

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**SPORTSMAN’S WAREHOUSE, INC.**

**and**

**Cases 28-CA-308079  
28-CA-312103  
28-CA-321296**

**UNITED FOOD & COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 99, AFL-CIO, CLC**

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for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

JOHN T. GIANNOPOULOS, Administrative Law Judge. On December 2, 2022, a representation election was held to determine whether the approximately 24 employees working for Sportsman’s Warehouse Inc., (Respondent or Sportsman’s Warehouse), at its Prescott, Arizona location (Prescott store), wanted to be represented for purposes of collective-bargaining by the United Food & Commercial Workers International Union, Local 99, AFL-CIO, CLC (Union or UFCW Local 99). The employees voted against union representation 18 to 5, with one challenged ballot. Based upon charges filed by the Union, on February 23, 2024, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint), issued alleging that Respondent committed unfair labor practices both before and after the election, in violation of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Specifically, the Complaint alleges that Respondent violated Section 8(a)(1) of the Act before the election by: (a) soliciting employee grievances; (b) threatening employees that the store would close if they voted to unionize; (c) interrogating employees about their union activities; (d) inviting employees to quit; (e) threatening employees with unspecified reprisals; (f) promising employees benefits; (g) holding captive audience meetings without letting employees know their attendance was voluntary and would not result in rewards/benefits; (h) paying

employees who were off-duty to attend the captive audience meetings; (i) threatening employees that unionization was futile; and (j) threatening employees with the direct loss of communication with management if they unionized. The Complaint further alleges that, after the election, Respondent Section 8(a)(3) of the Act by firing employee Peter Scott Fuller on December 28, 2022, and decreasing the work hours of employee Gina Gonzales, because of their activities in support of the Union. Finally, the Complaint alleges that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with UFCW Local 99 since October 26, 2022. This allegation is premised upon the government’s request that a bargaining order issue due to the severity of the alleged unfair labor practices and the fact that, before the election, a majority of the employees had designated the Union as their exclusive collective-bargaining representative. On March 8, 2024, Respondent filed its Answer, denying the unfair labor practice allegations. This matter was tried before me in Phoenix, Arizona on May 7–9, 2024.

After considering the entire record, including my observations of witness demeanor, and having reviewed briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.<sup>1</sup>

## I. JURISDICTION AND LABOR ORGANIZATION

Sportsman’s is a Utah corporation with a retail store in Prescott, Arizona, that sells sporting, hunting, and fishing goods and related products.<sup>2</sup> In conducting its operations, Respondent purchases and receives goods at its Prescott store valued in excess of \$5,000 directly from points located outside the State of Arizona, and derives annual gross revenues from its Prescott store in excess of \$500,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. UFCW Local 99 is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and the National Labor Relations Board (NLRB or the Board) has jurisdiction pursuant to Section 10(a) of the Act.

## II. BACKGROUND FACTS

### A. Respondent’s operations

Sportsman’s Warehouse is “nationwide ‘big box’ retailer of hunting, fishing, and camping gear.” *Chesterfield Exch., LLC v. Sportsman’s Warehouse, Inc.*, 572 F. Supp. 2d 856, 859 (E.D. Mich. 2008). The company is headquartered in West Jordan, Utah, and during the relevant time period it operated over 130 stores, located in 30 different states.<sup>3</sup> Shane Miller

<sup>1</sup> I have considered the entire record in this matter, including those portions that could detract from the weight of my findings. Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel, Respondent, and ALJ exhibits are denoted by “GC,” “R,” and “ALJ” respectively. Citations are intended as an aid only, as factual findings are based upon the complete record. Witness demeanor was assessed during the hearing and considered in my findings; testimony contrary to my findings has been considered and discredited.

<sup>2</sup> See *In re Sportsman’s Warehouse, Inc.*, No. 09-10990 CSS, 2013 WL 492554, at \*1 (Bankr. D. Del. 2013) (stating that Sportsman’s is a Utah corporation that sells sporting, hunting, and fishing goods).

<sup>3</sup> See [https://www.sec.gov/Archives/edgar/data/1132105/000095017023012621/spwh-20230128.htm#item3legalproceedings\\_77520](https://www.sec.gov/Archives/edgar/data/1132105/000095017023012621/spwh-20230128.htm#item3legalproceedings_77520) (the Sportsman’s Warehouse Holdings, Inc., Form 10(k) for the fiscal year ended January 28, 2023, filed with the Securities and Exchange Commission on April 13, 2023). According to

(Miller) served as the company’s Senior Vice President of Stores from June 2000 until January 2024. In this position, Miller managed day-to-day operations for all retail stores across the country. Miller, who worked out of the company’s Utah corporate headquarters, reported directly to the company’s Chief Executive Officer. Below Miller was Chuck Richards (Richards), a Regional Director for the company. From September 2001 through March 2024, Kyle Hendrickson (Hendrickson) was a district manager for Sportsman’s Warehouse. Hendrickson, who lives in the Phoenix, Arizona metropolitan area, oversaw the company’s 13 stores located in Arizona and New Mexico. Hendrickson reported directly to Richards. Shelley Swain (Swain) is the company’s director of human resources. She reports to the chief human resources officer Steve Stoner (Stoner); the human resources department operates out of the company’s Utah headquarters. In her position, Swain oversees a team of six human resources managers who oversee different regions of the country. One such manager is Jacob Kohler (Kohler). From March 2022 until November 2023, Kohler was the human resources manager overseeing Arizona, Nevada, New Mexico, and California. Respondent admits that Miller along with Hendrickson are supervisors, as defined under Section 2(11) of the Act. And, as high level human resources officials, the record evidence shows that Richards, Swain, and Kohler are, at the very least, Respondent’s agents as defined by Section 2(13) of the Act.<sup>4</sup> (Tr. 113–114, 155, 458–460, 463, 625–628, 659–660, 796; GC. 1(k))

Respondent’s Prescott store is located on the outskirts of the city, directly off of Arizona State Route 69 (SR. 69), which is the main road that connects Prescott to Interstate 17. The Prescott store, which is about 15,000 square feet, is located in the southwest corner of a shopping center that contains big box retailers, along with various other stores, most of which run parallel to SR. 69, across the southern edge of the development. The shopping center has a number of connected parking lots; there are also a number of stand-alone establishments running across the northern edge of the development including a bank, a number of restaurants, and a Starbucks. (Tr. 29, ALJ. 4)

Jon Kauffmann (Kauffmann) has been the Prescott store manager since 2016. The Prescott store has multiple departments including hunting, hard goods, clothing, front-end, and receiving. Each department has a manager who reports directly to Kauffmann.<sup>5</sup> (Tr. 28, 36, 161, 251–252, 265, 327)

Scott Taylor (Taylor) is the hunting department manager in Prescott. The hunting department sells an assortment of goods including firearms, bullets, reloading equipment, and hunting accessories. One full-time and seven part-time sales associates work in the hunting department. From March 2021 through March 2024, Glenn Backley (Backley) was the hard goods/camping manager. The hard goods department sells camping equipment, optics, electronics, and sundry items that “you use while you’re out in the field.” (Tr. 36) From July 2022 through July 2023, Sarah Bruce (Bruce) was the Prescott store office manager. Part of

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the Form 10(k), Respondent is a wholly owned subsidiary of Sportsman’s Warehouse Holdings, Inc. *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company’s annual report filed with the Security and Exchange Commission); Fed. R. Evid. 201(b).

<sup>4</sup> At the time of the hearing Hendrickson was working for Respondent in a regional management position and Kohler was working for Sportsman’s as the company’s benefits manager. (Tr. 113, 795)

<sup>5</sup> At various points throughout the transcripts, Kauffmann is incorrectly referred to as “John” instead of “Jon.” The transcripts are corrected accordingly.

Bruce’s duties included supervising the approximately 10 front-end employees who work as cashiers. During the relevant time period Geena Cardoza (Cardoza) was the clothing manager at the Prescott store; the clothing department, also referred to as “soft goods” sells various types of clothing and footwear. Kauffmann, Taylor, Bruce, Backley, and Cardoza are all admitted  
 5 Section 2(11) supervisors. (Tr. 36, 159, 216, 250–252, 265–266, 326; GC. 1(k)).

## B. The unionization drive in Prescott

### 1. Employees meet with the Union and sign authorization cards

10 Peter Scott Fuller (Fuller) worked at the Prescott store as a sales associate in the hunting department.<sup>6</sup> Fuller worked for Respondent from December 2020 until he was fired on December 28, 2022. At one point during his employment, Fuller worked as the assistant hunting manager. However, Fuller needed to reduce his hours for family reasons, so he reverted to the  
 15 position of sales associate, working part-time.<sup>7</sup> (Tr.432, 536, 543, 578)

Sometime during the late summer of 2022, Fuller contacted UFCW Local 99 to discuss unionizing the Prescott store employees. The Union sent a representative named Spencer to meet with Fuller. Fuller, along with a coworker, met with Spencer on September 2, 2022,<sup>8</sup> at the  
 20 Starbucks located in the same shopping center as the Prescott store, and discussed their unionization efforts. During the meeting, Fuller and his colleague signed union authorization cards. Spencer also gave Fuller a stack of blank cards for store employees to sign. (Tr. 433–438; GC. 34A, 34B)

25 With cards in hand, Fuller started speaking with coworkers and passing out cards to see if they were interested in unionizing. If a coworker completed an authorization card Fuller would take a picture of the card and text it to Spencer. Fuller kept the completed cards and would turn them over to Spencer at their next meeting. By September 19, Fuller had collected signed  
 30 authorization cards from 16 out of the approximately 24 store employees (67%). The authorization cards that employees signed were pre-printed, in both English and Spanish, and state the following: “I hereby authorize United Food and Commercial Workers Union, Local 99 to represent me for the purposes of collective bargaining.” The cards have an area for employees to fill in their contact information and a line for their signature. Fuller authenticated all the  
 35 signatures for the authorization cards in evidence. (Tr. 434–449; GC. 2, 33, 34)

### 2. Union files election petition

40 With a sufficient number of authorization cards in hand, on October 24, 2022, the Union filed a petition in Case 28-RC-306147 to represent a unit of Respondent’s Prescott store cashiers, sales associates, and department leads. A pre-printed box on the petition form says “[r]equest for recognition as Bargaining representative was made on (Date) \_\_\_\_ and the Employer declined

<sup>6</sup> While Fuller goes by “Scott,” his full name is “Peter Scott Fuller.” (Tr. 432) However, because the hunting manager’s first name was also Scott, in the store Fuller was sometimes referred to as “Peter Scott.” (Tr. 725)

<sup>7</sup> Transcript page 543, line 5 should read: “A. Yes, I wasn’t able to go full-time. Q. Okay, so . . .”

<sup>8</sup> All dates are in 2022 unless otherwise noted.

recognition or about (Date) \_\_\_\_ (if no reply received, so state).” In this box, the Union typed “by this petition” in the first blank, and “n/a,” in the second one. (GC. 2(a))

The petition lists Kauffmann as Respondent’s representative. Kauffmann testified that he saw the petition, roughly around the date it was filed, and said that he forwarded all union related paperwork to human resources. Kauffmann also testified that he was not aware of a union organizing campaign at the Prescott Store until he received the petition. (Tr. 39–40)

During the early afternoon on October 24, both Kauffmann and Hendrickson received an email with the subject matter “Unionizing attempt,” from Taylor, the Prescott Store hunting manager. In the email, Taylor wrote that he was informed by one of his employees “of an attempt to unionize the store,” and that Fuller “is the one organizing this.” Taylor also wrote that Fuller had “80% of the store on board,” but that the employee who provided this information did not have all the details because “he wanted nothing to do with this.” In the email Taylor further said that the employee told him that “it is going to happen soon and they might go on strike for higher wages.” (R. 1)

Regarding the email, Taylor testified this was the first time he learned about the unionization effort. Taylor said Kauffmann was out of town at the time, so they did not discuss the matter until his return a few days later. Taylor further testified that he received a call from Kohler on October 25, and told him the same information that he put in the email. (Tr. 164–165)

Kohler testified that he first learned about the Union organizing drive from either a telephone call he received from Taylor, or from an email that Kohler, Swain, and Hendrickson received from one of the store managers telling them about the union drive; Kohler could not remember which came first. Kohler said that after learning about the union drive, he met with his team, saying that he “wanted to get all the information before we took any steps.” (Tr. 798).

According to Hendrickson, he learned about union activity at the Prescott store from Taylor. Hendrickson initially testified that he became aware of the union drive when he received a phone call from Taylor sometime in October before the petition was filed; in the call Taylor told him he was “hearing things about unions within the store.” (Tr. 118) After hearing this from Taylor, Hendrickson testified that he called Richards, who was his boss at the time, along with “the HR team at the corporate office . . . just to find out [the] course of action.” (Tr. 118) Hendrickson said that Richards told him to “head up there next week,” so Hendrickson went to the Prescott store the following week. (Tr. 119) Later, answering a leading question from Respondent’s counsel, Hendrickson said that he first learned about the Union drive when he received Taylor’s October 24 email. As to who he spoke with at human resources about the union drive, Hendrickson said that he called the “HR hotline” and may have spoken with Swain, but he did not exactly remember. In her testimony, Swain confirmed that Hendrickson had called about union activity in Prescott. (Tr. 118–119, 155–156, 666)

Miller testified that he first learned about the union drive in Prescott from Hendrickson, who told him there was union activity at the store, that union meetings were taking place, and union card signing was occurring. Miller said that once he learned about the union drive he shared the information with Stoner and Swain to determine their next steps. According to Miller,

they decided that Swain and a human resources colleague would travel to the Prescott store to answer questions, and that Miller would schedule time to go to the store in November to also answer questions. Prior to this, Miller had only been to the Prescott store once. (Tr. 461–463)

5 Bruce shares an office at the Prescott store with Kauffmann, which is located one floor above the sales floor. Bruce testified that she learned about the union drive sometime around October 24, when Taylor came upstairs and told both Bruce and Kauffmann that there had been union activity, or talk about union activity, in the store. Then, Bruce said they “immediately did a conference call with HR.” (267–268)

### 10 3. Fuller passes out union flyers

The Union created a flyer containing Fuller’s picture that was disseminated at the store as part of the organizing drive. The flyer is titled “Scott Fuller is proud to VOTE UNION YES.” It has a picture of Fuller giving a thumbs-up, with his name and work title. It also contains a quote from Fuller saying “I believe a union will give employees the opportunity to be able to make livable wages with the company.” The bottom of the flyer says “UFCW 99.” (GC. 15)

20 Fuller passed out the flyer to coworkers and also put them in the breakroom from about mid-November until the date of the election. According to Fuller, he was continuously restocking the flyers in the breakroom because they were generally gone by the end of every shift.<sup>9</sup> Various management officials, including Kauffmann, Taylor, and Swain, knew about the flyers with Fuller’s picture. Indeed, Kauffmann testified that he picked up a flyer, copied it, and emailed it to Swain who acknowledged receiving the flyer. (Tr. 71–73, 179–180, 450–451, 539–540, 654–655, 658; GC. 15)

30 During this same time period, Respondent reviewed security camera footage based upon claims of alleged misconduct by Fuller. Specifically, on November 21, a sales associate named Austin Gamez (Gamez) texted Taylor asking, “[y]ou figure anything out?” Taylor responded with a text saying human resources “is looking for evidence with cameras. Did he try it again?” Gamez replied, “[n]ot while I was here.” (GC. 27) Taylor testified that this text exchange related to Fuller. According to Taylor, Gamez brought to his attention that Fuller “had been going through my emails to find stuff to use against us.” (Tr. 185) Taylor said that the security cameras in the store could detect whether anyone was going through his emails, and he was made aware that human resources was going to look at the video to determine whether this claim was true. However, no evidence of misconduct was discovered. (Tr. 185, Tr. 197–198)

### 4. Dispute between Scott Fuller and coworker Greg Phillips over a gun sale

40 Sometime in mid to late November, Fuller and another hunting department sales associate named Greg Phillips (Phillips) were involved in a dispute over who should receive credit for a specific gun sale. According to Taylor, the hunting department sales staff receive “kickbacks from manufacturers,” for selling a particular company’s firearm. (Tr. 202) These

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<sup>9</sup> Lines 19–21, of transcript page 539, are corrected to show that the question starting on line 19 ends on line 21 after the word “them.” The witness’s answer begins on line 21 with the word “No.”

kickbacks are referred to as “spiffs.”<sup>10</sup> Pursuant to Respondent’s custom, whoever finishes the background check for a gun purchase, which is the person who “ran it through the register,” receives credit for the gun sale and the resulting the manufacturer’s spiff. (Tr. 202–203) Regarding spiffs, Fuller said that sales receipts are submitted to the manufacturer, and “if you  
 5 sell enough of their products, they will give you a free product.” (Tr. 522) Spiffs at the store were also described as getting “points” towards a free gun, that certain companies give a salesperson as a reward for selling or promoting that manufacturer’s product. With enough points, “[y]ou get a firearm.” (Tr. 754) For the hunting department staff, it appears that possession of the sales receipt was essential for a spiff. (Tr. 202–206, 210–211, 522, 548, 568,  
 10 753–756)

Phillips accused Fuller of taking credit for a specific gun sale in November and claiming the related spiff. Regarding this sale, Phillips testified that Fuller “stole from me . . . took one of my spiffs,” and that “it was my customer.” (Tr. 753) Phillips asserted that Fuller went “in the  
 15 system,” downloaded the receipt, and cashed it in, before Phillips could “go home with mine and cash it in.” (Tr. 754) Phillips further claimed that Fuller sold the spiff receipt to a coworker for cash. Regarding this sale, Fuller said that he was the person who actually completed the gun sale and that the receipt along with accompanying paperwork showed Fuller’s name. Fuller took the position that Phillips went to lunch before finalizing the sales transaction, which Fuller  
 20 completed. According to Fuller, Phillips was “visibly upset about this receipt,” so Fuller said that he offered to give Phillips the spiff receipt, in order to make amends, but Phillips refused to accept it. (Tr. 522) (Tr. 522, 548, 568, 753–754; GC. 28, R. 9)

After this incident, Fuller testified that it appeared Phillips held a grudge against him, even after he had offered Phillips the spiff receipt as an olive branch. Fuller said that Phillips  
 25 was “very aggressive,” and gave him “constant dirty looks.” (Tr. 523) According to Fuller, Phillips would stare him down, badmouth him to others, and stand in his pathway as he walked by. Phillips testified that he did not care about spiffs, as he had received his share, and that he did not work at Sportsman’s to “get free guns,” but that it was “a matter of principle,” with  
 30 respect to Fuller. (Tr. 786) Phillips admitted that, after this incident, his behavior towards Fuller changed, and that he avoided Fuller “like the plague.” (Tr. 758) Phillips said that he no longer wanted anything to do with Fuller because he does not “associate [him]self with people who lie and cheat,” referring to Fuller. (Tr. 759) (Tr. 523, 548 758–759, 786)

Around this time, Phillips claimed that he asked to no longer be scheduled to work with Fuller. In an affidavit provided under oath during the underlying investigation, Phillips wrote that he asked to “not work around” him because of Fuller’s “passive aggressive attitude towards  
 35 me at work, i.e. Union vote.” (Tr. 757) Indeed, even though Phillips signed an authorization card in September, the record shows that his attitude towards both Fuller and the union had soured by mid-November. Phillips thought Fuller was harassing him by asking if Phillips was  
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<sup>10</sup> Generally, the term “spiff” refers to a payment made by a product manufacturer to a retail sales clerk as an incentive to sell the manufacturer’s products. *Kappen v. Ashley Med. Supply, Inc.*, 695 Fed.Appx. 94, 95 (6th Cir. 2017); *Schut v. Stafford-Smith*, No. 1:12-CV-787, 2016 WL 4190022, at \*1 (W.D. Mich. 2016). Sometimes, the term is used to refer to a general incentivized sales commission, *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 193 (3d Cir. 1992), or a bonus for selling designated items. *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1572 (11th Cir.), modified, 776 F.2d 265 (11th Cir. 1985).

“still with me.” (Tr. 760) And, the record shows that Phillips was complaining to Respondent’s management officials about union activity occurring at the store. (Tr. 277–281, 757, 760; GC. 28, GC. 34(g))

5 During his testimony Phillips initially denied that he was opposed to the union. Eventually, however, Phillips admitted that when coworkers asked him about the union drive he told them that the “math doesn’t work,” regarding the union and that he was “probably not going to vote for it.” (Tr. 761) He also admitted to opposing the union when he voted. That being said, when asked whether he was happy the union lost the election, Phillips testified “I can’t say  
10 there was an emotion either way,” even though he texted “Yes!” to Tayler when he learned the union had lost. (Tr. 787; GC. 28) (Tr. 755, 760–761, 787; GC. 28)

#### 5. The union representative meets with employees and Phillips complains

15 After the petition was filed, and until the date of the election, Spencer (the UFCW Local 99 representative) spent time in the Sportsman’s parking lot talking to employees during their breaks or as they were going to, or leaving, work. Spencer would park his car about 20 feet away from the Prescott store entrance, and using his car as a meeting point he would speak with employees about the union in the parking lot. Bruce and Cardoza admitted to seeing Spencer in  
20 the parking lot speaking with employees. And, the record shows that throughout the course of the campaign, various company officials including Kauffmann, Backley, Miller, and Swain, were in the area or walking to/from their cars while employees were meeting with Spencer in the parking lot. (Tr. 261–262, 277–278, 345, 389–392)

25 Hunting manager Taylor also knew that employees were meeting with Spencer in the parking lot. On November 22, Phillips and Taylor exchanged a series of text messages about the fact that Spencer was in the parking lot talking to workers. The text exchange reads as follows:

30 **Phillips:** Hey buddy, a bunch of us are getting sick of this union guy harassing us out in the parking lot. I’m getting a little tired of the stress of there [sic] putting on everybody for this union. Fuck the union.

**Taylor:** I know man I’m really sorry we are all having to deal with it. Unfortunately there is nothing I can do about him in the parking lot. I’ll talk to  
35 HR and see if there is anything we can do to keep him away from the people that don’t want to talk to him.

**Phillips:** He’s a young moron that thinks everything evolves around his ideology and his stupid union. He confronted us and asked if everything was OK at work  
40 today? I said why is it any of your concern and then told him to get out of my face because everything was great. And I also told him him [sic] being out there was a form of harassment.

**Taylor:** Hahah I wish I could have seen you tell him. Also wish I was allowed to  
45 confront him but I’m pretty sure that’s a big legal no no.



**Phillips:** It's ok. I've been talking to people and honestly telling them this is bad for all of us. The union guy is like a fly, he can be swatted. PS [Fuller] and I had a talk, and he didn't like what I had to say to him. Taking the Springfield receipt and selling it for \$15 was low. He kept telling me, but you're my Boy I would  
 5 never do anything to disrespect you. I said: too late you already did. I don't care about trivial things, especially receipts for spiffs. Loser!

Taylor denied that he was friends with Phillips, but admitted to talking and texting with him regularly, both at work and outside of work. Indeed, the text messages introduced into evidence  
 10 show that that, along with discussing workplace issues, the pair exchanged texts about photography, wished each other a Happy Thanksgiving, Merry Christmas, and safe travels; they also shared a picture of meat being barbecued, and called each other "brother man" and "buddy." (Tr. 199, 204–205, 789; GC. 28)

Bruce testified that Phillips also complained to her about Spencer. Bruce said that, about a week before the vote, Phillips was "just upset" and that he "wanted to vent." (Tr. 277–278) According to Bruce, Phillips complained to her about Spencer generally, and also wanted to know how the union was able to get an "entire . . . directory of the store." (Tr. 277) During this same conversation Phillips complained to Bruce about another associate named Danielle, who  
 20 reported to Bruce. Phillips complained that Danielle was very pro-union and had been expressing these sentiments at work, claiming that the union was about women's rights and equality, things that Phillips did not believe were true. According to Bruce, she discussed the complaints made by Phillips with both Taylor and Kauffmann. Bruce said that she also instructed Phillips that he was "welcome to not only consult with the Union, but he could also  
 25 consult with HR," and advocate for himself as he sees fit, with the resources he was given, and that he should "ask the right questions." (Tr. 281) (Tr. 277–282)

## 6. Respondent's officials visit the Prescott Store

### a. Hendrickson visits the Prescott Store in October and brings pizza

Hendrickson testified that he visited the Prescott Store on either Tuesday, October 25, or Wednesday, October 26, as per Richards's request. According to Hendrickson, he generally visits stores in his district once a month to once every six weeks. During these visits,  
 35 Hendrickson said that he: walks the store; checks store conditions, inventory, and building conditions; makes sure merchandising programs are being followed; ensures compliance with gun form requirements; and speaks with the department managers and the store manager to review key performance indicators that drive business sales. Hendrickson said that he sometimes meets informally with employees if they are present during his store walk, but that the walks are  
 40 "usually pretty high level," meaning he is generally with the store manager or department managers. This was confirmed by Kauffmann, who said that Hendrickson would come to the store about once a month, walk around the store observing the products and giving feedback on what did, or did not, need to be improved, and then spend most of the time in Kauffmann's office reviewing financials with him and discussing if anything needed improvement. Hendrickson  
 45 would not conduct meetings with employees during his store visits. (Tr. 44, 113–114, 117–122, 181)

When he visited the Prescott store on October 25/26, Hendrickson was with a district manager from Utah, named Ian, who had been slated to spend the week training with him. On this visit to Prescott, for the first time, Hendrickson brought pizza with him to the store.

5 Although Hendrickson was not asked why he brought pizza, he offered an explanation anyway; his testimony reads as follows:

Q. Okay, got it. All right. And when you visited the Prescott store on either October 25 or 26, '22, you brought pizza.

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A. Correct. So, a lot of times, I've got a \$75 I can spend each day based on travel and meals. I had new [sic] district manager with me. This store had actually been one of our worst credit card app Stores, the Prescott location, and they had reached that .75 percent threshold, how many apps to transactions? And so I

15 needed to eat, and everyone needed to eat, so I went and got some Papa John's pizza. I think we bought three pizzas, and the district manager that I was training with, we ate some pizza in the break room and then left. (Tr. 121–122)

The pizza was available in the breakroom for Prescott store employees to eat, but Hendrickson said he could not recall if any employees were in the breakroom eating pizza with himself and Ian. Hendrickson denied speaking about the Union to anyone during this visit. According to Hendrickson, before the trip to Prescott, he had “a little bit of quick training on unions around tips.” (Tr. 123) Hendrickson said that he was “kind of unsure and not totally trained,” so his focus was just to avoid any talk about unions and to just check on store conditions during his

20 visit. (Tr. 121–123)

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#### b. Prescott Store managers meet for training on unions

After the petition was filed, Respondent's human resources staff came to Prescott from Utah and held a training session for the Prescott store management team on November 2, at a Prescott area hotel. One training session was at 1:00 p.m. and the other at 2:00 p.m. After the training they went to the Prescott store and continued their meetings. (Tr. 156–157, 166, 177, 661–661, 672, 799–800; R. 2)

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The training was prepared by Miller and Swain, around the time the petition was filed, with guidance from the company's legal counsel. Stoner, the company's chief human resources officer, also reviewed and approved the content of the training. Kohler and Swain conducted the training, which occurred in two different sessions, one led by Kohler and the other one by Swain. The entire management team, including Kauffmann, Bruce, all the department managers, and Hendrickson who came up from Phoenix for the meetings, attended at least one session. (Tr.127–128, 177, 661, 663, 659–660, 799–800)

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Part of the training was a Power Point presentation titled “Management's Guide for Reacting to a Union in our Work Place, Union-Free Management Training.” The presentation included, among various items, “TIPS” training (instructing participants that they cannot threaten, interrogate, promise benefits, or spy on employee union activities). It also instructed

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managers to maintain a positive climate, contained a list of “dos and don’ts,” coached managers on what they can say when employees start signing union authorization cards, how to communicate with workers about unionization, and specified items that should be reported to human resources, including inquiries about “union affairs” that originate from team members, union activities managers observe that might affect the company, and the presence of any union literature which the training said should be taken to the human resources department. (GC. 10) (Tr. 177–178)

After the training ended, Kohler and Swain went to the store and held “semi on-on-one” meetings with individual managers in the store’s cash office. Taylor was one of the managers they met with on November 2. Taylor testified that Hendrickson was also present, along with Swain and Kohler, in his meeting. (Tr. 169–170, 668)

Swain described the store meetings as a “wellness check,” to see “how are things going,” how the store was operating, and to see if managers had any questions or concerns. The union drive was also discussed in these meetings. Swain said the “biggest thing” that was discussed relating to the union activity in the store was the discussion of wages, and the difference in pay between the Flagstaff and Prescott stores; this disparity existed because the City of Flagstaff had a higher minimum wage requirement than the rest of Arizona. Respondent’s starting wage at their Prescott and Flagstaff stores was the minimum wage; thus Flagstaff employees were getting paid more than the Prescott workers. During their meetings that day, all the managers consistently relayed to Swain and Kohler that the Prescott employees were upset about their low wages. (Tr. 668–670)

Kohler testified that he and Swain had the opportunity to visit with employees while they were at the store on November 2. Taylor also said that Swain and Kohler were at the store that day to listen to any concerns employees had. In fact, Taylor had been informed that Swain and Kohler would be coming to the store and said that he was instructed to tell his employees they would be present at the store that day. According to Taylor, this was the first time that people from human resources had come to the Prescott store to talk to employees and listen to their concerns. As instructed, Taylor sent text messages to different hunting department employees on October 29, and October 31, saying that he was “required to tell everyone that corporate HR” was going to be at the store on November 2 from “8 am until late,” that any employee “can go talk to them about whatever they want,” and employees could clock-in to speak with them if they were not scheduled to work. Notwithstanding the testimony from Kohler and Taylor, Swain testified that, other than perhaps having some casual introductions, they did not meet with any employees at the store on November 2, but only met with management. (Tr. 167–168, 672, 800; GC. 25, 26)

#### c. Miller meets with Prescott store employees

Miller conducted meetings at the Prescott store on November 16 and 17 and then again on November 28 and 29. These meetings lasted about an hour. Miller held multiple small group meetings at different times across these four days, to ensure that all of the store’s approximately 24 employees could attend. Prior to November 2022, Miller had only visited the Prescott store once, sometime in either 2020 or 2021, during a routine store visit to check on operations. He

had never previously held meetings with employees at the store. (Tr. 463–464, 468–473, 476–477; GC. 9, 24)

Along with Miller, at least one other supervisory or management official, which could have included Hendrickson, Kohler, Kauffmann, Bruce, or Taylor, attended the meetings; no meetings were held where Miller was the only company official present.<sup>11</sup> Miller initially testified that Kohler attended the mid-November meetings, and that Hendrickson was present and attended the meetings on November 28 and 29; later he said it was possible he mixed-up the dates. According to Kohler, he attended the meetings that occurred on November 28 and 29, and not the ones that occurred in mid-November. As for Hendrickson, he testified that he was present at the store with Miller on November 16, and attended the meetings held on that date. Hendrickson could not recall if he was also at the Prescott store during the last week of November. (Tr. 47–48, 124–125, 129, 149–150, 173, 269, 470, 481–482, 497, 802)

Miller characterized all the meetings as being voluntary and said that he informed the Prescott store management officials to let employees know they were voluntary. Once the meetings started, employees present were not told that they were free to leave meeting.<sup>12</sup> Notwithstanding Miller’s testimony, Kauffmann admitted to telling employees, on the days the meetings occurred, that attendance was mandatory. Kauffmann testified that this directive came from Miller himself, who told Kauffmann that if employees were in the store and were “on the clock,” they had to attend. (Tr. 52) Kauffmann relayed this information to his management team, including the department managers. While Taylor claimed that he “did not tell anyone they had to do anything,” regarding the meetings with Miller, two employees testified they were specifically told by hunting manager Taylor that they were required to attend one of the meetings held by Miller. (Tr. 190, 411–412, 589–590) Hendrickson also testified that all of the store’s employees were asked to attend at least one meeting, and the emails in the record show that Miller wanted to ensure that all employees attended a meeting. Specifically, after the first set of meetings on November 18, Miller sent Kauffmann, Hendrickson, and Bruce an email, with a copy to Swain. In the email Miller listed eight employees by name and wrote he would return to Prescott and the listed employees needed to be scheduled to meet with him during their scheduled shifts. In the email Miller also wrote that he wanted to meet with five of the employees on November 28, three on November 29, and asked the store managers to “please inform the associate of the meeting they are scheduled for.” Kauffmann wrote back the same day saying that, “[e]verybody looks good for meetings,” except for one employee who worked as a sheriff’s deputy during the day. (GC. 16) (Tr. 51–53, 133–134, 411–412, 492–494, 590; GC. 16)

Finally, the record shows that, if employees were off-duty, Respondent offered to pay them for attending the meeting with Miller. And, managers were instructed by Kauffmann that, if employees were not scheduled to work during the meeting, they could be clocked-in; all employees were paid for their time attending a meeting. Finally, during the meetings Miller told

<sup>11</sup> Miller said he could not attend the final meeting on November 29, because of a scheduling conflict and that Kohler conducted the meeting; Kohler confirmed he conducted this meeting. However, Swain testified that she was the one who actually conducted this meeting. Otherwise, Miller conducted every meeting. (Tr. 482, 803–804 )

<sup>12</sup> While Kohler testified that Miller told employees during the meetings that they were free to leave (Tr. 822), Miller denied doing so. (Tr. 492–493) I credit Miller, as he was the one leading the meetings.

employees that, if they were off the clock, they would be paid for their time in attendance. Notwithstanding, no evidence was presented to show whether any of the employees who attended one of the meetings had been off-duty, and clocked in just for the meeting. (Tr. 53, 133-134, 472-473; GC. 9)

As for the meetings themselves, they were held in the employee breakroom and they followed a similar general format. Three flyers were given to employees at the meetings; the flyers were also placed in the employee breakroom. These flyers were approved for use by Stoner, and were created by Miller, Swain, Stoner, and Respondent's legal counsel. (Tr. 61-62, 65-66, 129-130, 269, 355, 413, 469, 483, 517, 679-680; GC. 11A, 11B, 12))

The first flyer was titled "10 UNION FACTS & FAQ'S," and contains a list of ten "questions" with corresponding answers. During the meetings, Miller used this flyer as his primary outline, going through each question and corresponding answer and using it to facilitate dialogue with the employees. (Tr. 129, 496; GC. 11A)

The second flyer contained two themes. The first discussed why Sportsman's was opposed to unions and highlighted that: (1) Respondent liked to deal with employees directly and not through "some outside third party;" (2) currently the company has flexibility to help employees deal with issues, without "rigid work rules" that are typically found in unionized workplaces; and (3) "unions often create a hostile work environment by pitting employees against management." The second theme discussed collective bargaining. Here, the flyer emphasized that employees would not automatically get better wages and benefits with a union and that wages and benefits could be higher, lower, or remain the same. In bold font the flyer stated that "**employees could end up worse off,**" noting that a union could trade away benefits for something the union wants like automatic dues deductions. Finally, this portion of the flyer noted that a union might call its employees out on strike to try and force Respondent to agree to its demands, and stated that in such a situation Sportsman's would not be required to pay employees while they are on strike. (GC. 11B)

The third flyer also contained two topics. The first headline on the flyer read "DON'T GET STUCK WITH THE UNION," and said that getting rid of a union is "NOT THAT SIMPLE" and noted in bold that "**even those of you who voted NO-would be stuck with the union.**" This portion of the flyer discussed the election process, the limits on decertifying a union that has been certified, and urged employees to "**JUST SAY NO,**" warning them that they "could be stuck paying Union dues and fees-even if the Union is unable to deliver on its many promises." The second headline on the flyer read "YOUR RIGHT TO SPEAK OUT," and discussed an employee's right to campaign against the union, claiming that employees have asked if they could do so. This portion of the flyer says that it is a common tactic for a union to pressure employees who speak out against unionization or who refused to sign an authorization card. It also says that employees will not face retaliation based upon their position towards unionization, and asks employees to "please let us know" if they have been threatened saying "we will stop it." The flyer ends by saying "**we strongly feel that voting 'NO' against the Union is in all of our best interests,** and we are confident that many of you feel the same way;" it urges employees to make their feelings known to others and says that Respondent "will respect your choice." (GC. 12)

The meetings started with an “introduction period,” that Miller described as a “slight get to know you.” (Tr. 483) Miller and other management officials introduced themselves to the employees and discussed their background. The employees in attendance would also introduce themselves and likewise discuss their background, with Miller using these introductions as an opportunity to connect with the employees. After the introductions, Miller would discuss the union organizing drive and the upcoming vote generally before going through the questions and answers outlined in the “TEN UNION FACTS & FAQ’s” flyer. As different topics or questions arose, Miller would provide further information, including sharing what he said were his past experiences regarding unions. During the meetings Miller invited employees to share their concerns with him, which they did, asking different questions and raising various topics and issues. Further discussions occurred as a result of specific questions that employees asked and the concerns that they raised. (Tr. 483–485; GC. 23, 24)

Miller said that the questions from employees during the meetings varied. Initially, when Miller was asked by the General Counsel whether any employee in these meetings raised the question of “the Prescott store being shuttered or closed, [or] anything like that,” he answered “no.” (Tr. 489) However, he later testified under questioning by Respondent that in one meeting an employee asked if the Prescott store was going to close if the union was elected. Miller did not identify the employee who asked this question, or say which employees were present in this meeting. Miller testified that he responded to the question saying, “we had not discussed that topic,” it was “not a topic that we were considering,” and that it “had not even been thought of at this point.” (Tr. 502) Nobody else present at any of these meetings testified that the issue of the store closing in the event unionization was discussed at any time. Pay was another topic Miller said was raised by employees during these meetings, particularly the fact that employees working in Respondent’s Flagstaff, Arizona store were paid more than employees in Prescott; Flagstaff is approximately 90 miles northeast of Prescott.<sup>13</sup> (Tr. 478–479, 484–485, 489, 502)

#### d. Respondent sends letters to employees

As Miller was meeting with the Prescott store employees, Respondent mailed a letter to them dated November 17. Swain testified that she, Miller, and Stoner had input into the content of the letter. Enclosed with each letter were the fliers given to employees during Miller’s November meetings. (Tr. 66–67, 130, 467–467, 680–681; GC. 11–14)

The letter, which is signed by Miller, starts by noting the date and polling hours of the upcoming unionization election. It urges all employees to vote and be well informed about the issues presented by possible unionization. Miller wrote that he was enclosing “factual information” so employees could make an informed decision, and urged workers to “research alternative resources,” such as friends and family about their experiences with unions, saying that “this information will help you understand why the Company and I oppose unionization.” Miller ended the letter by writing “[w]e value our relationship with our employees and urge you to Vote NO” so everyone can continue working together “without third party intervention,” and

<sup>13</sup> I take judicial/administrative notice of the locations of Prescott and Flagstaff and the associated mileage calculations. *Xcel Protective Services, Inc.*, 371 NLRB No. 134, slip op. at 41 (2022) (taking judicial notice of locations as shown on Google maps and the associated mileage calculations).

said that the company looked forward to communicating with workers “between now and the election.” (GC. 13)

## 7. The election and its aftermath

On November 17, the parties signed a stipulated election agreement for an election at the Prescott store in the following unit:

**INCLUDED:** All full-time and regular part-time cashiers, sales associates including hunting, clothing, fishing, firearms, hardgoods, camping, archery sales associates, inventory specialists, customer service employees and department leads.

**EXCLUDED:** All other employees, including confidential employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

The vote was scheduled to occur on December 2, in the Prescott store employee break room; polling times were from 1:00 p.m. to 2:00 p.m. and from 5:00 p.m. to 6:00 p.m. The election occurred as scheduled. Swain and Kohler were present at the store on the day of the election serving as Respondent’s representatives at the pre-election conference. Two employees served as observers during the election, one designated as the Union’s observer and one for the Respondent. Swain and Kohler both confirmed that Fuller served as the Union’s election observer that day. The Union lost the election by a vote of 18 to 5, with one challenged ballot. (Tr. 678, 817; GC. 2(d), 2(f))

### a. Text messages between Taylor and employees

#### i. Text messages between Taylor and Phillips

Immediately after the election, at 6:18 p.m. on December 2, Taylor and Phillips exchanged a series of text messages which read as follows:

**Taylor:** it failed no union 5 for 18 no.

**Phillips:** Yes! Thanks Scott. Can we have a going away party for Peter Scott [Fuller] without him included in the party?

**Taylor:** Rumor is he is about to put in his 2 weeks.

**Phillips:** Good! Nobody wants to work with a cheater.

Regarding this text exchange, Taylor testified that Gamez along with hunting department lead Robert Gould (Gould), brought to his attention the “rumor” that Fuller was about to quit. And, Taylor said that the reference in the text exchange about Fuller being a “cheater,” referred to the spiff incident between Phillips and Fuller. (Tr. 205–206, 207–208, 211; GC. 28)

On December 6, Phillips texted Taylor the following:

Hey buddy, no way shape or form. Am I trying to tell you what to think or how to react to a situation. But I think we should all be very careful when we are around Peter Scott [Fuller] he is looking for anything to sue the company so I would, tell people to not even have a conversation about the union. I know you already know that, but he just gave me a weird feeling tonight like he is just waiting for something to happen. He's going to lunch in a negative way we have to protect our self [sic].

Taylor responded by asking if Phillips was "off," and Phillips responded that he was "at home." (GC. 28)

Finally, the record shows that on Saturday, December 10, Taylor texted Phillips a screenshot showing Swain's contact information, including her work address, phone number, and email. (GC. 28, p. 3) It is unclear why he did so, as no testimony was elicited about this text from any witness. Nor was there testimony as to whether Phillips contacted Swain after receiving her contact information.

## ii. Text messages between Taylor and Gamez

After the election, Taylor also exchanged a series of text messages with Gamez, the sales associate who had previously told Taylor that Fuller was going through his emails to find "stuff" to use against the company. On the evening of December 5, Gamez texted Taylor about the upcoming week's work schedule, which he characterized as "weird on Wednesday." Taylor responded the same day saying "I was trying to make sure I had someone there because I was expecting peter [Fuller] to quit. Idk do you want to be?" Gamez responded saying that he would "be at the shop Wednesday," and close Saturday, Sunday, and all week. Taylor replied that he wasn't "following 100%" and asked Gamez to call him the next day. (GC. 27; Tr. 185–186)

On December 6, during another text exchange, Taylor sent Gamez the following message: "Hey real talk. Chris . . . has 9 christensen [sic] in the back. We ain't gonna push it through until when peter [Fuller] is leaving but I'll do about anything for that receipt of [sic] he shows up." Regarding the references to Fuller no longer working at the store, Taylor again testified that, based upon what he heard from Gamez and Gould, he thought Fuller "was going to walk out," if the "vote did not go his way." (Tr. 186)

On December 13, Gamez and Taylor exchanged the following texts:

**Gamez:** Yo boy got a gun 7:24 didn't clock out.

**Taylor:** My boy? Robert or you?

**Gamez:** Other scott. Just trying to get him out of here. Robert's so fake around him man. He's trying.

**Taylor:** Tell him I love him.

**Gamez:** I will.



Regarding this exchange, Taylor testified that Gamez was informing him that Fuller purchased or received a firearm without clocking out and was using company time to do a background check for himself. The “Robert” refers to Gould, and Taylor said he was referring to Gould when he texted Gamez “[t]ell him I love him.” (Tr. 186–187)

b. The Union sends a letter asking for bargaining

The Union sent a letter to Respondent dated January 11, 2023, requesting bargaining. The letter, which was addressed to Kauffmann and was emailed to him on January 20, 2023, reads as follows:

The Union enjoyed majority support from the petitioned-for bargaining unit prior to the December 2, 2022, election. As such, we now request that you begin bargaining with the Union. Please provide your availability for this month.<sup>14</sup>

Both Kauffmann and Swain admitted receiving a copy of the letter, and Swain confirmed that no bargaining has occurred between Respondent and the Union. (Tr. 96–97, 695; GC. 22)

III. SECTION 8(A)(1) COMPLAINT ALLEGATIONS

A. Alleged solicitation of grievances by Hendrickson  
(Compl. Para. 5(a))

1. Facts

Fuller testified that when Hendrickson brought pizza to the Prescott store in late October, he was working behind the firearms counter with another employee named Kenneth. According to Fuller, sometime during the afternoon, Hendrickson approached them, stood on the other side of the counter, and asked if there were any improvements that needed to be made or things he thought should be changed. According to Fuller, he told Hendrickson that there was no janitor in the store, and Hendrickson responded by saying he was unaware of this fact, and was going to hire one. Fuller further testified that Kenneth told Hendrickson employees did not receive anything for successfully signing up customers for a Sportsman’s Warehouse credit card, even though the company wanted employees to increase their credit card enrollments.<sup>15</sup> Therefore, Kenneth suggested that employees receive a sales incentive, or spiff, for signing up customers to a company credit card. According to Fuller, Hendrickson responded by saying he was going to look into the credit card issue. Fuller said that he had never previously seen Hendrickson ask employees about improvements during any of his past visits to the Prescott store. Instead, Fuller testified that Hendrickson would normally walk the store with managers and just point out things he thought needed to be changed around the store. Hendrickson denied speaking to employees about unions, wages, the need for a janitor, or potential store improvements, when he brought pizza to the Prescott store on either October 25 or 26. (Tr. 123–124, 453–455)

<sup>14</sup> In the email, the Union notes that it was resending the letter, because it was previously emailed to Kauffmann a few days earlier, but “bounced back.” (GC. 22)

<sup>15</sup> It was a requirement at Sportsman’s for cashiers to ask every customer if they would like to sign up for a Sportsman’s Warehouse credit card. (Tr. 362)

Regarding janitors, the Prescott store had a janitor when the store first opened in 2016. However, after about eight months the janitor stopped working and the company never hired another one. Instead, the manager on duty was responsible for ensuring the store was clean, including the bathrooms, and could delegate that task as needed. It is unclear from the record whether any of Respondent’s other stores employ a janitor. (Tr. 74–75, 181–182)

## 2. Analysis

Throughout his testimony, Hendrickson exhibited an acute lack of recall. (Tr. 119, 123, 127, 128, 132–134, 143–150) He also vacillated in his testimony about how he first learned about the union organizing drive at the Prescott store, first saying he learned about it via a phone call from Taylor before the petition was filed and then saying he learned about it from Taylor’s October 24 email. (Tr. 118–119, 155–156) Given his general lack of recall, I find his specific denials about the events of October 25/26 questionable. Also, starting with his explanation of why he brought pizza to the Prescott store, I do not find Hendrickson’s description of what occurred that day credible. Hendrickson’s convoluted excuse as to why, for the first time ever, he brought pizza to the Prescott store days after the petition was filed detracted from his credibility; Hendrickson tried to deflect any connection between the union petition and the pizza, but his explanation was nonsensical. Specifically, Hendrickson said he bought three pizzas that day and brought them to the store because he had \$75 to spend on travel and meals, had a new district manager with him, and that “I needed to eat, and everyone needed to eat.” (Tr. 121–122) Most people need to eat every day; that doesn’t explain why, for the first time ever, Hendrickson brought three pizzas to the store and left them in the employee breakroom. He and his colleague could have easily eaten their lunch elsewhere. Nor does his statement about credit card applications explain why he brought three pizzas to the store. Hendrickson testified that the Prescott store had been one of the “worst credit card app stores . . . and they had reached that .75 percent threshold, how many apps to transactions?” Hendrickson did not seem to know how many applications per transactions the store had reached, and it is unclear how reaching a threshold of less than 1% would merit recognition.

Instead, having been sent to check on the Prescott store by Richards, after learning about the union activity, I believe Hendrickson showed up to the store with pizza in an attempt to show a friendlier face to employees who had just petitioned to unionize. Thus, it makes sense that Hendrickson asked some employees if there were any improvements that needed to be made or things they thought should be changed in the store; he needed something to report back to Richards. I therefore credit Fuller as to what occurred that day, as he seemed to have a sharper recollection of events generally, as compared to Hendrickson.

Accordingly, I find that on the day Hendrickson brought pizza to the Prescott store in late October 2022, while walking the store he stopped by the gun counter and asked Fuller and Kenneth if there were any improvements that needed to be made or things in the store that needed to be changed. In reply, Fuller told Hendrickson that there was no janitor in the store and Kenneth suggested that employees receive spiffs as an incentive for signing up customers to receive a Sportsman’s credit card. Hendrickson responded by saying that he would look into Kenneth’s suggestion, that he was unaware the store did not have a janitor, and that one would

be hired. There is no evidence that, before the petition was filed, Hendrickson had a habit of asking employees about potential improvements or changes during his store visits.

Absent a previous practice of doing so, the solicitation of grievances during an organizing campaign, accompanied by an express or implied promise to remedy the grievances, violates Section 8(a)(1) of the Act. *Maple Grove Health Care Ctr.*, 330 NLRB 775, 775 (2000). By asking Fuller and Kenneth if there were any improvements that needed to be made, or things in the store that needed to be changed, just days after the unionization petition was filed, Hendrickson’s unlawfully solicited grievances, with an implied promise to remedy them, in violation of Section 8(a)(1). *MEK Arden, LLC v. NLRB*, 755 Fed.Appx. 12, 17 (D.C. Cir. 2018) (solicitation of grievances where management official approached employee and “asked how things were going, and stated that he would ‘look into’ her complaints.”), enforcing 365 NLRB 1065, 1065–1067 (2017).

B. Alleged threats to close the store by Backley  
(Compl. Para. 5(b))

Fuller testified that in about mid-November, hard goods manager Backley was walking around the store declaring that the union was going to cause the store to close down.<sup>16</sup> Fuller said that he heard Backley say this several different times, and on several different occasions, in mid-November; Backley would just walk by and make this statement out loud while various employees were within earshot.<sup>17</sup> And, Fuller testified that he spoke with five or six different coworkers at the store about Backley’s comments. (Tr. 512–514, 541–542, 578–579)

Backley’s behavior was brought to the attention of Bruce, the Prescott store office manager. Bruce testified that a week or two before the election, a camping department employee named Kenny came to her and complained that Backley was saying that the store may “shutter” if the union won the election, or “language along those lines.” (Tr. 274–275) Bruce said she told Kenny this was not true, if he had any questions to follow up with human resources or with the Union’s representative, and that she gave him the human resources telephone number, which was on the company bulletin board. Bruce said that she spoke with Kauffmann about Kenny’s complaint, and it was decided that if Kenny wanted to report the matter to human resources he could do so as they provided him with the phone number. (Tr. 274–276, 280–281)

The General Counsel called Backley as a witness and asked if he told employees the store would close if they voted for the union. Backley denied doing so. According to Backley, he became aware of the union petition when he heard from one of the “employees that they were talking about [the] union.” (Tr. 327) Backley admitted to having discussions with three separate employees about the union. Backley said that a hard goods/camping employee named Arthur asked him his thoughts about the union and he replied saying that unions “are good and bad.” (Tr. 328) When pressed as to whether he said anything else to Arthur, or gave examples of how

<sup>16</sup> Transcript page 512, line 14 should read “camping manager” instead of “campaign manager.”

<sup>17</sup> Transcript page 541, line 7 should read: “Q. Where does Max work? A. He was a . . .” Transcript page 542, line 4 should read “he walked by” instead of “we walked by.”

unions could be good or bad,<sup>18</sup> Backley testified that he did not “recall exactly what was said.” (Tr. 327–330)

The second employee Backley said she spoke with was cashier Gina Gonzales (Gonzales). Backley said Gonzales asked him what he thought about the union and about the store unionizing. According to Backley, he told Gonzales, “basically, unions could be good things and bad things,” and that he did not say anything else because she did not work in his department. (Tr. 329)

Next, Backley testified that an employee named “Ken . . . might have come up and asked me about that also,” inquiring as to what Backley thought about the union. (Tr. 331) When asked by the General Counsel about this conversation, Backley replied “it was the same thing. What do you think about this whole union deal? And I just said, unions could be good things, they can be bad things.” (Tr. 331) The General Counsel also asked Backley whether he said “anything to Ken about the store may close, anything like that,” and Backley replied “not that I recall, no.” (Tr. 332)

Backley also testified that he did not “remember any manager coming up” to him saying that he had been telling employees the store was going to shutter if the union comes in. (Tr. 330) When asked directly whether he had any conversations with employees about what might happen if the union came in, Backley said “not that I can remember. I mean, Arthur came asked me a question and I answered it.” (Tr. 330–331)

I do not credit Backley’s denials. Viewing Backley’s demeanor on the witness stand, he seemed put-off by the fact that he was even required to testify in this matter. And, his answers as to what he told Arthur, Ken, and Gonzales, seemed rote, and evidenced an indifference as to what actually occurred. Finally, Backley hedged his answers saying that he could not “recall” or “remember.” *Gunderson Rail Services*, 364 NLRB 279, 307 fn. 51 (2016) (in making credibility determination judge notes that certain managers couched their testimony with “hedging terms” including “if I recall”); *Tracy Toyota*, 372 NLRB No. 101, slip op. at 17 fn. 15 (2023) (that manager used hedging term during his testimony raised doubts as to his veracity). Finally, Bruce’s admission that Kenneth complained to her that Backley was saying the store may close if the union won the election supports Fuller’s testimony as to what occurred.

Accordingly, I credit Fuller, and find that in mid-November, on multiple occasions and on different days, Backley walked around the Prescott store pronouncing that the union was going to cause the store to close. He did so while employees, including Fuller, were working within earshot. By making these statements Backley violated Section 8(a)(1) of the Act. *Avecor, Inc.*, 296 NLRB 727, 730 (1989) enfd. in pert. part 931 F.2d 924 (D.C. Cir. 1991) (violation where department manager told employee that “the Union would cause the company to close the doors and that it would do no good.”); *Simley Corp.*, 233 NLRB 391, 394 (1977) (supervisor’s “remark that the advent of a union would cause” the owner “to close the plant” a violation); *Valley Special Needs Program, Inc.*, 314 NLRB 903, 914 (1994) (violation where managers told workers that the advent of the union would cause the employer to declare bankruptcy or close down and reopen under a new name).

<sup>18</sup> Transcript page 329, line 22 should read “you said,” instead of “he said.”

C. Alleged threats to close the store by Sara Bruce  
(Compl. Para. 5(c))

5

1. Facts

a. Maximilian Hogan’s testimony

10       Maxamilian Hogan (Hogan) worked at the Prescott store until April 2023 as an e-commerce/warehouse associate. Hogan reported directly to the e-commerce manager, who reported to Bruce; sometimes Hogan also reported to Bruce directly. (Tr. 401–402)

15       Hogan testified that, about one or two weeks before the election, he was in the customer service area, near the front of the store, when he overheard Bruce speaking to someone. According to Hogan, his job frequently required him to be on the sales floor picking up items for outstanding orders. On this day, he was walking by the customer service area while Bruce was in the middle of a conversation with someone else. Hogan could not see who Bruce was speaking with, but said that “it sounded like just another coworker,” as Bruce was speaking casually. According to Hogan, as he walked by, he heard Bruce tell the person “that the store  
20       might close if we voted yes for the union.” (Tr. 405) At the time he overheard Bruce, Hogan said that he was only a couple of feet away from her. Hogan felt that he was not “really supposed to be inserting [him]self in the conversation,” so he just continued walking by. (Tr. 406) The only part of the conversation Hogan heard was Bruce’s comment that the store may close; he did not hear any other part of the conversation, nor did he know the identity of the  
25       individual Bruce was speaking with. (Tr. 403–406, 421–422)

30       During cross-examination by Respondent, Hogan acknowledged that Bruce was not the company CEO, and that she would not be the person making the decision as to whether the store would close. Hogan also acknowledged that, although he attended meetings with higher management officials, and spoke with Hendrickson directly, he did not ask any of these officials whether store would close if the union won the election. (Tr. 423–424)

b. Joseph Steuer testimony

35       Steuer, who was subpoenaed to testify in this matter, started working for Sportsman’s in October 2021. At the time of his testimony Steuer was working at the Prescott store as a sales associate in the hunting department; he was working in this same job at the time of the union election. Steuer testified that, sometime towards the end of November 2022, about a week before the election, he was in the customer service area when Bruce talked to him about the  
40       union. According to Steuer, Bruce told him that the union would be bad for the company, pay raises and time off requests would have to go through the union, and employees would have to pay union dues. During this conversation Bruce also told Steuer that Sportsman’s would not have the union spread to other stores, and if the union came in the company would most likely close the Prescott store to stop the union from spreading. Steuer, who did not recall anyone else  
45       being nearby during their discussion, did not respond to Bruce; instead he acknowledged what she said and went back to work. (Tr. 587–589, 615)

During cross-examination by Respondent, Steuer said that he knew Bruce did not have the ability to decide on her own to close the store. Steuer also acknowledged that he did not ask any of the corporate human resources officials, while they were at the store the week before the election, whether there was a possibility that the Prescott store would close. (Tr. 613–614)

### c. Sara Bruce’s testimony

Respondent never asked Bruce to confirm or deny the specific conversations testified to by Steuer or Hogan.<sup>19</sup> The General Counsel did ask Bruce whether she ever said that the store may close if employees voted for the union “or anything similar to that.” (Tr. 291) In response, Bruce answered, “[n]ot that I recall.” (Tr. 291)

### 2. Analysis

I found both Hogan and Steuer to be credible witnesses. Assessing Hogan’s demeanor, he appeared as a thoughtful witness who was trying to testify truthfully. The same is true with Steuer. Although Steuer seemed nervous during his testimony, he was still working at Sportsman’s at the time he testified; his nerves appeared to be correlated to the fact that he was giving testimony that was against his employer’s interests. *State County Employees AFSME Dist. Council 47*, 277 NLRB 1088, 1090 (1985) (judge noting that employee’s nervousness while testifying was attributed to her position as an employee testifying against her current employer); *Seville Flexpack Corp.*, 288 NLRB 518, 526 (1988) (judge attributes the nervousness of employee to the fact he was testifying under subpoena against his employer’s interest). Cf. *Flexsteel Industries*, 316 NLRB 745, 745 (1995) (recognizing that testimony of current employees testifying against their employer is likely to be particularly reliable because they are testifying adversely to their pecuniary interests). Regarding Bruce, she never specifically denied the statements attributed to her by either Hogan or Steuer. Instead, when asked whether she ever said to anyone that the store might close if employees voted for the Union, she answered “not that I recall.” Not recalling something is not the same as denying the conversation occurred. *Garcia v. City of Chicago*, No. 09-C-5598, 2012 WL 601844, at \*4 (N.D. Ill. 2012) (Answering “not that I recall” to a question is not a denial, but instead shows the witness “does not remember.”). *United States v. Alawi*, No. 20-CR-00192, 2021 WL 5812035, at \*3 (W.D.N.Y. 2021), report and recommendation adopted, 2021 WL 5810473 (W.D.N.Y. 2021) (collecting cases and noting that “not recalling something is not the same as denying it.”); *Collins v. Cnty. of Alameda*, No. 20-CV-05477, 2022 WL 7652247, at \*10 (N.D. Cal. 2022), affirmed 2024 WL 1192265 (9th Cir. 2024) (not recollecting a conversation is not the same as an outright denial and “[t]his failure of memory does not contradict” opposing testimony nor does it “create a disputed issue of fact.”).

As such, I credit the testimony of both Hogan and Steuer as to what occurred and find that Bruce’s statement to Steuer that Sportsman’s would not have the union spread to other stores, and would most likely close the store in order to stop the union from spreading, constitutes a violation of Section 8(a)(1) of the Act. *W. D. Manor Mechanical Contractors, Inc.*,

<sup>19</sup> Bruce was called as a witness by the General Counsel during the government’s case in chief, and testified before both Hogan and Steuer. Respondent did not recall Bruce to testify during its defense.

357 NLRB 1526, 1543 (2011) (threat of plant closure “is the ultimate threat designed to chill employees in the exercise of their Section 7 rights to engage in union activity.”).

That Bruce was not Steuer’s direct supervisor, or that he acknowledged Bruce was not the person who would ultimately decide whether to close the store, does not preclude the finding of a violation. Bruce, an admitted Section 2(11) supervisor, shared an office with Kauffmann, Respondent’s highest level management official at the store level. As such, Bruce would be in a position to directly learn about any upcoming plans for the store. Cf. *C & T Mfg. Co.*, 233 NLRB 1430, 1430 (1977) (Board finds that ALJ’s failure to impose *Gissel* remedy because threats of plant closure were made by a “first line supervisor in the course of a casual conversation” was improper, noting that there were only 50 employees in the unit and thus regardless the supervisor’s “line classification,” a supervisor in this situation “acquires a special relationship with higher management and influence over her or his supervisees, if only for the fact that of necessity there are fewer such supervisors,” as compared to the situation in a medium or larger plant “where supervisors are more numerous and relationships are likely to be more remote.”).

The same is true regarding Steuer’s characterization of his conversation with Bruce as being “casual.” Id. While the conversation may have been “casual,” there is no evidence that Steuer initiated the discussion, or that Bruce and Steuer were somehow friends. Indeed, it appears that Bruce was the one who initiated the conversation and that the threat was made while she was otherwise trying to dissuade Steuer from supporting the union. *Schwarzenbach-Huber Co.*, 170 NLRB 1532, 1536 (1968) (The “illegality” of supervisor’s threats were “not cured by the casual nature of the conversation.”).

Also, that Bruce said the company “might” close if the union won, instead of definitively saying that the company would in fact close the Prescott store, is immaterial as she did not provide any objective facts to support a probable conclusion beyond Respondent’s control that a union election victory would cause the company to close the store. *Kmart Corp.*, 316 NLRB 1175, 1178 (1995) (telling employees that the company would have to think about closing the warehouse if company expenses went up because of a union victory was an unlawful threat as the statement was not based on any objective facts); *Metfab, Inc.*, 344 NLRB 215, 218 (2005) (shop foreman’s statement that company “might have to shut its doors if the union prevailed in the election” a violation as it was not based on any objective facts).

Finally, in its brief Respondent complains that the employees did not confirm the various threats of store closure with higher level management officials claiming, without citing any authority, this was “proof” the employees did not take the threats seriously. (Respt’s Br. at 36) However, the Board applies an objective standard in determining whether a statement “would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or on the success or failure of the . . . coercion.” *Dorsey Trailers, Inc.*, 327 NLRB 835, 851 (1999), enfd. in part 233 F.3d 831 (4th Cir. 2000). And, “[n]o words can put more economic fear in the minds of workers than an employer’s threat to close the plant down when made in the context of a union’s organization of its employees.” *Thurston Motor Lines, Inc.*, 257 NLRB 1262, 1264 (1981). The threats of store closure here violate

Section 8(a)(1) of the Act.<sup>20</sup> It was Respondent's responsibility to ensure its supervisors did not violate the law, and not the obligation of employees to confirm the truth of the unlawful threats made by company officials.

5 D. Alleged statements made by Genna Cardoza  
(Complaint Paras. 5(d) & 5(e))

1. Facts

10 Complaint paragraphs 5(d) and 5(e) allege that, in the weeks preceding the election, clothing manager Cardoza made various statements to employees that violated Section 8(a)(1) of the Act. Hogan, Gonzales, and Cardoza all testified at the hearing regarding these allegations.

a. Maximillian Hogan's testimony

15 Hogan testified that sometime around the end of November, a few weeks before the election, he was working in the e-commerce/warehouse area in the back of the store when Cardoza approached him. Hogan said that Cardoza was very upset, aggressive in her tone, and swearing. Cardoza told Hogan that that he was a "fucking idiot if you vote for this," referring to  
20 the union. (Tr. 408) Cardoza also told Hogan "if you don't like the pay, you don't deserve it,"<sup>21</sup> and asked Hogan how he was going to vote in the election. (Tr. 408) Hogan testified that he was taken aback by Cardoza's question, and replied to her saying that he was "not really sure" and that it was "a tough decision." (Tr. 408) During this discussion, Hogan said that Cardoza also mentioned "the rumor about the store closing" if the employees voted "yes." (Tr. 408)  
25 Finally, as Cardoza was leaving, Hogan testified that she told him to "remember this conversation" when it came time for him to vote in the election. (Tr. 408) According to Hogan, it was atypical for Cardoza to approach him while working at the store, and Hogan testified that people rarely visited him in the e-commerce/warehouse area while he was working. (Tr. 408, 410, 424-425)

30 Regarding the "rumor" referenced by Cardoza about the store closing, Hogan testified that he heard from a variety of people about a rumor the store would close if employees voted to unionize, and said coworkers had asked him about this rumor. According to Hogan, people were unsure about the source of the rumor, but they kept hearing the store would close if employees  
35 voted to unionize. During cross-examination by Respondent, Hogan acknowledged that Cardoza did not have the ability to decide on her own to close the store. That being said, as the vote approached, Hogan testified that he became increasingly concerned about the possibility of the store closing if the union was successful and believed that it might occur. (Tr. 409, 422, 425, 428)

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<sup>20</sup> Bruce's statement that the company might close if employees voted yes for the union, which was overheard by Hogan, similarly violates Section 8(a)(1) of the Act. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1181 (2006), motion for rehearing denied 351 NLRB 1032 (2007) (collecting cases and finding that portion of supervisor's statement that was overheard by an employee was a violation, notwithstanding the fact the statement was made during a telephone conversation between the supervisor and the company's owner).

<sup>21</sup> Transcript page 408 should read "the pay" instead of "to pay." Transcript page 410 should read "He already said that," instead of "He really said that?"



## b. Gina Gonzales’s testimony

Gonzales started working for Sportsman’s at the Prescott store in September 2020, as a cashier. At the time of her testimony she was still working at the store in the same position.

5 During the relevant time period Gonzales reported to Bruce, who was the front-end manager. (Tr. 340–341)

10 Gonzales testified that Prescott store employees often take their breaks in the parking lot outside the store, or in their cars, and that Cardoza would also frequently take her smoke breaks outside the store in the parking lot. According to Gonzales, one day in late October or early November 2022, she was taking her mid-morning break and approached Cardoza, who was already outside the store; the pair had a conversation where the union was discussed. (Tr. 347–349, 370–371)

15 On the day in question, the pair were engaged in small talk when Cardoza told Gonzales that she could not understand why employees were trying to organize a union, as it would not be good for their location to have a union, noting that employees would also have to pay union dues. Cardoza further told Gonzales that the Prescott store did not make a lot of money, and that if the union came in and the company had to pay everyone \$15 or \$16 per hour the store could  
20 end up losing money and might have to close because they could not afford it. At the time, cashiers were being paid \$13 per hour. Gonzales responded by saying that she could understand Cardoza’s point. Regarding her answer, Gonzales said she was trying to be respectful to Cardoza, who was a manager, and she “didn’t know how else to respond to that.” (Tr. 351) (Tr. 350–352)

25 Gonzales further testified that she considered herself and Cardoza to be friends, and that she did not tell any other employees about Cardoza’s comments regarding the store possibly closing. She also acknowledged that, as the clothing manager, Cardoza would not be the person making the decision to close the Prescott store. (Tr. 371–372)

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## c. Testimony of Geena Cardoza

Cardoza worked as the clothing manager at the Prescott Store from September 2022 until April 2023. As clothing manager, she oversaw the clothing department and reported directly to  
35 Kauffmann, the store manager. Cardoza was called as a witness by the General Counsel, before either Hogan or Gonzales had testified about their interactions with her. (Tr. 250–253)

Initially, Cardoza denied having any discussions at all with Prescott store employees about the union. Instead, Cardoza said that she had discussed outside the store “just that there  
40 was a Union going on,” with “just the management . . . the managers that I hung out with,” including Bruce, Taylor, and hunting lead Gould, saying that she was not “really friends with many other people,” having only been at the store for a couple months. According to Cardoza, she really did not have much of an opinion on the union, testifying that she “didn’t really talk much about it while it was going on because . . . we kind of had to mind . . . what we say or who  
45 we talk to,” so she “just kind of chose not to really discuss it much.” (Tr. 258) When asked again, after her initial testimony, if there were any employees she had discussions with outside of

the store about the union, Cardoza replied “not really . . . [I]ike not that I can recall.” (Tr. 259) (Tr. 258–259)

5 After admitting that she would sometimes vape outside the store with Gonzales, the following exchange occurred:

Q [by the General Counsel]: Okay. And so, again, focusing on that time period from October 24 of '22 to December 2 of '22, did you have any discussions with Ms. Gonzalez outside -- hold on -- outside the store --

10 A. No.

Q. While you were on break about the Union, or the Union is going on -- anything similar?

A. The only time that I ever spoke to Gina was she asked me a question. I don't recall what the question was. And the only thing I told her was that if you wanted to know, you should probably ask the guy that's representing the Union. There was something that she wanted to know that was concerning her. And I told her that she should probably ask him. He would probably have the answers or know somebody who does. (Tr. 260)

20 Cardoza said that she did not remember the question that Gonzalez had asked, but then said that she directed Gonzales to ask the union representative “that was hanging around . . . or the people that he represents” because Gonzalez had a “question concerning the Union,” and Cardoza “did not have the answer.” (Tr. 261)

25 Towards the end of her testimony, Cardoza was asked the following questions by the General Counsel:

Q. Okay. All right. So again, focusing on that same time period between October 24 of '22 to December 2 '22, did you ask any employees about their Union support?

30 A. I did not.

Q. And did you ask any -- or did you suggest to any employees that maybe they should seek employment elsewhere or anything similar to that?

A. I did not.

35 Q. All right. And did you have any discussions during that period of time with any employees about the potential for the store to close at all?

A. I did not. (Tr. 263)

40 Despite having an opportunity to do so, Respondent did not ask Cardoza any questions. Nor did Respondent call Cardoza as a witness as part of its defense.

## 2. Analysis

45 I found Gonzales to be credible regarding her interactions with Cardoza. It appeared that Gonzales was trying to testify honestly about what occurred, and admitted that she considered Cardoza to be a friend. And, as mentioned above, I found Hogan to be a credible witness. Not

so with Cardoza. Cardoza equivocated during her testimony about having discussions with employees regarding the union, initially denying having any such discussions, and insisting that the only discussions she had about the union were with just “the managers” that she “hung out with.” When asked an almost identical question later, as to whether there were any employees  
 5 she had discussions with about the union, she then said “not really . . . [l]ike not that I can recall.” And then, after admitting that she would vape with Gonzales during breaks, Cardoza testified that she did, in fact, have a discussion with Gonzales where something concerning the union was discussed. I do not credit Cardoza’s testimony or her denials.

10 Accordingly, reviewing the totality of the circumstances, I find that Cardoza’s asking Hogan how he was going to vote in the upcoming union election constitutes an unlawful interrogation, in violation of Section 8(a)(1). The Board reviews a variety of factors to determine whether unlawful interrogation occurred including: the general background; the nature of the information sought; the identity of the questioner; the place and method of the  
 15 interrogation; the truthfulness of the reply; whether the employer had, or conveyed, a legitimate purpose for the questions; whether assurances against reprisals were provided; and whether the employee who was questioned was an open and active union supporter. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), *affd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *RHCG Safety Corp.*, 365 NLRB No. 88 slip op. at 1-2 (2017); *NLRB v. North American Mfg. Co.*, 563 F.2d 894, 896 (8th Cir. 1977) (employer showed no legitimate purpose for the questions, which were not accompanied by assurances against reprisals); *NLRB v. Brookwood Furniture*, 701 F.2d 452, 462 (5th Cir. 1983) (same). These factors, which are not mechanically applied, are  
 20 “useful indicia that serve as a starting point for assessing the totality of the circumstances” to determine whether the questioning would “reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Center*, 330 NLRB 935, 939–940 (2000).

Here, there is no evidence that Hogan was an open union supporter at the time Cardoza  
 30 questioned him, which militates towards finding a violation. Cf. *Meadow Crest, Inc.*, 272 NLRB 1137, 1137 (1984) (questioning of employee who was not an open and active union supporter about his union sentiments constitutes objectionable conduct). Hogan had not signed a union authorization, nor is there evidence that he wore any pro-union paraphernalia at work or that he otherwise showed his union support in front of management officials. While Hogan  
 35 spoke up to support his coworker’s complaint about low pay at the meeting he attended with Miller and Hendrickson, his statements did not necessarily identify him as an open union supporter. Instead, Miller/Hendrickson opened up the meeting for employees to voice their questions or concerns regarding working conditions at the store, which Hogan did at their invitation, and low pay at the store was a consistent topic of discussion. Also, Miller agreed with  
 40 Hogan that pay at the store was, in fact, too low. (Tr. 412–415, 429)

That Cardoza initiated the conversation with Hogan, was upset and aggressive during the discussion, had no legitimate purpose for her question, and the fact that it was uncommon for anyone, particularly Cardoza, to have a conversation with Hogan at his work area, also support  
 45 the finding of a violation. Cf. *Aluminum Tech. Extrusions*, 274 NLRB 1414, 1420 (1985) (manager’s confrontation of employees at their work station and posing “unadorned an

unexplained” questions asking if they attended a union meeting and signed a union petition a violation). And, importantly, Cardoza asked Hogan how he was going to vote in the upcoming election, which further weighs in favor of finding a violation. *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 1 (2017) (The Board has long recognized that questions going specifically to how an employee himself intends to vote have a uniquely coercive tendency.); *Royal Laundry*, 277 NLRB 820, 830 (1985) (“The Board jealously guards the secrecy of the voting booth. How an employee votes, or intends to vote, is a prohibited subject for interrogation by an employee’s employer—even when done . . . by a low-level supervisor.”). In all, considering the totality of the circumstances, Cardoza’s asking Hogan how he was going to vote in the upcoming election constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.

Similarly, I find that Cardoza statement to Hogan about the rumor the store would close if employees voted to unionize, which she then reinforced by telling him to remember their conversation when he votes, was an unlawful threat in violation of Section 8(a)(1). *Desert Inn & Country Club*, 220 NLRB 877, 880, 878 (1975) (supervisor’s mentioning “rumor he heard” that the hotel would close if the union won the election a violation). Finally, Cardoza also violated Section 8(a)(1) of the Act by telling Hogan that, if he did not “like the pay, you don’t deserve it.” Respondent knew that the issue of pay was one of the subjects driving the employee unionization effort, as Swain discussed this with store officials in early November. (Tr. 668–669) Therefore, I find that Cardoza’s statement to Hogan that, if he did not like the pay at Sportsman’s he did not deserve it, had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and constituted a violation of Section 8(a)(1) of the Act.<sup>22</sup> Cf *Georgetown Holiday Inn*, 235 NLRB 485,493, 495 (1978) (manager’s statement to employees that they did not deserve their jobs back because they had engaged in a strike constituted an illegal implicit threat in violation of Section 8(a)(1)).

Regarding Cardoza’s interaction with Gonzales, I find that Cardoza also violated Section 8(a)(1) of the Act by telling Gonzales that the Prescott store did not make a lot of money, and that if the union came in and Respondent had to pay everyone \$15 or \$16 per hour the store could end up losing money and might have to close because the company could not afford it. Compare *B.F. Goodrich Footwear Co.*, 201 NLRB 353, 353–354 (1973) (statement that the company would very likely have to close down because it could not afford a union which would want higher wages was merely an expression of opinion based on known economic facts, protected by Section 8(c), as the statement was made in connection with a larger discussion of the competitiveness of the industry, the fact the employer had not made a profit in several years, and no evidence was presented that these statements were inaccurate) with *NLRB v. Gerbes Super Markets, Inc.*, 436 F.2d 19, 21 (8th Cir. 1971), enforcing 176 NLRB 11, 21 (1969) (manager’s statement to employees that the company might have to close the store because it could not afford to pay union wages a violation), and *Marsden Elec. Co.*, 226 NLRB 1097, 1098 (1976) enf’d. 586 F.2d 8 (6th Cir. 1978) (Foreman’s version of events, that he told employee the company was paying all it could pay at the time, could not afford to pay more, and that if the union came in and forced the company to pay higher wages it would have to shut the doors a violation, as the employer offered no evidence to support these statements.). Here, I do not

<sup>22</sup> Although Cardoza’s statement coercive and violated of Section 8(a)(1) of the Act, it was not also an invitation to quit. I therefore recommend that Complaint paragraph 5(e)(3) be dismissed.

believe Cardoza’s prediction of what might occur in the event of a union election victory was “carefully phrased on the basis of objective fact to convey” Respondent’s “belief as to the demonstrably probable consequences beyond” the company’s control that the store might close if employees unionized. *Gissel Packing Co., Inc. v. NLRB*, 395 U.S. 575, 616-619 (1969). No evidence was presented about the actual profitability of the Prescott store, nor was there evidence presented that Respondent could not afford to pay employees \$15 or \$16 per hour. Indeed, Sportsman’s was paying employees at its Flagstaff store at least \$15.60 per hour in 2022,<sup>23</sup> and there is nothing in the record to show that this higher wage rate had any impact on the company’s ability to keep the Flagstaff store open or remain competitive. Accordingly, Cardozo’s statement constituted an unlawful threat of store closure. *Gerbes Super Markets, Inc.*, 436 F.2d at 21; *Marsden Elec. Co.*, 226 NLRB at 1098; *Galbreath Bakery, Inc.*, 163 NLRB 408, 416 (1967), *enfd. in part* 1969 WL 11133 (6th Cir. 1969) (Supervisor’s statement to rank and file employee that economic reprisals would follow if workers went on strike, including being “blackballed” with little chance of working elsewhere, a violation even though the supervisor and employee were “close personal friends.”).

E. Allegations involving Shane Miller’s November 16, 2022, captive audience meeting  
(Compl. Para. 5(g) & 5(h))

1. Facts

Miller held multiple captive audience meetings on November 16. Either the third or fourth meeting of the day included Hendrickson along with three store employees: Fuller, Steuer, and Garrett Gustafson (Gustafson).<sup>24</sup> Fuller recorded the meeting and the recording along with a transcript were introduced into evidence.<sup>25</sup> (Tr. 141–142, 517–518; GC. 23, 24)

As with the other captive-audience meetings that Miller held in November, Respondent had three flyers available for employees, including the “10 UNION FACTS & FAQ’s” flyer that Miller used as an outline for his meetings. (Tr. 61–62, Tr. 516–517) The meeting with Fuller, Steuer, and Gustafson started with Miller introducing himself, discussing his background, his history with Sportsman’s, along with his prior work experiences in the retail industry. Hendrickson then introduced himself, and discussed his time at Sportsman’s along with his personal interests. After this, the employees were asked to introduce themselves and discuss

<sup>23</sup> I take judicial notice of the City of Flagstaff’s minimum wage ordinance, as established in Title 15 of the Flagstaff City Code, showing that the minimum wage in Flagstaff was \$15.50 in 2022; it increased to \$16.80 on January 1, 2023. See <https://www.flagstaff.az.gov/3520/Minimum-Wage> (last accessed on July 19, 2025). *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.1977) (“matters of public record such as . . . city ordinances fall within the category of ‘common knowledge’ and are therefore proper subjects for judicial notice.”); *Cota v. Maxwell-Jolly*, 688 F.Supp. 2d 980, 998 (N.D. Cal. 2010) (“Court may properly take judicial notice of the documents appearing on a governmental website.”).

<sup>24</sup> During the meeting Miller made contradictory comments as to whether the meeting with Fuller was his third or fourth meeting of the day. No meeting schedules were introduced into evidence for November 16.

<sup>25</sup> As to what was said during the meeting, I have relied upon the audio recording; citations to the transcript are only intended for use as an aid. See Tr. 141 (admitting transcript of recording as an aid). See also *United States v. Spence*, 566 Fed.Appx. 240, 244 (4th Cir. 2014) (Court’s limiting instruction, that transcripts of recording are only to be used as an aid, prevented prejudice that may have resulted from any discrepancies between the audio recordings and the transcripts).

their backgrounds; Miller interposed various questions or anecdotes during the employee introductions. (GC. 24 #00.00–18:35) (GC. 23, p. 1–14)

5 After the introductions, Miller told the employees that he was there to visit with them, to learn a little bit about them, and to discuss the upcoming union vote. Miller said that he wanted to be transparent, and that “we shouldn’t be afraid to talk about that,” as unions are a business and Sportsman’s is a business so it “shouldn’t be something that we’re uncomfortable talking about.” Miller explained that he had previously worked in environments that had a union and/or where union organizing was occurring, which gave him some perspective based upon his  
10 background so he wanted to share some facts about unions that he wanted the employees to be aware of. Miller told the group he believed it was important they educated themselves about unions, that he had some information on this topic to share, and was going to be as transparent as possible as there was “no reason not to talk about unions.” Miller expounded saying, “we don’t have any reason not to share, or be transparent or open and honest,” and told the workers “if you  
15 have questions, if you have any concerns, if you have thoughts you’d like to share, experiences you’d like to share, perspective, then I’m happy to answer those questions for sure.” (GC. 24 #18:35–21:24) (GC. 23, p. 14–17)

20 Miller then started going through the questions and answers contained in the 10 UNION FACTS & FAQ’s flyer, starting with the first question asking: “who pays for a union?” Miller said he wanted to “back that up even a little bit further and say, what is a union?” Miller explained that a union is a “third-party company, a third-party organization” that is not affiliated with Sportsman’s, and people pay dues to the union in order to have them represent their interests and/or bargain for certain things in their workplace. He said a union is “their own  
25 separate business” and union members pay for a union because “they’re a business” with expenses and they “need income to be able to pay for that business.” Miller then discussed the cost of union dues, saying he did not know exactly how much employees would pay in union dues, but that if the store unionized “that you would pay union dues, that it would be an environment where you did pay.”<sup>26</sup> Miller then urged employees to research the how much  
30 union dues would cost. (GC. 24 #21:25–24:00) (GC. 23, p. 17–19)

After his comments about union dues, Miller moved on to the second question in the flyer which reads as follows:

35 2. WILL A UNION PROVIDE MORE JOB SECURITY?  
No. A union cannot create or guarantee job security. At Sportsman’s Warehouse, working with you directly to improve our business leads to job security for everyone. **Ask the union: Will the union guarantee me better job security in writing?** (capitalization and emphasis in original)

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<sup>26</sup> Miller discussed union dues at various points throughout his November 16 meeting, emphasizing that employees will be required to pay union dues if they unionized; this misrepresents the law in Arizona. Because Arizona is a right to work state, employees cannot be compelled to pay union dues. See *United Food & Com. Workers Loc. 99 v. Bennett*, 934 F. Supp. 2d 1167, 1186 (D. Ariz. 2013) (Noting that “Arizona is a right-to-work state, and employees’ choices to pay union dues are already voluntary.”); *AFSCME Local 2384 v. City of Phoenix*, 213 Ariz. 358, 364, 142 P.3d 234, 241 (2006) (Arizona’s constitution and “right to work” statutes prohibit compulsory union membership and also prohibit requiring workers in a collective-bargaining unit to pay mandatory “fair share” fees, that is pro-rata fees associated with union’s representational costs.).

Miller asked the employees “will the union provide job security,” said he wanted to pause on this question for moment, and that he hoped they worked in an environment where people felt their jobs were secure. Miller then said he knew they were in an economy and environment where a number of retailers were shutting doors, closing stores, and that headlines may say Amazon had just laid off ten thousand workers; however Sportsman’s is stable and growing. Miller stated that, while many retailers are shuttering and laying off people, in the previous month Sportsman’s had hired more than 700 people over the company’s 130 stores; Respondent was not laying off people, not closing doors, but was opening new stores and by the end of the year it will have opened nine stores for the year. Miller described Sportsman’s as the fastest growing pure-play outdoor retailer. He further said that while competitors were also opening new stores, in the last three years Respondent had opened 27 stores, with plans to open 18 more the next year, which hopefully allowed “some sense of opportunity” for those looking for a career and wanted to grow with Sportsman’s and take on leadership roles. That Sportsman’s was not conducting layoffs or closing stores should bring employees some comfort regarding the question of “is our job secure,” Miller said, but then noted that the real question was whether the union will provide more job security and that “the answer there is, no.” Miller explained that a “union can’t create or guarantee job security,” and Respondent felt that working with employees to continue taking care of customers and the business “will allow us the opportunity to continue to grow within Sportsman’s Warehouse but a union cannot guarantee job security.” (GC. 24 #24:00–26:45) (GC. 11; GC. 23, p. 19–21)

Miller next discussed the question of “will a union provide better wages and benefits,” and said “this one’s tricky.” Miller explained that union’s often talk about getting employees more money, or even guarantee more money, but said a union needs to bargain for any pay changes and employees could win, lose, or pay could drop. And, Miller noted that “one thing is certain, to be able to talk about your wages in the future if the store was union will cost you money. You’ll pay somebody to do that.” Miller then told the group the following:

Now, I’ve had, this is my third meeting today, and I think what I’ve heard in the two meetings prior to this one is some of the discussion that we need to have, that perhaps hasn’t taken place appropriately in the past or hasn’t been shared to an extent that was needed, is that we need to examine pay. We need to look at pay in Prescott. We need to look at pay in this store in particular, that we need to look at it as a part of cost of living, we need to compare it to stores that surround it. And, I’m happy to take that away from the meetings. But that has come out and been very, very prevalent and very easy to understand in the three meetings I had prior to this one.

Miller further told the employees, “I’ll share with you and take away that information, and nobody had to pay for it, it was free to have that discussion with me today.” But, Miller emphasized, one thing was guaranteed, if the store becomes union, “to have those discussions further down the road will take money out of your paycheck. You will pay union dues to have those conversations and to bargain for increased pay.” Miller told the group that he wanted them

to understand that “if we have an opportunity and need to pay more in Prescott, Arizona,<sup>27</sup> there’s an opportunity for us to review that, consider that and make that happen should we need to and should we get the opportunity to. But the reality is, again, that to have those conversations in the future through a union, will cost money for dues.” (GC. 24 #26:45–28:44) (GC. 23, pp. 21–23)

The next topic Miller covered was whether employees could try out a union and then get rid of it later, which Miller said was “tricky,” as decertification of a union was “long and complicated,” and the law would not allow Sportsman’s to help in that process. Miller then discussed whether employees were required to talk to union representatives. Miller said that, should employees no longer want to talk to union representatives, they did not have to, and no one can force them to do so. Miller claimed that, at one point in time when he was a store manager, and “this was happening,” employees felt they were obligated to talk to union representatives and “vote yes,” because they “signed a card.” Miller told to the group that “the card is a pledge card,” and employees were not obligated to talk to a union representative or to vote yes, even though a “pledge card” may or may not have been signed. (GC. 24 #28:45–#30:34) (GC. 23, p. 24)

Miller then asked, “do I have to vote union if I signed the card,” which was related to his previous answer. Miller again said that employees could choose to vote either for or against the union, even if they signed a card, and that it was illegal for anyone in a union, or outside a union, to threaten, intimidate or coerce them into doing something they did not want to do. He said the election would be conducted by a secret ballot and the vote is anonymous. Miller stressed the importance of having everyone vote, whether they vote “yes” or “no,” because the outcome will be determined based upon a simple majority of the total number of actual voters. Therefore, Miller explained that if only 10 people vote, out of 25 eligible voters, and six people vote for the union, the “store becomes union, because six people voted it in.” Thus, Miller said it was important for everyone’s voice to be heard through the vote. (GC. 24 #30:35–#33:10) (GC. 23, pp. 24–26)

The seventh question in the flyer asked, “[w]hat if I have a problem? Who do I talk to?” Regarding this question, Miller said he wanted to “share my experiences here,” and explained that if “a union gets into the store,” and an employee is dissatisfied with their schedule, pay, or store equipment, the union decides whether to bring the issue to management; it would no longer be up to employees. Miller shared what he claimed were his past experiences working at a store where some employees were unionized while others were not, and said the situation was difficult to navigate as a store manager. Miller averred that he could quickly resolve issues for the nonunion employees, as they could come to him directly and he could change their schedules if they wanted to take the weekend off to go hunting or fishing, but he could not do so for unionized employees who had to “work with someone else in the union,” if they wanted to change their schedule to take time off or “what not.” According to Miller, this “drove great division in the store” as some groups felt privileged they could get things done quickly and others were frustrated that they could not. (GC. 24 #33:15–36:16) (GC. 23, p. 27–29)

<sup>27</sup> The transcript mistakenly reads “impressed by Arizona,” whereas in the audio recording Miller clearly says, “in Prescott, Arizona.” (GC. 24, #28:23–28:27) I have not specifically noted other minor discrepancies between the transcript and the recording, but as noted earlier all quotations are based upon the audio recording.



The next question addressed was whether the union would provide a safety committee. Miller said Respondent wanted to keep everyone safe and hoped these issues were already being addressed. But, if they were not, he noted that the company currently had an associate safety  
 5 program in stores, and said, “we don’t have to pay hundreds of dollars to unions to make sure that our working environment is safe.” Miller then recounted his time working for Walmart in Price, Utah, a city where the coal mining industry is prevalent, and where relatives of Walmart employees worked in the coal mines. Miller said the miners were represented by a union because it was a dangerous work environment that presented daily life threatening working  
 10 conditions and that he believed the people “working in the mines needed some help.” Miller said he hoped the Prescott store workers understood that “we want to keep you safe here” and if they had concerns, which he hoped/believed were not life threatening, they can be addressed “without having to pay someone to make sure our environment is safe in the stores.” (GC. 24 #36:17–38:12) (GC. 23, p. 29–31)

15 Then Miller addressed the last two questions in the flyer, “will I have to go on strike” and “if the union calls a strike will I get paid?” Miller explained that if a union calls a strike, they expect “you will not work even if you need to keep working to earn money to pay your bills,” and that unions “may even issue fines to employees who tried to continue” working. Miller  
 20 discussed when a union might call a strike, and said Sportsman’s will not pay people on strike nor will strikers be eligible for unemployment. (GC. 24, #38:13–39:38) (GC. 23, p. 31–32)

After finishing up the questions on the flyer, Miller told the employees he wanted to pause and open things up for “a little bit of dialogue and some conversation around questions  
 25 you might have, concerns that you might have, things that you might want to tell me in regards to the store or anything on your mind that I might be able to understand, and take away, or potentially help with.” Nobody responded, and after about 15 seconds of silence, Hendrickson said “nothing? This group is quiet.” Fuller replied, “not much to say.” Addressing Fuller, Miller then said “Steve, anything I can help you with, any concerns or questions?” Fuller answered  
 30 saying that his name was Scott, and Miller said “I’m sorry Scott, I said Steve, got any questions?” Fuller said no. Miller then asked Steuer, “Joe, questions or concerns?” Steuer responded saying “I’m pretty good actually, yea.” Miller next addressed Gustafson saying, “Garrett, anything I can clarify for you, any questions?” Gustafson said “no, we covered quite a bit, pretty much said everything.” (GC. 24 #39:40–#40:52) (GC. 23, p. 32–33)

35 As the employees did not raise any concerns, Miller said, “maybe a couple of the things that have come up in other meetings, and I’ll just share broadly so that you will leave with an understanding—and my intent isn’t to keep you here long—and that’s an extensive conversation around pay.” Miller told the employees that “we’ve had some extensive conversations” around  
 40 minimum pay in the stores and how that pay currently only matches “state minimums.” Miller said there were “some things there that I think are very, very relevant, some key points that I’ve taken away, and I’ve actually wrote down that I’ll research and get back.” Miller stated, “I want you to understand that the company does care about pay . . . we do care about pay.” Miller explained that Sportsman’s does an evaluation once a year at every work site and compares the  
 45 cost of living against wages, wage rate minimums, and wage rate averages. For the Prescott store, Miller said that review was conducted “last January, ten months ago” and told the group to

think about what has happened in the last ten months, to think about the economy, business, and inflation, as he was not paying \$7 a dozen for eggs a year ago. Miller then said, “so has the cost of living gone up? Absolutely. Has it gone up in Prescott? I’m sure that it has. Has it gone up disproportionately—possibly.” Miller confirmed, “that’s research that we’ll do for sure,” as they do every year and for every store. (GC. 24 #40:52–#42:24) (GC. 23, p. 33–34)

Miller then raised the issue of pay at the Flagstaff store, and confirmed that the Flagstaff store pays employees a higher hourly wage rate than the Prescott store. He asked rhetorically, “should it” and said “we can evaluate it and see.” Miller explained that, at some point in time, when that evaluation was done, there was a difference between the cost of living in Flagstaff and the cost of living in Prescott and a decision was made about pay at the two stores.<sup>28</sup> Miller said, “I’m not telling you that things will change. I’m telling you we review that cost of living every single year in every store. And we’ll be mindful to do it in Prescott, like we do every single year before the changes that have taken place.” (GC. 24 #42:25–43:08) (GC. 23, p. 34–35)

Miller next discussed hiring and turnover, and related that he travels across the country and sees “now hiring” signs and billboards everywhere. Miller said that Respondent is hiring, and that it was not lost on him that “pay is an enormous component of that” and the ability to hire in the future is reliant on pay. Miller acknowledged, “we like to work here,” but said that while everyone likes to fish, hunt, and shoot, they work at Sportsman’s to make a living as it is not a volunteer organization, thus regarding pay Miller expressed it was not lost on him “that we have some very tough work to do there in evaluating what that looks like, and what it has been and what it needs to be.” (GC. 24 #42:20–#44:30) (GC. 23, p. 35–36)

Miller indicated that in some of the previous meetings there was a big conversation about the belief that somehow Sportsman’s sees associates as expendable, and said this was absolutely not true. Miller expressed that part of the “magic” of the organization was the level of passion and love for the outdoors and the experience of the employees; he said this was invaluable to him, as “our people know the business,” which is what differentiates Sportsman’s from other retailers. Again, Miller said that, “it’s not lost on me that that has a value and needs to be weighed, needs to be evaluated, and in the conversation that we’ve had today, needs to be appropriately compensated.” Miller assured the group that “our teams aren’t expendable,” everyone does the same work for the same customers, and are on the same team with the same agenda. (GC. 24 #44:32–#47:00) (GC. 23, p. 37–38)

Miller then discussed problems the company was having with inventory and product distribution, saying they have work to do in that area, as it was a weak spot. Miller explained how the inventory system worked, saying it was an old, antiquated, and manual process. He gave examples of inventory failures across different stores, and said in the future he hoped this would get better and the company automated its systems. (GC. 24 #47:00–50:25) (GC. 23, p. 38–41)

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<sup>28</sup> As noted earlier, Swain testified that Respondent generally starts employees in both Prescott and Flagstaff at the mandated minimum wage rate. And, Flagstaff employees receive a higher starting salary because the City of Flagstaff has a higher mandated minimum wage than the standard State of Arizona minimum wage rate that applies in Prescott. (Tr. 668–670)

Just before ending the meeting, Miller told the workers he was going to be there through the evening, and would be happy to listen if they had any questions or concerns or things they wanted to talk about that maybe they did not want to discuss in front of others. Miller said:

I'm here, come ask me. I'll be as honest and transparent as I can. Some of that is painfully obvious that we're not good at. Some of the other things or considerations and things that I certainly have a knowledge of after having been here today with a group of you, I'll take those thoughts, concerns, or questions, and do what I can in the future to become better.

Miller expounded that the "future depends on what happens here in the next couple of weeks," and said "I absolutely appreciate you being transparent and open with me in sharing some of your concerns." He then asked whether there was anything else the employees wanted to talk about before wrapping up the meeting and said, "I'll give you another . . . opportunity to share what's on your mind or questions or concerns." Again, none of the workers responded. (GC. 24 #50:30–51:30) (GC. 23, p. 41–42)

Miller ended the meeting by acknowledging that it can be stressful when workers are told the "boss is coming," and that he spent some time walking the store that day, helping customers, and said the "store is phenomenal." He added, "you guys do a great job in the store. It's a great store. The customers here love you," but said he did not come for that reason. Miller explained that he came to the store that day "to get to know you and to be able to help you with concerns that you have, to be able to answer questions." And, Miller said, that was also Hendrickson's priority. He thanked everyone for how the store looked, for the work that they've done, and said that in the coming weeks there was "going to be people up here continuing to support, continuing to ask questions, answer questions, continuing to be available," and it isn't about how pretty the store is. Instead, he said that, "we're coming up here to support you, be a part of you and to help you with anything that we can." Miller ended the meeting by again telling employees that, if they had any other questions or concerns or suggestions to please let him know. (GC. 24 #51:30–#53:15) (GC. 23, p. 42–44)

## 2. Analysis

### a. Holding a mandatory meeting without assurances the meeting was voluntary

The record shows that the captive audience meetings held by Miller in November were effectively mandatory. While Miller testified that he instructed Prescott store managers the meetings were voluntary, and at least one sign was posted telling employees that they were encouraged to attend (GC. 9), Kauffmann admitted that Miller told him the employees who were working and "on the clock" were required to attend the meetings, and that he relayed this information to his management team. (Tr. 52–53) Also, Hogan and Steuer credibly testified that they were specifically told by Taylor they had to attend one of Miller's meetings.<sup>29</sup> (Tr. 411–412, 589–590) Finally, after the first set of meetings, Miller exchanged emails with

<sup>29</sup> While Taylor denied telling employees they had to attend, his denial was not credible, given Kauffmann's testimony that he specifically instructed his department managers to determine times for every worker to attend one of the meetings. (Tr. 53)

Kauffmann, Hendrickson, Bruce, and Swain, making it clear that he expected the eight employees listed in the emails to meet with him during their scheduled shifts when he returned at the end of the month. (GC. 16) According, I find that the November meetings with Miller were mandatory.

In *Amazon.com Services LLC*, 373 NLRB No. 136 slip op. at 19 (2024), the Board overturned *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), and held that going forward an employer violates Section 8(a)(1) of the Act if it requires employees to attend a meeting at which the employer expresses its views on unionization, unless it informs employees that: (1) the meeting is voluntary; (2) they will not be subject to discipline or adverse actions if they do not attend the meeting or leave the meeting; and (3) no records will be kept as to which employees attended, did not attend, or left the meeting. Because the Board said that its holding in *Amazon.com Services LLC* applies prospectively only, and the conduct here, occurred in 2022, I recommend that the allegations in Complaint paragraphs 5(g) and 5(h)(i) be dismissed.

b. Paying employees to attend mandatory meetings  
(Compl. Para. 5(h)(2))

Complaint paragraph 5(h)(2) alleges that, by paying off-duty employees to attend Miller’s mandatory meetings, Respondent violated Section 8(a)(1) as it granted employees benefits to discourage them from voting for the union. In support of this allegation, in the relevant analysis portion of its brief, the General Counsel cites *Carnegie Linen Services, Inc.*, 357 NLRB 2222 (2011), where the Board found that an employer violated Section 8(a)(1) of the Act by offering an employee money to cease his union activities. (GC. Br. at 38–39) Specifically, in *Carnegie Linen* the company’s general manager told an employee that he wanted him to cease talking about the union and offered a cash payment of \$1,000 to \$3,000, telling the employee to name his price. *Id.* at 2227–2228. The facts here do not involve an employer offering large cash inducements to employees to stop their union activities; thus *Carnegie Linen* is clearly distinguishable.

The General Counsel’s citations to *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) and *Conair Corp.*, 261 NLRB 1189, 1274 (1982), are similarly unavailing. (GC. Br. at 38) *Exchange Parts* simply stands for the proposition that, as a matter of blackletter law, an employer violates Section 8(a)(1) by granting benefits to employees subsequent to the commencement of a union organizing drive, and while an election is pending. In *Exchange Parts*, the Supreme Court affirmed a violation where the employer announced an additional “floating holiday” for all employees, noting that a “well-timed increases in benefits is the suggestion of a fist inside a velvet glove.” *Id.* at 406–407, 410. Giving employees an extra day off is clearly distinguishable from what happened here. Similarly distinguishable is *Conair Corp.*, 261 NLRB at 1274, where the employer unlawfully granted multiple benefits to discourage employees from supporting the union, including by enlarging its plant cafeteria and introducing hot food, providing gloves for assembly line workers, and instituting employee social clubs for bowling, skating, and baseball, among the benefits provided. Here, no social clubs were instituted, nor do employees at the Prescott store have a cafeteria. Instead, the only arguable “benefit” is the extra pay given to employees who were not otherwise scheduled to work, but clocked-in and were paid to attend the approximately one-hour meeting with Miller.

The Board has found that paying employees an extra one hour of pay constitutes an unreasonable inducement and was therefore objectionable conduct sufficient to set aside an election. *River Parish Maintenance, Inc.*, 325 NLRB 815 (1998). In *River Parish Maintenance*, two days before the election, the employer required all but four unit employees to attend an offsite campaign meeting from 3:15 until 4:00 p.m., which was the employees’ regular quitting time, and then paid employees an extra hours pay to attend a “crab boil” from 4:00 to 5:00 p.m. The employer advanced no business reason unrelated to the election for the extra hours pay and the crab boil where food and drinks were provided. Relying upon the principles set out in *B & D Plastics*, 302 NLRB 245 (1991), the Board set aside the election finding that the objectionable conduct was “not that the Employer held the ‘crab boil’ offsite but rather that the employees could have reasonably viewed receipt of an extra hours pay as intended to influence their votes in favor of the employer’s position.” *River Parish Maintenance*, 325 NLRB at 815.<sup>30</sup> In *B & D Plastics*, 302 NLRB at 245, the Board noted that the “standard in preelection benefit cases is an objective one.” And, the Board examines a number of factors to determine whether “granting the benefit would tend unlawfully to influence the outcome of the election.” *Id.* These factors include, “(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.” *Id.* The Board “has drawn the inference that benefits granted during the critical period are coercive,” when “determining whether a grant of benefits is objectionable.” *Id.* This presumption may be rebutted “with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits.” *Id.*

Applying the reasoning of *B & D Plastics* and *River Parish Maintenance* here, any Prescott employee who was not scheduled to work, but was clocked-in and paid for attending the approximately one-hour meeting with Miller, would have “reasonably viewed receipt of an extra hours pay as intended to influence their votes in favor of the employer’s position.” *River Parish Maintenance*, 325 NLRB at 815. This is especially true since the record contains no business justification for having off-duty employees attend the meeting, with pay, other than it being the most effective way for the company to present its position on unionization, which is not a valid business justification. *B & D Plastics, Inc.*, 302 NLRB 245, 246 (1991) (“The Employer’s ‘business justification’ has little or nothing to do with its ‘business,’ but amounts only to a claim that granting the paid holiday in connection with, and at the culmination of, its antiunion campaign was the most effective way to influence the election outcome in its favor . . . [which] merely underscores the likely effect on the election that warrants” it being set aside.). However, the General Counsel has not shown that any off-duty Prescott employee actually clocked-in, and was paid, for attending one of the November 2022 meetings with Miller.

There is ample record evidence that Respondent *anticipated* off-duty employees would attend the meetings and *offered* to pay them for doing so. Respondent posted a flyer saying employees who were not scheduled to work could clock-in for the meeting with Miller. (GC. 9) Kauffmann confirmed that everyone who attended a meeting with Miller was paid, and said he

<sup>30</sup> Objectionable conduct sufficient to set aside an election “is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).” *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962); *Regency Manor Nursing Home*, 275 NLRB 1261, 1268 (1985) (objectionable conduct that interferes with an election is, “a fortiori,” objectionable because it constitutes an unfair labor practice).

informed the store managers that if employees were not scheduled to work during the meeting they could be clocked-in while attending. (Tr. 53) When asked “if . . . store employees attending the meeting when they were off duty,” would be paid “for the time they attended the meeting,” Hendrickson replied “I believe yes. They were asked to clock in, yes.” (Tr. 133–134)

5 And, Miller testified that he believed that Respondent “would have paid” off duty employees for attending one of his meetings. (Tr. 472–473) In fact, during the meeting, Miller told employees that “I’m not sure if you’re on the clock or off the clock . . . [i]f you’re off the clock, we will certainly pay for your time while we’re here in the meeting.” (GC. 24 #3:23–3:40) (GC. 23, p. 1) However, no evidence was presented that any off-duty employee actually attended one of the

10 meetings and was paid. None of Respondent’s witnesses admitted that an off-duty employee actually attended one of the Miller meetings. None of the employees who testified about attending one of the meetings said that they were off-duty, or otherwise not scheduled to work, when they attended. And, no time sheets or payroll records were introduced into evidence, even though such evidence would have shown the number of off-duty employees, if any, that attended

15 a meeting with Miller and were paid for their attendance. (Tr. 476–477) Under these circumstances, there is no way of determining “the number of employees,” *B & D Plastics*, 302 NLRB at 245, if any, that actually received an extra hours pay for attending a meeting with Miller. Accordingly, I recommend that Complaint paragraph 5(h)(2) be dismissed.

20 c. Alleged statements of futility  
(Compl. Para. 5(h)(3))

Complaint paragraph 5(h)(3) alleges that, during the November 16 meeting Miller unlawfully threatened employees that it would be futile for them to select the Union as their

25 collective bargaining representative by saying that the Union cannot provide job security. In support of this allegation, the General Counsel points to the audio recording of the meeting made by Fuller, and the “10 UNION FACTS & FAQ’S” flyer that was disseminated at the meeting. (GC. Br. at 68–70)

30 Regarding the issue of job security, the “10 UNION FACTS 7 FAQ’s” flyer given to employees reads as follows:

2. WILL A UNION PROVIDE MORE JOB SECURITY?

35 No. A union cannot create or guarantee job security. At Sportsman’s Warehouse, working with you directly to improve our business leads to job security for everyone. **Ask the union: Will the union guarantee me better job security in writing?** (capitalization and emphasis in original)

40 A statement that a union cannot provide job security, standing alone, does not violate the Act. *Bray Oil Co.*, 169 NLRB 1076, 1080 (1968) (statement that “no union can provide you with job security, better wages, or improved working conditions,” lawful). However, the Board has held that statements which are “not unlawful by themselves . . . may become unlawful ‘if uttered in a context of other unfair labor practices that impart a coercive overtone to the statements.’”

45 *Shamrock Foods*, 366 NLRB No. 117, slip op. at 14 (2018), (quoting *Reno Hilton*, 319 NLRB 1154, 1155 (1995) (employer’s vague assertion that the “union would not benefit you in any way

and could hurt you seriously,” unlawful in light of the employer’s numerous other unfair labor practices, including threats of closure, discharge, and loss of benefits, which gave the assertion “both specificity and force.”)).

Thus, had Miller simply restated what was written in the flyer alone, and his statements were made in an atmosphere free from other coercive statements or unfair labor practices, there would be no violation. However, here, as Miller was telling employees that a union cannot “create or guarantee job security,” Respondent’s department managers were threatening employees that Sportsman’s would close its doors in the event of a union victory; threats of store closure are one of the most coercive threats a company can make during an election. *Conair Corp. v. NLRB*, 721 F.2d 1355, 1374 (D.C. Cir. 1983) (“We recognize that a threat of economic retaliation by closing a plant is one of the most coercive actions which a company can take in seeking to influence an election.”). The record shows that reports about the Prescott location closing if employees unionized were circulating at the store in the weeks before the election. “Precedent acknowledges the gravity of threats to close a plant.” *Id.* (collecting cases). Thus, when analyzed against the backdrop of these severely coercive threats, I find that Miller’s statements at the meeting violated Section 8(a)(1) of the Act.

During his discussion about job security, Miller highlighted how other employers were shutting doors, closing stores, or laying off employees, while Respondent was opening stores and hiring workers. Miller explained that a “union can’t create or guarantee job security,” and said Respondent believed that working with employees to continue taking care of customers and the business “will allow us to continue to grow within Sportsman’s Warehouse but a union cannot guarantee job security.” Considered against the backdrop of multiple threats by the department managers that Respondent would close the store if employees unionized, I find that Miller’s statements implied that, if employees unionized, stability, growth, and hiring would end, resulting in layoffs and the Prescott store closing.

Adding to the coercive nature of Miller’s words at the meeting, was his solicitation of employee grievances. Throughout the November 16 meeting, on numerous occasions, Miller asked employees if they had any concerns, asked them to share their experiences, and said he was opening up the meeting for a dialogue and conversation and requesting that they share questions or “concerns you might have, things that you might want to tell me in regards to the store or anything on your mind that I might be able to understand, and take away, or potentially help with.” At the end of the meeting, he asked each employee individually if they had any concerns or questions. And, he told the employees the reason he came was to help them with “concerns that you have,” and to answer their questions. Prior to the advent of the union drive, Respondent did not have an established practice of meeting with employees to solicit their workplace complaints or concerns. Indeed, Miller had only been to the store once previously, sometime in 2020 or 2021, and had never before held meetings with employees. Accordingly, under these circumstances, Miller’s asking employees about their concerns and anything he might be able to help with is conduct that is representative of the unlawful solicitation of grievances.<sup>31</sup> *Chartwells, Compass Grp., USA*, 342 NLRB 1155, 1168–69 (2004) (Unlawful

<sup>31</sup> That employees remained silent when Miller solicited their grievances and concerns “does not negate the objectively coercive tendency of the solicitation itself, which depends on the employer’s message considered in context.” *Albertson’s, LLC*, 359 NLRB 1341, 1342 (2013), *aff’d* 361 NLRB 761 (2014).

solicitation of grievances where employer asked workers if they had any problems or any concerns, as the company had no prior practice of doing so.); *Wal-Mart Stores, Inc.*, 335 NLRB 1310, 1313–14 (2001) (Solicitation of grievances where district manager asked employee whether she needed any help with problems in the store, if she liked her job, whether everything was going fine); *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001) (Statement from human resources director that she will look into employee concerns of pay, scheduling, and the length of their workday, constitutes a solicitation of grievances.); *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 10, (2018), enfd. 779 Fed.Appx. 752 (DC. Cir. 2019) (A solicitation of employee grievances during a union campaign inherently includes an implied promise to remedy those grievances, unless the employer had a past practice of soliciting grievances and did not significantly alter its past manner and methods of doing so.). Although the Complaint does not allege that Respondent unlawfully solicited grievances, I find Miller’s statements relevant in determining the coercive nature of the meeting, with respect to the conduct that is alleged in the Complaint to be unlawful. *Lush Cosmetics, LLC*, 372 NLRB No. 54, slip op. at 3 (2023) (“The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce.”).

Under this same premise, Miller’s various statements about employee pay are similarly relevant. During the November 16 meeting, Miller told the employees,

we need to examine pay. We need to look at pay in Prescott. We need to look at pay in this store in particular, that we need to look at it as a part of cost of living, we need to compare it to stores that surround it. And, I’m happy to take that away from the meetings. But that has come out and been very, very prevalent and very easy to understand in the three meetings I had prior to this one.

Miller further said that, “if we have an opportunity and need to pay more in Prescott, Arizona, there’s an opportunity for us to review that, consider that and make that happen should we need to and should we get the opportunity to.” He also told the workers that the ability to hire was dependent on pay, that Sportsman’s has some “very tough work to do there” in evaluating what pay looks like, what it needs to be, and that employee knowledge of the outdoors has value that needs to be evaluated and appropriately compensated. Miller’s statements about pay in the meeting went beyond simply explaining to employees that the company reviews pay annually, and had this been alleged in the Complaint, his comments would constitute an unlawful promise of benefits. Cf. *Sysco Columbia, LLC*, 368 NLRB No. 129, slip op. at 13 (2019) (manager’s statement that he would “look into” whether employer can guarantee a 40-hour work week a violation, since “[i]n connection with the solicitation of grievances, a statement indicating that the employer is ‘looking into’ making changes desired by employees indicates that action is being contemplated and constitutes an implied promise of improvements.”); *Majestic Star Casino, LLC*, 335 NLRB at 407–408.

Accordingly, examining the totality of the circumstances, including Miller’s comments set forth above, and the multiple threats to close the Prescott store if the employees voted to unionize that were occurring during the time frame of the mandatory meetings, I find Miller’s statements about the Union not being able to provide job security reasonably tended to coerce employees in the exercise of their Section 7 rights, and violated Section 8(a)(1) of the Act.



F. Alleged threat of loss of direct communication if employees unionized.  
(Compl. Para. 5(i))

5 In the meetings Respondent distributed a leaflet titled “WHY ARE WE OPPOSED TO  
UNIONS AT SPORTSMAN’S,” which Miller referenced. This leaflet was also left in the  
breakroom in the Prescott Store, and was also mailed to employees. The leaflet was also  
included as an exhibit in the November 17, letter that Miller sent to employees. (Tr. 61–62, 65–  
66, 129–130, 413, 465–466, 517, 681–682) (GC. 11(b), 13, 14).

10 The leaflet discusses the collective bargaining process, and also explains why  
Sportsman’s is against unionization. In discussing why the company opposes the Union, in  
relevant part, the leaflet states:

15 First, we like the fact that we can deal with employees directly, not through some  
outside third party. Now you can come directly to management with your  
problems or concerns. Many of you have taken advantage of that open door  
policy. This one-on-one access to management would no longer exist if the Union  
was voted in because we would have to share your problems through a grievance  
20 process with the Union instead of first talking to you directly.

This portion of the flyer also states that employees currently have flexibility in dealing with  
difficulties involving work schedules because the company does not have “the type of rigid work  
rules that are typically found in Union workplaces.” And, it says that Union’s often create a  
25 hostile work environment by pitting employees against management. (GC. 11(b), 14)

The General Counsel alleges the section of the flyer that discusses the loss of direct  
communication with management if employees unionized violates Section 8(a)(1) of the Act.  
(GC. Br. at 43) The Board had long found such statements constitute a violation. See e.g.,  
30 *Economy Fire & Casualty Co.*, 264 NLRB 16, 20 (1982); *Tipton Electric Co.*, 242 NLRB 202  
(1979), *enfd.* 621 F.2d 890 (8th Cir. 1980); and *Storktowne Products, Inc.*, 169 NLRB 974  
(1968) However, in *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985), the Board changed course and  
found that statements involving the loss of direct communication with management if employees  
unionized were lawful. In *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024), the  
35 Board overruled *Tri-Cast*, but did so prospectively only. Therefore, because the relevant  
statements in the flyer were lawful at the time under *Tri-Cast*, I recommend that Complaint  
paragraph 5(i) be dismissed. See *Amazon.Com Services LLC*, 373 NLRB No. 136, slip op. at 1  
fn. 5 (2024) (Affirming dismissal of complaint as *Siren Retail Corp.* overruled *Tri-Cast*  
prospectively only, and the statements in question were lawful at the time they were made.).

G. Alleged promise of benefits by Hendrickson  
(Compl. Para. 5(f))

45 Hogan testified that he attended a mandatory meeting with Miller and Hendrickson  
sometime in late November. Shortly after the meeting, Hogan said he was outside the store with  
a coworker named Kenny when they had a conversation with Hendrickson, who congratulated

them for doing a good job on Black Friday sales.<sup>32</sup> Hogan said that both he and Kenny acknowledged the store did well during Black Friday sales. Hogan further testified that he told Hendrickson he was “glad that we did really well” and hoped “we can get a raise soon,” as it seemed the Prescott store “did better than a lot of other stores.” (Tr. 418) According to Hogan,  
 5 Hendrickson replied saying that he along with “some higher ups” and peers “looked into it,” and that Prescott employees were “getting paid far too low” for the cost of living in the area, but that he could not “promise anything quite yet.” (Tr. 418) (Tr. 410–411, 417–418)

Hendrickson testified that he could not recall discussing with Prescott store employees  
 10 how well they did with Black Friday sales. And, when asked if he visited the Prescott store the week following Black Friday, he said that he could not recall. (Tr. 149–151)

Miller originally testified that Hendrickson was, in fact, with him at the Prescott store on November 28 and 29 when he held meetings with employees. (Tr. 470–471) Later, when  
 15 answering a borderline leading question posed to him by Respondent’s counsel asking “is it possible” that that Kohler, and not Hendrickson, was with him during the late November 2022 meetings, Miller said “[i]t is possible.”<sup>33</sup> (Tr. 497)

Taylor confirmed Hendrickson was at Prescott during the week after Black Friday,  
 20 testifying that, at one point during the week after Black Friday, Hendrickson talked to an employee named “Kenneth” about employee wages, while they were at the gun counter inside the store. According to Taylor, Kenneth complained about wages, and Hendrickson replied saying there was “nothing we can do right now.” (Tr. 194–195) Taylor also confirmed that, “at some point,” he discussed Black Friday sales with Hendrickson, and that Black Friday is “always  
 25 really busy” for the hunting department as they “sell a lot of firearms.” (Tr. 193–194)

As noted earlier, I found Hogan to be a credible witness, whereas Hendrickson had an acute lack of recall throughout his testimony. Taylor confirmed that Hendrickson was at the store during the week after Black Friday, as did Miller in his original testimony. I therefore find  
 30 that Hendrickson was, in fact, at the Prescott store that week, and credit Hogan’s testimony as to what occurred during the conversation between himself, Kenny, and Hendrickson while they were outside the store.

Given the surrounding circumstances, including the context of the other unfair labor  
 35 practices that occurred during the organizing drive, and the fact that Hogan been in a mandatory meeting with Miller discussing the union drive shortly before this conversation, I find that Hendrickson implied that wage increases were forthcoming when he told Hogan and Kenny that Respondent had looked into their wages, and Prescott store employees were getting paid far too low for the cost of living in the area. This statement was coercive, even though Hendrickson  
 40 added the caveat that he could not “promise anything quite yet.” The unionization election was less than a week away, and employees would reasonably interpret Hendrickson’s caveat as

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<sup>32</sup> Black Friday refers to the day after Thanksgiving, which has been referred to as “America’s biggest shopping day.” *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 980 (9th Cir. 2021).

<sup>33</sup> See *Johns v. Gwinn*, 503 F. Supp. 3d 452, 472–473 (W.D. Va. 2020) (finding defendant’s testimony unpersuasive and noting he “walked . . . back” his original testimony “after a leading question” was posed to him where the attorney asked “is it possible” and then described the possible event).

suggesting that a promise of increased wages would be forthcoming if they rejected the union. *Smithtown Nursing Home*, 228 NLRB 23, 27 (1977) (unlawful promise of better wages where manager told employees the wage rate they were receiving was low and while he could make no promises, he believed they should have an increase in salary). Indeed, the general topic of Miller’s mandatory meetings, which Hogan had just attended before his conversation with Hendrickson, was to urge employees to reject unionization. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged.

#### IV. DISCHARGE OF PETER SCOTT FULLER

##### A. Facts

##### 1. Background

On December 23, Fuller was working in the hunting department when a confrontation occurred with a coworker. This incident ultimately led to his discharge on December 28, while the coworker received a final written warning. Recall, Fuller was the Prescott employee who first contacted UFCW Local 99 to discuss unionizing the store. He was also identified by hunting manager Taylor in his October 24, email to Kauffmann and Hendrickson as the employee “organizing” the union drive, and was pictured in the pro-union flyer circulating at the store before the election. (Tr. 433; GC. 15, 21, 29; R. 1)

The coworker involved in the December 23 incident was Phillips, who had worked at the Prescott store for just over a year. Phillips and Fuller had previously quarreled in late November about spiffs, which seems to have strained their relationship. The union organizing drive further added to the tension between the two. Phillips had originally signed a union authorization card in September, and denied that he was anti-union. However, by November he was complaining to management about the union in general and the union activity of coworkers that was occurring in the store. He also celebrated the Union’s election loss by texting “Yes!” on December 2 after Taylor texted him that the union vote failed. (GC. 28) And, immediately thereafter, texted Taylor asking if they could have a “going away party” for Fuller, “without him included in the party.” (GC. 28) Phillips also texted Taylor on December 6 warning him to be careful around Fuller, and to tell people to not have any conversations with him about the union, claiming Fuller was “looking for anything to sue the company,” and that “we have to protect our self [sic].” (GC. 28). During his testimony, Phillips said Fuller had an “agenda” regarding the union drive, and claimed Fuller was telling people he would get a “stipend from this,” referring to the union and the upcoming election. (Tr. 755) (Tr. 199, 277–280, 522–523, 548, 755–759, 786; GC. 19, 28, 29; 34(g))

##### 2. The hunting department gun counter

The gun counter at the Prescott store is well over 50 feet long, with multiple glass display cases containing firearms and related items and accessories.<sup>34</sup> The screenshot below in Figure 1, from a video taken by one of the store’s security cameras, shows how the gun counter looked on

<sup>34</sup> The evidence shows that the individual floor mat tiles behind the gun counter are one foot square. I have used the one-foot floor tiles to estimate the various distances described in this section.

December 23. One part of the counter (depicted at the top of Figure 1) contains various optics, such as binoculars, rangefinders and rifle scopes, along with some camping related items. The remaining part of the counter displays different types of handguns. On the back wall, behind the counter, an assortment of long guns are displayed vertically. About halfway down the back wall is a niche, which is about 8 to 10 feet long, where additional handguns for sale are displayed on the wall. (Tr. 238, 240, 558, 576, 706, 732, 780; R. 7)

FIGURE 1



On the backwall, across from the display containing optics and binoculars, is a doorway that leads to the ammo room, which is also referred to as the storage or tool room, where ammunition and various supplies are stored; the room is also used as a type of workshop. At the opposite end of the gun counter is another doorway that leads to the gun room, where excess firearms are kept. The gun room also contains a desk that employees use to process paperwork, including mandated background checks for gun purchases. The door to the gun room is secured with a keypad lock; all hunting department employees have a code to the lock and can enter the room. (Tr. 162, 551, 558–559, 602–603, 740, 751, 780, 793, 795; R. 7)

The aisle behind the gun counter, where the sales staff work, is about three feet wide, except for the end of the counter near the ammo room entrance, which is wider. The gun counter has at least one cash register to ring-up customers. And, near the cash register there is an opening in counter which allows workers to access the sales floor. (R. 7)

### 3. The store's security cameras

A five-minute video capturing part of the row between Fuller and Phillips on December 23 was introduced into evidence as Respondent's Exhibit 7. The video is a compilation of views from three different security cameras. One view shows most of the gun counter. The second shows the entrance to the ammo room, and the part of the gun counter where binoculars and optics are displayed. The third view shows the ammo room. The video, which is titled "Prescott 3 Stitched Playback" includes a timestamp, showing the date and time; there is no sound. (R. 7)

The security cameras at the Prescott store are managed remotely by Respondent’s corporate office, through the company’s computer network. Surveillance videos are kept on a local drive for each particular location, and stored for about 60-days, which is roughly the number of days before the storage drive reaches its maximum capacity. Swain and her team of human resource managers can access the local drives where the surveillance videos are stored from their offices in Utah; they can review videos going back for the approximate 60-day period. The company’s loss prevention/security department can also access the videos, as can the surveillance operations center manager Josh Wade (Wade). (Tr. 198, 636–640)

#### 4. Dispute about the video

At the hearing a dispute arose related to the video and the trial subpoena the General Counsel issued to Respondent. In its subpoena, the government asked for the complete surveillance camera recordings for December 23, 2022, showing every interaction between Fuller and Phillips. All the government received in response was the five-minute “stitched” video in Respondent’s Exhibit 7, showing the three different camera views discussed above edited together at different points. The video does not show any interactions between Fuller and Phillips that happened before 4:39 p.m. that day. The limited nature of the video is pertinent, in that Fuller claimed the incident that occurred was provoked by Phillips who had earlier stuck his elbow out and nudged him as they were behind the gun counter.<sup>35</sup> (Tr. 529, 563; GC. 35, 37)

Even though Swain knew by December 26 that Fuller claimed Phillips had nudged him just before the confrontation between the two occurred, Swain testified that she did not ask anyone to review the surveillance video to confirm Fuller’s account. Respondent’s officials did not watch surveillance video for the entirety of December 23, or for the entire shift that Fuller and Phillips had worked together. Nor did Respondent take any steps to preserve the store’s security camera video footage for the day, even though it had received the NLRB charge regarding Fuller’s discharge around January 10, 2023. The only portion of the security camera videos for December 23 that were saved are those contained in the edited/stitched video that was introduced into evidence as Respondent’s Exhibit 7. Notwithstanding the edited nature of the video, there is no claim that the images captured in the video are somehow inaccurate. (Tr. 560–561, 641, 645, 651–653; GC. 6; R. 7)

#### 5. The December 23, 2022, incident

Both Fuller and Phillips were scheduled to work the afternoon shift in the hunting department on December 23. Fuller arrived to work at 2:00 p.m., and it appears that Phillips was already working when Fuller started his shift. Although Phillips did not recall exactly when his shift started that day, it is clear that in the late afternoon both were assigned to work behind the gun counter. Others that were working on the sales floor included hunting department lead Robert Gould and Steuer. Fuller, Phillips, Gould, and Steuer all testified at the hearing about what occurred that day. Fuller and Phillips testified with the aid of the video; neither Gould nor Steuer were shown the video during their testimony.<sup>36</sup> (Tr. 237–238, 525, 555–557, 595, 731, 751)

<sup>35</sup> Transcript page 563, line 12 should read “A. No,” instead of “No” as the witness is answering the question.

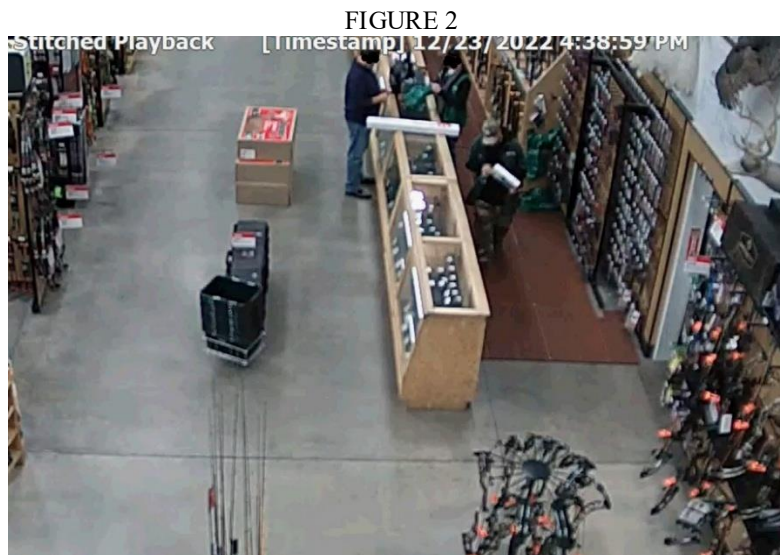
<sup>36</sup> Transcript page 556, line 21 should read “on that” instead of “in that.”

## a. Video of the incident

The video starts one second before 4:39 p.m. According to Fuller, about two or three minutes before the video started, he was working behind the gun counter and walked by Phillips who stuck his shoulder out and used his elbow to “nudge” him while saying something that sounded like, “I wish you would.” (Tr. 526, 548) Phillips initially denied nudging or elbowing Fuller on December 23, saying that the area “is very narrow. We run into each other all the time because there’s just barely enough space when we’re working with somebody. That happens all the time . . . [i]t’s—intentionally, no.” (Tr. 741–742) Later, when asked under cross examination by the General Counsel to clarify whether he nudged Fuller, either intentionally or unintentionally, Phillips testified:

A. I don’t recall. To be 100% honest, which I am, I don’t know. Like I said, when there’s a bunch of guys back there, there’s not very many people back there. There’s usually—there has been up to, like, nine guys back there, and we’re all slamming into each other. It’s just a part of that. You get hit and nudged all the time, and it’s not, what’d you do? It’s not like that. But it could have been. If he did that, he probably ran into me, the way he was acting before, so I’m not going to intentionally do that. That’s not me. (Tr. 778–779)

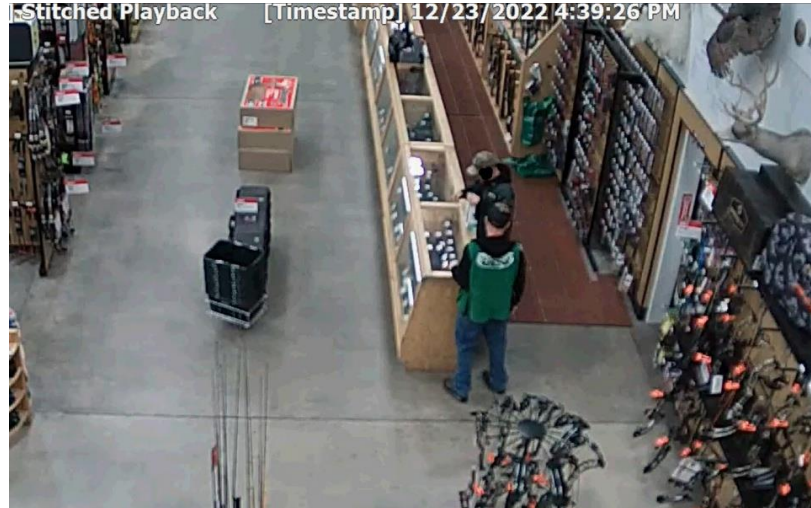
When the video begins, as shown in Figure 2, Fuller is standing at the cash register, wearing a green work vest and a black jacket/hoodie, completing a transaction with a customer.<sup>37</sup> After completing the transaction, Fuller walks to the end of the counter where the binoculars and optics are kept and starts speaking with Gould, as shown in Figure 3; Fuller has his back to the camera. The doorway to the ammo room is shown on the right, directly below a moose head that is hanging on the wall. (Tr. 526, 548, 558–561, 566, 741–742, 778–779)



<sup>37</sup> The faces of the various people shown in the video have been redacted.



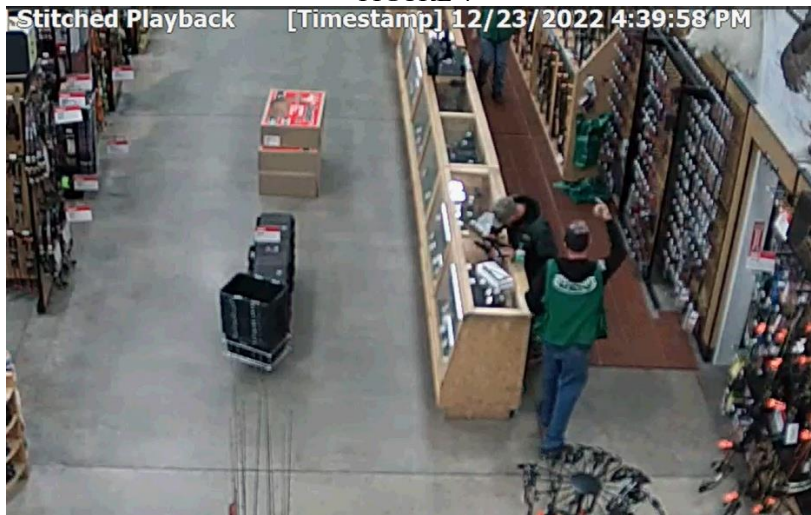
FIGURE 3



5        Around this time, Fuller said that he started speaking with Gould telling him that Phillips was bothering him and “acting that way again.” (Tr. 569) While Fuller is speaking to Gould, the video shows Gould focused on a box containing what looks like a rangefinder or optical scope. Fuller testified that he was upset as Phillips was “doing it again because he had physically put his elbow on me.” (Tr. 563) According to Fuller, he believed Phillips had been trying to intimidate or bully him for a couple weeks and he felt uncomfortable/threatened by Phillips’s attitude. (Tr. 563, 569, 764–765)

15        As Fuller is standing next to Gould, he is facing towards the top of the counter where Phillips, who is out of view of the camera, is working. After standing at the end of the counter with Gould for about 30 seconds, the video shows Fuller playing with his hat, looking up the gun counter in the direction of Phillips, and then making a gesture with his finger directed towards Phillips, pointing up and to his left. Figure 4 shows Fuller gesturing with his finger. Steuer can be seen at the top of the screenshot, walking towards the cash register. (Tr. 571)

FIGURE 4



Fuller testified that at some point between 4:39:32 p.m. and 4:40:00 p.m. he may have noticed Phillips “staring me down,” and so he started speaking directly to Phillips. For his part, Phillips denied looking in Fuller’s direction, saying that he was engaged with a customer at the time. According to Phillips, it was only when “the obscenity started” that he turned his attention to Fuller. Phillips denied having any previous discussions with Fuller prior to this moment. (Tr. 525–527, 564, 569–571, 763–764)

The video shows Fuller starting to walk up aisle at about 4:40:00 p.m. After he passes Gould, Fuller takes off his hat and puts it on a rifle rack. Gould can be seen looking up the gun counter aisleway towards Phillips and Fuller, as Fuller walks behind Steuer, who is now standing at the cash register. At this point, the video switches to another camera with a different view, as shown in Figure 5.<sup>38</sup>

FIGURE 5



Figure 5 shows Phillips in the foreground, standing behind the gun counter helping two customers dressed in matching camouflage jackets standing across the counter. Phillips is showing the customers a handgun. The next person shown in the screenshot is Steuer, who is standing at the cash register and looking out towards the sales floor. Between Phillips and Steuer, just before the cash register, is the opening in the gun counter that allows workers to exit aisleway and walk out onto the sales floor. Fuller can be seen walking down the aisle towards the opening. At the far end of the gun counter is Gould, who is mostly obstructed by the lettering, still tinkering with a rifle scope or rangefinder.

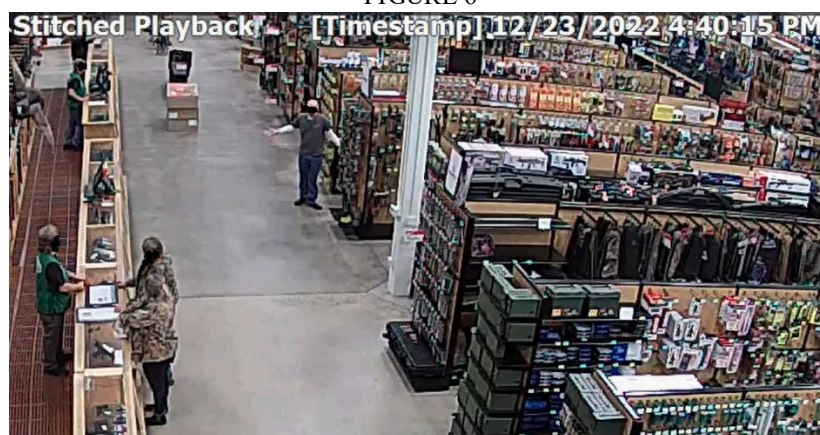
As Fuller walks past Steuer he starts removing his hoodie and work vest, and walks out onto the sales floor. It appears from the video that, as Fuller walks onto the sales floor, both he and Phillips start exchanging words; both are now looking at each other and in the video their heads are moving at angles as if they are talking to each other. Fuller walks over to a point on the sales floor near a merchandise endcap as he and Phillips are looking at each other; Fuller then

<sup>38</sup> Although the time-stamps on the edited video correspond, the editing of the images does not match perfectly. Before the camera angle switches, Fuller can be seen walking past Steuer. However, at the beginning of the second view, as shown in Figure 5, Fuller has yet to walk past Steuer. (R. 7 4:40:05–4:40:06 p.m.),



puts his arms out to his side for about a second, while shrugging his shoulders and holding his hoodie and vest in his left hand, as shown in Figure 6.

FIGURE 6



Fuller testified that, as he walked up the gun counter aisle, he and Phillips exchanged words. According to Fuller, he told Phillips that he was tired of him “talking shit behind my back and saying stuff when I walked by,” and that if Phillips really had a problem with him, “we can take it outside.” (Tr. 527) In reply, Fuller testified that Phillips said “okay, let’s go.” (Tr. 527) According to Fuller, it was Phillips’s saying “okay let’s go,” which triggered him to remove his hat and work vest. Fuller further testified that he and Phillips were going back and forth, as he walked out onto, and was on, the sales floor. Fuller said that it was around this point in the interaction that Phillips said “I’m calling the cops,” and he called Phillips a “bitch.” (Tr. 529) After this, Fuller testified that he realized Phillips did not actually mean, “let’s go,” so he decided to go back to work and returned to his spot behind the gun counter. (Tr. 573) Respondent’s counsel asked Fuller why he chose the word “bitch,” and Fuller responded saying that he thought it was appropriate as Phillips had been trying to bully him for weeks, called him out by saying, “okay, let’s go,” but then said he was going to call the police.<sup>39</sup> (Tr. 582) (Tr. 527–530, 549–551, 565, 572–573, 581)

According to Phillips, as Fuller was walking down the gun counter aisle and onto the sales floor, Fuller was yelling at him the entire time in a tone that was loud enough for the customers to hear. Phillips said that Fuller was yelling obscenities, saying “a lot of F-bombs,” like “motherfucker, blah, blah, blah.” (Tr. 767) And, Phillips testified that Fuller said “let’s take it outside,” while Fuller was taking off his vest and walking onto the sales floor. While Fuller was standing on the sales floor with his arms outstretched, Phillips testified that Fuller was saying, “like, let’s settle this and go, you know . . . he was pretty verbal.” (Tr. 735) Phillips said that Fuller taking off his hat and vest was “like a gauntlet being thrown down.” (Tr. 730–731) (Tr. 730–736, 767)

The video shows that, as Fuller stepped out onto the sales floor, Phillips looked directly towards Fuller and moved his head, as if he was speaking directly to him. When it was pointed

<sup>39</sup> Transcript page 551, lines 9–12 are corrected to show that the witness’s answer starting on line 9 ends with the word “store” on line 12. Counsel’s next question begins on 12 with the phrase “Isn’t it true . . .”

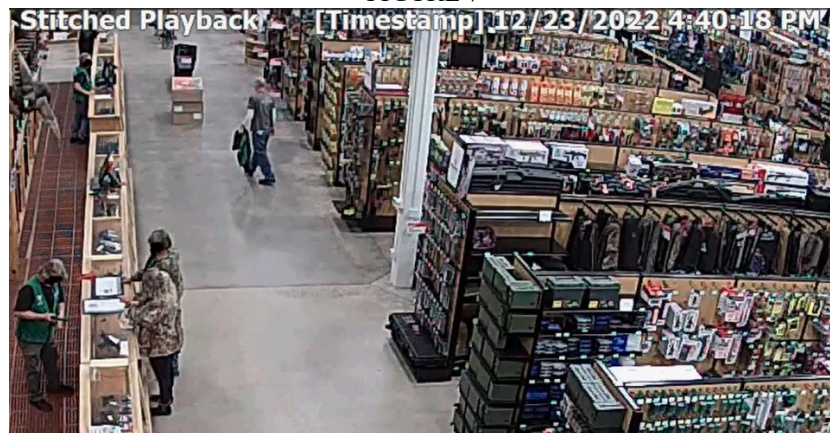
out that Phillips had made eye contact with Fuller at this point in the video, Phillips said it was because “[h]e’s yelling at me.” (Tr. 768) And, Phillips said that he apologized to the customers “for this.” (Tr. 768)

The video shows that Fuller stood on the sales floor with his arms out to his side for less than a second. He then drops his arms to his side, and walks back through the opening in the gun counter to return to the employee side of the counter. In all, Fuller was on the sales floor for about 10 seconds; this includes the time it took him to walk to the merchandise endcap, put his arms out, and then return to his position behind the sales counter.

A review of the video also shows that during the time Fuller was walking down the aisle and out onto the sales floor, the two customers at the gun counter were focused on their interaction and discussion with Phillips and/or each other. It does not appear from their body language, or the movement of their heads, that they were aware of Fuller until after Fuller returned from the sales floor and started walking back behind the gun counter. At this point, at about 4:40:22 p.m., both customers noticeably turn their heads towards Fuller, who is going through the opening in the counter and starting to walk towards Steuer and Gould, with his back towards Phillips. (R. 7, 4:40:06 p.m.–4:40:24 p.m.)

As Fuller was walking back towards the gun counter from the sales floor, at about 4:40:18 p.m., the video shows Phillips reinserting the handgun’s clip/magazine back into the gun, as shown in Figure 7. Fuller then put the trigger lock/cover over the gun’s trigger.<sup>40</sup> (Tr. 770–771) (R. 7, 4:40:10 p.m.–4:40:26 p.m.)

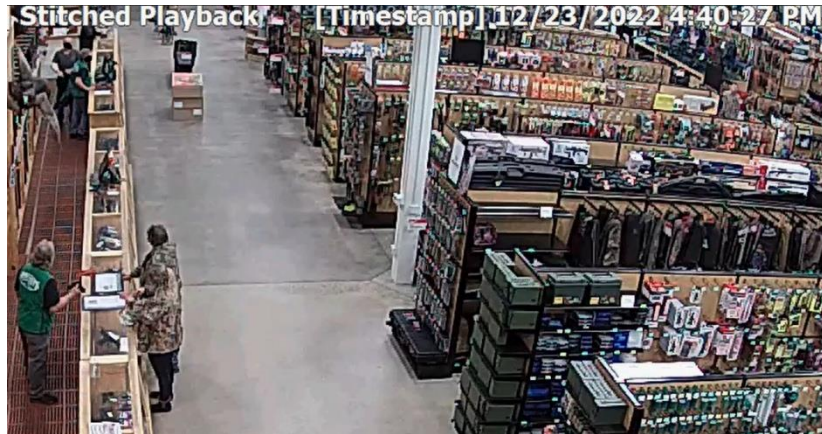
FIGURE 7



By this point, Fuller had walked back to his work area behind the counter and was standing near Steuer, who was still at the cash register. After Phillips reinserted the gun clip and trigger guard, he looked towards Fuller, who had turned around and was now facing Phillips. As shown in Figure 8, by 4:40:27 p.m. both Phillips and Fuller are looking directly at each other; Fuller had retrieved his hat and was holding it along with his hoodie and work vest, while Phillips was holding the handgun in his right hand.

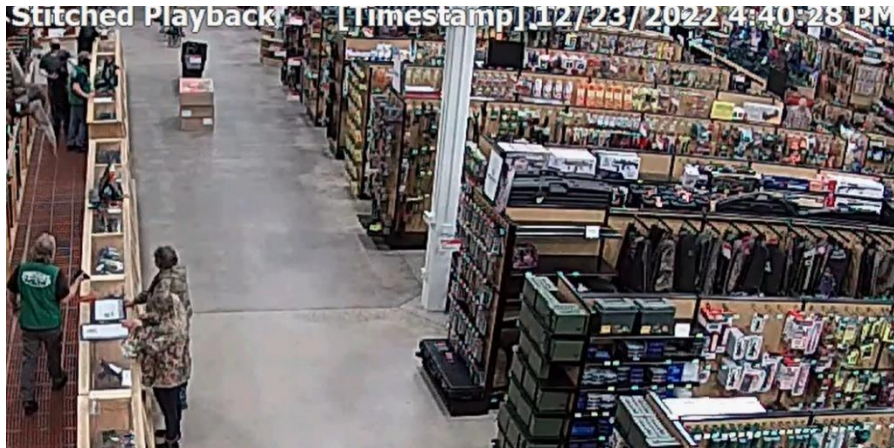
<sup>40</sup> Transcript page 770, line 20 should read “trigger lock” instead of “trigger locked.”

FIGURE 8



About five or six seconds after Fuller returned to the employee side of the gun counter, at about 4:40:28 p.m., Phillips starts walking towards Fuller holding the handgun in his right hand. Figure 9 shows Phillips walking towards Fuller, as the customers now seemed focused on the interaction between Fuller and Phillips.

FIGURE 9



The video shows Phillips walking between 20 to 25 feet down the gun counter aisle towards Fuller holding the gun in his right hand, to his side, at about chest/shoulder level, and stopping about 5 to 8 feet away from Fuller. As he walked down the aisle, Phillips passed the niche in the back wall where handguns are displayed. The entire time he walked towards Fuller, Phillips is holding the gun in his right hand, at chest/shoulder level, to his side. As Phillips walks down the aisle towards Fuller it appears from their body language in the video that both Phillips and Fuller are exchanging words with each other. After Phillips stops, he drops his right hand, which is holding the gun, to his side and turns around; he then walks back up the aisle.

Fuller testified that “it was such a heated exchange” between himself and Phillips he could not recall exactly what was said as Phillips was walking towards him. (Tr. 575) According to Phillips, he did not actually start speaking with Fuller until he started “walking forward.” (Tr. 768) And, as he was walking towards Fuller, Phillips testified that he was trying to “like ask him what, you know—you have a problem with me?” (Tr. 729) Phillips testified



that Fuller responded by saying, “you’ve been talking shit about me all day, and I’m sick of it,” to which Phillips replied “I haven’t said anything to you.” (728–729) Figures 10 and 11 show Fuller walking down the aisle, and the spot where he stopped and turned around. (Tr. 575, 728–729, 768)

5

FIGURE 10



10

FIGURE 11



With respect to the handgun, the video shows that as he walked towards Fuller, Phillips held the firearm in his right hand with the gun’s handle/grip between his thumb and forefinger, and the barrel in his palm, pointing downwards at an angle; the gun was not loaded. Fuller testified that Phillips was walking towards him holding the gun “in his hand, like kind of raised, more of a threatening way.” (Tr. 531) Fuller knew the gun was not loaded, but testified that he thought Phillips could potentially hit him with it, saying he felt Phillips was holding the gun like a club. (Tr. 531, 551–552, 574, 738)

20

For his part, Phillips denied holding the gun in a threatening manner. When asked by Respondent’s counsel about the “rule at Sportsman’s for how you hold a firearm,” Phillips answered that you always have to assume a gun is loaded, so “[t]he slide was racked back, the magazine was removed. So I put that back, put it back on the shelf.” (Tr. 738) That being said, Phillips admitted that, as shown in the video, he put the clip/magazine back into the gun before he started walking down the counter towards Phillips with the handgun in his right hand. And,

25

the video shows that he did not return the handgun to the niche until after he walked back up the aisle. (Tr. 738, 770-771)

After Phillips turned around, he walked back down the aisle holding the gun at his side,  
 5 as he walked past the niche Phillips placed the gun on the wall, in the niche, where it was  
 originally displayed. Figure 12 shows Phillips walking down the aisle, and Figure 13 shows him  
 returning the gun to the niche. Phillips testified that as he was walking back towards the  
 customers, getting ready to put the gun back in the niche, he told Fuller that he was going to call  
 the cops/police. At no point during his testimony did Phillips say that Fuller called him a bitch.  
 10 (Tr. 737, 739, 771-772, 776)

The video shows that the two customers wearing camouflage coats were watching the  
 exchange between Fuller and Phillips, from the time Fuller returned to the aisleway from the  
 sales floor until Phillips placed the gun back on the wall in the niche. As Phillips was returning  
 15 the gun to the wall, both customers turned their heads and looked directly towards Phillips.

FIGURE 12

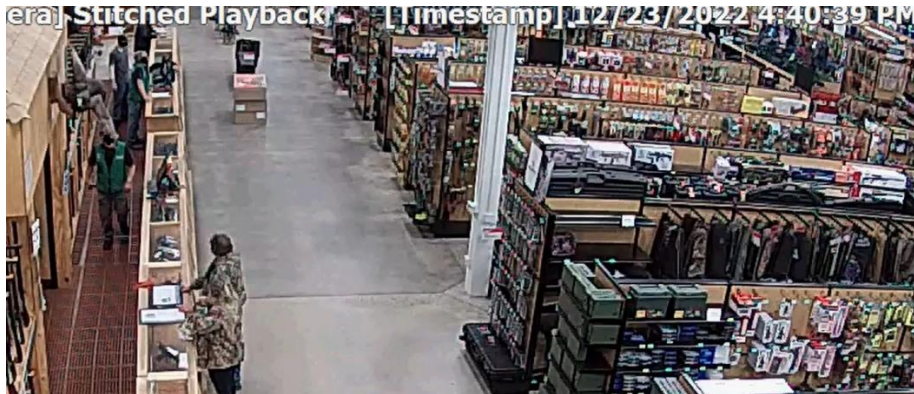


FIGURE 13



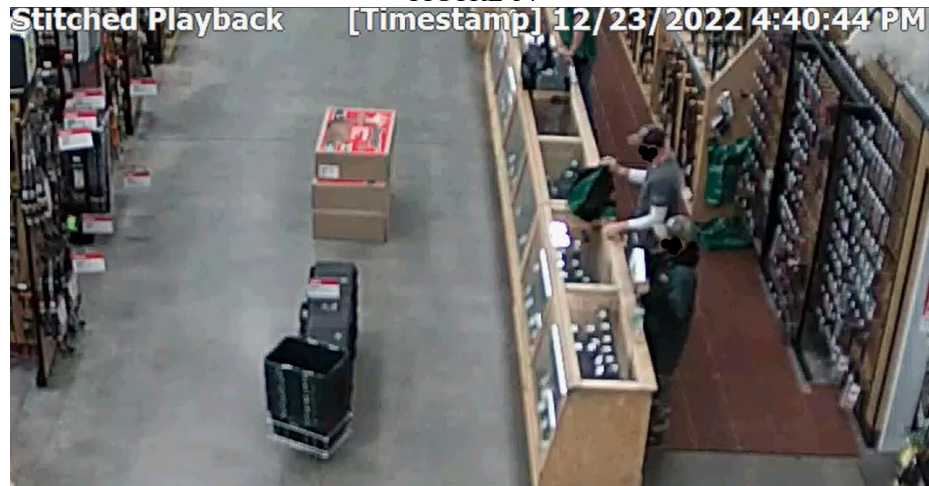
As Phillips approaches the niche, another customer, wearing a plaid shirt, steps into the  
 video. After Phillips returned the gun to the niche wall, the camera view in the video changes  
 25 again, as shown in Figure 14. Now, Steuer can be partially seen standing near the register,  
 leaning on the gun counter; Fuller and Gould are standing next to each other towards the end of



the counter displaying the binoculars/optical goods. Fuller is wearing his hat and is holding his work vest and hoodie in his right hand, while Gould appears to be looking out onto the sales floor. From this point forward the video does not show Phillips any further.

5

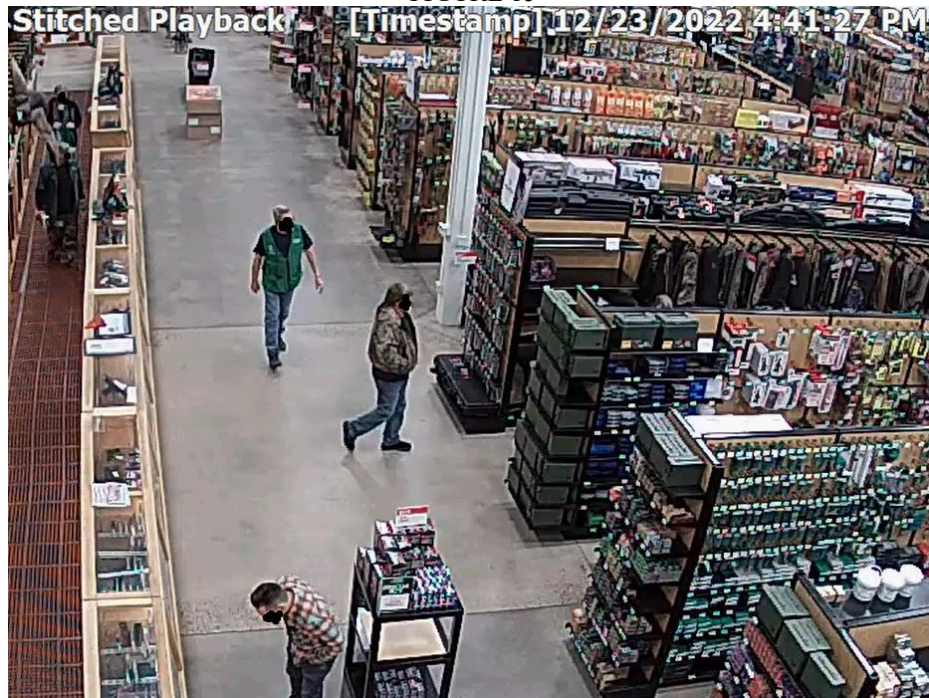
FIGURE 14



The video shows that Phillips and Gould start talking with each other, as Phillips puts his hoodie and work vest back on. They both walk back up the gun counter, and at about 4:41:26 p.m. the camera view changes again. As shown in Figure 15, Phillips and Gould continue walking up the aisle, as Steuer walks away from the gun counter, going to help the customers in the matching camouflage coats with something in one of the general merchandise aisles. Meanwhile, the customer in the plaid shirt is looking at items in the gun case.

15

FIGURE 15



Gould places something on one of the rifle racks along the back wall, and at about 4:41:50 p.m., Gould and Phillips start walking down the aisle towards the ammo room. Gould is then shown walking into the ammo room while Fuller is at the end of the gun counter, across from the ammo room door. At 4:42:03 p.m., the camera angle changes again, and it appears that Fuller is speaking with Gould, who is inside the ammo room. As Fuller and Gould continue talking, Gould exits the ammo room holding an item in his hands; a little later Gould walks back into the ammo room and the pair continue talking through the ammo room doorway. Fuller walks into the ammo room at about 4:43:10 p.m. and the camera view changes to show the two of them in the ammo room, as shown in Figure 16. It appears that Fuller and Gould are talking to each other, as Gould is at a work bench and Fuller is pacing around the room.



Fuller straddles the doorway for a time, apparently still talking with Gould, and then reenters the ammo room completely. The remainder of the video shows Gould and Fuller in the ammo room, until Fuller walks out of the room at 4:43:55 p.m. Two seconds later the video ends. Fuller testified that he was still upset when he was in the ammo room with Gould, and that they were probably discussing what occurred between himself and Phillips, along with other unrelated matters. (Tr. 561–562)

Regarding their interaction that day, Phillips testified that he took the situation seriously, as soon as Fuller “was yelling at me.” (Tr. 769) Phillips said that while he is “not afraid of anybody,” he was fearful of the situation, which he thought was threatening. (Tr. 771) Phillips testified that he interpreted the words used by Fuller as him wanting to fight, “to settle this once and for all.”<sup>41</sup> (Tr. 750). When asked about his walking towards Fuller, Phillips said that he was “trying to listen,” and take the conversation away from the customers, as it was embarrassing to deal with. (Tr. 771, 775) Phillips claimed that, when he walked towards Fuller holding the gun in his hand, he was “trying to lower the situation,” and deescalate things. (Tr. 771, 775) Phillips testified that he said he was “calling the cops,” when Fuller “kept going,” as the situation had gone too far.<sup>42</sup> (Tr. 771–772, 775–776) As for Fuller, he denied that he wanted to fight Phillips when he said, “if you really have a problem with me, we can take it outside.” (Tr. 549) Instead, Fuller claimed that “we can take it outside,” meant that he did not want to deal with it in the workplace. (Tr. 549)

<sup>41</sup> Transcript page 749, lines 14 and 15 should read “taking of his vest . . .”

<sup>42</sup> Phillips said he was in his late 60s at the time of the incident, and estimated Fuller was in his 40s. (Tr. 731) Steuer also estimated that Fuller was in his 40s. (Tr. 611) The record does not establish Fuller’s actual age.

## b. Testimony of Gould and Steuer

Both Gould and Steuer testified about the events of December 23, without the aid of the video. For his part, Gould said he was at the end of the counter looking at range finders talking shop with Fuller, while Phillips was at the opposite end of the gun counter. According to Gould, Fuller said something that Gould did not catch, as he was busy in his “own world.” (Tr. 239) Gould said that he looked up and saw Fuller and Phillips were “kind of staring at each other.” (Tr. 239) And then, Phillips said something, and Fuller said something. Gould thought they it was “just them being stupid with each other,” so he was laughing at the time. (Tr. 238–239, 245)

Gould testified the incident started out “almost like shop talk, kind of just talking kind of crazy to each other,” so he thought they were “just messing around.” (Tr. 239, 244) So, Gould said he initially laughed it off thinking, “come on, you guys are grown-ups . . . knock it off.” (Tr. 239, 244) But, Gould said it escalated, “got kind of louder,” and when Fuller said something to the effect of “let’s go outside,” was when it got serious. Gould testified that, at one point, Phillip said something like, “I’m gonna call the cops,” and went into the back room. (Tr. 239)

After the incident, Gould testified that he stayed at the gun counter area with Fuller saying “I kind of laughed, and I was like, you know, what’s going on?” Gould said that Fuller “was just like, I’m so mad, or whatever.” According to Gould, nothing really was said, as he was trying to see if he could “get [Fuller] away to kind of cool him off, too.” (Tr. 242)

Regarding December 23, Steuer testified that he saw Phillips engage with Fuller early in the shift, and said there was an argument between the two of them. Steuer testified that Phillips was arguing loudly with Fuller, who asked him what was wrong and whether the two of them could go into the shop area to talk about it. According to Steuer, Fuller was trying to solve the problem with Phillips in a nice way, but that Phillips “said, no.” (Tr. 597–598)

Steuer also said that he saw Phillips elbow Fuller during the shift. According to Steuer, while Fuller was standing in the gun counter aisle working with customers across the counter, Phillips would walk past and stick his elbow out and bump Fuller with his elbow. Steuer testified that hunting department workers are always polite and “excuse [them]selves” as they are passing each other. While they may occasionally bump into each other, Steuer described what he saw Phillips do that day as being “ongoing and more . . . intentional,” saying “I witnessed the elbow go out.” (Tr. 599) Steuer said this physical contact was related to the badgering that happened throughout the day, and that it happened a few times that day. (Tr. 598–600, 610)

Finally, Steuer testified that at the end of the day, there was loud arguing between Phillips and Fuller. Steuer said that Fuller “had enough,” and took off his work vest and said “let’s go outside and talk about this.” (Tr. 600) According to Steuer, after Fuller removed his vest, Phillips said that he was calling the police and ran into the gun room at the opposite end of the gun counter. (Tr. 600–601)

## 6. Fuller and Phillips are suspended pending investigation

After Phillips returned the handgun to the niche, he walked directly to the gun room where assistant manager Jaimie Perry (Perry) was sitting. Phillips told Perry to call the police,



and explained his version of what happened. Perry called Taylor instead of the police. Phillips testified that Taylor told Perry to call Kauffmann, and that Kauffmann then came to the store to deal with the situation. Phillips further testified that Perry also gave him the option of also calling the police, saying it was his right to do so, but instead Phillips said “let’s just talk to”  
 5 Kauffmann. (Tr. 778) (Tr. 729–730, 778)

Taylor testified that he was driving home when Perry called saying there was an altercation at the store and that Fuller tried to fight Phillips. According to Taylor, he tried calling Kauffmann but could contact him. Taylor said he then called Hendrickson, got Swain’s  
 10 telephone number, and called Swain directly to inform her about what occurred. Taylor testified that Kauffmann eventually called him back, and said he would return to the store. (Tr. 196–197)

Swain testified that she was at home on December 23 when Taylor called on her personal cell phone and informed her about the incident between Fuller and Phillips. Swain said that it  
 15 was unusual for the hunting manager of a store to contact her directly. After speaking with Taylor, Swain testified that she called Wade, the surveillance operations center manager, and asked him to start looking for surveillance footage. Swain said that she also spoke with Kohler on the evening of December 23. (Tr. 649–650, 700; R. 9)

Kohler testified that he first learned about the incident on December 23 when Taylor called him sometime after 5:00 p.m. According to Kohler, Taylor told him “that he had been made aware of an interaction between” Phillips and Fuller, that he wasn’t at the store at the time, but wanted to let Kohler know “that he was aware of it and that we might need to do something about it.” (Tr. 808) (Tr. 807–808)  
 20

After the incident, Phillips said that he stayed in the gun room for over an hour, until Kauffmann returned to the store. Phillips testified that he gave Kauffmann a written statement about what had occurred, and that Kauffmann told him he was suspended until the incident could be reviewed by corporate. According to Phillips, he had to leave work early that day, as his shift  
 25 had not ended when Kauffmann suspended him. (Tr. 742–743, 790–791; GC. 19)

Fuller testified that he continued working after the incident and was helping a customer when he saw Kauffmann return to the store. According to Fuller, after he finished with the customer he went to the office and Kauffmann asked him to write a statement, saying the  
 35 incident “had already gone above his head” and had “reached the highest levels of HR.” (Tr. 532) Fuller asked how the matter could have already reached human resources, as Kauffmann was the store manager, and nobody had asked Fuller about what occurred. Kauffmann told Fuller that it was Taylor’s decision and that Taylor was the one who had called human resources. Fuller asked if he could write his statement at home, as he did not feel comfortable writing in the  
 40 office, and his handwriting was not the best, but Kauffmann asked him to complete the statement there, and said he could use one of the office computers. Fuller testified that he completed his statement while sitting at Taylor’s desk, and said that he felt pressured as Kauffmann was standing behind him almost the entire time. After completing the statement, Fuller said that Kauffmann told him he was suspended and being sent home, as per a directive from human  
 45 resources. (Tr. 530–534 )

Kauffmann testified that when he arrived at the store he took Fuller and Phillips into separate areas and had them complete written statements about what occurred. About the incident, Kauffmann said that he contacted “corporate HR,” and spoke with either Swain or Kohler, and that one of them instructed him to get written statements. Kauffmann said he also  
 5 received written statements from Steuer, Phillips, and maybe Perry. Kauffmann testified that he did not remember sending anyone home early on December 23, as both Phillips and Fuller had ended their shifts by the time they had finished their written statements. (Tr. 81–87; GC. 17–19)

#### 7. The written statements collected by Respondent

10 Regarding his statement, Steuer testified that he was approached by Kauffmann and that he completed “a basic paper of what happened,” which he signed. (Tr. 602–603) Steuer’s statement is dated December 23 and reads, in pertinent part, as follows, “I . . . observed a[n] argument between Greg [Phillips] and Peter Scott [Fuller] behind the gun counter. After words  
 15 back and forth Peter [Fuller] asked Greg [Phillips] to go outside and talk about it. Greg [Phillips] then said he was going to call the police and went into the gun room.” (GC. 18)

The statement Phillips completed is dated December 23, at 4:35 p.m. During his testimony, Phillips confirmed both the date and time the statement was written.<sup>43</sup> (Tr. 749) In  
 20 the document Phillips wrote that Fuller started “verbally slandering me,” from across the gun counter, so Phillips asked if there was a problem, and Fuller replied “you’ve been talking shit about me all day!” Phillips wrote “I never said one word to him, only I asked to not work around him because of his passive aggressive attitude towards me at work. i.e., union vote.” Phillips’s statement says that Fuller removed his hat and vest and “said let’s handle this outside” which  
 25 Phillips wrote “was a threat of violence towards me.” Phillips further wrote that he told Fuller he was going to call the police and that Fuller laughed. Phillips ended the statement by saying that he went into the gun room and “communicated the event” to Perry. (GC. 19)

Fuller provided two written statements to Respondent. The first was drafted in  
 30 Kauffmann’s office and is dated December 23. In this statement Fuller wrote that he started his shift at 2:00 p.m., greeted his coworkers, and said Phillips was the only who did not say anything but instead gave him a dirty look. As the shift continued, Fuller wrote that when walked by, Phillips stayed “in the pathway” and would make “comments under his breath.” Fuller further wrote that, after finishing with a customer, he was talking to Gould about the situation when  
 35 Phillips started staring him down. At this point, Fuller wrote he told Phillips that, if he had something to say then “say it to my face, enough of this saying stuff behind my back [and] under your breath, [and] if you really have a problem we can take it outside.” According to the statement, Phillips responded by saying “ok let’s take it outside.” Fuller describes how he started walking towards Phillips who said he was going to “call the cops;” Phillips then went to  
 40 the back room. The remainder of Phillips’s statement explains his belief that the animosity between the two stemmed from the “spiff” issue, which he tried to resolve by giving Phillips the spiff receipt; notwithstanding Phillips seemed to still be holding this grudge. Fuller ended his first statement by writing that he did not have any other issues with employees in his two years

<sup>43</sup> While Phillips confirmed the date and time his statement was written during his testimony as being 4:35 p.m. on December 23 (Tr. 749), the video shows that he was still at the gun counter at that time. The video shows Phillips returning the handgun to the niche at 4:40:42 p.m. (R. 7)

of employment, but that Phillips has had verbal arguments with at least four other employees during his one year tenure. (GC. 17)

Fuller emailed his second statement to Kohler, Kauffmann, and Swain on December 26.  
 5 Both Kauffmann and Swain confirmed receiving the document. Fuller testified that he wrote his second statement while at home, where he felt more comfortable, less pressured, and could think more clearly. In this statement, Fuller wrote that he was updating his original declaration because he felt pressured to quickly produce his first statement. Fuller wrote that Phillips had been trying to bully and intimidate him, and was also trying to damage his reputation by  
 10 spreading lies to coworkers by telling them Fuller was a thief and stole from him, relating to the spiff issue. Fuller explained that he offered Phillips a replacement spiff to clear up the matter but that Phillips refused and was still holding a grudge. Fuller wrote that when he walked past Phillips at work, Phillips would say things under his breath, stand in Fuller's pathway, yell at him, and nudge him while Fuller went by. Fuller also wrote that he had previously asked Gould  
 15 to tell Tayler to no longer schedule him with Phillips (GC. 20; Tr. 86, 533, 535, 651)

Regarding the incident on December 23, in his second statement Fuller wrote that Phillips appeared to have a hostile attitude that day and gave Fuller a dirty look. Fuller further wrote that, when he walked past Phillips later in the day to ring up a customer, Phillips "nudged me,"  
 20 and made a comment under his breath. After finishing with the customer, and while talking with Gould about Phillips's conduct, Fuller wrote that Phillips was "staring me down again;" Fuller said he felt a bit threatened because Phillips had been attempting to push him around for the last few weeks, and was now "starring me down this time with a pistol in his hands." Fuller wrote that he told Phillips "man if you really have something to say about me just say it to my face  
 25 enough with this saying shit behind my back [and] under your breath," and that he told Phillips that if he really had "such a big problem with me we can go outside;" Phillips replied by saying "ok let's go." As Fuller started walking towards the front of the store, the statement says that Phillips declared that he was going to call the cops and then went into the back room with Perry. (GC. 20)

30 In his second statement Fuller said that he was confused as to why nobody had attempted to speak with him "before escalating the situation to the highest levels of HR." And, he wrote that there were at least four other employees with whom Phillips has had similar issues, even though Phillips had only worked at the store for a year. Fuller ended his second statement by  
 35 writing that he was worried about his safety and the safety of his colleagues for having to work "with someone that constantly shows this type of behavior towards their coworkers." (GC. 20)

Assistant hunting manager Perry also submitted a written statement, even though he was not a witness to what occurred. Perry's statement is dated December 23, at 4:35 p.m., the same  
 40 time as Phillips's statement.<sup>44</sup> In his statement, Perry writes that Fuller verbally used foul language against Phillips. When Phillips asked Fuller if "he had a problem" the statement says that Fuller removed his hat and vest and said "let's settle this outside." Perry wrote that Phillips replied saying "he would call the police and proceeded to come to the gun room," where he informed Perry about what happened. Perry ended his statement writing that there is a camera

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<sup>44</sup> As noted earlier, the video shows that, at 4:35 p.m., Phillips was still at the gun counter and had not yet reported the incident to Perry.

“in front of gun counter.” It appears that Perry later added to his statement writing that, at 4:45 p.m. a customer called and reported a young man behind the counter being verbally abusive to a coworker in front of children. Perry wrote the customer was very unhappy that “his kids heard such language.”<sup>45</sup> (R. 9)

5

#### 8. Phillips texts Fuller after getting suspended

After he was suspended by Kauffmann pending investigation, Phillips exchanged a series of text messages with hunting manager Taylor. The text chain starts at 6:11 p.m. on December 23 and read as follows:

10

**Phillips:** I feel like a victim!

**Phillips:** And I feel like I’m being punished I can’t go back to work until I’m told to do so.

15

**Phillips:** Scott if you’re not responded to me because corporate protocol I understand. But this shit with PS [Peter Scott] is serious. I wish you would respond to me. This is between you and me. You said to me today that you said to John [sic] that you wish there was a fight to get rid of this guy now I’m the victim not cool.

20

**Taylor:** I’m juggling phone calls from 5 people. I didn’t see what happened. HR is looking into it. I love you but I’m walking a really fine line and trying not to do anything to make the situation worse.

25

**Phillips:** Understand. But that guy threatened me.

**Taylor:** I believe you. Shelly will more than likely call you in the morning.

30

**Phillips:** So, I’m suspended?

**Taylor:** They didn’t tell me that. Jake said they saw you work tomorrow and they would call you.

35

**Phillips:** OK.

Phillips admitted that sometime during the morning of December 23, he and Taylor had a conversation wherein Taylor said that he told Kauffmann he wished there was a fight to get rid of Fuller. (Tr. 791–794; GC. 28)

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Although Taylor authenticated the various texts he sent and received, and they were admitted into evidence without objection, he testified to having “no recollection” of the text

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<sup>45</sup> The video does not show any children in the area at the time of the incident. Nor did any of the witnesses testify that there were children/kids present that day.

messages in question. And, when asked whether he told Phillips that he wished there was a fight to get rid of Fuller, Taylor answered “not to my recollection.” (Tr. 209) (Tr. 201–210)

## 9. Respondent’s investigation into the December 23 incident

5

### a. Swain’s testimony

Swain testified that she began her investigation into the incident between Phillips and Fuller the evening of December 23, after she was notified by Taylor. According to Swain, both  
10 herself and Kohler were in charge of the investigation. (Tr. 649)

As part of the investigation Swain said they interviewed between six to eight employees including Fuller, Phillips, Gould, Perry, Steuer, Taylor, and Kauffmann. Of those, the only eye witnesses were Fuller, Phillips, Gould, and Steuer. Swain testified that she instructed Kohler to  
15 speak with Fuller, and learned that Fuller had admitted calling Phillips a “bitch” and saying “let’s take this outside.” (Tr. 701, 702–703) When asked by Respondent’s counsel, via a leading question, that she understood “the threat of violence was corroborated by Fuller himself” as of December 23, Swain answered “correct.” (Tr 703) (Tr. 687–688, 701–703; R. 9)

For the investigation, Swain said she requested security camera surveillance video from Wade, who works in the same office as Swain, on the night of December 23. According to Swain, she explained to Wade what to look for on the videos, based upon the description of the incident she received from Taylor. However, Swain said the first video Wade sent her only showed Gould and Fuller standing at the end of the counter; so she asked for more video footage.  
20 Wade then sent Swain the edited video that was introduced into evidence as Respondent’s Exhibit 7. Swain said that the video footage was an important part of their investigation because it showed the body language between Fuller and Phillips and showed Fuller removing his hat and vest, appearing agitated, which she said validated what was described in the written statements. (Tr. 703–707; R. 9)  
25

30

Although Swain knew by December 26 that Fuller claimed Phillips had been “nudging him” in the weeks prior to the incident, and that Phillips “nudged” him on December 23, just prior to the altercation, Swain admitted that she did not take any steps to review the store’s security camera footage for the day to see if it substantiated Fuller’s claim; nor did she do  
35 anything to ensure that the video camera footage from December 23 was preserved. Swain said that she did not do so because Fuller had already admitted to saying, “let’s take it outside” and also admitted calling Phillips a “bitch.” (Tr. 651–652)

Also, during their investigation, Swain acknowledged that she did not inquire into the  
40 prior disciplinary history of either Fuller or Phillips. Nor did Respondent contact any employee who may have had previous conflicts with Phillips, even though Swain was aware of Fuller’s claims that at least five other employees had previously clashed with Phillips. (Tr. 688–690)

Swain was asked to explain the procedure human resources goes through in reaching a  
45 decision to discipline an employee, and who is involved in the decision making process. Swain testified that “at least” the store manager is involved, and “more than likely the . . . department

manager,” is also involved. Swain said, “we go through all the information that we have,” including statements and video, “and we make a determination collectively.” (Tr. 715) Swain testified that, when she is specifically involved in an investigation, she “always ask[s] the store manager, what do you want to do in this situation?” (Tr. 715–716)

Regarding the incident between Fuller and Phillips, Swain testified that it was a “group decision” to fire Fuller that involved herself, Kohler, and Kauffmann. (Tr. 716) According to Swain, one of the reasons they use a group process is because the store manager ultimately will present the termination, so it is better if the store manager makes the decision, or “at least ha[s] an opinion in the decision, so that they can support what’s about to happen.” (Tr. 716–717) In this case, Swain testified that she specifically asked Kauffmann what he “wanted to do,” and that Kauffmann told her that he wanted to terminate Fuller. (Tr. 716) (Tr. 715–717)

Swain further testified that Kauffmann was also involved in the decision to give Phillips a final warning. Swain said they discussed different options with Kauffmann regarding Phillips and he agreed that the decision to issue Phillips a final warning was appropriate. In differentiating between the disciplines issued to Phillips and Fuller, Swain said that Fuller was the “one who had made threats of violence with his words,” and said that “he crossed the line. He broke the policy.” (Tr. 717) As for Phillips, Swain testified that she did not believe that he behaved appropriately, so he received a “final warning,” which is “like your last chance.” (Tr. 717–718)

#### b. Kohler’s testimony

Kohler testified that after he received the written statements, he called the store on December 23 and spoke with Perry, Fuller, and Steuer, to see if there was anything else he should know. Kohler did not speak to Phillips, testifying that Phillips had already left the store by the time he called. In fact, the record shows that Kohler did not speak with Phillips until December 27. (Tr. 808–812)

After Kohler completed his interviews and read all the written statements, he completed a document containing a summary of his investigation that was introduced into evidence. Kohler’s summary includes notes of what was said during his telephone conversations which are, for the most part, consistent with the information that was provided in the initial witness statements. Regarding his discussion with Fuller, the summary says that Fuller told Phillips “if you have something to say let’s go outside,” and Phillips responded “OK let’s do it.” Then, according to the summary, Phillips stopped and said he was going to “call the cops,” to which Fuller replied by saying “you’re a bitch.” (R. 8) (Tr. 809–811)

Regarding his conversation with Gould, according to Kohler’s summary, Gould told him that Fuller and Phillips seemed to have been bickering all day, and at one point during their bickering Fuller said “I’m fucking done with you let’s go,” as the altercation began. As the altercation was ending, and Phillips was walking away, the summary says that Gould thought he heard Phillips say “you’re fucking dumb,” under his breath. As for his conversation with Steuer, in the summary Kohler wrote that Steuer said Phillips “just had it out for him,” referring to Fuller, even though Fuller attempted to “work it out.” And, the summary states that Steuer said

there was “a little bickering throughout the day,” that Fuller said “let’s go outside and talk,” and Phillips said “I’m going to call the cops.” (R. 8)

Kohler’s summary notes that Phillips had “left for the end of his shift,” so Kohler did not speak with him until December 27. Regarding their conversation, the summary says that Phillips claimed there were “one or multiple employees feeding false information” to Fuller, and that maybe “some associates were trying to start an altercation by telling” Fuller that Phillips was “talking shit all day.” Kohler also wrote in the summary that Phillips said he was in the middle of a transaction when he heard Fuller yelling at him “from the other side of the gun counter,” that Phillips walked over and said “do you have a problem with me,” after which Fuller said “something about taking it outside,” at which point Phillips replied saying that he was “going to call the cops.” According to the summary, Phillips then apologized to the customers he was helping and continued the transaction. The summary notes that Phillips claimed the customers were upset about the altercation and Fuller’s language. (R. 8)

Regarding the decision to terminate Fuller and discipline Phillips, Kohler testified that they were talking with Kauffmann throughout the investigatory process, and that after they finished speaking with employees on December 27, himself and Swain gave their “recommendation to the store manager” and then it was up to Kauffmann to either “confirm or deny that decision.” (Tr. 813) Kohler said that this conversation between himself, Swain, and Kauffmann occurred during a telephone call on either December 27 or December 28. (Tr. 813)

Regarding Fuller, Kohler said they told Kauffmann he “would be in line for a termination.” (Tr. 812–813) Kohler testified about his belief that termination was appropriate for Fuller because it was consistent “with other situations,” and that anytime there is a “threat of violence” there is a “no-nonsense policy for that,” because they deal with harmful products, including firearms and knives. (Tr. 814) As for why Phillips received a final warning, instead of being terminated, Kohler said that Phillips did not engage in a “direct threat of violence.” (Tr. 814) Instead, according to Kohler, Phillips “didn’t walk away from the situation,” which was why they moved directly to a final warning, as opposed to a lower discipline. (Tr. 814–815)

Finally, Kohler testified that Respondent’s standard for discipline and discharge is based upon the policies set forth in the employee handbook. Regarding the incident between Fuller and Phillips, Kohler said that the following sections of the discipline and discharge policy apply:

- Making threatening gestures, remarks, or written communications or behaving in a threatening manner.
- Fighting, harassment, or other disorderly conduct on Company premises or on Company business.

And, responding to a leading question that was posed by him by Respondent’s counsel, Kohler testified said that, in his experience, threats of violence typically result in discharge (Tr. 815–816; R. 11)

## c. The testimony of Kauffmann and Taylor

Kauffmann testified that either Perry or Taylor telephoned him and reported the incident between Fuller and Phillips, telling him that Fuller had asked Phillips to go out into the parking lot. Afterwards, Kauffmann said that he contacted “corporate HR” and spoke with either Swain or Kohler who instructed him to collect written statements, which he did. (Tr. 82) Once he received the statements, Kauffmann said he copied them and sent the statements to Swain and Kohler. (Tr. 80–82, 87)

During his testimony, Kauffmann insisted that he played no role in the decision to fire Fuller, or discipline Phillips. Instead, Kauffmann said that he was simply told by Swain and Kohler over the telephone what to do and that he was a conduit. (Tr. 90–91, 94–95)

Like Kauffmann, Taylor testified that he was not involved in any way with the disciplinary decisions, which he said were made by people above him. And, Taylor said that nobody from the company asked him any questions about the incident, or about the employment history of either Fuller or Phillips. (Tr. 210–212)

## 10. Fuller’s termination and the discipline issued to Phillips

Fuller was terminated on December 28. Respondent prepared a “Separation Record,” that is signed by Kauffmann and Kohler detailing the reasons for Fuller’s discharge. Fuller did not sign the document, and in the employee signature block the words “over the phone,” are written. In fact, Fuller never received a copy of his separation record, or any other document detailing the reason for his discharge. (Tr. 92, 537; GC. 21)

In the separation document, the reason for Fuller’s discharge is listed as “Gross Misconduct.” The document contains a box which asks for the “details of final incident,” in which the following is written:

On 12/23/22 Peter [Fuller] behaved in a manner that incited violence towards a co-worker which is a clear violation of our company policies. During the incident, Peter removed his hat and work vest, then continued to use aggressive body language while stating, “If you have something to say, let’s go outside.” When the co-worker stated they were going to call law enforcement due to feeling threatened, Peter replied “You’re a bitch,” further escalating violence in the workplace.

After a clear detailed review of this incident and witness accounts, including from Peter himself, the Company has determined the above description of the incident to be accurate. As a business that operates in the sales of firearms and other weapons, Sportsman’s Warehouse takes all threats of violence seriously. Due to these reasons and consistency in how processes and policies are administered for altercations throughout the company, Peter’s employment is being terminated immediately.



Regarding Fuller’s separation record, Kauffmann testified that it was prepared by “somebody at corporate,” and that it was probably Kohler who emailed it to him to issue. (Tr. 93; GC. 21)

5 Kauffmann and Kohler had a telephone conversation with Fuller on December 28, where Fuller was informed of his discharge. During the call, Kauffmann either read the entire separation document to Fuller, or the pertinent parts of the document. According to Kauffmann, during their phone call Fuller “agreed to it” and said that there were “no personal hard feelings” towards Kauffmann. (Tr. 92) Fuller, on the other hand, testified that during the phone call he told Kauffmann and Kohler he disagreed with their decision. Fuller also said that during the call he expressed concerns about his coworkers because Phillips had been aggressive in the past with others and told Respondent they should keep their eye on Phillips, who was a problem (Tr. 91–92, 537)

15 Phillips received a final written warning on December 31. It was presented to him by Taylor, whose signature appears on the document. Phillips also signed the discipline, as did Bruce who served as a witness. Taylor testified that the discipline was prepared by human resources with input from Kauffmann, and that he was instructed by Kauffmann to present the discipline to Phillips. For his part, Kauffmann said that the completed disciplinary document was sent to him from human resources. (Tr. 94–95, 212–214; GC. 29)

20 Taylor testified that he met with Phillips on December 31, in the office that Kauffmann shares with Bruce, and presented the discipline to Phillips. Taylor said that he read the document aloud, and then presented it to Phillips to review; Phillips then wrote his comments on the discipline. (Tr. 213–215, 744)

25 Phillips’s discipline contains a box asking for a summary of what occurred, wherein Respondent wrote the following:

30 On Saturday December 24th [sic],<sup>46</sup> Greg was involved in an altercation with another associate while on shift. Greg involved himself by walking towards the other associate and stating, “Do you have a problem with me?” Greg exhibited poor judgment by contributing to the altercation rather than walking away, further escalating an uncomfortable threatening environment for other associates and customers who witnessed the incident.

35 Additionally, Greg neglected customers that he was currently assisting by stepping away to involve himself in the altercation.

40 The document contains another box that says “state the improvement required of the associate.” In this box Respondent wrote:

Improvement must be immediate and sustained. Greg will act in a professional manner at all times, including when he is presented with confrontation in the workplace. Greg is required to walk away and notify a manager should other

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<sup>46</sup> This date is incorrect; all parties agree the incident between Fuller and Phillips occurred on December 23.

incidents be presented. Any further misconduct will result in further disciplinary action up to and including termination.

As for Phillips’s comments, he wrote the following: “Peter Scott was yelling/cussing and that is why I asked him if he had a problem. Never in my life have I experienced such violent [sic] in the work place.” (GC. 29)

#### 11. Taylor texts Gamez about Fuller’s discharge

After Fuller was discharged, at about 4:00 p.m. on December 28, Taylor texted Gamez saying “Peter go by by,” referring to Fuller getting fired. (GC. 27) Gamez was the employee who had told Taylor sometime in November that Fuller was trying “to find stuff” to use against the company; this resulted in human resources reviewing video footage but discovering no misconduct. Gamez responded to Taylor’s text message saying “I figured. Who’s closing.” Taylor replied that someone named Tim would close. (Tr. 185, 188, 197–198; GC. 27)

#### 12. State of Arizona unemployment office determination

After his discharge, Fuller filed for unemployment compensation with the Arizona Department of Economic Security; his claim was initially denied and a hearing was held on Fuller’s appeal. In support of his position, Fuller submitted short written statements from three former coworkers, who described Phillips as a problem employee that was aggressive and/or argumentative with coworkers and difficult to work with. Respondent submitted security camera footage relating to the incident between Fuller and Phillips, along with a position statement. A telephonic hearing was held in March 2024, and a few weeks later a state unemployment judge issued a decision finding that Fuller was discharged “for reasons other than willful or negligent misconduct.” (GC. 6) Fuller was therefore awarded unemployment compensation. (Tr. 537–538; 656–657; GC. 4–6)

#### B. Legal Standard

In determining whether an adverse employment action was motivated by activities protected under the Act, the Board applies *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *MCPC, Inc.*, 367 NLRB No. 137, 10 slip op. at 3 (2019) (Board applies *Wright Line* in cases that turns on an employer’s motive). Under *Wright Line*, the General Counsel first bears the burden of persuasion to show that antiunion animus contributed to the employer’s decision. *Acumen Cap. Partners, LLC v. NLRB*, 122 F.4th 998, 1003 (D.C. Cir. 2024). “This burden is met by establishing that: (1) the employee engaged in protected activity; (2) the employer had knowledge of the employee’s protected union activity; and (3) the employer harbored anti-union animus.” *Id.* Once established, “at the second step the burden shifts to the company to show that it would have taken the same action in the absence of the unlawful motive.” *Id.* (internal quotations omitted) An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). “In other words, a respondent must

show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so.” Id. (italics in the original) Where an employer’s explanation is “pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon.” *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). Also, where the “proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation.” *Roadway Express*, 327 NLRB 25, 26 (1998); *Transportation Mgt. Corp.*, 462 U.S. at 398 (“[I]t is undisputed that, if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice.”).

### C. Analysis

#### 1. The General Counsel’s request for an adverse inference regarding the video

In its brief, the General Counsel asks that an adverse inference be made finding that, had the entire security video been preserved, it would have shown Phillips nudging Fuller immediately before the incident occurred. The General Counsel makes this request based upon Respondent’s failure to preserve evidence after receiving a copy of the underlying charge, and failing to fully comply with the General Counsel’s subpoena which requested video for the entire day. (GC. Br. at 75–79)

I find that an adverse inference in this matter is unnecessary, as the credited record evidence supports a finding that Phillips did, in fact, nudge Fuller with his elbow on December 23, sometime before 4:39 p.m., which is the time the video marked as Respondent’s 7 starts. Steuer specifically testified that on December 23 Phillips “would put his elbow out and bump” Fuller was “as he walked past him,” while they worked behind the gun counter. (Tr. 598–600) Steuer said this was “ongoing and more . . . intentional,” as opposed to the occasional bump that might happen as employees sometimes walk past each other, as he witnessed Phillips physically push his elbow out into Fuller that day. (Tr. 599). Assessing his demeanor at the hearing, I found Steuer to be a credible witness and one who was attempting to testify truthfully about what occurred. And, Steuer’s credibility was not diminished by the fact that he did not include the “nudge” in his written statement or conversation with Kohler, both of which occurred while Steuer was still at the store on December 23. Steuer said that he was nervous at the time, and therefore it did not come to mind. (Tr. 616) Steuer’s nervousness is understandable, as he continued to work shifts alongside Phillips, despite having asked Taylor not to schedule them together. (Tr. 593, 612) Steuer said that Phillips was hard to get along with, hostile, and caused arguments and problems. (Tr. 593) Given the chummy relationship between Taylor and Phillips,<sup>47</sup> I find it reasonable that Steuer would be nervous about saying anything to Respondent that would potentially trigger or intensify any hostility between himself and Phillips.

<sup>47</sup> Although Taylor denied being friends with Phillips, their texts show otherwise. They exchanged holiday greetings via text message, tips about photography equipment, a picture of barbecued meat, called each other endearing names like “buddy” and “brother man,” and joked about having a “going way party” for Fuller “without him included in the party,” after the union lost the election. The two were clearly chums. Regarding Taylor, I found his testimony to be suspect on several fronts. Along with trying to downplay his friendly relationship with Phillips, Taylor exhibited a convenient lack of memory when confronted with the text message chain between himself and Phillips about telling Kauffman he wished there was a fight in the store so as to get rid of Fuller.

As for Phillips, his testimony about this issue exhibited his tendency towards deflection while testifying. Phillips initially denied intentionally elbowing or nudging Phillips, and said that sales staff “run into each other all the time,” because of the confined space. (Tr. 741) Later, when asked whether he intentionally or unintentionally nudged Fuller that day he said that he did not recall, and testified, “to be 100% honest, which I am, I don’t know.” (Tr. 778) But, Phillips immediately deflected and rambled, saying “there’s not many people back there,” referring to the gun counter aisleway, “there has been up to, like, nine guys back there, and we’re all slamming into each other . . . [y]ou get hit and nudged all the time.” (778–779) Then, Phillips blamed Fuller and said that if a nudging did occur, it was Fuller who “probably ran into me.” (Tr. 778–779) Again, I found that Steuer was a witness who was attempting to testify truthfully at the hearing, and I credit his testimony, which was also corroborated by Fuller who said that Phillips stuck his elbow/shoulder out and nudged him just before the incident between the two of them occurred on December 23. (Tr. 526–527, 548)

## 2. What occurred on December 23 and the incident between Fuller and Phillips

I find the credited evidence, along with the inferences derived therefrom, show that the following occurred on December 23. After Phillips started his shift on December 23, and before his altercation with Fuller, Phillips had a conversation with Taylor. During this talk, Taylor told Phillips about a discussion he had with Kauffmann wherein Taylor told Kauffmann that he wished there was a fight at the store in order to get rid of Fuller.

Fuller started his shift that day at about 2:00 p.m. As Gould and Steuer testified, both Fuller and Phillips were bickering the entire shift. At one point Fuller complained to Gould that Phillips was “talking shit” about him. At some point before 4:39 p.m., while Phillips and Fuller were working together behind the gun counter, Phillips purposely stuck his elbow out and nudged Fuller. The nudge upset Fuller, as Phillips also said something to him that sounded like “I wish you would,” when it occurred. After Fuller finished ringing up a customer, he walked towards the end of the counter opposite the ammo room and started complaining to Gould about Phillips, telling Gould that Phillips had elbowed him. At first Gould did not catch what Fuller was saying, as he was focusing on a piece of optical equipment. Phillips, at this point, was at the other end of the counter helping two customers who were wearing matching camouflage coats and were looking at a handgun. Fuller believed that Phillips was staring at him, so he started speaking to Phillips and made a gesture with his finger, directed towards Phillips, pointing up and to his left.

After gesturing with his finger, Fuller started walking up the gun counter aisle, towards the opening in the counter. As he walked up the counter and through the opening onto the sales floor, Fuller removed his hat, putting it on a rifle rack, and took off his vest and hoodie, which he then held in his hand. During this time, Gould heard both Phillips and Fuller saying things to each other, which he described as “taking kind of crazy” and “being stupid with each other.” Specifically, Fuller told Phillips that he was tired of Phillips “talking shit” behind his back along with saying stuff as he walked by, and told Phillips that if he had a problem “we can take it outside;” in reply Phillips said okay “let’s go” or “let’s do it.” Fuller then walked out onto the sales floor, as both he and Phillips exchanged words and were looking at each other. Fuller

stopped at a point on the sales floor near an aisle endcap and, facing Phillips, put his arms out to the side and shrugged his shoulders for a second. Fuller then walked back through the gun counter opening, into the sales staff aisle, and started making his way back towards the end of the counter near Gould. As Fuller walked back from the sales floor to the gun counter aisleway, Phillips took the gun he was showing the customers and reinserted the magazine clip and trigger guard. As Fuller retrieved his hat and put it back on, Phillips took the gun in his right hand, and walked about 20 to 25 feet down the gun counter aisle towards Fuller, passing the niche on the way, while holding the gun in his right hand, at about chest/shoulder level, and to his side. As he walked towards Fuller holding the gun, Phillips said to Fuller “do you have a problem with me?” Fuller responded saying that Phillips had been talking shit about him all day and he was sick of it. Phillips replied that he had not said anything to Fuller. Phillips got to within 5 to 8 feet of Fuller before he turned around. Phillips then said he was calling the police; Fuller called Phillips a “bitch” and Phillips said “you’re fucking dumb” under his breath. Phillips walked up the aisle, returned the gun to the niche, and then walked past the two customers he had been helping, who were looking at him, straight to the gun room where he reported his version of events to Perry.

### 3. Fuller’s termination was unlawful

The evidence shows that Fuller engaged in protected union activities, as he was active in the union drive at the store. Fuller was the one who first contacted the Union, he solicited signatures on union authorization cards from coworkers, his picture was displayed prominently on the union flyers that were passed out at work and placed in the breakroom, and he was the Union’s observer at the election.

The evidence also shows that Respondent, at multiple levels, had knowledge of Fuller’s union activities. On October 24, Taylor emailed Kauffmann and Hendrickson saying that Fuller was “the one organizing this,” referring to the unionization efforts at the store. Kauffmann and Swain both saw the union flyers with Fuller’s picture; Kauffmann even copied one of the flyers and emailed it to Swain who admitted receiving a copy of the flyer. And, both Swain and Kohler confirmed that Fuller was the person serving as the Union’s election observer on December 2. There is no question that Respondent knew about Fuller’s union activities.

There is abundant record evidence of Respondent’s antiunion animus, as shown by the multiple 8(a)(1) violations that occurred during the organizing drive, including the threats to close the store if employees unionized. *Michael’s Painting, Inc.*, 337 NLRB 860, 867 (2002) enfd. 85 Fed.Appx. 614, 615 (9th Cir. 2004) (animus shown by Respondent’s coercive statements and actions, including threats to close the business); *Lithography Serv., Inc.*, 229 NLRB 1157, 1159 (1977) (threat to close plant is evidence of knowledge, animus, and motive), *Continental Radiator Corp.*, 283 NLRB 234, 249 (1987) (threat to move the company to the South for cheaper labor if the union won “is evidence of a particularly virulent variety of animus.”); *General Trailer, Inc.*, 330 NLRB 1088, 1098 (2000) (Threats to close a facility are “among the most flagrant of unfair labor practices.”).

Having established the elements of a prima facie case of discrimination—union activity, knowledge, and animus—the burden shifts to Respondent to show that it would have fired Fuller even absent its unlawful motive. *Acumen Capital Partners*, 122 F.4th at 1003. To meet this

burden, Sportsman’s “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that” it would have fired Fuller “even in the absence of protected activity.” *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). I find that Respondent has failed to do so.

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The inconsistent testimony from Respondent’s officials regarding who was involved in the decision to fire Fuller is evidence of unlawful motive. See *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op at 39 (2021) (employer’s inconsistent testimony as to who made the decision to fire employee is indicative of unlawful motive); Cf. *Planned Building Services, Inc.*, 347 NLRB 670, 713-715 (2006) (in a refusal-to-hire case, inconsistent testimony as to who made decision to not hire employees supports a finding of pretext). Swain testified that, when deciding to discipline an employee, “at least” the store manager is involved, and “more than likely” the department manager, saying they all go through the information collectively. However, both Taylor and Kauffmann denied having any involvement the decision making process. Regarding Fuller’s discharge, Swain specifically said that she asked Kauffmann what he “wanted to do,” and that Kauffmann said he wanted to terminate Fuller. Swain also testified that Kauffmann agreed with the decision to give Phillips a final warning. Kohler similarly testified that they were talking with Kauffmann throughout the decision making process regarding Fuller’s termination and Phillips’s discipline. And, Kohler testified that he and Swain had a telephone call with Kauffmann on December 27 or 28 where they gave their recommendation to Kauffmann regarding Fuller and that it was up to him to either “confirm or deny that decision.” The fact that Kauffmann categorically denied any involvement in the decision making process, when both Swain and Kohler said he was actively involved, supports a finding that the proffered reason for Fuller’s discharge is pretext, and that real reason for Fuller’s termination was his union advocacy.

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Kauffmann’s denials about being involved in the disciplinary decisions, along with those of Taylor, become even more suspicious given what occurred just prior to the December 23, incident. Recall, Taylor told Phillips he had a conversation with Kauffmann where Taylor said he wished there was a fight in the store they could use as a reason to discharge Fuller. After this conversation, while Phillips was in the gun counter aisleway, he purposely elbowed Fuller, precipitating the incident between the two. I find that Kauffmann’s claim that he was not involved in the decision making process was an attempt to obfuscate the conversation he had with Taylor on December 23, wherein they discussed using a fight in the store as a reason to discharge Fuller. And, Kauffmann’s attempt to deny his involvement in the disciplinary decisions at the hearing, when Kohler said he was the person with the final say, is indicative of Respondent’s unlawful motive regarding Fuller’s discharge. *Apex Linen Service, Inc.*, 370 NLRB No. 75 slip op. at 39 (2021).

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I also find the fact that Respondent failed to review the relevant security videos on December 23, in order to determine whether Phillips purposely elbowed/nudged Fuller, as Fuller asserted, is evidence of pretext. This is particularly so as Respondent claimed that Fuller was discharged, while Phillips was only disciplined, because Fuller was the one who instigated the fight and Swain testified that the video was an important part of their investigation. *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005) (inadequate investigation into incident upon which employer relied as grounds for discharge can

support a finding of discriminatory motive); *Arbah Hotel Corp.*, 368 NLRB No. 119, slip op. at 15 (2019,) enfd. 845 Fed.Appx. 181 (3d Cir. 2021) (failing to substantiate critical aspects of the circumstances purportedly justifying a discharge constitutes evidence of pretext). When Taylor received a call from Perry, who relayed to him Phillips’s version of events that Fuller tried to start a fight, Taylor did not wait to for Respondent to interview Fuller to get his version of what occurred. Instead, Taylor, who had earlier discussed using a fight in the store as a reason to discharge Fuller, telephoned Swain directly; he also telephoned Kohler. Swain admitted it was unusual for the hunting manager of a store to contact her directly. And, even after Swain learned that Fuller claimed Phillips had “nudged” him immediately before the incident, Swain made no attempt to review the entire security camera video to corroborate Fuller’s statement. Nor did she make any efforts to ensure that the video footage for the day was preserved. Instead, Respondent relied upon security camera video that was edited together from three different cameras, that starts only after Phillips nudged/elbowed Fuller. The stitched video also excludes a critical camera angle so it does not show whether Phillips was “staring down,” Fuller immediately before Fuller started walking up the aisle, as Fuller claimed. I find that Respondent’s failure to review the entire video for December 23, which would have substantiated Fuller’s assertion that he was nudged/elbowed by Phillips, shows pretext. Cf. *Thermo Elec. Co., Inc.*, 222 NLRB 358, 368–369 (1976), enfd. 547 F.2d 1162 (3d Cir. 1977) (Table) (Respondent’s evidence used to substantiate discharge, which excluded missing information for a critical period, “lends an aura of deception and pretext to the entire document.”).

Respondent claims that Fuller was lawfully fired because the company “was acting in accordance with its policy against violence and consistent practice.” (Respt’s Br. at 33; R. 10; R. 12) But, this claim is undermined by the fact that Fuller was discharged while Phillips was only disciplined. *Cemex Construction Materials Pacific, LLC*, 272 NLRB No. 130, slip op. at 108 (2023) (disparate treatment of employee is evidence that discharge was unlawfully motivated). Kohler testified that the disciplinary decisions were based upon the company’s discipline and discharge policy in the employee handbook, specifically the portions which prohibit: (1) “making threatening gestures, remarks, or written communications or behaving in a threatening manner;” and (2) “fighting, harassment, or other disorderly conduct on Company premises or on Company business.” (R. 11, Tr. 815–816) According to Kohler, Fuller was discharged, while Phillips was only suspended, because Phillips did not “engage in a direct threat of violence.” (Tr. 814) However, Respondent’s explanation ignores the fact that Phillips elbowed/nudged Fuller immediately prior to the incident, which Respondent would have seen if it had reviewed the entire security video. It also ignores the fact that, after Fuller told Phillips they “can take it outside” if he had a problem, Phillips responding by saying “let’s go,” or “let’s do it.”<sup>48</sup>

Finally, and importantly, Respondent’s explanation for the disparate discipline ignores Phillips’s actions after Fuller walked back behind the gun counter, as shown on the video. When Fuller returned to the gun counter aisle from the sales floor he was standing between Steuer and Gould, some 20 to 25 feet away from Phillips. At this point, whatever row occurred between the two had substantially ended. Instead of continuing with his sales transaction, Phillips walked away from the customers and strode down the gun counter with gun in hand to confront Fuller,

<sup>48</sup> Phillips’s response of “let’s do it,” is specifically mentioned in Kohler’s summary of his conversation with Fuller. (R. 8) Despite speaking with Phillips after having spoken with Fuller, it does not appear that Kohler asked Phillips whether he told Fuller “let’s do it” on December 23. (R. 8)

getting some 5 to 8 feet away from him and saying “do you have a problem with me?” Phillips’s conduct that day clearly violated the employee handbook provisions mentioned by Kohler and constituted a direct threat of violence.<sup>49</sup> While Kohler testified that Fuller was fired because Sportsman’s has a “no-nonsense policy,” since it deals with “harmful products,” including  
 5 “firearms, [and] knives,” Respondent cannot not explain why Phillips was only disciplined for confronting Fuller while holding a gun and saying “do you have a problem with me?” Of course, Respondent’s store officials had not been discussing using an in-store fight as pretext to rid themselves of Phillips, who had become a strong anti-union advocate; they had only been discussing this scenario as a reason to fire Fuller.

10 I find that the disparate discipline meted out to Fuller, compared to Phillips, is evidence of pretext and Respondent’s unlawful motive. *Constellium Rolled Prod. Ravenswood, LLC*, 371 NLRB No. 16, slip op.at 4 (2021), enfd. 45 F.4th 234 (DC. Cir. 2022) (Respondent’s blatant disparate treatment forecloses the company from establishing its *Wright Line* defense that it  
 15 would have fired employee absent his protected conduct); Cf. *La-Z-Boy S., Inc.*, 212 NLRB 295, 305 (1974) (No violation where both participants in an argument and fight received the same discipline.). Accordingly, Respondent has not met its defense burden under *Wright Line*, and by discharging Fuller, Sportsman’s violated Section 8(a)(1) and (3) of the Act.

## 20 V. DECREASED WORK HOURS OF GINA GONZALES

### A. Facts

25 Gina Gonzales was active in the union organizing drive. She attended union meetings in the parking lot with Spencer, the union representative, signed a union authorization card, and spoke up at one of the mandatory meetings with Miller about discrepancies in pay at the store. Regarding the union meetings in the parking lot, Gonzales testified that she saw various members of management, including Kauffmann and Bruce, going out to their cars while she was attending these meetings, as everyone parks in the same parking lot. As for Bruce specifically,  
 30 Gonzales said that while she was speaking with Spencer, she saw Bruce on multiple occasions in the parking lot going on break, going to lunch, or leaving for the day, and testified that Bruce “would see me, or I would see her,” during these times. (Tr. 356–357, 372, 388–393; GC. 33)

35 Bruce testified that she did not know whether Gonzales was for or against the union, saying that there were many rumors circulating at the store, and that she did not talk about the union with Gonzales. Bruce acknowledged that Spencer would “hang out” in the store parking lot and talk with workers when they went on their breaks, or as they were coming and going. (Tr. 277–279) But, Bruce said she really did not see Spencer very much. (Tr. 278, 297–298)

40 Regarding the Complaint allegation that her work hours were reduced, Gonzales testified that when she returned from vacation during the first week of January 2023, she saw that her work schedule had been reduced and she was only scheduled to work about ten hours for the week; before January 2023, Gonzales said she had been averaging 27 hours per week. Gonzales further testified that she spoke with Bruce about why her hours had been reduced, and said Bruce

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<sup>49</sup> As for Fuller calling Phillips a “bitch” it appears that Phillips also used foul language by telling Fuller “you’re fucking dumb” under his breath, after having strode down the aisle to confront him.



told her that “corporate” had given direction “to give more hours to people that were getting credit cards,” referring to employees who successfully solicited customers to sign-up for a Sportsman’s branded credit card. (Tr. 361–362) According to Gonzales, she told Bruce this was not fair, as she had been at the store the longest, and complained that a new cashier named Kylie was working more hours than she was. Gonzales said that Bruce did not respond to her objections. (Tr. 360–362, 374)

The evidence shows that, on September 8, 2022, Bruce signed a form showing Gonzales had changed her status from a full-time to a part-time employee. On the same date, Gonzales signed a work availability form indicating that she was available to work, and wanted to work, 27 hours per week. According to this form, Gonzales indicated that she was available to work on Monday through Saturday from 9:00 a.m. until 3:00 p.m. and Sunday from 11:00 a.m. until 5:00 p.m. Gonzales acknowledged during her testimony that this was her work availability, and that it precluded her from working until the store closed on any day; it also prevented her from working an opening shift on Sundays. (Tr. 363–364, 380; R. 3, 4)

As for the decline in Gonzales’s work hours, Bruce testified that Gonzales was a part-time employee, had submitted multiple time off requests, and could not work after 3:00 p.m., which complicated her scheduling. Also, Bruce testified that a store-wide cut in hours was implemented. Furthermore, Bruce said that she was directed to shift 20 hours of her schedule away from her office manager duties, and schedule herself to work on the sales floor as a cashier. Therefore, Bruce said that she had to cut herself “20 hours into the schedule” and this reduced the available work hours for the other workers on her team. (Tr. 320) (Tr. 305–306, 318–321)

On March 13, 2023, Gonzales sent an email to Bruce, with a copy to Kauffmann, asking about the “lack of hours,” she had been receiving. In the email, Gonzales says she was informed that “corporate” wanted employees who were able to sign up customers for company credit cards to get the most hours, and that she was receiving fewer hours than other cashiers with the same or lesser amount of credit card enrollments. Gonzales acknowledged in the email that she had a “set schedule availability” of 9:00 a.m. to 3:00 p.m., but wrote that her availability had not previously been an issue. (R. 6; GC. 32)

Bruce replied to Gonzales by email on March 15, 2023. Bruce’s email reads, in pertinent part, as follows:

As far as the lack of hours, there are a few reasons that factor into the reduction:

- company wide cuts in all stores
- moving from a full time to part time position
- limited availability during store hours (ie: mids and closing shifts)
- time off requests.

We can definitely have a discussion about this on your next shift. (R. 6; GC. 32)

The weekly work schedules for the front-end employees for the thirty-week period from September 11, 2022 through April 8, 2023 were introduced into evidence. (GC. 31) The below

chart in Figure 17, which is based upon the work schedules, shows the total hours each employee was scheduled to work per week.

FIGURE 17  
FRONT END SCHEDULE

											Total
	Gina	Cayden	Roman	Garrett	Emilee	Kylie	Danielle	Alex	Robin	Garrett	Weekly
<b>2022</b>											
Sept 11 - Sept. 17	27.5	7.5	32.5	6.5	37.5	37.5	37.5		37.5	37.5	261.50
Sept 18 - Sept. 24	27.5	36.5	26	21.5	30	19	0		37.5	37.5	235.50
Sept. 25 - Oct. 1	22	32.5	26	20.5	0	30.5	22.5		37.5	37.5	229.00
Oct. 2 - Oct. 8	27.5	32.5	0	20.5		31.5	37.5		37.5	37.5	224.50
Oct. 9 - Oct. 15	26.5	33.5		21.5		35.5	22.5		37.5	37.5	214.50
Oct. 16 - Oct. 22	22	33.5		20.5		35.5	37.5		37.5	30	216.50
Oct. 23 - Oct. 29	22	32.5		26		33.5	37.5		37.5	0	189.00
Oct. 30 - Nov. 5	27.5	31.5		19.5		34.5	37.5		37.5	37.5	225.50
Nov. 6 - Nov. 12	27.5	32.5		19.5		32.5	37.5			37.5	187.00
Nov. 13 - Nov. 19	22	33.5		19.5		33.5	37.5			37.5	183.50
Nov. 20 - Nov. 26	27.5	27		21.5		31.5	30			37.5	175.00
Nov. 27 - Dec. 3	23.5	13		22.5		28	37.5	18.5		37.5	180.50
Dec. 4 - Dec. 10	27.5	30.5		22.5		33.5	37.5	19.5		37.5	208.50
Dec. 11 - Dec. 17	27.5	37.5		22.5		33.5	37.5	21.5		37.5	217.50
Dec. 18 - Dec. 24	22	29		30		30	34	34.5		37.5	217.00
Dec. 25 - Dec. 31	0	22.5		22.5		30	37.5	22.5		37.5	172.50
<b>Average</b>											<b>209</b>
<b>2023</b>											
Jan. 1 - Jan 7	15.5	15.5		15.5		15.5	37.5	15.5		37.5	152.50
Jan. 8 - Jan. 14	15.5	15.5		15.5		15.5	37.5	15.5		37.5	152.50
Jan. 15 - Jan. 21	5.5	14.5		5.5		22	34.5	15.5		37.5	135.00
Jan. 22 - Jan. 28	10	15.5		11		16.5	37.5	15.5		37.5	143.50
Jan. 29 - Feb. 4	10	21				23	37.5	15.5		37.5	144.50
Feb. 5 - Feb. 11	11	20				22	37.5	15.5		37.5	143.50
Feb. 12 - Feb. 18	11	22				26	37.5	16.5		37.5	150.50
Feb. 19 - Feb. 25	15.5	21				22.5	37.5	16.5		37.5	150.50
Feb. 26 - Mar. 4	0	25.5				26	37.5	11		37.5	137.50
Mar. 5 - Mar. 11	0	22				26	37.5	16.5		37.5	139.50
Mar. 12 - Mar. 18	5.5	17.5				25	37.5	24		37.5	147.00
Mar. 19 - Mar. 25	11	21				27	37.5	16.5		37.5	150.50
Mar. 26 - Apr. 1	22	26				37.5	0	21		37.5	144.00
Apr. 2 - Apr. 8	21	5.5				32.5	30	22		37.5	148.50
<b>Average</b>											<b>146</b>

Regarding the weeks when she was not scheduled to work at all, Gonzales was on vacation (PTO) starting December 27 through December 30, 2022.<sup>50</sup> And, she was on FMLA leave from March 1 through March 13, 2023; Gonzales was scheduled to work again on March 17. Bruce testified that, regarding Gonzales’s FMLA leave in March 2023, that she had to wait for Gonzales to get a doctor’s release before she could return her to the schedule. (Tr. 320) (Tr. 366, 368, 387; GC. 31)

The work schedules also show which specific dates each employee had requested off.<sup>51</sup> The below chart in Figure 18 shows how many work days per week each employee had requested off from January 1, 2023 through April 8, 2023.<sup>52</sup>

FIGURE 18

DAYS OFF REQUESTED PER WEEK							
2023	Gina	Cayden	Garrett	Kylie	Danielle	Alex	Garrett
Jan. 1 - Jan 7	1			3			
Jan. 8 - Jan. 14				1			
Jan. 15 - Jan. 21	2				1	3	
Jan. 22 - Jan. 28	2					2	
Jan. 29 - Feb. 4	3						
Feb. 5 - Feb. 11	2	1			1		
Feb. 12 - Feb. 18	1						
Feb. 19 - Feb. 25	1						
Feb. 26 - Mar. 4	7					1	
Mar. 5 - Mar. 11	7				1		
Mar. 12 - Mar. 18	3			1			
Mar. 19 - Mar. 25	1			1	2	2	
Mar. 26 - Apr. 1		1		1	7		
Apr. 2 - Apr. 8		2			3		
Total Days	30	4		7	15	8	

Bruce testified that she consistently honored Gonzales’s time off requests. (Tr. 320)

<sup>50</sup> In Figure 17, the “revised” schedules were used for weeks that contained duplicate schedules. (GC. 31)

<sup>51</sup> Respondent also introduced into evidence Bruce’s desk calendar wherein she said employee time off requests were written. (Tr. 313–317) In her testimony Gonzales disputed the accuracy of some of the information on Bruce’s desk calendar, but confirmed the accuracy of the time off requests in the work schedules. (Tr. 366, 387–388) Therefore, I have not relied upon the information contained in Bruce’s desk calendar.

<sup>52</sup> Neither Roman, Emilee, or Robin worked during this period in 2023.

## B. Analysis

The evidence shows that Gonzales engaged in union activities, and also supports a finding that Bruce knew about her union activities. Gonzales testified that she attended union meetings with Spencer in the Prescott store parking lot while various members of management were going to/from their cars. Regarding Bruce, Gonzales said that while she was in the parking lot talking with Spencer, Bruce “would see me, or I would see her,” on multiple occasions. While Bruce said that she did not see Spencer that often, she acknowledged that workers met with him in the parking lot, and never denied seeing Gonzales in the parking lot with Spencer. Therefore, I credit Gonzales’s testimony, and find that Bruce saw her speaking with Spencer in the parking lot on several occasions while they were having union meetings. The various 8(a)(1) violations, including Cardoza’s direct threat to Gonzales, evidences Respondent’s anti-union animus. And, the employee work schedules show that Gonzales’s work hours were reduced starting the first week of January 2023. As such, I find that the General Counsel has established a prima facie case of discrimination, and the burden shifts to Respondent to show the same action would have been taken in the absence of Gonzales’s union activities. *Acumen Cap. Partners, LLC* 122 F.4th at 1003; *Donaldson Brothers Ready Mix, Inc.*, 341 NLRB 958, 963 (2004) (applying *Wright Line* to allegations involving the reduction of employee work hours).

The evidence shows that, from September through December 2022, Gonzales’s work hours fluctuated between 22 to 27.5 hours per week. Starting January 2023, her hours were reduced to 15.5 hours per week, before returning to the low 20’s in April. However, everyone else’s work hours were also reduced in January 2023, as were the overall work hours for all of the front end cashiers.

For the first two weeks of January 2023, everyone except Danielle and Garrett, who appear to be full-time employees, were scheduled for 15.5 hours per week. Bruce testified that she was ordered to cut work hours for the store, and to schedule herself to work as a cashier 20 hours per week. The 2023 work schedules appear to confirm this testimony, and the General Counsel introduced no evidence showing otherwise. The work schedules show that in 2022, the total weekly hours worked for the store’s front end cashiers averaged 209 hours. In 2023, the average weekly hours worked dropped to 146 hours per week. While there were some weeks that Gonzales was scheduled to work 11 hours or less, while her coworkers received 15 or more hours, Gonzales consistently requested days off each week in 2023, including the weeks in question. The work schedules show that from January 1, 2023, through April 8, Gonzales had requested to be off on 30 separate days. This was significantly more than any other cashier, and more days off than she had requested in 2022.<sup>53</sup> And, no evidence was presented that other cashiers who had received more hours than Gonzales during these weeks had similarly limited their availability to work closing or opening shifts.

As for Gonzales being assigned to only work 5.5 hours the week of March 12, 2023, she was still on FMLA leave through March 13. And, the General Counsel presented no evidence that Bruce’s testimony about waiting for Gonzales to submit a doctor’s release before returning her to the work schedule was somehow untrue. In sum, the evidence shows that Sportsman’s has

<sup>53</sup> Although not included in Figure 18, the work schedules show that, for the period of September 11, 2022 through December 31, 2022, Gonzales had requested to not work on 20 separate days. (GC. 31)

met its *Wright Line* defense burden, and the General Counsel has not shown that Respondent’s proffered non-discriminatory reasons for Gonzales’s reduced work schedule from mid-January through March 2023, was pretext. Accordingly, I recommend that Complaint paragraph 6(b) be dismissed.

## VI. REQUEST FOR A BARGAINING ORDER

In *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 25, 29–30 (2023), the Board held that in all cases going forward, including pending cases,

an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union’s majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).<sup>54</sup>

Furthermore, the Board held that, if an “employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order.” *Id.* slip op. at 26.

Pursuant to *Cemex Construction Materials Pacific*, a bargaining order is warranted here. A majority of unit employees, approximately 67%, had signed authorization cards designating the Union as their collective-bargaining representative. And, the representation petition filed by UFCW Local 99 “itself constitutes a sufficient demand for recognition.”<sup>55</sup> *Alamo-Braun Beef Co.*, 128 NLRB 32, 33 n. 5 (1960). See also *List Industries, Inc.*, 373 NLRB No. 146, slip op. at 49 (2024) (“Long-held precedent establishes that the filing of the petition is sufficient demand for recognition.”).<sup>56</sup> It is undisputed that Respondent has refused to bargain with the Union. Finally, Respondent’s multiple unfair labor practices during the critical period, particularly its threats to close the facility if the employees unionized, which are amongst the most flagrant of possible unfair labor practices, support setting aside the election. *Cf. New Process Co.*, 290 NLRB 704 (1988), *enfd.* 872 F.2d 413 (1989) (Board directs election be set aside, and orders a new election, even though the union only received 18% of the vote); *Hess, G. H., Inc.*, 82 NLRB 463, 465–466 (1949) (Threat of economic and other reprisals made to one employee was sufficient to set aside the election). As such, a bargaining order is warranted pursuant to *Cemex*. In fact, given the small size of the unit, and Respondent’s various unfair labor practices during the critical period, particularly its repeated threats to close the facility which were disseminated across the store,<sup>57</sup> a bargaining order would also appropriate pursuant to the standard set forth in

<sup>54</sup> According to the *Cemex* Board, absent unforeseen circumstances, “promptly” will be interpreted as requiring an employer to file an RM petition within 2 weeks of the union’s demand for recognition. *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 25 fn. 139.

<sup>55</sup> Here, the Union wrote on the petition itself that it was requesting recognition “by this petition.” (GC. 2)

<sup>56</sup> Along with the filing of the representation petition, on January 20, 2023, the Union emailed Respondent a separate letter requesting that bargaining begin. (GC. 22)

<sup>57</sup> The credited evidence supports a finding that Respondent’s multiple threats to close the store were disseminated amongst the unit, and Respondent has not shown otherwise. I credit Hogan’s testimony that he heard from a variety of people about rumors the store would close if they voted to unionize and that employees in the store were asking

*NLRB v. Gissel Packaging Co.*, 395 U.S. 575 (1969). See *Milgo Industries, Inc.*, 203 NLRB 1196, 1200–1201 (1973), enfd. mem. 497 F.2d 919 (2d Cir. 1974) (*Gissel* bargaining order warranted based upon employer’s 8(a)(1) violations, including threats of plant closure and job loss, and noting that threats of plant closure “are plainly actions which in and themselves are egregious enough under the rule of *Gissel*” to warrant a bargaining order); *Jim Baker Trucking Co.*, 241 NLRB 121, 122 (1979), enfd. mem. 626 F.2d 866 (9th Cir. 1980) (Board notes that, “[s]ince most employees are dependent on their jobs for their livelihood, threatening to eliminate their place of employment is sufficiently serious to justify a bargaining order, even standing alone.”); *Precision Graphics, Inc.*, 256 NLRB 381, 382–383 (1981), enfd. mem. 681 F.2d 807 (3d Cir. 1982) (*Gissel* bargaining order issued on employer’s announcement that facility will close, even though company subsequently said the plant will continue its operations); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301 (6th Cir. 1988) (affirming *Gissel* bargaining order and noting that “threats of plant closure are ‘among the most flagrant’ of unfair labor practices.”).<sup>58</sup>

Accordingly, I recommend that a remedial bargaining order issue in this matter.

#### CONCLUSIONS OF LAW

1. The Respondent, Sportsman’s Warehouse Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food & Commercial Workers International Union, Local 99, AFL-CIO, CLC (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:

(a) Soliciting employee grievances and impliedly promising to remedy them in order to discourage employees from unionizing.

(b) Threatening employees by telling them that the union was going to cause the Prescott store to close.

(c) Threatening employees by telling them that Respondent would most likely close the Prescott store if the union came in, in order to stop the union from spreading.

(d) Interrogating employees by asking them how they were going to vote in the upcoming union election.

(e) Threatening employees by telling them there was a rumor the store would close if they voted to unionize.

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him about the rumors. Phillips acknowledged this rumor was spreading in the store (Tr. 787), and even Bruce admitted she “might have overheard people talking amongst themselves,” about the store closing because of the union drive. (Tr. 290)

<sup>58</sup> While the closeness of an election is a factor to consider, particularly with respect to dissemination, it is not a prerequisite, as requiring an election to be close before a bargaining order issues “might encourage an employer to escalate its misconduct in order to achieve an overwhelming election victory and avoid a bargaining order, thereby rewarding those who engage in the greatest misconduct.” *United Dairy Farmers Coop. Assn.*, 257 NLRB 772, 775 fn. 22 (1981). See also, *Cemex Construction Materials Pacific, LLC.*, 372 NLRB No. 130, slip op. at 16 n. 95.

(f) Threatening employees by telling them that, if they do not like their pay they do not deserve it.

(g) Threatening employees by telling them that if they unionized the company could end up losing money and might have to close the Prescott store.

(h) Threatening employees by telling them that selecting a union representative would be futile.

(i) Making an implied promise of employee wages increases to discourage employees from unionizing.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Peter Scott Fuller on December 28, 2022, because of his union activity.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of Prescott store employees in the following appropriate unit, while engaging in the conduct described above that undermined the Union's support and prevented a fair rerun election:

INCLUDED: All full-time and regular part-time cashiers, sales associates (including hunting, clothing, fishing, firearms, hardgoods, camping, and archery sales associates), inventory specialists, customer service employees and department leads.

EXCLUDED: All other employees, including confidential employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

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

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions, as further set forth in the Order below, designed to effectuate the policies of the Act. Having found that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Peter Scott Fuller, I shall order Respondent to reinstate him and make him whole for any loss of earnings and other benefits he suffered as a result of the unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall compensate Fuller for any adverse tax consequences of receiving a lump-sum backpay award in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). As set forth in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), Respondent shall be required to compensate Fuller for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge,

including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall also file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar year(s). In addition, pursuant to *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent must file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 forms reflecting the backpay award.

The Respondent shall also be required to remove from its files any reference to the unlawful discharge of Fuller and to notify him in writing that this has been done and that the adverse actions will not be used against him in any way.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees in an appropriate bargaining unit, while engaging in the conduct described above that undermined the Union’s support and prevented a fair rerun election, I shall order the Respondent to meet with the Union on request and bargain in good faith concerning the terms and conditions of employment of the bargaining unit employees, and, if an agreement is reached, embody such agreement in a signed contract.

The Union wrote on the petition itself that it was requesting recognition via the petition, and by the time the petition was filed on October 24, the Union represented a majority of unit employees, as shown by the 16 signed authorization cards. Kauffman acknowledged receiving the petition “roughly” around the date it was filed (Tr. 39–40), and it is undisputed that Respondent has refused to recognize the Union since the date it received the petition. Finally, the record shows that Respondent initiated its campaign of unfair labor practices on either October 25 or 26, the day Hendrickson brought pizza to the Prescott store and solicited employee grievances. As such, I find that Respondent’s bargaining obligation should attach as of October 26, 2022. By this date Sportsman’s had initiated its unfair labor practice campaign and it is reasonable to infer Respondent had already received the petition with the Union’s recognition demand.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>59</sup>

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



## ORDER

Respondent Sportsman's Warehouse Inc., its officers, agents, successors, and assigns,  
shall:

1. Cease and desist from

- (a) Soliciting employee grievances and impliedly promising to remedy them in order to discourage employees from selecting union representation.
- (b) Threatening employees by telling them the union will cause the store to close.
- (c) Threatening to close the store if employees unionized.
- (d) Coercively interrogating employees about their union activities.
- (e) Intimating to employees that the store will close if they vote to unionize.
- (f) Threatening employees by telling them that, if they do not like their pay they do not deserve it.
- (g) Threatening employees by telling them that it would be futile to support the union.
- (h) Making implied promises of wage increases in order to discourage employees from selecting a union representative.
- (i) Discharging employees, or otherwise discriminating against them, for engaging in union activities protected by Section 7 of the Act.
- (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

- (a) Within 14 days from the date of this Order, offer Peter Scott Fuller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Peter Scott Fuller whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.
- (c) Compensate Peter Scott Fuller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.
- (d) File with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown,

a copy of Peter Scott Fuller’s corresponding W-2 form reflecting the backpay award.

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

(f) On request, bargain with the Union as the exclusive collective-bargaining representative of Prescott store employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time cashiers, sales associates (including hunting, clothing, fishing, firearms, hardgoods, camping, and archery sales associates), inventory specialists, customer service employees and department leads.

EXCLUDED: All other employees, including confidential employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

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

(h) Post at its Prescott, Arizona store copies of the attached notice marked “Appendix.”<sup>60</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

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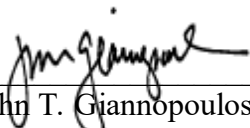
<sup>60</sup> If any of these facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that “This notice is the same notice previously [sent or posted] electronically on [date].” If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2022.

- (i) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 28-RC-306147 is set aside.

Dated, Washington, D.C. July 22, 2025

  
\_\_\_\_\_  
John T. Giannopoulos  
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 a representative to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** solicit grievances from you and promise to remedy them in order to discourage you from selecting union representation.

**WE WILL NOT** threaten you by saying the union will cause the store to close.

**WE WILL NOT** threaten to close the store, or imply the store will close, if you vote to unionize.

**WE WILL NOT** coercively question you about your union activities.

**WE WILL NOT** tell you that if you don't like your pay you don't deserve it.

**WE WILL NOT** inform you that it would be futile for you to support the union.

**WE WILL NOT** make implied promises of wage increases in order to discourage you from selecting a union representative.

**WE WILL NOT** discharge you because of your union support or because you engaged in union activities.

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

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

**WE WILL** compensate Peter Scott Fuller for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 28, within 21

days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Peter Scott Fuller’s corresponding W-2 form reflecting the backpay award.

**WE WILL**, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharge of Peter Scott Fuller, and **WE WILL**, within 3 days thereafter, notify him in writing that we have done so and that we will not use the unlawful discipline against him in any way.

**WE WILL**, on request, bargain with the Union as the exclusive collective-bargaining representative of our Prescott store employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

**INCLUDED:** All full-time and regular part-time cashiers, sales associates (including hunting, clothing, fishing, firearms, hardgoods, camping, and archery sales associates), inventory specialists, customer service employees and department leads.

**EXCLUDED:** All other employees, including confidential employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

Our employees have the right to join United Food and Commercial Workers International Union, Local 99, AFL-CIO, CLC, or any other labor organization, or to refrain from doing so.

Sportsman’s Warehouse, Inc.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

2600 North Central Avenue–Suite 1400; Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m. MT

The Administrative Law Judge’s decision can be found at [www.nlrb.gov/case/28-CA-308079](http://www.nlrb.gov/case/28-CA-308079) 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 (602) 640-2160.