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

AUTOFIT INC.
Respondent

and Case 16-CA-355961

DANIELA IRENE MELENDEZ
An Individual

Alberto Aguirre, Esq.
for the General Counsel.

Bryant Banes, Esq. and Lauren B. Lebato, Esq.
for the Respondent.

Decision

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. Charging Party Daniela Irene Melendez (Melendez) maintains, after a few weeks of employment, Respondent Autofit Inc. (Respondent) violated Section 8(a)(1) when it terminated her for discussing pay with a fellow employee. Respondent maintains that Melendez was terminated because she stole commissions from other employees, was a bad fit with Respondent's culture, and other employees disliked her. Respondent's administrative assistant, in response to a Texas Workforce Commission inquiry for Melendez's unemployment, stated that Melendez was also terminated for revealing sensitive information, including pay. Respondent further implies that the administrative assistant was not its agent and Melendez's testimony was not credible. I find that General Counsel presents a prima facie case and Respondent's reasons for terminating Melendez are pretextual.

STATEMENT OF THE CASE

On December 2, 2024, Charging Party Melendez filed unfair labor practice charge against Respondent Autofit Inc., docketed by Region 16 of the Board as Case 16-CA-355961 and was served upon Autofit on December 4, 2024. (GC Exhs. 1(a) and 1(b).)[1] On December 12, 2025, the Regional Director for Region 16 issued a complaint. (GC Exh.

[1] I include the following abbreviations to cite to record evidence: Tr. for transcript; GC Exh. for General Counsel exhibit; R. Exh. for Respondent Autofit Exhibit; GC Br. for General Counsel brief; R. Exh. for Respondent brief. The specific citations set forth in the decision are included to aid review and are not necessarily exclusive or exhaustive. My findings are not based solely on the record citations contained in this decision but rather are based upon my review and consideration of the entire case record.

1(c).) On December 26, 2025, Respondent filed a timely answer denying all violations and stating affirmative defenses. (GC Exh. 1(e).)

A trial was conducted in this matter on March 17 and 18, 2026 in Houston, Texas. Counsel for the General Counsel, and Respondent filed timely post-trial briefs in support of their position, which I carefully considered.

On the entire record, I make the following findings, conclusion of law, and recommendations.[2]

FINDINGS OF FACT

I. JURISDICTION

I find, and Employer Autofit admits, it is a Texas corporation engaged in the sale and distribution of aftermarket autobody parts with locations in Houston, Texas, Dallas, Texas, San Antonio, Texas, and Phoenix, Arizona. I find, and Employer admits, that, during the 12-month period ending December 31, 2024, it derived gross revenues in excess of $500,000.00 from conducting its operations and purchased and received goods valued in excess of $5,000 directly from points outside the State of Texas. Also see Jt. Exh. 1.

At all material times, Employer Autofit Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. BACKGROUND

Respondent employs over 300 people with 6 locations at the time of hearing. (Tr. 38, 84, 100.) It sells automotive parts. The events in the Complaint are limited to the Houston 1 facility.

Since 1996 Fakhredin Emadi (CEO Emadi) has been Respondent's owner and president. (Tr. 57, 84, 92.) He primarily meets with vendors, including international vendors. CEO Emadi's two daughters, Elham Emadi and Maryam Emadi, hold executive positions within Respondent's organization. Maryam Emadi is the Chief Financial Officer (CFO Emadi). (Jt. Exh. 1.)

[2] The transcripts and exhibits in this case generally are accurate, but I hereby make the following transcript corrections: Page 28, L. 12, instead of "sale", it should be "steal"; Page 356, LL. 16 and 25, Page 408 L. 25, instead of "Rivera" should be "Guevara"; and Page 434 L. 11, instead of "phishing", it should be "fishing."

Elham Emadi[3] is Employer's Chief Logistics Officer (CLO) for the entire Autobody operation.[4] Her office is in the "Houston 1" facility. As Chief Logistics Officer, Elham Emadi hires employees. CLO Emadi served as the corporate representative and was present throughout the hearing. Although she testified in her capacity as custodian of records, Respondent did not call her for its case in chief. CLO Emadi is also in charge of the human resources functions.

CLO Emadi shares an office with her administrative assistant, Esperanza Guevara. The office they share is very small. At the time of the hearing, Guevara worked for Respondent for 2 years. (Tr. 358.) The administrative assistant position is considered a sensitive position. (Tr. 360.) Guevara maintains she coordinates "internal communications and gives administrative support, including employee onboarding, recordkeeping and "addressing basic HR-related inquiries." (Jt. Exh. 3.)

Guevara also conduct[s] research, compiles data, and prepares papers for consideration and presentation by executives, committees, and boards of directors. The job description also requires that the administrative assistant "interpret administrative and cooperating policies and procedures for employees" and "set up and oversee administrative policies and procedures for offices or organizations." Another duty is to "meet with individuals, special interest groups and others on behalf of executives, committees, and board members.

Guevara testified that she is in the room when interviews take place and sometimes makes comments. (Tr. 404.) She also sits next to CLO Emadi when Emadi conducts disciplinary meetings. (Tr. 409-410.) She may leave the office during terminations if CLO Emadi asks; if not asked, Guevara continues her work in the office and does not leave. (Tr. 411.)

Respondent has used ADP for many of its human resources functions since March 2021. Before ADP took over the human resources functions, Respondent had a corporate human resources department that established policies. (Tr. 111.) About January 9, 2021, a posting on company stationery with CEO Emadi's signature established that Respondent prohibited employees from discussing pay. (Tr. 101; GC Exh. 4.) The document was likely posted before ADP took over the HR functions. CEO Emadi testified he posted policies in the break room before ADP made Respondent's policies. (Tr. 90.) CEO Emadi maintained he had no knowledge of the posting, despite his affixed signature and stated that the signature likely was stamped. (Tr. 101-102.) No employee authenticated the photo or testified about it. Once ADP took over the HR functions, it also issued Respondent's employee handbook.

Administrative Assistant Guevara testified that she has access to the ADP program for certain tasks, when CLO Emadi gives her permission or forwards something to her. Guevara further testified that access from CLO Emadi into ADP occurred:

[3] A number of the employees call her "Ms. Ellie." For clarity in the decision, I use her title, CLO Emadi.

[4] CLO Emadi also serves as the Custodian of Records.

> [L]ike if she needs me to, I don't know, review something that going on at, you whatever store or take care of whatever store or take care of whatever, then she'll forward that to me so I can look into it.

(Tr. 397-398.)

Human resources documents were stored within its purchased software program ADP. Regarding payroll, Guevara testified

> So again, I have access to [CLO Emadi]'s stuff. If she gives me access, then I'd be able to access it, but no, I don't directly go to payroll because I don't care of that.
>
> But if I'm in her staff, then yes, I have access to everything in the company.
>
> . . .
>
> I don't take care of payroll, no.

(Tr. 397.)

The sales personnel do not have access to ADP and instead use a software program called CRM. (Tr. 264.) The computers hold the sales information on parts and making purchase orders. At the Houston 1 facility, the employees sit at desks with computer monitors. Most, if not all, have telephones at their desks to make phone sales. The telephones ring "all the time." (Tr. 243.)

Respondent witnesses Shih and Guevara testified that Respondent requires employees to be trustworthy above all. Salesperson Reyes testified that the sales environment is competitive. If an item is returned, only three people in Houston 1 can credit the return: Manager Cisco; Acting Manager Shih; or Gustavo, who works in the loading area. In this competitive environment, if sales employees have disputes with each other about who receives credit for sales, a manager resolves the matter. (Tr. 250-251.)

III. SUBPOENA DUCES TECUM

At the hearing, CLO Emadi testified solely as the custodian of records. She ultimately is responsible for managing all of Respondent's documents. (Tr. 16.) She received the subpoena. She testified that she examined the documents and then provided the documents needed. (Tr. 17-18, 21.)

Regarding her search for documents, CLO Emadi[5] testified that she searched for documents through its human resources software, ADP. ADP does not contain sales records. (Tr. 26.) The manager of each department enters information into ADP. (Tr. 40.) ADP also

[5] CLO Emadi was initially evasive and became hostile towards the end of GC's questioning. She attempted once to ask her counsel for an answer and later tried to question GC about why he needed certain information. See, e.g., Tr. 73.

provides Respondent's policies, handbook, and human resources administrative services. (Tr. 58, 60-61; R. Exh. 4.)[6]

After searching for the subpoenaed information, CLO Emadi provided the documents to Respondent's counsel and then asked if anything was missing. (Tr. 30.) CLO Emadi became testy when General Counsel asked if sales records were stored in ADP. She replied: "Sales is different thing, sir. We are here for the employee, not for the sales." (Tr. 26.) She also testified:

> [I]f you're trying to tell me where did I get the sales, because Ms. Daniela [Melendez] is stealing the sales from the company. And then when the employee, they steal the sale from the company, everything is going to be recorded under ADP. If you are referring me on that for the sales document, those are – she steal the sales from the other, other employees, so those are, is all recorded under ADP.

(Tr. 27-28; Tr. 71-72.) When asked about a possible comparator and whether he was included in the search, CLO Emadi stated that she did not recall him and "then we are not here for Mr. Moses today." (Tr. 41.)[7] CLO Emadi later testified that Moses stole from the company by processing return and placing the credit on his own credit card. (Tr. 49-50.) CLO Emadi testified to Respondent's leading questions that employee Felipe was also terminated for stealing in Respondent's Dallas location. (Tr. 55.)

While on the stand in her capacity as custodian of records, CLO Emadi testified that she took over Human Resources functions after CEO Emadi signed the contract with ADP in 2021. She testified, again to leading questions from Respondent, that: She took steps to replace old policies and issued a new ADP handbook. (Tr. 57-58.); ADP centralized all document retention (Tr. 60.); and that ADP served as the HR consultant. (Tr. 60.) The initial GC Exh. 7 was created by Administrative Assistant Esperanza Guevara. (Tr. 67.)

CLO Emadi testified about GC Exh. 7 (which was later updated and shown on the screen in the hearing room). She testified that she created the document originally for all locations in Houston by entering Houston terminations for the years requested. (Tr. 63-65.)

Respondent has security cameras at the facility. The videos are kept in a different system. Respondent did not offer any videorecordings for the record. (Tr. 46-48.) CLO Emadi seemed unsure of where the videorecordings were stored.

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[6] The initial contract with ADP was signed on March 3, 2021. (R. Exh. 4 at 39.)

[7] The employee in question was Moses Ventura. (Tr. 38.) The matter was discussed related to a Respondent exhibit 10(m) but the exhibit was never entered into the record

IV. Alleged Unfair Labor Practices

A. Respondent Hires Melendez as an Administrative Assistant

Charging Party Daniela Melendez was hired to be an administrative assistant at Respondent's Houston One location, which began on Friday, September 27, 2024.[8] (GC Exh. 2.) She was terminated on October 19, 2024. (Tr. 123.)

On September 12, Administrative Assistant Esperanza Guevara, by text message, notified Melendez to interview with Respondent. CLO Emadi was included in the text. (GC Exh. 2.) The interview took place on September 13 with CFL Emadi and Guevara.[9] Melendez asked about work culture. She testified that the work environment with the sales employees was very competitive and they could sometimes be abrasive. They told Melendez, if hired, she would start in sales and then transition to working as an administrative assistant. (Tr. 131.)[10]

On September 13, Respondent hired Melendez as an administrative assistant with a pay rate of $22.00 per hour.[11] The letter offering Melendez the position included an agreement to confidentiality and non-disclosure agreement. (Tr. 130; R. Exh. 1(k), 3.) The Non-Disclosure Agreement, with Respondent as the Disclosing Party, defined confidential information as:

> (a) Information relating to the Disclosing Party or its current or proposed business, including financial statements, budgets and projections, customer identifying information, potential and intended customers, employers, products, computer programs, specifications, manuals, software, analyses, strategies, marketing plans, business plans, and other confidential information, whether provided orally, in writing, or by any other media that was or will be

[8] All dates occur in 2024 unless otherwise indicated.

[9] Guevara did not recall whether CLO Emadi was in the interview. (Tr. 362.) Guevara denied doing any human resources (HR) work. Later Guevara testified that she was in the interview with CLO Emadi and talked about the job description. (Tr. 365-367.) Also later, Guevara testified that she was in the small office where the interviews take place and denied she was "officially interviewing," but she may make comments. (Tr. 404.) She later testified she vaguely recalled the interview and then testified she commented that she said to Melendez that CLO Emadi was "big on timing and she's very big on trust and your integrity, confidentiality because of the position that she's in." (Tr.407.) She did not recall telling Melendez she would start in sales but testified it was standard to do so. (Tr. 408.)

[10] Melendez later denied that she was told during the interview that she would work in sales. (Tr. 177.) Two of Respondents' witnesses credibly testified that all new employees work in sales, so this statement is not credited.

[11] Administrative Assistant Guevara testified, to a leading question, that everyone who starts in sales is paid a commission with "Yes, I believe so." (Tr. 363.) None of Melendez's paychecks were presented to show that Melendez was paid on commission.

(i) Provided or shown to the Receiving Party of its directors, officers, employees, agents and representatives (each a "**Receiving Party Representative**") by or on behalf of the Disclosing Party or any of its directors, officers, employees, agents, and representatives (each a "**Disclosing Party Representative**");

. . . .

The Disclosing Party shall identify Confidential Information disclosed orally as confidential within 180 days of disclosure. The Disclosing Party's failure to identify information as Confidential Information is not an acknowledgment or admission by the Disclosing Party that the information is not confidential and is not a waiver by the Disclosing Party of any of its rights with respect to that information.

(R. Exh. 1(k).)

Melendez also received Respondent's policies as part of the onboarding process. Respondent's policy manual was created by ADP. The manual included a portion on workplace conduct, which further stated that an employee's unacceptable conduct could be grounds for discipline up to and including termination. Types of conduct listed as unacceptable include:

5. Stealing, removing or defacing Auto Fit Inc. property or a co-worker's property, and/or disclosure of confidential information.

(R. Exh. 1(f) at 35.)

The handbook also contains a code of conduct, which includes that Respondent may any kind of discipline it chooses, or none, and will deal with a situation on an individual basis. Yet the handbook continues that Respondent "will endeavor to utilize progressive discipline but reserves the rights . . . to terminate the employee at any time for any reason." (R. Exh. 8 at 35.)

The job description for administrative assistant included a summary:

Provide high-level administrative support by conducting research, preparing statistical reports, and handling information requests, as well as performing routine administrative functions such as preparing correspondence, receiving visitors, arranging conference calls, and scheduling meetings. May also train and supervise lower-level clerical staff.

(R. Exh. 8.) Respondent admits that the job "occasionally required assistants to exercise independent judgment and discretion in assisting with operational matters when Ms. Emadi was out of the office." (R.Br. at 11, citing Tr. 399 and 400.)

Among the specifically listed duties and responsibilities in the administrative assistant job description are:

. . . .

- Prepare responses to correspondence containing routine inquiries . . . .

- Conduct research, compile data, and prepare papers for consideration and presentation by executives, committees, and boards of directors . . . .

- Perform general office duties, such as ordering supplies, maintain records management database systems, and performing basic bookkeeping work.
- File and retrieve corporate documents, records, and reports.
- Read and analyze incoming memos, submissions, and reports to determine their significance and plan their distribution. . .
- Process payroll information and HR support.
- Interpret administrative and operating policies and procedures for employees.
- Set up and oversee administrative policies and procedures for offices or organizations . . . .
- Supervise and train other clerical staff and arrange for employee training by scheduling training or organizing training material.
- Review operating practices and procedures to determine whether improvements can be made in areas such as workflow, reporting procedures, or expenditures.

(R. Exh. 8.)[12]

During her short tenure with Respondent, Melendez only worked in sales. (Tr. 136, 178.) Other than sales information, Melendez had no access to personnel files or pay information other than her own. (Tr. 138.) The record does not show that Melendez had access to any confidential information outside of sales, or that she shared sales information with anyone.

Melendez's first day was On September 27. She was sent to work with Manager Cisco. In turn Cisco set Melendez to work with Gabby, a sales associate.[13] Gabby sat to Melendez's left at the end of a bank of seats and desks, with partitions. At Gabby's right sat another salesperson, Ruth Reyes. Managers sat in a row behind the sales associates. (Tr. 138-139.)

Melendez's sales duties involved customer service at a desk. Respondent did not provide Melendez with a telephone, as other sales representatives had, and was limited to in-person transactions. (Tr. 135-136.) If a customer came into the desk where the sales

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[12] Guevara testified that she had no HR training and did not get involved in HR. The job description requires her to perform payroll duties and HR support.

[13] Neither Melendez nor Shih knew Gabby's last name but the record later reveals the full name. Gabby continues to work for Respondent. (Tr. 332.) Neither side called Gabby to testify. I use only the first name to protect her identity.

staff sat, she would ask the customer what part was needed. Melendez searched for the sales computer for the part and showed the customer the part on the computer screen. If the customer agreed that the part was correct, Melendez hit the print button on the computer, which apparently sent a check out tape to a checkout desk.

Melendez could not process a return. To her knowledge, only managers and assistant managers could handle returns. (Tr. 142.)

B. Melendez and Gabby Discuss Pay; Gabby Then Asks Management About the Administrative Assistant Job and Pay Increase

Through casual conversation, Gabby and Melendez started to become acquainted with one another.[14] Gabby stated she worked there for 9 years. Gabby also shared that her husband worked for Respondent. (Tr. 143, 150.)

During one of these conversations, about the second or third day of Melendez's employment, Gabby and Melendez were sitting at the front desk during a time when customers were not likely to arrive. Gabby lowered her voice and had a concerned look on her face. Gabby asked how much Melendez was making. When Melendez said $22 per hour, Melendez observed Gabby had an even more concerned facial expression. Gabby said she had worked there for 9 years and never received $22 per hour. Gabby told Melendez that she should be earning as much.

Gabby then went to the computer and found the online posting for Melendez's administrative assistant position. They sat silently for a few minutes while Gabby read the posting. Melendez noted that Gabby usually was bubbly, but now she was solemn, wearing a frown and looking sad. Gabby then got up and went by herself into the office where CLO Emadi and Administrative Assistant Guevera[15] sat. The office was located at a 45-degree angle behind where Gabby and Melendez sat.[16]

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[14] Melendez undisputedly testified to the pay discussion with Gabby. Respondent repeatedly objected to the entire presentation of these events as hearsay, which I overruled. Melendez's testimony of what she and Gabby discussed before Gabby asked for a raise is not hearsay. See, e.g., *North Hills Office Services, Inc.*, 344 NLRB 1083, 1101 (2005) (supervisor who was present at incident and heard the conversation was credited over hearsay evidence from others). Further, no Respondent witness testified whether Gabby asked for a raise while Melendez was employed. Instead, Respondent's witnesses testified that they did not hear Melendez talking about pay.

[15] Guevara testified she did not recall being present at any time when Gabby asked for a raise, and then said Gabby never talked to her about it. (Tr. 382.)

[16] During cross-examination, Respondent asked questions about what, if anything, Melendez did to support Gabby's actions:

> Q: Did you engage with her to go to management to ask for a change in conditions or more pay?
>
> A: I said she deserves more pay, so if she feels like it, that's her choice.
>
> Q: Okay. But you didn't --- you didn't combine with her to go to management to ask for either a pay for her or you?
>
> A: Mr. Banes, no. We did not.

(Tr. 175.) As such Respondent asks Melendez about the legal question of whether the

Gabby was away from her desk for no more than 10-15 minutes. When she returned to the desk next to Melendez. Gabby told Melendez she asked about the administrative assistant job, and that she deserved higher pay. Gabby continued that she was told she did not qualify for the job. Melendez said to Gabby that she worked there many years and really hard for the company and deserved higher pay. (Tr. 148-149.)

At some point. Gabby said that not a lot of people want to hear a conversation about pay. (Tr. 151.) Melendez explained that she held a master's degree that usually meant a difference in pay. (Tr. 145, 174.) Melendez testified that Gabby's last education was high school.

C. Respondent Corrects Melendez Once About Sales Procedures

Respondent maintains that Melendez, on two occasions, stole commissions from salespeople. Because the testimonies diverge, I set forth their testimonies in significant detail; this level of detail is necessary because some of the testimony is uncorroborated or supported. *Sunbelt Mfg. Co.*, 308 NLRB 780, 784 (1992), enfd. in rel. part, 996 F.2d 305 (5th Cir. 1993).

1. Melendez's Testimony

About the second week of her employment, Melendez was working alone while Gabby was on break. She asked Manager Cisco to assist her with a sale redo. Melendez thought the incident was confusing. Cisco handed her a piece of paper and told her to make sure it was "that" on her computer. Melendez printed it out. (Tr. 151.)

Around her unpaid lunch in the break room, Assistant Manager Justin Shih approached Melendez and told her she was not supposed to steal sales. She thought Cisco instructed her to make the redo, which she did not consider stealing sales. She asked Shih what she needed to prevent it from occurring again. (Tr. 152.) Shih told her how to enter a sale, which Melendez still found confusing. (Tr. 152-153.)

Melendez went to speak to Administrative Assistant Guevara about what transpired. They were alone in the office. Melendez expressed concern that she was reprimanded for following a manager's order. Guevara told her not to worry and that Respondent was looking to see if she was a reliable employee and her performance in sales. (Tr. 153.) Melendez stated she had no recollection of any other incident involving stealing a sale. (Tr. 154.)[17]

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activity was concerted. That question is not in Melendez's bailiwick, but a question for the finder of fact.

[17] Respondent contends that Melendez learned on her first day of training not to steal sales. (R. Br. at 12, citing Tr. 196.) However, Melendez's testimony is that Shih spoke with her about not stealing sales but does not specify when Shih spoke with her about it. I therefore do not credit that Shih instructed Melendez when she first started.

2. Employee Reyes

Respondent called Ruth Reyes, the salesperson who sat to Melendez's right. Reyes continues to be employed with Respondent. Reyes initially testified that Melendez was paid on commission but then admitted she was not sure. (Tr. 219-220.) Whoever spoke to the customer or got a ticket number is supposed to receive credit for the sale. If a part has been sold and delivered, no one can make an adjustment; instead, the sale would be cancelled. Only a person who made a sale or is a manager is permitted to make a change. (Tr. 202-203.) The only people who cancel sales are Manager Cisco, Acting Manager Justin Shih,[18] and Gustavo. Gustavo is in charge of deliveries. (Tr. 209-210, 213; R. Exh. 2(a).)

Reyes estimated she sat two to three feet away from Melendez. She also testified she could see Melendez's computer screen, which was facing straight. (Tr. 204-205, 214-215.)[19] To Reyes's right sat another salesperson, Krystal Lopez.

Lopez made a sale that Gustavo later wrote up as a return. (R. Exh. 2(b).) Reyes was supposed to be answering her phone, as she testified she was always on the phone. (Tr. 214.) Nonetheless, Reyes testified that, on October 4, she observed Melendez's computer screen while Lopez was away from her station. (Tr. 216; R. Exh 2(c).)

According to Reyes, Gabby was present during these events and "was on the phone or something." (Tr. 254-255.) Reyes further testified that she observed Melendez re-sell the part that Lopez sold and was returned. The part identification number and the customer were the same. (Tr. 218; R. Exh. 2(c).) The customer information reflects that Melendez placed an order for the items about 4 minutes after the sale was cancelled. (R. Exh. 2(d).) Reyes did not know who told Melendez to place the order. (Tr. 225.) The documentation also reflects that the events took place on October 4, which was about a week after Melendez started. (R. Exh. 2(d).)[20]

Reyes saw Lopez re-enter the building after her lunch. Reyes then told Lopez that her sales was stolen. Reyes printed out the documents to support her conclusion that Melendez stole Lopez's commission. (Tr. 225.) According to Reyes, Melendez understood the sale should belong to Lopez, but Melendez stated, "it doesn't matter anyway." (Tr. 228.)

Reyes also spoke with Assistant Manager Shih. She told him that she told Melendez not to make the sale because Lopez had just re-entered the building and let Lopez have the sale. (Tr. 227.)

On cross-examination, Reyes testified that Melendez had a phone conversation with the customer:

[18] Shih was an acting manager at the time of these events.

[20] I take notice of the calendar for year 2024.

Q: Did you recall when the customer came into place that order with Ms. Melendez?

A: No, it was over the phone.

Q: It was over the phone?

A: Yes. They didn't place the order. They called to say, "Hey, I'm going to pick it up." But they didn't call to be like, "Hey, I need you to place this order." They just said, "Hey I'm going to cancel. I'm going to pick it up though."

Q: And who picked up the phone?

A: Her.

Q: Who's her?

A; [Melendez].

(Tr. 237-238.) Reyes did not explain how she knew the contents of the alleged telephone conversation but maintained Melendez not only had a work phone, but also saw Melendez receive sales answering the telephones. (Tr. 238-239.)

As Reyes continued during cross-examination, she stated that she saw Melendez go to Gustavo's desk to get the cancellation and that she told Melendez not to get the cancellation before Melendez went to talk to Gustavo. Gustavo's desk was about 6 feet away from Reyes. The only part of the conversation Reyes heard was Melendez requesting the cancellation; she did not hear the rest of the conversation. (Tr. 241-243.) Further, Reyes testified that she did not see the customer talk to Melendez and then said she did not recall. (Tr. 248.)

Also on cross-examination, Reyes said she advised Acting Manager Shih a second time that Melendez stole a sale. According to Reyes' testimony, Shih said that he spoke with Melendez already and he did not understand why Melendez "keeps stealing sales." Reyes did not elaborate on Melendez's repeated stealing of coworkers' sales. (Tr. 252.) Reyes testified that she observed Melendez alter a sale "plenty of times." However, she never explained what was altered or whether these actions violated any of Respondent's policies or practices. Reyes also testified that Melendez would make new tickets if a customer came in for a previously ordered part, and Melendez would instead create a new ticket. Reyes maintained she told Shih, who said he did not understand why Melendez continued doing so and that he spoke to Melendez. (Tr. 231.) [21]

3. Acting Manager Shih

[21] However, unlike the two incidents Respondent presented where Melendez allegedly stole commissions from salespersons, Respondent did not provide any documentation to support Reyes' claims. I therefore do not credit this testimony.

At the time of the hearing, Shih worked for Autofit for 2 years and was an acting manager at the time Melendez worked for Respondent. (Tr. 259.) He was hired on March 18, 2024, almost 6 months before Melendez was hired. During that initial six-month period, Shih initially worked one month in sales, then purchasing, then went back to sales for 2 months of training before moving to the management role. (Tr. 283, 294-296.)[22] Shih mistakenly believed a different senior employee was mentoring Melendez.[23] (Tr. 262, 284.)

Shih had no experience in training new employees. He learned about the new employee's progress from a senior employee who reports verbally to him. Allegedly Melendez's mentor documented assessments of Melendez's progress in paper form, but these documents were not retained. Unless CLO Emadi made a specific request for a specific report on a new employee, Shih did not send CLO Emadi a report on an employee. (Tr. 304.)

Sales personnel are not permitted to make returns. Shih explained that if any disciplinary situation arose, the manager examines the details and talks with both parties. The investigation might include reviewing computer logs. Situations that warranted investigation for potential discipline were stolen sales, customer disputer and "hung up calls." (Tr. 286.) Shih did not know how often stolen sales occurred. He later testified that he was not apprised of every single stolen sale, although it should be reported. Shih testified that Manager Cisco might have known of a few.[24]

(a) Melendez allegedly stole a sale from Lopez

Shih testified to two incidents where Melendez allegedly stole sales. Shih testified that Reyes told him that she witnessed Melendez stealing a sale. (Tr. 263-264.) Respondent's computer documents show that Lopez made a sale, but Gustavo canceled the sale. Melendez then created a new sale for the same parts because the previous sale was canceled because the customer requested to pick up the parts in person. Melendez listed the salesperson as herself. (Tr. 267; R. Exh. 2(a)-(c).) Shih estimated that Melendez had worked for Respondent for a week before these events. (Tr. 289.).

Shih confronted Melendez about the sale, sharing with her the documentation about the allegedly stolen sale. Melendez initially denied the incident and also was defensive or nonchalant. Shih showed her the evidence on the computer. Shih testified that Reyes said Melendez stated the sale was a "win-win." Based upon the "win-win" comment, Shih believed that Melendez demonstrated a lack of integrity. Later Shih

[22] Shih thought Melendez worked in December to January and worked for two weeks. (Tr. 288.)
[23] As Melendez and Reyes agree on who was mentoring, Shih's testimony about who was mentoring the other employee's practices is disregarded.
[24] Respondent's counsel interjected that its reports do not show other stolen sales. (Tr. 342.) However, I do not consider it sworn testimony and CLO Emadi, as custodian of records, testified that all stolen sales would be recorded in ADP software. Based upon her testimony, CLO Emadi apparently did not check the CRM sales records in the sales software.

testified that Melendez stated that Melendez denied making the sale and said, "You know, I try to help out a bit." (Tr. 268-269, 291-292.)

Shih did not discuss the incident with Melendez's mentor and did not investigate whether the mentor was present with these events. He also did not check on the videocameras regarding these events. (Tr. 337-338.) Shih stated Lopez did not know that Melendez put the sale in her name until he told Lopez. Respondent's Position Statement states Shih found Melendez defensive and that she disregarded his instructions. (R. Exh. 1 at 2-3.)

Shih's statement maintains he notified CLO Emadi by email about Melendez stealing a sale. (Jt. Exh. 2.) However, Shih discussed the matter with CLO Emadi and Administrative Assistant Guevara. (R. Exh. 1; Jt. Exh. 3.) In that meeting he said Melendez would not be a good fit for Respondent and CLO Emadi determined Melendez must be discharged. (Jt. Exh. 2.)

(b) CLO Emadi asked Shih to report on two new employees, one of whom was Melendez

Nonetheless, on Wednesday, October 9 at 3 p.m., CLO Emadi requested that Shih provide the following in a report on Melendez and another new employee, Cindy:[25]

> . . . I'm interested in their sales performances, how well they have adapted to and understood our system, and their attendance records. Additionally, if you have any feedback regarding their customer service, I would appreciate that as well. Finally, please share your overall impressions of their attitudes and contributions to the team.

(R. Exh. 1(b).)

This report was not initially placed in ADP but provided directly to CLO Emadi by email. At 4:33 p.m. that same day, Shih reported: [26]

> [Melendez] has been doing well as well. She's been friendly with the customers and has been doing better with identifying parts. She no longer needs the diagrams and improved on the mock exam we made for her. She also does not have a background with cars so sometimes doesn't know the make of the vehicle as well. We did have an incident with her stealing sales even though the person sitting next to her had informed her that it was someone else's ticket. I was getting complaints about the issue and her attitude when her coworkers were pointing it out to her. She was allegedly telling them "it's a win-win situation" after they had let her know

[25] The report Respondent presented at the hearing redacted the report on Cindy.
[26] Shih testified that based upon his working with CLO Emadi "for a good while," that CLO Emadi requires a level of integrity. (Tr. 269.) However, at the time he made his subsequent report to CLO Emadi, he had worked for Respondent for six months or less.

> she should've waited instead of printing the ticket. I did have a conversation regarding the situation and it seems she was trying to deny or was defensive about it. Overall, I would say her sales performance is fine and she needs more time as well. However, I would be cautious due to her interaction with her coworkers and mindset/attitude. Although she understand how to respond professionally, I'm not confident that her actions align with [Respondent], especially when it comes to more sensitive information.
>
> Both [redacted] have been on time and their attendance has been great the past two weeks.
>
> Please let me know if you need more information.

(Tr. 268, 271-272; R. Exh. 1(b).)

The email chain shows that CLO Emadi sent this email to ADP on December 8, which was weeks after Respondent terminated Melendez and 8 days after Melendez filed the instant Board charge.

On cross-examination Shih elaborated on his July 2025 sworn statement (Jt. Exh. 2 ¶5).Shih now added that he had a subsequent discussion in the office with CLO Emadi and Administrative Assistant Guevara about Melendez's conduct after the above email. Shih's statement now added that he discussed the "next steps" with the two. Shih told CLO Emadi and Guevara that Melendez was not a good fit for Respondent because of the theft of the sale and overall attitude towards other employees. (Tr. 325-326.) Shih testified that CLO Emadi and Guevara did not tell Shih what they intended to do because it was their decision (Tr. 328.) However, Shih's July 23, 2025 statement said that CLO Emadi then decided to terminate Melendez., without mentioning an alleged second stolen sale. Respondent's Position Statement, which is dated after Shih's statement states that its records found Melendez had "taken more than one sale from another employee." (R. Exh. 1.)

Shih believed Melendez was retained for another week after discovering the first stolen sale. (Tr. 354.)

(c) Shih testified that Melendez stole a second sale from another employee

Shih testified that Melendez allegedly stealing a sale from a different employee. On October 15, employee Gahil placed a sale for a part, and the customer was supposed to pick up the part at the Houston 1 facility. Manager Cisco returned the sale on October 16. (Tr. 276-277; R. Exh.2(f).) About 2 hours after Cisco closed the sale, Melendez sold the same part to the same customer. (R. Exh. 2(e)-(h).) Shih opined that Melendez stole the commission from Gahil.

Shih did not mention this alleged stolen sale in a July 23, 2025 affidavit he gave to Respondent. (Jt. Exh. 2.) However, he testified that he told CLO Emadi and Guevara afterward but kept no documentation except those from the sales computer program.

Unlike the sale involving Lopez (R. Exh. 2(d), Respondent's documentation of this second alleged steal does not show that Respondent corrected the commission so that Gahil was credited for the sale. (R. Exh. 2(h).) Further, Shih did not testify to any specific conversation with Melendez about this second incident, nor her attitude about correcting the sale. Shih later testified he did not feel the need to document this incident and "just retained the information because I didn't get a request to write a report." Shih did not testify that he discussed the sale with Manager Cisco.

Shih testified that the complaints he made about Melendez had nothing to do with pay. (Tr. 273.) However, when asked about the "sensitive information" and whether Melendez's actions aligned with Respondent, Shih thought working as CLO Emadi's assistant had sensitive work with HR and "payment-related, things" and that "I would be cautious moving forward." (Tr. 313-314.) When further pressed, Shih said that CLO Emadi's assistant deals with "sensitive information," such as what goes on behind the scenes of the company, such as billing, but did not know specifically. (Tr. 315-316.)

(d) Additional information about sales practices

Shih maintained that entry level personnel are not necessarily required to work in sales. (Tr. 270.) He testified that new employees receive a packet of information on using the computer program within the first two weeks. (Tr. 298.)[27] After the new employee becomes more familiar with the computer, the new employee learns how to make a sales order, how to make a return and how to cancel sales. (Tr. 263.) Training takes two weeks to a month. (Tr. 306.) Shih testified that a new employee who did not learn enough in the one-month period is not terminated because "we still shape employees, we still work with them and so forth." (Tr. 307.)

Shih stated each salesperson has a telephone at the desk. When a call comes in, all the phones ring, even with someone who has a customer. Because all sales personnel are on commission, they rush to answer the phones. (Tr. 347-348.)

D. Administrative Assistant Guevara Terminates Melendez

On October 19, CLO Emadi telephoned Administrative Assistant Guevara. CLO Emadi instructed Guevara to terminate Melendez. Guevara testified that CLO Emadi gave her no indication about why Melendez needed to be terminated.

About 30 minutes to an hour before she was leaving, Administrative Assistant Guevara told Melendez to come with her, through the break room and into another room. The door was closed and the two were alone. Guevara stated that Melendez was being let

[27] Shih subsequently testified that the packet of information was given to a new employee on his first day. (Tr. 299.)

go and her position was filled with someone else, so Melendez could no longer work for Autofit. Melendez, concerned about her short tenure for future job applications, asked if there was anything that she could "improve on moving forward." Guevara said that Melendez "didn't do anything. Everything was fine. Your performance was good." Melendez then asked for a letter of recommendation for her next job. Guevara agreed to provide a letter. The conversation took no longer than 15 minutes. (Tr. 154-156.)[28]

During the termination conversation, Guevara never told Melendez that she was terminated for stealing sales or any other reason other than her position was being filled with someone else. (Tr. 156.) After the termination, Melendez texted Guevara to obtain the letter of recommendation, again explaining her reasons for wanting the letter. Melendez never had a reply from Guevara and never received any letter of recommendation. (Tr. 156-157; GC Exh. 2.)

E. For a Response to the Texas Workforce Commission, Guevara Tells ADP That Melendez Was Terminated for Several Issues Including Confidentiality and Pay Discussions

On October 20, Melendez applied for unemployment through the Texas Workforce Commission.[29] Melendez cited the reasons for applying as "permanent layoff."

On November 4, Administrative Assistant Guevara[30] responded to a request for information from ADP about Melendez's claim for unemployment. The response was time sensitive as it was due November 8.[31] Guevara testified that CLO Emadi was not present in the afternoons but was present in the mornings. Guevara later testified that CFO Emadi told her to submit the response "right away." (Tr. 380.) Because Guevara saw that the ADP request was time sensitive, she responded to it quickly. (Tr. 373-374.)[32]

In her response about Melendez's termination, Guevara wrote the reasons for termination:

> The employee was terminated due to a number of performance issues, which included serious breaches of confidentiality and difficulties in teamwork. As part of her role, she was explicitly instructed to keep

[28] Guevara admittedly terminated Melendez. (R. Exh. 1(i).)
[29] Melendez testified she applied two to three weeks after her termination. Because the actual application identifies the date, that document is credited.
[30] Guevara testified she did not know whether she was present when Gabby requested a raise. (Tr. 382.)
[31] Respondent's counsel suggested that CLO Emadi left because she had an emergency, which was not Guevara's testimony, Guevara was then led about why she responded on November 4 to the November 8 deadline. (Tr. 373-374.) This testimony, to leading questions, receives limited credit. However, documentation is clear that Guevara wrote the response for ADP, and ADP transmitted it unchanged.
[32] Guevara testified that she did not have access to the email received through Respondent's email; only CFO Emadi and CLO Emadi had access to it. (Tr. 386-387.)

> sensitive information confidential, yet she shared pay details with colleagues. Despite receiving guidance on our systems and processes, she dismissed these discussions, claiming she had done nothing wrong. Additionally, her interactions with other employees were problematic, leading to strained relationships within the team. Despite conversations with her manager, there was no improvement in these areas, necessitating the decision to terminate her employment.

(R. Exh. 1(i).)

Under a section on whether Melendez had a prior warning, ADP noted yes and repeated the part about pay. ADP did not create this information but obtained it through Respondent. (R. Exh. 1(i).) Guevara's documentation was sent to ADP on November 5. Id.

Guevara described how she created the responses for ADP, and ultimately to Texas Workforce Commission, about Melendez. In response to a series of leading questions, Guevara responded that she asked Acting Manager Shih what happened with Melendez, and Shih told her that Melendez did not get along well with the rest of the employees and she was stealing sales. (Tr. 374-375.) Guevara may have seen the email Shih sent CLO Emadi at some point before she drafted the response. (Tr. 375-376.)

On cross-examination, Guevara testified that she asked Shih to remind her what occurred with Melendez. (Tr. 417-418.) Shih told her that when he talked to Melendez about stealing sales, that she shrugged and some of the comments that she made. Shih also told her that she did not get along well with other employees, but never said who those employees were. (Tr. 421.)

The record contains an email in which Guevara issued her response for ADP to send to the Texas Workforce Commission. Guevara testified she did not submit the summary for CFO Emadi's review. Guevara then testified that she was not supposed to have access to ADP but accessed it to send the report, yet "[CFO Emadi] needed to know what happened with [Melendez]." (Tr. 382.) However, nothing reflects that the CLO or the CFO reviewed Guevara's report, and the email to ADP has an unexplained gap that looks like at least one email is missing. Guevara did not recall anything about the gap in the email to ADP and Respondent did not call Custodian of Records/CLO Emadi to explain the gap. The form regarding Respondent's response for the Texas Workforce Commission to ADP has Guevara's signature, dated November 4. (R. Exh. 1(i).)[33]

In contrast to her July 24, 2025 sworn statement (Jt. Exh. 3), Administrative Assistant Guevara testified how she created the narrative for ADP and ultimately the Texas Workforce Commission: She used ChatGPT because she wanted the response to sound professional and only admitted it after Respondent's

[33] Respondent agrees that R. Exh 1(i) was properly admitted as Guevara completed and submitting the information to be used as the response to the Texas Workforce Commission. (R. Br. at 8.)

counsel asked her about it. After seeing the email at hearing, Guevara later testified that Shih said Melendez was stealing sales, sharing sensitive information and her character, “that’s mainly what he described, like her character was not aligned to be in the position . . . .” (Tr. 378-379.)

Guevara did not tell anyone that she relied on the free ChatGPT program[34] until she was in witness preparation for this hearing. Guevara testified that ChatGPT rephrased the entry for her. Guevara testified she copied and pasted the ChatGPT results into the form and sent to ADP. She did not recall whether she “read it thoroughly.” (Tr. 377-379.) However, at trial, Guevara said the information about sensitive information was what she typed in, regarding stealing sales and that she shared sensitive information.

Guevara claimed she did not read what ChatGPT wrote and just automatically put what ChatGPT spit out into the response for Melendez’s unemployment claims. Guevara also testified that she did not keep a record of her interactions with Chat GPT “because I didn’t want to tell her. . . .” (Tr. 422.) Guevara also testified she thought ADP would “fix it.” Guevara’s email to ADP is from the address humanresoucreshr@Autofit.bz. Guevara maintained that she did not have access to ADP unless CLO that email address yet admitted that she sent the email to ADP. (Tr. 386-387.)

One morning a Texas Workforce Commission representative, in a telephone call, told Melendez that her claim could not be processed. The Commission representative read to Melendez the reasons Respondent provided for contesting her unemployment application. For the first time, Melendez heard Respondent terminated her for a number of issues, and one of those issues was discussing pay. Melendez asked if talking about pay was against the law. (Tr. 160-161.) The Texas Workforce Commission granted Melendez’s request for unemployment payments.

After discovering that Respondent terminated her for pay discussions, on December 2, Melendez filed her initial charge with the Board. (Tr. 170.) On December 13, the Texas Workforce Commission mailed to Melendez the information about her unemployment application, which included the information Guevara provided. (GC Exh. 5.)[35]

Respondent denied the need to examine disparate treatment, stating that the situation with Melendez was unique. (Tr. 433.)

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[34] A large language model program, which will be discussed in more detail below.

[35] I take administrative notice of the information the Texas Workforce Commission provided to Melendez. (GC Exh. 5.) In addition, the information from Respondent in GC Exh. 5 is identical to the information Guevara reported to ADP for Respondent’s reasons. (R. Exh. 1(i).

V. Credibility

In addition to the credibility determinations in the footnotes, I discuss credibility of the witnesses. CLO Emadi was not called as a fact witness, which is also discussed.

A. Applicable Law

To determine whether a witness testified truthfully, the administrative law judge must demonstrate an "accurate and logical bridge" between the evidence and result. *J.C Penney v. NLRB*, 123 F.3d 988, 996 (7th Cir. 1997). A credibility determination may rest on various factors, including the context of witness testimony, the witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Witness testimony is appropriately weighed with evidence as a whole and evaluated for plausibility. *Golden Hours Convalescent Hospitals*, 182 NLRB 7986, 798-799 (1970); also see *MEMC Electronic Materials*, 342 NLRB 1172, 1200 n. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 n.1 (1997); Excel Container, 325 NLRB 17 n. 1 (1997). Weight is also given to generally consistent testimony among witnesses with the understanding that people's accounts of even a short event are seldom identical. With regards to demeanor, I consider numerous factors, including but not limited to witnesses' general ability to recall, tone while testifying, body language and physical presentation, or any changes in these factors in connection with the questions asked and by whom. Depending upon the testimony, I may believe that a witness testified credibility regarding one fact but not another. *Daikichi Sushi,* 335 NLRB at 622. Also see *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950) (J. Learned Hand). Certain of the findings are based upon witness credibility.

Conclusory and/or leading testimony is entitled to little, if any, credit. *Ajax Tool Works, Inc.*, 257 NLRB 825, 826 n. 2 (1981). A witness's attempts to obscure relevant facts and acting evasive lead to a conclusion that the witness is trying to distort facts. *Northway Nursing Home*, 243 NLRB 544, 546 (1979). When a witness answers leading questions and merely capitulates to the proposition presented by its counsel, those answers are not credit worthy. *Lhoist North America of Alabama, LLC,* 370 NLRB No. 112, slip op. at 11-12 (2021) and cases cited therein.

B. Fact Witness Credibility

Gabby, who continues to work for Respondent, was not presented as a witness. I do not fault either party for not presenting her as a witness.

Respondent contends that Melendez should not be credited as her testimony was uncorroborated. Nonetheless, I find that the testimony is credible and trustworthy. Most of Melendez's statements were undisputed as well. *Ferguson Enterprises, Inc.*, 355 NLRB 1121 n.2 (2010), citing *Sam's Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998).

Melendez was sincere and forthcoming in her testimony, without a hint of guile. I credit Melendez's undisputed testimony that she talked with Gabby about pay. Melendez observed Gabby enter CLO Emadi's office with the stated intent of seeking better pay. I credit that Gabby and Melendez discussed the results of her request and that Gabby asked about the administrative assistant position, and that Gabby told Melendez to CLO Emadi's office and that Respondent rejected Gabby's request for equal pay. I also credit her description of being confused when Acting Manager Shih approached her about the sales incident and that she only received one discussion from Shih. Melendez was not specific on her dates, including how quickly she filed for unemployment and when she had the conversation with Gabby. However, those errors are relatively minor and do not detract from her testimony.

Melendez also testified that, after the first "steal," she spoke with Guevara, who told her not to worry and that Respondent was looking to see if she was a reliable employee and her performance in sales. (Tr. 153.) Guevara did not dispute this conversation, and I credit that it occurred. Guevara also did not dispute that she gave none of Respondent's reasons for termination when she terminated Melendez. I also credit Melendez's detailed account of her termination.

The Joint Exhibits include three sworn statements that Respondent took during its investigation of the charge: CLO Emadi; Guevara; and Shih. Reyes did not have a sworn statement. Shih and Reyes testified that they did not hear Melendez discuss pay. Under the circumstances, I find that the discussion between Gabby and Melendez quietly took place. Reyes testified that the phones ring frequently and the salespeople were busy. Melendez testified that Gabby "lowered her voice," which indicated that she was concerned about anyone else hearing the conversation

Reyes credibly testified that sales disputes are resolved by managers. Reyes also credibly testified that she told Melendez that the sale was made by Lopez. However, in cross-examination, she embellished the initial story. The claim that she heard Melendez on the telephone is contradicted in two ways: first, Melendez testified credibly that she did not have a telephone; and second, the noise level due to the telephones ringing made it less likely that Reyes could hear any telephone conversation on the other end of a customer call with Melendez. Further, Melendez testified credibly that she received some instruction from Cisco about the returned item.

During cross-examination Reyes also testified to hearing part of a conversation with Gustavo and Melendez, but again, this information was not brought forth on direct examination. I therefore cannot credit Reyes' testimony on cross-examination. See *Overnite Transportation Co*., 245 NLRB 423 n. 1(1979) (judge upheld on not relying upon witness with internal consistencies in testimony).

I give little weight to answers when Respondent leads its witnesses on direct examination. *H.C. Thomson*, 230 NLRB 808, 809 n. 2 (1977) ("[W]e accord minimal weight to them and view them as little more than Respondent attorney's testimony in favor of his client's position.") For example, in response to a leading question, Reyes agreed with counsel that Shih reported back to her and Lopez that it would not happen again and that he told Melendez not to do it. (Tr. 230.)

Shih repeatedly testified that Reyes told him that Melendez, upon entering the information on Lopez's sale, was a "win-win." However, Reyes, the person who allegedly heard this description of Melendez's response about re-entering the sale, never testified that Melendez made that statement. Shih determined that Melendez's alleged response reflected a lack of teamwork and integrity. Because this statement was not corroborated by Reyes, the original listener, I do not credit that Melendez stated the re-sale was a "win-win."

In addition, Shih reported to CLO Emadi that coworkers reported that Melendez said it was a "win-win." Again, no employee testified that Melendez said it was a win-win situation. Shih also reported to CLO Emadi that "coworkers" told Melendez not to process the ticket. However, the evidence reflects that only one coworker, Reyes, told Melendez not to process the ticket. Lopez did not discover the events until Shih told her. I find that Shih therefore exaggerated the number of employees who discussed the alleged steal from Lopez.

The second stealing incident is problematic. First, Reyes maintained that she observed Melendez on many occasions stealing sales from others. However, she was never testified about these instances or from whom these sales were stolen. If Reyes indeed advised Shih that Melendez continued to steal commissions, Shih did nothing about it: Shih's testimony provided only two examples of the alleged steals. Because Reyes's conclusory statement has no support and she only testified in depth to the October 4 incident, I find that Reyes only witnessed one "steal."

Second, Melendez testified credibly that Acting Manager Shih only spoke with her once about the first incident. Third, Shih reports a second incident but does not indicate that he spoke with Melendez about it. Shih's July 23, 2025 sworn statement did not include any information about the second incident, such as finding it, reporting it or discussing with Melendez. (Jt. Exh. 2.) I therefore find that Shih did not discuss the second incident with Melendez because he had no knowledge of it before July 23, 2025.

On top of these three issues, the documentation in support of the second stealing incident is unlike the first. In the first example, Lopez received credit for the sale on the same day of the event. The salesperson who was responsible for original sale in the second alleged steal did not receive credit for the sale at all. This document has no date to identify when the steal was discovered. Shih's sworn statement makes no mention of the second incident at all. Shih's explanation on cross-examination, that he did not feel the need to document this incident and "just retained the information because I didn't get a request to write a report," was not included his July 23, 2025 statement. His statement also does not support the fact that he discussed the matter with Melendez. I must conclude that Shih only learned of this second incident *after* his July 23, 2025 statement, and Respondent could not have relied upon it when terminating Melendez.[36]

Shih also testified contradictorily about training new employees. He testified that they worked with them and new employees would not be terminated. Yet for Melendez, he quickly determined that she would not be a good fit. Nor did Shih define what "sensitive information" Melendez could have accessed in sales. He relied upon this conclusion to recommend Melendez was not a fit with Respondent's organization. (Compare R. Exh. 2(b).) The term "sensitive information" continued throughout Respondent's case. Respondent's witnesses never clearly identified what kind of information was sensitive at the time Melendez worked at the sales desk, nor did their explanation of what information she would deal with later ring true. Although the ADP handbook discusses confidential information and when a new employee is given access to that information, Respondent never provided confidential information, other than sales codes, to Melendez.

Shih also maintained that Melendez did not get along with coworkers, but never stated which coworkers found Melendez troublesome or cite specific instances other than Reyes telling him about the first incident with Lopez. Reyes did not testify that she did not get along with Melendez, only discussing the sale that should have gone to Lopez. Shih made this report to CLO Emadi, who apparently relied upon this conclusion. This conclusion was repeated in Administrative Assistant Guevara's report to ADP and subsequently the Texas Workforce Commission. However, the conclusion is not supported by any surrounding facts, leading one to discredit this reason for termination.

As a result, Shih's testimony receives little credit, including that he warned Melendez and that Melendez was defensive and tried to deny what happened.

Reyes initially testified that Melendez was paid on commission but then admitted she was not sure. (Tr. 219-220.) Respondent presented no documentary evidence that Melendez was paid in any way other than her flat rate of $22.00 per hour. Regarding whether Melendez was paid on commission or a straight $22 per hour, two of Respondent's witnesses testified that they believed Melendez was on commission but

[36] Respondent addresses these issues in its Proposed Findings of Facts:

> Records generated from Respondent's systems reflect the same sequence of events observed in the Lopez incident with respect to the [Gahil] sale, showing cancellation of an original sale made by [Gahil] and the reentry of that sale under Ms. Melendez's name. . . . Consistent with same, Mr. Shih testified that, based on his review of the system records, Respondent's Exhibits 2(e)-2)(h) reflect the same sequence of events. (Tr. 276:1-278:4.) Based on his review of the same, Mr. Shih testified that in his view, the records in Respondent's Exhibits 2(e)-2(h) are another example of Ms. Melendez stealing another employee's sale. (*Id.*)" (R. Br at 15, ¶¶32-33.)

This explanation gives Shih's review of the records, but not when he found the alleged second incident of steal. Respondent's April 25, 2025 Position Statement also claims Shih gave 2 verbal warning, but Shih did not testify to doing so.

were unsure. Guevara, who denied working on payroll, maintained that Melendez was on commission. This information was important as Respondent maintained that Melendez was gaining pay if she was credited with sales that were stolen. This matter could have been resolved easily if Respondent produced Melendez's paycheck as the best evidence to show Melendez had an incentive to take credit for others' sales.

C. Guevara's Testimony

Respondent initially asked Guevara a series of leading questions about her position and duties, including whether she considered her work as an administrative assistant sensitive. Later Respondent asked about CLO Emadi's absence on the day Guevara was told to fill out the Texas Workforce Commission response.

Q: Was [CLO Emadi] in the office that day for --- or was she absent for some reason?

A (Guevara): She was there in the morning, but sometimes she has to go.

Q: And then she had some emergency and she had to go.

General Counsel then objected because Guevara did not testify that CLO Emadi had an emergency. Guevara subsequently testified that CLO Emadi "had some personal things going on, so I can't reach her." (Tr. 373-374.) I do not credit answers to leading questions or when Respondent suggested answers to Guevara. *Ajax*, above.

Guevara testified contradictorily about interviewing Melendez and whether CLO Emadi was present. At first, she did not recall if CLO Emadi was present and later testified Emadi was present. (Tr. 362, 366.)

Guevara's testimony about her use of ADP is contradictory. She testified that she only had access with certain permissions, yet she was able to access ADP without further special permission to respond to ADP for the Texas Workforce Commission inquiry. Without Respondent's explanation of the gap in the email, I find that Guevara could access ADP without obtaining access through CLO Emadi or CLO's approval.

Respondent contends that the information Guevara sent to ADP was prepared by someone who had no firsthand knowledge of the events because it was needed quickly. Regarding the need for an expeditious return, Guevara received the request on November 4 and emailed the following day, although the response was due on November 8. Respondent had 4 more days in which to respond. Regarding no knowledge, Shih testified that he discussed Melendez with CLO Emadi and Guevara and they determined the next steps. Guevara therefore was included in these discussions, despite her recollection that she did not. She admitted she discussed the matter with Shih before she wrote the answers for the Texas Workforce Commission inquiry. Further the email that Guevara had sent to ADP had a break that Guevara did not or could not explain. No other Respondent witness was called to explain the break in the email.

Respondent contends this information was unreliable and inaccurate from “a non-decision maker.” (R. Br. at 30-31.) However, based upon the trust CFO Emadi obviously put in Guevara’s abilities and knowledge of the situation, CFO Emadi directed Guevara to respond.

Without an explanation about the email break, Respondent places responsibility on Guevara for the response to ADP and ultimately the Texas Workforce Commission. Respondent cannot have it both ways. As a result, I do not credit Guevara’s denial that she did not complete the form for ADP about Melendez’s termination. Guevara was allowed to work independently on this matter and allowed to respond to the inquiry without further supervision.

The answer for ADP and the documentation supports that she included disclosure of confidential information and pay as reasons for Melendez’s termination. However, the belated rationale that she used ChatCPT raises more questions, which I address below.

Another issue arose when CFO Emadi directed Guevara to respond to the Texas Workforce Commission’s inquiry about Melendez’s application for unemployment benefits. Guevara gave Respondent a sworn statement during the course of its investigation, which was admitted as Jt. Exh. 4. In that document Guevera avers:

> There may be some question about an email I [sic] filed in for ADP HR dated November 4, 2024. In it, I list several reasons I heard about for the termination of Ms. Melendez. I did not coordinate this with either Ms. Emadi or Mr. Shih, who actually had first hand knowledge and made the decisions to terminate Ms. Melendez. There is a reference in that email that “she shared pay details with colleagues.” This does not refer to the pay details of Ms. Melendez, but rather, is a reference to Ms. Melendez taking information or sales commissions of others and sharing it or using it for herself.

(Jt. Exh. 3 ¶4.)

This explanation is not credited. The plain language in the response to ADP is that Respondent terminated Melendez for a variety of reasons, including breaches of confidentiality and discussing sensitive information such as pay. In contrast to the sworn statement, Melendez also testified at hearing that she spoke with Acting Manager Shih before she submitted her response, but her statement maintains she did not coordinate with Shih at all. The record does not support that Melendez took “sensitive” information, breached confidentiality (much less “serious” breaches) or shared it. While I credit that Guevara spoke with Shih before she wrote her response in November, I also find Guevara did not rely upon ChatGPT to insert pay or confidential information into the response to ADP.

At hearing, Guevara again shifted her explanation of how pay was included in the email to ADP. Guevara also claimed that she used ChatGPT to write the unemployment response.

So, to better understand this issue, let's examine what ChatGPT is:

> ChatGPT is a chatbot that uses artificial intelligence (AI). The specific type of AI technology it uses is GPT, which stands for generative pre-trained transformer. Generative means the chatbot predicts how text can be recombined in a way that does more than merely repeat existing patterns. Pre-trained means that long passages of text were used as training data to show the chatbot what types of answers are expected. Transformer means the chatbot doesn't take everything the user says as a literal, absolute command. Instead, the chatbot assigns different levels of importance to different parts of the prompts the user provides in an attempt to simulate how humans interpret language and context.
>
> . . . To use ChatGPT, type a question or a request in the chat box, press Enter on the keyboard, and the chatbot will respond to the prompt. It has been trained to decline inappropriate requests. Clicking thumbs-up or thumbs-down provides feedback about the quality of the answer. Clicking "Regenerate response" produces another answer to the same prompt. A user can continue the conversation with ChatGPT, asking the chatbot to correct and refine its responses, and it will remember what the user said earlier in the same conversation. User interactions further train the chatbot.

Eve Ross and Amy Milligan, *What Can ChatGPT Do, and Should We Let It*?, 34-MAY S.C. LAW (May 2023). Also see Samuel Mallick, *Generative AI in the Law*, 42 CORP. COUNSEL R. 157, 158-159 (2023) (discussing what are generative AI and Chat GPT).

Anyone can use ChatGPT's free version or may sign up for more expensive plans. Among ChatGPT's features, users can communicate with the functions, which allows a "back and forth," allowing the user to request responses for the data that the used puts into the ChatGPT function. Ross and Milligan, above. "Chat GPT can summarize and paraphrase like a champ . . . ." Id.

Guevara would have us believe that ChatGPT made up the language that sensitive information includes pay. For example, why didn't ChatGPT say another type of sensitive information, like trade secrets. I therefore do not credit Guevara's explanation that ChatGPT added pay without Guevara's help. 2 McCormick on Evid. §251, Prior Statements of Witnesses as Substantive Evidence (9th Ed. February 2025 Update) (change in testimony may suggest a change due to improper influence).

Even if ChatGPT spit out language about pay, Guevara could have reviewed it, found it inaccurate, and removed the part about pay. Guevara also did not dispute that she used the term "confidential" information. Further, Guevara, who maintained she was in a position where trust mattered, never received discipline for her belated confession about using ChatGPT.

Guevara denied that pay was at issue in Melendez's termination. However, her testimony does not explain how she included "serious breaches of confidentiality" or sensitive information. I therefore discredit Guevara's explanations about why pay was included in Respondent's explanation about why it terminated Melendez.

D. CLO Emadi Did Not Testify as a Fact Witness

Respondent declined to call CLO Emadi. General Counsel only called her as the custodian of records.[37] She served as the company's representative when the witnesses were sequestered. Since she did not testify, I approach this issue in two ways: First, by evaluating the submitted statement dated 2025: and second, under missing witness rule.

1. CLO Emadi's Sworn Statement

First, CLO Emadi's out-of-court statement about events leading to termination is hearsay. See *Augusta Bakery Corp*., 298 NLRB 58 n. 1 (1990) (affidavit inadmissible hearsay evidence that was not within the unavailable declarant exception). The traditional view is that prior statements are considered hearsay because a "declarant, who, when the statement was made was not (1) under oath, (2) in the presence of the trier, or (3) subject to cross-examination,." 2 McCormick on Evidence § 251 Prior Statement of Witnesses as Substantive Evidence (9th Ed. February 2025 update). CLO Emadi's statement was not made in the presence of the trier of fact nor was she subject to cross-examination. Although her statement was admitted to the record, CLO Emadi's out-of-court statement meets two of the disjunctive prongs of hearsay: She was not in the presence of the trier, nor was she subject to cross-examination about her statement. I find it was hearsay and do not rely upon it for this decision.

2. The Question of the Missing Witness

CLO Emadi's absence as a fact witness raises whether to apply the missing witness rule. Respondent did not call CLO Emadi as a fact witness although she was present during the hearing as the corporate representative and therefore available to testify. Determining when to apply the missing witness rule remains in the discretion of the fact finder. *Underwriters Laboratories Inc. v.* NLRB, 147 F.3d 1048, 1053-1054 (9th Cir.

[37] Respondent states: "General Counsel never called or cross-examined CLO Emadi on this while she was on the stand." (R. Br. at 29-20 ¶56.) Because General Counsel only called CLO Emadi as the custodian of records, Respondent objected when General Counsel wanted to call her for redirect as a fact witness. I sustained the objection.

1998) (no abuse of discretion when administrative law judge determined not to apply adverse witness rule). An adverse inference may be applied

> when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party . . . regarding any factual question on which the witness is likely to have knowledge. (2 Wigmore, Evidence, § 286 (2d ed. 1940); McCormick, Evidence, § 272 (3d ed. 1984). See *Greg Construction Co*., 277 NLRB 1411 (1985); *Hadbar*, 211 NLRB 333, 337 (1974).) In particular, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. Ibid. Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management, and it supports the judge's findings on the issues on which Davis' testimony would have been probative.

International Automated Machines, Inc., 285 NLRB 1122, 1122 (1987).[38] Also see the more recent McCormick on Evidence, §264(d) (9th ed. February 2025 update).

"The adverse inference rule requires the missing witness's testimony be relevant and significant." *JHP & Associates v. NLRB,* 360 F.3d 904, 910 (8th Cir. 2004). When an opposing witness is not questioned about potentially damaging statements attributed to him or her, it is appropriate to draw an adverse inference and find that the witness would not have disputed that testimony. See *LSF Transportation, Inc.,* 330 NLRB 1054, 1063 n. 11 (2000); *Asarco, Inc.,* 316 NLRB 636, 640 n. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). Also see C*ompania Cervercera de Puerto Rico, Inc. v. NLRB*, 150 F.4th 601 (D.C. Cir. 2025), citing *Int'l Union (UAW) v. NLRB*, 459 F.2d 1329, 1336 (1972); *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 541 (6th Cir. 2000), enfg. 327 NLRB 522 (1999).

As daughter of the CEO and a company officer, CLO Emadi was predisposed to support Respondent's positions. Her missing testimony was relevant and significant for specific facts, such as (but not limited to): Gabby's demands for more pay and relationship to the administrative assistant job; when CLO Emadi determined to terminate Melendez, who was present and on what basis; and Guevara's duties, including her access to ADP.[39]

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[38] The Fifth Circuit's maintains that a missing witness rule should only be applied if the individual "(1) peculiarly within one party's power to produce, and (2) would provide testimony that will elucidate facts at issue." *U.S. v. Rios*, 636 F.3d 168, 171 (5th Cir. 2011). The rule should not be applied if testimony is cumulative. Id. Also see *Matter of Evangeline Refining Co.*, 890 F.2d 1312, 1321 (5th Cir. 1989). *Cf. Herbert v. Wal-Mart Stores, inc.*, 911 F.2d 1044, 1045-1048 (5th Cir. 1990) (calling into question continued relevance of uncalled witness rule). Under the Fifth Circuit's ruling, the missing witness rule also would apply as well: Respondent had the power to produce CLO Emadi and could have explain a wide swath of facts. As the ultimate decision maker for Melendez's termination, this testimony would not have been cumulative.

[39] Respondent also did not call CFO Emadi about directing Guevara to answer the Texas Workforce Commission and whether she directed to Guevara to send the response directly to ADP.

Ready Mixed Concrete Co. v. NLRB, 81 F.3d 1546, 1551-1552 (10th Cir. 1996), affg. 317 NLRB 1140 (1995) (ALJ correctly applied adverse inference rule when employer failed to call supervisor who knew about employee's protected activities). I therefore apply the missing witness rule to CLO Emadi's failure to appear as Respondent's fact witness. See *Daikichi Corp. d/b/a Daikicki Sushi v. NLRB*, (unpub.) 56 Fed. Appx. 516 (D.C. Cir. 2003), enfg. 335 NLRB 622, 622 (2001) (administrative law judge drawing adverse inference from failure of employer witness to testify not improper).

D. Analysis

Terminating an employee for protected concerted activity is unlawful. *Citizens Investment Services Corp. v. NLRB,* 430 F.3d 1195, 1197 (D.C. Cir. 2005), enfg. 342 NLRB 316 (2004). Similarly, an employer may not terminate an employee as a preemptive strike for the perception that an employee will engage in protected concerted activity. *Parexel Int'l,* 356 NLRB 516,519 (2011). Also see *Hyundai Motor Mfg. Alabama, LLC,* 366 NLRB No. 166, slip op. at 2 (finding discharge unlawful when based on belief employees engaged in protected concerted activity, regardless of whether they actually did so).

For this Analysis, I determine whether: Melendez was an employee under the Act; Guevara was Respondent's agent; Melendez engaged in protected concerted activities; and whether Respondent terminated Melendez, in relevant part, due to her protected concerted activity.

A. Melendez Was an Employee Under the Act

Respondent's Fourteenth Affirmative Defense maintains that Melendez was a probationary employee. A probationary employee is still an employee under the Act. Respondent also does not demonstrate Melendez was a probationary employee.

"Probationary employees receive and hold their employment with a contemplation of permanent tenure, subject only to the satisfactory completion of an initial trial period." *Vogue Art Ware & China Co.*, 129 NLRB 1253, 1254-1255 (1961). Probationary employees are entitled to the same protections as employees under the Act, so the Board has long held. *Airco Alloys, a Div. of Airco, Inc.*, 249 NLRB 524, 527 (1989); *Lafferty Trucking Co.*, 214 NLRB 582, 582 and 584 (1974) (contrary to respondent's claim that employee was casual, Board finds employee was probationary and entitled to protections of the Act).

Respondent's handbook defines three types of employees: full-time; part-time and short-term. The short-term employees are those hired "for a specific short-term project, or on a short-term freelance, per diem or temporary basis." Respondent presented no evidence that Melendez was a casual or seasonal employee. Melendez therefore was an employee as defined in the Act and entitled to its protections.

B. Administrative Assistant Guevara Acted as a Section 2(13) Agent

General Counsel contends that Guevara was Respondent's agent, which is evident at two distinct points: first, when she terminated Melendez; and second, when she responded to the Texas Workforce Commission. Respondent's Answer admits "generally" that Administrative Assistant Guevara acted as an agent but states it had no knowledge of instances when she acted as one. (GC Exh. 1(e) ¶7.). General Counsel carries its burden to show Guevara acted as Respondent's agent.

Common law principles are used to determine agency. *D&F Industries, Inc.*, 339 NLRB 618, 619 (2003). Express authority occurs when the purported agent acts within the scope of the authority. *Bill's Electric, Inc.*, 350 NLRB 292 n. 3 (2007). However, not all agents have express authority. Agency is also found through apparent authority:

> Apparent authority is present if a third person reasonably believes that the principal consents to the purported agent acting on the principal's behalf and (2) that the subjective belief in the agent's authority was objectively reasonable.

Poly-America, Inc. v. NLRB, 260 F.3d 465, 480 (5th Cir. 2001) (citing *Myers v. Bennet Law Offices*, 238 F.3d 1068, 1073 n. 2 (9th Cir. 2001)), enfg. in rel. part *Poly-America, Inc.*, 328 NLRB 677, 688 (1999). If the agent commits a violation, the violation is properly imputed to the principal. *Poly-America v. NLRB*, 260 F.3d at 481.

Administrative Assistant Guevera, upon CLO Emadi's direction, told Melendez that she was terminated. (Jt. Exh. 3 ¶3.) An individual is an employer's agent when she communicates to employees in such a manner that employees would reasonably believe that the individual is speaking and acting for management. *Community Cash Stores*, 238 NLRB 265, 265 (1978), citing *American Lumber Sales*, 229 NLRB 414, 420 (1977) and *International Ass'n of Machinists, Tool & Dye Makers Lodge No. 35 v. NLRB*, 311 U.S. 72 (1940). CLO Emadi, the principal, gave Guevara the authority to terminate Melendez. Melendez reasonably believed Guevara was terminating her and asked for a reference. Because Guevara terminated Melendez without telling her she was acting upon CLO Emadi's direction, a reasonable employee would believe Guevara was acting for management. On this basis Guevara had apparent authority. *Poly-America*, supra. *International Automated Machines, Inc.*, 285 NLRB 1122, 1122-1123 (1987).

The second example General Counsel cites is Guevara responding to ADP with information on reasons why Melendez was terminated. Respondent contends that Guevara completed the questionnaire on an expedited basis "using secondhand information" and relied upon ChatGPT and is therefore unreliable and "an uncorrect characterization created by a non-decision-maker." (R. Br. at 30-31.) The question is not whether Guevara was the decision maker, but rather whether she had the knowledge to answer the Texas Workforce Commission inquiry as requested by ADP and whether she acted with apparent authority in doing so.

CFO Emadi entrusted Guevara to create the answers for the Texas Workforce Commission. Respondent does not show that CLO Emadi or CFO Emadi, or any other manager, reviewed Guevara's work. Guevara does not testify that either CLO or CFO needed to review the response before Guevara issued the response. Respondent did not produce any evidence that the email that had a break was sent to any manager. As noted in the Credibility section, Guevara therefore worked independently to provide the response, which included that Melendez was terminated for discussing pay.[40] Guevara acted with apparent authority to provide this response. As a result, Guevara again was Respondent's agent.

As Respondent's agent, Guevara's statements and actions are imputed to Respondent. *Cooper Hand Tools, Div. of Cooper Industries, Inc.*, 328 NLRB 145-146 (1999), rev. den. on other grounds sub nom *United Steelworkers of America v. NLRB*, (unpub.) 8 Fed. Appx. 610 (9th Cir. 2001); *Unites States Service Industries, Inc.*, 319 NLRB 231 n. 2 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).

C. Melendez Engaged in Protected Concerted Activity

General Counsel proposes two different methods to analyze Melendez's discharge. Both require determining whether Melendez engaged in protected concerted activity.

1. Applicable Law

Section 7 of the Act gives employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Thus, the statutory concept of protected concerted activity has two elements: the employee's activity must be "concerted," and it must be "for mutual aid or protection." See, e.g., *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB 151, 152–153 (2014). "[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." Id. at 153 (citing, inter alia, *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984)). Both the "concertedness" and "mutual aid or protection" elements under Section 7 are analyzed under an objective standard, whereby motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for "mutual aid or protection." *Fresh & Easy,* 361 NLRB at 153.

The analysis for concerted activity is an objective standard based upon the totality of circumstances. *Castro Valley Animal Hospital*, 370 NLRB No.80, slip op. at 12 (2021). Concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *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). Notably, the "object of inducing group action need not be express," and an employee's statement may, in certain contexts, "implicitly elicit[] support from his fellow employees." *Whittaker Corp*., 289 NLRB 933, 933–934 (1988). As the Board stated in *Meyers II*, "the question of whether an employee

[40] Guevara testified she could not recall why the email to ADP had a break and Respondent never called either Emadi sister to clarify what happened.

has engaged in concerted activity is a factual one based on the totality of the record evidence." 281 NLRB at 886; see also *Miller Plastic Products, Inc*., 372 NLRB No. 134 (2023).

Mutual aid or protection," in turn, "focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees."' *Fresh & Easy*, 361 NLRB at 153 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

2. Melendez's Discussions with Gabby Were Protected and Concerted

Melendez was engaged in the protected concerted activity of discussing wages with her preceptor. The right of employees to discuss their wages and terms and conditions of employment with each other is a core substantive right protected by the NLRA. *Triana Industries, Inc*., 245 NLRB 1258, 1258 (1979) (explaining that the Act "encompasses the right of employees to ascertain what wage rates are paid by their employer" because "wages are a vital term and condition of employment"); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) ("Few topics are of such immediate concern to employees as the level of their wages."). As such, are protected, regardless of whether they are engaged in with the express object of inducing group action. See, e.g., *North Mountain Foothills Apartments*, LLC, 373 NLRB No. 26, slip op. at 8 (2024), enfd. 157 F.4th 1089 (9th Cir. 2025); *Alternative Energy Applications, Inc*., 361 NLRB 1203, 1206 n. 10 (2014); *Hoodview Vending*, 359 NLRB 355 (2012), reaffd. 362 NLRB 690 (2015); *Automatic Screw Products Co*., 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Scientific-Atlanta, Inc*., 278 NLRB 622, 624-625 (1986).

The rationale for finding wage discussions inherently concerted is that wages are a "vital term and condition of employment," the "grist on which concerted activity feeds," and such discussions are often preliminary to organizing or other action for mutual aid or protection. *N.W. Rural Electric Coop*., 366 NLRB No. 132 (2018); *Alternative Energy Applications, Inc*., above; *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (citations omitted), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996). See also *Trayco of S.C. Inc*., 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991) (contemplation of group action is not required when employee discussion concerns wages); *Whittaker Corp*., 289 NLRB 933, 933 (1988) (with respect to wage discussions, "object of inducing group action need not be express"). Pay remains inherently concerted even if the discussion involves only a speaker and a listener, or whether the listener agrees with the speaker or joins the cause. *Belle of Sioux City, L.P*., 333 NLRB 98, 101 (2001); *Mushroom Transportation*, above.

"The mere fact that an employee act[s] alone does not preclude treatment of his action as concerted activity for mutual aid or protection under section 7." *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1160 (5th Cir. 1980). Employees do not have to combine their efforts "in any particular way" for their actions to be concerted. *Fresh & Easy*, 361 NLRB at 153.

"[E]mployee discussions in which advice about future action is sought or offered constitute concerted activity." *UniQue Personnel Consultants*, 364 NLRB 1628, 1630 (2016). Here Melendez was talking with Gabby about Gabby's pay and Gabby believed she was underpaid. These discussions are protected because the subject was pay. The discussions are also concerted and looked towards action for Gabby, seeking pay parity with Melendez and Melendez's encouraging her to do so. I credit Melendez's account of Gabby's meeting with Respondent.[41] The concertedness arises because Melendez provided pay information and Melendez told Gabby that Gabby should be making as much. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785-786 (8th Cir. 2013).

Respondent contends that it never had a policy against discussing wages, nor did it consider any such policy related to Melendez's termination. (R. Br. at 7; Jt. Exh. 4.) The issue is not whether Respondent had such a policy, but whether Respondent terminated Melendez because she and Gabby discussed pay.[42]

I therefore find that Melendez engaged in protected concerted activity with Gabby in their pay discussions.

D. Application of Wright Line for Melendez's Termination

1. Applicable Law: Burden Shifting per *Wright Line*

An employer violates Section 8(a)(1) of the Act if it terminates an employee for engaging in protected concerted activity. *Citizens Inv. Services Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005). Because many employers do not admit that they took adverse action against employees with unlawful discriminatory motives, the *Wright Line* test is used to make the determination. *NLRB v. Air Contact Transport Inc.*, 403 F.3d 206, 215 (4th Cir. 2005) enfg. 340 NLRB 688 (2003).

The *Wright Line* test uses a burden shifting analysis in cases where Respondent's motive is disputed, such as here, where the Respondent maintains an employee was terminated for legitimate reasons. "The Board may infer a discriminatory motive where evidence shows that (1) the employee engaged in concerted activities protected by Section 7; (2) Respondent knew of the employee's engagement in those activities; and (3) Respondent harbored animus toward the employee's protected activities. (cite omitted)" *Cordua*, 985 F.3d 415, 423 (5th Cir. 2021); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 383 (1983). Unlawful motivation may be

[41] Melendez was asked about whether she combined with Gabby on Gabby's search for improved pay. However, that question requires an in-depth legal determination for the answer. I therefore disregard that portion of Melendez's testimony.

[42] This situation is differentiated from *NLRB v. Brookshire Grocery Co.*, 919F.2d 259 (5th Cir. 1990). There the court found that no protected activity took place because the alleged discriminatee improperly took from the employer's file confidential pay information, which he shared with other employees. Here, Melendez had no such access and shared only her own pay information with a fellow employee.

established by direct evidence of the employer's discriminatory motivation or "inferred from circumstantial evidence based on the record as a whole." *Tschiggfrie Properties, Ltd.*, 368 NLRB 120, slip op. at 1 (2019). The employee's protected activity may not be the only reason for termination as long as the activity was a "substantial or motivating factor." *Cordua*, 985 F.3d at 423.

The burden shifts to Respondent to show that Respondent would have terminated the employee "even if the employee had not engaged in the protected activities (cites omitted)." *Cordua*, 985 F.3d at 423-424. Respondent must persuade by a preponderance of the evidence that it would have terminated Melendez even if she had not engaged in protected concerted activity. *NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury,* 372 NLRB No. 35 n. 1 (2022), enfd. 94 F.4th 67 (D.C. Cir. 2004). If the record has competing or equal inference of a legitimate basis for the termination, the Board could reasonably infer an improper motive. *Renew Home Health v. NLRB,* 95 F.4th 231, 244 (5th Cir. 2024). Also see *Trader Joe's Co. v. NLRB*, 167 F.4th 766, 780 (5th Cir. 2026) enfg. 373 NLRB No. 73 (2024). Respondent must demonstrate that its stated reason for terminating the employee was not just a partial or contributing factor for termination but must be "'the justification.'" *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013).[43] However, if the employer's reason for termination is one that is protected, *Wright Line* "does not apply because the employer has conceded that its motive was unlawful." Id., citing *St Joseph's Hospital*, 337 NLRB 94, 95 (2001). When Respondent's reasons are pretextual, such as false or not actually relied upon, discriminatory motive may be inferred

The previous analysis demonstrates that Melendez engaged in protected concerted activity when discussing pay. I find that the evidence demonstrates Respondent had knowledge and animus. I additionally find that Respondent's defenses are pretextual.

2. Knowledge and Animus

a. Direct evidence

An agent's knowledge that the employer violated the Act is correctly imputed to the employer. *NLRB v. Thermon Heat Tracing Services, Inc.,* 143 F.3d 181, 186, rehg. den. (5th Cir. 1998), enfg. 320 NLRB 1035 (1996) (agent's knowledge imputed to the employer). Guevara told ADP, which in turn provided her statement to the Texas Workforce Commission, that it terminated Melendez for several issues. One of those issues was discussing pay. As Guevara was Respondent's agent, her statement is imputed to Respondent. *American Press*, 280 NLRB 937, 943 (1986), enfd. 845 F.2d 324 (6th Cir. 1987). The statement is therefore an admission against interest and provides direct evidence of Respondent's knowledge and animus toward Melendez. *Bohemia, Inc.*, 266 NLRB 761, 777 (1983).

[43] Citing *NLRB v. Rockline Indus*., 412 F.3d 962, 970 (8th Cir. 2005).

Respondent's answers to the Texas Workforce Commission about why Melendez was terminated show that Respondent was less than pleased about Melendez having a protected concerted discussion about pay. CLO Emadi was not called to explain anything in the workplace except as custodian of records. Her failure to dispute that Gabby immediately went to discuss pay after her discussions with Melendez leaves Melendez's credited testimony undisputed. *Andronaco, Inc.*, 364 NLRB 1887, 1896 (2016).

Respondent also used the term "sensitive information" and confidentiality as the basis for termination. In *Vesta VFO, LLC*, 373 NLRB No. 10, slip op. at 1-2 (2024), the employer told two brothers that they were discharged for improperly accessing "confidential business information," which was payroll information. The statements demonstrated animus and direct evidence of unlawful motivation.[44] Similarly, Respondent did not demonstrate that Melendez had access to any confidential information that caused any suspicions but was terminated for discussing pay. This direct evidence establishes knowledge and animus.

b. Circumstantial evidence

General Counsel contends Respondent denies that any circumstantial evidence, such as timing or shifting explanations, exists. I find that circumstantial evidence shows knowledge and animus.

Evidence of actual motive is not usually forthcoming and what evidence is available may also be "self-serving." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accord: *NLRB v. Buckhorn Hazard Coal Corp.*, 472 F.2d 53, 55-56 (6th Cir. 1973). This examination is a question of fact with consideration of all credited evidence. *Buckhorn,* 472 F.2d at 56. Beyond the direct evidence of Respondent admitting a reason it terminate*d* Melendez was about pay, the circumstantial evidence also demonstrates knowledge and animus.

CLO Emadi does not dispute that Gabby requested a pay raise or asked for the administrative assistant position. Her failure to testify raises an adverse inference of knowledge that Gabby asked for a raise and the administrative assistant position after her pay discussion with Melendez. *Boatel Alaska, inc.*, 236 NLRB 1458, 1462 (1978) (failure to deny conversation); *Consolidated Accounting Systems,* 225 NLRB 93 (1976) (company president fails to testify about discussions on union activity).

Animus toward protected concerted activity may be demonstrated through circumstantial evidence, such as timing of Respondent's adverse action in relationship to the employee's protected activity, the statements and actions showing Respondent's general and specific animus, disparate treatment of the alleged discriminatee, departure

[44] I do not rely upon the 2021 employer policy that restricted employees from discussing pay. (GC Exh. 4.) Although CEO Emadi verified his signature on the policy, no employee testified to viewing it. Further, any policy that may have been in effect in March 2021 was superceded by Respondent's adoption of the ADP policies, which were in effect when Melendez was employed.

from past practice and evidence that an employer's proffered explanation for the adverse action is a pretext. Additionally, shifting explanations for the personnel action may demonstrate unlawful motive. See generally *Harvard Maintenance, Incorporated v. NLRB*, 165 F.4th 886, 895 (5th Cir. 2026), enfg. in rel. part 373 NLRB No. 117 (2024).

Animus is shown in a number of areas, including Respondent's transmission to ADP. Timing can also be a strong indicator of animus for an employer's actions. *Masland Industries*, 311 NLRB 184, 197, (1993), quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing). Timing of Respondent's actions show knowledge and can be a significant indicator of Respondent's unlawful motive. *Cordua*, 985 F.3d at 426. Here, the timing occurred shortly after Melendez's conversations with Gabby. *Citizens Inv. Services Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005) (unlawful motive found when employer discharged employee two weeks after employee announced he was the union president), enfg. 342 NLRB 316 (2004).

Shih's testimony indicates that he was concerned that Melendez would not be a good fit with Respondent handling sensitive information. In *NCRNC, LLC,* 372 NLRB No. 35, slip op at ___ (2022), the employer stated in a termination meeting with the discriminatee that she was no longer a "'good fit.'" The discriminatee received nothing in writing about the termination. Here, Shih determined that Melendez would not be a good fit because of her likely handling of "sensitive information." Respondent's explanation of Melendez's handling of the Lopez sale is not credited to the extent that Shih explained to Melendez what her error was. Similar to *NCRNC*, Melendez received nothing in writing about Respondent's reasons for termination. These factors again point to animus.

Shih testified that he only wrote reports on new employees when CLO Emadi directed him to do so. Respondent did not provide any other reports to demonstrate that CLO Emadi made such requests.

Respondent denies that it failed to investigate Melendez because Reyes testified about a second steal and Acting Manager Shih confirmed it. (R. Br. at 35-36.) However, Reyes testified generally that Melendez stole a number of commissions. As noted in the Credibility Section, Respondent could not have relied upon the alleged second steal because Shih did not testify about it in his July 23, 2025 statement and the employee who should have received the credit for the sale did not. CLO Emadi, who made the determination to terminate Melendez with Shih and Guevara present, gave no testimony. Because Respondent relies upon Shih's testimony on this point, Respondent shifts to an additional *post haec* reason on why terminated Melendez. However, no such reason existed at the time of Melendez's termination. Therefore, Respondent failed to investigate thoroughly at the time and now creates the second steal as a reason it terminated Melendez at that time. *Mondelez Global LLC v. NLRB*, 5 F.4th 759, 771 (7th Cir. 2021) (failure to investigate demonstrates discriminatory intent).

Shih additionally failed to determine whether Melendez's mentor was present at the time of the first "steal." He also did not find out whether the mentor instructed Melendez about the commission. Again, Shih did not complete the investigation. Id.

Respondent's Position Statement dated August 11, 2025, states Melendez stole from 2 employees within 2 weeks. It further maintains that Melendez "logged into the system, looking up the sales of others with the knowledge of others and shifting the sale to herself . . . . " (R. Exh. 2.) However, this statement incorrectly identifies the process for returning sales, which cannot be accomplished without a manager cancelling a previous sale or made by the person who made the sale. Neither Reyes nor Shih provide any support for this accusation. This second alleged "steal" also reflects that Manager Cisco authorized the return, which Melendez could not do, and is contrary to Respondent's claim that Melendez searched the computer to give herself extra commissions. Further, it is unsupported by Shih's statement from July 2025, in which he only identified one stolen sale These shifts also demonstrate animus.

Respondent shifts regarding when Shih initially discussed Melendez's steal and when Respondent determined to terminate Melendez. Shih's July 23, 2025 statement states he sent an email about the "steal" to CLO Emadi,[45] then met with Emadi and Administrative Assistant Guevara. CLO Emadi then determined to terminate Melendez. Shih's explanation shifted during his testimony and added a meeting after his October 9 email evaluation of Melendez and Cindy. Shih's written sworn statement was closer in time to the events. As a result, I find that he discussed the matter with CLO Emadi and Guevara before his October 9 email. This shift not only demonstrates the credibility gap but also demonstrates animus.

When Melendez approached Guevara about the allegedly stolen sale, Guevara told Melendez not to worry because Respondent was trying to find out if she was reliable on sales. Guevara did not dispute Melendez's testimony. When a party witness is not asked about certain events on direct examination, that failure supports finding that the answer would not have helped the party. Melendez's testimony is therefore unrebutted and Respondent's failure to ask Guevara about that conversation demonstrates her answer would not have benefited Respondent's case.

Shih's October 9 email to CLO Emadi lists several issues with Melendez's performance, including what she might do with sensitive information. That theme carried over to Administrative Assistant's documentation to ADP for the Texas Workforce Commission but now reveals discussing pay with coworkers as a reason for termination. Guevara was present for discussions with CLO Emadi and Shih. Guevara only discussed pay in her statement and testimony but never identifies what serious breaches of confidentiality took place, much less when Melendez was instructed to keep "sensitive information" confidential. Like Shih, Guevara's testimony never identifies any instances of difficulties in teamwork either. Adding reasons for termination demonstrate animus. *RELCO*, 734 F3d at 787.

As custodian of records, CLO Emadi testified that all information about "stealing sales" was entered into the ADP system. However, the documentary evidence shows that the incident involving Melendez was not placed into ADP until weeks after Melendez's termination and 8 days after Melendez filed the instant Board charge. The tardy entry into

[45] Respondent did not put this email into evidence, presuming it exists.

ADP indicates that Respondent may not be entering all "stolen" sales into ADP. CLO Emadi evaded a question on whether she searched the CRM database for other alleged "steals" by other employees. Additionally, Reyes' testimony demonstrates that disputes about who gets credits and commission for sales do occur and are resolved through a manager. Treating Melendez differently demonstrates knowledge and animus.

I therefore find that Respondent had knowledge of Melendez's protected concerted activity and held animus against it. General Counsel therefore presents a strong prima facie case.

3. Respondent's Reasons Are Pretextual[46]

Respondent contends that, even if General Counsel established a prima facie case, it would have terminated Melendez for stealing sales. It also denies any pretext. (R. Br. at 35-41.)

When General Counsel makes a strong showing of unlawful motivation, Respondent's rebuttal burden is "substantial." *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 2 (2018). Accord: *Sysco Grand Rapids, LLC,* 367 NLRB No. 111, slip op. at 27 (2019); *Eddylon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011); *JCR Hotel v. NLRB,* 342 F. d 834, 842 (8th Cir. 2003).

The trier of fact may not only reject a witness story but also determine that the truth is the complete opposite. *Boothwyn Fire Company No. 1*, 363 NLRB 1893 (2016). "[L]ack of clarity and consistency in explaining the reasons for termination is an important factor in evaluating the proffered justifications . . ." and if not rational or consistent, the conduct may be evidence that its actions conceal the true basis. *Citizens Inv. Services Corp.,* 420 F.3d at 1202, citing *Black Entertainment Television,* supra. If the stated motives for discharge are false, the factfinder may infer that the employer is concealing its unlawful motive. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966). Respondent may not rely upon "[s]uspicion, conjecture, and theoretical speculation" for "substantive evidence." *Cordua*, 985 F.3d at 428 and cases cited therein.

If the employer's proferred reasons are pretextual (i.e., either false or not actually relied upon), the employer fails to show that it would have taken the same action for the reasons regardless of the protected activity. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Pretext may be demonstrated by (1) an employer's false reasons for an adverse action; (2) disparate treatment; (3) departure from past practice: (5) shifting explanations by an employer for an adverse action; and/or (5) failure to investigate whether the employee engaged in the alleged misconduct. *MonorCare Health Services-*

[46] Notably, the factual basis for animus are identical to those found in pretext. I separately find animus and do not rely upon it for pretext. See *Cordua Restaurants, Inc. v. NLRB*, 985 F.3d 415, 424-425 (5th Cir. 2021) (analysis for facts supporting animus are separate from pretext).

Easton, 356 NLRB 202, 204 (2010); *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), enfd. in rel. part 570 F.3d 354 (D.C. Cir. 2009); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007). Furthermore, the Board held that even when the employer's rationale is not patently contrived, "weakness of an employer's reasons for an adverse personnel action can be 'a factor raising a suspicion of unlawful motivation.'" *General Films, Inc.*, 307 NLRB 465, 468 (1992), citing *Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987); *Briarwood Hilton,* 222 NLRB 986 (1976).

a. False reasons for the adverse action

When an employer fails to reveal its reasons at the time of termination to an alleged discriminatee, the administrative law judge may infer that those reasons put forth afterwards are pretextual. *K.T. Metal Finishing d/b/a Electro-Plating Specialties*, 236 NLRB 534, 534 (1978). Guevara told Melendez that her position had otherwise been filled. It is only when Melendez receives the documentation from the Texas Workforce that Respondent's additional reasons are revealed. Because Respondent did not provide any additional reason(s) to Melendez when she was terminated, these reasons are pretextual.

Respondent also maintains Melendez could not get along with staff. None of Respondent's witnesses testified to any examples. *MacCafferty's Irish Pub*, 230 NLRB 49, 51 (1977) (employer's defense that employees were complaining about discriminatee unsupported) enfd. 578 F.2d 1393 (table) (8th Cir. 1978). I therefore find that Respondent's assertion is unsupported, which lends no credence to Respondent's asserted reasons for terminating Melendez. Id. See generally *Casey*, 313 NLRB at 774 n. 7; *NLRB v. Main Street Terrace Care Center*, 218 F.3d at 543.

Like the additional reasons Respondent put forth, not getting along with employees was not mentioned in any discussion with Melendez, including when she was terminated. *Boatel Alaska*, 236 NLRB at 1465 (no support for allegation in any witness that poor attitude was reason for termination). Respondent also does not demonstrate what sensitive information Melendez failed to keep confidential. Instead, it hypothesizes what Melendez might do based upon on her alleged "attitude."

b. Disparate treatment and departure from past practices

Respondent departed from its practices, which caused Melendez's discharge. An "overreaction to a violation of a rule or accepted standard may itself be an indication of pretext." *Sea-Land Service*, 240 NLRB 1146, 1147 (1979). Shih found that Melendez was learning sales and doing well on those tasks. Nonetheless, instead of following its practice of handling a disputed sale by a manager, Respondent's actions point to "invidious motivation." *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). In *Citizens Inv. Services Corp.*, 430 F.3d at 1203, the employer terminated a salesperson for poaching sales, which the employer considered unethical. However, the employer did not "take action consistent with its claim that . . . [the] conduct was a serious breach of ethics." Here, Respondent was inconsistent in the way it handled the returned sales. *New Orleans*

Cold Storage & Warehouse Co., Ltd. v. NLRB, 201 F.3d 592, 601 (5th Cir. 2000) (pretext when employer discharges employees for reasons usually unenforced), enfg. 326 NLRB 1471 (1998).

Shih testified that in training salespeople, Respondent works with them and bring them along. Not so for Melendez. Shih claimed Melendez was defensive and did not admit the error, but Melendez says Shih, who was a manager, was confusing. I credit that at the time, Shih did not explain the situation well and was confusing. Similarly, Respondent deviated when it maintains it had to discipline a new employee for "stealing" a sale when Respondent normally had a manager resolved these disputed sales. Respondent did not do so for Melendez. As a result, Respondent provides no other evidence that a disputed sale would be handled by termination.[47]

c. Shifting reasons

Shifting reasons support finding pretext. *Vesta VFO, LLC*, 373 NLRB No. 10, slip op. at 2 (2023). "'When an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.'" *Black Entertainment Television, Inc.*, 324 NLRB 1161, 1161 (1997), quoting *Sound One Corp.*, 317 NLRB 843, 848 (1995). Many of Respondent's shifting reasons are discussed in the Knowledge and Animus section above but are considered independently here.

At the time Respondent terminated Melendez, it only stated that Melendez was terminated because it hired another person for the position and stated nothing of the multitude of reasons it provided elsewhere. Guevara told Melendez that her performance was good. Guevara never testified otherwise, yet her response to ADP lists everything that Shih included in his written assessment and more. Therefore, these reasons are pretextual. Id.

Respondent also shifts on considering Melendez stealing sales. On one hand, Reyes credibly testified that disputes between salespeople do occur and a manager sorts the matters out. But with Melendez, Respondent never states why it considered the situation with Melendez "stealing" a sale when it apparently is an event a manager will resolve when disputes over sales arise. Thus, Respondent fails to explain why Melendez's alleged 'stealing' of a sale was viewed as problematic, especially when such situations occur when the manager handles the dispute. Reyes's testimony that sales disputes were handled by managers indicates that Respondent did not terminate employees for similar conduct. *Sambo's Restaurants, Inc.*, 237 NLRB 195, 196-197 (1978) (failure to discipline for same or worse conduct shows disparate treatment).

Shih admitted that Respondent did not terminate new employees but worked with them to achieve competence. With Melendez's sales performance, Respondent did not do

[47] The two examples Respondent provided do not involved disputed sales commissions. One put a return on his own credit card rather than the customer. Respondent's examples are not similarly situated.

so. As General Counsel points out, normally training in sales takes one month but Melendez was terminated in less than a month. I find that Respondent's failure to give Melendez an opportunity to improve and have Respondent work with her demonstrates pretext. *Rahco, Inc.*, 265 NLRB 235, 257 (1982) (employer who rarely did anything about employee misconduct shows employer's reasons were false).

Shih only discussed one steal in his July 2025 statement but now presents a second one. Shih also shifted on when Respondent determined to terminate Melendez. For the reasons already stated, the differences in Shih's statement, testimony and Respondent's later positions demonstrate a significant shift. The shifts cover a wide range of areas, from when the decision to terminate was made to adding in unsupported allegations of Melendez's conduct to suppositions on how she might act as an administrative assistant. All of these claims are pretextual.

d. Failure to investigate

Shih's sworn statement only mentioned one incident of allegedly stealing sales, yet he testified to two incidents. As mentioned in the Credibility section, Shih did not raise a second incident until the hearing. This failure also demonstrates that Respondent failed to conduct a reasonable investigation before it terminated Melendez. It also demonstrates a shift between Shih's July 23, 2025 statement and his testimony at hearing. *Casey Electric, Inc.*, 313 NLRB 774, 775 (1994).

Regarding the first alleged steal, Shih admittedly did not talk to Melendez's assigned senior salesperson, much less know who that person was. He did not give instructions to Melendez before October 4; Respondent can only suppose that Melendez was given such instruction. Shih therefore did not properly investigate, and the assumption that Melendez received instruction both point to pretext.

Guevera's response for the Texas Workforce Commission inquiry says Melendez received a warning. In contrast, I do not credit that Shih gave her a warning that she could be disciplined or fired for stealing sales. As discussed in more detail in the Credibility section, Shih did not find the second alleged steal until after his July 2025 statement, long after the termination. He admittedly did not correct Melendez on the second incident. These failures also point to pretext.

e. Conclusion on pretext

Respondent states, even if Melendez engaged in protected activities, it had sufficient reason to terminate her. Closely reviewing the record, I find much of Respondent's actions demonstrate pretext.

4. Conclusion of *Wright Line* analysis

Even if Respondent only believed Melendez engaged in protected concerted activity and terminated her on that basis, Respondent would still violate Section 8(a)(1). *Capstone Logistics, LLC v. NLRB* 122 F.4th 194, 204 (5th Cir. 2024), enfg. 372 NLRB No. 124

(2023). General Counsel presents a prima facie case. Respondent's defenses are pretextual. Under *Wright Line*, Respondent violated Section 8(a)(1) for terminating Melendez due to her protected concerted activities.

E. Analysis under Burnup & Sims

The *Wright Line* analysis does not necessarily apply to situations in which Respondent asserts that discipline was justified by misconduct occurring within the course of otherwise protected conduct. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (*Wright Line* not applicable if stated reason for termination is protected activity and demonstrates its motive was unlawful). In those situations, employees have enhanced protections. See *Burnup & Sims,* 379 U.S. 21 (1964). The Court stated Section 7 rights would be "weaken[ed] or destroy[ed]" and "protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." When an employer disciplines employees for conduct that is protected and concerted violates the Act unless Respondent shows the employee engaged in conduct removing her from the Act. Id. at 22-23.

Ultimately, General Counsel is not required to demonstrate an independent showing of animus under this test. See *Aqua-Aston Hospitality, Inc.*, 365 NLRB 592,596-697 (2017) ("the existence or lack of unlawful animus" irrelevant per *Burnup & Sims,* supra). An employer's mistaken belief of misconduct does not equal a pass when it comes to finding a Section 8(a)(1) violation. *General Elec. Co., Battery Product, Capacitor Dept. v. NLRB*, 400 F.2d 713, 721 (5th Cir. 1968).

The test for here has three prongs: An employee engaged in protected activity; the basis of the alleged act of misconduct occurred during the protected activity; and the employee was not, in fact, guilty of misconduct. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1 n. 2 (2021), citing *Burnup & Sims*, 379 U.S. at 23; *In re Shamrock Foods Co*., 337 NLRB 925, 925 and 924-925 (2002), enfd. 346 F.3d 1130, rehg. den. (D.C. Cir. 2003). Respondent retains the burden of showing it held an honest belief that the employee engaged in serious misconduct while engaging in protected activity. *In re Kiewit Power Constructors Co.*, 355 NLRB 708, 719 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011). Presuming Respondent meets its burden, the burden shifts to the General Counsel to affirmatively show that the alleged misconduct did not occur. *Kiewit Power*, 355 NLRB at 719.

Respondent's ADP response, subsequently sent to the Texas Workforce Commission intact, states specifically that Melendez engaged in misconduct by sharing confidential information and sensitive information, including pay. As noted above, the conversation with Gabby about pay is protected concerted activity and is considered misconduct. Respondent does not meet its burden to show that a pay discussion is serious misconduct. Pursuant to this analysis, Respondent violated Section 8(a)(1) by terminating Melendez for discussing pay.

F. Conclusion Regarding Melendez's Termination

The record evidence supports finding Respondent violated Section 8(a)(1) when it terminated Melendez for the protected concerted activity of discussing pay, which resulted in her preceptor going to CLO Emadi's office to request more pay or a better job. Guevara, who told the Texas Workforce Commission that Melendez was terminated for reasons including protected concerted activity, is an agent pursuant to Section 2(13). Even without the direct evidence provided to the Texas Workforce Commission, as transmitted from Guevara to ADP, none of Respondent's defenses remain substantiated. Respondent's defenses instead provide knowledge, animus, and ultimately, pretext. I therefore recommend that Respondent violated Section 8(a)(1) for terminating Melendez.

G. Respondent's Other Affirmative Defenses

Respondent presented 16 affirmative defenses and stated it reserved the right to present additional defenses. Some relate to remedial action and are addressed with the Remedy section. Respondent also maintains that Melendez did not engage in protected concerted activity, which, as demonstrated by the above analysis, is not the case.

Respondent's Fifth Affirmative Defense states: "Some or all of the claims against Respondent fail because they are not identified the Complaint with any degree of particularity and therefore, Respondent cannot adequately respond to them, resulting in prejudice and a denial of due process." Respondent also contends that the Complaint did not provide notice of the theory alleged and the theory litigated. (R. Br. at 22-25.)

Respondent understood that General Counsel alleged that Melendez was terminated for discussing pay with a coworker but claims it did not know who that person was. It further claims it could not identify, investigate or prepare Gabby as a witness to rebut the allegations made during the hearing. Respondent also maintains that the lack of pre-hearing discovery hindered Respondent and denied it of due process.

Due process requires notice and the opportunity to be heard. The Board's Rules §102.15(b) identifies that the Complaint will include "[a] clear and concise description of the acts whch are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts." Respondent had sufficient notice to develop its investigation about Melendez's termination, as demonstrated through its Position Statements, even before the Complaint issued. The Complaint itself identifies the alleged discriminatee, Melendez, and that General Counsel alleged several supervisors and/or agents defined respectively in 2(11) and 2(13) of the Act. The Complaint meets the standards of §102.15(b). Respondent's trial strategy revealed it had notice of the Complaint allegation and was able to make its defense. *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135-136 (2d Cir. 1990).

Even so, once Respondent heard General Counsel's case, it did not request a continuance to conduct its expanded investigation or raise an objection at hearing. The case was fairly and fully litigated when Respondent learned who discussed pay with

Melendez and Respondent's documentation supports that it knew Melendez discussed pay. *Pergament*, 920 F.2d at 136-137. I therefore dismiss this affirmative defense.

Respondent's Sixth Affirmative Defense states the remedies sought are beyond the Board's remedial authority. The Third Affirmative Defense contends that the Complaint failed to identify specificity of the remedies. The Board's remedial authority has been in existence for some time. The Board has held the authority to order reinstatement for certain unfair labor practices, such as termination for discussing pay. "The legitimacy of back pay a remedy for unlawful discharge . . . is beyond dispute . . . . "*NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969), citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). This affirmative defense is dismissed.

Respondent's Seventh Affirmative Defense calls for its right to a jury trial under Seventh Amendment. In *NLRB v. North Mountain Foothills Apartments*, 157 F.4th 1089, 1099 (9th Cir. 2025), the court cites *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). Since *Jones & Laughlin Steel*, courts continue to find this argument without merit. *North Mountain Foothills*, 147 F.4th at 1099, citing *SEC v. Jarkesy,* 603 U.S. 109, 137-138 (2024) (Board unfair labor practice proceedings are statutory and reinstatement of an employee and pay for time lost do not implicate the Seventh Amendment). Also see *Sea World of Florida LLC d/b/a Discovery* Cove, 375 NLRB No. 4, slip op. at 1 n. 1 (2026). This affirmative defense is dismissed.

Respondent's Eighth Affirmative Defense contends that the composition of and power vested in the Board are unlawful and in violation of the separation of powers created by Article II of the Constitution. In the Ninth Affirmative Defense, Respondent contends the Board members and administrative law judges have been appointed in violation of Art. II. Respondent cites three cases that were decided under *Space X v. NLRB,* 151 F.4th 761 (5th Cir. 2025), cert. denied 2026 WL 1052045 (2026). Historically, the Supreme Court has held that a combination of investigative and judicial functions does not create due process concerns. See *FTC v. Cement Institute,* 333 U.S. 683 (1948). Further, Respondent did not seek injunctive relief from a federal district court in Texas. The Texas federal district courts have granted preliminary injunctions before Board hearings occur[48] However, Respondent did not avail itself of that legal remedy. I therefore dismiss this affirmative defense.

The Sixteenth Affirmative Defense claims that General Counsel was guilty of laches and unreasonable delay, which prejudiced Respondent because it unnecessarily multiplied the amount of backpay. Laches is not a viable defense against the government when public policy requires the Board to pursue "the vindication of the rights of the employees who have been the targets of an employer's unfair labor practices." *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1618-1619 (2001). Also see: *Kroger Texas L.P.*, 374 NLRB. No. 113, slip op. at 2 n. 2 and 10 (2026); *Sanford Home*

[48] See, e.g., *Energy Transfer, LP v. NLRB*, 742 F.Supp.2d 755 (S.D. Texas 2024) and *Aunt Bertha v. NLRB*, 2024 WL 420383 (N.D. Texas 2024). Compare *ESCNC, LLC d/b/a Surgery Center of Northern California,* 375 NLRB No. 1, slip op at1 n. 2 (July 21, 2026).

for Adults, 280 NLRB 1287, 1289 (1986); *W.C. Nabors Co.*, 134 NLRB 1078 (1961), enfd. 323 F.2d 686, 688-689 (5th Cir. 1963), cert. denied 376 U.S. 911 (1964); *Majestic Flour Mills*, 15 NLRB 541, 564 (1939).[49]

Even if laches was an available defense, Respondent must show an unreasonably delay in bringing a case and resulting prejudice to the defending party. *Kroger Limited Partnership d/b/a Kroger Delta Division*, 375 NLRB No. 6, slip op. at 9, citing *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Respondent does not demonstrate how it was prejudiced other than claiming, if a violation is found, that backpay increased. Respondent also does not demonstrate that "it was prejudice by the delay in its ability to call witnesses or offer other evidence or make legal arguments." *Kroger Delta Div.*, 375 NLRB No. 6, slip op. at 9. This affirmative defense is dismissed.

CONCLUSION OF LAW

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

2. The following are supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13) of the Act:

Fakhredin Emadi	President
Elham Emadi	Chief Logistics Officer
Maryam Emadi	Chief Financial Officer
Justin Shih	Acting Manager (now Manager)
Esperanza Guevara	Administrative Assistant

3. Respondent violated Section 8(a)(1) of the Act by, on or about October 19, 2024, by discharging Daniela Irene Melendez for discussing pay as protected concerted activity.

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

The Act has not been violated in any other way.

REMEDY

Having found that 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.

[49]Also see *Carnival Carting, Inc. v. NLRB*, 455 Fed. Appx. 20, 24 (2d Cir. 2012) (in compliance case, the Board did not delay unnecessarily between 1996 and 2008), enfg. 355 NLRB 297 (2010).

Respondent, having unlawfully discharged Daniela Irene Melendez 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 she would have enjoyed absent the discrimination against her. See *Convenience Food Systems, Inc. v. NLRB*, 129 Fed. Appx. 57 (2005); *Ferguson-Williams, Inc. v. NLRB*, 127 F.3d 35 (unpub.) (5th Cir. 1997). Respondent shall also make Melendez whole for any loss of earnings and other benefits.

Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022),[50] Respondent shall also compensate Daniela Irene Melendez for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, 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, Respondent shall compensate Melendez 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), 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.

Respondent shall also be required to remove from its files any references to the unlawful discharge of Daniela Irene Melendez 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

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[50] Respondent contends that it should not pay "speculative, consequential or non-pecuniary damages." Although the Fifth Circuit rejects the Board's ability to pursue pecuniary harm per *Thryv*, other circuits have held differently. Compare *Hiran Management, Inc. d/b/a Hungry Like the Wolf v. NLRB*, 157 F.4th 719, 728-729 (5th Cir. 2025) and *NLRB v. Starbucks Corp.*, 125 F.4th 78, 94-97 (3d Cir. 2024) with *Int'l Union of Operation Engineer Local 39 v. NLRB* 155 F.4th 1023, 1049-1053 (9th Cir. 2025) (damages sought vindicate a public right). In the meantime, I am required to follow current Board law.

[51] 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

ORDER

The Respondent, Autofit Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Discharging or disciplining employees because they engage in protected concerted activities, such as discussing pay.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

a. Within 14 days from the date of this Order, offer Daniela Irene Melendez 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.

b. Make Daniela Irene Melendez whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and, within 3 days thereafter, notify Daniela Irene Melendez in writing that this has been done and that the discharge will not be used against her in any way.

d. Compensate Daniela Irene Melendez 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 awards to the appropriate calendar year.

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 Daniela Irene Melendez's corresponding W-2 forms reflecting the backpay award.

adopted by the Board and all objections to them shall be deemed waived for all purposes due under the terms of this Order.

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 amounts due under the terms of this Order.

g. Within 14 days after service by the Region, post at its Houston, Texas facility copies of the attached notice marked "Appendix."[52] 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 the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2024.

h. 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 that the Respondent has taken to comply.

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

Dated, Washington, D.C. August 10, 2026

Sharon Levinson Steckler
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 discharge or otherwise discriminate against any of you for engaging in protected concerted activities, such as discussing pay.

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 Daniela Irene Menendez 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 Daniela Irene Melendez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Daniela Irene Melendez 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 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.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge Daniela Irene Melendez, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

AUTOFIT, INC.
(Employer)

Dated: ____________________ By: ______________________________

(Representative) (Title)

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

819 Taylor Street, Fort Worth, Texas 76102-6107
Telephone 817-978-2821 Hours: 8:15 a.m. - 4:45 p.m. Central time

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 16-CA-355961 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.