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Apple, Inc. and Ellen Shen. Cases 32–CA–306609

May 13, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY  
AND MAYER

On January 7, 2025, Administrative Law Judge Gerald Michael Etchingham issued the attached decision. The Charging Party filed a brief in support of exceptions. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 13, 2026

James R. Murphy, Chairman

David M. Prouty, Member

Scott A. Mayer, Member

<sup>1</sup> There are no exceptions to the judge’s Sec. 10(b) analysis or to his failure to specifically address the complaint allegation that the Respondent violated Sec. 8(a)(1) the Act by selectively and disparately enforcing a work rule against Charging Party Ellen Shen.

<sup>2</sup> The Charging Party has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge’s dismissal of the allegations that the Respondent violated Sec. 8(a)(1) of the Act by threatening, coercing, and interrogating Shen about sending mass emails on June 6 and 8, 2022, and threatening discipline if Shen sent additional emails, we note that the Charging Party’s exceptions brief does not specifically address these allegations. Even assuming the brief could be read to challenge the judge’s dismissals, we find that the Respondent’s communications to Shen did not

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ezera Miller-Walfish, Esq. and Tracy Clark, Esq., for the General Counsel.

Jennifer G. Betts, Esq. and Bryce Farrington, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Oakland, California, on January 22 and May 13–15, 2024. Ellen Shen, an individual (the Charging Party or Shen), filed the charge in this case on November 3, 2022, and an amended charge on January 24, 2023. The General Counsel issued the complaint (complaint) on June 2, 2023, and amended it on January 3, 2024. Apple, Inc. (Respondent or Apple) answered the original complaint on June 16, 2023, and the amended complaint on January 17, 2024, generally denying the critical allegations of the complaint.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by disciplining and terminating Shen’s employment because she engaged in protected concerted activities citing concerns about workplace culture in mass emails and communications to coworkers. The complaint also alleged unlawful threats, and coercive interrogation of Shen by various Respondent managers. The record shows, however, that by July 2022, Respondent’s management had fully investigated Shen’s personal disagreements which dated back more than 2 years to an April 2020 Incident and managers instructed Shen to stop sending three disruptive mass emails in June 2022 to a large portion of Apple employees who had no work connection with Shen and who expressed feeling unsafe by the rising aggressive tone. When Shen ignored Respondent’s warnings that the disruptive mass emails were in violation of Apple’s respect policy and insubordinate, Respondent discharged Shen when she again sent out disruptive mass emails in October 2022 in violation of Apple’s respect policy. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

violate the Act because they were not in response to protected concerted activity, nor would any employee have reasonably perceived the communications as limiting their right to engage in protected concerted activities going forward. See *KSM Industries*, 336 NLRB 133, 133 (2001) (noting that the standard for analyzing statements alleged to violate Sec. 8(a)(1) of the Act is whether they have a reasonable tendency to coerce employees in the exercise of their Sec. 7 rights). To the extent the Charging Party asserts that she was prohibited from sharing the details of her disciplinary action with other employees, that assertion is contrary to the credited testimony.

We also adopt the judge’s dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by disciplining and discharging Shen. In doing so, we rely only on the judge’s finding that the General Counsel failed to establish, as a threshold matter, that Shen engaged in concerted activity. The Charging Party’s exceptions, which primarily challenge the judge’s credibility determinations, fail to demonstrate any basis for overturning the judge’s finding.

FINDINGS OF FACT<sup>1</sup>

## I. JURISDICTION

The Respondent, a corporation with headquarters in Cupertino, California, has been engaged in the creation and sale of technology devices and related products and services since 1976. I further find that during the 12-month period ending on April 30, 2023, Respondent derived gross revenues more than \$500,000, and during the same period, Respondent purchased and received at its various California facilities, products, goods, and materials valued more than \$5000 directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(j) and 1(g).)<sup>2</sup>

## II. STATEMENT OF FACTS

*A. Apple's Background and Operations*

Apple is a technology company that sells devices such as phones, tablets, and computers, as well as providing various digital services to consumers. Apple's Information Service and Technology (IS&T) Division is a division responsible for providing software services for Apple's internal needs—akin to "Apple's internal IT group." (Tr. 241.)<sup>3</sup> The division was headed by Senior Vice President Mary Demby when Shen was hired in 2015 and was later headed by Vice President Dave Smoley (Smoley).

Within IS&T, the Applied Machine Learning Platform (AML) department provides artificial intelligence and machine learning support for Apple internal needs, such as in manufacturing, support, and sales. (Tr. 241.) AML is headed by Director Vivek Chopra (Chopra) and employed around 240 people at the time. (Tr. 240–242.) AML employs many software engineers, generally divided between individual contributors and those in a management position. Software engineering roles at Apple are divided into six levels, with the highest being individual contributor level 6 (IC-6). (Tr. 57.)

As part of its internal communications, Apple employees have access to company email and Slack. Slack is a platform for groups of people to instantly message one another, as opposed to the asynchronous nature of emailing. (Tr. 267.) Employees often communicate through Slack channels, which are created for predetermined groups of people with a shared interest or purpose. At Apple, projects and teams are often grouped through Slack channels, and the channels can become more specific or broad based on the purpose needed. For example, someone may post in an Apple-wide Slack channel to discuss a new sick day policy, whereas a specific project in AML made up of a few developers may have its own channel. (Tr. 266–267.) Users can also create new channels. (Tr. 268.) Posts and messages in Slack do not immediately disappear, and everyone in the channel can view the messages later. (Tr. 267.)

<sup>1</sup> The Findings of Fact are a compilation of the credible testimony, and other evidence, as well as logical inferences drawn therefrom.

<sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for record transcript; "Jt. Exh. for joint exhibits; "R. Exh." for Respondent's exhibit; "R. Br. for Respondent's closing brief; "GC Exh." for General Counsel's exhibit; and "GC Br." for the General Counsel's closing brief.

*B. Shen's Background and Employment at Apple*

## 1. Shen's early years and her raised disagreements begin in April 2022

Shen began working for Apple as a software engineer on January 26, 2015, in the AML department. Shen was hired as an IC-4 and was eventually promoted to IC-5 (Tr. 57–58). At the time of her hiring through May of 2020, Shen worked on the Developer (Dev) team and was directly supervised by Senior Software Engineering Manager Mikhail Stepura (Stepura) starting in October 2016. (Tr. 60, 411.)

Project Alloy is a project that Shen and several other developers in the Dev team had been working on since the end of 2019. (Tr. 73, 412.) The team had Stepura, Shen, Andy Wu (Wu), Nick Quin, Sheetal Gosrani, Vijay Nareddy (Nareddy), and Project Manager Prabha Nallappan (Nallappan). (Tr. 412.) Stepura had a team he estimated at around 15 to 20 people reporting to him and he oversaw multiple engineering projects, including Project Alloy in 2019–2020. *Id.*

Wu was the main developer on Project Alloy, as he wrote the core code for the Project Alloy system. (Tr. 412.)

Project Alloy is an engine that supports Athena, a fraud-prevention platform used across Apple. As part of Athena's fraud detection responsibilities, it predicts whether a request being sent to Apple is fraudulent and whether it should be blocked. Project Alloy helps run this prediction capability in Athena. (Tr. 245–246.)

Both the Dev team and the Development Operations (DevOps) team worked to support Project Alloy, with the DevOps team also managing other infrastructure leads for Athena. (Tr. 306–307.) Wu wrote the core code for Project Alloy and was the main developer on the project. (Tr. 412.) Shen primarily worked on testing and evaluating the performance of Project Alloy. This meant Shen would test how well the Project Alloy system responded based on the number of incoming requests or the volume of traffic. (Tr. 412.)

The Dev team worked on designing and implementing software products based on customer needs. The Dev team often worked closely with the DevOps team, where the Dev team would design the high-level strategy and write the main software code, and the DevOps team would be responsible for creating and monitoring the infrastructure that runs the software. (Tr. 243.) The DevOps team would report any recorded issues to the Dev team, who would then evaluate and fix the issue. (Tr. 60–61.)

Chopra opines both the Dev team and DevOps team are engineering organizations and there is "no difference in terms of one engineer [being] more capable than the other engineer." (Tr. 243.) The manager of the Dev team, Stepura, reports directly to the head of the department, Chopra, while the manager of the DevOps team, Nareddy, is lower on the reporting spectrum in

<sup>3</sup> Although I have included several citations to the record to highlight specific testimony or exhibits, my findings and conclusions are not limited to those portions and instead are based on my review and consideration of the entire record.

relation to Chopra. (Tr. 244.) Further, Stepura is a senior software engineering manager while Nareddy is a software engineering manager who reports to a Senior Manager Anurag Jambhekar (Jambhekar), who then reports to Chopra. (Tr. 244.)

In April of 2020, Shen finds what she perceived to be a critical technical flaw in Project Alloy. (Tr. 73.) Shen, the rest of the team, and her manager, Stepura, disagreed on the best path forward to deploy the project. Specifically, Shen proposed a code design for the issue found in production, but Stepura and the rest of the team chose a different direction suggested by one of Shen's other team members Wu. (Tr. 311.) No other employee on the team or elsewhere at Apple sided with Shen as to this project disagreement. A personality conflict developed between Shen on one side, and Manager Stepura and main developer Wu on the other side, and disagreement is referred to repeatedly hereafter as "the April 2020 Incident."

Chopra convincingly explains that in his AML department: . . . disagreements around how to build a software [are] very common. It happens every day. It is something we nurture, because without that, you won't be able to build something which is very valuable. But at some point, there are business objectives and organization priorities, and you—you—at some point, then you commit that this is okay. And then we move on as a group, and in the team, and collaboration, and organization, and company is more important at that particular point in time.

(Tr. 280.) After the April 2020 Incident and throughout all of May 2020, Shen had great difficulty moving on from the April 2020 Incident.

## 2. Shen is transferred to the DevOps Team in June of 2020

On June 6, 2020, Shen is transferred to the DevOps team of AML. (Tr. 230.) Shen was told that despite the transfer, she would still be doing the same job for the Dev team but would just be working under a different manager—Software Engineering Manager Nareddy, manager of the DevOps team. (Tr. 74.)

Chopra and Nareddy explain that Shen's transfer to DevOps was not a demotion; rather, it occurred due to an alignment between her performance engineering skills and the organization's need to migrate certain software to run on Amazon Web Services (AWS), a third-party cloud infrastructure run by Amazon. (Tr. 246, 248, 308.) Chopra also explains that Shen's job title and pay did not change in any way after her transfer. (Tr. 248.) Carylynn Lemoge (Lemoge) of HR also confirmed that Shen was not demoted, and her job title and salary did not change. (Tr. 484.)

Shen believes her job title changed from Dev Engineer to DevOps Engineer, but admits that her compensation stayed the same. (Tr. 77–78, 484.) She explained this job title change led to further confusion on her role, as she continued to work with the Dev team and was indirectly managed by the DevOps Manager Nareddy. (Tr. 78.) Shen further believes this job title change also affected her teamwork score, which is directly tied to her compensation. (Tr. 78.)

Shen continued to work on Project Alloy with the Dev team and Stepura for another 2 years while reporting to Nareddy.

## 3. Shen's increasing concerns about decision making in Project

### Alloy and workplace culture

Since the April 2020 Incident, Shen grew increasingly concerned with workplace culture—both on a personal level in how she began to be treated and on an organization level in how business and technical decisions are made. Shen felt her design idea in April 2020 was immediately dismissed by Stepura, but, as a team member employee not manager, Shen wanted to review how decisions were made in Project Alloy and whether they match the policies of the organization more broadly. (Tr. 311–312.)

Throughout 2021, while Shen is on the DevOps team, she believed she continued slowdown in her code review feedback and approvals. Shen believes her code contributions began to be blocked, and there were increasing delays in getting team members to review her code. Shen further opines that due to the importance of receiving feedback and approval on code contributions before code can be deployed to production, her code was in a stuck position in the process. (Tr. 79.) This made it less likely her code would be adopted or used. (Tr. 81.) Additionally, Shen believes she had increasingly experienced fewer opportunities for collaboration with team members and customers, particularly with respect to Project Alloy. (Tr. 162.) Shen felt this affected the teamwork and collaboration category in her performance evaluations. (Tr. 78.)

While working on Project Alloy from April 2020 to early November 2021, Shen and others on her team would work up code changes and share credit for improving or evolving the code set. (Tr. 228.) Frequently, a team member might get credit for evolving the code with an idea they suggested which received further approval by a team manager or another team member. Getting approval and feedback on suggested code changes through the code review process is highly important to a software engineer like Shen. The feedback and approval steps are generally required before the code can be launched into production and can affect not only the quality of a software engineer's work but his or her performance evaluations and compensation as well. (Tr. 385.) If an engineer does not receive feedback and review, he or she may have lower quality work and less code that is officially used, which results in worse scores in the annual performance review. (Tr. 385.)

Apple employees are evaluated in an annual performance review on three categories: Teamwork, Innovation, and Results. Each employee is rated based on a three-level scale per category. The manager collects individual performance reviews from each team member and then writes the report and gives the overall rating. (Tr. 63–64.) Annual performance reviews are connected to compensation and potential for promotion and are given out at the same time. There are three different areas of yearly compensation: group salary increases, cash bonuses, and restricted stock units (RSU). RSUs are based on the market value of Apple's share in the stock market. (Tr. 65.) An employee's performance review can affect the amount of compensation received beyond the base salary, including the amount of RSU given.

In a November 15, 2021 meeting, Shen brought up the April 2020 Incident again and alleges that Stepura had covered up what she disclosed to the team in April 2020 to be flaws in Project Alloy, and Stepura and other managers instead presented them as positives by November 2021. (Tr. 161–162.) Shen

believed that the “mistakes [would] become legacy” in that this mentality to cover up mistakes would become ingrained in the project and the culture of the organization. (Tr. 162.)

Shen claims she repeatedly reached out to Nareddy, Stepura, Chopra, and team members about her same concerns over the decision-making in Project Alloy and how they negatively impact her and the greater workplace culture. She also requested to have meetings to review the decision-making process and results in Project Alloy.

On December 13, 2021, Shen emailed Nareddy about her concerns about Stepura and how he continues to block her contributions to the code repository for Project Alloy (Tr. 309, R. Exh. 1.) Nareddy responded that he had already discussed these concerns with Shen in prior discussions dating back to the April 2020 Incident. (Tr. 309.)

Around the end of December 2021 or the beginning of January 2022, Shen emails Nareddy and Nallappan requesting a high-level review for what happened. (Tr. 313.) Nareddy responded that there were already multiple meetings on Project Alloy and its technical design decisions since and including the April 2020 Incident, and they had discussed Shen’s personal concerns more than once already. (Tr. 314.)

On January 21, 2022, Chopra forwarded another of Shen’s emails to Stepura, Nareddy, and Jambhekar. (Tr. 414; R. Exh. 79.) At the hearing, Stepura testified that Shen’s line of attack was not new. “[I]t wasn’t the first time I was seeing those statements,” explained Stepura. (Tr. 414.) “[I]t was the same problems over and over again[.]” Id. “[S]o I’ve seen those points,” continued Stepura, “and the problem is—again, so I heard those questions. And the way that information was delivered, Ellen [Shen] was trying to blame me for, like, for the way I’m making technical decisions or because—decisions that related to business.” (Tr. 415.) Stepura further explained how Shen, who no longer reported to him in January 2022, was continuously attacking members of his team in various forms and how this impacted the team:

[T]he situation went out of control and that behavior, that negative feedback or opinions of Ellen [Shen], they started affecting other members of my team. And like especially like—okay, if we’re talking about names, Andy Wu specifically. Andy was, like, targeted on almost every meeting regarding our work because of decisions he made, or like, design choices he made. (Tr. 416.)

On January 25, 2022, Shen emailed Chopra about these same concerns, including her contributions being blocked. (R. Exh. 87.) Chopra views the emails about disagreements on software design. (Tr. 249.) Shen continued to email Chopra in the next few months, including on March 14, 29, April 11, 17, 21, and 23, each time wanting to revisit the April 2020 Incident and related events since. (Tr. 249–269.)

Around the end of 2021 and beginning of 2022, with Shen continuing to bring up her complaints regarding management

and decisions in Project Alloy, Nareddy and Stepura felt they had each met with Shen to address her concerns multiple times and the situation was escalating as Shen could not move past the April 2020 Incident. (Tr. 309, 414.)

Stepura explained he viewed Shen’s concerns as being about technical decisions made on Project Alloy by himself and other developers that Shen disagreed with. (Tr. 415–416.) The situation became one in which Shen’s behavior began affecting other team members; for example, Shen began targeting Wu, the main developer on Project Alloy, on software design decisions he made about the project. (Tr. 412, 416.) Wu was the main developer who built the Project Alloy system with his code-named Alloy which Wu created on his own from scratch. (Tr. 412.)

As Stepura described Shen’s emails to him, Nareddy, and Chopra at the time, “it was the same problems over and over again.” (Tr. 414, R. Exh. 79.) In a nutshell, the problem, according to Stepura in January 2022, remained unchanged from the April 2020 Incident according to Shen and the same as before:

I [Shen] have figured everything. Only I’m [Shen is] right Andy [Wu] is wrong, Mikhail [Stepura] is unprofessional<sup>4</sup>.

(R. Exh. 79.)

On February 1 and 2, 2022, Stepura received a few complaints via email from Dev team employees about Shen, including that she cannot take criticism, does not listen to teammates, and personally attacks or interrogates other developers—especially Wu, who told Stepura he was facing “harassment” by Shen and was no longer comfortable posting code changes. (Tr. 418, R. Exh. 58.) Stepura explained some members on his team had reached out to him via Slack or verbally with their concerns about Shen’s behavior and he asked them to email their concerns to him so he could inform her manager, Nareddy. (Tr. 419–420.) Stepura also noted that around this time, he did not always read Shen’s emails about her concerns because it was emotionally taxing for him to continue to read false complaints about him. (Tr. 423.)

Shen also continued to email Nareddy and others, calling for a meeting to review Project Alloy results. On April 20, 2022, Shen again emails Nareddy and Nallappan requesting a review meeting and attached a report she created entitled “Alloy Result Report.” (Tr. 328, R. Exh. 10.) Nareddy responded to the email explaining that Shen’s role as a performance engineer is to evaluate the performance of Project Alloy and raise potential issues, which she has already done. Those issues will then be discussed and addressed by team members based on bandwidth and priority. (Tr. 330, R. Exh. 10.) Notably, Nareddy explained in the email to Shen that he can meet to discuss these raised issues in the queue but that Shen’s other concerns “are being discussed/handled separately”<sup>5</sup> and Shen needs to “focus [the] discussion on functional/technical aspects” of Project Alloy rather than her concerns “about individuals.”<sup>6</sup> (R. Exh. 10.)

4. Alleged concerted activity—in January 2022, Shen allegedly

<sup>4</sup> Shen again is referring to the April 2020 Incident and similar technical disagreements on Project Alloy since 2020.

<sup>5</sup> Nareddy is referring to Shen’s Employee Relations (ER) and HR complaints that had been investigated and concluded in the prior months.

<sup>6</sup> Again, Nareddy is referring to Shen’s concerns around mismanagement and misconduct surrounding Project Alloy which should and had already been addressed via the formal channels (ER and HR investigations).

discusses concerns with unnamed coworker who does not testify at hearing

On January 12, 2022, Shen alleges she related her concerns about the workplace culture and technical decision-making process to a colleague.<sup>7</sup> This colleague is an employee who allegedly used to work in AML with Shen but had switched to a different division by the time of this conversation.

#### 5. Formal Complaints to Employment Relations in Early 2022

Beginning in January 2022, Shen filed four complaints in January, March, and April 2022 about her same concerns and treatment through Apple's Employee Relations (ER) portal. Reaching out to ER was a path suggested to Shen earlier in the year by Nareddy, to resolve her disagreements and concerns. (Tr. 312–313.) Shen originally met with People Business Partner Lemoge, who redirected her complaints with Stepura and his decisions to ER. (Tr. 481–482). Lemoge's roles and responsibilities as a People Business Partner are akin to Human Resources (HR) (Tr. 477.)

Shen filed her first complaint on January 26, the next in March, the third complaint on April 15, and a fourth complaint later in April. (Tr. 66–68, GC Exh. 2, 3.) In the complaints, Shen reports that she has personally been experiencing isolation, exclusion, retaliation, and suppression by Stepura and others on the Project Alloy team. (GC Exh. 2, 3). Shen largely worked with Heather Lyons (Lyons) and Eric Williams (Williams) of the ER department in addressing and investigating her complaints. (Tr. 556). Lyons and Williams both report to Corey Hosken (Hosken), the ER Leader. (Tr. 554, 557.)

In an email Lyons to Shen on March 12, 2022, Lyons followed up on Shen's concerns in a recent meeting with Lyons, Shen, and Lemoge. (Tr. 66.) Lyons summarized Shen's concerns in an email titled, "Issue Confirmation" with four key bullets:

1. Mikhail Stepura engaged in overall blocking of your code solutions which began approximately on or after May 26, 2021, prior to this date there were no concerns. Specifically, not having your code solutions included as part of Project Alloy . . .
2. Mikhail Stepura contributed to the deterioration of your personal relationships with other Code Developers by creating artificial competition with peers . . .
3. Mikhail Stepura contributed to the overall lack of collaboration within your peer group specifically because Mikhail had advised his direct report, Andy Wu, around November 17, 2021 to come up with "different solution than Ellen's" without offering a transparent explanation. Around this same time[,] you began to notice your peer group beginning to exclude you from various access channels and requests to collaborate despite repeated requests to be included . . .
4. There is a lack of technical justification and standards that

<sup>7</sup> Given the lack of detail, the refusal of any witness coming forward to testify and confirm Shen's alleged conversation, and lack of supporting evidence about this conversation and about who the past coworker in question is, I do not find Shen credible in her story here. Moreover, this is inadmissible hearsay testimony, offered for the truth of the matter asserted, which I find lacks weight considering the overwhelming evidence that Shen's conduct was to advance her personal agenda alone. Even if credible, there is no evidence that Apple management had knowledge of

would provide transparency as to why certain solutions are implemented over others which ultimately hides more effective solutions to the customer (internal client).

(R. Exh. 7.)

During the months of the investigation, Nareddy is made aware of emails from developers on the Dev team to Stepura complaining about Shen's harassing behavior in public forums. (Tr. 320, 418, R. Exh. 58.) Nareddy forwarded these emails to Lemoge and asked for guidance in removing Shen from overlap with Dev team responsibilities because Shen is unable to work collaboratively especially with Wu in February 2022. Lemoge suggested to Nareddy waiting until HR and ER complete their investigation of Shen's personal disagreements because Lemoge recommends keeping Shen where she is during the investigation to not be perceived as retaliation. (R. Exh. 58.)

In April 2022, after interviewing Shen, her managers, and her teammates in Project Alloy, ER determined there was no merit to Shen's personal claims and dismissed all her complaints, most of which were directly or indirectly related to the April 2020 Incident and subsequent events in 2021. On April 8, 2022, Williams communicated to Shen that the investigation did not confirm any violations of Apple policy and therefore would be closed. (GC Exh. 7.)

Shen continued to email ER, including Hosken, about her concerns around the investigative process and how her complaints were handled. (R. Exh. 30.) On April 8, 2022, after being told her complaints had been dismissed, Shen reached out to Hosken asking if ER accidentally closed her case. (R. Exh. 30.)

On April 28, 2022, Shen emailed Hosken asking for information about the ER and HR processes, including what the appeal process was, if all parties can meet face-to-face, and whether management and the team she complained about were "used as the only ultimate source of truth" over Shen's claims. (R. Exh. 30.) In response to Shen's follow up emails, Hosken and Lemoge met with Shen in early May 2022 to discuss ER's role, the investigative process, and how decisions are made about cases. (Tr. 572.)

In early May, Lemoge also began to regularly meet with Shen as "after care,"<sup>8</sup> to help her move forward and give her a space to discuss concerns. (Tr. 487.) Lemoge recalls some of those weekly meetings being tough to get through and unproductive, and Shen continued to raise her same personal concerns dating back to the April 2020 Incident that had been dismissed in her ER complaints in each meeting. (Tr. 489–491.)

Hosken explained that because Shen continued to bring up the same issues with ER and in her meetings with Lemoge, she felt as though ER was continuously investigating Shen's claims throughout May and after, despite having closed her case in April. (Tr. 572–573.) However, she also felt that Shen did not raise any new allegations or concerns. (Tr. 573.) Shen continued

the conversation, and it lies outside the 10(b)6-month statute of limitations. (Tr. 157, 315, and 434.) Shen filed her charge on November 3, 2022, and this conversation is alleged to be more than 6 months earlier on January 12, 2022. See complaint, par. 5(a)(1).

<sup>8</sup> Lemoge explained "after care" at Apple is when People Business Partners meet with employees who had concerns to help them transition productively back into work, regardless of the outcome of their complaints. (Tr. 486–487.)

to bring up similar personal concerns for months dating back more than 2 years to the April 2020 Incident. Even in September, Hosken and Lemoge were meeting with Shen to go over the ER investigative process again, where Hosken again explained there was no policy violation, and there was a legitimate business rationale in deciding to move forward with someone else's code design. (Tr. 578–580.)

*C. May 17, 2022 Project Alloy Group Meeting With Chopra And Subsequent Events*

Chopra confirms that by mid-May 2022, the part of Project Alloy relevant to Shen's team function was done because they had achieved satisfactory results, and he wanted the Project Alloy team to move on. (Tr. 279.) Similarly, Nareddy confidently explains that in June 2022, he moved Shen over to Project Druid because Project Alloy had come to a "certain logical conclusion" in May where the project was already live in production by June. (Tr. 339.)

On May 17, 2022, because of Shen's numerous requests for a Project Alloy results review meeting in the months prior, an in-person meeting was held to discuss Project Alloy. This meeting is referred to hereafter as "the May 2022 Meeting." Chopra invited everyone involved with Project Alloy with around 10 to 12 stakeholders and team members' total. (Tr. 270.) Attendees included Dev team developers who worked on Project Alloy, Dev Team Manager Stepura, DevOps Team Manager Nareddy, Stepura's first-line manager, Gosrani, Project Manager Nallappan, Jambhekar, and AML Director Chopra. The meeting was led by Nallappan. (Tr. 71.)

Chopra organized the meeting to discuss technical disagreements and business needs for Project Alloy. He felt the disagreements had gone on 8 to 9 months already, and the team needed to move forward. (Tr. 270.)

Shen was told the meeting was to discuss her personal concerns which dated back to the April 2020 Incident. (Tr. 82.) However, the meeting was unproductive for all parties.

Chopra and Nareddy felt Shen was bringing up stale topics unrelated to moving on from the technical aspects of the recently completed and live production of Project Alloy. (Tr. 270, 332.) On the other hand, Shen arrived with different expectations and was frustrated with the unexpectedly large group meeting and lack of agenda items. (R. Exh. 12.)

Shen prepared printouts with her concerns and distributed them in the meeting. Some of these printouts included screenshots of private Slack messages from 2020 between Shen and Stepura, which she hoped would exemplify some of her personal concerns about misconduct and poor decision-making dating back more than 2 years to the April 2020 Incident. (Tr. 270, 332)

Other attendees, including Nareddy and Chopra, felt the printouts of very old private Slack messages from 2020 were inappropriate and irrelevant to the goals of the meeting. (Tr. 331–332.) During the meeting, Chopra referred to Shen as being a bad team player and claimed that she was "playing the blame game." (Tr. 82; R. Exh. 97.)

After the May 2022 Meeting, Shen continued to reach out to managers about her personal concerns, including about the unproductive May 2022 Meeting.

On May 19, 2022, Shen emailed Nareddy expressing she had

not wanted this high-level architect review meeting with everyone to discuss Project Alloy to try and "settle system level issues hanging over for 3 years." (R. Exh. 12.) (Emphasis added). She wanted a smaller group meeting with a predetermined agenda, and she felt that meeting attendees did not want to discuss cultural and managerial concerns. She continued in the email to say that she feels she is not trusted in the workplace anymore and would like to work with Nareddy on having a more open process and communication. (R. Exh. 12.)

On May 25, 2022, Shen emailed Chopra about the failed May 2022 Meeting. Chopra characterizes her raised concerns as the same technical disagreements that have already been discussed many times with Shen dating back again to the April 2020 Incident and specifically citing what Shen characterizes as an episode starting from November 2021 and issues "hanging over this project for 3.5 years." (Tr. 273, R. Exh. 96.)

In at least one of Shen's emails to Chopra about Project Alloy concerns after the May 2022 Meeting, Shen copied Apple Vice President Smoley who is Chopra's direct supervisor. The email was entitled, "alloy result report is fact, not perception," and raised similar concerns over Project Alloy results, decision-making, and lack of review and transparency in the time since the May 2022 Meeting and criticizes Chopra to Smoley repeating Chopra's May 2022 Meeting statement to Shen that Chopra has an unusually high standard or threshold before saying to the group that Shen was "playing the blame game" for activities that date back all the way to the April 2020 Incident. (R. Exh. 97.)

Around this time, Nareddy increasingly felt as though Shen could not move on from her personal concerns about Project Alloy and the April 2020 Incident which she had brought up multiple times. (Tr. 333.) On May 31, 2022, Nareddy sent Lemoge a document of goals for Shen to focus on, most of which are technical and work goals unrelated to Project Alloy and related to her Proof of Concept (POC) task with Project Druid. (Tr. 335, R. Exh. 64.)

Under "Development Tips" in the Goals document, Nareddy included, among others, a tip titled "Listen, Challenge, and Commit." Nareddy explained that "Listen, Challenge, and Commit" means that a team must discuss and challenge each other, but then commit to a direction and work towards delivering the project. He intentionally added this specific tip because he felt Shen was lacking in this area. (Tr. 335.)

In the email, Nareddy asked Lemoge to review the Goals document with Shen. (R. Exh. 64.) Nareddy explained this document was part of the feedback and goals given to developers for their annual performance reviews, and to make sure Shen had a "clear-cut direction on what [she] need[s] to deliver in the upcoming year." (Tr. 334.)

*D. Project Alloy Goes Live in Production and Shen Transfers to Project Druid*

Project Druid is an external open-source software, meaning it is a software whose code repository is publicly available. This means generally, anyone can view or download the software. The public may also be able to contribute code changes to improve the software as well, depending on the software's specific licenses. (Tr. 349.) Shen was tasked with doing a POC project to evaluate if AML should integrate Project Druid into Athena. (Tr.

89, 340.)

Once again, Nareddy and Chopra explain that in June 2022, Nareddy moved Shen over to Project Druid because Project Alloy had come to a “certain logical conclusion” in May where the project was already live in production by June. (Tr. 279, 339.) Shen also falsely describes her June 2022 transfer to Project Druid as her being improperly removed from the Project Alloy team. (Tr. 83, 85–86, 94.) Nareddy credibly explains that Shen was tasked with working on the Project Druid project as Shen’s work with Project Alloy had come to an end and Nareddy provided Shen with the new POC task with Project Druid. (Tr. 85, 339.)

Once again, by June 2022, Project Alloy reached the next phase of live production and Shen’s specific role was no longer relevant or needed given that the project had moved onto this next phase to something new and I find that Shen’s transfer to Project Druid filled this void.

*E. Shen’s June 6 and 8, 2022 Mass Emails And Subsequent Events*

1. June 6, 2022 *first* mass email from Shen to Chopra and other employees

Since 2022, Respondent has maintained the following valid rule and policy for its employees (Apple’s respect policy):

The following principles guide Apple’s business practices:

- Honesty—Demonstrate honesty and high ethical standards in all business dealings.
- Respect—Treat customers, partners, suppliers, employees, and others with respect and courtesy.
- Confidentiality—Protect Apple’s confidential information and the information of our customers, partners, suppliers, and employees.
- Compliance—Ensure that business decisions comply with applicable laws and regulations.

(GC Exh. 1(e) 3.)

On June 6, 2022, Shen sent a mass email to 164 people, including Chopra and his direct and indirect reports—roughly the entirety of the AML division. (Tr. 278, GC Exh. 5.) Shen explains that approximately 140 of the people were individual contributor employees and 24 were managers. Most of them were employees who had no history working with Shen and/or they did not know why Shen was sending these mass emails to them. The email’s subject line stated, “Its ok to be publicly blamed, but not publicly defamed.”

In the mass email, Shen once again communicates her personal gripes about Respondent’s management and alleged what had happened to her since the April 2020 Incident, including the following: finding a critical flaw in a project that her manager continued to dismiss; being transferred from the Dev team to the DevOps team in June 2020 with a confusing mix of assignments and expectations; scoring lower on the teamwork and collaboration category in performance reviews; being evicted from the team and blocked in code contributions; being publicly criticized by Chopra during the May 2022 Meeting when he said she was a bad team player who played the blame game; having her title changed from Dev engineer to DevOps engineer; and not having a clear role in the DevOps team. (GC Exh. 5.) She also attached

a picture of her now-empty calendar to show that she had been isolated and removed from collaboration opportunities. (GC Exh. 5.) The main thrust of Shen’s June 6 and 8, 2022 mass emails focused on her personal complaints toward Chopra for calling Shen a bad team player who was playing the blame game at the May 2022 Meeting.

Most of the recipients of this email did not work on Project Alloy, had no knowledge of issues or disagreements within and around Project Alloy including the April 2020 Incident and the May 2022 Meeting, and had no knowledge of any previous communications between Shen and management, which again starts with the April 2020 Incident. (Tr. 214, 391–392.) According to Chopra, around 5–10 percent of recipients of the email were involved with Project Alloy, and around 30–40 percent were involved with Athena. (Tr. 278.)

Later in the day, on June 6, 2022, Shen cancelled a prescheduled, recurring meeting with Nareddy on Project Druid. Shen explained she was not emotionally ready for the meeting. (Tr. 339.)

2. June 8, 2022 *second* mass email from Shen to Chopra and other employees

On June 8, 2022, Shen sent another mass email to Chopra and his direct and indirect reports (GC Exh. 6). The email’s subject line stated, “The engineering principles and standards, 3 questions to the Head of our engineering team.” In the email, Shen discussed high level engineering principles and standards and questioned Chopra on what the internal engineering guidelines should be, how to apply principles to daily work, and how much, if any, business and technical justifications engineering leaders should provide about their decisions. She goes on later in the email to discuss her perspective on the importance of discussing and communicating about these topics with individual contributors like Shen to avoid a “mistake becom[ing] a legacy.” (GC Exh. 5.)

As with the previous mass email, the email communicated Shen’s personal disagreements to Apple management and is not a protected concerted activity. Most of the recipients of this email had no prior knowledge or context about issues within and around Project Alloy including the April 2020 Incident and the May 2022 Meeting, apart from these two mass emails, and had no knowledge of any previous communications between Shen and management, which again starts with the April 2020 Incident more than 2 years earlier. (Tr. 214, 391–392.) Once again, Apple dismissed Shen’s four formal complaints covering many of Shen’s same personal concerns in April 2022.

Nareddy convincingly recalled that a few employees verbally complained to him about Shen’s June mass emails. (Tr. 338–339.) Lemoge also recalls multiple employees complaining to her about Shen’s mass emails, saying that they did not want to be involved, did not know why they were receiving the emails, and that the emails were disruptive to their work. (Tr. 499.)

One of the individuals who reached out to Lemoge with concerns about Shen and her mass emails was Rajiv Kumar Shaw (Shaw), a senior DevOps engineer in the AML department (T. 460, 462.) Shaw did not work on Project Alloy or any teams with Shen, and only met Shen once or twice prior to those emails. (Tr. 471, 474.)

Shaw remembers seeing Shen's first email on June 6, 2022, and thinking she had some problem with her managers. When he received her second email, on June 8, 2022, he felt worried about Shen and reached out to his manager. (Tr. 462-463.) Shaw had difficulty comprehending the problems Shen was facing because he could not easily follow what she was saying in her mass emails, but he felt worried because it seemed she was facing some issues and was having a tough time emotionally. (Tr. 462-464.) He also felt that sending a mass email was not the appropriate channel to address her issues and reached out to his manager asking why there are these mass communications when there are already proper channels for these personal concerns of Shen. (Tr. 463.) Shaw's manager directed him to Lemoge, who let him know that HR had already been addressing and working on Shen's personal concerns with her. (Tr. 471-472.)

### 3. Employee Relations follows up with Shen with warning

On June 8, 2022, People Business Partner Lemoge reached out to Shen following her two mass emails. Lemoge told Shen her emails were disruptive to the organization, wanted to know what Shen wanted, and Shen alleges that Lemoge asked whether Shen wanted her coworkers to join, and proposed to meet on June 10, 2022. (Tr. 99-100.)

Lemoge believably denies specifically asking Shen if she wanted her coworkers to join but admits that Lemoge was puzzled by Shen's disruptive mass email and wondered about Shen's intent in sending more than one disruptive mass email especially after Shen's January, March, and April 2022 formal complaints covering the same issues had been dismissed before Shen's June mass emails. (Tr. 495.)

After the conversation, Lemoge emailed Shen on June 8 saying only:

Ellen,

*Per our conversation, further emails and posts to channels to the broader organization of this nature are inappropriate and should not continue. I'll put time on your calendar for Friday so we can talk further then.*

Thanks,

Carylynn [Lemoge]

(GC Exh. 25). (Emphasis added.)

On June 10, 2022, Shen, Lemoge, and Hosken met to discuss Shen's disruptive mass emails. Lemoge again told Shen her emails were disruptive and made some people uncomfortable. Lemoge instructed Shen once more to stop sending these mass emails. Hosken then confirmed that if Shen continued to send these kind of mass emails, she would be disciplined. Hosken told Shen she is not allowed to send these mass emails and there are proper channels for Shen to escalate her concerns. However, in this case, Hosken believed there were no facts or claims in her mass emails that had not already been raised, investigated, and dismissed in Shen's ER complaints dating back to January, March and April 2022 and the April 2020 Incident. (Tr. 101-

102.) Lemoge agreed that there were no new facts or concerns from Shen. (Tr. 497.)

Shen asked if she had the right to speak up if ER and HR try to threaten her, because Apple's business conduct policy protected her right to speak up. While Lemoge and Hosken did not explicitly say she did not have the right to speak up, they were clear in their warning to Shen to stop sending these disruptive mass emails to the entire Apple organization. (Tr. 101.)

On June 15, 2022, Lemoge sent Shen an email following up on their June 10, 2022, discussion summarizing the situation. (GC Exh. 7.) Lemoge explained that the concerns about improper conduct by management and concerns around the code selection process were taken seriously and already thoroughly investigated by the ER team. Shen had been told on April 13, 2022, that the investigation did not confirm any violations of Apple policy and was thereby closed.

Lemoge further explains that she had told Shen to continue coming to ER with any new facts or concerns she may have, and that Shen should have raised her concerns through the appropriate channels. In the email, Lemoge claimed Shen's actions—including her two mass emails, her multiple emails to Chopra and Smoley, her behavior and distributing Slack message printouts at the May 2022 Meeting, and her cancellation of a Project Druid meeting on June 6, 2022, with Nareddy—violated the expectation of respect in Apple's Business Conduct policy. The email also repeated to Shen that failure to comply with appropriate conduct and using appropriate channels could lead to corrective action. (GC Exh. 7.)

Shen responded on June 21, 2022, to Lemoge's follow up email by providing her perspective and more context about the listed violations. Shen explained she delayed the Project Druid one-on-one meeting with Nareddy on June 6, 2022, by one day, due to the trauma she felt from sending the mass email earlier that day. (R. Exh. 82). Shen also explained that the May 2022 Meeting where Shen alleges she was publicly defamed by Chopra constituted new evidence not previously addressed in her ER complaints. (R. Exh. 82).

### 4. Alleged concerted activity—Shen discusses concerns with a coworker

On June 13, 2022, Shen alleges she discussed her concerns with another unnamed coworker while taking a walk around Apple's Sunnyvale campus. (Tr. 98.) This coworker who did not testify at hearing is alleged to be an AML employee that previously worked on a project together with Shen. The coworker supposedly echoed the concerns Shen brought up in her group emails and explained he had experienced similar things before. (Tr. 97-98.)

Later the same day, Shen falsely claims she reported the conversation in an email to Lemoge as an example of other employees showing support for Shen. (Tr. 158.) Shen recalls that in the email, she identified the name of the coworker she had the conversation with. (Tr. 158.)

As with the previous rejected alleged concerted activity on January 12, 2022, this claim lacks the supporting evidence and details that would make the existence of such a conversation believable. Shen again alleged that this conversation on June 13, 2022, was communicated by her in an email to HR, along with

the name of the coworker. (Tr. 158.) However, no email was produced in support of Shen's second made-up story. Moreover, this is inadmissible hearsay testimony, offered for the truth of the matter asserted, which lacks weight considering the overwhelming evidence that Shen's conduct was to advance her personal agenda alone. I further find that given these reasons and the lack of supporting evidence and failure to come forward with this witness' testimony at hearing, I also view this conversation as unbelievable and reject it.

5. June 20, 2022 *third* mass email from Shen Going Up the Management Chain

On June 20, 2022, Shen sent a third mass email to all 164 recipients of her first two mass emails earlier in the month (Chopra and AML), this time adding select Apple higher-level executives. The added recipients included the following persons: Senior Vice President Demby, the head of the IS&T Division; James Ferguson, the ER Director; the head of Inclusion and Diversity; and Tim Cook, the CEO of Apple. (GC Exh. 8.) Shen also blind-copied Lemoge on the email. (Tr. 105.)

In the email, Shen described events more than 6 months earlier and "[o]ver the past 2 years" and again generally complains how Shen has been mistreated after raising her personal concerns on workplace culture and decision-making processes dating back more than 2 years to the April 2020 Incident, including that HR told her the first two mass emails she sent earlier in the month—such as the one where she raised questions about technical principles of the organization—were considered "disruptive to the organization." (Tr. 105–106, GC Exh. 8.)

Shen also stated in the email: "[My] [q]uestions were either not welcomed or hit dead silence." Shen further reminded Apple management that she has been with her team for 6 years, yet Shen's repeated gripes were described by Apple management as "bringing up questions again" and "considered [by Apple management to be] 'ineffective', 'contentious', and 'not collaborative.'" (Tr. 105, GC Exh. 8.) Shen explained this was the reaction she received from Lemoge and, after her ER complaints were dismissed, Nareddy. (Tr. 105.) Nareddy opined that Shen needed to focus on her work on Project Druid as, instead, Shen kept going back to Project Alloy issues which involve problems dating back to the April 2020 Incident and Nareddy continued to try and get Shen to move forward and improve her work on her current assignment Project Druid. (Tr. 343.)

As with the previous two mass emails, most of the recipients of this email had no prior knowledge or context about issues within and around Project Alloy including the April 2020 Incident and the May 2022 Meeting, apart from these two mass emails, and had no knowledge of any previous communications between Shen and management, which again involves Shen's personal gripe about Apple management primarily from April 2020 to Shen's dismissed complaints in April 2022. (Tr. 391–392.)

On June 22, Chopra responded directly to Shen's three

questions from her June 8 mass email, explaining his technical principles and beliefs on best team practices. (R Exh. 98.) (Chopra's June 22 response.) Chopra's June 22 response provides:

Ellen,

I have been out with COVID and vacation for the most part of the past 2 weeks.

I have responded to these questions previously and would prefer to have a conversation on these versus going back and forth on mail . . .

Code performance, code reliability, simplicity of solution and delivery speed are some of the key engineering principles followed in the team to drive agility and operational excellence in the team. If all these things are done right, they manifest themselves as a reliable and available platform with no P0/P1 incidents. So P0 incidents is one metric but that is not the only engineering guideline/principle . . .

Team meetings, projects specific meetings and 1 on 1 discussions are many avenues available for engineers to brainstorm ideas and share feedback. Engineers and managers are encouraged to bring diverse ideas and viewpoints in collaborative settings while ensuring mutual trust and respect even in the face of disagreements. Based on these discussions, multiple options and design flows are evaluated in the context of project scope, code performance, reliability, manageability and delivery timelines and the best possible solution is selected taking into account the feedback from the team and engineers working on the project. Working together as one team with everyone 100% behind the agreed approach is what makes us successful in delivering and delighting our customers.

In AML, engineering leaders have strong technical background and they actively participate in the design discussions and are actively involved in all key programs and deliverables. Engineering leaders have the understanding of business objectives and priorities and they provide this context and input in various discussions. Project and business objectives and their delivery timelines along with the engineering principles described earlier goes together in coming to an agreement on a solution with input and ideas from every member of the team.

If you have further questions about how we operate in this organization, please reach out to me or your management team copied here. I've also copied Carylynn [Lemoge] here as I trust that she is involved in helping all of us in several aspects.

Thanks, Vivek [Chopra]

(R. Exh. 98.)<sup>9</sup> Chopra's June 22 response was not enough for

Board proceeding and further on appeal, if applicable, and that all transcripts and exhibits introduced into evidence under seal will continue to be maintained under seal and that portions of the transcript and exhibits

<sup>9</sup> On the request of the parties and for good cause shown, I issued a protective order during the hearing prohibiting the parties from disclosing the contents of certain testimony and exhibits marked "sealed" or "confidential" which order will continue in full force and effect for any

Shen, who replies to Chopra's June 22 response in another lengthy e-mail repeating the same issues and asking the same questions she had before. (R. Exh. 98; Tr. 331–332.)

6. Shen meets with higher-level management after her third mass email

JUNE 21, 2022 MEETING BETWEEN SHEN AND NAREDDY'S  
MANAGER, JAMBHEKAR

On June 21, 2022, Jambhekar met with Shen where he discussed some of the concerns raised in Shen's three mass emails and explained some of the bigger-picture reasons behind some of the technical design decisions made in Project Alloy. (Tr. 443.) Jambhekar also addressed questions and concerns Shen had regarding the Druid project and provided broader business context as to why the time was critical for the project and Shen needed to focus completely on the Project Druid tasks. (Tr. 444.)

Although Jambhekar's original purpose in meeting with Shen was to discuss her concerns about Nareddy as a manager, he opined he was able to address and answer many of Shen's concerns and that overall, the meeting went well. (Tr. 439–444.) Shen seemed to agree the meeting was productive, because two days later, on June 23, 2022, Shen emailed Jambhekar thanking him for responding to her concerns and speaking with her promptly. (R. Exh. 82.)

*F. Shen's Requested July 8, 2022 Meeting with  
Vice President Smoley*

On July 8, 2022, Shen met with Smoley<sup>10</sup> and Lemoge. The meeting was initiated by Shen's emailed meeting requests Shen had sent both Smoley and Chopra in May of 2022, after her ER complaints were dismissed. (Tr. 106–107.) Smoley had been copied by Shen in June 20 mass email. The meeting with Smoley had been postponed a couple of times and finally took place on July 8.

During the meeting, Smoley told Shen her mass emails were disruptive to the organization, and she needed to stop. Further, her concerns had already been addressed with a thorough and conclusive ER investigation dating back to the April 2020 Incident and Apple's April 2022 dismissal of Shen's January, March, and April 2022 formal complaints. (Tr. 108.) Moreover, Shen's complaints about the May 2022 Meeting were answered by Chopra's June 22 response.

Shen responded that she did not understand how her concerns about the integrity of the organization and its managers were specifically explained by ER when the investigation closed. (Tr. 108.) For example, Shen alleges that she had been publicly defamed by Chopra despite never actually receiving specific feedback from Chopra, and she felt her managers had fabricated facts about business and technical decisions. (Tr. 108.) Shen, however, ignores the fact that Chopra's June 22 response to Shen contained his more credible beliefs that Shen needs to move on from her past perceived slights, especially now that Project Alloy has moved into production. (Tr. 279, 339, R. Exh. 98.)

Smoley told Shen that when a wise person hits a wall, they will walk around the wall and move forward. Shen disagreed,

saying that the engineer's job is to build the house to aid people, not building a wall and the issues are not historical yet, they are relatively new, with the project only having started in 2020. (Tr. 109.) Once again, Shen is focusing her personal disagreements on events in the 2020–2021 time.

Shen next alleges that Smoley then became upset and asked Shen if she had children, to which she responded she did. Shen further alleges that Smoley then told Shen she was just like his granddaughter, saying she wants this and wants that, and whining and griping when she does not get her way. (Tr. 109.) Shen next alleges that Smoley went on to tell Shen that if she wants to continue at Apple, she should move on and stop sending the disruptive mass emails. Otherwise, she should consider moving on to a new employer because nobody wants to work with her.

Shen was surprised by Smoley's response and told him she felt she was being threatened. (Tr. 110.) Lemoge remembers Smoley, being more diplomatic than Shen alleges, stating in the meeting that Shen had choices if she did not like her manager or team, and one of the choices for Shen to determine was whether she wants to stay at Apple and be less disruptive and combative, more collaborative, or move away from the Apple organization and onto some new employer. (Tr. 514–515.)

Afterwards, Lemoge emailed a summary of the July 8 meeting to Hosken. In the email, Lemoge described how Shen shared concerns about Chopra that had already been addressed as part of the ER investigation and that Shen should "focus on any new factors." (GC Exh. 29.) Lemoge then wrote how Shen became frustrated and falsely accused Smoley of being "ok with the dishonesty. . . ok with being unethical." (GC Exh. 29.)

Lemoge explained Smoley then gave Shen his perspective on the behavior expected of team members to be collaborative and productive (not combative) when asking questions or needing clarification and Smoley next stated:

being collaborative and partnering to make improvements is part of our culture, and if you can't behave in that way without being disruptive or combative, perhaps this isn't the organization for you. You own that decision, as well as your behavior.

(Tr. 514–515; GC Exh. 29.)

Shen responded by saying that what Smoley just said is a threat . . . and that he is pushing [Shen] out of Apple. (GC Exh. 29.) I find that by July 2022, Apple management had fully investigated Shen's personal disagreements which dated back more than 2 years to the April 2020 Incident and that VP Smoley and Lemoge instructed Shen to stop sending disruptive mass emails to a large portion of Apple employees who were not Shen team members and had no work connection with Shen and that if Shen could *not* get past the April 2020 Incident and similar related incidents and move on to return to being a collaborative partner at Apple, Shen should consider moving on to a new employer.

*G. Shen Receives Documented Verbal Warning on September*

sealed at hearing will not be open to the public. See *National Football League*, 309 NLRB 78, 88 (1992) (Same).

<sup>10</sup> Smoley was Chopra's immediate supervisor and an Apple vice president at the time. (Tr. 514.)

*13, 2022, for Violating Apple's Open-Source Policy*

On September 13, 2022, Shen was informed by Nareddy in person and via email that she was receiving a Documented Verbal Warning for violating Apple's Open-Source policy by posting to an open-source software project on August 24, 2022. (GC Exh. 9.)

Open-source software projects have a source code that is publicly accessible to the public, and usage is often conditioned by specific clauses in the relevant legal licensing agreements. (Tr. 111, 349–350.) Generally, subject to the licensing, anyone can contribute code changes to the software. (Tr. 111.) Often, a community of developers act as a chair for an open-source software by creating guidelines and responding to code contributions. (Tr. 349.)

On August 24, 2022, Shen engaged with Project Druid, an open-source software, by opening an issue on the platform. In the issue, she raised a question asking whether a specific feature was available in Project Druid. Shen did not know the full extent of its functionality. As part of her posted issue, she provided a suggested nine lines of code to supplement the question. (Tr. 112–113.) Shen then immediately messaged Nareddy via Slack to inform him that she had posted a question with suggested code change in Project Druid. (Tr. 113–114, 353.)

However, Shen claims a lack of understanding of Apple's open-source policy, as any contributions or engagement with an open-source software project by Shen must be submitted to Apple's open-source portal and gain approval *prior* to action—even if the developer is just raising a question or suggesting code changes, and not actually trying to officially committing code changes to the software. (Tr. 351–353, 357.)

Later, the same day, Shen informed Nareddy of her contribution to Project Druid. Nareddy told Shen she had already violated the Apple open-source policy and needed to immediately take down her post. (Tr. 115.) Shen tried to remove the issue from the Project Druid platform, but due to the intricacies of how open-source software works. Shen was unable to remove or delete her issue from public view.<sup>11</sup> (Tr. 115–116, 226, GC Exh. 9.)

On September 13, 2022, Nareddy and Jambhekar met with Shen. Nareddy informed Shen that Apple launched a 3-week business conduct investigation on her actions in Project Druid, and the investigation determined she had violated Apple's open-source policy. (Tr. 117; GC Exh. 9.) Because of this, she would be receiving a documented verbal warning, which would go in her personnel file. (Tr. 117.)

Shen's actions were a violation of Apple's policies because she did not go through the requisite channels and gain permission before posting. (Tr. 357; GC Exh. 9.)

In response to being told of her documented verbal warning on this issue, Shen told Nareddy and Jambhekar that she would share the warning she received with the rest of the organization

so they can also be aware that this type of activity will result in a Documented Verbal Warning. (GC Exh. 9.)

Trying to avoid more disruptive mass emails from Shen being sent to 164 of Apple's AML employees most who did not work with Shen and would be unfamiliar with the issues Shen was being disciplined for, Nareddy and Jambhekar instructed Shen not to share the warning she received with the rest of the organization. (Tr. 356.) Later that day, Nareddy emailed Shen to reiterate her documented verbal warning, why she received it, and what the open-source policy she violated was. In the email, Nareddy also warns Shen against sharing her documented verbal warning and that doing so could lead to further discipline. (GC Exh. 9.) Nareddy wrote:

During the discussion [where you were given a Documented Verbal Warning], you insisted that you will share this Email with rest of the organization. I would like to remind you that you have been given prior guidance about this behavior of sending team/org-wide emails as they can be disruptive. Taking such actions as forwarding on a Documented Verbal Warning that is being given to you is another example of that behavior, is not acceptable, and could lead to further discipline for you.

(GC Exh. 9.)

Nareddy recalls he did not tell Shen she could not discuss her warning with her fellow team members, but Nareddy was clear that he specifically wanted to remind Shen that she could not share the warning in another disruptive mass email to 164 of Apple's AML employees workforce organization<sup>12</sup>, because it would be disruptive to the employees.<sup>13</sup> (Tr. 356.)

Shen tried to appeal the documented verbal warning with Nareddy and Lemoge, but she was unsuccessful. (Tr. 132.)

*H. September 16, 2022 Performance Serious Concerns Memorandum Sent to Shen*

Testimony and evidence show that Nareddy had concerns about Shen continuously focusing on Project Alloy over her assigned POC project for Project Druid in the months leading up to September 16, 2022. He began to become especially concerned with her inability to collaborate and work with a team around the summer of 2022. (Tr. 338.) On July 25, 2022, Nareddy expressed frustration in managing Shen because she kept bringing up her personal gripes and old discussions already addressed about Project Alloy dating back to 2020 and 2021 again rather than work on Project Druid. (Tr. 340, R. Exh. 67–69.) Nareddy testified that dealing with Shen began to take up most of his day. (Tr. 342.) He also raised concerns to Lemoge and Jambhekar about Shen and how the Project Druid project was at a standstill due to Shen. (Tr. 344.)

On September 16, 2022, Shen received a Performance Serious Concerns Memorandum from Nareddy (GC Exh. 11.) Nareddy also met with Shen the same day to review the contents of the

<sup>11</sup> Users must have special, privileged permissions remove or delete contributions and issues already posted to the Druid open-source software project. (GC Exh. 9.)

<sup>12</sup> By "organization," Nareddy is referring to the same 164 AML department employees who Shen sent her first three disruptive June mass emails.

<sup>13</sup> I am inclined to believe Nareddy's testimony that Shen was told not to share her warning with all of Apple's 240 AML employees over its entire AML workforce organization over Shen's testimony denying such statements. In Nareddy's email follow-up about the warning to Shen, he references her prior warnings in sending organization-wide emails. (GC Exh. .9)

memorandum. (Tr. 363.) The memorandum states that Nareddy has serious concerns about Shen's performance, specifically in the areas of teamwork and communication, based on her behavior since mid-June 2022. The memorandum also states Nareddy's belief that Shen's lack of teamwork and communication is negatively impacting her productivity, particularly in working collaboratively with other team members. (GC Exh. 11.)

The memorandum listed examples of Shen's behavior in 2022 that led to the decision to issue her a memorandum, including the following incidents:

- (a) Shen posted on Slack in January of 2022 with false allegations against Stepura while the ER and HR investigations into her complaints were ongoing. This caused disruption to the team.
- (b) During the May 2022 Meeting, Shen refused to discuss the Project Alloy issues she had raised, "accused multiple attendees of dishonesty," and did not give other attendees a chance to discuss other topics.
- (c) Multiple team members expressed concerns about Shen's behavior during team meetings and her [June 2022] "org-wide disruptive [mass] emails."
- (d) Shen continues to spend time discussing and raising process-level issues from previous projects in 2020 and 2021, particularly Project Alloy, rather than focusing her time on her ongoing project, the Druid project.
- (e) Shen refuses to collaborate with Nareddy on new assignments and accused him of retaliating against her.
- (f) Shen's open source contribution on August 24, 2022 is a violation of Apple's Open Source policy and serves as another example to show Shen's inability to collaborate and discuss issues ahead of time.

(GC Exh. 11.)

The memorandum continued, stating:

Overall, your communication style, your teamwork skills, and your ability to have a collaborative, open mind to understand others point of view needs significant improvement. I would like to establish an immediate improvement plan . . . I will be reviewing your progress . . . on a regular basis . . . and expect you to demonstrate immediate and significant improvement. If you are unable to demonstrate immediate and significant improvement in your performance the next step would be a documented coaching plan.

(GC Exh. 11.) Finally, the memorandum also provided Shen a list of resources that are available to Shen and all Apple employees including: (1) Employee Assistance Plan; (2) Workplace Accommodations; (3) Leave of Absence Programs; and (4) the Apple Wellness website. *Id.*

Nareddy explained he drafted the memorandum himself and collaborated with ER and HR in creating it. It was also his decision to issue it to Shen. (Tr. 358.) He explained the purpose of the memorandum was to "set goals for [Shen] to improve on her performance with respect to teamwork and collaboration," as well as provide examples of his concerns about Shen's recent performance. (Tr. 359.) Chopra was also aware of performance concerns with Shen at the time, including that she continued to go back to Project Alloy and events including the April 2020

Incident rather than focus on her new assignment. (Tr. 286.)

*I. October 19, 2022, Fourth Mass Email from Shen And Subsequent Slack Communications*

On October 19, 2022, Shen sent her fourth and last disruptive mass email (the October 19 mass email). (GC Exh. 30.) Shen once again directed the email to Chopra, but in the copy line included the entirety of the 240 employee AML department and multiple high-level executives, including Apple CEO Tim Cook. Shen followed-up a few days later, on October 24, 2022, by posting to a Slack channel whose members include the same entirety of the AML department (the October 24 mass Slack message).

The October 19 mass email was entitled, "[IS&T AML] Without transparency, an engineering team could become an engineering leader's personal kingdom." (GC Exh. 30.) In the email, Shen gave a recap of her perceived mistreatment in the last few months for trying to call out what only Shen perceived to be Chopra's misconduct and call to improve workplace culture and transparency. Shen alleges again that she was forced to "move forward" by leaders, was defamed, received poor performance evaluations that led to zero bonus compensation and RSU, and had received the September 16 Performance Serious Concerns memorandum. (GC Exh. 30.) All in all, the October 19 mass email reverted to events primarily focused on the April 2020 Incident, 2021, and the May 2022 Meeting.

Nareddy recalled at least six or seven employees raising concerns with him about Shen's October 19 mass email. Some of these employees were managers and some of these were individual contributors. (Tr. 364–365.) Nareddy stated the concerns raised included not understanding why they were still receiving these mass emails unrelated to them as well as safety concerns, with some employees claiming they did not feel safe around Shen anymore due to the aggressive tone of her emails. (Tr. 366.) Nareddy also received emails from some employees with similar concerns. (Tr. 366–368, R. Exh. 77; R. Exh. 99.) I observed that Nareddy legitimately opined that Shen's mass emails were disruptive, disrespectful, and contained the same issues she had been raising for the past years. (Tr. 371.)

Lemoge also received several emails from employees after Shen's October 19 mass email and October 24 mass Slack message raising concerns about being in the broad distribution list for her personal gripes mass emails. (Tr. 523.) For example, in an email on October 20, 2022, an employee from the AML department, whose name is redacted, emailed Lemoge the following:

There is a trail of emails from [Shen] that is very disturbing. She must sort out her concerns by discussing them internally or adding intended recipients. Some of the team members reached out to me, sharing concerns about the same. It is shocking to see such emails, as they disturb team synergy.

Please take a look into this matter to prevent such annoying emails.  
(R. Exh. 107) (sic).

Lemoge responded to this email by thanking the person for sharing feedback and explaining that Shen and her concerns are being addressed, and that "employees have multiple avenues for communicating grievances or concerns about working

conditions that do not include mass-emails.” (Tr. 523–524.)

*J. Shen is Terminated On November 1, 2022*

On October 28, 2022, Nareddy sent an email to Jambhekar, copying Lemoge and Chopra, informing him he would like to terminate Shen’s employment. (R. Exh. 78.) Nareddy briefly outlined his reasons for termination, which largely focused on Shen’s continued disruptive and disrespectful behavior.

Nareddy opined that Shen continuously caused disruption in the workplace with her mass emails and slack messages, and she showed no signs of improvement despite months’ worth of coaching her on behavioral expectations (Tr. 369–372, R. Exh. 78.) He also noted that he felt this disruptive behavior was in lieu of focusing on improving in areas where Shen had been given documented warnings, including the Documented Verbal Warning for her open-source contribution without prior approval and the Serious Concerns Memorandum for her lack of teamwork and collaboration. (R. Exh. 78.)

Shen was terminated from Apple on November 1, 2022. Nareddy and Jambhekar met with Shen in a virtual meeting in the morning of November 1, 2022, to inform her of her termination. (Tr. 149.) Nareddy explained to Shen that her October 19 mass email and October 24 mass Slack message led to her termination, as they are violations of Apple’s policies on proper workplace behavior. (Tr. 149.) After the meeting, Nareddy emailed Shen a termination letter, which stated that she was terminated in part due to her October 19 mass email which violated Apple’s Business Conduct policies. The email also attached Apple’s Business Conduct policies. (GC Exh. 22.) This was the last email Shen received from Nareddy. (Tr. 150.)

Shen appealed her termination but on December 20, 2022, the termination appeals investigation concluded, and Shen was informed her termination was merited based on Apple’s “umbrella policy,” which Shen violated by her continued mass communications rather than going through appropriate channels. (Tr. 150–151.)

Jambhekar explained that he agreed with Nareddy’s termination decision at the time because he believed Shen violated Apple’s Business Conduct policy to “treat customers, partners, suppliers, employees, and others with respect and courtesy.” (Tr. 449.) He felt that Shen was unable to move on from her personal concerns despite them addressing the concerns with her multiple times. Additionally, her comments were becoming increasingly aggressive and disruptive and multiple people expressed concerns about Shen’s behavior. Jambhekar explained that other employees who continued to receive Shen’s mass emails would mistakenly believe that management had not already addressed Shen’s concerns as they did not have inside knowledge about the situation or about conversations and steps that had already taken place. (Tr. 448.)

Lemoge was consulted on the termination and believed Shen did violate Apple’s Business Conduct policy mandating respect. (Tr. 525–526.) Lemoge explained that Shen’s mass emails were disrespectful of others’ time and led to multiple complaints from other employees that their work was being disrupted. She felt Shen had behaved disrespectfully in other ways, such as raising her voice in meetings, hanging up calls, and extending meetings long beyond the scheduled time (Tr. 526–527.)

Lemoge does not recall discussing suspension or anything less drastic than termination as a next step for Shen in receiving corrective action. (Tr. 545.) She explained, Apple does not have a formal progressive discipline policy but generally does have such a progressive discipline system in place. (Tr. 542–545.) And while Apple does sometimes issue written warnings, Lemoge explained that Shen did not receive a written warning for her conduct; rather, Shen received a verbal warning, which was documented in writing, in addition to the September 16 Performance Serious Concerns memorandum. (Tr. 543–544.)

Hosken was also consulted on the termination of Shen and agreed with the decision. (Tr. 583.) She gave similar reasons for the decision—disruptive, disrespectful behavior, employee complaints about Shen’s hostility, multiple opportunities to improve. (Tr. 581.) Hosken explained that Apple looks at “all the factors” in determining when to move to termination, rather than providing something lesser, such as a written warning. (Tr. 582.) In this case, Hosken explained that calculation was made based on the number of prior conversations with Shen that many different managers in ER, HR, and the IS&T and AML departments held about Shen’s behavior, and the egregious and highly repetitive nature of Shen’s personal gripes, where Shen was creating a disruptive and hostile environment to other employees.

### III. ANALYSIS

#### A. Credibility Legal Standards

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

Apple managers, Chopra, Jambhekar, and Nareddy were observed to testify in a professional straight-forward manner with what appeared to be excellent recollection of facts in this case, and they remained earnest and trustworthy with their recollection of facts from April 2020 to November 2022 even during cross-examination. In contrast, Shen spoke very quickly at times but I do not question her credibility except as noted herein. While I agree with Apple’s management that Shen could never get past her personal gripes and disagreement with coworker Wu and Manager Stepura dating back to April 2020, I understand Shen got frustrated and reached a point in June 2022 when she decided to raise the level of her personal discontent and Shen’s June and

October 2022 mass emails and posting contained her comments which are increasingly aggressive and disruptive.

Chopra and Nareddy persuasively claim Shen's transfer to DevOps in June 2020 was not a demotion; rather, it occurred due to an alignment between Shen's performance engineering skills and the organization's need to migrate certain software to run on Amazon Web Services (AWS), a third-party cloud infrastructure run by Amazon. (Tr. 246, 248, 30.8. Chopra also explained that Shen's job title and pay did not change in any way after her transfer, but Shen disagrees. (Tr. 248.) However, Manager Lemoge of HR also confirmed that Shen was not demoted, and her job title and salary did not change. (Tr. 484.) In fact, Shen admits that her compensation stayed the same. (Tr. 77–78.) I credit Chopra, Nareddy, and Lemoge's testimony over Shen's testimony on this point and I find that Shen was not demoted when she transferred from the Dev team to Apple's DevOps team in June 2020.

As mentioned above in the body of this decision, I also reject all statements by Shen that she had undocumented conversations on January 12 and 13, 2022, with two different Apple employees about Shen's personal concerns. Both alleged conversations, which I reject as untrue, took place without management hearing either conversation. Neither Apple employee was called as a witness to testify at hearing and there is no evidence that either employee was unavailable to testify. Moreover, Shen testified that she reported the second conversation in an email to Lemoge but no email was produced at hearing in support of Shen's alleged and unbelievable testimony. (Tr. 97–98, 158.)

Shen admits she became frustrated in her position at Apple beginning with the April 2020 Incident, continuing with her job transfer in June 2020, and that all her personal complaints were dismissed after investigation in April 2022. I find that Shen acted in a very unprofessional manner in response to the April 2022 dismissal of her four formal complaints in January, March and April 2022 as well as the May 2022 Meeting which had been arranged on Shen's request by Chopra but did not work out to Shen's satisfaction despite Chopra's June 22 response. (R Exh. 98.) Beginning in June 2022, Shen with her first three disruptive mass emails raised the level of her frustration and personal gripes by sending the disruptive mass emails well beyond her team member employees to random Apple employees who had no idea why Shen had sent them the disruptive mass emails. The only rationale considered by an employee receiving such an email is that Shen was suffering from some pain or personal gripe and that Shen could not reach any less disruptive manner to tell her story and this made some employees feel unsafe being around Shen given the aggressive tone of her mass emails. Shen's personal gripe disruptive mass emails were comprised of outdated events going back to the April 2020 Incident and many events more than 2 years old. (Tr. 366, 462–464.)

The four disruptive mass emails, Shen's October 24 mass Slack message, and Shen's formal complaints in early 2022 amount to Shen's unprofessional ridicule of Respondent without there being an ongoing labor dispute present. Shen's disagreements with Apple management over decisions on Project Alloy involved Shen alone and Project Alloy's direction rather than be anything intended to induce group action. In addition, Shen's personal gripes were against Stepura and Chopra and technical

decisions made in 2020 and 2021 and *not* about group working conditions or any concerns expressed by Shen on behalf of other Apple employees and there is no evidence presented showing that Shen was bringing group complaints to the attention of Apple management or that any other employee agreed with or even understood Shen's opinion of Project Alloy design. Finally, none of Shen's mass emails, October 24 Slack message or formal complaints filed and dismissed in early 2022 involved group concerns as they were all Shen's personal gripes shared by no other Apple employee.

Shaw was a most believable witness and testified in a non-hesitant, confident manner about the disruptive effect of Shen's mass emails and the events leading up to Shen's termination on November 1, 2022. I conclude that Shaw related the facts accurately, logically, and to the best of his ability to do so. Shaw also answered questions directly without coaching in a naturally conversant fashion and confidently opined about the high risk of detrimental effect that Shen's mass emails were having and would have if more mass emails issued going forward.

I further find that in this case Lemoge and Hosken believably treated Shen with a great amount of empathy from 2021–2022 as did other individuals in their Employee Relations and Human Relations departments and at least two individuals from each department spent large blocks of time and made much effort trying to understand Shen and tried very hard to get Shen to move on from events more than 2 years old. Moreover, Lemoge and Hosken tried to help Shen move on from the April 2020 Incident and attempted to change Shen's focus to Project Druid and all the resources offered by Apple to its employees who require assistance.

Stepura also testified in a straight-forward manner, and he appeared very sure of himself and his abilities as an engineer and manager at Apple.

*B. None of Shen's Personal Gripes Directed at her Managers Beginning in April 2020 Were Protected, Concerted Activities*

Complaint paragraph 5(a) alleges that:

1. On about January 12, 2022, Charging Party had a conversation with a coworker criticizing manager(s) in the performance of their duties in relation to their management of employees.
2. On about January 26, 2022, Charging Party filed a formal complaint with Respondent about concerns with manager(s)' misconduct and mismanagement, specifically relating to employee development and advancement.
3. On about June 6, 2022, June 8, 2022, June 20, 2022, and October 19, 2022, Charging Party sent group emails to coworkers that raised issues about terms and conditions of employment, specifically relating to employee development and advancement.
4. On about October 26, 2022, Charging Party sent a message on a group Slack channel that raised issues about terms and conditions of employment, specifically relating to employee development and advancement.

(GC Exhs. 1(e), 1(g), 1(h), and 1(j).)

The main question in this case is whether Shen was discharged because of her protected concerted activities. Such cases are

analyzed under the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As the Board has stated:

Under *Wright Line*, the General Counsel must satisfy the initial burden of showing by a preponderance of the evidence that the employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action.

The General Counsel meets this burden by proving that

(1) the employee engaged in Section 7 activity; (2) the employer knew of that activity; and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the [adverse action] and the Section 7 activity [footnote omitted].

Once the General Counsel sustains her initial burden, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity.

*Security Walls, LLC*, 371 NLRB No. 74, slip op. 3 (2022).

In general, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce protected activities. *Id.*; *Station Casinos, LLC*, 358 NLRB 1556, 1573–1574 (2012); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). Thus, the initial inquiry to be made in this case is whether Shen engaged in protected concerted activity when she began to complain to her immediate managers and their supervisors about a disagreement and personal gripe Shen had against Stepura and Chopra that began in April 2020 and continued to expand and escalate in distribution causing disruption with an increasing negative tone between Shen, her managers, Employee Relations personnel, Human Relations personnel and upper management at Apple with formal complaints, mass emails, and Slack postings to employees many who were unrelated to Shen's work and personal complaints which always came back to the April 2020 Incident and events in 2021 and 2022 more than 6 months before Shen filed her November 3, 2022 charge in this case.

For the reasons set forth below, I find Shen's individual complaints criticizing management were *not* concerted or protected.

1. Section 10(b) 6-Month Statute of Limitations Bars unfair labor practices alleged before May 8, 2022

I find that Respondent raised its 10(b) affirmative defense in its answer to the complaint and, in its closing brief. I further find

there was sufficient notice to the General Counsel that Section 10(b) would be a valid affirmative defense, and it was fully litigated as part of the May 2024 hearing.<sup>14</sup> (GC Exhs. 1(e), 1(g), 1(h) and 1(j); R Cl. Br. 21 fn. 7.) Because the charge in this case was filed on November 3, 2022, I further find that all unfair labor practices alleged in the complaint dated before May 7, 2022, are barred by the 6-month statute of limitation of Section 10(b) of the Act. See *U.S. Postal Service Marina Mail Processing Center*, 271 NLRB 397, 400 (1984) (Board holds that date of the alleged unlawful act, rather than the date its consequences became effective, is used in determining whether the period for filing a charge under Section 10(b) has expired.) I further find that paragraphs 5(a)(1) and 5(a)(2) are time-barred because they allege that Shen had participated in protected concerted activities with other employees on January 12, 2022, and that Shen filed a formal complaint on January 26, 2022, with Respondent about concerns with manager(s)' misconduct and mismanagement which formal complaint was investigated and dismissed by Respondent in April 2022, specifically relating to employee development and advancement. I further find that the April 2020 Incident, Shen's transfer in June 2020, all events in 2021 and the alleged activities on January 12 and 26, 2022, are time-barred because they are all outside the 6-month statute of limitations which ended on May 7, 2022.

2. Even if Shen's alleged activities are not barred by the 6-month statute of limitations, Shen's unilateral complaints and disruptive mass emails and Slack message in January, June, and October 2022 were Shen's personal gripes and disagreements with Respondent managers and not a protected concerted activity

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance

<sup>14</sup> In contrast, in *United Government Security Officers of America Int'l.*, 367 NLRB No. 5 at slip op. 1 fn. 1, the Board affirmed the administrative law judge who held that the Respondents did not raise their 10(b) defense until they submitted their post hearing brief and although the Respondents included a 10(b) defense in their initial answer to the

complaint the ALJ still held that the affirmative defense was insufficiently specific and was not litigated during the hearing. As such, the Board agreed with the judge's finding that the Respondents waived the defense. See, e.g., *Atelier Condominium*, 361 NLRB 966, 1001 (2014), enfd. mem. 653 Fed.Appx. 62 (2d Cir. 2016).

of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), *enfd.* 853 F.2d 966 (1st Cir. 1988). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen & Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984); *National Specialties Installations*, 344 NLRB 191, 196 (2005).

The Board has held that whether an employee’s activity is concerted depends on the way the employee’s actions may be linked to those of her coworkers. *Fresh & Easy Neighborhood Market*, *supra* at 153. The Supreme Court has observed that “[t]here is no indication that Congress intended to limit [Section 7] protections to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *NLRB v. City Disposal Systems*, 465 U.S. at 835. Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, *supra* at 154. Employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. *Id.* citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. *Id.* at 6, citing *Mushroom Transportation*, 330 F.2d 683, 685 (3d Cir. 1964), *Circle K Corp.*, 305 NLRB at 933; *Whittaker Corp.*, 289 NLRB 933, 934 (1988); and *El Gran Combo*, 284 NLRB 1115, 1117 (1987).

“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.’” *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Here, I find that Shen’s formal complaints in early 2022 which were fully investigated and dismissed by Respondent in April, Shen’s four disruptive mass emails, and Shen’s October 24 mass Slack message, amount to Shen’s increasingly aggressive ridicule of Respondent’s management without there being an ongoing labor dispute present. Shen’s disagreements with Apple management over decisions on Project Alloy involved Shen alone and Project Alloy’s direction rather than be anything intended to induce group action. In addition, Shen’s personal gripes were against Managers Stepura and Chopra and technical decisions made in 2020 and 2021 and *not* about group working conditions or any concerns expressed by Shen on behalf of other Apple employees. Furthermore, I find that there is no evidence presented showing that Shen was bringing group complaints to the attention of Apple management or that any other employee was involved with Shen’s personal gripes or even understood Shen’s criticism of Project Alloy design. Finally, none of Shen’s disruptive mass emails, her October 24 Slack message nor Shen’s formal complaints filed and dismissed in early 2022 involved group concerns as they were all personal to the relationship between Shen and her managers.

In sum, I find no evidence that when Shen filed her January formal complaint, issued her four disruptive mass emails in June and October 2022, or posted her October 24, mass Slack message, Shen was engaged in concerted or group action or acting in any way on behalf of any fellow Apple coworker employee at that time with similar unfair labor claims. I further find that each of Shen’s January, June, and October 2022 filing/postings were Shen’s own purely personal complaints that were mistakenly based on Shen’s unreasonable belief that she was wronged by Respondent when Respondent disagreed with Shen and accepted Manager Stepura and coworker Wu’s technical direction in Project Alloy along with Chopra’s June 22 response to Shen. The discrimination charge and complaint allegations involving Shen’s disruptive mass emails and her mass Slack message are limited to Shen’s unilateral disagreement with Apple management during Project Alloy and any expansion or added rationale for Shen’s personal gripes through her formal complaint and mass emails and Slack messages in 2022 are not credible. Also, Shen’s communications and related activity mainly revolved around a personal feud that she had with management over technical decisions, and which had nothing to do with her coworkers’ working conditions. Furthermore, Shen’s disagreements with Apple management were individual ones rather than a group action. She sought to undo the April 2020 Incident in 2022 only for herself. Shen’s endeavors were commenced without prior support by fellow workers and no evidence was introduced to show that any other employee shared Shen’s complaint or disagreement about Project Alloy’s direction or Respondent’s managers guiding Project Alloy. See *Tampa Tribune*, 346 NLRB 369, 371–372 (2006) (Employee who raised a personal gripe complaint about favoritism was speaking only for himself and there was no evidence that his coworkers even shared his belief that favoritism existed so no protected concerted activity); see also *National Wax Co.*, 251 NLRB 1064, 1064–1065 (1980) (same).

The Board in *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153–154, held that an employee who approached her coworkers with a concern implicating the terms and conditions of their employment, *and solicited or sought their help in pursuing it*, was acting in a concerted nature. (Emphasis added.) Here, as stated above, Shen did *not* approach any of her coworkers with her personal gripes or disagreements or solicit or seek their help before she aggressively escalated her complaints with her disruptive mass emails and disruptive October 24 mass Slack posting of her personal criticisms of Respondent’s managers and Project Alloy.

Moreover, Shen’s disruptive mass emails and October 24 mass Slack message are distinguishable from the facts in *Triple Play Sports*, 361 NLRB 308, 311 (2014), where the Board affirmed an administrative law judge who found that a social media website known as Facebook discussion amongst four employees was *concerted* activity because it involved four current employees and was “part of an ongoing sequence” of discussions that began in the workplace about the Respondent’s calculation of employees’ tax withholding. Noting that the employees, in their Facebook conversation, discussed issues they intended to raise at an upcoming staff meeting as well as possible avenues for complaints to government entities, the judge also found that

the participants were seeking to initiate, induce, or prepare for group action. As a result, the judge concluded that the Facebook discussion was concerted under the standard set forth in *Meyers Industries*, 281 NLRB 882, 887 (1986).

Here, Shen's January formal complaint, four disruptive mass emails, and her October 24 disruptive mass Slack posting were not a social media posting like Facebook or X (formerly known as Twitter). Instead, Shen's personal filings involving her disagreements with Respondent's management and Project Alloy direction was Shen's disruptive final personal salvo against Respondent's management leading to her termination. I further find that Shen's disruptive mass emails and October 24 mass Slack message to many Apple employees who Shen did not work with and who had no understanding why they were sent these angry and increasingly aggressive examples of Shen's insubordination. The disruptive mass emails and the October 24 mass Slack message were not part of any ongoing sequence of discussions between Shen and her fellow coworkers as no Apple employee came forward to become part of the complaint here. More importantly, there is no evidence put forth that anyone other than Shen shared her individual concerns that Respondent's managers chose the wrong direction to take Project Alloy.

As stated above, Shen was not seeking to initiate or to induce or to prepare for group action nor was she "bringing truly group complaints to the attention of management." *Miller Plastic Products*, 372 NLRB slip op. at 4 (quoting *Meyers II*). In *Miller Plastic Products*, an employee voiced concerns to management during a group meeting about the employer continuing in-person operations during the early days of the COVID-19 pandemic. Id. at 2. The Board held that this was concerted activity because while the employee acted alone in the group meeting, other employees had expressed concerns about the same issue, namely the employer continuing operations during the pandemic. Id. at 11. The employee's further actions in speaking to management about operating during the pandemic additionally constituted concerted activity because it was a "logical outgrowth" of the "truly group complaint" that the employee had stated. Id. (citing *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-1039 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995)). Unlike the employee in *Miller Plastic Products*, however, Shen's complaints were both specifically unilateral in nature and focused on business disagreements. The record evidence reflects no credible evidence of similar employee concerns. In fact, Shen herself noted that this was her concern and her concern alone; no one else agreed with her. (R. Exh. 94.) No credible evidence exists that Shen engaged in any activity with other employees. The General Counsel did not call any other employees to testify in support of their claims or to identify any group concerns tied to Shen's uniquely personal conduct. As analyzed in detail above, Shen's communications came from her alone; they were not on behalf of other employees.

Here, like in the *National Wax* case, there is no evidence that Shen's coworkers even shared her belief that Shen's performance review was negatively affected by events in 2020 and 2021 dating back to the April 2020 Incident and Shen's managers' impact on her evaluation so there was no protected concerted activity. *National Wax Co.*, 251 NLRB 1064, 1064-1065 (1980). Once again, the employee in *National Wax* was not

engaged in concerted activity even though his gripes were about a wage increase, and wages affect all workers. Id. The *National Wax* employee's complaints were about him getting a wage increase, not about the employer's wages in general. Id. Similarly, Shen's complaints were about managers' impact on her performance. Shen did not raise issues about other employees, and her concerns about her managers were deeply personal and many times stale as they dated back more than 2 years. The totality of the record evidence demonstrates that Shen's conduct centered on Shen's personal disagreements about Project Alloy. For this reason alone, the General Counsel's allegations concerning her discipline and discharge should be dismissed.

3. The Disruptive June and October Mass Emails and the October 24 Mass Slack Message were unprotected under the Act

Even assuming arguendo that Shen engaged in concerted activity, I find her disruptive June and October 2022 mass emails and October 24 mass Slack message were not protected. To be protected under the Act, the activity must relate to Section 7 rights. ["S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-568 (1978). Simply put, it is difficult to see how Shen's personal complaints were aimed at improving "the employees' interests as employees." See *G & W Electric Specialty Co.*, 154 NLRB 1136, 1137 (1965).

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, supra at 154-155 citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, supra at 156. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Id. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB 1130, 1134 (2014).

Furthermore, employee discussions that do not include representatives of their employer are protected. The Board has made clear that employee discussions with coworkers are indispensable initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo*, 359 NLRB 368, 370 (2012), citing *Relco Locomotives*, 358 NLRB 298, 315 (2012), affd. and incorporated by reference at 361 NLRB 911 (2014). Protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

Shen's emails and Slack message are unprotected under *Atlantic Steel*, 245 NLRB 814, 816 (1979), analysis. They

originated from Shen herself through the disruptive and disrespectful June and October mass emailing and posting unprovoked by Respondent after Shen had been instructed by more than one Apple manager and warned that further organization-wide communications were disruptive and in violation of Apple's respect policy.

In evaluating Shen's June and October disruptive mass emails and posting under the totality of the circumstances, I consider the following factors:

- (1) whether the record contained any evidence of the Respondent's antiunion hostility—there was no evidence presented showing Respondent's antiunion hostility so this factor weighs for no protection.
- (2) whether the Respondent provoked Shen's conduct—This factor weighs for no protection because Respondent did not provoke Shen's conduct as Shen was insubordinate and could not come to grips with a decision made in April 2020 that did not go her way and Respondent's dismissal of Shen's complaints in April 2022.
- (3) whether Shen's conduct was impulsive or deliberate—This factor weighs for no protection as Shen acted deliberately in sending her multiple disruptive and insubordinate mass emails in June and October and her October posting even after being warned not to do so by Respondent.
- (4) the location of Shen's June and October mass emails and posting directly to other employees with no real understanding why they were receiving the disruptive emails—This factor weighs for no protection because Shen's mass emails were both disruptive and insubordinate and sent directly to employees.
- (5) the subject matter of the outburst—this factor weighs for no protection because the subject matter of Shen's personal gripes disruptive and insubordinate mass emails and October posting was unrelated to any alleged protected concerted activity.
- (6) the nature of Shen's disruptive, disrespectful, and insubordinate mass emails and October posting—this factor weighs for no protection because the mass emails were disruptive, egregious, and insubordinate and falsely alleged misconduct by Respondent management against Shen.
- (7) whether the Respondent considered language similar to that used by Shen's to be offensive—this factor weighs for no protection because Nareddy, Lemoge, Hoskin, and Smoley warned Shen that her June mass emails were disruptive and in violation of Apple's respect policy yet Shen disregarded the warnings and sent out her disruptive and disrespectful October mass emails and posting.
- (8) whether the employer maintained a specific rule prohibiting the language at issue—this factor weighs for no protection because Respondent has a specific Apple respect policy which Shen violated by issuing her disrespectful mass emails in June and October 2022.
- (9) whether the discipline imposed upon Shen was typical of that imposed for similar violations or disproportionate to her offense—This factor weighs for no protection as Respondent exhibited much patience and empathy from April 2020 to November 1, 2022 in its attempt to help Shen move on from the

April 2020 Incident, her personal gripes, and did not consider discharging Shen until after her disruptive and insubordinate mass emails in June 2022, warnings to Shen in June and July 2022, and finally after Shen's final egregious, disruptive, and insubordinate October mass email and October Slack posting.

Consequently, I find that Shen, as a disgruntled employee with ever-increasing level of frustration starting in April 2020 when her direction on Project Alloy was out-voted by the rest of her team in favor of Wu and Stepura made Shen's June and October 2022 mass communications highly disrespectful and inappropriate to Respondent requiring first a warning and then termination of Shen's employment and not on a concerted protected activity. Based on the foregoing, I find the General Counsel failed to establish that Shen engaged in activity protected by Section 7 through her June and October mass emails or her October 24 mass Slack message. Here, under the totality of circumstances, I find that Shen's escalated and aggressive disrespectful June and October mass emails and her October 24 mass Slack message complaints is better characterized as an unprofessional personality conflict where Shen refused to accept her team coworkers' opinions over her own individual opinion on Project Alloy. I further find that an objective review of the evidence under the foregoing factors weighs in favor of finding that Shen's June and October disruptive and insubordinate mass emails and posting were so egregious as to take them outside the protection of the Act. See *Atlantic Steel*, 245 NLRB 814, 816 (1979) (The Board weighs four factors to determine whether conduct is sufficiently egregious to remove it from the Act's protection – (1) the nature of the employee's conduct; (2) the subject matter of the conduct; (3) the place of the conduct; and (4) whether the conduct was in any way provoked by an employer's unfair labor practice.) As a result, I further find that none of Shen's June or October disruptive mass emails or her disruptive October 24 mass Slack message were protected communications under the Act.

*C. Even if Shen Took Part in Some Protected Concerted Activity Which Apple Knew About, Animus by Apple Management has Not Been Proven*

Applying the above principles, I find that the General Counsel has not met the initial burden of proving that the discharge of Shen was discriminatory. There is, of course, doubt that Shen was involved in protected concerted activities, but even if she was and Respondent knew about these activities, I further find that there has been no showing that her Shen's discharge was caused by such activities or that any animus displayed toward Shen had a causal connection to the discharge or the previous disciplines leading up to the discharge. Rather the discharge was caused by the well-established unprotected disruptive behavior of Shen from her June and October mass emails and Slack message, and pursuant to a progressive disciplinary policy that justified her discharge after a string of well-supported disciplinary warnings and measures against Shen from June through early November 2022.

It is also significant that there is no allegation in the complaint that any of the disciplines prior to the last one that led to Shen's discharge violated the Act. Nothing in the cited examples showed the kind of animus that would even suggest that

Respondent would invoke discipline for what Shen said or did. Indeed, many of the statements attributed by the General Counsel to management officials that were alleged examples of animus against Shen were simply statements of opinion. Moreover, the General Counsel failed to establish that the discharge of Shen for her disruptive emails and Slack posting constituted unlawful disparate treatment. Disparate treatment involves “inconsistencies between the proffered reason for the discipline and other actions of the employer” with respect to “other employees with similar work records or offenses.” *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). No comparator evidence was offered by the General Counsel.

As a result, I find that the General Counsel has failed to prove animus by Apple management against Shen sufficient to show a 8(a)(1) violation. In these circumstances, the General Counsel has failed to meet her initial burden of proving that the discipline and discharge of Shen was unlawfully motivated. The discharge was for the reason stated and it was not pretextual, which would require a finding, that I cannot make on this record, that the reason given was “either false or not actually relied on.” See *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. 7 (2018).

*D. Apple has Proven That it Would Have Disciplined and Terminated Shen Absent Any of Shen’s Protected Concerted Activities*

I find that Apple’s discipline and discharge of Shen were not unlawful. Specifically, I find that even assuming Shen’s protected concerted activities were a motivating factor in her discipline and discharge, the Respondent has demonstrated that it would have disciplined and discharged Shen in the absence of her protected concerted activities.

As the record shows, the Respondent had significant concerns about Shen’s disruptive conduct beginning no later than June 2022 when Shen emailed her first disruptive mass email. In addition, there is a long period dating back to the April 2020 Incident where Shen has not shied away from her personal gripes with Respondent management and Shen’s productivity and ability to act as a collaborative team member began to suffer years before her November 2022 discharge. Starting in June 2020, Chopra and Nareddy took issue with Shen’s personal disagreements with Stepura and Wu and first moved Shen to the DevOps department under Nareddy to help Shen work better. In addition, Shen’s September 13, 2022 violation of Respondent’s Open-Source policy led to Shen receiving a documented verbal warning. Further, Nareddy issues Shen his September 16, 2022 performance serious concerns memo for Shen to “set goals for [Shen] to improve on her performance with respect to teamwork and collaboration,” as well as provide examples of his concerns about Shen’s recent performance. (Tr. 359.)

I further find that Respondent has proven that it would have disciplined and terminated Shen despite any of Shen’s alleged protected concerted activities. After numerous conferences, discussions, and investigations of Shen’s personal gripes between Shen and Apple management including two layers of Apple’s

employee relations and human relations departments between April 2020 and April 2022, Shen’s personal concerns formal complaints were dismissed. By May 2022, Shen’s frustrations with this process left her relitigating her personal gripes with Apple’s higher management outside the usual chain of command and Shen added her disruptive, insubordinate, and disrespectful mass emails which violated Apple’s respect policy as Shen could never move past the April 2020 Incident.

The Respondent’s discharge of Shen on November 1, 2022 for her several disruptive mass emails and her October 24, 2022 disruptive Slack channel posting was the culmination of Shen’s continued violation of Apple’s respect policy of conduct and failure to follow instructions. The Respondent’s termination of Shen, following her admitted failure to meet the respect policy, was an action that was consistent with the terms of the September 13, 2022, written warning. I further find this evidence, when considered in context, sufficient to meet the Respondent’s defense burden under Wright Line. See *Commercial Air, Inc.*, 362 NLRB 379, 379 fn. 1, 390–391 (2015) (finding that an employer met its defense burden where the record demonstrated that the employer was dissatisfied with an employee’s performance before it had knowledge of union activity).

In conclusion, I find that the General Counsel failed to make an initial showing that Respondent discharged Shen because she engaged in protected concerted activities. There is almost no evidence that Shen engaged in anything but her own personal gripes and personality conflict with co-worker Wu and Manager Stepura dating back to April 2020 and this remains a material point of contention for Shen through her June and October disruptive mass emails. The General Counsel did not demonstrate, however, that Respondent discharged Shen based on any protected concerted activities. To the contrary, Apple management went out of its way from the April 2020 Incident through Shen’s discharge in November 2022 to placate Shen’s personal gripes dating back to her personality conflict with Manager Stepura and coworker Wu in April 2020. At least two individuals each in Respondent’s ER and HR departments spent large blocks of time to listen to Shen and try to help her move past the April 2020 Incident. In short, there is insufficient evidence that Respondent (through Nareddy, Jambhekar, and Lemoge) discharged Shen because of Shen’s protected concerted activities. Due to that shortcoming in the General Counsel’s case, I recommend that the complaint allegation regarding Shen’s discipline and discharge be dismissed.<sup>15</sup>

*E. On June 10, 2022, Apple by Hosken Did Not Unlawfully Threaten Shen with Discipline For Sending the June 6 And/or June 8, 2022 Disruptive Mass Emails*

Paragraph 6(a) of the complaint alleges that on about June 10, 2022, Respondent, by and through Hosken, threatened Shen with discipline for sending the disruptive June 6, 2022 and/or June 8, 2022 mass emails.

“The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether

protected concerted activities, most of which are time-barred and outside of the 6-month statute of limitations of Sec. 10(b) of the Act and that Apple would have discharged Shen regardless of any protected activity.

<sup>15</sup> There are likely other forums where Shen can bring a wrongful termination action against Respondent if she so chooses but I do not find here that Respondent acted with animus towards Shen’s alleged

they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Intent is immaterial.” *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001) (citing *Concepts & Designs*, 318 NLRB 948, 954, 955 (1995), and *Puritech Industries*, 246 NLRB 618, 622–623 (1979)). The Board considers the totality of circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *Id.* Whether the employee changed their behavior in response is not dispositive, nor is the employee’s subjective interpretation of the statement. See *Boar’s Head Provisions Co.*, 370 NLRB No. 124, slip op. at 16 (2021); *Sunnyside Home Care Project*, 308 NLRB 346, 346 fn. 1 (1992). The Board therefore considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees’ free exercise of their rights under the Act. See *American Tissue Corp.*, 336 NLRB 435, 441–442 (2001).

Tentative language about adverse consequences can be coercive, particularly where the employer’s prediction is not based on objective facts or the nature of the collective-bargaining process. *Daikichi Sushi*, 335 NLRB at 622, 623–624 (holding that it was not a defense that the employer phrased its prediction that the plant could close if employees unionized “as a possibility rather than a certainty”), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020) (employer unlawfully threatened that if employees unionized, the employer’s leave policies might become less generous and its shift scheduling less flexible); *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010) (employer unlawfully threatened that an employee’s pay rate could get worse if the union came in); compare *Jefferson Smurfit Corp.*, 325 NLRB 280, fn. 3 (1998) (employer’s statement that benefits “could go either way as a result of collective bargaining” was lawful). An employer may lawfully communicate to its employees “carefully phrased” predictions about “demonstrably probable consequences beyond [the employer’s] control” that unionization will have on the company, provided that the predictions are based on objective facts. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, (1969). However, if the employer predicts, without any supporting objective facts, that it may or may not act solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer’s prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, *supra*.

Here, I further find that on June 10, 2022, Respondent, by and through Hoskin, did not unlawfully threaten Shen with discipline for sending her disruptive June 6, and/or 8, 2022 mass emails. Instead, Hoskin’s warning that Shen’s conduct could be subject to discipline was in response to objective facts and Hoskin properly referred Shen to Apple’s respect policy and pointed out to Shen that her June 6 and June 8 disruptive mass emails could objectively be viewed as being in violation of Apple’s respect policy. I further find that under the totality of circumstances, Hoskin’s June 10, 2022 message to Shen was *not* an unlawful threat but, instead, lawful and helpful advice to remind Shen that her June 6 and June 8 disruptive mass emails could be viewed objectively as a violation of Apple’s respect policy and subject to discipline so Shen would stop her disruptive and unsafe conduct.

*F. On about June 10, 2022, Respondent, By And through Carylynn Lemoge, Did Not Interrogate Shen Regarding Her Intention In Sending the June 6 And/or 8, 2022 Disruptive Mass Emails*

Paragraph 6(b) of the complaint alleges that n about June 10, 2022, Respondent, by and through Carylynn Lemoge, interrogated Charging Party Shen regarding her intention in sending the June 6 and/or 8, 2022 group emails.

In analyzing whether an employer’s interrogation violates Section 8(a)(1) of the Act, the Board determines whether, under the totality of the circumstances, the interrogation “reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, *supra* at 1177–1178. In making this determination, the Board may consider (1) the background of employer hostility or discrimination; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the employee’s reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). Other factors that the Board examines in determining coerciveness include whether the employee was provided with adequate assurances that the questions did not have to be answered and that the employee would not be subject to retaliation. *Norton Audubon Hospital*, 338 NLRB 320, 321 (2002). Accordingly, the Board considers the full extent of the circumstances surrounding an employee’s experience when determining whether an interrogation is coercive. *Westwood Health Care Center*, *supra*, 330 NLRB at 940 (noting “a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone”); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 fn. 8 (2014) (“The Board has recognized that a subsequent unfair labor practice can increase the coerciveness of a preceding interrogation[.]”).

Applying the above factors here, I find that the statements made by Lemoge to Shen on or about June 10, 2022, did *not* constitute a coercive interrogation under the totality of circumstances here.

First, there is no evidence that Respondent’s questioning of Shen on June 10 occurred amidst a background of the Respondent’s hostility toward employees’ union or other protected concerted activities. Second, Lemoge had a legitimate reason to question Shen about Shen’s intentions going forward as Shen June 6 and June 8 mass emails were disruptive and were sent to many employees outside of Shen’s team who had no idea why they were receiving the emails and the mass emails caused safety concerns to employees who did not work or know Shen. Consequently, Lemoge asked Shen about her intentions to prevent any further organization-wide sending of Shen’s personal gripes emails. Things would be materially different if Lemoge was trying to get information about Shen’s team employees who might have similar concerns as Shen about Respondent management but no evidence was produced in support of this argument and Lemoge legitimately intended the organization-wide mass emails to stop. The third factor of Lemoge being a manager in the HR department and not in Shen’s line of supervision weighs against Lemoge’s questions being coercive interrogation. Finally, Lemoge did not provide Shen with assurances that her answers to Lemoge’s question would not be used against her favors

the question being a coercive interrogation of Shen. However, I find that Lemoge's question to Shen at the June 10 meeting expressed her legitimate objective belief that Shen's disruptive mass emails organization-wide must stop and was not a coercive interrogation of Shen under the totality of circumstances.

*G. On about June 15, 2022, Respondent, by and through Lemoge, Did Not Unlawfully Threaten Shen With Discipline For Sending the June 6 and/or June 8, 2022 Group Emails*

Paragraph 6(c) of the complaint alleges that on about June 15, 2022, Respondent, by and through Lemoge, unlawfully threatened Shen with discipline for sending the June 6, and/or 8, 2022 group emails.

Tentative language about adverse consequences can be coercive, particularly where the employer's prediction is not based on objective facts or the nature of the collective-bargaining process. *Daikichi Sushi*, 335 NLRB at 622, 623–624 (holding that it was not a defense that the employer phrased its prediction that the plant could close if employees unionized “as a possibility rather than a certainty”), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020) (employer unlawfully threatened that if employees unionized, the employer's leave policies might become less generous and its shift scheduling less flexible); *Metro One Loss Prevention*

*Services Group*, 356 NLRB 89 (2010) (employer unlawfully threatened that an employee's pay rate could get worse if the union came in); compare *Jefferson Smurfit Corp.*, 325 NLRB 280, fn. 3 (1998) (employer's statement that benefits “could go either way as a result of collective bargaining” was lawful). An employer may lawfully communicate to its employees “carefully phrased” predictions about “demonstrably probable consequences beyond [the employer's] control” that unionization will have on the company, provided that the predictions are based on objective facts. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, (1969). However, if the employer predicts, without any supporting objective facts, that it may or may not act solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer's prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, *supra*.

In this case, I find that on about June 15, 2022, Respondent, by and through Lemoge, did not unlawfully threaten Shen with discipline for sending her disruptive June 6, and/or 8, 2022 mass emails. Instead, Lemoge's warning that Shen's conduct could be subject to discipline was in response to objective facts and Lemoge properly referred Shen to Apple's respect policy and pointed out to Shen that her June 6 and June 8 disruptive mass emails could objectively be viewed as being in violation of Apple's respect policy. I further find that under the totality of circumstances, Lemoge's June 15, 2022 conversation with Shen was *not* an unlawful threat but, instead, lawful and helpful advice to remind Shen that her June 6 and June 8 disruptive mass emails could be viewed objectively as a violation of Apple's respect policy and subject to discipline so Shen would stop her disruptive and unsafe conduct.

*H. On About July 8, 2022, Respondent, by and through Smoley, Did Not Unlawfully Make a Coercive Statement to*

*Shen That She Should Quit Her Employment With Respondent*

Paragraph 6(d) of the complaint alleges that on about July 8, 2022, Respondent, by and through Smoley, did not unlawfully make a coercive statement to Shen that she should quit her employment with Respondent.

In analyzing whether an employer's interrogation violates Section 8(a)(1) of the Act, the Board determines whether, under the totality of the circumstances, the interrogation “reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, *supra* at 1177–1178. In making this determination, the Board may consider (1) the background of employer hostility or discrimination; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the employee's reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)). Other factors that the Board examines in determining coerciveness include whether the employee was provided with adequate assurances that the questions did not have to be answered and that the employee would not be subject to retaliation. *Norton Audubon Hospital*, 338 NLRB 320, 321 (2002). Accordingly, the Board considers the full extent of the circumstances surrounding an employee's experience when determining whether an interrogation is coercive. *Westwood Health Care Center*, *supra*, 330 NLRB at 940 (noting “a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone”); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 fn. 8 (2014) (“The Board has recognized that a subsequent unfair labor practice can increase the coerciveness of a preceding interrogation[.]”).

Applying the above factors here, I find that the statements made by Smoley to Shen on July 8, 2022, did *not* constitute a coercive threat under the totality of circumstances here.

I find that by July 8, 2022, Apple management had fully investigated Shen's personal disagreements which dated back more than 2 years to the April 2020 Incident and that VP Smoley and Lemoge instructed Shen to stop sending disruptive mass emails to a large portion of Apple employees who were not Shen team members and had no work connection with Shen or any understanding why they were receiving her disruptive mass emails and that if Shen could *not* get past the April 2020 Incident and move on to return to being a collaborative partner at Apple, Shen should consider all her options including moving on to a new employer.

During the meeting, Smoley told Shen her mass emails were disruptive to the organization, and she needed to stop. Once again, Shen's concerns had already been addressed with a thorough and conclusive ER investigation dating back to the April 2020 Incident and Apple's April 2022 dismissal of Shen's January, March, and April 2022 formal complaints. Moreover, Shen's false complaints about the May 2022 Meeting were answered by Chopra's June 22 response.

Moreover, there is no evidence that Respondent's questioning of and statements to Shen on July 8 occurred amidst a background of the Respondent's hostility toward employees' union or other protected concerted activities. None of this was proven in this case. Second, Smoley and Lemoge had a legitimate reason to question Shen and make statements to her to get Shen to

comply with Apple's respect policy and stop emailing more disruptive mass emails—many going to employees with no understanding or history of Shen's personal gripes with Respondent management which date back to more than 2 years earlier. The third factor of Smoley being a vice president at Respondent several levels above Shen is a factor favoring the General Counsel's argument that the July 8 statement from Smoley to Shen was in a coercive nature of a threat except for the fact that Shen asked more than once to have this meeting with Smoley which takes away a fourth factor that the place of the meeting was somehow coercive. By July 8, 2022, Shen had decided to escalate her many complaints to Apple's upper management in a very disruptive, insubordinate, and disrespectful manner that needed addressing and correction by Shen. Finally, neither Smoley nor Lemoge provided Shen with assurances that her answers to Smoley's question and statement would not be used against her favors the statement from Smoley being a coercive threat to Shen. However, I find that Smoley's questions and statement to Shen at the July 8 meeting expressed his legitimate objective belief that Shen's disruptive and disrespectful mass emails must stop and Shen should make up her mind whether to move past her personal gripes—some more than 2 years old - and return to being a collaborative employee at Respondent or explore other options such as possibly moving on to a new employer if Respondent was unable to get Shen past her personal gripes.

Thus, under the totality of circumstances analysis here, I find that VP Smoley's questioning and statement to Shen on July 8, 2022 did *not* amount to a coercive threat. Instead, Smoley attempted to get Shen to stop her insubordinate behavior of sending disruptive and disrespectful mass emails about Shen's personal gripes to Respondent employees and management who had no prior working relationship with Shen and feared her continued conduct could cause serious safety issues to Shen and/or other Respondent employees.

*I. On About September 13, 2022, Respondent, by and through Narreddy, Did Not Unlawfully Threaten Shen with Further Discipline if Shen Sent another Group Email Regarding Respondent Disciplining Her*

Paragraph 6(e) of the complaint alleges that on about September 13, 2022, Respondent, by and through Narreddy, unlawfully threatened Shen with further discipline if Shen sent a group email regarding Respondent disciplining her.

On September 13, 2022, Nareddy and Jambhekar met with Shen. Nareddy informed Shen that Apple launched a 3-week business conduct investigation on her actions in Project Druid, and the investigation determined she had violated Apple's open-source policy because Shen did not go through the requisite channels and gain permission before posting. (Tr. 117, 357; GC Exh. 9.) Because of this, she would be receiving a documented verbal warning, which would go in her personnel file. (Tr. 117.) In response to being told of her documented verbal warning on this issue, Shen told Nareddy and Jambhekar that she would

share the warning she received with the rest of the organization so they can also be aware that this type of activity will result in the same discipline. (GC Exh. 9.)

Trying to avoid more disruptive mass emails from Shen being sent to all Apple employees who did not work with Shen and would be unfamiliar with the issues Shen was being disciplined for, Nareddy and Jambhekar instructed Shen not to share the warning she received with the entire Apple workforce organization. (Tr. 356.) Later that day, Nareddy emailed Shen to reiterate her documented verbal warning, why she received it, and what the open-source policy she violated was. In the email, Nareddy again warns Shen against sharing her documented verbal warning with all Apple employees or the rest of Respondent's workforce and that repeating Shen prior disruptive behavior with a new mass email to the entire Apple organization could lead to further discipline. (Tr. 356; GC Exh. 9.) Nareddy wrote:

During the discussion [where you were given a Documented Verbal Warning], you insisted that you will share this Email with rest of the organization.

I would like to remind you that you have been given prior guidance about this behavior of sending team/org-wide emails as they can be disruptive. Taking such actions as forwarding on a Documented Verbal Warning that is being given to you is another example of that behavior, is not acceptable, and could lead to further discipline for you.

(GC Exh. 9.)

Nareddy recalls he did not tell Shen she could not discuss her warning with her fellow team members, but Nareddy was clear that he specifically wanted to remind Shen that she could not share the warning in another disruptive mass email to 164 of Apple's entire AML workforce organization,<sup>16</sup> because it would be disruptive to the employees.<sup>17</sup> (Tr. 356.)

Tentative language about adverse consequences can be coercive, particularly where the employer's prediction is not based on objective facts or the nature of the collective-bargaining process. *Daikichi Sushi*, 335 NLRB at 622, 623–624 (holding that it was not a defense that the employer phrased its prediction that the plant could close if employees unionized “as a possibility rather than a certainty”), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003); see also *Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 1 fn. 3 (2020) (employer unlawfully threatened that if employees unionized, the employer's leave policies might become less generous and its shift scheduling less flexible); *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010) (employer unlawfully threatened that an employee's pay rate could get worse if the union came in); compare *Jefferson Smurfit Corp.*, 325 NLRB 280, fn. 3 (1998) (employer's statement that benefits “could go either way as a result of collective bargaining” was lawful). An employer may lawfully communicate to its employees “carefully phrased” predictions about “demonstrably probable

<sup>16</sup> By “organization,” Nareddy is referring to the entire AML department of approximately 164 employees.

<sup>17</sup> I am inclined to believe Nareddy's testimony that Shen was told not to share her warning with all of Apple's 164 employees over its entire

AML workforce organization over Shen's testimony denying such statements. In Nareddy's email follow-up about the warning to Shen, he references her prior warnings in sending organization-wide emails to the entire AML department. (GC Exh. 9.)

consequences beyond [the employer's] control" that unionization will have on the company, provided that the predictions are based on objective facts. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). However, if the employer predicts, without any supporting objective facts, that it may or may not act solely on its own initiative for reasons unrelated to economic necessities and known only by the employer, then the employer's prediction is a threat of retaliation that violates Section 8(a)(1) of the Act. *Daikichi Sushi*, supra.

In this case, I further find that on September 13, 2022, Respondent, by and through Nareddy, did not unlawfully threaten Shen with discipline for sending an email regarding Respondent disciplining Shen because Nareddy had a legitimate concern that Shen would be sending her requested email about Respondent disciplining her to the same 164 AML employees rather than restricting her emailing to just her team members on the Project Druid team where Shen was working when she was disciplined for violating the open-source policy. Given Shen's disruptive and insubordinate mass emails in June 2022, Nareddy based his reasonable and lawful warning to Shen on the objective facts and Shen's prior conduct in June 2022. Shen refused to limit her

planned distribution of Respondent's discipline of her to just her team members so Nareddy lawfully reminded Shen that she would receive further discipline if she sent Respondent's written discipline of Shen by another mass disruptive email organization-wide to the same 164 employees as the June mass emails rather than just to her team.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

Based on the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended<sup>18</sup>

#### ORDER

The complaint is dismissed.<sup>19</sup>

Dated, Washington D.C. January 7, 2025

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<sup>18</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>19</sup> On joint agreement of the parties and their attorneys, I issued a protective order in this case prohibiting the parties from disclosing the contents of certain testimony and exhibits marked "sealed" or "confidential"

and this protective order will continue in full force and effect for any further Board proceeding and further on appeal, if applicable, and all transcripts and exhibits introduced into evidence under seal will also continue to be maintained under seal and the portions of the transcript and exhibits sealed at hearing will not be open to the public.