JD(SF)-17-25
Phoenix, AZ

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

CATALINA HILLS BOTANICAL
CARE, INC. d/b/a CURALEAF MIDTOWN

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

Cases 28-CA-302934
28-CA-303282
28-CA-305502
28-CA-337417
28-CA-342154
28-CA-345058

*Chris J. Doyle, Esq.* for the General Counsel.[1]
*Jeffrey E. Dilger, Esq. (Littler Mendelson),*
for the Respondent.
*Martin Hernandez,* for the Charging Party.

# DECISION

## STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case over the course of 12 days between July 16 and October 4, 2024, in Phoenix, Arizona. This case was tried following the issuance of Orders consolidating cases, consolidated complaint, and notice of hearing by the Regional Director for Region 28 of the National Labor Relations Board on September 8, 2023 and August 14, 2024 (the complaints). The complaints were based on a number of original and amended unfair labor practice charges, as captioned above, filed by Charging Party United Food and Commercial Workers Union, Local 99 (Charging Party, Local 99 or the Union). The General Counsel alleges that Respondent Catalina Hills Botanical Care, Inc. d/b/a Curaleaf Midtown (Respondent or Curaleaf) violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. (the Act). Respondent filed timely answers to the complaints denying the commission of the unfair labor practices alleged against it.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and

[1] On February 3, 2025, President Donald J. Trump appointed William B. Cowen to be Acting General Counsel, replacing former General Counsel Jennifer Abruzzo. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsel for the General Counsel collectively as the General Counsel.

to file post-hearing briefs.[2] Post-hearing briefs were filed by the General Counsel and Respondent, and each of these briefs has been carefully considered. Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

## FINDINGS OF FACT[3]

### I. JURISDICTION

The complaints[4] allege and I find that, at all material times, Respondent has been a corporation with an office and place of business in midtown Phoenix, Arizona (Respondent's Midtown facility), and has been engaged in operating a cannabis-related dispensary. I further find that, during the 12-month period ending September 1, 2022, Respondent purchased and received at its Midtown facility goods valued in excess of $50,000 directly from points outside the State of Arizona, and further that, in conducting its operations during the 12-month period ending September 1, 2022, Respondent derived gross revenues in excess of $500,000. Respondent is thus engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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

### II. THE ALLEGED UNFAIR LABOR PRACTICES

Curaleaf operates cannabis dispensaries nationwide, including eight in Arizona. This case concerns its store located at 2918 North Central Avenue in Phoenix, known as the "Midtown store," where customers (sometimes called "patients") are sold cannabis for medical and

---

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "Jt. Exh. __" for Joint Exhibit; "GC Br. at __" for the General Counsel's post-hearing brief; and "R. Br. at __" for Respondent's post-hearing brief.

[3] I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

[4] For reference, the September 8, 2023 complaint is contained in the record as GC Exh. 1(g). It was amended on June 26, 2024 (see GC Exh. 1(j)), and again on July 18, 2024 (see GC Exh. 21.) The August 14, 2024 complaint is contained in the record as GC Exh. 82(i).

recreational use. The sale of medical and more recently, recreational cannabis is legal in Arizona subject to state and local regulation.

During the spring and summer of 2022, Local 99 successfully organized the employees (also known as "store associates" or "budtenders") working at the Midtown store. This case involves Curaleaf's response to that campaign, as well as to the Union's election victory and subsequent certification as the store's bargaining representative.

The General Counsel alleges that, during the organizing effort, Midtown store managers held a meeting during which they made various threats and promises to induce employees to withhold their support for the Union, and that, following the Union's certification, managers forbade employees from discussing workplace health and safety conditions, as well as from wearing union insignia at work, and additionally violated employees' *Weingarten* right to representation at a disciplinary meeting.[5] Each of these actions is alleged as an independent 8(a)(1) violation. The General Counsel also alleges that Respondent made unilateral changes to Midtown store employees' working conditions in violation of Section 8(a)(5) of the Act.

The General Counsel also challenges post-certification actions taken by Respondent against three Midtown store associates. Specifically, the General Counsel contends that Respondent violated Section 8(a)(3) of the Act by unlawfully disciplining, suspending and/or discharging its employees Nick Fredrickson (Fredrickson), Zakeya Crawford (Crawford), and Luis Isreal Tinajero-Torres (Tinajero)—because they supported the Union, and in Crawford's case, alternately because she engaged in protected, concerted activities. As discussed below, I find that Fredrickson's discipline and discharge violated Section 8(a)(3) but find that the allegations regarding Craford and Tinajero lack merit.

It is additionally alleged that the adverse actions taken against Frederickson, Crawford and Tinajero were violative of Section 8(a)(5). The General Counsel does not contend that this conduct amounts to a violation under current Board precedent. Rather, it argues that the Board should overrule the current controlling Board precedent, *800 River Road Operating Co., LLC d/b/a Care One at New Milford*[6] and find a violation under a different standard. Obviously, the decision about whether to reverse Board precedent is not mine to make. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge, to determine whether [] precedent should be varied."). As such, applying existing Board precedent, and without considering the merits of the General Counsel's arguments for reversing it, I find the allegations that Respondent violated Section 8(a)(5) and (1) of the Act by exercising disciplinary discretion without bargaining must be dismissed.

[5] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[6] This 2020 case held that "upon commencement of a collective-bargaining relationship, employers do not have obligation under . . . 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice." 369 NLRB No. 109, slip op. at 7, enfd. 848 Fed. Appx. 443 (D.C. Cir. 2021).

## III. Facts Common to Multiple Allegations

### *A. Respondent's Operations*

#### 1. Respondent's management team

Front-line supervisors at the Midtown store are called lead store associates (or lead budtenders); they are statutory supervisors not included in the bargaining unit. The next level of supervision is performed by 2−3 assistant store managers (ASMs), who in turn report to the store manager (SM). (Tr. 101−102, 344.)

The Midtown store manager position changed hands twice between the same two individuals between 2021 and 2022. Alyssa ("Lilly") Reff (Reff) held the position until October 2021; she then transferred to open a new Curaleaf location and was replaced by Tranica Reilly (Reilly). Reilly, who did not testify, was store manager during the union organizing campaign. Shortly before the mail ballot election, Reilly resigned from Curaleaf[7] and was replaced by Reff, who retook her former position following the ballot count on July 5, 2022. There is no direct evidence, however, that Reilly's departure and Reff's return was related to the organizing campaign or the representation election.[8]

Tanya Nitti has worked as an ASM in Midtown since approximately March 2022. She previously worked as a budtender and lead budtender at Midtown. Other managers involved in this case include Senior Labor Relations Manager Ryan Gonsalves, his predecessor, Keevin Cox and Labor Relations Specialist Kaitlin Cook. (Tr. 92−95, 170−171, 256, 344−346, 1317−1319; R. Exh. 15.)

#### 2. Store operation and job responsibilities

The Midtown store is staffed with three to eight store associates per shift. Their job duties include maintaining a cash register, providing customer service, assisting with inventory tasks, performing cleaning and opening/closing the store. The sales floor is less than 3000 square feet, and employees work in close proximity to one another. There is always a lead budtender on the sales floor. (Tr. 337, 342, 982−983.)

Store associate positions are exclusively part-time, meaning that none of the budtenders are eligible for health benefits. Respondent's employees are required to display their state-issued credentials to sell cannabis; they do so by attaching them to a lanyard. No official "Curaleaf"

---

[7] Although Reilly did not testify, Gonsalves' testimony that she resigned constitutes a "verbal act" and is therefore admissible nonhearsay. See, e.g., *Carpenters Local 257 (DAT Construction)*, 290 NLRB 538, 538 fn. 2 (1988) (job applicant's testimony that employer's president told him to "go to work Monday with your tools" was admissible nonhearsay evidence that manager offered him a job).

[8] The General Counsel claims that Respondent decided to install Reff as store manager only "after the NLRB election." This contention is not supported by the record. See Tr. 410.

lanyard exists; instead store associates wear lanyards of their own choosing, often including those branded with product names. (Tr. 350–351, 436–437; 441–442.)

3. The Union's election and certification in Case 28–RC–294474

On April 21, 2022, the Union filed a representation petition seeking to represent budtenders at the Midtown store. In response, Curaleaf mounted a campaign to encourage employees to vote "no" in the representation election, including messaging by managers and posting flyers about the disadvantages of union representation. A mail-ballot election was conducted between June 3 and June 24, 2022; at the ballot count that followed, the Union won by a margin of 13 to 6. Curaleaf filed objections to the election; approximately seven months later, those objections were dismissed. The Union was certified on February 23, 2023. (GC Exh. 26–35; Jt. Exhs. 1, 4, 5, 6–9; Tr. 314.)

The bulk of the allegations set forth in this case are based on conduct that occurred while Respondent's objections to the Union's victory were pending. Board law is clear that, except in limited circumstances, an employer acts at its own peril by unilaterally changing the working conditions of unit employees during this period. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). Likewise, an employer that—during the same period—denies a unit employee his *Weingarten* representation will be found to have violated the Act should its post-election objections be dismissed. *Anchortank, Inc.*, 239 NLRB 430, 431 (1978), affd. 618 F.2d 1153, 1165 (5th Cir. 1980).

4. Respondent's progressive discipline policy

At all relevant times, Curaleaf maintained a progressive discipline system that included the following steps: (a) verbal warning; (b) written warning; (c) final written warning; (d) termination. Under the policy, increasing levels of discipline are imposed regardless of the type of infraction; for example, an attendance violation followed by an incident of inappropriate language would trigger progress to the next disciplinary step. That said, the system contemplates a "reset" after a year of no discipline. Therefore, an employee with a final written warning would not be subject to discharge based on another infraction occurring 13 months later. (GC Exh. 5(a) at 25; Tr. 1504.)

Notably, the policy reserves to Respondent the right to "combine or skip progressive discipline steps," as well as to "forego progressive discipline altogether" and to "move directly to the immediate separation of employment" based on the nature of the particular offense involved. GC Exh. 5(a). In its description of the discharge step of the process, the policy states that "misconduct that involves dishonesty, violation of the law, or significant risks to CURALEAF operations or to the safety or well-being of oneself or others is grounds for immediate separation of employment" and includes among its examples of such misconduct the offenses of "serious neglect of duty, insubordination [and], violation of safety rules…" Id.

5. Respondent's attendance policy and practices

Curaleaf's attendance policy, as set forth in the Employee Handbook, states:

> Excessive absenteeism and/or tardiness will lead to disciplinary action, up to and including separation. Any employee with unexcused tardiness or unexcused absences that exceed 3 occurrences within a 3-month period will face disciplinary action, up to and including separation of employment. Tardiness is considered 10 minutes or more late for your shift.

(GC Exh. 5(a) at 9.) The policy specifically excludes from the definition of an unexcused absence "time off that was previously approved, including vacation." Id.

In order to be "approved" vacation per Curaleaf's policy, an employee must request time off at least 2 weeks before the date of their absence. (Id. at 33.) As Reff explained, an employee failing to meet this deadline is still permitted to designate their absence as a paid, but such "unapproved vacation time" would nonetheless be counted an unexcused absence for purposes of the attendance policy. (Tr. 1545–1546.)

When issuing discipline for time and attendance discipline, Respondent's established practice is to insert into the Corrective Action Form the portion of the above-stated policy that explicitly refers to the standard for discipline, i.e., "unexcused tardiness or unexcused absences that exceed 3 occurrences within a 3-month period." Typically, the narrative portion of the form then proceeds with the words, "In the last three months, you have had [number] of absences/tardies." See, e.g., R. Exhs. 36–38, 41–46; GC Exh. 75, 77, 78. The only exception to this practice appears when the last discipline (or the employee's hire date) itself occurred less than 3 months before the Corrective Action Form's issuance date. See, e.g., R. Exhs. 37, 38, 44.

6. Respondent's solicitation of comments from disciplined employees

Respondent documents employee discipline using a "Team Member Corrective Action Form" (Corrective Action Form). The last portion of Respondent's Corrective Action Form is captioned, "Team Member Comments" with the following instruction, followed by approximately 5 inches of blank space:

> If you disagree with any information in this document, you may submit a written statement explaining your position on the matter. Curaleaf will keep your statement in your personnel file.

(GC Exh. 52; Tr. 538–540.) Reff testified that employees were not required to complete this portion of the form and that no comment added by an employee in this space had any effect on the discipline issued. (Tr. 1500.)

## IV. NON-ADVERSE ACTION ALLEGATIONS

### *A. Alleged 8(a)(1) Statements During the May 22 Meeting*

The General Counsel alleges that, on May 22, 2022, Respondent's managers held a meeting at the Midtown store to dissuade employees from voting for the Union. As of that date, an in-person election was scheduled to take place at the Midtown store 4 days later. During the meeting, then-District Manager Ryan Gonsalves (Gonsalves) and Labor Relations Manager Keevin Cox (Cox) allegedly made certain statements in violation of Section 8(a)(1) of the Act. Specifically, the government contends that:

- Cox threatened employees that it would be futile to select the Union as their bargaining representative;
- Cox threatened employees that their pay would be reduced if they selected the Union;
- Cox and Gonsalves threatened employees that they would "lose their voice" if they selected the Union; and
- Gonsalves promised employees more opportunities for full-time positions and "respect in the workplace" if they rejected the Union.

(September 8, 2023 complaint ¶ 5(a)-(c).)

#### 1. Facts

Mandatory pre-shift meetings called "huddles"—typically led by the store manager or an assistant store manager—are held at the Midtown store before each morning and evening shift. The main function of the huddle is to assign store associates particular duties for the shift. Other topics typically covered include new workplace policies, product roll-outs, promotions and "daily deals," and upcoming industry events. (Tr. 106, 319–321, 360–363.)

Current Midtown Store Associate Brandon Richardson (Richardson) testified that, in mid-May, he attended at least one huddle meeting[9] at which Cox and Gonsalves spoke. According to Richardson, Cox addressed the prospect of a Union victory in the election, telling the assembled employees that "Curaleaf would not have to bargain in good faith, and that if bargaining were to occur, that we can even go back in pay or even lost benefits." Cox did not testify, and Richardson's testimony went otherwise unrebutted. In this regard, I reject as hearsay Gonsalves' admittedly "very vague" recollection that that Cox actually stated, "we bargain in good faith." (Tr. 310–311, 315, 321–322.)

Richardson also testified that Cox told the employees that electing the Union would mean that they would basically lose their voice and ability to negotiate for themselves, because "everything would be done through the Union" instead of directly between the employees and management. On this point, he was corroborated by Crawford, who also recalled attending a huddle meeting at which Cox warned that bringing in the Union would mean employees

[9] Richardson testified that he actually attended two to three huddle meetings at which Cox made essentially the same comments. (Tr. 318, 322.)

"wouldn't have control over anything anymore, and that we will have to always go through a middleman for certain decisions." I credit this testimony, which was unrebutted by Respondent's witnesses. (Tr. 315, 324–325, 712.)

With respect to the government's claim that Cox promised employees benefits (i.e., full-time opportunities and "respect in the workplace") in exchange for rejecting the Union, the only testimony offered by the government was that of Crawford. I found this testimony forced and do not credit it. Rather, I credit Richardson's account, which made no mention of promises of benefits.[10] I therefore recommend dismissal of this allegation.

2. Analysis

(a) The 8(a)(1) standard for coercive speech

Section 7, the Act's fundamental provision, states in part that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act provides that an employer may not "interfere with, restrain, or coerce employees" in the exercise of their rights to engage in activity protected by Section 7. It is well-settled that employer motive and an employee's subjective interpretation of the employer's conduct is generally immaterial when evaluating an alleged violation of Section 8(a)(1). *Lush Cosmetics, LLC*, 372 NLRB No. 54 at p. 3 (2023) (quoting *KSM Industries, Inc*., 336 NLRB 133 (2001)). Instead, the Board determines whether "statements alleged to violate Section 8(a)(1) . . . have a reasonable tendency to coerce employees in the exercise of their Section 7 rights." Id. In applying this analysis, the Board "considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees' free exercise of their rights" pursuant to Section 7. Id. (citing *American Tissue Corp*., 336 NLRB 435, 441–442 (2001)).

(b) Cox's statement that Respondent would not have to bargain in good faith

Threats or statements conveying that support for a union is futile violate Section 8(a)(1). See, e.g., *Sunbelt Rentals, Inc*., 370 NLRB No. 102, slip op. at 1, 22 (2021); *Wellstream Corp*., 313 NLRB 698, 706 (1994). Indeed, as the Board has noted, "[t]here is no more effective way to dissuade employees from voting for a collective-bargaining representative than to tell them that their votes for such a representative will avail them nothing." *Trane Co. (Clarksville Mfg.*

[10] I found Richardson particularly credible, both in demeanor and by virtue of his status as a current employee. See *Flexsteel Industries*, 316 NLRB 745, 745 (1995) ("[T]he testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest."), enfd. mem. 83 F.3d 419 (5th Cir. 1996); *Avenue Care & Rehabilitation Ctr.,* 360 NLRB 152, 152 fn. 2 (2014) (current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues). Moreover, he did not attempt to embellish or "spin" his testimony.

*Division)*, 137 NLRB 1506, 1510 (1962). Cox's direct statement that Curaleaf would not bargain in good faith with the Union, if elected, constitutes just such an unlawful suggestion. See, e.g., *Cogburn Healthcare Ctr*., 335 NLRB 1397, 1399−1400 (2001); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 510−511 (1995); *Sherwood-Trimble Med. Bldg*., 247 NLRB 1121, 1124 (1980); *Franklin Parish Broadcasting*, 222 NLRB 1133, 1137 (1976); *Redwing Carriers, Inc.*, 165 NLRB 60, 83 (1967).

Accordingly, I conclude that Respondent, by Cox, violated Section 8(a)(1) by informing employees that it did not have to bargain in good faith with the Union, informed its employees that it would be futile for them to select the Union as their bargaining representative.

(c) Cox's statement that associates' pay could go backwards and benefits could be lost

As noted, I have credited unrebutted testimony that Cox, after stating that Curaleaf would not be required to bargain in good faith, added that, even were it to bargain, the employees could "even go back in pay or even lose benefits." The General Counsel asserts that, pursuant to *NLRB v. Gissel Packing Co.* and its progeny, this latter statement constituted an unlawful threat. See 395 U.S. 575, 618 (1969). Respondent claims this statement is facially lawful and protected by Section 8(c) (often referred to as the Act's "free speech" provision).

The Supreme Court in *Gissel* established that an employer may express its general views about unionism, or specific views about a particular union, so long as the communications do not contain a threat of reprisal or force. Likewise, Section 8(c) provides that "[t]he expressing of any views, argument, or opinion" by an employer is not an unfair labor practice as long as the expression "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). These principles protect the right of an employer, in responding to an organizing campaign, to lawfully "predict 'the precise effects he believes unionization will have on his company[,]'; they do not, however, give that employer "carte blanche to make threats against union activity under the guise of innocent prognostication." *Cadillac of Naperville, Inc. v. NLRB*, 14 F.4th 703, 716 (D.C. Cir. 2021) (citing *Gissel*, 395 U.S. at 618), cert. denied, 142 S. Ct. 2650 (2022).

The *Gissel* Court further explained that the distinction between lawful advocacy and coercive threats turns on whether the employer communicates a predicted adverse consequence of unionization as "outside [the employer's] control" (e.g., the result of the normal give-and-take of good faith collective-bargaining negotiations), as opposed to the result of the employer's own conduct in response to union activity. If the employer's prediction of negative consequences carries the latter implication, the statement will be deemed an unlawful threat of retaliation outside the protection of Section 8(c). 395 U.S. at 618. "When the question is close, a critical factor in determining whether the statement has a threatening color is whether the context of the statement includes contemporaneous threats or unfair labor practices." *Hendrickson USA, LLC. v. NLRB*, 932 F.3d 465, 472 (6th Cir. 2019) (internal quotations omitted); see also *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 188−189 (2000). The Board also considers whether the statement arose "in direct response to union promises." *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007).

Respondent argues that Cox's prediction that bargaining could result in lowered pay and/or benefits was lawful insofar as it merely indicated that wages or benefits might be reduced as a result of the normal give-and-take of collective-bargaining negotiations. It is true that the Board has found similar comments, when made without any implication that the employer would engage in regressive or otherwise bad-faith bargaining, to be lawful campaign predictions of the impact of unionization, see, e.g., *Flexsteel Industries, Inc.*, 311 NLRB 257 (1993); *Sunbelt Mfg., Inc*., 308 NLRB 780, 791 (1992), affd. 996 F.2d 305 (5th Cir. 1993), particularly when made in response to "exaggerated claims by [a] union." *Ludwig Motor Corp*., 222 NLRB 635, 635−636 (1976).

Cox's statement, however, was quite different. There is no evidence that his comments rebutted promises made by the Union, merely cautioned that good-faith bargaining carried implicit risks, or included an assurance that the projected wage and benefit reductions would result from the normal give and take of bargaining. To the contrary, he explicitly premised his conjecture on a pledge that Respondent would *not* engage with the Union in good faith. I believe that a reasonable employee, dependent economically on Curaleaf, would certainly take his prediction about losing pay and benefits as a threat of unilateral action by Respondent.[11] As such, I find that Cox's comment constituted an unlawful threat to reduce wages and benefits if employees selected the Union as their bargaining representative. See *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980) (finding "bargaining from scratch" comments, unaccompanied by any assurance that such losses, if any, would be the result of the normal give and take of collective bargaining, amounted to unlawful threat of loss of existing benefits), enfd. mem. 679 F.2d 900 (9th Cir. 1982).

I further find that Cox's statement about reduced wages and benefits amounted to a threat of futility, insofar as a reasonable employee would take Cox's comment to mean that, if forced to bargain with the Union, the only bargaining in which Respondent would engage would be either regressive or sham bargaining, meaning that a vote for the Union would accomplish nothing. See *Sherwood-Trimble Medical Bldg*., 247 NLRB at 1126 (employer's claim that it was not required to bargain in good faith, combined with threats that pay and benefits would not be increased during negotiations, unlawfully conveyed futility).

(d) Cox's statement that they would lose their "voice" and their direct relationship with management if they selected the Union

The General Counsel alleges that, pursuant to *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135, slip op. at 1−2, 6−12 (2024), Cox's statements about employees losing the ability to deal directly with Respondent were unlawful. However, similar statements were deemed categorically lawful under the Board's prior standard, *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985). While the Board has overruled that precedent and rejected such a categorical rule, it did so only

[11] As the Board has repeatedly recognized, an employer's right of free speech must be balanced with employees' Section 7 rights, and any assessment of that balance "must be made in the context of [the] labor relations setting," where, because of employees' economic dependence on an employer, they may be more likely to sense intended threats than a disinterested observer. *Hendrickson USA, LLC v. NLRB*, 932 F.3d at 470 (citation omitted).

prospectively. See *Starbucks*, 373 NLRB No. 135, slip op. at 10. Accordingly, because Cox's statements were lawful pursuant to *Tri-Cast* at the time he made them, I recommend that this allegation be dismissed.

### *B. Alleged Unilateral Changes Following the Ballot Count*

On June 30, 2022, a video ballot count in the Midtown store election was conducted, with the majority of employees voting for representation by the Union. Within the next week, Respondent announced that Reff was returning as the Midtown store manager. Upon her return, the General Counsel alleges, Respondent changed the store's policy regarding the maximum acceptable amount for cash drawer variances and also began more strictly enforcing several other existing policies, including: (a) employee clock-in/clock-out procedures; (b) discipline for failure to adhere to those procedures; and (c) employee use of cell phones at work.[12]

These are each alleged to constitute a Section 8(a)(5) unilateral change, as well as Section 8(a)(3) retaliation for the Midtown store employees' expressed union support. It is undisputed that, prior to the July 5 meeting, Respondent did not provide the Union with notice or the opportunity to bargain over the subjects of the alleged change or more strict enforcement.

#### 1. The legal standard for unilateral changes

Employers have a duty to bargain in good faith with union representatives about mandatory subjects of bargaining, specifically, wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958). An employer's unilateral change to an employment term constituting a mandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act, absent a valid defense. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

For a unilateral change in mandatory subject of bargaining to be unlawful it must be a "material, substantial and significant change." *Berkshire Nursing Home, LLC*, 345 NLRB 220, 221 (2005). The work rules alleged to be the subject of Respondent's unilateral changes/more strict enforcement are indisputably mandatory subjects of bargaining, and Respondent does not argue that the alleged changes did not constitute a "material, substantial and significant change." Instead, Respondent argues that the General Counsel failed to establish that the changes/stricter enforcement actually occurred as alleged. As discussed below, I agree with Respondent.

[12] Notably, the August 14, 2024 complaint originally alleged that, on July 5, Respondent substantively changed its cell phone and clock-in/clock-out policies; the General Counsel, however, later amended these allegations to state that Respondent's unlawful conduct was actually the more strict enforcement of those policies as they existed as of July 5, 2022. (See GC Exhs. 1(g), 21.)

2. The alleged changes

(a) The July 5 meeting

On June 30, 2022, the video ballot count was conducted. The same day, Reff—who was about to return as the Midtown store manager—announced by email that there would be a mandatory, all-hands meeting on July 5.[13] No party offered a copy of the email as evidence, but it is undisputed that it instructed employees that they were required to attend either in person or via the Zoom video platform. (Tr. 107–108, 407, 1151–1152, 1318.)

The meeting, led by Reff with Gonsalves in attendance, took place as scheduled. The meeting was attended by all store associates, leads and managers. That said, the only employee witness called by the General Counsel to testify about the meeting was Frederickson, who attended by video. Fredrickson testified that, at the meeting, Gonsalves announced that Reff would be returning as store manager and then added that there would be "a few policy changes." (Tr. 410.) They are discussed in turn, below:

(b) Cash variance policy change

A cash variance is a discrepancy (i.e., an overage or underage) in an employee's cash drawer. As of July 5, 2022, Respondent maintained a written "Cash Handling Policy" dictating how those incidents are to be documented and reported, and further states:

> Disciplinary actions for those involved in cash discrepancies will be at the discretion of Retail Leadership. Based on severity and frequency of cash variances, disciplinary actions will range from verbal counseling up to and including termination.

(GC Exh. 4). Fredrickson testified that, prior to the July 5 meeting, the practice at the Midtown store was to discipline employees based on a cash variance of $10 or more. At the meeting, he claimed that Gonsalves announced that, going forward, the cash variance amount that would trigger discipline was reduced to $5. (Tr. 417–420.)

Reff confirmed that the Midtown store's cash variance limit was at some point lowered from $10 to $5 but claimed this occurred in either 2020 or 2021. Gonsalves, for his part, admitted that the cash variance policy may have been changed at the Midtown store, insofar as Curaleaf has acquired multiple stores in Arizona that had a $10 cash variance and its practice was to "standardize" its policies (i.e., to $5) after an acquisition. (Tr. 127–128, 315–316, 328–329, 1324–1325, 1490.)

[13] Fredrickson testified that Ryan Gonsalves—not Reff—announced the meeting via email within minutes of the final ballot being counted and while the Board agent was still speaking on the video ballot count. This timing went uncorroborated by any other employee witness or documentary evidence and frankly appeared embellished; rather, I credit Reff, who admitted to sending the announcement on the day of the ballot count but also credibly denied watching the count. (Tr. 407, 1151, 1153.)

Richardson also testified about a change to the cash variance policy. He did not corroborate Fredrickson's testimony that Gonsalves announced the change on July 5, 2022, but rather testified that, "within a month or two" following the ballot count, the cash discrepancy amount was lowered from $10 to $5. Richardson's Board affidavit, however, stated that the change was announced in May 2022—in other words, before Respondent's bargaining obligation attached. This version of events is generally consistent with Gonsalves' and Reff's testimony. (Tr. 127–128, 315–316, 328–329, 1324–1325, 1490.)

I credit Richardson's affidavit testimony as to the timing of this change and therefore find that Respondent had no obligation to bargain over it. Based on the rationale offered by Respondent's witnesses for making the change, I further decline to find that it was undertaken in retaliation for the union organizing campaign. I therefore recommend dismissal of the 8(a)(3) and (5) allegations related to the cash variance policy change.

(c) More strict enforcement of cell phone usage policy

At all relevant times, Respondent's employee handbook has contained the following policy regarding employee cell phone use:

> **PERSONAL CALLS, VISITS, AND BUSINESS**
>
> CURALEAF expects your full attention while you are working. Although you may occasionally have to take care of personal matters during the workday, you should conduct such personal business on your personal cell phone, either before or after the workday, or during breaks. Absent special circumstances, CURALEAF's phones should not be used to plate or receive personal calls, as they must be available to serve CURALEAF's customers. Personal calls should be made in employee-only areas of the building and not in view of patients or customers.

(GC Exh. 5(a) at 21.)

According to Fredrickson, despite this language, the practice prior to July 5 was that employees were permitted to use their cell phones on the sales floor a limited basis as long as they were not "in front of a customer." According to Fredrickson, Gonsalves used the July 5 meeting to announce that Curaleaf would be updating and more strictly enforcing its existing cell phone policy.

After the meeting, according to Fredrickson, "the new practice is you could not have your cell phone out anywhere near the sales floor or anywhere on shift without it being a dire emergency." (Tr. 416–417.) He gave no explanation as to how he came to learn this and his claim as to this "new practice" went uncorroborated by every other General Counsel witness. More significantly, neither Fredrickson nor any other General Counsel witness offered a concrete example of an employee being disciplined (or not) based on cell phone use, either before or after

July 5. SM Reff and ASM Nitti testified that their written cell phone use policy was consistently followed at all times. (Tr. 1444, 1488–1489.)

Under the circumstances, I find that the General Counsel has not offered credible evidence that the cell phone policy was more strictly enforced and therefore recommend dismissal of this 8(a)(3) and (5) allegation.

(d) More strict enforcement of clock-in/clock-out procedure and accompanying discipline

Fredrickson testified that, at the July 5 meeting, Gonsalves told the assembled employees that Respondent was changing the store's "clock-in/clock-out" procedure, whereby managers would no longer correct errors in Respondent's timekeeping app and employees would be subject to discipline for multiple clock-in/clock-out errors. (Tr. 407–409, 410, 416, 417.) The record is devoid, however, of any evidence that Respondent followed through on this announcement (i.e., by refusing to correct timekeeping errors or disciplining employees for them). As such, I agree with Respondent that the General Counsel has failed to establish that the unilateral changes—more strict enforcement of its clock-in/clock-out and accompanying discipline—in fact occurred. I therefore recommend that these allegations be dismissed.

(e) More strict enforcement of time and attendance policy

As noted above, at all material times, Respondent has maintained a written time and attendance policy that states, "Tardiness is considered 10 minutes or more late for your shift." (GC Exh. 5(a) at 9.) The General Counsel maintains, however, prior to July 5, the Midtown store in fact allowed employees to be 11 minutes late before being considered tardy. Both Fredrickson's February 29, 2024 written warning and Tinajero's May 21, 2024 discharge, it is alleged, resulted from Respondent's enforcement of the written '10 minutes or more' policy. See August 14, 2024 complaint ¶ 6(a), ¶ 6(g).

The General Counsel's evidence in support of these allegations is scant. Tinajero provided vague hearsay, which I do not credit, to the effect that, "[t]owards the end, somebody had told me like oh, it changed." (Tr. 987.) The General Counsel also cites an email Reff sent to the Midtown employees following the July 5 meeting and purporting to "recap" it. The relevant portions of the email read:

> **Accountability**
>
> - Attendance, mis-punches, lunches - please see Handbook policy* at end of email for what qualifies as an attendance infraction and how they will be handled moving forward!

At the end of the email, she inserted an excerpt from Respondent's time and attendance policy in bold:

> ***ATTENDANCE AND REPORTING TO WORK**
>
> **Each employee is important to the overall success of our business. When you are absent from, or late to, your work shift, someone else must perform your job in your absence. Consequently, you are expected to report to work on time by the scheduled start of each shift. Reporting to work on time means that you are ready to start work, not simply arriving at work, at your scheduled start time.**
> **If you unexpectedly need to be absent from, late to work or need to leave early, you must notify your supervisor at least one hour prior to the start of your scheduled workday that you will be late or absent from work, except in cases of an emergency, and provide the reason for that absence or tardy. If your supervisor is not available, you should leave a message that includes your phone number so that your supervisor can return your call. Failure to properly notify CURALEAF may result in disciplinary action, up to and including the separation of employment. Your attendance record (absenteeism and tardiness) is part of your overall performance rating and will be referenced during your review.**
> **Excessive absenteeism and/or tardiness will lead to disciplinary action, up to and including separation. Any employee with unexcused tardiness or unexcused absences that exceed 3 occurrences within a 3-month period will face disciplinary action, up to and including separation of employment.**
> **Tardiness is considered 10 minutes or more late for your shift.**

(GC Exhs. 2, 5(a) at 9; Tr. 110–111, 1153.)

At first blush, Reff's email suggests that she may have, at the July 5 meeting, announced that some aspect or aspects of the attendance policy would be more strictly enforced going forward, no witness, however, testified to that effect. Thus, the record is devoid of any credible evidence supporting the General Counsel's theory that what was more strictly enforced was the grace period for tardiness.

Because the General Counsel failed to establish that, in violation of its written policy, Respondent historically permitted Midtown store employees a 10—not 9—minute grace period before being considered tardy, I recommend dismissal of the 8(a)(3) and (5) allegations that Tinajero's discharge and Fredrickson's written warning constituted the more strict enforcement of Respondent's time and attendance policy.

## V. ALLEGATIONS INVOLVING FREDRICKSON

### *A. Factual Background*

Fredrickson worked for Curaleaf Midtown from June 2021 until his discharge on April 22, 2024. In February 2022, he reached out to the Union and became the lead employee organizer at the Midtown store. Frederickson engaged in extensive union activities, including handing out union literature, soliciting authorization cards, educating his coworkers about union representation and acting as a liaison between the store associates and the Union. Shortly after the Union filed its April 22 representation petition, Fredrickson began wearing a Union pin and lanyard daily. (GC Exh. 38; Tr. 337, 352–353, 355, 359, 434–436.)

There is no dispute that Fredrickson's union activities were known to management since at least May or June 2022, and he was handled differently from the other store associates when it came to Curaleaf's campaign to persuade employees to reject the Union. He did not attend any "huddles" during which the Union was discussed. He did have (on his own) a confrontational exchange with Gonsalves and Cox in May or early June, in the weeks before the mail-ballot election commenced. This occurred when Gonsalves—whose appearance at the Midtown store had been rare until that point—asked Fredrickson how he was "feeling." Fredrickson—in what appears to have been his manner—became combative with Gonsalves, accusing the company of posting anti-union flyers in the breakroom containing false and coercive statements. (Tr. 365–368, 376.)

The discussion quickly became heated, at which point Cox appeared and Gonsalves suggested that they continue it in a nearby conference room. Once behind closed doors, the three men engaged in an hour-long debate over subjects such as store associates' concerns about security at the store and whether it was mandatory for employees to pay union dues. Cox and Gonsalves attempted to dissuade Fredrickson from his union support, telling him that he "didn't know what [he] was talking about," that Local 99 "did not have to be honest" with the employees and that Fredrickson should "take a look at the Union's tax records." (Tr. 368–375.)

### *B. Non-Adverse Action Allegations Involving Fredrickson*

As noted, almost 7 months passed after the Union's ballot-count victory and its ultimate certification. During this period, Fredrickson had several run-ins with management. The General Counsel claims that Respondent, in its conduct towards Fredrickson, issued unlawful rules/directives barring employees from wearing union insignia and discussing workplace issues, denied Fredrickson his *Weingarten* rights and made coercive statements regarding his ability to exercise such rights.

1. Prohibition on discussing working conditions (September 2022)

The General Counsel alleges that, in August 2022,[14] Respondent issued an overly broad and discriminatory rule or directive prohibiting employees from discussing their terms and conditions of employment with their coworkers.

(a) Facts

In September 2022, Fredrickson confronted ASM Nitti and lead budtender Jasmine Hall (Hall) about a bad smell in the store's breakroom. After they assured him that it was being taken care of, he responded that Respondent was unlawfully denying the budtenders access to the break room, claiming the smell was caused by rats and stating that an emergency pest control service should be called. This exchange began in a non-customer area but, as he exited towards the sales floor where customers were present, Fredrickson continued to complain loudly, stating that there were "rats in the walls" causing the smell. Hearing this, ASM Nitti immediately called him back into the office and told him that he could not be having that conversation on the sales floor. Budtender Richardson was present for this exchange.[15]

(b) Analysis

Section 7 grants employees the right to engage in concerted activities for mutual aid or protection, including by communicating with their employer's customers. *Capstone Logistics LLC*, 372 NLRB No. 124, slip op. at 4–5 (2023) (citing cases). It is well established that health and safety conditions are terms and conditions of employment and that concerted activity in connection therewith is for mutual aid and protection. See, e.g., *Burle Industries*, 300 NLRB 498 (1990), enfd. mem. 932 F.2d 958 (3d Cir. 1991). ASM Nitti's pronouncement that Fredrickson was not allowed to speak about Respondent's response to a rat infestation in the workplace, on its face, amounted to a ban on speech protected by Section 7 and therefore violated the Act. As noted, I find that the General Counsel failed to adduce credible evidence that either Hall or Nitti threatened Fredrickson with discharge should he violate this rule; accordingly, I recommend this allegation be dismissed.

2. September 8, 2022 *Weingarten* comment/directive to remove Union insignia

The General Counsel alleges that Respondent violated the Act during a meeting on September 8, 2022 when managers informed Fredrickson that he was not entitled to a union representative during an investigatory interview and additionally ordered him to remove his union insignia. Respondent asserts that the September 8 interview was not investigatory and therefore telling him that he was not entitled to representation constituted an accurate recitation

[14] Respondent's business records establish that this incident actually occurred in September, not August of 2022. See R. Exh. 27.

[15] I have based these factual findings on Nitti's testimony, Respondent's business records and, to a lesser extent, Fredrickson's testimony. I do not credit his claim that Hall was the speaker in question, or that she threatened him with a write-up, as this was not corroborated by Richardson. (Tr. 420–423, 1454; R. Exh. 27.)

of the law. With respect to the alleged order to remove union insignia, Respondent both disputes the factual allegations and claims to have remedied any violation that may have occurred.[16]

I find Respondent's defenses unavailing and find that it violated the Act as alleged.

(a) Facts[17]

On September 8, Reff summoned Fredrickson, who was working with a customer, to the store's conference room to meet with Gonsalves. When he arrived, Gonsalves was there, accompanied by Curaleaf's Retail Field Operations Manager Andrew Holstein (Holstein); also in attendance by video was Regional Director of Human Resources Staci Johnson (Johnson). As usual, Fredrickson was wearing his Union lanyard and button. (Tr. 432–438.)

In a meeting that lasted approximately 30 minutes, Johnson—who did not testify—asked Fredrickson if he recalled an incident that had occurred between him and a customer approximately a month earlier. When he said he could not, she asked if she could refresh his recollection. He responded yes, at which point she explained that she was referring to an incident in which Fredrickson had reported a death threat he had received from a dissatisfied customer a month earlier (on August 12). Fredrickson immediately responded that, "if this meeting is in any way, shape or form related to an investigation, or any discipline could result in this meeting, then I hereby invoke my *Weingarten* rights and request to have my Union rep present." Johnson responded that Respondent "was not recognizing our Union at the moment, and because of that, they did not need to provide the *Weingarten* rights." Fredrickson replied by questioning whether Respondent was recognizing the Union at its Camelback location (referring another store in Phoenix that had voted for union representation), to which she responded, "no."

At this point, Johnson informed Fredrickson that he was under investigation regarding the August 12 incident, stated that a security officer he reported that he had cursed at the customer in question (stating, "I am not fucking dealing with this shit"). She then asked whether he recalled saying something of that nature, and he claimed no recollection of having done so but did recall the customer threatening his life. She then informed him that that was "all the information they

[16] See generally *Passavant Memorial Area Hosp.*, 237 NLRB 138, 138 (1978) (finding "under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct").

[17] My factual findings this meeting are based on Fredrickson's largely unrebutted testimony. I do not credit Gonsalves' recollection of the meeting; it was markedly vague and went uncorroborated by Holstein (who was employed by Respondent as of the hearing). Nor do I credit Gonsalves' hearsay statement—elicited by means of a leading question—that a determination had been made not to issue Fredrickson discipline. (Tr. 1301–1302, 1382.)

need[ed]" and that he would be informed of the results of the investigation in a couple of weeks. (Tr. 438–440.)

Near the end of the meeting, Gonsalves admittedly told Fredrickson that his Union pin and lanyard violated Respondent's dress code policy and would need to be removed.[18] Fredrickson complied, albeit while noting he believed the directive to be unlawful. He was provided with a manufacturer-branded lanyard. In his opening statement, Respondent's counsel represented that Gonsalves' directive was "immediately reversed in a matter of days" and therefore no violation should lie. No witness, however, testified that this "reversal" actually occurred, and Fredrickson denied being given permission following the September 8 meeting to display his union insignia again. (Tr. 61, 440–444.)

(b) Analysis

(i) Statement regarding *Weingarten* representative

Under the Board's *Weingarten* doctrine, an employee is entitled, upon request, to a representative for a meeting that is 'investigatory,' that is, on that the employee reasonably fears may result in discipline or otherwise adversely affect their working conditions. *Weingarten*, 420 U.S. 251, 256. By contrast, *Weingarten* rights do not apply to a meeting held solely to inform an employee of and act upon a pre-determined disciplinary decision. *Baton Rouge Water Works Co*., 246 NLRB 995, 997 (1979).

As noted, where an employer challenges a union's representation election victory, it acts at its peril in denying the *Weingarten* rights of unit employees while its objections are pending. *Anchortank, Inc.*, 239 NLRB 430, supra. Indeed, an employer that bases its refusal to grant a *Weingarten* request on its ultimately disproven belief that it is operating a "nonunion" workplace compounds the violation, and a statement to that effect constitutes an independent 8(a)(1) allegation. See *PAE Aviation*, 366 NLRB No. 95, slip op. at 1, fn. 5 (2018) (telling employee that company did not recognize *Weingarten* rights unlawfully conveyed to employees that invoking such rights was futile); see also *Freuhauf Trailer*, 335 NLRB 393, 403 (2001) (falsely telling represented employee, "this is a nonunion shop," constitutes independently unlawful act of coercion) (citing cases).

In the instant case, Respondent was ultimately proven wrong in its belief that its post-election objections would invalidate the Union's election victory, rendering *Weingarten* inapplicable. Regardless, Respondent claims that telling Fredrickson he was not entitled to a union representative was a lawful statement, insofar as Johnson had, prior to the meeting, determined *not* to issue Fredrickson discipline, transforming the meeting into one where no *Weingarten* right attached. Johnson, however, did not testify to having made that determination. Rather,

[18] By its opening statement, Respondent admitted that it "did mistakenly tell its employees that they could not wear Union insignia." By its post-hearing brief, however, Respondent reversed course, arguing that no directive was ever issued. (Tr. 61; R. Br. at 53–55.) I hold Respondent to its original admission. *Tracy Toyota*, 372 NLRB No. 101, slip op. at 4–5 (2023) (finding party bound by admission in opening statement).

Respondent would have me credit Gonsalves' hearsay testimony to find that she informed Fredrickson she interviewed Fredrickson only after determining *not* issue him discipline, no matter what she learned from during the interview. But Fredrickson's unrebutted testimony established that Johnson began the interview by telling him he was under investigation and proceeded to test his recollection of the event and attempt to elicit an admission that he had used profanity with a customer. Such questioning went well beyond the scope of merely relating a predetermined decision and took the interview beyond the parameters established in the *Baton Rouge* decision. See id. at 997.

Accordingly, I find that, by informing Fredrickson that Respondent was not recognizing the Union and therefore he was not entitled to a *Weingarten* representative, Curaleaf violated Section 8(a)(1) of the Act.

(ii) Directive to remove union insignia

Based on Respondent's own admission, I find that Gonsalves did, in fact, order Fredrickson to remove his union pin and lanyard as alleged and further find that Respondent failed to substantiate its claim that this order was later rescinded.

It is well established that an employee's right to wear union insignia while at work is protected by the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795−804 (1945). The Board has held that, in the absence of "special circumstances," an employer's prohibition of or limitation on the display of union insignia violates Section 8(a)(1). *Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enf. mem. 511 F.2d 527 (6th Cir. 1975); see also *Kolkka Tables*, 335 NLRB 844, 849 (2001) (unlawful to order employee to remove union stickers from his toolbox); *St. Luke's Hospital*, 314 NLRB 434, 494 (1994) (unlawful to direct employees to remove prounion insignia from their uniforms). It is the employer's burden to prove the existence of special circumstances, such as safety concerns, justifying its restriction on union insignia. *AT&T*, 362 NLRB 885, 887 (2015).

In this case, Respondent has failed to establish any special circumstances that justified Gonsalves' order and additionally failed to adduce evidence in support of its repudiation defense. I therefore find that it violated the Act as alleged.

### *C. Fredrickson's Discipline and Discharge*

The General Counsel alleges that Respondent retaliated against Fredrickson based on his union activities by disciplining him on February 29, 2024 and April 5, 2024, and ultimately discharging him on April 21, 2024. While maintaining that the record supports a finding that each of these actions was independently discriminatory pursuant to Section 8(a)(3), the General Counsel alternately argues that, because the February 29 discipline was unlawful and was considered in issuing the latter two adverse actions, it "tainted" them with illegality.

Respondent maintains that it had legitimate, nondiscriminatory reasons for issuing each of the disciplines, and that it would have disciplined and discharged Fredrickson even in the absence of his union activity. Respondent also claims that one of Fredrickson's disciplines was

barred by Section 10(b) of the Act, and that, pursuant to Section 10(c) of the Act, it cannot be required to reinstate Fredrickson or pay him backpay because it discharged him "for cause."

As discussed below, I find that the General Counsel has established that Fredrickson's written warning violated the Act, and further that Respondent relied on that discipline in issuing his final written warning and later discharging him, rendering these actions likewise unlawful. I further find that Respondent's Section 10(b) defense lacks merit and its Section 10(c) defense has been waived.

1. Fredrickson's post-certification union activities

As detailed above, Fredrickson was widely known to be the lead employee-organizer of the Midtown store budtenders. Following the Union's eventual February 2023 certification, he continued his open and assertive union activity.

(a) The September 2023 unfair labor practice strike

On September 15, 2023, several Midtown employees, including Fredrickson, engaged in a single-day strike to protest Respondent's discharge of a budtender at a different Phoenix store location. Fredrickson spent approximately 3 to 4 weeks before the September 15 strike rallying his coworkers' support for the action. He spoke to store associates whenever he was away from the sales floor, whether on breaks or before or after his shift. He did not work the three days leading up to the strike (September 12–14), instead using the time to prepare for the event. According to Fredrickson, he received verbal approval from Reff to use vacation days on September 12–14. He testified that he did so at least two weeks in advance, as required by Respondent's policy. Reff denied approving Fredrickson's leave for September 12. (Tr. 455–456, 459–464, 1556–1557.)

At 2 p.m. on September 15, Fredrickson and other Midtown budtenders, accompanied by Local 99 representatives Martin Hernandez (Hernandez) and Mario Gonzales (Gonzales), gathered at a parking lot adjacent to the Midtown store. As law enforcement officers arrived on the scene, Gonzales, Fredrickson and approximately a dozen other budtenders entered the store; they were greeted by Curaleaf's regional vice president of retail for the West Coast, Jim Smith, who briefly conversed with Gonzales. At that point, a police officer entered the store and physically ejected Gonzales from the building. Fredrickson and the other employees proceeded to march in front of the store with picket signs displaying slogans such as, "ON STRIKE AGAINST ULP" and "STOP SMOKING YOUR EMPLOYEES" in front of the store. Gonsalves was present at the event and appeared to use his cell phone to record or photograph the participants. (Tr. 185, 469–477, 479–480, 496–498; GC Exh. 41, 44.)

At some point during the event, which lasted until approximately 6 or 7 p.m., the group also held a press conference, at which local politicians and union representatives spoke. Fredrickson gave a speech and afterwards was interviewed by the press. A day following the strike, an online news article from a local Fox news affiliate appeared with the headline, "In Arizona first, marijuana dispensary workers go on strike." Fredrickson—the only Curaleaf employee named in the article—was quoted demanding that Curaleaf "come to the table" and negotiate with the

Union. He also appeared in a video embedded in the article, making the same statement. (Tr. 477–478, 483–484; GC Exh. 42; https://www.fox10phoenix.com/news/in-arizona-first-marijuana-dispensary-workers-go-on-strike.)

2. February 29, 2024: Respondent issues Fredrickson a written warning.

On February 29, SM Reff pulled Fredrickson off the sales floor into the store's conference room. Once there, Fredrickson asked to have his union representative present. Reff told him that Curaleaf "was not recognizing *Weingarten* rights at that moment" and further stated that the meeting was about a discipline and not an investigation, so he was not entitled to a representative in any event. She then said they were there to give him a write-up for his attendance and handed him a Corrective Action Form dated 6 days earlier, denoting a written warning and stating that he had been absent or late on four occasions. (Tr. 533–535.)

The narrative portion of Fredrickson's Corrective Action Form reads:

> On 4/27/23, you were issued a verbal warning for attendance and received notice that any further occurrences will result in the next corrective action up to and including termination. Since that time, you have had 4 additional occurrences:
>
> 9/12/23 - unexcused absence
> 12/17/23 - 17 minutes late
> 1/17/24 - 11 minutes late
> 2/20/24 - 10 minutes late

(GC Exh. 52.)

On its face, Fredrickson's written warning did not comport with Respondent's established policy, which provides for discipline for lateness or absences that "exceed 3 occurrences within a 3-month period." Instead, Respondent "looked back" not 3 but 5½ months to identify the four incidents justifying its action. Frederickson's written warning also notably omitted the stock reference to the 3-month look back period, instead quoting a more broadly worded portion of the written policy that warns, "[e]xcessive absenteeism and/or tardiness will lead to disciplinary action, up to and including separation." Id.

Approximately one month after receiving his written warning, Fredrickson informed Reff that there was something wrong with the written warning because he believed that he had been on vacation on one of the dates in question. She responded that he should reach out to Human Resources. (Tr. 553.) In fact, Fredrickson was correct—the first date listed (September 12) was the one of the days Fredrickson took as vacation in order to plan the September 15 strike. Respondent's business records, however, show that this was "unapproved vacation time" that could have been considered in issuing the written warning had it occurred within the 3 months prior to the discipline being issued.[19]

[19] Another aspect of the written warning was "off"—his tardiness on December 17 could not

The General Counsel alleges that this discipline was issued in retaliation for his union activities, that Reff engaged in coercive speech during his disciplinary meeting, and finally that language in Respondent's Corrective Action Form rendered the meeting an investigatory one in which Fredrickson was denied his requested representative.

3. April 5, 2024: Respondent issues Fredrickson a final written warning.

On April 3, 2024—approximately a month following his written warning—Fredrickson had a negative interaction with a customer who inquired about the day's specials. Fredrickson responded that, unfortunately, he did not have the deals memorized and referred her to a printed sheet on which they were listed. According to Fredrickson, the customer became verbally abusive and demanded a new budtender. Fredrickson alerted ASM Nitti, who took over the customer's transaction, and Fredrickson left the sales floor and reported to SM Reff. After Fredrickson told her what had happened, Reff said that he had been disrespectful and dismissive to the customer. (Tr. 555−556, 1186−1187.)

Fredrickson retorted that the budtenders did not get paid enough to have the deals memorized and memorizing the deals was not in their job description.[20] Reff replied that they worked in customer service and that was, in fact, why they were paid. She added that he did not need to memorize all of the deals but rather should have been more courteous with the customer. Fredrickson again insisted that he would not be able to memorize the deals and that they would have to "agree to disagree." Reff responded, "I am your manager. We can't agree to disagree." Fredrickson again stated he would not remember the deals, and then—walking back to the sales floor—said, "I guess I'll just have to file a Board charge against you." (Tr. 555−557, 1186−1188, 1615−1617, 1627.)

Two days later, Reff and ASM Jalen Pricer (Pricer) met with Fredrickson. After he asked for a *Weingarten* representative, Reff informed him that it was not an investigatory interview but rather a disciplinary meeting, and therefore, he was not entitled to a representative. Handing him a Corrective Action Form,[21] Reff said Fredrickson had been disrespectful towards a customer and insubordinate towards her when she attempted to coach him. (Tr. 558−561; GC Exh. 54.) According to Respondent, Fredrickson's final written warning was warranted in light of his prior discipline. See R. Br. at 80 (Fredrickson's "poor behavior warranted corrective action—having already received a verbal warning and a written warning." Although Respondent's progressive

---

have occurred because it is undisputed that he did not work that day. However, I credit Reff's explanation that, in drafting the Corrective Action Form, she meant to refer to December 16, on which Fredrickson was in fact tardy. I also credit her testimony that she observed Fredrickson enter 17 minutes late on the 16th, despite him having clocked in four minutes earlier.

[20] I credit Fredrickson's version of this conversation, as generally corroborated by ASM Jalen Pricer. I found Reff's sanitized version rehearsed and do not credit it.

[21] As with the meeting regarding Fredrickson's written warning, the General Counsel alleges that the "Team Member Comments" section in the Corrective Action Form presented on April 5, 2024, rendered the meeting an investigatory one in which he was denied his requested representative.

disciplinary policy allows for skipping steps for offenses such as insubordination, decisionmaker Reff did not testify that she would have issued him the final written warning even in the absence of his prior discipline.

4. April 21, 2024: Respondent discharges Fredrickson.

On April 9, 2024, Fredrickson was assigned as the "host" of the Midtown store. This meant that his primary job duty that day was to check the identification of those seeking to enter the dispensary to ensure that no minor was permitted access to the sales floor. Fredrickson failed check the ID of a minor, a mistake that was discovered by budtender Joylisha Lloyd (Lloyd), after minor identified themselves as underage.[22] After Lloyd reported the incident, SM Reff confronted Fredrickson, who admitted his error and promised that it would not happen again. (Tr. 424–425, 669, 1190–1196, 1200.)

According to Reff, she made the decision to discharge Fredrickson the same day. He was not actually discharged, however, until April 21, 2024. Reff testified that, during that period of time, she was waiting for approval from Curaleaf's human resources for the discharge. The record contains only one other instance of an employee being disciplined for admitting a minor to the sales floor. In January 2023, Respondent issued a final written warning to a budtender for allowing a known minor access to a (non-Midtown store) Curaleaf sales floor. Reff testified that she "believed" that this discipline was "escalated to a final" but the record does not disclose whether this was in fact the case. (GC Exh. 88; Tr. 1197–1199.)

As with Fredrickson's final written warning, Respondent appears to have explicitly considered Fredrickson's prior discipline in discharging him. While arguably Curaleaf's progressive disciplinary policy would have permitted Reff to accelerate his discipline based on him committing a serious offense, there is no indication that she would have done so in the absence of his prior discipline, and the evidence weighs against this conclusion. Fredrickson's Corrective Action Form for his discharge states, "This will result in separation of employment due to previous failures in conduct." See R. Br. at 80. Moreover, Respondent by its post-hearing brief admits that "Fredrickson was discharged because termination was simply the next step in Curaleaf's progressive disciplinary policy." (GC Exh. 56; Tr. 1197.)

5. Analysis

(a) The 8(a)(3) standard

In adverse-action cases in which the employer's motive is at issue, the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Pursuant to *Wright Line*, General Counsel must satisfy their initial

[22] Budtenders are also required to check the ID of those purchasing a product, but this is primarily to ensure that their transaction if credited to the correct customer profile. Unlike the host, a budtender would therefore not be expected to check the ID of an individual until they expressed interest in making a purchase. (Tr. 1192–1196.)

burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor in the employer's adverse employment action. Id. at 1089; *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 2 (2023). The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Proof of unlawful employer motivation may be based upon direct evidence or may be inferred from circumstantial evidence based on the record as a whole. *Brink's, Inc*., 360 NLRB 1206, 1206 fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006). Indeed, the Board has stated that, "[m]ore often than not, the focus in litigation . . . is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a ""motivating factor" in the employer's decision.'" *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019) (quoting *Wright Line*).

Typically, once the General Counsel has established an initial case under *Wright Line*, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. In order to meet this standard, the employer must do more than assert a legitimate basis for the adverse employment action or show that legitimate reasons affected its decision. Instead, it must "persuade . . . by a preponderance of the evidence" that "the action would have taken place absent protected conduct." *Weldun International*, 321 NLRB 733 (internal quotations omitted), enf'd. in relevant part 165 F.3d 28 (6th Cir. 1998); see also *NLRB v. Transportation Mgmt. Corp*., 462 U.S. at 401.

Where, however, the record as a whole demonstrates that the employer's proffered reasons "are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Cadillac of Naperville*, 371 NLRB No. 140, slip op. at 2 (2022) (citing *Golden State Foods Corp*., 340 NLRB 382, 385 (2003)); see also *Ground Zero Foundation*, 370 NLRB No. 22, slip op. at 7 (2020); *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. at 7 (2018); *Aliante Casino & Hotel*, 364 NLRB 1186, 1186, 1197 (2016); *Metropolitan Transportation Servs.*, 351 NLRB 657, 659 (2007).

(b) "Tainted" employment actions

The Board has long held that "where an employer disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." *Kitsap Tenant Support Services, Inc*., 366 NLRB No. 98, slip op. at 27 (2001) (quoting *Hays Corp.*, 334 NLRB 48, 50 (2001)); *Southern Bakeries, LLC,* 366 NLRB No. 78 (2018); *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995); *Dynamics Corp*., 296 NLRB 1252, 252–1255 (1989), enfd. 928 F.2d 609 (2d Cir. 1991); *Asociacion Hospital del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988); *Celotex Corp.,* 259 NLRB 1186, 1186 fn. 2 & 1190–1193 (1982).

Where it is established that an employer relied at least in part on prior unlawful discipline in taking an adverse employment action, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the prior unlawful discipline. See, e.g., *Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1521 (6th Cir. 1996); *Southern Bakeries,* 366 NLRB No. 78, slip op. at 2; *Dynamics Corp*., 296 NLRB at 1254; *Celotex*, 259 NLRB at 1186 & fn. 2, 1191−1192.

(c) Fredrickson's union activity

The evidence amply establishes that Fredrickson engaged in union activity of which Respondent was aware. He was the Union's primary contact, regularly wore Local 99 insignia, solicited employees to sign union authorization cards and organized a 1-day unfair labor practice strike at the Midtown store to protest the discharge of a union adherent at another Curaleaf location. He participated in multiple union actions, gave interviews to local news organizations and appeared at a press conference raising awareness of the first-ever union organizing campaign at an Arizona cannabis retail store. After the ballot count at the Midtown store, he insisted on his *Weingarten* rights when faced with what he perceived to be investigatory interviews and threatened to file an unfair labor practice charge against SM Reff.

(d) Curaleaf issued Fredrickson the February 29, 2024 written warning in retaliation for his union activities.

Application of the *Wright Line* burden shifting analysis to Fredrickson's written warning for time and attendance violations dictates that a finding that, by this action, Curaleaf discriminated against Fredrickson for his extensive and ongoing union activities.

The General Counsel has established a prima facie case with respect to the written warning. Respondent's knowledge of Fredrickson's union activities having been well demonstrated throughout the record, the evidence further establishes anti-union animus on the part of Respondent, and with respect to Fredrickson in particular. Cox made coercive statements during Respondent's campaign against the Union, including threatening employees' pay and benefits and telling the workforce that Respondent would not be required to bargain in good faith. While not in attendance at the "huddle" meeting in which these remarks were made, Fredrickson was subjected to an hour long, two-on-one personal sit down with Gonsalves and Cox, during which they accused him of being ignorant for supporting the Union and insinuated that Local 99 was dishonest and had tax problems.

By the time Respondent issued him a written warning, Fredrickson had already been on the receiving end of multiple 8(a)(1) violations, including being (a) forbidden from discussing a health and safety issue at work, (b) told Respondent was not recognizing the Union, and (c) ordered to remove his union insignia. This conduct by Respondent easily establishes animus towards the Union and towards Fredrickson's union activities in particular. *Lucky Cab Co*., 360 NLRB 271, 274 (2014) (employer's contemporaneous 8(a)(1) violations demonstrate animus).

Respondent, for its part, claims that Fredrickson's discipline was consistent with its typical practice of disciplining employees for time and attendance violations and offers numerous

examples of "comparable" discipline issued to employees in the absence of union activity. As discussed below, I reject this claimed reliance on standard disciplinary practice as pretextual and further rely on it as evidence of animus. See *Airgas USA*, 366 NLRB No. 104, slip. op. at 2 (2018) (noting that a finding of disparate treatment, among other factors, supported a finding of animus) (citing *Aliante Gaming*, 364 NLRB 995, 995 fn. 3 (2016)), affd. 916 F.3d 555 (6th Cir. 2019).

The record simply does not support Respondent's proffered *Wright Line* defense. As noted, Respondent's policy provides for discipline when an employee exceeds 3 instances of tardiness in a 3-month period. Fredrickson's written warning departed from this standard, in that it "looked back" beyond the 3-month period in order to identify the requisite 4 instances of tardiness. This distinguishes it from Respondent proffered comparators, who were subjected to, at most, a 3-month "look back." At hearing, Respondent's witnesses offered no explanation for this aberration, or for having broken with its corresponding practice, in Fredrickson's Corrective Action Form, of reciting the 3-month standard.

An employer's unprecedented departure from its typical practices and procedures in imposing and effectuating discipline or discharge may be indicative of pretext. See, e.g., *Roemer Industries*, 367 NLRB No. 133, slip op. at 1, fn. 3 & 16 (2019) (citing *Purolator Armored v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985)). Moreover, it is well-settled that disparate treatment of similarly situated employees not known to have engaged in union or protected concerted activity may constitute evidence that an employer's allegedly legitimate, nondiscriminatory justification for an adverse employment action is in fact pretextual. See, e.g., *Lhoist North America of Alabama*, 370 NLRB No. 112, slip op. 1, fn. 3 & 16 (2021), enfd. 2023 WL 4679013 (11th Cir. 2023); *Pontiac Care & Rehabilitation Ctr.*, 344 NLRB 761, 767 (2005).

Because I reject Respondent's defense to Fredrickson's written warning, Respondent fails by definition to show that it would have taken the same action for those reasons, absent Fredrickson's union activity, and thus there is no need to perform the second part of the *Wright Line* analysis as to that allegation. See, e.g., *UPS*, 372 NLRB No. 158, slip op. at 20 (2023) ("Since 'pretext' means that the stated reasons are either false or not in fact relied upon... our finding of pretext 'defeats any attempt by the [r]espondent to show that it would have discharged' [the discriminatee] absent his protected activity.") (quoting *Rood Trucking Co.,* 342 NLRB 895, 898 (2004)); see also *Metropolitan Transportation Services*, 351 NLRB at 659; *Sanderson Farms, Inc.*, 340 NLRB 402, 402–403 (2003), enfd. 112 Fed. Appx. 976 (5th Cir. 2004); *Golden State Foods*, 340 NLRB at 385; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Accordingly, I find that, by issuing Fredrickson a written warning on February 29, 2024, Respondent violated Section 8(a)(3) of the Act.

(e) Fredrickson's final written warning and discharge were "tainted" by his unlawful written warning and therefore violated the Act.[23]

The Board has long held that employers should not be "permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline." *Postal Service,* 367 NLRB No. 142, slip op. at 2 (2019). Thus, as noted above, an employer's imposition of discipline violates the Act if it relies on prior discipline that violated the Act and fails to show it would have issued the same discipline even without reliance on the prior unlawful discipline. *Southern Bakeries, LLC*, 366 NLRB No. 78, slip op. at 2 (2018); *Dynamics Corp*., 296 NLRB at 1252–1255; *Celotex Corp,*, 259 NLRB at 1186 fn. 2 & 1190−1193. Application of these principles to the instant case compels a determination that Fredrickson's final written warning and discharge violated the Act.

As discussed above, Respondent reserves the right, under its progressive discipline policy, to combine or skip discipline steps—or even to totally forgo progressive discipline—for conduct such as "serious neglect of duty, insubordination [and], violation of safety rules . . . " (GC Exh. 5(a).) Considering the nature of the events giving rise to Fredrickson's final written warning (arguing with Reff over his job duties) and admittedly failing, as host, to check an ID, Respondent may well have been within its rights to rely on this portion of its policy. However, Reff—the sole decisionmaker—did not testify that she would have taken the same actions in the absence of his prior written warning. In fact, Respondent has taken the opposite position throughout these proceedings. Its post-hearing brief states that his April 3 conduct "warranted corrective action—[Fredrickson] having already received a verbal warning and written warning." (R. Br. at 80.) It also states unequivocally that "Fredrickson was discharged because termination was simply the next step in Curaleaf's progressive discipline policy." (R. Br. at 82.) This is consistent with the content of his discharge Corrective Action Form, which states, "[t]his will result in separation of employment due to previous failures in conduct." (GC Exh. 56.)

As such, I find that Respondent has failed to rebut the General Counsel's showing that Fredrickson's final written warning and discharge were "tainted" by his prior, unlawful written warning. *NLRB v. Relco Locomotives*, 734 F.3d 764, 787 (8th Cir. 2013) ("An adverse employment decision is unlawful if it relies upon and results from a previous unlawful action."); *Opportunity Homes, Inc. v. NLRB*, 101 F.3d at 1521 (discharge of employee for insubordination tainted where decisionmaker "could not say that she would have fired [employee] if [prior, unlawful] suspension had not occurred").

[23] The General Counsel alleges that Fredrickson's discharge amounted to a more strict enforcement of Respondent's "policy regarding disciplining employees for hosts checking patient identifications" in violation of Section 8(a)(3) and (5). However, the record contains no evidence of any such policy. I therefore recommend that this allegation be dismissed. The General Counsel also alleges that Respondent, on April 9, 2024, "more closely supervised" Fredrickson in violation of Sections 8(a)(3) and (5) of the Act. (August 14, 2024 complaint ¶ 6(d).) By its post-hearing brief, however, the General Counsel makes no mention of this allegation, and I consider it waived.

(f) Fredrickson's final written warning independently violated the Act.

Even were it not "tainted" by his prior, unlawful discipline, I would find that Fredrickson's April 5, 2024 final written warning amounted to a violation of Section 8(a)(3). As discussed, Fredrickson was squarely on Respondent's radar as the store's chief employee-organizer and was the target of individual 8(a)(1) statements. Moreover, his April 3 conduct was quintessentially protected—he complained that the budtenders were underpaid and, when Reff attempted to shut down his critique (telling him that she was the boss and they could not "agree to disagree"), he threatened her with a Board charge. Where an employee is disciplined "for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act." *Goya Foods, Inc.*, 356 NLRB 476, 477 fn. 11 (2011) (citing *Consumers Power Co*., 282 NLRB 130, 132 (1986)) (footnote omitted).

Respondent maintains that, in challenging Reff, Fredrickson engaged in insubordination that cost him the Act's protection. At the most basic level, this argument fails olfactory examination. The essential component of insubordination is a willful disregard of or refusal to obey an order. See *Crown Cork & Seal Co.*, 253 NLRB 310, 316, fn. 29 (1980) (insubordination is "'refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer.'") (citing Black's Law Dictionary).

In Fredrickson's case, Curaleaf has failed to identify what order or instruction Fredrickson refused. He asserted that he and his coworkers did not get paid enough to memorize Respondent's daily deals, by Reff's own telling, however, she never ordered him to do so. Instead, she told him that she wanted him to interact courteously with customers, which he never refused to do. After she pronounced that he had no right to disagree with her about whether the budtenders were fairly paid, he threatened to file a Board charge against her. While brazen and perhaps somewhat impertinent, Fredrickson was undoubtedly asserting his Section 7 rights. See *Tamara Foods*, 258 NLRB 1307, 1308 (1981) (whether an employee could have made his case in a "more efficacious or reasonable manner" irrelevant to whether activity was protected), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983).

To the extent any part of Fredrickson's April 3 conduct could be considered insubordinate, it was not of the caliber that would trigger the loss of his Section 7 right to complain about the budtenders' wages. When evaluating whether insubordination triggered a loss of the Act's protection, the Board distinguishes between "true insubordination" and behavior that is only "disrespectful, rude, and defiant." Id. at 478; see also *Severance Tool Industries,* 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992).

At the very most, Fredrickson's fell squarely into the latter category and therefore retained protection under the Act. Were protesting about wages and threatening to file a Board charge deemed unprotected, there would be very little left of Section 7 to enforce. Accordingly, even were it not "tainted" by his prior, written warning, I would find that Fredrickson's final written warning independently violated Section 8(a)(3) of the Act.

(g) Respondent's 10(b) procedural defense fails.

Respondent argues that pursuant to Section 10(b) of the Act,[24] one of Fredrickson's discipline allegations is unsupported by a timely filed charge and therefore must be dismissed.

By way of background, the charges in this proceeding include two that name Fredrickson—Case 28-CA-342154, which alleges that he was discharged, and Case 28-CA-337417, which alleges that Respondent issued him a "final warning." Despite this terminology, as of the charge filing, Fredrickson had not yet received a final written warning, but only his February 2024 written warning. After Respondent did issue his final written warning, the charge was amended to allege a *Weingarten* allegation, while maintaining the reference to a single "final warning." It follows, according to Respondent, that the Board lacks jurisdiction over either Fredrickson's February 2024 written warning or his April 2024 final written warning. I disagree.

The purpose of an unfair labor practice charge "is merely to set in motion the machinery of an inquiry" and is not itself "to be measured by the standards applicable to a pleading in a private lawsuit." *NLRB v. Fant Milling Co*., 360 U.S. 301, 3078–308 (1959). The Board—not the charge filer—is responsible for undertaking this inquiry and framing the issues in the case. As the Supreme Court has explained:

> To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act.

Id. at 307–308 (citations omitted). For this reason, Section 10(b) permits litigation of certain unfair labor practice allegations that were not raised in a timely charge but "are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." Id. at 308–309 (footnotes, citations, and internal quotations omitted).

In *Redd-I, Inc*., 290 NLRB 1115 (1988) and *Nickles Bakery of Indiana*, 296 NLRB 927 (1989) the Board held that a complaint allegation satisfies the *Fant Milling* "relatedness" criteria if it: (a) involves the same legal theory as that contained in a pending timely charge, (b) arises from the same factual circumstances or sequence of events as a timely charge and (c) if a respondent would raise similar defenses to those in the charge.

In *Carney Hospital*, the Board explicitly addressed the second prong of that test, noting that, the "chronological coincidence during a union's campaign does not warrant the implication that

[24] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." In addition to functioning as a statute of limitations, this provision operates as a jurisdictional limitation, under which the Board (through the General Counsel) "may investigate and prosecute conduct only in response to the filing of a 'charge.'" *Precision Concrete v. NLRB,* 334 F.3d 88, 90 (D.C. Cir. 2003) (quoting *Ross Stores, Inc. v. NLRB,* 235 F.3d 669, 677 (D.C. Cir. 2001) (Randolph, J., concurring)).

all challenged employer actions are related to one another as part of a planned response to that campaign." 350 NLRB 627, 630 (2007). However, it explained, "a sufficient factual relationship can be established by showing that the timely and untimely alleged employer actions are 'part of an overall employer plan to undermine the union activity.'" Id. Thus, the second part of the test will be satisfied where two sets of allegations "demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity…" Id.

I find that Fredrickson's final written warning is closely related to the charge that his prior, written warning violated the Act and is therefore not barred by Section 10(b). The two disciplines occurred approximately one month apart and share a common legal theory—that Reff targeted Fredrickson for discipline based on his union activity. Moreover, there is a causal nexus between the allegations, insofar as Respondent relied on the written warning in issuing the final written warning. Thus, to the extent that I have found that Reff manufactured a time and attendance infraction in order to set him along the progressive discipline path, the final written warning was simply the next step in Respondent's overall plan designed to rid itself of the Midtown store's chief union adherent. Finally, the allegations involve similar defenses, i.e., whether there was a legitimate, nondiscriminatory reason for the Respondent's actions. See *Starbucks Corp*., 372 NLRB No. 50 (Feb. 13, 2023); *Kentucky Tennessee Clay Co*., 343 NLRB 931, 932 (2004).

Accordingly, I find that Fredrickson's April 5, 2024 final written warning is closely related to the timely filed charge alleging his prior written warning, and that therefore Respondent's 10(b) defense lacks merit.

(h) Respondent's Section 10(c)[25] argument has been waived.

Separate from the merits of a particular unfair labor practice allegation, Section 10(c) of the Act permits a respondent to raise an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause," to be considered in light of the facts of the particular case. *Total Security Mgmt.*, 364 NLRB 1532, 1546 (2016). However, an affirmative defense must be timely raised in the answer or litigated at trial; it is waived if first raised in a party's post-hearing brief. *Freedom Electric Construction LLC*, 373 NLRB No. 61, slip op. at fn. 2 (2024); *EF International Language Schools, Inc.*, 363 NLRB 191 fn. 2 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *Approved Electric Corp.*, 356 NLRB 238 fn. 1 (2010); *Newspaper & Mail Deliverers' Union of New York (New York Post)*, 337 NLRB 608, 609 (2002).

[25] As noted, Section 10(c) of the Act provides, in relevant part:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

In the instant case, Respondent failed to state its Section 10(c) defense in its answers and additionally failed to litigate the issue at trial. By raising the defense for the first time in its post-hearing brief, Respondent has waived it, and it cannot be considered.

*D. Weingarten Allegations involving Respondent's Corrective Action Form*

As noted, the General Counsel alleges that the "Team Member Comments" section in the Corrective Action Forms presented to Fredrickson on February 29 and April 5, 2024 rendered these meetings "investigatory," for purposes of *Weingarten*. Specifically, it is alleged that the forms' language permitting the employee to submit a written statement of their 'side' of the discipline constituted investigatory questioning giving rise to *Weingarten* rights. I disagree.

In its 1979 decision, *Baton Rouge Water Works*, the Board held that an employee has no Section 7 right to the presence of a representative at a meeting with his employer held for the purpose of informing the employee of a previously made disciplinary decision. 246 NLRB 995. Such is the case even where the parties discuss the discipline; such an exchange, "during which the employee expressed his disagreement with, and the employer explained his reasons for, the disciplinary action" simply does not convert a non-investigatory interview into an investigatory one. Id.; see also *Houston Coca Cola Bottling Co*., 251 NLRB 860, 861 (1980) (no *Weingarten* rights arose where, following the issuance of predetermined discipline, employer permitted employee to state his explanation of events).

In the instant case, Reff offered unrebutted testimony that she made each of the disciplinary decisions at issue prior meeting with Fredrickson on February 29 and April 5, 2024, and further that nothing an employee wrote in the "Comments" section of the Corrective Action Form is used to determine the level of discipline. The form afforded Fredrickson an opportunity to state his version of events, not to talk his way out of receiving the discipline in question. This, like the post-disciplinary discussions in *Baton Rouge* and *Houston Coca Cola*, supra, was not part of an ongoing investigation and therefore did not trigger any *Weingarten* right.

Accordingly, I recommend that paragraph 5 of the August 14, 2024 complaint be dismissed.

*E. Allegations Involving Crawford*

As discussed, the General Counsel claims that Respondent suspended and discharged Crawford in retaliation for her union support and, alternately, for engaging in protected, concerted activity. It is further alleged that Gonsalves unlawfully coerced Crawford by informing her that she was not entitled to identify anyone as her union representative. As discussed below, I find merit to the latter, but not the former, allegation.

1. Facts

Crawford was hired by Respondent in October 2021 to work as a budtender at the Midtown store. After a month, she transferred to another Curaleaf location in Phoenix at the request of then-SM Reilly but then transferred back to the Midtown store in January 2022. Crawford—who desired full-time work—testified that, each time she moved locations, she was assured by management that transferring was a path towards a lead budtender position. Both before and after May 3, 2022, she spoke with her coworkers, including Fredrickson and Tinajero, about their shared concern that, as part-time employees, they were not eligible for employee benefits. (Tr. 697–704 , 717–719.)

(a) Crawford's union activity

In March 2022, Crawford attended an employee-only brunch where Fredrickson spoke about the Union; that month, she also electronically signed a union authorization card and wore a Local 99 pin on her work lanyard for an unspecified period of time. There is no evidence that Respondent was aware of this conduct on her part.[26] She (sometimes along with Fredrickson and other Curaleaf employees) also spoke weekly, after work, with two outside organizers for the Union in the parking lot of a vacant building near the Midtown store. The organizers, according to Crawford, promised to "help come in and help us get full-time positions," more hours and prevent managers from stealing the budtenders' tips. (Tr. 704–705, 723–729, 880–881, 885–887; GC Exh. 59)

Shortly after Cox appeared at the Midtown store in May 2022, Crawford and he developed a romantic relationship. During the period running up to the election, she regularly shared with him the details of her parking lot-discussions with Local 99 organizers; he typically responded that their promises of improved work conditions were not true and that the organizers would tell the employees "anything" to get their vote. Ultimately, at Cox's behest, Crawford voted against union representation; she informed Cox of this at the time. (Tr. 725–726, 732–734, 814–815.)

(b) Crawford's post-election protected, concerted activities

Crawford testified that, following the June 30 ballot count, she spoke with her coworkers on a daily basis about their working conditions, including the quality and size of product they received as bonuses, a rodent infestation in the building, being treated with disrespect by Reff and the lead associates, and management cutting themselves into the budtenders' tip pool. According to Crawford, the budtenders had raised at least some of these subjects with an unspecified member of management to no avail.[27] Although she specifically named six such individuals as participating in such discussions, only one of them (Fredrickson) corroborated her on this point. Furthermore, while she claimed that these conversations occurred on a daily basis,

[26] Crawford testified that she told lead budtender Ben Valero that she had signed an authorization card; there is no allegation, however, he was a 2(11) supervisor or 2(13) agent of Respondent. See Tr. 343, 810, 816, 868, 873.

[27] Crawford's testimony in this regard was vague and went uncorroborated.

she later clarified that an unspecified portion of them actually took place outside of work. (Tr. 735–737.)

(c) August 18, 2022: Crawford violates Respondent's tip pooling policy.

The Midtown store features a long counter separating customers from the sales associates. At several places along the counter, a computer and cash drawer are situated. Customers may tip their budtender following a sale, and a tip jar is situated on the counter near each computer. Although customers generally place their tips in the jar, they also sometimes simply leave the tip on the counter, in which case the budtender is expected to place it in the jar. ASM Pricer testified that he trained Crawford as a new hire, specifically instructing her that all tips were required to be pooled.

The video evidence shows, and Crawford admits, that she "pocketed" a $6 tip on August 18, 2022. Specifically, video footage shows Crawford concealing the cash tip in an inventory bin, taking the bin off the sales floor and then recovering the cash in her pocket. At hearing, Crawford claimed that, early in her tenure with Curaleaf, she was told by management that she could take personal tips, as long as she did so outside the presence of other employees, in order to avoid them being jealous. This rather unlikely version of events went uncorroborated. (Tr. 132, 259–262, 1537, 1621–1623; R. Exhs. 18(c), 18(d).)

(d) August 30, 2022: Crawford emails complaints to Gonsalves.

Crawford admitted to having a strained personal relationship with Reff; the two of them, he testified, "were just getting into it every day"; as an example, recounted an incident in which Reff forced her to change her "cropped" shirt although other associates had been permitted to wear similar shirts. Crawford—who is African-American—also testified that one of her white coworkers continuously used the word "nigga" at work, and that "managers were aware of the situation" and "thought it was funny." (Tr. 740–741, 874.)

On August 30, Crawford emailed then-District Manager Gonsalves as follows:

> Subject: midtown
>
> Hey Ryan, I'm reaching out to you because i honesty don't know who else to talk to or express my problems and concerns. Me and a few other budtenders have been having issues in the store and we are in this same bubble of not having anyone to turn to at this location. Im reaching out because i love my job here at curaleaf but its to the point where im uncomfortable & walking on egg shells here and I'm just trying to do my job. I really need to talk to someone who can listen and maybe find a solution, alot of others are scared to reach out because they fear of retaliation, i have been holding stuff in to avoid any bad blood or anything but its becoming alot. If we could maybe set up a time to talk that would be great.

Crawford testified that what led her to send the email was the incident in which Reff admonished her for wearing a "cropped" shirt. According to Crawford, she did not consult with any coworker when writing the email, nor did she inform anyone before she sent it. Gonsalves responded, asking Crawford if she would be comfortable meeting with him. (GC Exh. 6; Tr. 741, 883.)

Crawford assented and, within an hour, Gonsalves and DM Holstein met with her at the Midtown store. By her own admission, she did not use the meeting to impart concerns she had discussed with her coworkers but instead advanced her own agenda. Complaining about how Reff treated her, including recently singling her out for wearing a cropped shirt, Crawford told the managers of her interest in becoming a lead budtender; as she explained, "I was just speaking on my behalf."[28] Gonsalves said that he understood and would speak with Reff.

Toward the end of the conversation, Crawford stated that would let Local 99 organizer Gonzalez know about their discussion; Gonsalves responded by stating that the Midtown employees were not represented by the Union, so it was not necessary for her to update Gonzalez, and that she "[did not] have a Union rep to talk to." (Tr. 142–143, 185, 743–744, 749–751, 878–880.) This statement is alleged by the General Counsel to constitute unlawful coercion.

(e) September 11, 2022: Respondent learns of Crawford's tip theft.

Crawford's tip theft was discovered by lead budtender Hall during her response to a customer complaint. Specifically, the customer complained to Hall about not getting a "first responder" discount; an off-duty Crawford became involved when the customer (with whom she was friendly) called her on speaker phone from the store to confirm that he was entitled to the discount. The matter was reported to ASM Nitti, who had doubts about the customer's bona fides as a first responder; she called SM Reff, who advised her to review the customer's sales transactions to see who had been giving him the discount.

Nitti reviewed records of the customer's recent transactions, Crawford was the budtender for many of them. She then reviewed video footage[29] of those transactions; two August 18 video clips showed him leaving a $6 tip on the counter in front of Crawford, who pocketed the tip rather than put it in the tip jar. I credit Nitti's testimony that she inadvertently discovered Crawford's theft in this manner. (Tr. 266–273, 1450–1454, 1538–1539.)

(f) Respondent's Asset Protection team investigates Crawford.

[28] I do not credit Crawford's testimony that she also mentioned the racial slur used by a coworker or the lead associates' lack of respect for the budtenders. It appeared thrown in as an afterthought, after which she qualified, "it was really more so about the lead position." (Tr. 749, 823.)

[29] The Midtown store features multiple cameras that record video but not sound. (Tr. 263–264.)

The same day, Nitti sent the latter two videos, along with an email describing what had occurred, to Reff, who forwarded them to Holstein, Johnson, and Cook. Holstein consulted with Senior Security Manager Ashleigh Burden (Burden) and then forwarded the videos to her and Curaleaf's National Director of Investigations, Robert Patterson (Patterson) with the understanding that he and Burden would take over. Crawford was informed that she was being suspended (with pay) pending an investigation. (Tr. 206, 1540–1541; GC Exh. 10; R. Exh. 21.)

Ten days later, on September 21, a Teams call was held between Patterson, Burden, Holstein, Cook, and Johnson. Burden presented her investigatory findings, namely that Crawford was suspected of tip theft and incorrect discounting. A decision was made that Peterson would interview Crawford, with the understanding that, were the allegations against Crawford substantiated, her suspension would continue pending a disciplinary determination. (Tr. 182, 185–186, 194, 282–286, 1398, 1453–1454; R. Exhs. 21, 27.)

Later that day, Peterson interviewed Crawford at the Midtown store with Burden as a witness. Peterson had Crawford confirm that she was aware of the company's tip pool policy. He then asked why she had put a $6 tip in her pocket. Crawford admitted to taking the cash and then admitted that she had done so on one or two other occasions, totaling $15 in tips.[30] At the end of the meeting, Peterson asked Crawford to write a statement, which she did. In her statement, Crawford claimed that, when she started working for Curaleaf, a customer offered to directly tip her $16, and that she "verified with management at the time if I could take personal tips and both GM and ASM confirmed I could." She further stated that she had been specifically instructed that she should always accept such tips where a camera would record her doing so, but to be courteous of her coworkers, who might be jealous; this, she stated, was why she secreted the tip and only pocketed it once she was away from the counter. (Tr. 188, 190–192, 285–291, 757, 760–765, 1402–1406, 1410–1411; R. Exh. 24.)

Following the interview, Peterson prepared a written report summarizing the investigation, to which he attached Crawford's statement; he emailed these items to Johnson, Holstein and Cook on September 23. Based on the report, Johnson decided to discharge Crawford for admittedly stealing tips.[31] SM Reff informed Crawford of the decision on October 6, 2022. (GC Exh. 10; R. Exhs. 23, 25; Tr. 1542.)

Peterson testified that, in his tenure with Curaleaf, he could not recall any occurrence of a substantiated finding of tip theft that did not result in the employee being discharged. Indeed, Respondent produced three examples of other employees being discharged, like Crawford, for admitted theft of tips. In each of these cases, however, the amount of the theft ranged between

[30] I do not credit Crawford's testimony that she in fact told Peterson that she did not recall whether she had taken the $6, maintained that position throughout the interview and did not admit to taking additional tips. This testimony was notably scattered and rambling, suggesting that she was obfuscating.

[31] Johnson did not testify, but the parties stipulated as to her decisionmaker status. (Tr. 200–202.)

$50 and $80—considerably more than in Crawford's case. (GC Exh. 11−16; Tr. 215−229, 1426−1427.)

2. Analysis

The General Counsel alleges that Crawford's suspension and discharge were motivated by her union activities, and alternately by her protected, concerted conduct. The General Counsel additionally alleges that Gonsalves violated the Act by informing Crawford on August 30, 2022, that she "[did not] have a Union rep to talk to." As a preliminary matter, I find that this statement did amount to an independent 8(a)(1) violation. See *Freuhauf Trailer*, 335 NLRB at 403 (falsely telling represented employee, "this is a nonunion shop," constitutes independently unlawful act of coercion) (citing cases).

As discussed below, however, I do not find that Crawford's suspension or discharge violated the Act based on either theory asserted by the General Counsel.

(a) The 8(a)(1) theory

The General Counsel alternately argues that Crawford was suspended and discharged based on her protected, concerted conduct—specifically, for concertedly complaining with her coworkers about various issues, including SM Reff's management style. For the reasons set forth below, I disagree.

(i) The Section 7 standard

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." With respect to the "mutual aid and protection" component, the Board law is clear that employees have a protected right to complain not only about their substantive terms and conditions of employment but also about the conduct of management. *Bates Paving & Sealing, Inc.*, 364 NLRB 509, 511 (2016); see also *Arrow Electric Co.*, 323 NLRB 968, 970 (1997), enfd. 155 F.3d 762 (6th Cir. 1998).

The lone act of a single employee may still be deemed concerted activities where it "'stems from'" or "'logically grew'" out of prior concerted activity. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 265 (9th Cir. 1995); see also *Meyers Industries, Inc*., 281 NLRB 882, 885 (1986) (under proper circumstances, single employee may engage in concerted activity). To establish that a solitary individual has engaged in conduct undertaken in furtherance of, or a "logical outgrowth" of, group concerted activity, the Board does not require proof of his actions were expressly authorized or endorsed by his coworkers. See, e.g., *Gold Coast Restaurant Corp.*, 304 NLRB 750, 752–753 (1991) (finding concerted complaint where single employee, acting without authority from other employees, reported to management the group's dissatisfaction with their pay). Instead, once there has been established the existence of a common complaint or concern which transcends the interests of that employee alone, an employee's individual conduct will be deemed concerted as a continuation of the employees' protected activity. See, e.g., *Every Woman's Place, Inc.*, 282 NLRB 413, 413 (1986).

(ii) The General Counsel established a prima facie case.

a. Crawford engaged in protected concerted activity of which Respondent was aware.

The General Counsel argues that Crawford engaged in extensive discussions with her coworkers on the sales floor in which they complained about their part-time status, lack of benefits and poor treatment by management. While there is no direct evidence that these discussions were overheard by any supervisor or manager, Crawford— by emailing Gonsalves on August 30, 2022—firmly put Respondent on notice that she and her coworkers had been "having issues in the store," were isolated "in this same bubble of not having anyone to turn to at this location," and that she was speaking out on behalf of those who were afraid to reach out for fear of retaliation. Thus, at a minimum, Respondent appears to have believed that Crawford had engaged in protected conduct with her coworkers. *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at 2 (2018) (finding unlawful discharge based on belief employees engaged in protected concerted activity, regardless of whether they actually did so); *Holyoke Visiting Nurses Assn*., 310 NLRB 684, 687−688 (violation of Sec. 8(a)(1) and (3) to take action against employee because of employer's conclusion that she had supported a union protest), enfd. 11 F.3d 302 (1st Cir. 1993).

The General Counsel urges that I additionally find knowledge of the employees' workplace discussions to Respondent based on the "small plant doctrine," which I find appropriate, based on the small footprint of the sales floor, the number of employees at the Midtown store, the ubiquitous presence of supervisors and managers on the sales floor and testimony that employees spoke freely about the union and other workplace issues. See, e.g., *Strategic Technology Institute, Inc.*, 371 NLRB No. 137, slip op. at 1, fn. 1 (2022) ("small-plant doctrine 'applies when the facility is small and open, the workforce is small, the employees make no great effort to conceal their union activities, and management personnel are located in the immediate vicinity of the protected activity, which increases likelihood of knowledge'") (citing *Roemer Industries*, 367 NLRB No. 133, slip op. at 15 (2019), enfd. 824 F. Appx. 396 (6th Cir. 2020)).

Applying the above-referenced standards, it is clear that—at a minimum—Respondent was under the impression that Crawford engaged in protected Section 7 activity. She gained an audience with Gonsalves and Holstein by disclosing that she and her coworkers were dissatisfied with store management; that she changed course and used that audience to advance her individual agenda did not 'unring' that bell. *Mushroom Transportation Co., Inc*. v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if [] communications are denied protection because of lack of fruition"). Nor did her personal motive for pursuing the meeting render her overall conduct unprotected. See *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 154 (2014) (employee's subjective motive for engaging in concerted action, even if selfish, is irrelevant; "what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of 'mutual aid or protection' of employees") (citations omitted).

b. Respondent's animus against Crawford's protected, concerted activity.

Animus may be proven by direct or circumstantial evidence. Id. Circumstantial evidence of discriminatory motive may include evidence of suspicious timing, false or shifting reasons provided for the adverse employment action, and/or disparate treatment. See *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 3 (2020). In Crawford's case, the timing of Respondent's investigation into her conduct—which began a mere two weeks after she met with Gonsalves and Holstein—supports a finding that Respondent was motivated by antiunion animus. See generally *Masland Industries*, 311 NLRB 184, 197 (1993) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.") (quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)); see also *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117 at 3, fn. 12 (2021) (intervals of three to five weeks between discharge and filing of representation petition, unlawful threats and interrogation, and upcoming election evidence of animus), enfd. 41 F.4th 518 (6th Cir. 2022); *Evenflow Transportation, Inc*., 358 NLRB 695, 697 (2012) (inference of animus appropriate based upon timing, where layoff occurred "within a few weeks of the renewal of the organizing campaign" and soon after unlawful interrogation), affirmed and adopted 361 NLRB 1482 (2014).

The General Counsel also urges that Gonsalves' comment to Crawford that she had, in effect, no union representative to contact, also evidences animus against her protected, concerted conduct. I am not convinced of this point. As noted, Crawford concertedly complained about "issues" at the Midtown store at a time when Respondent's election objections were pending; Gonsalves' hasty response and personal sit-down with her suggests that his admittedly coercive comment (that she "[did not] have a Union rep to talk to") may, at most, reflected his preference to address the workplace concerns she had raised with her directly, which reflects general anti-union animus but not necessarily a bias against protected, concerted conduct.

c. Respondent's *Wright Line* defense prevails.

Based on the above, I find that the General Counsel successfully established a prima facie case that Crawford's suspension and discharge were motivated by her Section 7 conduct. As noted, under *Wright Line*, once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to show, by the preponderance of the evidence, that "same action would have taken place even in the absence of the protected conduct." Id. I find that Respondent has done so.

Crawford's discharge resulted from misconduct discovered during the investigation of a customer complaint, and there is no evidence that this investigation was precipitated by a desire to discharge her for raising workplace complaints. Cf. *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003); *Kiddie, Inc.*, 294 NLRB 840, 840 fn. 4 (1989) and cases cited therein. Armed with video evidence of her theft, Respondent's asset protection team confronted her, at which point she admitted to pocketing the tip in question. Her rather implausible explanation—that she had been given carte blanche to ignore the store's tip pooling policy—was unsurprisingly rejected by management. Under the circumstances, I find that Respondent had a reasonable, good-faith belief that Crawford had stolen tips from her coworkers—misconduct of a serious nature—as substantiated by Respondent's investigation. See, e.g., *Chinese Daily News*,

346 NLRB 906, 909, 946 (2006) (finding employer met *Wright Line* burden by showing that employee would have been suspended even in the absence of his protected activities, because respondent held good-faith belief that employees had engaged in theft of employer's property).

That Curaleaf takes tip theft seriously is well established throughout the record, as evidenced by the unrebutted evidence that every instance of substantiated and admitted tip theft has led to the exact same result: the discharge of the employee in question. Thus, there is no evidence that Crawford was singled out because she complained about working conditions. See *Mid-Mountain Foods, Inc*., 350 NLRB 742, 743 (2007) (finding that disciplinary action administered in accordance with a lawful disciplinary policy is lawful "absent evidence of disparate treatment."). The General Counsel argues that I should discount Respondent's comparator evidence because the dollar amounts in those cases were higher. I decline to do so; there being no evidence that Respondent condones its employees stealing a "de minimus" amount of tips from each other, it is not my place to opine as to whether it could have—or should have—shown Crawford leniency based on the amount she took. See *Ryder Distribution Resources,* 311 NLRB 814, 816–817 (1993); see also *Sam's Club*, 349 NLRB 1007, 1009 fn. 10 (2007) ("'[A]s we have so often said: management is for management. Neither the Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision"') (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)); *FPC Advertising Inc.*, 231 NLRB 1135, 1136 (1977) (employer's business conduct is not to be judged by any other standard other than which it has set for itself).

Accordingly, I find that Respondent has shown, by a preponderance of the evidence, that it would have suspended and discharged Crawford even in the absence of her known protected, concerted activity. I further find that the General Counsel's pretext arguments lack merit and therefore recommend dismissal of the Section 8(a)(1) suspension and discharge allegations involving Crawford.

(b) The 8(a)(3) theory

I find that the General Counsel failed to make out a prima facie case that Crawford's suspension and discharge were discriminatorily motivated, i.e., that her protected union conduct was a "motivating factor" in Respondent's decision. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 2 (2023). As noted above, this requires a showing of: (1) Crawford's union activity, (2) Curaleaf's knowledge of that activity, and (3) antiunion animus, or animus against union activity, on Respondent's part. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB at 1065.

In support of its case that Crawford was suspended and discharged based on her union activity, the General Counsel argues that Respondent believed Crawford to be a Union supporter based on its knowledge of her pre-election parking lot conversations with union organizers, as well as her August 30, 2022 comment to Gonsalves that she intended to update a Local 99 representative about her conversation with him and Holstein. Insofar as animus is concerned, the General Counsel points to various 8(a)(1) statements by Respondent's supervisors, and in particular to Gonsalves' comment to Crawford that she had no union representation.

While I agree that Gonsalves' discouraging Crawford from contacting the Union about her concerns evidenced animus, as did Cox's May "huddle" comments, I do not find that these remarks—or Respondent's treatment of Fredrickson—establish a prima facie case of discriminatory motivation with respect to Crawford. The entirety of Crawford's arguably pro-union activity was her informing Gonsalves that she intended to report the details of their conversation to Gonzalez. However, I believe that her single comment, considering the record as a whole, gave Respondent reason to perceive her as a pro-union employee. During the campaign, she fed information to the Cox, the company's lead anti-union persuader, recounting the details of her conversations with Local 99 organizers. She later informed Cox that she had voted against the Union. Considering the Union's ballot-count victory, the fact that she apparently intended to involve Local 99 in her effort to be promoted to lead, this does not strike me as unusual.

Accordingly, I am persuaded that the General Counsel has not met its burden of establishing that Crawford's union activities (such as they were) were a "motivating factor" in Respondent's decision to suspend and discharge her. Even assuming that a prima facie case has been stated with respect to these allegations, I find that, for the reasons set forth above, Respondent has shown, by a preponderance of the evidence, that it would have suspended and discharged Crawford even in the absence of her telling Gonsalves she intended to inform Local 99 about their conversation. As such, I recommend dismissal of Crawford's 8(a)(3) suspension and discharge allegations.

### *F. Allegations Involving Tinajero*

Tinajero worked at the Midtown store from 2019 until May of 2024. (Tr. 945–946.) The General Counsel claims that Respondent discharged Tinajero in retaliation for his union support and activities. Respondent counters that Tinajero was discharged based on the application of its progressive disciplinary policy after numerous time and attendance violations. I agree with Respondent.

#### 1. Facts

##### (a) Tinajero's union activities and relationship with Reff

Tinajero and Reff, who worked together for several years, were friends outside of work. He testified that, despite this, she did not give him any "special treatment." (Tr. 1079.) As discussed below, I disagree.

Tinajero signed a union authorization card and frequently spoke with Fredrickson, as well as with Local 99 representatives (in the parking lot near the Midtown store), about the Union in March 2022. He testified that, between March and the June ballot count, he attended one or two union meetings and spoke with his coworkers about Local 99 "like every day." He testified that these discussions took place on the sales floor "out in the open." He also regularly wore a union pin on his work lanyard and at times brought a union-stickered water bottle to work. (Tr. 947–948, 951–955, 957–961, 964, 981–983.)

Tinajero testified that he planned on attending the strike at the Midtown store but ended up leaving for personal reasons just as it was getting underway. Although it is unclear whether SM Reff factored into his early departure, he did speak with her about the strike earlier that day; Reff confided in him that she was "really stressed" and wished the strike were not happening. He responded that she should not take it personally and that the employees just wanted better working conditions and more pay. (Tr. 959, 962–963, 969–975.)

According to Tinajero, within the 2 months preceding his discharge, he and fellow budtenders Richardson and Reba Reeves (Reeves), while at work, discussed the possibility of conducting another strike.[32] According to Tinajero, this conversation occurred on the sales floor but there is no evidence that it was overheard by a manager or supervisor. (Tr. 982–983.) Reeves did not testify and notably, as the government's witness, did not corroborate Tinajero on this point. Based on that, I do not credit that it in fact took place. See generally *Flexsteel Industries*, 316 NLRB at 758 (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

(b) Tinajero's disciplinary history

Tinajero admitted at hearing that, during his tenure with Curaleaf, he repeatedly failed to report to work on time. Indeed, it is undisputed that, at the time of his discharge, Tinajero had a lengthy disciplinary history, including the following:

| DATE | OFFENSE | LEVEL OF DISCIPLINE |
|---|---|---|
| 2/14/2020 | Tardiness (4 times) | Verbal warning |
| 9/15/2020 | Inventory incident discrepancies | Written warning |
| 8/2/2022 | Tardiness (4 times) | Verbal warning |
| 2/27/2023[33] | Tardiness (9 times) | Verbal warning |
| 6/2/2023 | Tardiness (10 times) | Written warning |
| 1/9/2024 | Attempting to purchase medical marijuana without proper credentials | Final written warning |

(GC Exhs. 72, 74, 75, 77, 78, 79.)[34] None of this discipline (including the four warnings issued following the Union's April 2022 representation-petition filing) is alleged to be unlawful.

[32] Although his testimony was somewhat vague, Tinajero seemed to indicate that the employees discussed using a strike to pressure Curaleaf into either negotiating or signing a collective bargaining agreement.

[33] This Corrective Action Form appears to have been prepared by Reff on January 24, 2023, but not issued for another month. (GC Exh. 77.)

[34] Tinajero also received two disciplines that, according to Reff, were later rescinded for Curaleaf internal policy reasons. (GC Exh. 73, 76.)

Interestingly, Reff appears to have been more tolerant of his tardiness *after* Tinajero began openly supporting the Union. In his 2020 verbal warning, she put him on notice that a single additional instance of tardiness within the next 3 months would result in a written warning. After he began wearing a union button, however, she actually relaxed her enforcement. For example, it is undisputed that, based on Respondent's progressive discipline policy, the verbal warning she issued him on February 23, 2023 was supposed to have been a written warning. Moreover, she only issued the lesser discipline after he had been tardy 9 times and delayed his start time, in her words, "to better suit his needs." (Tr. 1496; GC Exhs. 72, 77.)

On May 21, 2024, Reff discharged Tinajero for additional attendance violations; he was admittedly late on the 6 occasions in question. Four of them occurred within the 3-month "look back" period. According to Tinajero, Reff told him that she was sorry and had done everything she could but had to let him go. (GC Exh. 80; Tr. 1030.)

The record contains numerous other occasions in which employees were disciplined for tardiness, often more "by the book" than was Tinajero. Of the 13 instances of time and attendance discipline, the majority were triggered by four occurrences of either tardiness and/or absence. (R. Exhs. 32–38, 41–46.) Moreover, the General Counsel failed to identify any instance in which Respondent tolerated an employee's consistent pattern of tardiness similar to Tinajero's.

2. Analysis

The General Counsel argues that Respondent 'seized on' Tinajero's attendance violations in order to discharge him for his union support. Respondent, pointing to Tinajero's extensive disciplinary history, argues that discharging Tinajero was consistent with its progressive discipline system and that it would have done so in the absence of Tinajero's union activity. I agree with Respondent.

Tinajero engaged in union activity by donning Local 99 insignia and discussing the Union with coworkers on the sales floor. Based on his comments to Reff on the day of the strike, she was undoubtedly aware that he supported the Union, and based on the small-plant doctrine recited above, I also impute knowledge of his workplace union discussions to Respondent. There is also no question, as discussed above, that Respondent, by its coercive speech and actions towards Fredrickson, exhibited animus towards the Union. That said, Reff's treatment of Tinajero suggests that she repeatedly looked the other way insofar as his chronic tardiness problem was concerned, and, true to her own words, did "everything she could" to avoid him getting discharged.

As discussed, a prime example is his February 27, 2023 verbal warning for being tardy 9 times in a single month. Instead of disciplining him when he exceeded 3 instances of tardiness, Reff did not act until his tardies more than doubled that amount and then she held off issuing the discipline for another month, issued him a verbal warning (when he should have received a written warning) and literally accommodated his tardiness by delaying his start time. These actions mitigate against a finding that Reff was itching to fire Tinajero, with whom she was

admittedly friendly outside of work. Nonetheless, for purposes of this analysis, I find that the General Counsel has (albeit narrowly) stated a prima facie case with respect to his discharge.

I find, however, that Respondent has met its rebuttal burden. "[A]n employer that follows its established discipline policy carries its *Wright Line* step two burden 'absent evidence of disparate treatment.'" *Absolute Healthcare v. NLRB,* 103 F.4th 61, 68 (D.C. Cir. 2024) (quoting *Mid-Mountain Foods, Inc*., 350 NLRB at 743). Pursuant to the terms of Respondent's attendance policy, Tinajero incurred four tardies within a 3-month look-back period, which is the established standard for advancing up a disciplinary step. It is undisputed that, based on his prior discipline—none of which is challenged as unlawful—he was subject to discharge for his next infraction. This is despite Reff's having gone out of her way to *avoid* progressing him through the disciplinary steps, as evidenced by the fact that he was tardy an impressive 23 times between January 1, 2023 and his discharge. Moreover, the comparator evidence introduced by Respondent indicates that, rather than targeting him for his union activity, Reff appears to have singled him out for more favorable treatment. Indeed, there is no evidence of Respondent indulging any other chronically tardy employee with a delayed start time or a repeat verbal warning such as that Reff granted Tinajero.

The General Counsel argues that the circumstances of Tinajero's discharge suggest pretext, based on Respondent's alleged change to its 10-minute grace period and the proximity of his discharge to his alleged discussion of a second strike. But, as discussed herein, I have specifically discredited the factual evidence offered in support of these arguments. As such, I find that the General Counsel has failed to present any pretext argument to overcome Respondent's evidence that Tinajero's discharge was based on his tardiness and would have occurred even in the absence of his protected conduct. I therefore recommend dismissal of the Section 8(a)(3) discharge allegation involving Tinajero.

## CONCLUSIONS OF LAW

1. Respondent Catalina Hills Botanical Care, Inc. d/b/a Curaleaf Midtown an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers Union, Local 99 is a labor organization within the meaning of Section 2(5) of the Act.

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

> All full-time and regular part-time Store Associates employed by the Employer at its facility located in Phoenix, Arizona; excluding all other employees, office clerical employees, professional employees, Store Associate Leads, managers, guards, and supervisors as defined in the Act.

4. At all times since about June 30, 2022, United Food and Commercial Workers Union, Loca 99, has been and is the exclusive collective-bargaining representative of the employees in the collective-bargaining unit described in paragraph 3, above.

5. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Informing employees that it would be futile for them to select the Union as their bargaining representative by telling them that it did not have to bargain in good faith with the Union and by threatening to reduce their pay and benefits if they selected the Union as their bargaining representative.

(b) Threatening to reduce employees' pay and benefits to discourage them from electing the Union as their bargaining representative.

(c) Ordering employees not to discuss Respondent's response to a rodent infestation in the workplace with coworkers and/or customers.

(d) Ordering employees to remove their union insignia in the workplace.

(e) Telling employees they were not eligible for a *Weingarten* representative because Respondent was not recognizing the Union.

(f) Telling employees that they do not have a union representative.

6. Respondent violated Section 8(a)(3) of the Act by disciplining and discharging Nickolas Fredrickson for supporting the Union.

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

## REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(3), (5), and (1) of the Act, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully disciplined and discharged Nickolas Fredrickson, is ordered to offer him reinstatement to his former position, 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, and to make him whole for any loss of earnings and other benefits he may have suffered because of discrimination against him. The backpay remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *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).

In accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), Respondent shall also be ordered to make Fredrickson whole, with interest, for any other direct or foreseeable pecuniary harms suffered because of his termination, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. See *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Compensation for these harms shall be calculated separately from taxable backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Further, Respondent is ordered to compensate Fredrickson for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to 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(s) to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In accordance with *Cascades Container Board*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent is further ordered to file with the Regional Director for Region 28 copies of the W-2 form(s) reflecting his backpay award. Respondent is also ordered to expunge from its files any references to the unlawful discipline and discharge of Fredrickson and notify him in writing that this has been done and that evidence of the unlawful action will not be used against him, as set forth in the recommended order that follows.

Respondent is ordered to rescind the mid-September 2022 verbal directive by Tanya Nitti to Fredrickson when she instructed him that he was not permitted to discuss, on the sales floor, Respondent's response to a rodent infestation at Respondent's Midtown store location, and is additionally ordered to rescind the September 8, 2022 verbal directive by Ryan Gonsalves to Fredrickson when he informed him that his Union pin and lanyard violated Respondent's dress code policy and would need to be removed.

Respondent shall post an appropriate information notice, as described in the attached Appendix. This notice shall be posted at Respondent's Midtown store location in Phoenix, Arizona, wherever notices to employees are regularly posted, for 60 days, without anything covering the notice or defacing its contents. In addition to the physical posting of paper notices, notices shall be distributed electronically, posted on an intranet or an internet site, and/or other electronic means, to the extent Respondent customarily communicates with its employees in such a manner. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed its Midtown store location, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at these locations at any time since May 22, 2022.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

[35] 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, Catalina Hills Botanical Care, Inc. d/b/a Curaleaf Midtown, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that it would be futile for them to select the Union as their bargaining representative by telling them that it did not have to bargain in good faith with the Union.

(b) Threatening employees with loss of pay and benefits if they selected the Union as their bargaining representative.

(c) Informing employees that it would be futile for them to select the Union as their bargaining representative by threatening to reduce their pay and benefits if they selected the Union as their bargaining representative.

(d) Ordering employees not to discuss Respondent's response to a rodent infestation in the workplace with coworkers and/or customers.

(e) Ordering employees not to wear union insignia in the workplace.

(f) Telling employees its Midtown store they were not eligible for a *Weingarten* representative because Respondent was not recognizing the Union.

(g) Telling an employee that they did not have a union representative.

(h) Disciplining or discharging employees for supporting the Union or any other labor organization.

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

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

(a) Rescind its directives/rules prohibiting employees from discussing Respondent's response to a rodent infestation in the workplace and from wearing union insignia in the workplace.

(b) Within 14 days from the date of the Board's Order, offer Nickolas Fredrickson full reinstatement to his former job, or, if that job credibly no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Nickolas Fredrickson whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, because of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Compensate Nickolas Fredrickson for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(e) 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, file

with the Regional Director for Region 28 a copy of a report allocating the backpay awards to the appropriate calendar years for Nickolas Fredrickson.

(f) File with the Regional Director for Region 28 a copy of Nickolas Fredrickson's corresponding W-2 forms reflecting the backpay award.

(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) Remove from Respondent's files, any and all records of the discipline issued to Nickolas Fredrickson on February 29, 2024 and April 5, 2024, as well as his April 21, 2021 discharge and within 3 days thereafter, notify Nickolas Fredrickson in writing that this action was taken, and that the materials removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

(i) Within 14 days after service by the Region, post at its facility in midtown Phoenix, Arizona copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 22, 2022.

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

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

Mara-Louise Anzalone
Administrative Law Judge

[36] 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."

## APPENDIX

## NOTICE TO EMPLOYEES
**Posted by Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

FEDERAL LAW GIVES YOU THE RIGHT TO

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

**WE WILL NOT** interfere with, restrain, or coerce you in the exercise of the above rights.

**WE WILL NOT** tell you that if United Food and Commercial Workers Union, Local 99 (the Union) is elected we will not bargain in good faith or otherwise telling you that selecting the Union as your bargaining representative would be futile.

**WE WILL NOT** threaten you with reduced wages and benefits if you unionize.

**WE WILL NOT** order you employees not to discuss our response to a rodent infestation in the workplace with coworkers and/or customers.

**WE WILL NOT** tell you that you cannot wear union insignia at work.

**WE WILL NOT** tell you that you are not eligible for union representation during an investigatory interview because we are not recognizing the Union.

**WE WILL NOT** tell you that you do not have a union representative.

**WE WILL NOT** discipline or fire you because of your union membership, activities, sympathies, and/or support for the Union or any other labor organization.

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

**WE WILL** rescind our directives/rules that: (1) you cannot discuss management's response to a rodent infestation in the workplace with your coworkers; and (2) you cannot wear union insignia in the workplace.

**WE WILL** offer NICHOLAS FREDRICKSON (FREDRICKSON) immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without any loss to his seniority rights or any other privileges previously enjoyed because we discharged him.

**WE WILL** make whole FREDRICKSON for any loss of earnings and other benefits resulting from his termination, less any interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

**WE WILL** file with the Regional Director for Region 28 copies of W-2 forms reflecting FREDRICKSON'S backpay award.

**WE WILL** within 14 days, remove from our files, any and all records of FREDRICKSON'S February 29, 2024 written warning, his April 5, 2024 final written warning and his April 21, 2024 discharge and WE WILL within 3 days thereafter, notify FREDRICKSON in writing that we have taken this action, and that the materials removed will not be used as a basis for any future personnel action against him or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against him.

**WE WILL** compensate FREDRICKSON for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

**WE WILL**, 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, file with the Regional Director for Region 28 a copy of FREDRICKSON'S corresponding W-2 form(s) reflecting the backpay award.

**WE WILL** 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 years for FREDRICKSON.

**CATALINA HILLS BOTANICAL CARE, INC.**
**d/b/a CURALEAF MIDTOWN**

_____
(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.

NLRB Region 28
2600 North Central Avenue -Suite 1400
Phoenix, AZ 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
(602)640-2160

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-302934 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) 416-4755.