May 26. However, Klassen testified that she spoke to him on May 29 and her written statement is dated May 29. (Tr. 661-662, 686-688) (R. Exh. 22) Accordingly, I find that Carolina spoke to HR on May 29.

> On Thursday 5/26/22 at about 5:25 am, me and other AMs/PAs were at the inbound dock desk finishing up paperwork for the shift. AA cioffp approached me to apologize for the disagreement that we had the day before regarding the workflow in inbound. He put out his hand for me to shake it, and asked if we were good. I shook his hand and said, "yes". Immediately after he called me a "Bitch" and slapped me on my neck/cheek. This made me feel very uncomfortable. I tried to play off the situation like it wasn't a big deal and continued to fill out paperwork, trying to ignore AA cioffp. AA cioffp then kicked down the garbage can that was located to the left of me and the trash fell out of the can at my feet. I continued trying to ignore AA cioffp. He eventually picked up the trash, put it back in the trash can, and walked away.

Klassen notified Loss Prevention and an investigation commenced. Klassen and Loss Prevention Specialist Funaro[15] participated in the investigation. (Tr. 688-690)

On May 29, PA Kalogeropoulos provided the following written statement regarding the May 26 incident (R. Exh. 11) (Tr. 509-512):

> From the dates 5/22 – 5/26 there were disagreements between the two teams on the West side floors A01 – A04, which were Imaane/Carson – Quierand/Pasquale about workflow.
>
> On Thursday morning May 26th, 2022, end of shift, managers gather around INBOUND DOCK DESK. I was at my Desk, INBOUND DOCK P.A., closing out my reports for end of shift. Across from me I see Imaane and Pasquale making up for their disagreements. I could not clearly have an idea about what was talked about as I was focused on my paperwork, but at the end of their discussion, Pasquale lightly in a slap gesture tapped Imaane cheek on her face.

On May 29, Area Manager Goldstein provided the following written statement regarding the May 26 incident (R. Exh. 21) (Tr. 612, 618, 692-694) :

> On 05/26, at the end of shift the managers meet up at the dock desk. Pasquale met up with Imaane to apologize for an altercation they had the day before. Pasquale shook Imaane's hand but became upset because Imaane didn't apologize in return. Pasquale jokefully put his hand across Imaane's face and called her a Bitch. Imaane then kept telling Pasquale to walk away. She didn't take it in a joking manner.

At hearing, Goldstein testified that he did not recall Carolina telling Cioffi "to walk away." (Tr. 613) Goldstein further testified that he said in the statement that Carolina did not take Cioffi's conduct in a joking manner "because she was angry." (Tr. 613)

On May 29, after talking to Kalogeropoulos and Goldstein and reviewing video, Klassen called Cioffi to the office to be interviewed by Funaro. (Tr. 695) Klassen took notes. (R. Exh. 23) At hearing, Cioffi described this conversation as follows: The managers repeatedly asked him whether he knew why he was there. Cioffi told them he did not know. They said he was

[15] At the time of the hearing, Funaro was employed by the Respondent as a tier 1 associate and was no longer working in loss prevention. (Tr. 753-754)

accused of having an altercation with a manager in which he hit the manager and called the manager a name. Cioffi said he did not know what they were talking about. They said it would have occurred Wednesday morning at the end of the shift. Cioffi said he had a dispute with an area manager on the floor that evening and told them what happened. However, as to hitting someone, Cioffi said he tapped the manager on the shoulder that morning in a congratulatory manner, in the same way people have congratulated him many times. Cioffi denied smacking the manager and noted that there was no commotion after he tapped her. They asked Cioffi to write a statement, but he refused. Cioffi asked if they were going to fire him because he knew, if he hit somebody, they were supposed to fire him on the spot. They said he was being placed on paid suspension. Cioffi asked to see a video of the incident. The managers said they had a video, but refused to show it to him. Cioffi accused the managers of targeting him and nitpicking because he was pro-union. (Tr. 281-285, 695-699) (R. Exh. 23) (Jt. Exh. 1 ¶ 7)

Klassen described the interview with Cioffi as follows: Cioffi denied everything and did not know why he was there. The managers told Cioffi they had video of him slapping and touching Carolina on her face. Cioffi asked for the footage, but the managers refused. Cioffi said he felt he was being discriminated against because he was an ALU member and would get the news involved if he had to. Cioffi also claimed Carolina was being racist toward him. The managers did not have time to ask Cioffi for a written statement because he walked out before they could do so. (Tr. 695-699) (R. Exh. 23)

On May 29, the Respondent placed Cioffi on paid administrative suspension pending investigation, citing violations of the Respondent's Standards of Conduct policy. (Jt. Exh. 1 ¶ 7) Cioffi was walked out of the building. (Tr. 365) According to Area Manager Ficci, on his way out, Cioffi walked over and said, "Tell Imaane I said good luck." Ficci described Cioffi's tone as serious and not a genuine expression that he was wishing Carolina good luck. (Tr. 827-829) Cioffi denied saying anything of the kind to Ficci or anyone else.[16] (Tr. 365-367)

Klassen's June 5 notes of Loss Prevention Specialist Funaro's interview of Carolina including the following (R. Exh. 27):

> At the end of the week, he came up to me to apologize for the way he acted earlier in the week. He asked me to say "sorry" back or something like that, and I didn't say sorry, so he called me a "bitch" and hit me in the neck. It was just weird because he had just apologized and it changed in an instant. I was very surprised by what happened so you see me laughing on video trying to play it off, and then you can't see this on video but I asked him "why are you calling me a bitch and slapping me after apologizing?" He walked away when I said this, didn't respond to my knowledge, and then kicked the garbage can over.

[16] In my legal analysis below, I do not address Cioffi's comment to Ficci to "tell Imaane I said good luck" because the evidence does not indicate that the Respondent relied on such a comment to suspend or discharge Cioffi. However, I do credit Ficci's testimony that Cioffi said, "tell Imaane I said good luck," or something to that effect. As noted herein, I did not find Cioffi or Ficci entirely credible. Cioffi's testimony was inconsistent with video evidence and Ficci's testimony was inconsistent with her prior statements. However, Ficci's written statement and the notes of her interview by loss prevention reflect that, on June 7, she reported that Cioffi made such a comment. And while Ficci's testimony at hearing was not entirely credible, her June 7 statements appeared to be accurate and did not exaggerate Cioffi's misconduct. Indeed, the notes of Ficci's interview reflect that she denied seeing Cioffi kick the garbage can or that Cioffi necessarily used the word "bitch" in a malicious way. Accordingly, I credit Ficci's testimony that, on May 29, Cioffi said, "tell Imaane I said good luck," or something to that effect.

Klassen's June 5 notes of Funaro's interview of PA Vixama indicate that Vixama said, "What I did see was Pasquale, he basically hit one of the managers, Imaane, in the face, and called her a 'bitch'." (R. Exh. 26)

Klassen's June 5 notes of Funaro's interview of tier 1 associate Guerrier indicate that Guerrer said he did not see anything happen between Cioffi and Carolina on May 26 and "it was just a normal Wednesday." (R. Exh. 24)

Likewise, HR Assistant Muller's June 7 notes of Funaro's interview of Area Manager Diaz indicate that Diaz was on his laptop and "not aware of what happened . . .." (R. Exh. 46)

Klassen's June 7 notes of Funaro's interview of Area Manager Ficci included the following (R. Exh. 29):

> [Funaro]: When I reviewed the footage from the incident involving Pasquale, you were seen at the leadership desk when the incident happens. Do you have any information for us regarding the incident?
>
> [Ficci]: The[ ] day before he was getting very upset regarding workflow between him and Imaane's team. He was saying that he "doesn't give a fuck" about other team's problems. I know that he came down to the leadership desk and was there Thursday morning. I saw the trashcan on the ground, but I didn't see him kick it. I heard him say "bitch," but I cannot say that I saw him say it to Imaane nor did I know if it was said in a malicious way. I'm sorry. I was just trying to get my work done that morning so I could go home and I wasn't really paying attention to anything around me.
>
> . . .
>
> [Funaro]: . . . When Pasquale was leaving the building on 5/29/22, did he tell you and Kevin to "Tell Imaane good luck?"
>
> [Ficci]: Yes, I can confirm he said that to me. At the time, I had no clue what he was talking about, so I didn't think it needed to be escalated.

On June 7, after being interviewed, Ficci provided the following written statement (R. Exh. 30):

> The initial first disagreement was on the Tuesday 24th, they had another disagreement on Wed. 25th. At the end of the night, all managers meet at the dock desk for EOS meeting. Pasquale came down to the desk. I didn't see the kick of the garbage can but I did see it on the floor. I did not witness the altercation but I heard him say "bitch." On the 29th of Sunday, Pasquale was getting walked out when he gave Kevin G. and I his walkie before leaving he said "tell Imaane good luck."

Funaro ultimately prepared a Global Workplace Incident Management Reporting Template ("WIM Report") which described the May 26 incident as follows (R. Exh. 33):

> On May 29th, 2022, at 1836hrs, Sr. Human Resources Assistant (HRA) Danny Klassen informed me, JFK8 Loss Prevention Specialist (LPS) Sarah Funaro, that [Carolina] had been physically assaulted by [Cioffi] at 0515hrs, at the inbound dock leadership desk on May 26th, 2022. [Carolina] stated that [Cioffi] slapped

> them in the face. [Carolina] stated they had a disagreement with [Cioffi] earlier in the day regarding work flow. [Carolina] also stated that immediately after the assault, [Cioffi] called them a "Bitch" and kicked over a garbage can. The WITNESS, Anastasios Kalogeropoulos, stated that they observed [Cioffi] slap [Carolina] on the face. Both [Carolina] and WITNESS Kalogeropoulos signed written statements. I reviewed video footage which is consistent with the statements.
>
> At 1938hrs on May 29th, I interviewed [Cioffi] in the presence of Sr.HRA Klassen. [Cioffi] initially denied the incident took place. After I explained to [Cioffi] what was visible on video footage, [Cioffi] stated, "It was a pat on the back to congratulate [Carolina] on their shift accomplishments and [Carolina] was laughing with me." [Cioffi] denied using the profanity "Bitch" during the interaction with [Carolina]. [Cioffi] also stated that they kicked the garbage can over by accident after celebrating their shift accomplishment. At 1954hrs, I escorted [Cioffi] from the building and security suspended their badge.

In a section for "Additional Notes," the WIM Report stated, "[Cioffi] abruptly exited the interview room at 1954 hrs and refused to provide a voluntary statement." (R. Exh. 33)

On June 9, the Respondent discharged Cioffi. (Jt. Exh. 1 ¶ 7) (R. Exh. 51) The Respondent prepared a feedback termination notice which stated as follows (R. Exh. 51):

> The following feedback pertains to Amazon's NAFC Security Standards of Conduct policy. Workplace violence, including any intentional or reckless act that harms persons or property, is prohibited. Workplace violence also includes any verbal or physical conduct that threatens or that reasonably could be interpreted as an intent to cause harm to property or personal safety, even if it does not ultimately lead to harm to property or personal safety. On May 26, 2022, it was discovered that you made physical contact with another employee by hitting them in the face and calling them a "bitch". Additionally, you kicked over a garbage can toward them. A complete investigation was conducted where these allegations were confirmed.

The Respondent suspended and discharged Cioffi without providing the Union notice or an opportunity to bargain prior to taking those actions. (Jt. Exh. 1 ¶ 9)

On June 10, Union counsel emailed Hunton attorney Rodgers a letter demanding that the Respondent, among other actions, reinstate and make Cioffi whole, bargain over a moratorium on terminations until the issue of Union certification has been decided, and provide certain information regarding Cioffi's termination. (G.C. Exh. 14)

Credibility Determinations Regarding the Early-Morning May 26 Incident

As noted above, I did not find Cioffi particularly credible and largely discredit his testimony, including his account of the May 26 incident. Cioffi did not, as he claimed, try to tap Carolina on the shoulder and accidentally make contact with her neck. Rather, Cioffi can be seen on video reaching over Carolina's shoulder and pushing her in the neck or face. Likewise, Cioffi did not, as he claimed, accidentally knock over the garbage can. Rather, Cioffi looked at Carolina and kicked the garbage can in her direction. Despite being shown the video at hearing, Cioffi provided vague and shifting testimony that he "probably" knocked over the garbage can while "playing around with whoever that person was" or, alternatively, that the

garbage was knocked over by somebody else. As a witness, Cioffi appeared more intent on minimizing any allegation of misconduct than accurately describing what occurred.

Cioffi's testimony regarding what was said at the dock desk on May 26 was also less credible than the Respondent's corroborated evidence. Cioffi denied he used the word "bitch." However, as discussed above, I did not find Cioffi generally credible, in large part, because his testimony was inconsistent with video evidence. Conversely, for the most part, I did not have similar problems with the credibility of the Respondent's witnesses. Carolina, Kalogeropoulos, Goldstein, Vixama, and Ficci all testified that they heard Cioffi used the word "bitch." Further, the written statements of Carolina, Goldstein, and Ficci corroborate such testimony. Klassen's notes of Vixama's interview also indicated the same. I found the corroborated testimony of the Respondent's witnesses that Cioffi used the word "bitch" to be more credible than Cioffi's denial.[17]

Cioffi also claimed that, at the dock desk, he only spoke to Carolina about work and was merely congratulating her on having a good productive day when he accidentally made contact with her neck. However, Goldstein and Vixama testified that, at the time, Cioffi was apologizing to Carolina regarding a prior argument. Carolina and Goldstein provided written statements which state the same. Kalogeropoulous provided a similar written statement which indicated that Carolina and Cioffi were making up for their disagreements. Accordingly, based upon the credible corroborated evidence provided by the Respondent, I find that Cioffi and Carolina were discussing a prior argument, and he apologized to her before making physical contact.

Additional Disciplinary Actions

On June 22, the Respondent discharged JFK8 employee Sharon Bogat-Weathley in accordance with its SPPR policy. The Respondent did so without providing the Union with notice or the opportunity to bargain. (Jt. Exh. 1 ¶ 10, 12)

As noted above, on November 19, the Respondent issued a document coaching and first written warning to Spence, citing the Off-Duty Access policy. The Respondent did so without providing the Union with notice or the opportunity to bargain. (Jt. Exh. 1 ¶ 19-20, 24)

On November 26, the Respondent issued a verbal coaching to JFK 8 employee Michelle Valentin Nieves, citing its Off-Duty Access policy. The Respondent did so without providing the Union with notice or the opportunity to bargain. (Jt. Exh. 1 ¶ 23-24)

On February 5, 2023, the Respondent discharged JFK8 employee Simone Peele in accordance with SPPR policy. (Jt. Exh. 1 ¶ 13) The Respondent did so without providing the Union with notice or the opportunity to bargain. (Jt. Exh. ¶ 14)

Union Information Requests and Demands to Bargain

On about October 5, Union counsel sent a letter to Hunton attorneys Larkin and Rogers which included the following (Jt. Exh. 1 ¶ 17) (Jt. Exh. 3):

[17] The credibility of these largely corroborated accounts is not diminished because witnesses had different recollections as to the exact use and context of the word "bitch." The area was noisy and the witnesses were admittedly more focused on what they were doing than what Cioffi and Carolina were saying to each. However, they all credibly testified that they heard Cioffi use the word "bitch."

As you know, this office is General Counsel to the Amazon Labor Union (ALU). We wrote to you on June 10, 2022, and June 22, 2022, on behalf of the ALU demanding a right to bargain over discharges at JFK8 and in particular the unlawful terminations of Pat Cioffi and Sharon Bogat-Weathley. Not only did you fail to bargain over those terminations, but you also failed to even acknowledge receipt of those letters nor to provide the demanded information in those letters.

Since then, Amazon has brazenly and arbitrarily continued to terminate Associates who are supporters of the ALU in order to reduce support for the Union and has refused to discuss this matter with the union. This kind of unilateral action must end. Moreover, workers who have sought to exercise their Weingarten rights have been repeatedly refused and told that the Company's Employment lawyers claim that Associates at Amazon have no Weingarten rights. This is another very serious matter which the Union is addressing. The situation has now been exacerbated by the events of October 3, 2022, when a fire broke out at the JFK8 facility and while you excused the attendance of the day shift workers, Amazon ordered the night shift workers to come in as scheduled even though the warehouse continued to have a smell of toxic fumes. . . .
We were informed throughout the day of October 4, 2022, that numerous workers had been suspended pending investigation for their participation in this protest over unsafe work conditions. These are workers including the ALU officers and leaders who exercised their collective right to protest what they believed were abnormally dangerous working conditions. This type of retaliation in violation of federal law will not be tolerated by the ALU. We will take all necessary steps to ensure that these workers are not punished for engaging in protected
concerted activity.

Furthermore, we believe that Amazon's objections to the election at JFK8 were not valid and interposed only for purposes of delay. The report of the Hearing Officer confirms this. At this point the ALU believes all of the suspensions of the persons who protested unsafe working conditions due to the fire be rescinded and no investigation commenced.

On behalf of the ALU we demand that Amazon engage in good faith negotiations with the union regarding ongoing disciplines of JFK8 associates.
We further make the following information demands:

1. Please provide a copy of the evacuation plan that Amazon has for emergency situations including but not limited to a fire evacuation plan.
   a. Please provide proof that any plan produced in response to demand 1[ ] has been provided to Associates at JFK8 on both the day and the night shift.
2. All documents showing the evacuation plan was implemented for the day shift, and specifically showing how all employees were accounted for.
3. Please provide documents showing history of fire drills in the JFK8 facility.
4. Please provide all documents which were relied on by Amazon to claim that the New York City Fire Department said it was safe for people to work in the building after the fire on October 3, 2022.
5. All documents showing steps taken to inform the night shift workers about the fire.

6. Please provide the scope of work for the Amazon subcontractor that arrived at JFKS on October 3, 2022, at approximately 11:30PM.

Since about October 5, the Respondent has neither responded to the request for information in this letter nor provided the Union with the requested information. (Jt. Exh. 1 ¶ 18)

On about February 19, 2023, Union counsel Seth Goldstein sent an e-mail to Hunton attorneys Larkin and Rodgers requesting information relevant to the discharge of Simon Peele's February 5, 2023, discharge. (Jt. Exh. 1 ¶ 15) The email stated as follows (Jt. Exh. 2):

> Please provide pursuant to Section 8(a)(5) of the Act [the] following information and/ or documents pursuant to Amazon Labor Union's request to bargain over discretionary disciplinary action not yet covered in the collective bargaining agreement as follows:
>
> 1. A copy of Simone Peele personnel file.
> 2. A copy of all Simone Peele's disciplinary write ups.
> 3. Please provide a copy of all notes taken by the Employer regarding the incident which resulted in Simone Peele was discharged?)
> 4. Please state where the incident involving Simone Peele occurred'?
> 5. Please state the date and time the incident involving Simone Peele occurred?

Since about February 19, 2023, the Respondent has neither responded to this request for information nor provided the Union with the information requested. (Jt. Exh. 1 ¶ 16)

ANALYSIS

8(a)(1) Allegations

Weingarten

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by denying the *Weingarten* requests of employees Spence, Hayden, Lopez, and Palmer.

"[U]nder *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) ("*Weingarten*"), a represented employee is entitled to have a union representative present at an investigatory meeting that may lead to discipline. Once an employee makes a valid request for union representation, the employer has one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without a union representative or having no interview at all." *Troy Grove*, 371 NLRB No. 138, slip op. at 3 (2022).

Initially, the Respondent defends against all the *Weingarten* violations on the ground that the Union's certification was not valid. However, the Board has rejected the Respondent's objections to the election and denied review of the Union's certification. *Amazon.com Services LLC*, 373 NLRB No. 92 (2024). Accordingly, *Weingarten* rights were available to unit employees at JFK8. See *Axelson, Inc.*, 285 NLRB 49, 49 fn. 2 (1987) (employer was found to have committed *Weingarten* violations after the Board confirmed union's majority status).

Conner Spence - Weingarten

The General Counsel contends that the Respondent violated 8(a)(1) by denying *Weingarten* requests to Spence on October 14 and October 23, 2023. I recommend the finding

of a violation on the October 14 allegation but dismissal of the October 23, 2023 allegation.

October 14, 2022

The Respondent contends that "Spence's account of the alleged October 14 . . . phone STU is not reliable enough to make out a *Weingarten* violation." (R. Brf. p. 78) The Respondent asserts that HR, by Greene, only conducted one STU with Spence on October 22.

I found Spence's testimony sufficiently detailed and credible to recommend the finding of a violation. On October 3, Spence participated in a work stoppage due to perceived unsafe conditions following a fire at JFK8. Upon arriving home, on October 4, at 12:41 a.m., Spence received an email from HR Business Partner Greene stating that Spence was suspended pending investigation. Spence replied, "I would like to have a peer or coworker accompany me during the investigative interview." (R. Exh. 7) On about October 14, a female HR representative called Spence and denied his request for a union representative before questioning him about what occurred during the October 3 work stoppage. Spence could not recall the name of the woman who called him.

The Respondent claims it did not receive sufficient notice of this allegation because the HR representative was not identified. Admittedly, a respondent is in a difficult position when the General Counsel's witness does not recall the name of a company representative who allegedly committed the violation. However, the Respondent knew the approximate date of the call, the subject matter of the conversation, the department (i.e., HR) of the caller, and the caller's gender. This would help the Respondent identify the caller. Alternatively, the Respondent could present evidence that it did not employ such a person or employed too many people who fit the description to consult as potential witnesses. The record contains no such evidence. See *Technitrol, Inc.*, 201 NLRB 74, 75 fn. 5 (1973) (the inability of a witness to remember the name of a supervisor she spoke to would not require such an unreasonably burdensome search by respondent as to warrant not giving the usual weight to that witness's uncontested testimony).

Even if Spence confused the October 14 phone call with a female representative and the October 22 phone call with Greene, I would recommend the finding of a *Weingarten violation*. That is, I would recommend a finding that Spence's October 4 request to have a "peer or coworker accompany me during the investigative interview" triggered his *Weingarten* rights for the STU by Greene on October 22. (R. Exh. 7)

In so concluding, I note that Spence's request was not invalid because he asked for a peer or coworker to be present instead of a union representative. Spence was a unit employee in a recently unionized facility and the Union officers were his "peers" and "coworkers." Spence also referenced an "investigatory interview," which is a term used by the Supreme Court in *Weingarten,* 420 U.S. 25, 262 (1975), and many subsequent Board decisions involving *Weingarten* violations, thereby suggesting he wanted to exercise his *Weingarten* rights. Further, even if Greene was confused about whether Spence was asking for union representation, he did not attempt to clarify the ambiguity. Indeed, Greene would have little reason to do so since, at the time, the Respondent maintained a policy of refusing *Weingarten* requests. See *Consolidated Casinos Corp.*, 266 NLRB 988, 1011 (1983) (employer's "failure to ask any clarifying questions and its consistent practice of denying all employee requests for the presence of anyone prevents [the employer] from successfully arguing the request was insufficiently specific to raise *Weingarten* rights").

Based upon the foregoing, I recommend a finding that, on October 14 or alternatively on October 22, the Respondent violated Section 8(a)(1) of the Act by refusing Spence's *Weingarten*

request to have a representative present during an investigatory interview.

October 23, 2023

Spence admittedly requested for Union representation during his October 23, 2023, STU with HR Business Partner Green regarding potential violations of the Off-Duty Access Policy. Spence testified that Greene flatly denied this request by saying, "no." (Tr. 179) Greene testified that he replied, "at this time we are not granting that request. This is a conversation we'd seek to have . . . one-on-one. If . . he would like to continue, he can do so." (Tr. 891) I credit Greene in this regard. In doing so, I note that Greene credibly testified without contradiction that STUs are always voluntary and that associates are always provided the option of continuing with those interviews or not.[18] Further, although I found Spence to be a credible witness who made every effort to testify truthfully, he did at times struggle to recall the details of certain events. (Tr. 183-184, 186-187, 190)

As noted above, once an employee requests union representation during a disciplinary interview, the employer may offer the employee a choice between continuing the interview without a union representative present or having no interview at all. *Troy Grove*, 371 NLRB No. 138, slip op. at 3 (2022). Here, the credible evidence supports a finding that Greene offered Spence such a choice on October 23, 2023. Accordingly, I recommend dismissal of that *Weingarten* allegation.

Derek Palmer - Weingarten

The General Counsel contends that, on December 7, the Respondent unlawfully denied Palmer's *Weingarten* request during an investigatory interview. I recommend the finding of a violation.

The Respondent claims it "did not violate Palmer's *Weingarten* rights during his December 7 meeting with Loss Prevention Manager Carbajal and HR Business Partner Greene because Carbajal provided Palmer the option to terminate the interview."[19] (R. Brf. p. 75) I disagree. During the December 7 interview, after Palmer made a *Weingarten* request, Carbajal and Palmer had the following exchange (G.C. Exh. 5):

> **Carbajal:** Perfect. So my response to that is right now we are not in a current union environment so we would rather have a direct conversation…
>
> **Palmer:** We are.
>
> **Carbajal:** here and with you… so let me finish, right, cause we are having a

[18] I admittedly found, below, that Loss Prevention Manager Carbajal, during an interview of Palmer with Greene present, did not successfully communicate to Palmer that he had the option to discontinue the interview. However, that finding was more a function of what appeared to be awkward phrasing by Carbajal and not an indication that Greene did not routinely ask associates whether they wanted to participate in investigatory interviews on a voluntary basis.

[19] In evaluating *Weingarten* violations, an objective standard is applied to determine whether an employee reasonably believed an investigatory interview may result in discipline. *Weingarten*, 420 U.S. at 257. Presumably, whether the employer offered an employee the choice between continuing the interview without a union representative present is subject to the same objective standard from the prospective of a reasonable employee.

> respectful conversation and appreciate you, and if you have something to say, then I'll let you finish. So, you know, currently right now, you know, we are not, you know, in a union environment, right, and we want to have a direct conversation with you so we can get, you know, some information regarding this incident. So, you know, ultimately that is on you. You know that is my response so if you have anything to say, … [unintelligible] happy to hear it.
>
> **Palmer:** Well, there's no… there's nothing involving me. If anything I'm just… So, you are denying Weingarten rights. Ok, cool.

I do not believe a reasonable employee in Palmer's situation would understand Carbajal to be offering a choice between continuing the interview without a union representative present or having no interview at all. Palmer was called down by management to have what appeared to be an involuntary disciplinary meeting. Carbajal incorrectly advised Palmer that he was not yet in a union environment and stated that they wanted to have a direct conversation with him to obtain information regarding the December 5 incident. Up until this point, a reasonable employee would believe participation in the meeting was mandatory.[20] I do not believe Carbajal communicated to Palmer that the opposite was true in stating that he would be happy to hear what Palmer had to say. That the Respondent would be happy to hear from Palmer does not necessarily mean Palmer could refuse to say anything. Additionally, Carbajal and Green did not correct Palmer when he said, "[s]o you are denying *Weingarten* rights. Ok, cool. Alright." (G.C. Exh. 5 at 3:10-4:46) The managers could have offered Palmer the option of continuing without a union representative present or having no interview all, but did not. Having failed to do so, I recommend a finding that, on December 7, the Respondent violated Section 8(a)(1) of the Act by denying Palmer's request to exercise his *Weingarten* rights during an investigatory interview.

Danielle Hayden – Weingarten

The General Counsel contends that the Respondent violated 8(a)(1) by denying Hayden's *Weingarten* requests on January 20, 2023, and in February 2023. I recommend the finding of a violation on both allegations.

January 20, 2023

At hearing, Powell initially denied and contradicted Hayden's testimony that she requested union representation and *Weingarten* rights during an investigatory interview on January 20, 2023. Powell claimed he would have escalated the matter to a more senior manager if Hayden had made such a request. However, when asked why he would have done so, Powell answered, "[b]ecause she was trying to request someone, so I – at the moment I did not know what to do at that time, so I would just escalate to my manager to get some guidance on that situation." (Tr. 586) It was my strong impression that Powell spontaneously testified that Hayden did, in fact, make a *Weingarten* request. Halfway through his answer, Powell appeared to recognize the inconsistency and testified that he "would" have just escalated the matter to his manager if she had done so, but the thrust of his testimony was to corroborate Hayden rather

[20] Although Greene credibly testified that investigatory STU interviews are always voluntary, the record contains no evidence that Palmer and other associates understood this to be the case.

than contradict her.[21] Accordingly, I credit Hayden over Powell.

Based upon the foregoing, I recommend a finding that, on January 20, 2023, the Respondent violated Section 8(a)(1) of the Act by refusing Hayden's request to have a union representative present and exercise her *Weingarten* rights during an investigatory interview.

February 2023

I credit Hayden's uncontested testimony that, during a February 2023 interview by Loss Prevention Specialist Funaro, Funaro denied Hayden's *Weingarten* requests. The Respondent did not call Funaro as a witness. Nevertheless, the Respondent asks that I "not draw an adverse inference for Amazon's failure to call Funaro because she is a former supervisor who is no longer under its direct control." (R. Brf. p. 76 fn. 23) At the time of the hearing, Funaro was a tier 1 associate and was no longer working in loss prevention. I draw no adverse inference even though Funaro was still employed by the Respondent and, whether she was employed or not, the Respondent could have compelled her appearance at hearing by subpoena. Rather, I simply credit Hayden's uncontested testimony as there is insufficient reason not to do so.

The Respondent claims Hayden admitted that Funaro ended the meeting after Hayden sought to exercise her *Weingarten* rights. I disagree. Admittedly, at hearing, Hayden could not initially recall whether Funaro asked any questions after Hayden requested union representation. The General Counsel showed Hayden her affidavit to refresh her recollection. Thereafter, in response to the same question, Hayden testified that "I had asked twice for union representation" and "I was vehemently denied." (Tr. 159) The General Counsel advised Hayden that this answer was not responsive to his question and again asked whether Funaro asked any questions after Hayden requested union representation. Hayden testified that Funaro "had asked me about the day of the incident and what had occurred." (Tr. 159) Although Hayden's recollection had to be refreshed and she struggled to understand what was being asked, I understood her testimony to be that Funaro asked these questions after she requested union representation. And although Hayden's recollection was admittedly imperfect, I did not find her uncontested testimony so flawed as to be unworthy of belief.

Based on the foregoing, I recommend a finding that, in about February 2023, the Respondent violated Section 8(a)(1) of the Act by denying Hayden's request to have a union representative present and exercise her *Weingarten* rights during an investigatory interview.

Yackisha Nebot Lopez – Weingarten

The General Counsel contends that, on April 26, 2023, the Respondent violated 8(a)(1) by denying the *Weingarten* request of employee Lopez. I recommend the finding of a violation.

The Respondent relies on Board law that "no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform [her] of, or impose, that previously determined discipline." *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) ("*Baton Rouge*"). Specifically, the Respondent asserts that the "SPPR policy mandates automatic termination after six warnings and that managers Jones and Ocampo had

[21] Powell's notes, which did not reflect that Hayden made a *Weingarten* request, do not provide a strong reason to credit him. The notes only reflect Hayden's comments regarding her interaction with her manager and ended before Hayden was asked to write a statement, which is when Hayden requested union representation.

no discretion in this decision, and merely communicated to Nebot Lopez that she was terminated per the SPPR Policy." (R. Brf. 78)

Initially, I disagree with the Respondent's factual assertion that the SPPR policy mandates termination and managers had no discretion in this regard. The Respondent's policy indicates only that the SPPR process "*recommends* . . . progressive discipline for the bottom 5% for productivity . . .." (R. Exh. 59) (Emphasis added) And although the policy indicates that "[a]ssociates are subject to termination on the 6th written warnings within a rolling 12 months," being "subject to termination" does not necessarily mean the employee must be terminated (particularly since the SPPR merely "recommends" discipline). (R. Exh. 59)

HR Business Partner Greene testified that he has never withdrawn a termination while administering discipline. However, such a withdrawal would not violate the policy and Green did not testify that other HR representatives have not done so. Indeed, on April 26, 2023, managers Jones and Ocampo engaged in a lengthy discussion with Lopez regarding the appropriateness of her termination, including whether Lopez was working with an existing accommodation, whether she received retraining (which, if not, would invalidate her termination under the SPPR policy), whether she was involuntarily transferred to the pick department or cross-trained, and whether her productivity was impacted by "pod gaps." During this discussion, Jones and Ocampo offered to consult with someone from the pick department regarding certain information Lopez provided and Jones left the meeting to do so. Although Jones and Ocampo told Lopez they could not promise anything and ultimately confirmed the termination after consulting with someone from the pick department, the totality of their comments strongly implied that they had discretion to reverse Lopez's termination on the spot.

Admittedly, it was Lopez who initiated the discussion of whether the termination was appropriate. However, thereafter, Jones and Ocampo asked Lopez several questions. Thus, this was not a situation where *Weingarten* rights did not attach because "the employer ha[d] reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview" and "meets with the employee simply to inform [her] of, or impose, that previously determined discipline." *Baton Rouge*, 246 NLRB at 997. In *Baton Rouge*, the Board observed that, "were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach." Id. The scenario described by the Board in *Baton Rouge* is akin to what happened here – i.e., managers informed Lopez of her termination and then asked questions to determine whether her termination was appropriate.

In so concluding, I understand that Jones and Ocampo did not appear intent on soliciting evidence to support the termination. Rather, to their credit, the managers engaged in a good faith exploration of facts which might mitigate Lopez's productivity lapse and be a basis to reverse her termination. However, as a legal matter, they were wrong about Lopez's union status and her right to have union representation present once the interview went beyond the mere administration of discipline and delved into a factual investigation of the same. Id.

Based upon the foregoing, I recommend a finding that, on April 26, 2023, the Respondent violated Section 8(a)(1) of the Act by denying Lopez's request to have a union representative present during an investigatory interview.

8(a)(3)

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Palmer for a 10-week period between December 7 and February 15, 2023, and, on May 29 and June 9, respectively, suspending and discharging Cioffi. The suspensions of Palmer and Cioffi were with pay pending investigation and no reference to such suspensions were maintained in the Respondent's files as disciplinary actions. I recommend findings that Palmer's suspension violated the Act, but dismissal of the allegations that Cioffi was unlawfully suspended and discharged.

The alleged discriminatory actions must be evaluated under the standard established in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). Under the *Wright Line* framework, the General Counsel must make a prima facie showing that union activity was a motivating factor in the employer's disciplinary decision. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip p. 7 (2023). The "General Counsel must establish an unfair labor practice by a preponderance of the evidence." Id., at 1088 fn. 11. See also *United Rentals, Inc.*, 350 NLRB 951, 951 (2007). This burden requires a showing that the employer had knowledge of and animus toward employee union activity. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip p. 7 (2023). An employer's motivation can be inferred from direct and circumstantial evidence on the record as a whole. Id. "Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee." Id. The General counsel may also use the employer's explanations for disciplinary actions or lack thereof to establish motive, including "proof that the employer's asserted reasons for the adverse action were pretextual." Id. "The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case." Id. citing *Wright Line*, 251 NLRB at 1088 fn. 12. If the General Counsel satisfies its initial prima facie burden, "the burden of persuasion shifts to the employer to establish that it would have taken the same action for a legitimate reason." Id. at 8. The Respondent's burden of establishing such an affirmative defense, like that of the General Counsel's prima facie case, is one of a preponderance of the evidence. Id.

Derek Palmer - Suspension

As noted above, the General Counsel contends that the Respondent violated 8(a)(3) by suspending Palmer with pay pending investigation from December 7 to February 15, 2023. To be clear, the General Counsel objects to the duration of the suspension and not the initial suspension itself. (Tr. 792-793) (G.C. Brf. p. 40)

The Respondent initially defends against this allegation on the grounds that a nondisciplinary suspension with pay is not an adverse employment action. Section 8(a)(3) provides that it shall be an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7[.]" Accordingly, an 8(a)(3) violation involves a discriminatory action and a derivative 8(a)(1) violation because the discriminatory action interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Powers Regular Co.*, 149 NLRB 1185, 1204 (1964); *Florida Citrus Canners Cooperative, Inc.*, 124 NLRB 1182, 1182-1183, 1210 (1959).

The Respondent, citing *Bellagio, LLC*, 362 NLRB 1426 (2015) ("*Bellagio*"), enf. denied 854 F.3d 703 (D.C. Cir. 2017) and *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006), contends that paid suspensions pending investigation do not constitute adverse employment actions because they are not disciplinary and do not remain in an employee's file as a potential basis for additional progressive discipline. However, in *Bellagio*, the majority rejected the dissent's assertion that a suspension pending investigation was not an adverse employment action even though the employee was returned to work without any disciplinary action being taken. 362 NLRB at 1429, fn. 13. Rather, in *Bellagio*, the majority found that an employee's removal from the building and the prospect of discipline was an adverse employment action.[22] In so holding, the Board noted that the employee's removal from the building and prospect of discipline would have a chilling effect on employees in the exercise of their Section 7 rights. Id., at 1428, fn. 14. Here, as in *Bellagio*, Palmer was removed from the building during a lengthy investigation that could potentially result in discipline. And since *Bellagio* is on point and controlling, the Respondent's defense cannot be sustained.[23]

In finding that Palmer's suspension with pay pending investigation was an adverse employment action, I note that Palmer was the Union vice president at the time and he routinely engaged in union activity inside and outside the JFK8 facility. Indeed, the argument between Daley and Smalls, which led to Palmer's suspension, occurred at the bus stop where Union organizers routinely engaged in union activity. Palmer's removal from the facility for 10 weeks could be expected to adversely impact the Union's ability to function on behalf of unit employees during that period. Further, Palmer's removal from the facility and the prospect of discipline (whether such discipline ultimately issued or not) would tend to chill employees' union activity. See *Bellagio*, 362 NLRB at 1428. Accordingly, I find that the Respondent engaged in an adverse employment action by suspending Palmer with pay pending investigation.

Prima Facie Case

Turning to the *Wright Line* analysis, the Respondent does not deny knowledge of Palmer's union position, support, and activity. Thus, the General Counsel's prima facie case turns only on whether antiunion animus was a motivating factor in Palmer's lengthy 10-week suspension following his involvement in an incident on December 5.

In my opinion, the strongest evidence of antiunion animus is the Respondent's failure to articulate a reason why Palmer's investigation took as long as it did. As noted above, the "absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case." *Wright Line*, 251 NLRB at 1088 fn. 12. Here, the evidence indicates that, within a week of the December 5 incident, the Respondent had collected evidence relevant to the investigation. The record does not indicate that the Respondent collected any additional evidence after the first week. In so finding, I note that the General Counsel attempted to question Regional Loss Prevention Manager Joe Troy and HR Business Partner Green regarding investigation activities which occurred more than a week after Palmer's suspension, but those witnesses either did not know of any such activities or were directed not to answer by

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[22] The Board quoted *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2002), in defining an adverse employment action as one in which "the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse." Id. at 1428.

[23] Although a circuit court of appeals refused to enforce the Board's *Bellagio* decision and found that no adverse employment occurred, I am required to follow Board precedent. See *Airgas USA, LLC*, 373 NLRB No. 102 (2024).

the Respondent's counsel on grounds of privilege. (Tr. 789-802, 940-945)

The Respondent urges me not to find an inference of animus based on the direction of Respondent's counsel to witnesses not to answer certain questions on the grounds of attorney-client privilege. However, I do not rely on that type of inference – i.e., a sanction based upon the refusal of a witness to answer questions. Rather, I simply rely on the absence of evidence that the Respondent did anything to investigate Palmer's suspension during the better part of a lengthy suspension *pending investigation*. Id. In finding animus on that basis, I note that the Respondent could have presented evidence of the date and general nature of investigation activities without breaking privilege. This is so because the "subject matter of meetings with an attorney, the persons present, the location of the meetings, or the persons arranging the meetings are not protected by the privilege." *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484–85 (D. Kan.), on reconsideration in part, 175 F.R.D. 321 (D. Kan. 1997) citing *U.S. v. Pappadio*, 346 F.2d 5 (2nd Cir. 1965).

The evidence also reflects disparate treatment of Palmer. Loss Prevention Manager Carbajal told Palmer he expected the suspension to be less than 7 days and Greene testified that it was common to complete an investigation of a potential disciplinary matter in 7 days or less. As noted above, there appeared to be no reason for Palmer's suspension to take any longer since the record contains no evidence that investigation activities took place more than 7 days after the investigation began. Further, the suspension was not simply extended by a couple of days or even weeks. Rather, Palmer was inexplicably suspended for 2 ½ months. In an effort to prove Palmer was treated like other employees, the Respondent presented evidence that other employees have been suspended pending investigation for over a month. However, those employees were ultimately discharged as a result of their investigations. Here, conversely, Palmer was not disciplined at all. Accordingly, the duration of the investigations of other employees is not analogous and the comparator evidence the Respondent relies upon to establish consistent treatment is not useful for that purpose.

Finally, I find it significant that the Respondent's December 7 suspension of Palmer was for an incident involving Union officers and a union related dispute at a location where the Union routinely engaged in organizing activity. On December 5, Palmer, Smalls, and other Union organizers went to the bus stop to engage in organizing activity. Daley submitted to the Respondent a written statement that argument occurred because Smalls was a "f[r]aud" who was "using the A.L.U. for his personal gain" and he (Daley) "don't back f[r]auds." (G.C. Exh. 20). That the Respondent targeted Palmer for an unexplained extended suspension following a union related incident suggests the Respondent's action was based on antiunion animus.

Based upon the foregoing, I find that the General Counsel established a prima facie case that the Respondent suspended Palmer for a 10-week period from December 7 to February 15, 2023 because of his union position, support, and activity.

Wright Line Defense

I find that the Respondent did not establish, as a *Wright Line* defense, that Palmer would have been suspended for 10 weeks regardless of his union position, support, and activity. As noted above, the Respondent routinely completed disciplinary investigations in 7 days or less. Here, the Respondent investigated the December 5 incident and obtained statements from witnesses within such a 7-day period. The Respondent failed to explain why the investigation and ultimate reinstatement of Palmer took so much longer. Accordingly, the Respondent failed to prove it would have suspended Palmer for 10 weeks regardless of his union position, support, and activity. And the Respondent having failed to establish such a *Wright Line* defense, I

recommend a finding that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Palmer with pay pending investigation for a 10-week period from December 7 to February 15, 2023 on a discriminatory basis.

Pasquale Cioffi – 8(a)(3) Suspension and Discharge

The General Counsel contends that the Respondent violated 8(a)(3) by suspending and discharging Cioffi.

Prima Facie Case

The Respondent does not deny knowledge of Cioffi's union activity. Therefore, to establish a prima facie case, the Respondent need only prove that Cioffi's union activity and support were a motivating factor in its alleged unlawful actions.

The General Counsel asserts that the timing of the Respondent's actions suggest animus because Cioffi was suspended 4 days after an Amazon attorney, on May 25, deposed Union President Smalls and asked him about Cioffi's claim at a public rally that he flipped 400-500 votes from no to yes. However, the rally was held on April 24 and Cioffi's participation was reported in the news at that time. The Respondent's attorney was clearly aware of this in advance of the May 25 deposition and asked leading questions to confirm the same. It was not the deposition which triggered action against Cioffi. Cioffi was suspended as a result of an intervening event, on May 29, when Carolina reported to HR the May 26 incident involving Cioffi. The Respondent then investigated the May 26 incident, which included statements obtained from witnesses on June 7. The subsequent June 9 discharge of Cioffi logically followed the completion of that investigation. Ultimately, there was nothing suspicious about the timing of Cioffi's suspension and discharge.

The General Counsel contends that the Respondent mischaracterized the "accidental" contact Cioffi made with Carolina as an assault. I disagree. The video is not consistent with Cioffi's claim that he tried to give Carolina a congratulatory pat on the shoulder and accidentally made contact with her neck or face. Cioffi may have been congratulating Carolina when he first offered to shake her hand, but pushing her was obviously intentional. Likewise, Cioffi's use of the word "bitch" and kicking the garbage can in Carolina's direction was not accidental or congratulatory. For its part, the Respondent was not in a position to know from Cioffi exactly what happened because his brief account of the incident was clearly inaccurate. I note also that the Respondent did not mischaracterize Cioffi's conduct as "an assault." Rather, the notice of termination merely stated, "On May 26, 2022, it was discovered that you made physical contact with another employee by hitting them in the face and calling them a 'bitch'. Additionally, you kicked over a garbage can toward them." (R. Exh. 51) This description of the incident was accurate and not an exaggeration of what occurred.

The General Counsel makes much of witness' accounts of the incident which suggest Cioffi and Carolina were not engaged in a full blown fight or argument. In a written statement, Area Manager Goldstein indicated that Cioffi "jokefully put his hand across Imaane's face and called her a Bitch." (R. Exh. 21) (Emphasis in original) In a May 29 statement, Carolina said she "tried to play off the situation like it wasn't a big deal and continued to fill out paperwork[.]" Moreover, HR Assistant Klassen's June 5 notes indicate that Carolina said, "you see me laughing on video trying to play if off . . .." (R. Exh. 27) However, witnesses other than Carolina and Cioffi (including Goldstein) did not know exactly what happened and not all the witnesses

characterized Cioffi's conduct as a joke.[24] Although Carolina did not react in an aggressive or adversarial way, she was more disturbed by it than she immediately let on. In her May 29 statement, Carolina stated that Cioffi "called me a 'bitch' and slapped me on my neck/cheek. This made me feel very uncomfortable." (R. Exh. 22) And as mentioned above, Cioffi's own account of the incident was inconsistent with the video and, therefore, unreliable. Meanwhile, the Respondent had reason to believe Cioffi acted out of anger in connection with an ongoing argument because, during the investigation, Goldstein and Carolina indicated that Cioffi became upset when he apologized to Carolina for an earlier disagreement and she did not apologize in return. (R. Exh. 21, 27)

The Respondent's actions in suspending Cioffi with pay pending investigation and discharging him were generally consistent with its policies and practices. As for the suspension, the uncontested evidence established that the Respondent routinely suspends employees with pay pending investigation if those employees are suspected of workplace violence. Here, before Cioffi was suspended, the Respondent actually took the extra step of talking to Goldstein and Kalogeropoulos to confirm that Cioffi made physical contact with Carolina, used the word "bitch," and kicked over a garbage can. Thus, the Respondent did not rush to suspend Cioffi, a known union activist, once the potential opportunity to do so presented itself. And although, as noted above, neither Goldstein nor Kalogeropoulos described Cioffi's conduct as malicious, they largely confirmed Carolina's factual account of the incident. Thus, consistent with its policy and practice, the Respondent had information which warranted Cioffi's suspension with pay pending an investigation of the matter.

As for the discharge, the Respondent's action was consistent with the NAFC Standards referenced in Cioffi's termination notice and other policies on workplace violence. NAFC Standards describe Category 1 misconduct as "[a]ll physical altercations (fights) regardless of severity or causation" (4.3) and "[a]ny physical threatening behavior including vocalized threats, written threats and implied threatening gestures" (4.9). (R. Exh. 42) In my opinion, as noted above, the Respondent could reasonably interpret Cioffi's conduct to have occurred in the context of an altercation because Goldstein and Carolina reported that Cioffi became upset when he apologized to Carolina for an earlier argument and Carolina did not apologize in return. However, even if the incident did not rise to the level of an altercation or a fight under NAFC Standard 4.3, Cioffi's conduct could be considered physically threatening behavior under NAFC Standard 4.9. In fact, the incident was arguably worse than most conduct described in NAFC Standard 4.9 because he pushed Carolina and standard 4.9 is generally directed at conduct which does not involve physical contact. And although the WIM Standards and Owner's Manual Standards were not referenced by the Respondent in the termination notice, Cioffi's conduct arguably qualified as category 1 misconduct under those policies as well. WIM Standard 6.1.1 identifies unacceptable physically or psychologically aggressive behaviors as including "[h]itting, kicking, punching, pushing, shoving, slapping, pinching, grabbing, and biting." (R. Exh. 32) Cioffi pushed or shoved Carolina in the face or neck. Category 1 of the Owner's Manual Standards includes "[a]ssaulting, threatening, intimidating, coercing, or interfering with supervisors or fellow associates." (R. Exh. 41) Even if Cioffi's conduct did not rise to the level of an assault, it was arguably threatening, intimidating, coercive, or interfering.

The General Counsel did not rely in its brief on evidence of disparate treatment to establish animus. The Respondent introduced disciplinary records to show Cioffi was treated

[24] HR Assistant Klassen's notes of a June 5 interview of PA Vixama reflect that Vixama said, "What I did see was Pasquale, he basically hit one of the managers, Imaane, in the face and called her a 'bitch'." (R. Exh. 26)

like other employees. As discussed above, although it is admittedly debatable whether the May 26 incident can be characterized as an altercation, the Respondent could reasonably view the incident as such. The Respondent produced evidence of several instances when JFK8 employees were discharged for physical contact with another person and other aggressive behavior in the course of an altercation. However, even if I were to disregard the numerous instances in which the Respondent discharged JFK8 employees for misconduct during an altercation, the record still contains evidence of consistent treatment. Thus, on August 27, 2020, an employee was discharged for pushing open a door and shoving an employee out of the way to get out of the room. (R. Exh. 39, pp. 92-95) On December 26, an employee was discharged for punching a monitor (having nothing, apparently, to do with an argument with another person). (R. Exh. 39 p. 251) On October 18, 2021, an employee was discharged for attempting to forcibly retrieve a scanner from another employee. (R. Exh. 39, pp. 436-439) On May 20, an employee was discharged for grabbing another employee by the wrist (but not, apparently, in the context of an argument). (R. Exh. 39, pp. 658-660) These instances suggest that physical contact need not occur during an altercation to result in discharge, and evidence that the Respondent treated Cioffi like other employees works against a finding of antiunion animus.

The General Counsel relies on certain statements as evidence of animus.[25] I do not find the General Counsel's evidence in this regard to be sufficient to establish a prima facie case by a preponderance of the evidence. As discussed above, I do not credit Cioffi's testimony that Carolina said to him, "with that sticker on your back, you're never going to become a permanent PA." (Tr. 222-224) However, even if I were to credit Cioffi and find that Carolina made the statement, the speculative comment by a low level manager would do little to establish that the Respondent harbored animus and was inclined to act upon it. See *Electronic Data Systems Corp.*, 305 NLRB 219, 221 fn. 7 (1991) (Board declined to rely on statements made by low-level supervisors to find union animus); *Sun Oil Company of Pennsylvania*, 245 NLRB 59, 68 fn. 8 (1979) (isolated and casual statement by low level supervisor not a basis for inferring animus).

Likewise, I do not credit Cioffi's testimony that Santos and Marc offered to promote him if he stopped supporting the Union, but would not find the conversation to be evidence of animus if I did. Cioffi testified that Marc said he noticed Cioffi was very influential in talking to employees about whether to unionize. That Cioffi was influential with employees could be a legitimate reason to believe he had leadership qualities suitable for a managerial position. It was Cioffi (not Santos or Marc) who said he suspected the managers were talking to him about applying for a promotion because they were afraid he would convince more people to be pro-union and wanted him to stop organizing. Cioffi's comment in this regard was speculative and the managers did not confirm that he was correct. Accordingly, I have no reason to find that Santos or Marc expressed antiunion animus.

I do not find other managerial statements significantly indicative of animus. Cioffi took

[25] The complaint does not allege that these statements violate 8(a)(1). However, the "fact that the General Counsel did not allege the remark[s] as unlawful under Sec. 8(a)(1) does not preclude [their] use as evidence of antiunion animus." *Cla-Val Co.*, 312 NLRB 1050, 1050 fn. 3 (1993).

exception to managers calling him "presidente,"[26] but did not deny he told managers he wanted to be Union president. And although Cioffi was perhaps legitimately unhappy about being referred to as "presidente" and did not find it funny, the reference appeared to be directed at his personal aspirations and not necessarily an expression of hostility towards the Union or his union activity.

Other managerial comments regarding the union stickers Cioffi wore on his work vest appeared similarly benign and not a strong indicator of animus. The one potential exception was the comment by former Senior Operations Manager Lugo, who said, "I heard about that. Just be careful. You got a target on your back." (Tr. 220-222, 305) 227-228) However, Cioffi had a good relationship with Lugo (a "good guy," according to Cioffi) and the comment seemed more of a generalized word of caution than a specific threat of adverse action. Accordingly, I do not find the comment to be sufficient proof to establish the General Counsel's prima facie case by a preponderance of the evidence.

Finally, the General Counsel urges me to find animus based on the Respondent's past violations as recommended in three administrative law judge decisions. However, the Board has ruled on only one of those decisions and I consider only that Board decision.[27] See *Amazon.Com Services LLC*, 373 NLRB No. 136 (2024) ("*Amazon*"). The Board is more likely to find general animus toward union activity through past violations if the prior violations occurred close in time and geographic proximity to the current alleged violations and involved the same people and similar types of unlawful conduct. See *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 fn. 2 (2000); *St. George Warehouse, Inc.*, 349 NLRB 870, 878 (2007); *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 371, 373 (1998); *Sunderland Construction Co.*, 307 NLRB 1036, 1037 (1992); *Tilden Arms Management Co.*, 276 NLRB 1111, 1118 (1985).

I do not believe the violations found in *Amazon* are sufficient to establish a prima facia case. A split Board reversed the judge's finding that the Respondent did not unlawfully solicit and impliedly promise to remedy grievances. Id. slip op. at 5-8. However, in my opinion, the Respondent, although ultimately determined to be incorrect, could have reasonably believed the comments in question were lawful statements reflecting its admitted opposition to unionization. Although coercive in its effect, the comments did not necessarily reflect a rabid antiunion motive in its subsequent disciplinary actions. This is particularly so because the agents made the remarks in a very different context and were not managers involved in the suspension and

[26] Although Santos and Ficci testified that they never heard a manager call Cioffi "presidente," they would not necessarily know what all managers said. Further, I do not credit Ficci's testimony that Cioffi referred to himself as "presidente" or rely on the same. Although Ficci testified briefly on cross-examination that she heard Cioffi refer to himself as "presidente," her testimony lacked foundational details and was not corroborated. Further, I did not find Ficci entirely credible. Ficci testified that Cioffi called Carolina a "bitch" in a way that was not friendly or joking, but the notes of her June 7 interview indicate that she did not know whether Cioffi called Carolina a "bitch" in "a malicious way." (Tr. 826, 841) (R. Exh. 29) Ficci was also not credible in her testimony that, when Cioffi called Carolina a bitch, Carolina appeared distraught. (Tr. 826) In speaking to HR, Carolina said, "you can seem me laughing on video trying to play it off." (R. Exh. 27) Goldstein and Kalogeropoulos confirmed as much.

[27] I do not rely on administrative law judge decisions which have not been ruled upon by the Board. See *Starbucks Corp.*, 373 NLRB No. 83, slip op. at 1, fn. 3 (2024); *Wallace Intern. De Puerto Rico, Inc.*, 324 NLRB 1046, 1046 fn. 1 (1997); *American Threat Co.*, 270 NLRB 526, 526 fn. 2 (1984). The Board may consider any additional violations it finds while this case is pending exceptions. See *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 393, 393 fn. 1 (1998).

discharge of Cioffi.

The Board in *Amazon* also adopted the judge's findings that certain agents of the Respondent, during captive audience meetings, misstated the law and thereby threatened to withhold improvements in wages and benefits during bargaining and/or the preelection period. Id. slip op. at 1 fn. 3, 59-60. However, at least one agent (Katie Lev) qualified her statements by telling employees she was not "fear mongering," they "could vote yes," and did not mean to say the "ALU is bad" or "unions are bad." Id. slip op. at 52. See *NACCO Materials Handling Group, Inc.*, 331 NLRB 1245, 1245-1246 (2000) (employer's antiunion comments offset by countervailing evidence in the record as a whole that employer acknowledged employees' right to unionize). And again, the comments were made in a very different context by individuals who were not involved in Cioffi's discharge.

I do not rely on the other violations found in A*mazon* to infer animus. In that case, the Board overruled *Babcock & Wilcox*, 77 NLRB 577 (1948), in finding that captive-audience meetings violate 8(a)(1), but declined to apply the ruling retroactively. Id. slip op. at 30. I also give no weight to the Respondent's discriminatory enforcement of a solicitation policy by removing an employee's July 9, 2021, Voice of Associates ("VOA") post soliciting other employees to sign a petition to make Juneteenth a paid holiday and threatening to discipline the employee if she posted the message again. Id. slip op. at 2-5. Although the Respondent removed the employee's post while allowing a different employee to post an invitation to come get a "VOTE NO" shirt, I am mindful that the Respondent otherwise allowed associates to post VOA messages urging coworkers to vote for and against the Union. Id. slip. op. at 3-4. See also *NACCO Materials Handling Group, Inc.*, 331 NLRB at 1245-1246 (employee handbook relied upon by the judge as evidence of animus expressly "acknowledge[d] the right of our employees to join a union if they wish.") Further, these violations occurred prior to the election campaign, were remote in time from Cioffi's discharge, involved different people, and were directed at different conduct (i.e., a protected concerted attempt to obtain a paid holiday rather than union campaign activity).

Based upon the foregoing, I do not find that the General Counsel established, by a preponderance of the evidence, a prima facie case that the Respondent suspended and discharged Cioffi because of his union support and activity.

Wright Line Defense

Even if I were to find that the General Counsel established a prima facie case, I would find that the Respondent satisfied its burden of proving that Cioffi would have been suspended and discharged regardless of his union support and activities. Beginning with the suspension, the uncontested evidence established that the Respondent maintained a practice of suspending employees suspected of workplace violence with pay pending investigation. On May 29, the Respondent reasonably suspended Cioffi pursuant to this practice. That day, Carolina reported to HR that Cioffi slapped her, called her bitch, and kicked over a garbage can. Carolina's statement was consistent with video recordings and generally confirmed by Area Managers Goldstein and PA Kalogeropoulos. Although Goldstein and Kalogeropoulos did not necessarily perceive the conduct as intentionally mean-spirited or malicious, they confirmed the basic facts. This was certainly sufficient reason for the Respondent to suspend Cioffi pending a broader investigation of the incident.

Regarding the discharge, the Respondent has a policy and practice of discharging employees for physical contact and other threatening behavior. As noted above, the Respondent's discharge of Cioffi was consistent with descriptions of category 1 misconduct

described in the NAFC Standards, WIM Standards, and Owner's Manual Standards. Further, the Respondent's discharge of Cioffi was generally consistent with its treatment of other employees. The Respondent has discharged numerous employees for physical contact with other personnel or physically threatening behavior during an altercation. And as discussed above, in my opinion, the Respondent could fairly characterize the interaction between Cioffi and Carolina as part of an ongoing altercation. However, as also discussed above, even if the incident did not occur during an altercation, the Respondent presented evidence that other employees have been discharged for physical contact and other aggressive behavior which did not occur during an argument or fight.

In so finding, I concede that Cioffi may have been joking and acting playfully in pushing Carolina in the face, using the word "bitch," and kicking a garbage can in her direction. However, the Respondent was not in a position to know this from Cioffi because he claimed he was simply congratulating Carolina with a pat on the shoulder (which was inaccurate). Witnesses other than Cioffi and Carolina provided mixed accounts and did not see or hear exactly what happened. And although Carolina admittedly downplayed the incident when it occurred and tried to laugh it off, she was more disturbed by the incident than she immediately let on and reported to HR that Cioffi made her feel uncomfortable. Thus, the Respondent was not necessarily in a position to disregard Cioffi's conduct as a joke or harmless playfulness.[28]

Based upon the foregoing, even if I were to find that the General Counsel established a prima facie case, I would recommend dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act because the Respondent established that it would have suspended and discharged Cioffi regardless of his union support and activity.

8(a)(5)

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by 1) unilaterally changing unit employees' terms and conditions of employment without providing the Union notice and an opportunity to bargain, 2) failing to bargain with the Union about the discharge of certain unit employees after the Union requested bargaining, and 3) refusing to furnish information requested by the Union.

The Respondent initially defends against all the 8(a)(5) allegations on the ground that the Union's certification was invalid. However, an employer "acts at its peril" by disregarding a bargaining obligation during the pendency of election issues if the final determination confirms certification. *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974) (employer violated the Act by unilaterally changing working conditions during the pendency of election issues since the final determination on objections resulted in certification), enf. denied on other grounds*, NLRB v. Mike O'Connor,* 512 F.2d 684 (8th Cir. 1975); *Sundstrand Heat Transfer, Inc*., 221 NLRB 544, 545 (1975) (employer assumes the risk if it refuses to provide information requested by a union following a Board election in which unit employees elected the union), enfd. in relevant part 538 F.2d 1257, 1259 (7th Cir. 1976). As the Board rejected the Respondent's objections to the JFK8 election in case 29-RC-288020 and denied the Respondent's request for review of the Union's certification of representative, the Respondent has established no defense against the 8(a)(5) allegations on the ground that the Union's certification was not valid.

[28] The Board generally recognizes that "management is for management" and refrains from second guessing an employer's disciplinary decisions. See *Sam's Club*, 349 NLRB 1007,1008-1009, fn. 10 (2007) (employer reasonably reacted to employee outburst by sending employee home after determining that she should not deal with customers in an agitated state).

Unilateral Changes

The General Counsel contends that the Respondent violated 8(a)(5) by unilaterally 1) eliminating time off for unit employees awaiting Covid test results, 2) rescinding a policy of notifying employees of positive Covid tests at the JFK8 facility, 3) changing its Mobile Phone Policy by preventing employees from recording investigatory interviews, and 4) implementing a new Off-Duty Access Policy. I recommend the finding of violations on allegations 2 and 4 and recommend dismissal of allegations 1 and 3.

It is well settled that an employer violates 8(a)(5) by unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without first providing their union bargaining representative with prior notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Omni Hotels Management Corp.*, 371 NLRB No. 53, slip op. at 3 (2022). An employer's practice will be considered a term and condition of employment which may not be changed without notice and bargaining if it occurs with such regularity and frequency that employees could reasonably expect the practice to occur on a consistent basis. See *Consolidated Communications Holdings, Inc.*, 366 NLRB No. 152, slip op. at 3 (2018). The party asserting the practice bears the burden of proof.[29] Id. "Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a 'material, substantial, and significant' one affecting the terms and conditions of employment of bargaining unit employees." *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). "The General Counsel bears the burden of establishing that the change was material, substantial, and significant. " Id.

Process for Requesting Leave to Obtain Covid Tests

The General Counsel contends that the Respondent violated 8(a)(5) by unilaterally eliminating time off for unit employees awaiting Covid test results.

On April 30, the Respondent announced in a "Manager Update" that, "with rapid testing widely available, we will no longer excuse time while waiting for a test result." (R. Exh. 57) However, HR Business Partner Greene testified that the new policy merely changed the managers who processed and granted leave requests to obtain a Covid test and did not change the leave itself. That is, according to Green, JFK8 employees had to request such leave from an off-site DLS team instead of the on-site HR team. Green testified that employees "were still able to get the days off. The policy in and of itself, . . . how much time they get, for what reason, remain[ed] the same." (Tr. 960)

The Board's decision in *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 9-10 (2018), enf. denied in relevant part, 803 Fed.Appx. 876, 880-881 (6th Cir. 2020), is instructive. In that case, a split-Board overturned the judge's recommended finding that an employer did not violate the Act by requiring employees, who previously submitted paper leave requests, to submit leave requests through a new electronic system. Id. In overturning the judge and finding a violation, the Board observed that the new system was more complicated

[29] The General Counsel must prove an employer maintained a practice which it claims was unilaterally changed. See *Consolidated Communications Holdings, Inc.*, 366 NLRB No. 152 (2018). That is the issue here. Conversely, if the Respondent asserts it acted in a manner consistent with a practice, the Respondent must prove the practice. *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183-184 (2011), enfd. 459 Fed.Appx. 874 (11th Cir. 2012). That is not the issue here.

and employees no longer immediately learned whether their request was approved. Id. at 10. The Sixth Circuit determined that the change was not material, substantial, and significant, and denied enforcement of the Board's order on that basis. 803 Fed.Appx at 881.

Unlike in *Ozburn-Hessey Logistics*, the General Counsel presented no evidence that the new leave request approval process took longer or was more complicated than the old one. The General Counsel contends that, under the new policy, "employees are no longer automatically excused from work for up to five days to get a COVID test." (G.C. Brf. p. 45) However, the evidence did not establish that the DLS was more likely to reject a request for leave than HR. Ultimately, unlike in *Ozburn-Hessey Logistics*, the evidence reflects a "Manager Update" that primarily described a managerial change in the department responsible for granting leave requests without corresponding evidence of a material, substantial, and significant change in the leave granted to employees or what employees were required to do to obtain that leave. Accordingly, I recommend dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by eliminating time off for Unit employees awaiting Covid test results or unilaterally changing the process of requesting such leave.

Notice of Positive Covid-19 Tests

The General Counsel contends that the Respondent violated 8(a(5) by unilaterally terminating its policy of notifying employees of positive Covid tests in the JFK8 facility.

The Board has generally held that changes to policies concerning the health and safety of employees are mandatory subjects of bargaining. See *American National Can Co.*, 293 NLRB 901, 904 (1989); *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995); *Minnesota Mining and Manufacturing. Co.*, 261 NLRB 27, 29 (1982). Accordingly, I find that a change to the Respondent's policy of providing notice to employees of positive Covid tests was a mandatory subject of bargaining. I also find the change material, substantial, and significant as it could impact employees' decisions, including whether to take leave or wear a mask. See *Pratt Industries, Inc.*, 358 NLRB 414, 422 (2012) (change in sick leave reporting procedures have a material, substantial, and significant impact on terms and conditions of employment).

The Respondent nevertheless contends that it had no obligation to bargain over an alleged "temporary" change in its policies and procedures regarding Covid. However, the Respondent presented no evidence that its Covid policies, including notice to employees of positive Covid tests, were designated as temporary at the time they were implemented. The Respondent only described the policy as "temporary" in the April 30 "Manager Update" issued about 2 years after the Respondent began its policy and practice of notifying JFK8 employees of positive Covid tests. Further, even if the Respondent had announced the policy as temporary when it was implemented, the Respondent has provided no legal authority for the proposition that an employer can preemptively eliminate a bargaining obligation over a subsequent change in policy by unilaterally declaring that the policy to be temporary when it is implemented. Indeed, the Board has found the unilateral elimination of temporary Covid measures to be unlawful. *Los Robles Regional Medical Center*, 372 NLRB 120, 120 fn. 2 (2023) (employer violated the Act by unilaterally rescinding a pandemic pay program even though it was only designed as a temporary measure during the Covid pandemic).

The Respondent, citing a non-precedential recommended decision of an administrative law judge and a non-binding General Counsel advice memorandum, asserts generally that "[u]nilateral COVID-19 related policy creation has been found to be a permissive subject due to the emergency situation." (R. Brf. 89) However, the Respondent cites no Board decision in support of that assertion and I am aware of none. Further, the change at issue here is the

Respondent's rescission of a Covid policy after the pandemic had passed rather than the creation of a Covid policy in response to the pandemic. The Respondent has provided no evidence that the absence of a pandemic is an "emergency situation" or that the elimination of the policy was an exigent reaction to such a situation.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding its policy and practice of notifying employees of positive Covid tests at the JFK8 facility.

Mobile Phone Policy

The General Counsel contends that the Respondent violated 8(a)(5) by unilaterally changing its Mobile Phone Policy when, during a disciplinary meeting held on November 19, HR Business Partner Greene told Spence it would be a violation of that policy to record the meeting. Greene also told Palmer, during a December 7 investigatory interview, "we don't consent to a recording of this conversation and doing so would violate Amazon's cell phone policy." (G.C. Exh. 5 at 7:05-7:10)

The Mobile Phone Policy states that it was revised on August 26, but does not indicate how it was revised. Greene testified that, in August, the Respondent did not ban the use of mobile phones in nonwork time or nonwork areas. However, this is beside the point as the issue is whether, prior to August, the Respondent allowed employees to use their mobile phones to record disciplinary or investigatory meetings with management (considered by the Respondent to be on working time and in working areas) and, thereafter, unilaterally changed that policy.

The General Counsel asserts that Green's directive to Spence not to record the disciplinary meeting because doing so would violate the Respondent's cell phone policy "was a change from the previous practice." (G.C. Brf. p. 46-47) As noted above, the General Counsel bears the burden to prove that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to occur on a consistent basis. See *Consolidated Communications Holdings, Inc.*, 366 NLRB No. 152 (2018). As evidence of past practice, the General Counsel relies on Spence's testimony that employees conspicuously recorded captive audience meetings during the organizing campaign. However, allowing employees to record large campaign meetings in which the Respondent sought to communicate its opposition to the Union to all unit employees might involve different considerations than allowing a single employee to record a potentially sensitive disciplinary or investigatory meeting. Although we know that Lopez recorded such an interview, we do not know whether management was aware of the recording. Further, even if the Respondent was aware of the recording by Lopez, a single instance would not establish that the Respondent allowed recordings of such meetings on a regular and frequent basis. And since the General Counsel has not proved a regular and frequent practice, the Respondent cannot be found to have violated Section 8(a)(5) and (1) of the Act by changing that practice.

Off-Duty Access Policy

The General Counsel contends that the Respondent violated 8(a)(5), on June 30, by unilaterally implementing a new Off-Duty Access Policy. The policy provides that, "[d]uring their off-duty periods (that is, on their days off and before and after their shifts), employees are not permitted inside the building or in working areas outside the building." (Jt. Exh. 1 ¶ 25)

The Board has held that employee access to an employer's facility is a mandatory subject of bargaining and the Respondent does not contend otherwise. See *Illiana Transit*

Warehouse Corp., 323 NLRB 111, 122 (1997)

The Respondent nevertheless contends that the implementation of the Off-Duty Access Policy was not material, substantial, and significant. I disagree. First, I note that, on November 19, the Respondent issued a documented coaching and first written warning to Spence, citing the Off-Duty Access Policy. The application of the policy to administer discipline for violations thereof renders the implementation of the policy material, substantial, and significant. See *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 903-904 (2000) (policy change material, substantial, and significant where salesman was discharged pursuant to the new policy). Further, the Board has found policy changes which may restrict conversations between employees to be material, substantial, and significant. Id. at 903. Here, prohibiting employee access to the building and working areas outside the building would restrict the ability of employees to discuss union matters and their terms of employment. Such a restriction would be particularly significant for JFK8 employees who recently elected a union representative to bargain collectively on their behalf.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its Off-Duty Access Policy.

Duty to Bargain over Discharge and Discipline

The General Counsel contends that the Respondent failed and refused to engage in post-disciplinary bargaining after the Union requested bargaining over the discharges of Cioffi and Bogat-Weathley. The Respondent did not address these allegations in its brief upon the apparent belief that the General Counsel only intended to use this case to overturn *Care One*, 369 NLRB No. 109 (2020).[30] (Resp. Brf. p. 82 fn. 26) As discussed below, I find that these allegations were not properly before me and are better addressed, if at all, upon exceptions.

The General Counsel relies on *Oberthur Technologies of America Corp.*, 368 NLRB No. 5 (2019) (*"Oberthur Technologies*") and *Fresno Bee*, 337 NLRB 1161 (2019) for the proposition that, despite *Care One*'s elimination of a unionized employer's obligation to provide notice and opportunity to bargain prior to certain employee discipline, the "Board has consistently held that an employer is obligated to bargain with its employees' union regarding disciplinary actions taken against bargain unit employees after the discipline has been implemented, upon request by the Union." (G.C. Brf. p. 65) In *Oberthur Technologies*, the Board clarified "the difference between two separate and distinct bargaining obligations under the Act." 368 NLRB Slip op. at 2. The first is an employer's duty "to refrain from unilaterally changing any term or condition of its unit employees' employment that constitutes a mandatory subject of bargaining" without giving "the union notice of the proposed change and opportunity to bargain over it[.]" Id. The second is an employer's duty to, absent a change in any terms or conditions of employment of unit employees, "bargain in good faith regarding any and all mandatory subjects of bargaining when requested by the union to do so." Id. slip op. at 3. The Board, in *Oberthur Technologies*, summarized the distinction as follows (emphasis in the original):

> In sum, when the employer proposes to change a term or condition of employment, the *employer* must act by giving the union notice and opportunity to bargain. If the employer does not make such changes, a *union* wishing to bargain over a mandatory subject must act by requesting bargaining.

[30] Under *Care One*, an employer has no obligation to notify and bargain with a union *before* issuing discretionary discipline pursuant to an established policy or practice. Id.

Id.

The preliminary procedural question is whether the Respondent received adequate notice of the allegations that it unlawfully refused Union requests to bargain over the discharges of Cioffi and Bogat-Weathley (as opposed to an alleged failure to provide the Union notice and an opportunity to bargain before unilaterally discharging those employees). Complaint paragraphs 25-26 allege that the Respondent discharged Cioffi and Bogat-Weathley, but the complaint does not allege that the Union requested bargaining over the same. (G.C. Exh. 1(AAA)) Conversely, complaint paragraphs 30-32 and 39-40 allege that the Respondent refused to bargain over disciplinary actions taken against Spence, Valentin Nieves, and Peele *since* the Union requested bargaining over the same. Accordingly, in an opening statement, the General Counsel asserted that the Respondent rejected the Union's request to bargain over the disciplines issued to Spence, Valentin Nieves, and Peel (not Cioffi and Bogat-Weathley). (Tr. 24) The General Counsel only asserted in their opening statement that Cioffi and Bogat-Weathley were unilaterally discharged upon a theory that *Care One* should be overruled. (Tr. 24-25)

In their posthearing brief, the General Counsel appears to flip the script and contend that the Respondent rejected the Union's request to bargain over the discharges of Cioffi and Bogat-Weathley, while not contending that the Respondent did the same regarding disciplinary actions against Spence, Valentin Nieves, and Peel. This is the opposite of what the complaint alleges and what the General Counsel asserted in an opening statement. I assume the reason for this change in theory is that, contrary to what was alleged in the complaint, the record contains no evidence that the Union requested bargaining over disciplinary actions taken against Spence, Valentin Nieves, and Peel, but does contain evidence that the Union requested bargaining over the discharges of Cioffi and Bogat-Weathley.

In the interest of due process, I make no recommendation on the General Counsel's allegations that the Respondent violated 8(a)(5) by refusing Union requests to bargain over the discharges of Cioffi and Bogat-Weathley as the Respondent had insufficient notice of those allegations. See *NLRB v. Blake Construction Co., Inc.*, 663 F.2d 272, 279 (D.C. Cir. 1981); *Admiral Semmes Hotel & Motor Hotel*, 164 NRB 482, 484 (1967). The complaint did not allege that the Union demanded bargaining over those discharges and the General Counsel did not contend as much in an opening statement. If the General Counsel takes exception to my refusal to recommend the finding of violations, the parties may then brief the allegations upon a clear and mutual understanding of them.

Information Requests

The General Counsel contends that the Respondent violated 8(a)(5) by failing and refusing to furnish information requested by the Union on October 5 and February 19, 2023, which was relevant and necessary for the Union's performance its function as the unit's bargaining representative.

An employer is required to provide information to a union which is relevant and necessary for the performance of the union's duties as the exclusive collective-bargaining representative of unit employees. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *Detroit Edison Co.* v. NLRB 440 U.S. 301, 303 (1979). Information requests regarding the terms and conditions of employment of unit employees are "presumptively relevant." Here, on October 5, the Union requested information relating to a fire which occurred at the FJK8 facility. On

February 19, 2023, the Union requested information regarding the discharge of employee Peele. The Respondent does not deny that these requests sought relevant information.

The Respondent defends against these allegations on the grounds that, on October 5 and February 19, 2023, Union counsel sent the information requests to Hunton attorneys Larkin and Rodgers. The Respondent contends that, since neither Amazon nor Hunton advised the Union that Hunton was the Respondent's counsel for purposes of bargaining, the Union did not transmit its requests to the Respondent. (R. Brf. p. 84) The Respondent provided no case law for this position and the General Counsel did not address this defense.

The Board has recognized that an agency relationship may be found on the basis of actual or apparent authority. *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1240 (2010). "The Board will find apparent authority where there is a 'manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question.'" *G.E. Maier Co.*, 349 NLRB 1052, 1052 (2007), quoting *Pan-Osten Co.*, 336 NLRB 305, 305-306 (2001).

Here, I find that Larkin and Rodgers had apparent authority to act as agents of the Respondent for the purpose of receiving the Union's information requests. In Board representation cases which preceded the Union's October 5 and February 19, 2023, information requests, Larkin and Rodgers filed appearances as counsel for Amazon, represented Amazon in hearing, and filed and were served with documents. The Union was a party in those representation cases. In these circumstances, Union counsel would reasonably believe Larkin and Rodgers were empowered to accept information requests on the Respondent's behalf. See *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1241 (2010) (labor consultant who represented employer in representation and unfair labor practice cases had apparent authority to enter recognition agreement); *Batavia Nursing Inn*, 275 NLRB 886, 886 fn. 2, (1985) (attorney who represented employer in matters relating to an election acted within the scope of his actual and apparent authority by assaulting union organizer); *WGOK, Inc.*, 152 NLRB 959, 968-969 (1965) (attorney who represented union in representation case was agent with apparent authority to demand recognition). The apparent authority of Larkin and Rodgers to accept information requests was further confirmed when they failed to advise Union counsel they were not authorized to receive those requests. See *H.C. Thomason, Inc.*, 230 NLRB 808, 809 (1977) (failure of employer's general manager to disavow apparent authority was a basis for union's reasonable belief that he had such authority).

As to the Union's February 19, 2023, information request regarding the discharge of Peele, the Respondent contends it had no obligation to furnish such information because, under *Care One*, 369 NLRB No. 109 (2020), it had no obligation to notify and offer to bargain with the Union over that subject. However, as discussed above, the Respondent would have had an obligation to bargain over Peele's discharge if the Union requested the same. See *Oberthur Technologies*, 368 NLRB No. 5 (2019); *Fresno Bee*, 337 NLRB 1161 (2019). And although, as noted above, the evidence did not establish that the Union requested bargaining over Peele's discharge or that the Respondent unlawfully rejected such a request, the Union was entitled to request information to determine whether bargaining was necessary and whether a request for such bargaining should be made. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967) (union may request information to determine whether to file a grievance); *August A. Bush & Co.*, 309 NLRB 714, 721 (1992) (union was entitled to information to determine whether the employer's action required bargaining and to prepare for the same). Thus, the Respondent was not at liberty to disregard the Union's February 19, 2023 information request regarding Peele's discharge even if the Union did not ultimately demand to bargain over that subject.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide information requested by the Union on October 5 and February 19, 2023, which was relevant and necessary to the Union's function as the exclusive bargaining-representative of unit employees.

CONCLUSIONS OF LAW

1. The Respondent, Amazon.Com Services LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Amazon Labor Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by denying the requests of employees to have a union representative present and exercise their *Weingarten* rights during investigatory interviews the employees could reasonably believe could result in discipline.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending Palmer with pay pending investigation from December 7 to February 15, 2023, a longer period of time than the investigation required, because of his union position, support, and activity.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by, without providing the Union notice and an opportunity to bargain, unilaterally terminating its policy and practice of notifying JFK8 employees of positive Covid tests and implementing an Off-Duty Access Policy.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with information the Union requested on October 5 and February 19, 2023.

7. The Respondent did not commit violations of the Act other than those listed above.

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

THE REMEDY

Having found that the Respondent, Amazon.Com Services LLC, engaged in unfair labor practices, I shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Although I found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Palmer with pay pending investigation for a longer period of time than was necessary, the record evidence reflects that the Respondent returned Palmer to his former position without the loss of compensation and without maintaining in its files any disciplinary reference to the suspension. Accordingly, the recommended order does not include the standard remedies that the Respondent reinstate, make whole, and remove from its files any reference to Palmer's suspension.

Having determined that the Respondent violated Section 8(a)(5) and (1) of the Act by, without providing the Union notice and an opportunity to bargain, unilaterally terminating its policy and practice of notifying JFK8 employees of positive Covid tests and implementing its Off-Duty Access Policy, the recommended order will direct the Respondent to rescind those unilateral changes.

Having determined that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information that is relevant and necessary to its function as the exclusive collective-bargaining representative of the Respondent's unit employees, the recommend order will direct the Respondent to furnish the Union with the requested information.

The Respondent will be ordered to post the notice attached hereto as "Appendix."

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Amazon.Com Services LLC, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees to take part in investigatory interviews without a union representative present if such representation has been requested by the employee and the employee has reasonable grounds to believe that the interview could result in disciplinary action.

(b) Suspending employees with pay pending investigation for a longer period of time than the investigation requires or otherwise discriminating against employees because of their union position, support, and activity.

(c) Unilaterally changing the terms and conditions of employment of unit employees without providing their exclusive collective-bargaining representative, the Amazon Labor Union (the Union), with notice and an opportunity to bargain over those changes.

(d) Failing and refusing to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of unit employees.

(e) In any like or related manner interfering, 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, provide the Union with notice and an opportunity to bargain as the exclusive collective-bargaining representative of the Respondent's employees in the following bargaining unit:

INCLUDED: All hourly full-time and regular part-time fulfillment center associates

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

employed at the Respondent's JFK8 building located at 546 Gulf Avenue, Staten Island, New York.

EXCLUDED: Truck drivers, seasonal employees, temporary employees, clerical employees, professional employees, managerial employees, engineering employees, maintenance employees, robotics employees, information technology employees, delivery associates, loss prevention employees, on-site medical employees, guards and supervisors as defined by the National Labor Relations Act.

(b) Rescind the changes in unit employees' terms and conditions of employment by reinstating its policy and practice of notifying JFK8 employees of positive Covid tests in the facility and discontinuing the Off-Duty Access Policy.

(c) Furnish to the Union in a timely manner the information requested by the Union on October 5, 2022, and February 19, 2023.

(d) Post at its Staten Island, New York facility, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since October 5, 2022.

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

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[32] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Covid pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work, and the notices may not be posted until a substantial complement of employees has 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 is the same notice previously [sent or posted] electronically on [date]."

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

Dated: Washington, D.C., May 6, 2025.

Benjamin W. Green
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT violate the *Weingarten* rights of employees by requiring them to take part in an investigatory interview without a union representative present if such representation has been requested by the employee and the employee has reasonable grounds to believe that the interview could result in disciplinary action.

WE WILL NOT suspend employees with pay pending investigation for a longer period of time than the investigation requires or otherwise discriminate against employees because of their union support, position, and activity.

WE WILL NOT unilaterally change the wages, hours, or other terms and conditions of employment of bargaining unit employees without providing the Amazon Labor Union (the Union) notice and an opportunity to bargain over those changes as the exclusive collective-bargaining representative of the employees of Amazon.Com Services LLC (Amazon) in the following bargaining unit:

> **INCLUDED**: All hourly full-time and regular part-time fulfillment center associates employed at Amazon's JFK8 building located at 546 Gulf Avenue, Staten Island, New York.
>
> **EXCLUDED**: Truck drivers, seasonal employees, temporary employees, clerical employees, professional employees, managerial employees, engineering employees, maintenance employees, robotics employees, information technology employees, delivery associates, loss prevention employees, on-site medical employees, guards and supervisors as defined by the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusively collective-bargaining representative of the Respondent's unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the

exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL rescind changes to the terms and conditions of employment for bargaining unit employes by reinstating our policy and practice of notifying JFK8 employees of positive Covid tests at that facility and discontinuing the Off-Duty Access Policy.

WE WILL furnish to the Union in a timely manner the information the Union requested on October 5, 2022, and February 19, 2023, as such information is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the Respondent's unit employees.

Amazon.com Services LLC
(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

One Metrotech Center, 20th Floor, Suite 2000, Brooklyn, NY 11201-3948
(718) 330-7713, Hours: 9:00 a.m. to 5:30 p.m. ET

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-296817 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 (212) 264-0300.