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

ATLASSIAN CORP.

Respondent

and Case 16-CA-324971

DENISE UNTERWURZACHER, an Individual

Charging Party

Colton Puckett, Esq.,
for the General Counsel.
Troy Valdez, Esq., and
Steve Hernandez, Esq.,
for Respondent.

Decision

SUSANNAH MERRITT, Administrative Law Judge. This case was tried in Austin, Texas, on March 3, 2026, following the issuance by the Regional Director of Region 16 of the National Labor Relations Board (the Board) of a complaint (the complaint) issued on May 21, 2025.[1] Respondent filed a timely answer to the complaint.[2]

The complaint was based on an unfair labor practice charge filed by the Charging Party Denise Unterwurzacher (Unterwurzacher) on August 30, 2023. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: 1) promulgating and maintaining unlawfully overly broad rules contained in its "Community Guidelines"; 2) terminating Unterwurzacher in retaliation for her protected concerted activities; and 3) offering Unterwurzacher a severance agreement that contained unlawfully overbroad "Confidentiality" and "Nondisparagement" clauses.

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

[2] I note that in its answer to the complaint and in its posthearing brief, Respondent asserts that it has been incorrectly named in the complaint as "Atlassian Corp." and that Respondent's correct name is "Atlassian US, Inc." (R. Br. at 1.)

On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

I. JURISDICTION

At all material times, Respondent, a Delaware corporation with facilities and places of business located throughout the United States, including a facility located at 140 E. 5th St., Building 2, Austin, Texas 78702, has been a global software company engaged in developing and selling software as a service to other companies. In conducting its operations during the calendar year ending December 31, 2024, Respondent performed services in excess of $50,000 in States other than the State of Texas.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Unterwurzacher's Termination

a) Background

Respondent is a software company that makes software programs for knowledge workers. Respondent has a couple of flagship products. One is a work item tracking system called JIRA, and another is a documentation system called Confluence. Confluence is used for document and knowledge sharing and was described as being similar to Facebook for work or Wikipedia with comments. Scott Farquhar (Farquhar) and Mike Cannon-Brookes (Cannon-Brookes) are the co-founders and co-Chief Executive Officers (CEOs) of Respondent, which was founded in 2002 in Sydney, Australia. (Tr. at 29.)

Unterwurzacher was employed as a software engineer for Respondent for about 11 years before she was terminated on June 26, 2023. Unterwurzacher, began her career with Respondent working at its office in Sydney, Australia, before transferring to its Austin, Texas office. For the last 6 years of her employment, she worked as a Senior Site Reliability Engineer. (Tr. at 29-30, 101.)

When Unterwurzacher started working for Respondent, the company had a unique culture, which Unterwurzacher described as open and collaborative. In line with this culture, Respondent maintains 5 core values which are:

1. Open company, no bullshit (OCNB);
2. Build with heart and balance;

3. Don't #@!% the customer;
4. Play, as a team (PAAT); and
5. Be the change you seek.
(Tr. at 31, 93-95; R. Exh. 2.)

Respondent uses a few different methods for internal electronic communication. The Confluence program had several different channels, one of which was called "Hello." All of Respondent's employees had access to the Hello channel and they were encouraged to use it for documenting work, making work decisions, and posting personal blogs for social engagement. While Hello was used for more formal communications, Slack was used by employees for informal communications. Slack is an instant messaging tool in which employees can communicate with all employees or just have a private chat with a select group of individuals. One of the Slack channels available to employees is called "Outrage Notifications."[3] The Outrage Notifications' Slack was used by employees to chat socially or express mock outrage at something. Employees also used the channel to ask other employees for help when they ran into a problem. Any employee could join the chat and Unterwurzacher estimated that there were approximately 1000 employees on the chat during the relevant period here. (Tr. at 32-33; 66-67.)

b) Unterwurzacher's September 2019 Post

In early September 2019, Respondent's human resources team announced changes to job titles in its Research and Development (R&D) department on a Hello blog post. (GC Exh. 2.) Employees had questions and concerns about the changes, and they posted hundreds of comments on the blog post over the following days and had conversations among themselves both on Slack and in person regarding the changes. (Tr. at 38.) Among the concerns expressed by employees on the Hello channel was that contrary to the Company's "Open company, no bullshit" core value the decisions were being made without transparency. Some examples of employee comments on the post are listed below:

- "It seems like this has been a very 'closed' decision, since it's been in the works a while and we're only just now hearing about it. I understand not every decision needs 3,000 opinions raining down on it, but I would be interested to know more about why this one was not more open, given that it affects so many employees in R&D." (GC Exh. 2 at 7.)
- "My personal feelings aside, is there a reason for this change to be announced overnight instead of being a proposal in OCNB [Open Company, No Bullshit] fashion? I know it doesn't have as much daily impact like the infamous BYOD policy, yet judging from the comments it triggered a huge emotional response, both positive and negative." (GC Exh. 2 at 23.)
- "My suggestion isn't around approaching engagement and the decision process, but more about the delivery of this information – R&D hasn't been taken on the journey of what research was done, who we reached out to, who we compared against, suggested titles (I'm sure we went through a few iterations), throwing

[3] The "Outrage Notifications" channel was a tongue-in-cheek reference to another Slack channel known as "Outage Notifications".

random stats in there with absolutely no proof to back that up (like the 30% rejection rate based on title and title alone) etc. If you read the **How did you come up with the new titles?** Section, that does not read like a journey, its' just statements, it absolutely does not tell me HOW you got to this decision." (GC Exh. 2 at 26.)

- "As a relatively new(ish) hire to Atlassian, the most disappointing thing about this is how the post squarely contradicts with the OCNB value. All through the interview and induction process we speak about our values highly; however when it comes to putting it in practice (in this case – collectively solving a hard problem, being open about hiring challenges and brainstorming potential solutions), it seems like and opportunity was missed here. Can someone who was involved in the decision share why this was done in such a closed manner? Also, did we gather feedback from a subset of engineers to measure impact on existing employees? If yes, what was the feedback? If not, why not ask existing employees." (GC Exh. 2 at 57.)

On September 11, 2019, Unterwurzacher chimed in adding a series of questions directed at the People Team regarding Respondent's decision-making process:

Dear People Team,

Some questions that I would have liked to see answered in the initial post:

1. How many engineers in Atlassian who will be effected by this change were consulted, and what were their reactions?
2. How are we measuring success?
    a. What specific KPIs are we targeting and at what level? For example, are we looking for a reduction in 'engineering declines based on titling'?
    b. What are the current statistics for those KPIs that we are targeting?
    c. What about adjacent KPIs, eg number of applicants applying for each level of role, number of declines due to salary, etc?
    d. What percentage of people are currently down leveled during the interview process? Will we be tracking changes to that, along with how many are now up leveled (because they're actually seniors (p5) and have applied for a 'senior' (p4) role)? Along with how many are down leveled now (because they're actual principals (p6) and have applied for a 'principal' (p7) role)?
    e. Will we be tracking the corresponding level of declines due to down leveling, and how that changes over time?
    f. Will we be tracking the level of declines due to salary not matching the salary expectations that go with title?
    g. Will we be tracking changes to these KPIs across different geos to determine whether there are differing outcomes?
    h. Will we be tracking sentiment relating to this change amongst the press/glassdoor, etc?
3. At what point will these statistics be revisited and this program determined a success or failure? If determined to be a failure, what is the plan for reversal?

> Looking forward to your response and getting some more clarity on the plan for the future.
> (GC Exh. 2 at 70-71.)

Unterwurzacher received 61 positive emojis on her post and several employees commented adding questions and comments. (GC Exh. 2 at 71; Tr. at 39-40.) The next day Unterwurzacher noticed that she had not received a response to her post and decided to follow up with the following post:

> Hi People Team. 24 hours has gone by with no response to this. Can someone please confirm if one is being drafted, and when we can expect it? (GC Exh. 2 at 71.)

In response to Unterwurzacher's post, Respondent's co-CEO Farquhar wrote on the chat:

> I love you to bits Denise, but your comments on this blog here really hit a nerve for me.
>
> I'm sorry. The people team do not report to you. Random people across the company do not get to demand of you how you do your job. Thousands of people are not commenting on the work that you do, and analysing[4] it 10 different ways.
>
> Try to imagine if you were trying to get your job done, and you had consulted dozens of people internally, created focus groups to get feedback, balancing the needs of recruiters, the needs of existing staff, the trade-offs between having global consistency and using local norms, and, after all of that work, you get someone in a completely different team *demanding* that you get back to them within 24 hours.
>
> Are you an expert in job titling? Have a background in HR? If so-I'm sure the team would love your help on the next initiative.
>
> As we grow, we have to trust people to do their jobs. We are hiring senior people who come to Atlassian and who are leaving because they can't get shit done because everyone feels the right to "have their opinion considered". We will grind to a halt if that is the case. We HAVE to change this cultural behavior.
>
> In an ideal world, this blog post would have contained a comment saying "staff engineer doesn't resonate with me, but I trust the team" and people liking that. Or "I'm so thankful to the team who must have spent ages trying to navigate this tricky topic, but I have some worries about senior title". This feedback helps us get better, But the snarkiness, the pages and pages of justification, one-upmanship and vitriol is totally out of line. (GC Exh. 2 at 72.)

[4] As Respondent was founded in Australia and many of its employees are Australian, some words in the posts use Australian spelling.

After publishing this posting, Farquhar reached out to Unterwurzacher asking if she was available for a one-on-one video call, which she agreed to. The one-on-one video call started amicably with Farquhar asking Unterwurzacher how she liked living in Austin and Unterwurzacher asking how Farquhar's kids were doing. After niceties were exchanged, Farquhar told Unterwurzacher that his comments were not just in reaction to her comment but were also due to the fact that he was hearing from people who had issued the policy and how her post had affected them. Unterwurzacher described to Farquhar that she had also had conversations with employees impacted by the proposal and how it was affecting them. She told Farquhar that employees were expressing to her that they were worried about how the title changes would affect their career growth and even their visa status. Unterwurzacher testified that her conversation with Farquhar was amicable, but that she had been shaken by the interaction, since it was rare for Farquhar to respond to a blog post and rarer still for him to take such a critical tone. Unterwurzacher testified that she was very effected by the incident and it led to her taking a 3-month sabbatical from work at the end of 2019. Unterwurzacher also testified that she was never informed that she should consider the conversation with Farquhar to be a warning or that she was being disciplined in any way. (R. Exh. 4; Tr. at 40-44.)

After her conversation with Farquhar, Unterwurzacher posted publicly on the blog thread thanking Farquhar for meeting with her and apologizing for not delivering her feedback with grace and empathy.[5] (GC Exh. 2 at 73; R. Exh. 5.)

Although Unterwurzacher was not told she was written up or that she was being disciplined for this incident, the incident was written up in an employee relations ticket and kept

[5] Unterwurzacher wrote:

Scott – thanks for taking the time to meet with me over VC just now. Firstly, I apologise that my comments made you feel the need to respond directly to me—I didn't intend to take up your time with this. Secondly, you're right. I've let my personal feelings of hurt and devaluation overshadow my empathy, and its not productive, for the people who made this decision, or myself. I want to trust that this is the right decision for the majority of Atlassians (you know how much I love this place), and I apologise that my follow up to that end came across as demanding. It wasn't my intention, but re-reading it I see how it came across that way. As I said on our call, the main reason I think I (and other Atlassians) have responded with so much emotion is that we feel this change directly threatens our futures, and we don't yet understand the reasoning. We could definitely have asked for more information with more empathy.

On a personal note, thank you for listening to my viewpoint and my concerns, and sharing yours. I'm unbelievably grateful for how you continue to live the values, and how that continues to shape and drive this amazing company you've built.

Lastly, to the People Team. I can't imagine how tough these kinds of announcements (and decisions) must be. I make decisions in my job that affect our customers, and the feedback can be swift and brutal, but it's not coming from customers that are also my colleagues_. For you, we are both your customers and your colleagues. I think in this instance a lot of us (myself included) behaved like anonymous customers, and not like your colleagues. We failed PAAT [Play As A Team], and I personally will commit to being a better colleague in future in how I deliver my feedback. Thank you for all you do for us, and thank you for listening to this feedback even though it was not delivered with grace (hug) (GC Exh. 2 at 73; R. Exh. 5.)

by Respondent. The document's reference number is ER-639 and the ticket's "status" is noted as "Informal Warning/Verbal Counseling – Conduct," and Respondent acknowledged that this write up was considered a disciplinary action by Respondent in their posthearing brief. (R. Br. at 3, 7.) In the comments section of the employee relations ticket Human Resources Representative Sandra Henschke (Henschke) commented that Unterwurzacher "made some concerning and disrespectful comments on the Confluence Blog post announcing title changes in R&D" and she attached the posting for reference. Henschke also noted that a manager had already spoken to Unterwurzacher about the post and noted that Farquhar had responded online with some "constructive feedback." (Jt. Exh. 1.)

c) Unterwurzacher's May 16, 2023 Post

In early 2023, Respondent began implementing a new performance review system that involved a forced distribution curve, commonly referred to in the industry as "Stack Ranking." Respondent performed a trial run of the new system which was referred to by Respondent as a "dry run." Unterwurzacher was chosen to be part of the dry run. Unterwurzacher testified that although she felt that she had gone above and beyond on delivering her assignment, her manager gave her a rating of "meets expectations" during the dry run performance cycle. When Unterwurzacher asked her manager about the rating, he informed her that because she had told him ahead of time that she would exceed the expectations on the project, her delivery of the project only met expectations because she had reset the expectations with him earlier. Unterwurzacher spoke with other employees involved with the dry run and they reported similar issues where they felt that they were receiving rankings that did not align with the quality of work they had provided. Her coworkers expressed to Unterwurzacher their concerns that the new system would not only hurt their careers, but could also negatively impact their mental health. (Tr. at 53-55.)

After her experience and these discussions, Unterwurzacher decided to comment on a Hello chat that announced the implementation of the new system. On May 16, 2023, Unterwurzacher wrote the following entry on the Hello chat:

> Dear fellow Atlassians,
>
> This One Cycle,[6] if you are rated below your expectations, and are given flimsy excuses for why, **you may be being gaslit**.
>
> The rating labels above all have a description that begins with 'An individual who'. This is designed to make you feel as though you are in control of, or at fault for, your rating.
>
> In many cases, this will be true.
>
> However, if you're told things like: (these are all real examples from the dry-run)

[6] "One Cycle" was the name of Respondent's performance review program. (Tr. at 127-128.)

- "That project you knocked out of the park? You told me, your manager, that you were going to exceed the deliverables that were asked of you. So, by exceeding their expectations, you merely *met* mine."
- "You do amazing work and we were discussing putting you up for a promo last week. But remember that one sprint 6 months ago where you had too many tasks allocated to you, and you got a little overwhelmed? Sorry—you're now in the bottom bucket."
- "You worked on one ticket that wasn't aligned to our sprint goals"
- "You speak too openly in our team room"

… you are being gaslit. Your manager either wasn't given the opportunity to, or failed to, adequately defend your rating. They are retroactively grasping at whatever straw they can, to make it seem like it's all *your fault*.

I don't blame the individual managers that are in this position fwiw, I expect they're also feeling trapped and lacking control. This system pits ICs *against* their direct managers. It isn't fair to either.

You should always approach performance reviews as an opportunity to learn and grow. There's usually some useful feedback in them, even when it's hard to hear.

But if you find yourself:

- Going from talking about promotion to being told you're only just, or not even, meeting expectations to the current role
- Confused and devastated, with no actionable feedback
- Unsure of what the expectations of the role actually are
- Feeling like you're being marked down for doing the right thing
- Feeling incentivized to work in a way that you *know* is worse for Atlassian

. . it may be because of the stack ranking we are now being forced into.
Please discuss it with people you trust, get some space and perspective, and be kind to yourself.

And then, (because it seems this is where we're at now), figure out how to play the game so it doesn't happen to *you* again.

FWIW [For what it's worth] I truly, truly, hope this doesn't happen during the real One Cycle. But it happened all across the org during the dry run, and management is now being *explicitly* told to stack rank, at a level of management that can not know every IC's impact, so I'm pretty worried, frankly. Please look after yourselves[7] (GC Exh. 4.)

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[7] One employee commented on Unterwurzacher's blog: "@Denise Unterwurzacher . . . just wow. This comment talked to me in such a way as if it was reading my mind. Saddening, but I get comfort from knowing I'm not alone on this." (GC Exh. 4.)

Unterwurzacher's uncontradicted testimony was that the examples she listed in her comment were from her coworkers' experiences with the dry run and that she received permission from her coworkers before posting their experiences. (Tr. at 56-57.)

5 Unterwurzacher never heard from any of her managers about this post, but about a week after she posted it, she received a direct message from employee relations partner Susan Kelbaugh (Kelbaugh) stating that Kelbaugh wanted to meet with her about something that had been flagged. In setting up the meetings, Kelbaugh specifically informed Unterwurzacher that she was not in trouble. Unterwurzacher ended up speaking with a different employee relations
10 representative, Kay Sanfilippo (Sanfilippo), later that day over Zoom, as Kelbaugh was not available. (Tr. at 59.)

Kelbaugh and Sanfilippo's comments regarding the interaction were documented in Employee Relations' ticket ER-2771, which was entitled: "Policy and Behaviors –
15 Behaviors/Values – Treat Others Respectfully." (Jt. Exh. 2.) On the ticket Kelbaugh wrote:

> As there have been multiple concerns with Denis's [sic] communication style and feedback has been given numerous times to her. Our Employment legal team have sought advice from external legal counsel and we have aligned on the following actions:
>
> 20
>
> - We should not discipline her for the blog. Her comment is protected because it relates entirely to company policy.
> - Any form of disciplinary action will violate the NLRA
> - We will need to arrange for our team to have a discussion with her to keep
> 25 communications civil (i.e. our community guidelines).
> - If she has issues with decisions, she can raise directly via the G'day service desk. This should be a general coaching conversation on her approach. (Jt. Exh. 2 at 3.)

On the same form Sanfilippo commented on May 26, 2023:

30

> Prior to meeting with Denise, I aligned with Daniel Lentz on the approach and key points: no policy violation, the People team is across the pushback and comments shared in the blog, comments regarding the dry-run; her comments were hurtful, there's another approach to raising concerns that would be more effective.
>
> 35
>
> . . .
>
> In addition to the comments she posted about the dry-run were ones from others she had spoken to and was given permission to share.
>
> 40
>
> I provided an example of how she could have expressed her opinion in a more constructive way, which was that she could have acknowledged that a lot of work went into the process but it would be helpful if *xyz*, or she could provide some constructive suggestions.
>
> 45 . . .

> The ask was that if she has concerns about a particular situation or process, there are multiple options and ways to reach out: discuss with her direct manager, skip level manager, HRBP, or raise a ticket via G'day. By raising a ticket, it would be directed to the appropriate team or individual depending on her concerns. I gave the example of if it's related to a policy change, it may be directed to that team who can listen to the feedback and provide clarity.
>
> She asked if she could speak to others about our conversation. I asked that she think about the intent of sharing and ensure she aligns with our community guidelines, PAAT, and other policies. She asked if she violated our Community Guidelines policy, which I said she did not. She said, oh good.
>
> In summary:
>
> I vocalized the concerns groups had about her comments. I shared that we welcome constructive comments but was clear on the other approaches and options to raise issues so she can speak directly with someone to discuss her concerns. She may have received the message, but future behaviors will tell. The ask was that communication aligns with our PAAT, as well as our Community Guidelines. (Jt. Exh. 2 at 4.)

Unterwurzacher testified that Sanfilippo's summary of their conversation on the form was generally accurate, but she noted that when she asked Sanfilippo which parts of her post had been hurtful and who had raised concerns that her post had been hurtful to human resources, Sanfilippo was unable to provide her with a response to either question. Unterwurzacher confirmed that she was never asked to remove or edit her post on stack ranking, and that she was told that she was not being disciplined. Neither Kelbaugh nor Sanfilippo testified at the hearing.[8] (Tr. at 60-61.)

d) Unterwurzacher's June 2023 Post

In mid-June 2023, Respondent announced a new initiative which involved getting rid of its front-line manager positions, also referred to as M50s. Employees were informed that individuals holding front-line manager positions would either be promoted to a senior manager position or changed back to being individual contributing engineers. According to Unterwurzacher, this meant that most engineering teams would go from six to eight people reporting to one manager, to teams of 18 people all reporting to the same senior manager. Unterwurzacher spoke with her coworkers about these changes. Front-line managers were concerned that they would be placed in roles that they did not want and had not signed up for and some were also concerned that they would lose their jobs. Additionally, team members were

[8] At the hearing the General Counsel noted that they had issued Kelbaugh a subpoena ad testificandum and that Respondent's counsel had informed the General Counsel that Kelbaugh would not be appearing due to a medical issue. The General Counsel stated on the record that since they did not receive documentation of Kelbaugh's medical condition, they were not rescinding the subpoena, but they were also not seeking subpoena enforcement. (Tr. at 10.)

nervous that they would have less contact with their direct manager and that they might have to take on a lot of the responsibilities that the front-line managers used to do. (Tr. 61-63.)

After this change was announced Chief Technology Officer (CTO) Rajeev Rajan (Rajan) and co-CEO Cannon-Brookes held an Ask Me Anything (AMA) town hall meeting by Zoom conference on June 22, 2023. At AMA meetings employees are given the opportunity to submit questions to their managers for Respondent's leadership to answer on the call. At the meeting Cannon-Brookes appeared to be in a different location than usual and he was wearing a Utah Jazz shirt. Cannon-Brookes co-owns the Utah Jazz National Basketball team and June 22, 2023, was the day of the National Basketball Association's draft. At the meeting, Rajan was asked what would happen to front-line managers who were neither promoted nor turned into contributing engineers, and Rajan said that a very small number of managers would actually lose their jobs under the new plan. A number of employees wrote in the Zoom chat asking what the number would be with some expressing concerns that the number would not be small. Comments in the Zoom chat are available for anyone on the call to read. At that point, Cannon-Brookes interjected and according to Unterwurzacher was very frustrated, stating that he didn't want to call people out, but he had had a "gutful" of people not trusting leadership. Unterwurzacher's uncontested testimony was that Cannon-Brookes said, "If we say it's a small number, then it's a small number. You should trust us to have done the work, and if you want to nar[k], go elsewhere." The word "nark" or to be "narky" has a particular meaning in Australia and it means to be overly frustrated and annoyed, often in situations where you have no right to be.[9] (Tr. at 64-66.)

Employees on the call also reacted to Cannon-Brookes' comments in the "Outrage Notifications" Slack channel with many employees expressing shock at Cannon-Brookes' comments and tone. Comments made by employees included the following:

- more Cult of Personal Responsibility nonsense coming from techbros (GC Exh. 5 at 7.)
- With frontline managers potentially doubling or tripling their number of direct reports, will IC's like myself get the same level of care and attention for our individual career development? I meet with manager weekly to talk career obj. and can't imagine that system working with>15 direct reports. (Id. at 11.)
- . . . with this new structure there will be less interaction between IC and the managers who need to support their promotions. Are we worried this will make things worse? (Id. at 14.)
- I've never felt MCB [Mike Cannon-Brookes] has been so disconnected before :((Id. at 14.)
- hes [sic] got a solar farm to run now. no time for the cash cow anymore (Id. at 14.)
- and houses to buy (Id. at 14.)

[9] This meaning of the word was also discussed in the group chat. See e.g., "I think it was more in the context of being 'narky' like . . . snarky?"; "Yeah narking can definitely also mean complaining"; and "In this context, narking is criticizing, usually harshly." (Id. at 28-29.)

- I guess with enough money everyone becomes tone-deaf (Id. at 15.)
- shut up and go back to your mines peasant (Id. at 25.)
- He said cut out the narking (Id. at 25.)
- love to be scolded by the founder (Id. at 27.)
- Summery [sic] of answer: stop narking, trust Rajeev, he's done a shit ton of work, it's a small numero f [sic] people affected by redundancy (Id. at 27.)
- Very upset tone (Id. at 27.)
- bro what in the fuck is happening (Id. at 27.)
- Yeah it will be a small number, the rest will be performance managed out of the role right (Id. at 27.)
- mike said stfu and trust Rajeev (Id. at 28.)
- Why do you think the billionaires want to go to space so bad? Sell their crap to Martians (Id. at 33.)
- Pretty much the town hall makes it clear any dissent around changes will be considered hostile (Id. at 33.)
- Personally I don't think that it was appropriate for Mike to have gone off at "chat". They are still non-anonymous Atlassians and he just essentially blew up at them in front of potentially thousands of their coworkers. (Id. at 35.)
- imo [in my opinion] it's still 100% not appropriate for the founder to go off at someone in front of 1000s of their coworkers (Id. at 36.)
- We're narking because we lost that trust. Maybe consider what you can do to regain that trust rather than suppress it (Id. at 37.)
- Open company no bullshit and all that (Id. at 39.)
- Not if you're suppressing dissent (Id. at 39.)
- I mean can we just agree that value is fucking dead and buried [sic] (Id. at 39.)
- when are values going to be updated to reflect Atlassian 2.0? (Id. at 57.)
- Reading through the Engineering craft guide, it seems that anyone below the level of P50 have effectively been demoted into, for lack of a better phrase, programmers where all the focus is on the code we ship vs actual engineering. How will this impact our future career and personal growth? (Id. at 60.)
- tbh I am really worried about mine and others mental & physical health at this stage (Id. at 60.)

Unterwurzacher added to the lengthy chat writing: "Whats up Outragers? Just dialling [sic] in from my NBA team's headquarters to yell at the people whose careers I've just pummelled [sic], wyd?" "WYD" stands for "What (are) you doing?" (GC Exh. 5 at 62; Tr. at 70-71.)

Hours after adding her comment to the chat, Unterwurzacher received a direct message from Farquhar on Slack referring to her comment and writing: "Denise, this is what's known as an ad hominem attack. You should hold yourself to a higher standard." (GC Exh. 6.) Unterwurzacher responded to Farquhar writing:

> You're right on both counts. It was an ad hominem attack, and I should hold myself to a higher standard. I appreciate your candour with me, truly.

> Since you reached out. I'd like to provide some context. I recognise this is really long, so please bear with me.
>
> When Rajeev said the number of people who would lose their jobs was 'small', four people reacted in the chat to say they disagreed, and one person said they wanted to see the numbers. They did so non-anonymously. Four of those five people are M50s. Mike reacted with what felt like pretty intense anger, and called those people out directly. His assumption seemed to be that they were just being negative for the sake of it, not that they were directly affected.
>
> I wonder if anyone has provided similar feedback regarding ad hominem attacks to Mike. To be clear, I'm not asking to know if that's the case. I just truly hope someone has.
>
> I think part of the problem with this specific situation is that 'small' is a relative term, and it conveys emotions, like 'unimportant'. To an exec running a company of 13k, losing (this number is an example, not a rumour) ~20 managers is small. To those 20 human beings, and those that work with them, it feels huge. I also suspect that the 'small' number being discussed is only those who aren't being offered P50 or M60; those who we know are going to leave. I expect many more M50s will be offered P50 but will instead take the redundancy option, since they don't *want* to go back to being an IC. I wonder whether four M50s who disagreed in chat are feeling as though they're being forced out, without being acknowledged.
>
> I suspect come December, we'll have lost a lot more than that expected small number of our M50s. Many folks I've spoken to believe *that's* the point; that this is a hidden layoff. The fact that leadership isn't publicly acknowledging that is leading to more distrust. And from what I've seen overnight, Mike's reaction has made the trust gap even worse. (GC Exh. 6.)

Unterwurzacher went on to describe how Farquhar's direct comments to her in 2019 had deeply affected her and that part of her reaction on the chat was in response to that experience, because she had empathy for the individuals who had been called out by Cannon-Brookes.

Unterwurzacher did not receive a response from Farquhar, but she was called into a Zoom meeting with senior vice president and head of IT engineering Tal Saraf (Saraf), who was the head of her department, the next Monday, June 26, 2023. When she got on the Zoom, Unterwurzacher saw that Kelbaugh was also on the call. At the meeting Unterwurzacher was told that she had a pattern of going against company values and violating community guidelines and codes of conduct. She was also told that she had consistently been coached through these instances, but management did not see that she was attempting to improve and so Respondent was letting her go. (Tr. at 73-74.)

On July 4, 2023, Unterwurzacher asked Respondent's human relations office for a written description of the specific incidents that caused her termination. In response on July 7, 2023, Unterwurzacher received an email from Kelbaugh who wrote:

> As you know, Atlassian terminated your employment because you violated our community guidelines and consistently acted against our company values. These are violations of our Code of Conduct. In various incidents over a span of multiple years, you engaged in acrimonious communications and ad hominem attacks against teammates and colleagues. This was an ongoing issue during your employment; it dated back to 2019 and resurfaced as recently as two weeks ago.
>
> There should have been no expectation to receive a formal warning before your termination. Our founders, managers, and HR professionals responded to you directly during these incidents and tried to constructively coach you, but we didn't see an effort to improve or a desire to consider the impact of your actions. The pattern and circumstances of behavior warranted termination.
>
> We consider this matter closed and won't be providing more information about why you were terminated. Please reach out if you have any questions about your pending separation agreement. I can serve as a point of contact on those questions. (GC Exh. 7.)

Unterwurzacher's uncontradicted testimony is that during the period from 2019 through the date of her termination, the only times that she had discussions with human resources, managers, or Respondent's co-founders about her communication style was regarding her September 2019 post, her exchange with human resources after her May 16, 2023 post, and her exchange with Farquhar in June 2023. No evidence was introduced to indicate that Unterwurzacher had any other such interactions from 2019 up through the date of her discharge. (Tr. at 77-78.)

The Employee Relations ticket for Unterwurzacher's termination is entitled "Denise Unterwurzacher-Policy and Behaviors – Behaviors/Values – Treat Others Respectfully." The ticket specifically notes that the termination is related to Employee Relations tickets 639 and 2771, which are the tickets that documented Unterwurzacher's September 2019 and May 2023 posts set forth above.[10] Other than these notations, the document does not provide a reason for Unterwurzacher's termination but just notes that "there has been approval to terminate her employment from Erika[11] and founders." (Jt. Exh. 3.)

2. Severance Agreement

At the meeting when Unterwurzacher was terminated, Kelbaugh offered her a severance agreement, which was sent to her. Unterwurzacher attempted to negotiate the severance agreement and was sent another version of the agreement that contained some changes including the amount of severance to be paid. (Jt. Exh. 8; Jt. Exh. 9.) It is uncontested that both of the severance agreements offered to Unterwurzacher by Kelbaugh included the following provisions in exchange for several weeks of pay:

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[10] I note that all three Employee Relations tickets (639, 2771, and 2885) cross reference each other in the "relates to" category and the numbers on those tickets do have lines through them, but there is no indication from Respondent as to the meaning of the lines. (Jt. Exhs. 1-3.)

[11] In its posthearing brief, Respondent posits that "Erika" referred to in then-Chief Administrative & Legal Officer at Atlassian, Erika Fisher. (R Br. at 4.)

10. **Confidentiality.** You agree that the existence, provisions and terms of this Separation Agreement will be held in strictest confidence by you and will not be publicized or disclosed in any manner whatsoever; *provided, however*, that you may disclose this Separation Agreement in confidence: (a) to your immediate family members; (b) to your attorney, accountant, auditor, tax preparer, and financial advisor, provided that such individuals in (a) and (b) above first agree that they will treat such information as strictly confidential and that you agree to be responsible for any disclosure by any such individual as if you had made the disclosure; and (c) as necessary to enforce the Separation Agreement's terms. In particular, and without limitation, you agree not to disclose the existence or terms of this Separation Agreement to any current or former Company employee.

11. **Nondisparagement.** You agree not to make any disparaging statements concerning the Company or any of its affiliates or current or former officers, directors, shareholders, employees or agents, including but not limited to posting, for attribution or anonymously, any disparaging or negative reviews or comments about the Company on the internet, e.g., on Glassdoor. For this purpose, the term "disparage" means, with respect to any individual or entity, negative comments regarding their integrity, fairness, satisfaction of obligations, overall performance, business practices, investment decisions, business model, equityholders, or personnel. (Jt. Exh. 8; Jt. Exh. 9.)

Unterwurzacher opted not to sign either version of the agreement messaging Kelbaugh: "I have been clear that I am unwilling to relinquish my rights for this offer. This negotiation is now closed, and I will proceed with exercising my rights." (Jt. Exh. 3 at 3; Tr. at 73-75; 166.)

Respondent presented only one witness at hearing: Respondent's in-house counsel Daniel Lentz (Lentz). Lentz was not involved when Kelbaugh presented the two versions of the severance agreement to Unterwurzacher and had no knowledge of how or why Kelbaugh presented those agreements to Unterwurzacher. (Tr. at 162-163; 166, 170.) Lentz testified that sometime around February 2023, he drafted a new template of the severance agreement that was meant to be used for non-managerial employees based in the United States after the *McLaren Macomb*[12] decision came out. (Tr. at 159-163.) This version did not include the same nondisparagement or confidentiality provisions as were found in the severance agreements presented to Unterwurzacher. Lentz testified that he was on vacation when Unterwurzacher was terminated. (Tr. at 170.) As discussed earlier in this decision, Respondent did not provide Kelbaugh as a witness for the hearing.

Respondent's Code of Business Conduct & Ethics contains the following description of what Respondent considers to be confidential information: "At the least, Atlassian Confidential Information includes information such as Atlassian's proprietary source code, nonpublic technical information about Atlassian systems and products, nonpublic information about Atlassian's product roadmap or partnerships, nonpublic financial information, and nonpublic information relating to employees and compensation." (Jt. Exh. 6 at 25.)

[12] 372 NLRB No. 58 (2023).

3. Rules

The complaint alleges and Respondent admits[13] that since about September 2023, Respondent promulgated and maintained "Community Guidelines" containing the following rules:

> "**Frame opinions, not demands**: It's okay to disagree. It's not okay to make demands of a team or teammate based on your opinion. Acknowledge what's your opinion vs. mandating a change or action.
>
> . . .
> What we will not tolerate
>
> - Name-calling, inappropriate jokes, passive aggression, threats or hostility, trolling, bullying, baiting, spreading vitriol (bitterly harsh or caustic language/criticism), defamatory or ad hominem attacks (those which target the character, motive, or some other attribute of the person making an argument rather than attacking the substance of the argument itself)
> - Disclosure of confidential, sensitive, private or personal information . . .
> - Communications or comments that could negatively impact Atlassian partners, shareholders or customers. (Jt. Exh. 5.)

Prior to September 2023,[14] Respondent's Community Guidelines included the following description:

> **Principles**
> **Communication and content shared between Atlassians should be respectful and in line with our play, as a team value.** Trolling, name calling (including unwelcome nicknames), ad hominem attacks, and derogatory generalizations and stereotyping (as perceived by each Atlassian), etc. are not welcome at Atlassian. (Jt. Exh. 4.)

B. Analysis

1. Unterwurzacher's Termination

The General Counsel alleges that Respondent terminated Unterwurzacher in violation of Section 8(a)(1) of the Act, because she engaged in protected concerted activity when she posted comments on Respondent's internal communications systems between March and June 2023.[15] Although in its post-hearing brief, Respondent contends that it terminated Unterwurzacher solely for "a gratuitous personal attack on Atlassian's co-founder" Cannon-Brookes in the Slack chat post on June 23, 2023,[16] the uncontested record evidence shows that Respondent informed Unterwurzacher that she was terminated for her pattern of behavior at the time of her discharge.

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[13] GC Exh. 1(c) and (e).
[14] These guidelines had been in place since at least 2018. (GC Exh. 4.)
[15] Complaint para. 7.
[16] R. Br. at 1.

Specifically, Respondent informed Unterwurzacher in her termination meeting and in a follow up email on the subject that Unterwurzacher was terminated due to her continued pattern of "acrimonious communications and ad hominem attacks against teammates and colleagues" and that this was "an ongoing issue during [her] employment" dating back to 2019 and resurfacing as recently as June 23, 2023.[17] In the email, Kelbaugh notes that although Unterwurzacher had been "coached" after each incident by Respondent's founders, managers, and HR professionals, Unterwurzacher failed to make an effort to improve or a desire to consider the impact of her actions and that this pattern of behavior warranted her termination. (GC Exh. 7.)

In examining Respondent's initial reasoning for Unterwurzacher's termination, I find that the evidence reveals only three incidents between 2019 and June 2023, when Unterwurzacher was coached by Respondent's founders, managers or human resources professionals regarding her communication style. These coachings relate to: 1) Unterwurzacher's September 2019 posts on the Hello chat regarding Respondent's decision to change job titles for its research and development employees (as documented by Respondent in Employee Relations ticket 639; Jt. Exh. 1); 2) Unterwurzacher's May 16, 2023 post on the Hello chat regarding stack ranking performance reviews (as documented in Employee Relations ticket 2771; Jt. Exh. 2); and 3) Unterwurzacher's June 23, 2023 Slack chat post regarding Cannon-Brookes' comments during the town hall meeting (as documented in Employee Relations ticket 2885; Jt. Exh. 3). As noted above, Unterwurzacher's termination paperwork also references Employee Relations tickets addressing Unterwurzacher's September 2019 and May 16, 2023 posts. (Jt. Exh. 3.)

a) Unterwurzacher's Posts Constituted Protected Concerted Activity

As an initial matter, I find that Unterwurzacher was engaged in protected concerted activity when she made each one of these posts and that Respondent documented her counseling after each incident. Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, to be protected under Section 7, the activity the employee engaged in must be "for the purpose of . . . mutual aid or protection" and must be "concerted." Although these concepts are closely related, Board precedent makes clear that they are analytically distinct.

The Board recognizes that an activity is undertaken for employee "mutual aid or protection" when 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*, 361 NLRB 151, 153 (2014) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

[17] The email's actual wording was: "In various incidents over a span of multiple years, you engaged in acrimonious communications and ad hominem attacks against teammates and colleagues. This was an ongoing issue during your employment; it dated back to 2019 and resurfaced as recently as two weeks ago." (GC Exh. 7.) As the email was sent on July 7, 2023, two weeks prior would have been June 23, 2023.

The Board defines concerted activity as actions engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself, including cases where individual employees seek to initiate, induce, or prepare for group action, as well as individual employees bringing "truly group complaints to the attention of management." *Fresh & Easy*, supra, at 153 (citing *Meyers Industries*, 268 NLRB 493, 497 (1984) (Meyers I), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (Meyers II), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Moreover, while no group action may have been contemplated, activity by a single individual is concerted "when an individual attempts to bring a group complaint to the attention of management." *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003); *Mitsubishi Hitachi Power Systems*, 366 NLRB No. 108 (2018) (finding concerted activity where it was a "logical outgrowth of the concerns" discussed among coworkers); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) (finding that "an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group").

The "mutual aid or protection" and "concertedness" elements are analyzed under an objective standard. *Fresh & Easy*, 361 NLRB at 153. In making these factual determinations, the Board examines the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005).

b) Unterwurzacher's September 2019 Posts

As set forth above, on September 11, 2019, Unterwurzacher joined her coworkers in expressing concerns and asking questions about Respondent's decision to change existing job titles on the Hello group chat. As is clear from the posts, employees were very concerned about how these job title changes would affect their careers and comments regarding these job title changes constituted concerns regarding the group's terms and conditions of employment. See, *ADT, LLC*, 374 NLRB No. 104 (2026) (change in job title constitutes a change in terms and conditions of employment); *Alamo Cement Co.*, 277 NLRB 320 (1985) (same); *New Link, Ltd.*, 343 NLRB No. 118 (2004) (same). Second, Unterwurzacher's post builds on her coworkers' concerns about Respondent's closed decision-making process, by asking questions about the process and in following up asking if the People Team intended to respond and if so when. As Unterwurzacher is clearly adding on to concerns already expressed in the blog comments, I find that her posting is also concerted. The Board has generally held that employees' efforts to ask questions on behalf of themselves and others as well as making group demands, constitutes protected, concerted activity. *See Prescott Industrial Products Co.*, 205 NLRB 51, 51 (1973) (finding employer violated the Act by terminating an employee who repeatedly demanded the right to ask a question on behalf of himself and other employees during a work meeting); *J. P. Stevens & Co.*, 219 NLRB 850, 850 (1975) (employee engaged in protected concerted activity when she insisted that her employer answer a question, stating that the employees had a right to know the answer).

After Unterwurzacher made this post, Farquhar responded on the group chat reprimanding her for questioning Respondent's decision-making process and instructing her that "We HAVE to change this cultural behaviour." (GC Exh. 2 at 72.) The incident was written up in

Employee Relations ticket ER 639 which noted that the counseling was considered an "Informal Warning/Verbal Counseling – Conduct."[18] (Jt. Exh. 1.)

c) Unterwurzacher's May 16, 2023 Post

Likewise, Unterwurzacher's May 16, 2023 post about her experience with Respondent's new stack ranking performance evaluations also constituted protected concerted activity. It is well established that a change in performance review systems is considered by the Board to be a term and condition of employment. See, e.g., *ADT, LLC*, 371 NLRB No. 67 (2022) (finding introduction of new performance review system to be a term and condition of employment); *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1153 (1999) (finding change in performance review and evaluation system to be a term and condition of employment). As Unterwurzacher here provides examples of experiences that she has gathered from her coworkers with their permission and explicitly identifies them as such (i.e., "these are all real examples from the dry run"), I find that this activity is also concerted. In fact, the Respondent itself conceded that this post constituted protected concerted activity as is reflected in the Employee Relations ticket describing the incident which notes:

> * We should not discipline her for the blog. Her comment is protected because it relates entirely to company policy.
>
> * Any form of disciplinary action will violate the NLRA. (Jt. Exh. 2 at 3.)

Even though Respondent internally recognized that Unterwurzacher's post was protected under the NLRA, Respondent persisted in coaching Unterwurzacher in an effort to dissuade her from continuing to engage in protected concerted activity. As set forth above, in her coaching Sanfilippo urged Unterwurzacher to change her language to be more constructive and to raise her concerns directly with management:

> The ask was that if she has concerns about a particular process, there are multiple options and ways to reach out: discuss with her direct manager, skip level manager, HRBP, or raise a ticket via G'day. By raising a ticket, it would be directed to the appropriate team or individual depending on her concerns. . . . I shared that we welcome constructive comments but was clear on other approaches and options to raise issues so she can speak directly with someone to discuss her concerns. She may have received the message, but future behaviors will tell." (Jt. Exh. 2.)

By her comments, Sanfilippo problematically "coaches" Unterwurzacher to use Respondent's internal processes rather than continuing to engage in protected concerted activity, even after Respondent had internally noted that Unterwurzacher's posting was protected. *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1254 (2007) (requiring employees to take all work-related concerns through a specific internal process is a violation of Section 8(a)(1)); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1991) (same). Given Sanfilippo's comments, it is clear that Respondent treated this coaching as a disciplinary warning despite telling Unterwurzacher that she "was not in trouble." Additionally, as this incident was noted on

[18] I note that Unterwurzacher was never told that this incident was considered a disciplinary action or that it would become part of her file. (Tr. at 44).

her termination paperwork as "related" it appears that Respondent relied on this incident in terminating Unterwurzacher, which also taints Unterwurzacher's termination. *Fermont, A Division of Dynamics Corp. of America*, 296 NLRB 1252, 1254 (1989) (noting "a legitimate basis for discharge or suspension cannot be established by unlawful disciplinary warnings"); *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995) (a decision to discipline or terminate an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB 1252, at 1253-1254 (1989) (same), enfd. 928 F.2d 609 (2d Cir. 1991). In such cases, the burden rests on the employer to prove that the discharge was made irrespective of the previous unlawful discipline. *Fermont,* supra, at 1254; *Opportunity Homes, Inc.*, 315 NLRB 1210, 1210-1211 (1994).

d) Unterwurzacher's June 23, 2023 Post

Unterwurzacher's post regarding Cannon-Brookes on the Slack chat ("Whats up Outragers? Just dialling in from my NBA team's headquarters to yell at the people whose careers I've just pummelled, wyd?") specifically addresses two areas of group concern: (1) the fact that Respondent had eliminated a job position ("Pummelling" their careers); and (2) Cannon-Brookes' treatment of employees during the town hall meeting ("yelling" at them). Additionally, Unterwurzacher's comments were not spoken in isolation nor were they only for her benefit as many other employees were expressing concerns about the elimination of the job category as well as Cannon-Brookes' tone in the group chat. See *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn. 2 (2020) (employee engaged in protected concerted activity when he raised a group complaint regarding a supervisor's mistreatment of employees); *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 17-18 (2018) (employee engaged in protected concerted activity in raising bullying and abusive behavior of supervisor).

Unterwurzacher's remarks addressed the fact that Cannon-Brookes had "pummelled" the careers of the M50s by deciding to eliminate their job classification and then publicly yelled at them for complaining about it. The concerns Unterwurzacher raised about decisions Cannon-Brookes had made regarding reclassifying employees as well as the tone he had taken during the call, stemmed from group complaints as demonstrated by her coworkers' comments on the Zoom chat and Slack chat. For example, employees had expressed concern that the classification change would result in layoffs in the Zoom chat, and in the Slack chat employees had expressed how the classification changes would affect their work (e.g., "With frontline managers potentially doubling or tripling their number of direct reports, will IC's like myself get the same level of care and attention for our individual career development? I meet with manager weekly to talk career obj. and can't imagine that system working with>15 direct reports." (GC Exh. 5 at 11); ". . . with this new structure there will be less interaction between IC and the managers who need to support their promotions. Are we worried this will make things worse?" (Id. at 14); "Yeah it will be a small number, the rest will be performance managed out of the role right" (Id. at 27); and "Reading through the Engineering craft guide, it seems that anyone below the level of P50 have effectively been demoted into, for lack of a better phrase, programmers where all the focus is on the code we ship vs actual engineering. How will this impact our future career and personal growth?" (Id. at 60.)

Employees also expressed concerns regarding Cannon-Brookes' tone and treatment of employees in the Slack chat: e.g., "Personally I don't think that it was appropriate for Mike to have gone off at 'chat'. They are still non-anonymous Atlassians and he just essentially blew up

at them in front of potentially thousands of their coworkers.” (Id. at 35); “imo [in my opinion] it’s still 100% not appropriate for the founder to go off at someone in front of 1000s of their coworkers” (Id. at 36); “Love to be scolded by the founder” (Id. at 27); “I guess with enough money everyone becomes tone-deaf” (Id. at 15); and “I’ve never felt MCB [Mike Cannon-
5 Brookes] has been so disconnected before.” (Id. at 14.)

Thus, Unterwurzacher’s comments in the Slack chat reflect group concerns about both the job title elimination and Cannon-Brookes’ treatment of employees and I find that it constitutes protected concerted activity as defined by the Act.[19]

10 In so finding, I reject Respondent’s contention that Unterwurzacher’s comments on June 23, 2023, were “nothing more than personal ridicule of an executive’s private life.” (R. Br. at 1.) In making its argument, Respondent focuses solely on one part of Unterwurzacher’s post (“Just dialling in from my NBA team’s headquarters . . .”) and ignores the fact that in the very same sentence she addresses not only employee concerns about the elimination of the M50
15 classification, but also the fact that Cannon-Brookes raised his voice in calling out employees raising concerns in the Zoom chat (“to yell at the people whose careers I’ve just pummelled, wyd?”). (GC Exh. 5 at 62.)

In light of Kelbaugh’s email and comments to Unterwurzacher at the time of her discharge--telling her that she had been terminated for her pattern of acrimonious
20 communications for which she had been coached--I find that Respondent terminated Unterwurzacher for her protected concerted activity.

e) Unterwurzacher Did Not Lose the Act’s Protection under the *Desert Springs* Totality of the Circumstances Test

When discipline is based on alleged misconduct that is part of the res gestae of protected
25 activity, the proper inquiry is whether the employee lost the Act’s protections in the course of that activity. See *Desert Cab, Inc.*, 367 NLRB No. 87, slip op. at 1, fn. 1 (2019) (limo driver did not lose protection with sarcastic posts on Facebook page conveying to co-worker “friends” that employer's policy forcing them to wait long periods for customers decreased their income).

In a case where the employer took action against an employee for engaging in protected
30 activity, the burden shifting framework set forth in *Wright Line* does not apply. Instead, the employer may contend that the employee engaged in misconduct during the activity that caused the employee to lose the protection of the Act. If the employer fails to prove that contention, then a violation of the Act is established. See *Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at 6 (2023), vacated on other grounds, 108 F.4th 252 (5th Cir. 2024); *Nor-Cal Beverage Co.*, 330
35 NLRB 610, 611-612 (2000).

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[19] *NLRB v. Electrical Workers, Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 477 (1953), cited by Respondent is easily distinguishable as in that case fliers sent out to the public which publicly disparaged the employer’s business without any connection to their labor dispute, were found not to be protected as the fliers made no mention to any labor dispute or other terms and conditions of employment. Here, the communication was made on an internal Slack channel and not to the public and it referenced issues of group concern: elimination of a job classification and treatment of employees.

In *Lion Elastomers LLC*, supra, the Board overruled *General Motors,* 369 NLRB No. 127 (2020), and reinstated the “setting-specific” standards for evaluating misconduct in the course of protected activity. Those setting specific standards include: (1) the four-factor *Atlantic Steel* test, which governed employees' conduct towards management in the workplace; (2) the totality-of-the-circumstances standard governing social-media posts and most cases involving conversations among employees in the workplace as described in *Pier Sixty, LLC*, 362 NLRB 505 (2015) and *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016) (“*Desert Springs*”); and (3) the standard governing picket line misconduct as described in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984).[20] *Lion Elastomers*, supra, at slip op. 1.

As Unterwurzacher’s comments appeared in Respondent’s internal Slack channel set up for employee communication, I find that her post most closely resembles a conversation among employees in the workplace and analyze Unterwurzacher’s comment using the totality of the circumstances standard. See *Desert Springs Hospital Medical Center,* 363 NLRB 1824, 1824 fn. 3 (2016). While the Board has not established a bright line test for this category of cases, factors that the Board has incorporated into previous totality-of-the circumstances analyses include: where the discussion took place; the subject matter of the discussion; whether the employer previously tolerated the use of similar language; whether the employer's actions provoked the conduct; whether the statement was made without threats, physical gestures, or contact; whether the untoward comments/actions were impulsive or deliberate; and whether the employer maintained a specific rule prohibiting the language at issue. See e.g. *Traverse City Osteopathic Hospital,* 260 NLRB 1061, 1061-1062 (1982)*; Honda of America Mfg.,* 334 NLRB 746, 747-748 (2001); *Desert Springs Hospital Medical Center,* 363 NLRB at 1824 fn. 3.

f) The Totality of the Circumstances Weigh in favor of Unterwurzacher Keeping Protection of the Act

The subject matter, the location of the discussion, and Respondent’s tolerance of similar language, all strongly favor continued protection of the Act. As discussed above, Unterwurzacher’s comments directly addressed the fact that Respondent’s decisions and Cannon-Brookes’ demeanor on the call were negatively impacting employees, and as such constituted protected concerted activity. Unterwurzacher’s post took place on an internal group chat, which is not open to the public and would not be viewed by customers or other third parties. Moreover, as demonstrated above, the chat was specifically designed for employees to air complaints, and the group chat was peppered with employees making comments similar to the one Unterwurzacher made. Although Unterwurzacher’s comment is satirical, she uses the technique to emphasize Cannon-Brookes’ tone deafness in responding to employees’ concerns about their livelihood, and other employees used a similar sarcastic tone in their comments about Cannon-Brookes’ outburst, but were not disciplined let alone terminated for doing so:[21] see, e.g.,“hes got

[20] Respondent contends that *Lion Elastomers* was wrongly decided and preserves its argument that the Board should return to the standard set forth in *General Motors, LLC, 369 NLRB No. 127 (2020)*, which *Lion Elastomers* overruled. (R. Br. at 8-10.) As an administrative law judge, I am bound to follow extant Board law, and any argument that a Board decision should be overturned is properly addressed by the Board.

[21] Respondent failed to introduce any comparator evidence to show that other employees were terminated for comments similar to Unterwurzacher’s on the chat that day. In fact, Respondent specifically concedes in its posthearing brief that other employees were not

a solar farm to run now, no time for the cash cow anymore" (Id. at 14); "and houses to buy" (GC Exh. 5 at 14); "I guess with enough money everyone becomes tone-deaf" (Id. at 15); and "Shut up and go back to your mines peasant." (Id. at 25.) All of these comments, like Unterwurzacher's emphasize that Cannon-Brookes' wealth has made him tone-deaf to his employees' concerns, and all of these comments were posted prior to Unterwurzacher's posting.

Also weighing in favor of continued protection is the fact that Cannon-Brookes' comments on the group chat provoked Unterwurzacher as well as other employees to respond. Cannon-Brookes publicly called out the individuals who were questioning management's decisions, raised his voice, and told employees if they wanted to nark (complain) they could go elsewhere, a comment that itself arguably constitutes an unlawful threat.[22] See *Starbucks Corp.*, 373 NLRB No. 123, slip op. at 1 (2024) (finding CEO's comment: "if you're not happy at Starbucks, you can go work for another company," to be unlawfully coercive) and cases cited therein. That these comments were provocative is also demonstrated by the sheer number of concerned comments they elicited from employees on the Slack chat. Also favoring continued protection of the Act is the fact that Unterwurzacher's comments were neither vulgar nor obscene and it is clear that Unterwurzacher's post in no way implicated any threat, physical or otherwise.

Although I do find that Unterwurzacher's comments were provoked, I do not find that they were impulsive as some time had passed between Cannon-Brookes' statement and Unterwurzacher's post and Unterwurzacher had a history of speaking out when she felt that management was making decisions that negatively impacted its employees. With regard to whether the employer maintained a specific rule prohibiting the language at issue, I note that Respondent's community guidelines specifically warn against the use of "ad hominem attacks." Specifically, Respondent warns employees that "ad hominem attacks" are not welcomed at Atlassian under Respondent's Principals in its Community Guidelines: "Communication and content shared between Atlassians should be respectful and in line with our play, as a team value. Trolling, name calling (including unwelcome nicknames), *ad hominem attacks*, and derogatory generalizations and stereotyping (as perceived by each Atlassian), etc. are not welcome at Atlassian." (Jt. Exh. 4, emphasis added.) "Ad hominem" is defined in the Merriam-Webster Dictionary as: "marked by or being an attack on an opponent's character rather than by an answer to the contentions made."[23] Noting that Unterwurzacher admitted to Farquhar that she had engaged in an ad hominem attack, Respondent contends that Unterwurzacher's comment attacks the fact that Cannon-Brookes is wealthy, rather than criticizing the substance of his contentions. Here Unterwurzacher emphasizes that Cannon-Brookes' show of wealth (wearing the Utah Jazz shirt when appearing at the town hall meeting) highlights his lack of sensitivity to employee's concerns about their livelihood. However, even assuming arguendo that

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disciplined for similar comments on the same chat: "On June 22, 2023, moreover, various employees criticized management's tone and leadership decisions and were not disciplined." (R. Br. at 1.)

[22] This statement was not alleged as an independent 8(a)(1) violation by the General Counsel in the complaint.

[23] "Ad hominem." Merriam-Webster, 2026, www.merriam-webster.com/dictionary/ad hominem. The term "ad hominem" literally translates to "to the person" in Latin.

Unterwurzacher's reference to Cannon-Brookes' wealth was not intertwined with her protected concerted activity, Respondent produced no evidence that this guideline had ever been enforced or had ever resulted in discipline or discharge of any employee, even though, as referenced above, similar comments by other employees were made on the very same chat.

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In examining a totality of the circumstances of Unterwurzacher's commentary, I find that Unterwurzacher did not lose protection of the Act and that Respondent violated Section 8(a)(1) when it discharged Unterwurzacher for her protected concerted activity.

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g) Alternative *Wright Line* Analysis

In their post-hearing briefs, the General Counsel and Respondent also analyzed Unterwurzacher's discharge allegation using the *Wright Line* causation test. *Lion Elastomers* rejects *Wright Line's* application here because Unterwurzacher was discharged for

15 her protected concerted activity, but assuming *arguendo* that *Wright Line* applies, I would reach the same conclusion. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014) (applying *Wright Line* to 8(a)(1) allegations involving employee concerted activity).

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Under this framework, the General Counsel must demonstrate that: the employee engaged in activity that is "concerted" within the meaning of Section 7 of the Act; the employer knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the employer's adverse action against the employee was motivated by the

25 employee's protected concerted activity. *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 15 (2018); *Lou's Transport, Inc.*, 361 NLRB 1446, 1447 (2014), enfd. 644 Fed. Appx. 690 (6th Cir. 2016); *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

Proof of discriminatory motivation (animus) can be based on direct evidence or can be

30 inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of discriminatory motivation may include, among other factors: the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. *Intertape Polymer*

35 *Corp.*, 372 NLRB No. 133, slip op. at 6-7 (2023), enfd. 2024 WL 2764160 (6th Cir. 2024); *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

If the General Counsel satisfies the initial burden of showing discrimination, then the burden shifts to Respondent to present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See

40 *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 15; *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (internal quotations and citations

45 omitted). "In other words, a respondent must show that it *would* have taken the challenged

adverse action in the absence of protected activity, not just that it *could* have done so." Id. (italics in original).

As set forth above, I find that all three of Unterwurzacher's postings constituted protected concerted activity. I also find that Respondent had knowledge that Unterwurzacher's activity was concerted as the concerted nature of the posts is clear from comments in the chats by Unterwurzacher's coworkers, and after each incident a member of management reached out directly to Unterwurzacher to discuss her posts.

With regard to animus, direct evidence of animus can be gleaned from the credited record evidence. First, after Unterwurzacher's first post, co-founder Farquhar demonstrated animus when he publicly chastised Unterwurzacher for her post, complaining that newly hired senior employees "can't get shit done because everyone feels the right to 'have their opinion considered'" and demanding that "[w]e HAVE to change this cultural behavior." (GC Exh. 2 at 72.) Second, even after internally acknowledging that Unterwurzacher's May 2023 post was protected, Sanfilippo coached Unterwurzacher to report issues of concern directly to management rather than engaging in protected group posts. This coaching also demonstrates Respondent's animus for her protected activity. Third, Cannon-Brookes demonstrated his animus towards his employees' protected concerted activities when he announced at the town hall meeting that if employees wanted to nark, they could go elsewhere.

Additional circumstantial evidence of animus can be found from the Employer's disparate treatment of Unterwurzacher. As noted above, several employees posted snide comments targeting Cannon-Brookes' wealth and Respondent presented no evidence to demonstrate that those employees were disciplined or discharged for their posts. The timing of Unterwurzacher's discharge only a month after her May 16, 2023 post is also circumstantial evidence of motive. After Sanfilippo coached Unterwurzacher to go directly to management with any concerns, she noted in her summary of the coaching, "She may have received the message, but future behaviors will tell." (Jt. Exh. 2.) After the coaching, when Unterwurzacher continued to reach out through the group chat to raise concerns about Respondent's decisions and treatment of employees, Respondent saw that Unterwurzacher was opting to continue to exercise her Section 7 rights and terminated her.

Finally, Respondent's shifting defenses also serve as circumstantial evidence of animus. *Lucky Cab Co.*, 360 NLRB No. 43, slip op at 4 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), citing *Mastercraft Casket Co.*, 289 NLRB 1414, 1420 (1988), enfd. 881 F.2d 542 (8th Cir. 1989). Initially, Respondent indicated that Unterwurzacher was terminated for her pattern of acrimonious communications and ad hominem attacks, but in its brief, Respondent relies solely on Unterwurzacher's June 23, 2023 post as its reason for her termination.

In light of all of the above, the General Counsel has met her burden of establishing that Unterwurzacher's protected activity was a motivating factor in Respondent's decision to discharge her, and the burden shifts to Respondent to show that it would have terminated Unterwurzacher even in the absence of her protected concerted activity.

In its brief, Respondent argues that Unterwurzacher would have been terminated for her ad hominem comment regarding Cannon-Brookes' wealth on the Slack chat, regardless of her

protected concerted activity. This argument fails, however, as other employees made far more cutting remarks about Cannon-Brookes' wealth before Unterwurzacher added her comments, and there is no evidence that any of those other employees were disciplined or terminated[24] (See, e.g.,"hes got a solar farm to run now, no time for the cash cow anymore" (Id. at 14); "and houses to buy" (Id. at 14); "I guess with enough money everyone becomes tone-deaf" (Id. at 15); and "Shut up and go back to your mines peasant" (Id. at 25). Thus, Respondent failed to put forth any evidence to support its contention that it would have terminated Unterwurzacher even if she had not been engaged in protected concerted activity.

Therefore, even under a *Wright Line* analysis, I find that Unterwurzacher's termination violated Section 8(a)(1) of the Act.

2. Severance Agreement

The analysis of whether Respondent's severance agreement violated the Act is governed by the Board's decision in *McLaren Macomb*, 372 NLRB No. 58 (2023). In that case, the Board held that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that condition its benefits on the forfeiture of employees' exercise of their NLRA rights "unless it is narrowly tailored to respect the range of those rights."[25] *McLaren Macomb*, 372 NLRB slip op. at 10. *McLaren Macomb* overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020), which in turn had overruled *Clark Distribution Systems*, 336 NLRB 747 (2001), and limited the application of *Metro Networks*, 336 NLRB 63 (2001), and *Shamrock Foods Co.*, 366 NLRB No. 117 (2018). In returning to the pre-*Baylor* standard, the Board made clear the agreement's language itself and its tendency to coerce should be the primary consideration, not the circumstances under which the agreement was proffered. The Board in *McLaren Macomb* explicitly held that the mere proffering of agreements with terms that would reasonably tend to coerce employees violated Section 8(a)(1) of the Act, finding that such an agreement "had a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances." *McLaren Macomb*, supra, slip op. at 3 fn. 9, 8. As such, the threshold issue is the language of the severance agreement itself.

The non-disparagement provision found unlawful in *McLaren Macomb* stated, in relevant part:

> At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of the Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives. Id., slip op. at 2.

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[24] See, supra p. 22, footnote 20.

[25] Although the Board in *McLaren Macomb* did not address what constitutes narrow tailoring, it noted that prior decisions had approved severance agreements where the releases "waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement." *McLaren Macomb*, supra, at fn. 38 (citing *Hughes Christensen Co.*, 317 NLRB 633 (1995) and *First National Supermarkets, Inc.*, 302 NLRB 727 (1991)).

The Board in *McLaren Macomb* found that this non-disparagement provision substantially interfered with employees' Section 7 rights on its face noting that public statements by employees about the workplace are central to the exercise of employee rights under the Act. Id., slip op. at 9. In finding the provision to be unlawfully restrictive, the Board reasoned that the provision failed to define "disparagement" or otherwise limit it to the definition recognized by *Jefferson Standard*. Id., slip op. at 9 (citing *NLRB v. Electrical workers Local 1229 (Jefferson Standard Broadcasting Co.),* 346 U.S. 464, 477 (1953)).

The General Counsel argues that the non-disparagement provision in Respondent's Severance Agreement, like that in *McLaren Macomb*, unlawfully conditions severance benefits on the employee-signer forfeiting the exercise of Section 7 rights. The non-disparagement provision in Respondent's Severance Agreement precludes employees from making "any disparaging statements concerning the Company or any of its affiliates or current or former officers, directors, shareholders, employees or agents, including but not limited to posting, for attribution or anonymously, any disparaging or negative reviews or comments about the Company on the internet, e.g., on Glassdoor," and defines the term "disparage" as "negative comments regarding [with respect to any individual or entity's] integrity, fairness, satisfaction of obligations, overall performance, business practices, investment decisions, business model, equityholders, or personnel." (Jt. Exh. 8; Jt. Exh. 9.) Here, as in *McLaren Macomb*, the language in the provision is extremely broad resulting in Respondent blocking the signer's right to engage in the core protected activity of disclosing, inter alia, any labor dispute to the public. Specifically, the employee-signer is prohibited from making any "negative comments" regarding the entity's integrity, fairness, business practices, business model, or personnel, which could clearly encompass an employee commenting or posting about a labor dispute or Respondent's mistreatment of its employees. Additionally, as in *McLaren Macomb*, Respondent's non-disparagement provision failed to narrowly tailor the language to specify that employees have a clear right to publicize labor disputes and communications that are not "so disloyal, reckless, or maliciously untrue as to lose the Act's protection," Id., slip op. at 8, citing *Emarco, Inc.*, 284 NLRB 832, 833 (1987). Further, as in *McLaren Macomb*, the prohibition is not narrowly tailored with regard to time or subject matter as the agreement has no temporal scope for the prohibitions and it prohibits statements related to an expansive group of entities and individuals. Thus, I find for the same reasons articulated by the Board in *McLaren Macomb*, that the non-disparagement language in the present Severance Agreement interferes with employees' Section 7 rights.

Turning to the confidentiality provision, the language in the agreement the Board found unlawful in *McLaren Macomb* stated:

> The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

McLaren Macomb, supra, slip op. at 2. The severance agreements at issue here prohibit disclosure of their terms as well as their mere existence "in any manner whatsoever" except immediate family members, personal attorney, accountant, auditor, tax preparer, or financial advisor. Accordingly, the confidentiality provisions "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into Respondent's use of the severance agreement, including the nondisparagement provision." Id.,

slip op. at 10. I find the General Counsel has established the confidentiality provisions in the severance agreements are unlawfully overly broad and violate Section 8(a)(1) of the Act as alleged.

Respondent contends that I should disregard *McLaren Macomb* because it was wrongly decided. As an administrative law judge, I am bound to follow extant Board law, and any argument that a Board decision should be overturned is properly addressed by the Board. The Respondent further argues that Unterwurzacher's rights were not limited since she did not sign either version of the severance agreement. However, whether the employee accepts the agreement is immaterial as the mere proffer of the agreement itself violates the Act. *McLaren Macomb*, supra, slip op. at 9.

Finally, Respondent asserts in its posthearing brief that the versions of the severance agreements offered to Unterwurzacher were offered to her in error and therefore did not violate the Act. (R. Br. at 23.) Respondent's contention fails. First, Respondent failed to present any reliable evidence that the agreement was offered to Unterwurzacher by accident, as Respondent failed to produce the individual who presented the severance agreements to Unterwurzacher—Susan Kelbaugh—at the hearing. The only evidence Respondent presented was their in-house counsel who testified that he had prepared a new version of the Severance Agreement for employees after the issuance of the *McLaren Macomb* decision, and he testified that he did not know how or why Kelbaugh failed to present the new version to Unterwurzacher. Moreover, even if Kelbaugh did make a clerical error in presenting the "wrong" version of the severance agreement to Unterwurzacher inadvertently (two different times), the fact remains that she was offered two different severance agreements with the overly broad language and the record is devoid of any evidence that Respondent ever reached out to Unterwurzacher to rescind the version of the severance agreement or even inform her that she had received the wrong version. Regardless, the fact remains that Respondent offered her two different versions of the severance agreements and both contained overly broad language in violation of Section 8(a)(1) of the Act.

3. Rules

In *Stericycle, Inc.*, 628 NLRB No. 113 (2023), the Board set forth the analytical framework for determining whether an employer's rules are unlawfully overbroad such that they interfere with employees' Section 7 rights.[26] To establish that a facially neutral rule is unlawful, the General Counsel must prove that the challenged rule "has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity." *Stericycle,* supra, slip op. at 8. The Board also stressed that it would interpret the rule from the perspective of "the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." Id. at 9. Further, the Board endorsed that a "typical employee interprets work rules as a layperson rather than as a lawyer." Id. If an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. Id. That is so even if the rule could also be reasonably

[26] I note that in its posthearing brief, Respondent specifically preserved the argument that *Stericycle* should be overruled and that the Board should restore the *Boeing Co.*, 365 NLRB 1494 (2017), framework in evaluating workplace rules. (R. Br. at 16 fn. 6.)

interpreted *not* to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights. Id. at 9–10. Any ambiguity is to be construed against the employer, as the drafter of the rule. Id. at 14.

Once the General Counsel carries its burden of demonstrating that the rule is presumptively unlawful, an employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. Id. at 10. As explained in *Stericycle*, this approach does not change the General Counsel's burden of proving the unfair labor practice, "but rather extends to the employer something akin to an affirmative defense." Id. at 11.

The General Counsel alleges that four different rules promulgated in September 2023 by Respondent in its Community Guidelines violated Section 8(a)(1) of the Act. Initially, the General Counsel alleges that Respondent's directive: "Frame opinions, not demands: It's okay to disagree. It's not okay to make demands of a team or teammate based on your opinion. Acknowledge what's your opinion vs. mandating a change or action" (Jt. Exh. 5 at 2.) violates the Act. The General Counsel contends that a reasonable employee would interpret this rule as restricting employees from making a demand on behalf of employees as a group or coming together to make a group demand, which is protected concerted activity. See *Halle Enters., Inc.*, 330 NLRB 1157, 1161 (2000) (employees demanding wage increases, uniforms, safety equipment and tools were found to be engaged in protected concerted activity); *Random Acquisitions, LLC*, 357 NLRB 303, 314 (2011) (employees demanding overdue paychecks were found to be engaged in protected concerted activity).

Respondent contends that this rule does not violate the Act because it does not restrict the substance of employee speech, but merely the manner of delivery. (R. Br at 18.) Respondent also asserts that its application of the provision confirms its narrow scope as the "record contains no instance in which the 'frame opinions' guideline was invoked to discipline or discourage protected concerted activity, and the provision, which was not in effect during her employment, played no role in Unterwurzacher's termination." (R. Br. at 19.) Respondent's contentions fail on multiple fronts. First, the rule on its face prohibits employees from making demands and contains no language making it clear that demands regarding terms and conditions of employment made on behalf of a group would be allowed. See *Prescott Industrial Products Co.*, 205 NLRB at 51. Second, while it is true that Respondent only promulgated the rule after terminating Unterwurzacher, the evidence shows that Respondent disciplined Unterwurzacher precisely because she was viewed as making demands that the People Team answer questions related to their decision to change employee titles. See supra at 5, 10. Thus, it appears that Respondent specifically drafted the rule in order to ensure that it could discipline or discharge employees in the future for making similar demands.

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act when it promulgated guidelines that it would not tolerate "ad hominem attacks (those which target the character, motive, or some other attribute of the person making an argument rather than attacking the substance of the argument itself)." (Jt. Exh. 5 at 2.) This rule is overly broad and would certainly infringe on an employee's protected concerted activity as employees making group complaints about their terms and conditions of employment cannot be barred from criticizing a member of management's motives as part of their campaign and outreach. As written, this rule, for example, would not permit an employee to accuse a manager or CEO of

firing an employee because of their Union or protected concerted activity as this would be an attack on the manager or CEO's motive. Thus, this ban strikes at the heart of Section 7 activity.

Respondent contends that this rule is lawful because it serves the legitimate substantial business interest of prohibiting personal abuse directed at individuals, rather than criticism of company policies, management decisions, or working conditions. (R. Br. at 18.) However, as Respondent failed to narrowly tailor the rule to explicitly allow for protected concerted activity, it is unlawfully overly broad. *NLRB v. S. Maryland Hosp. Ctr.*, 916 F.2d 932, 940 (4th Cir. 1990), *as amended* (Nov. 8, 1990) ("By permitting the punishment of employees for speaking badly about hospital personnel, the employer 'fail[ed] to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities,'" citing *American Cast Iron Pipe Co. v. NLRB,* 600 F.2d 132, 137 (8th Cir. 1979)); See *Alaska Pulp Corp.*, 296 NLRB 1260, 1260 (1989) (Board found employee letter attacking management and accusing the company of double booking, a conspiracy to force other corporations out of business, and misrepresentations "by a few self-serving greedy individuals" constituted protected concerted activity, which did not lose protection of the Act). In light of the above, I find that this rule violates Section 8(a)(1) of the Act.

The General Counsel also alleges that Respondent violated Section 8(a)(1) when it promulgated guidelines that it would not tolerate "[c]ommunications or comments that could negatively impact Atlassian partners, shareholders or customers." (Jt. Exh. 5 at 2.) This rule broadly applies to *any* communication or comments that could negatively impact Respondent's partners, shareholders or customers." It contains no language that would confine its reach to communications unrelated to Section 7 activity. In these circumstances, a reasonable employee would assume that the Respondent would likely consider Section 7 activity such as labor protests or public criticism of its policies to negatively impact Atlassian partners, shareholders or customers, and might then refrain from engaging in such activity. See *Schwan's Home Service, Inc.*, 364 NLRB 170, 174 (2016) (finding rule prohibiting conduct "detrimental to the best interest of the company or its employees" unlawful); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 fn. 5 (2014) (finding unlawful rule prohibiting participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict exists" or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"). Respondent failed to address this allegation in its posthearing brief. In light of the above, I find that this rule violates Section 8(a)(1) of the Act.

Finally, the General Counsel asserts that Respondent's rule prohibiting the disclosure of "confidential, sensitive, private, or personal information" to be unlawful, as those terms are not narrowly tailored. In fact, as the General Counsel points out, Respondent's definition of "Confidential Information" as set forth in its Code of Business Conduct & Ethics states:

> At the least, Atlassian Confidential Information includes information such as Atlassian's proprietary source code, nonpublic technical information about Atlassian systems and products, nonpublic information about Atlassian's product roadmap or partnerships, nonpublic financial information, and *nonpublic information relating to employees and compensation*." (Jt. Exh. 6 at 25; emphasis added.)

Thus, Respondent's rule regarding disclosing confidential information could easily be read to prohibit employees from disclosing their compensation, and as such violates Section 8(a)(1) of the Act. See *Cintas Corp.,* 344 NLRB 943, 943 (2005) enfd. 482 F.3d 436 (D.C. Cir. 2011)

(finding that "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" violated Section 8(a)(1) because it could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with those inside and outside the company, including a union); See *Victory II, LLC*, 363 NLRB 1578, 1580 (2016) ("It is likewise settled that employees have a Section 7 right to discuss their conditions of employment with third parties, such as union representatives, Board agents, and the public in general, and the Board has invalidated rules prohibiting such third-party communication"); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (confidentiality rule unlawful where it specifically defines confidential information to include wages).

Respondent contends that this rule targets trade secrets, proprietary business strategies, and personal employee data, rather than employees' compensation or working conditions. (R. Br. at 19.) The problem with Respondent's contention is that the rule as written does not define confidential information so narrowly but rather provides an ambiguously broad definition of confidential information. Moreover, as the General Counsel points out, Respondent's definition of "Confidential Information" as laid out in its Code of Business Conduct & Ethics, specifically lists as confidential "nonpublic information relating to employees and compensation," which any reasonable employee would interpret to specifically include employee wages. Thus, Respondent failed to show it was unable to advance that interest with a more narrowly tailored rule. *Stericycle*, supra, at 10.

Thus, I find that the General Counsel satisfied its burden showing that the four rules violated Section 8(a)(1) of the Act and Respondent failed to show it could not advance that substantial business interest with a more narrowly tailored rule. Id. at 10. In light of the above, I find that Respondent violated Section 8(a)(1) of the Act when it promulgated these four rules in September 2023.

CONCLUSIONS OF LAW

1. The Respondent Atlassian US, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging Denise Unterwurzacher in response to her protected concerted activities.

3. Respondent violated Section 8(a)(1) of the Act by offering Denise Unterwurzacher severance agreements that contained overly broad Confidentiality and Nondisparagement provisions.

4. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overly broad rules in its Community Guidelines.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged Denise Unterwurzacher, must offer her reinstatement to her former job or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority and other rights and privileges they would have enjoyed absent the discrimination against her. The Respondent shall also make Denise Unterwurzacher whole for any loss of earnings and other benefits.

The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), enf. denied in part on other grounds, 102 F.4th 727 (5th Cir. 2024), Respondent shall also compensate Denise Unterwurzacher for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, the Respondent shall compensate Denise Unterwurzacher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 16 a copy of each backpay recipient's corresponding W–2 form reflecting the backpay award.

The Respondent shall also be required to remove from its files any references to the unlawful termination of Denise Unterwurzacher and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice, on a form provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the Respondent shall distribute the notice electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its

employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the facility at any time since June 26, 2023.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Atlassian US, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) Presenting its employees with severance agreements that include overbroad non-disparagement and confidentiality provisions that have a reasonable tendency to coerce employees in the exercise of their Section 7 rights or maintaining or enforcing those provisions in the severance agreement.

(c) Maintaining work rules in our Community Guidelines that: 1) prohibit employees from making demands; 2) prohibit employees from criticizing or questioning the motives of Atlassian managers or supervisors; 3) broadly prohibit disclosure of confidential information; and 4) broadly prohibit comments or communications that could negatively impact Atlassian partners, shareholders or customers.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer full reinstatement to Denise Unterwurzacher to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[27] 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 due under the terms of this Order.

(b) Make Denise Unterwurzacher whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of her unlawful termination.

5 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Unterwurzacher and within three days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

10 (d) Compensate Unterwurzacher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

15 (e) File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Denise Unterwurzacher's corresponding W-2 forms reflecting the backpay award.

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

(g) Within 14 days of the Board's order, rescind the portions of its severance agreements, which contain overbroad non-disparagement and confidentiality provisions and notify, in writing, all current and former employees who were employed by the
30 Respondent at any time since June 26, 2023, that this has been done and that such language will not be enforced or given effect.

(h) Within 14 days of the Board's order, rescind the portions of its Community Guidelines, that: 1) prohibit employees from making demands; 2) prohibit employees
35 from criticizing or questioning the motives of Atlassian managers or supervisors; 3) broadly prohibit disclosure of confidential information; and 4) broadly prohibit comments or communications that could negatively impact Atlassian partners, shareholders or customers, and notify, in writing, all current and former employees who were employed by the Respondent at any time since September 1, 2023, that this
40 has been done and that such rules will not be enforced or given effect.

(i) Within 14 days after service by the Region, physically post at the Austin, Texas facility, copies of the attached Notice to Employees. Copies of the Notice, on forms provided by the Regional Director for Region 16 after being signed by the

Respondent's authorized representative, shall be posted by Respondent and maintained for at least 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the Respondent shall distribute the notice electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the facility at any time since June 26, 2023.

(j) Within 14 days after service by the Region, deliver to the Regional Director for Region 16 signed copies of the Respondent's notice to employees for posting by Respondent at its Austin, Texas facility in all places where notices to employees are customarily posted.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 1, 2026

Susannah Merritt
U.S. Administrative Law Judge

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

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

YOU HAVE THE RIGHT to discuss wages, hours and other terms and conditions of employment with other employees and **WE WILL NOT** interfere with your exercise of these rights.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT issue and/or maintain severance agreements with confidentiality provisions that broadly require you to hold the provisions and terms of the severance agreement "in strictest confidence" or that require you to "agree not to disclose the existence or terms" of the severance agreement to any current or former Atlassian employee.

WE WILL NOT issue and/or maintain severance agreements with overly broad nondisparagement provisions that prohibit you from making any disparaging statements concerning Atlassian or any of its affiliates or current or former officers, directors, shareholders, employees or agents, or broadly prohibit you from posting any disparaging or negative reviews or comments about Atlassian on the internet.

WE WILL NOT issue, maintain or enforce work rules in our Community Guidelines that: 1) broadly prohibit you from making any demands; 2) prohibit you from criticizing or questioning the motives of Atlassian managers or supervisors; 3) broadly prohibit disclosure of confidential information; and 4) broadly prohibit comments or communications that could negatively impact Atlassian partners, shareholders or customers.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL make Denise Unterwurzacher whole for any loss of earnings and other benefits suffered as a result of our discrimination against her.

WE WILL compensate Denise Unterwurzacher for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 16 of the National Labor Relations Board, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL remove from our files any reference to the termination of Denise Unterwurzacher and **WE WILL**, within 3 days thereafter notify her in writing, that this has been done and that the termination will not be used against her in any way.

WE WILL rescind the unlawful rules of our Community Guidelines, that: 1) prohibit employees from making demands; 2) prohibit employees from criticizing or questioning the motives of Atlassian managers or supervisors; 3) broadly prohibit disclosure of confidential information; and 4) broadly prohibit comments or communications that could negatively impact Atlassian partners, shareholders or customers.

WE WILL within 14 days of the Board's order, rescind the overly broad provisions contained in the "Confidentiality" and "Non-Disparagement" portions of our severance agreement and notify, in writing, all former employees who were offered and/or signed our severance agreements containing the above overly broad language that we have done so, and that the above overly broad language will not be enforced or given effect.

ATLASSIAN CORP.
(Employer)

Dated: ______________________ By: ______________________________________
(Representative) (Title)

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

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6107
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-324971 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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