Snowflake, Inc. *and* Scott Bessler. Case 20–CA–274626

September 16, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

On September 15, 2023, Administrative Law Judge Brian D. Gee issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions, and to adopt the recommended Order as modified and set forth in full below.[4]

We affirm the judge's conclusion, for the reasons he states and those set forth below, that the Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Scott Bessler. To begin, we agree with the judge's finding that Bessler engaged in protected concerted activity on August 7, 2020, by "bringing truly group complaints to the attention of management" regarding the Respondent's introduction of a new "API Change Policy" at a meeting attended by employees and management. See *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). Bessler acted concertedly because he raised concerns that employees had discussed before the meeting and framed his complaints in terms of the group. Other employees also spoke up in support of Bessler's speech at the meeting and reiterated the same concerns to management after the meeting. See id. at 884 (noting that an employee's conduct "requires some linkage to group action in order to be deemed 'concerted' within the meaning of Section 7").

We also agree with the judge that Bessler acted for mutual aid and protection because the API Change Policy was a term and condition of employment. As the judge found, the Respondent's management created a strong implication that an employee's repeated failure to follow the new policy would lead to discipline or discharge. See *Peerless Publications, Inc.*, 283 NLRB 334, 334 (1987) (explaining that "the attachment of express or implied penalties for breach of the substantive content is what transforms rules or codes of conduct from mere expressions of opinion or aspiration into terms and conditions of employment"). We therefore reject the Respondent's contention that the policy was a "purely business/entrepreneurial decision" outside the scope of the Act. While such a designation may be relevant in the context of bargaining, it is not relevant here. The Respondent's API Change Policy directly affected employees' working conditions, and Bessler's criticisms of the Policy, echoed by his

[1] There is no merit in the Respondent's contention on exception that the complaint is time-barred by Sec. 10(b) of the Act. The Respondent terminated Charging Party Scott Bessler on September 29, 2020. Bessler timely filed his unfair labor practice charge on March 23, 2021, within the 6-month limitation period set forth in Sec. 10(b) of the Act.

[2] We reject the Respondent's arguments, raised for the first time on exceptions, that the Board's administrative law judges are unconstitutionally insulated from removal, the Board's processes violate parties' due process rights, and the structure of the NLRB violates the separation of powers. The Respondent did not raise these arguments in any form before the judge. Consequently, these arguments are untimely and therefore waived. See *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (finding argument waived where party failed to raise it to the judge), enfd. 922 F.2d 832 (3d Cir. 1990). Moreover, because the Respondent did not provide any argument in support of these exceptions, we find that they should be disregarded in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. See, e.g., *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3 (2018), enfd. 929 F.3d 610 (8th Cir. 2019)).

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

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Vibe Consulting, LLC*, 374 NLRB No. 33 (2026). We shall substitute a new notice to conform to the Order as modified.

We find it unnecessary to pass on whether the judge correctly referenced stock options in his recommended make-whole remedy and Order, as any issue concerning the specific benefits is properly left for the compliance stage of this proceeding. Member Prouty notes that stock options are a standard form of compensation as referred to by the Board's remedial language and that the record evidence indicates that Bessler retained his stock options throughout his employment with the Respondent.

In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), the judge ordered the Respondent to compensate employee Scott Bessler for any direct or foreseeable pecuniary harms incurred as a result of his unlawful discharge. As fully explained in *Leo Marine Services, Inc.*, 374 NLRB No. 35, slip op. at 5 fn. 17 (2026), Chairman Murphy and Member Mayer agree to apply *Thryv* in this case for institutional reasons. Member Prouty continues to believe that *Thryv* was correctly decided, is well within the Board's remedial authority, and is necessary to satisfy the Board's statutory obligation to provide meaningful make-whole relief. See *Leo Marine,* supra at fn. 17.

coworkers, were therefore for the purpose of mutual aid and protected by Section 7.[5]

Furthermore, in adopting the judge's finding that the Respondent had knowledge of Bessler's protected concerted activity, we reject the Respondent's contention that Vice President Greg Czajkowski and Human Resources Representative Kristin Genegabus were the key decisionmakers regarding Bessler's discharge. Senior Director of Engineering Zheng Mi, Bessler's direct supervisor, was the key decisionmaker, and he attended the August 7 meeting. He also emailed Czajkowski and Genegabus details of Bessler's allegedly "disruptive" behavior at the August 7 meeting when explaining why he should be discharged. Moreover, many supervisors and managers attended the August 7 meeting, and their knowledge of Bessler's protected activity is imputed to the Respondent. See *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 15 fn. 85 (2023) (collecting cases), enfd. 2024 WL 2764160 (6th Cir. 2024).

We also adopt the judge's finding that the General Counsel established direct evidence of the Respondent's animus based on statements made by its management, including Mi, relying on Bessler's August 7 protected activity as a basis for his discharge.

Finally, we affirm the judge's finding that the Respondent failed to establish that it would have discharged Bessler even in the absence of his protected activity. As found by the judge, some of the Respondent's proffered reasons for the discharge, namely Bessler's performance ratings from prior quarters and his communications with colleagues in an effort to retain his job, were false or not in fact relied upon. We find these reasons were pretextual and therefore cannot sustain the Respondent's defense burden. See *Intertape Polymer Corp*., 372 NLRB No. 133, slip op. at 7.

We also reject the Respondent's assertion that documents produced contemporaneously with Bessler's discharge establish that his discharge was based solely on his continued poor performance. Although these documents refer to managers taking steps to mitigate Bessler's interpersonal issues and poor teamwork, such vague references do not outweigh management's specific references to Bessler's August 7 protected concerted activity.[6] Indeed, Mi presented Bessler's August 7 conduct as the primary example of why he should be discharged. Additionally, the Respondent's tolerance of Bessler's alleged poor performance up until he engaged in protected concerted activity undermines its position. See *Moore Business Forms, Inc.*, 288 NLRB 796, 796 fn. 3 (1988) (finding respondent's discharge of an employee who "by any standard . . . was nonexemplary" insufficient to show that it would have discharged him absent his Section 7 activity given its tolerance of his poor performance for 15 months).[7]

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging employee Scott Bessler because of his August 7 protected concerted activity.

ORDER

The National Labor Relations Board orders that the Respondent, Snowflake, Inc., San Mateo, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

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

(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.

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[5] Having adopted the judge's finding that Bessler engaged in protected concerted activity on August 7, 2020, we find it unnecessary to pass on the judge's finding that Bessler also engaged in protected concerted activity on August 4 and 26, 2020.

Member Prouty would adopt the judge's finding that Bessler also engaged in protected concerted activity on August 4, but for a different reason than stated by the judge. When employee Stefan Parker came to Bessler on August 4 with complaints about his supervisor, Joshua Jenkins, Bessler gave advice on how to best mitigate their conflict. After advising Parker, Bessler met with Jenkins, advocating that Jenkins take steps to create a better working relationship between himself and Parker. By offering advice and speaking to management, Bessler engaged in protected concerted activity pursuant to the well-established solidarity principle. See *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155-156 (2014) ("[M]ak[ing] common cause with a fellow work[er] over [that worker's] separate grievance is a hallmark of such solidarity, even if only one of them . . . has any immediate stake in the outcome.") (internal citations omitted); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942) ("[T]he solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."). Member Prouty would also find that, contrary to the Respondent's argument, the August 4 activity was properly pled. The General Counsel identified August 4 as an instance of alleged protected concerted activity in the complaint. Further, Member Prouty finds the August 4 activity is closely related to the API Change Policy and was fully and fairly litigated by both parties at the hearing. See *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[6] Thus, we do not rely on the judge's statement that there was no mention of Bessler's ongoing performance issues in these documents.

[7] The Respondent filed a bare exception to the judge's finding that it failed to present comparator evidence demonstrating that it discharged other employees for similar performance issues. Because the Respondent has not provided any argument in support of this exception, we find that it should be disregarded. See *St. Paul Park Refining Co., LLC d/b/a Western Refining*, 366 NLRB No. 83, slip op. at 1 fn. 3. We also reject the Respondent's appeal to civility rules as inapposite because there is no work rule at issue here.

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

(b) Make Scott Bessler whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Scott Bessler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(d) File with the Regional Director for Region 20, 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 Scott Bessler's corresponding W-2 form(s) reflecting the backpay award.

(e) 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 the employee in writing that this has been done and that the discharge will not be used against him in any way.

(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 amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its San Mateo, California facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 September 29, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

Dated, Washington, D.C. September 16, 2026

James R. Murphy, Chairman

David M. Prouty, Member

Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 representatives 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.

[8] 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."

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities.

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 Scott Bessler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

WE WILL compensate Scott Bessler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

WE WILL file the Regional Director for Region 20, 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 Scott Bessler's corresponding W-2 form(s) reflecting the backpay award.

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

SNOWFLAKE, INC.

The Board's decision can be found at http://www.nlrb.gov/case/ 20-CA-274626 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.

Jason P. Wong, Esq., for the General Counsel.
Ryan Vann, Esq., Helen Luu, Esq., and *Keahn Morris, Esq.,* for the Respondent.
Mr. Scott Bessler, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRIAN D. GEE, Administrative Law Judge. This case was tried before me using the Zoom for Government Platform from August 23 to 26 and 31, and September 1 and 2, 2022. The General Counsel issued the complaint and notice of hearing on April 14, 2022, and an amendment to complaint on August 5, 2022 (collectively, "the complaint").[1] The complaint is based on a charge filed by individual Charging Party Scott Bessler (Charging Party or Bessler) on March 23, 2021, and served on March 24, 2021. The complaint alleges that Respondent Snowflake, Inc. (Respondent or Snowflake) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Bessler on September 29, 2020, in retaliation for his protected concerted activities. Respondent filed timely answers on April 28 and August 16, 2022, denying all material allegations.

Based on a careful review of the entire record, including all posthearing briefs and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in San Mateo, California, where it is engaged in the business of cloud-based storage and analytics. In conducting its business operations during the 12-month period ending March 31, 2021, Respondent purchased and received at its San Mateo facility goods and services valued in excess of $50,000 directly from points located outside of the State of California. (R. Answer.) Respondent admits, and I find, that at all times material to the complaint, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction over this matter, pursuant to Section 10(a) of the Act.

[1] In its brief, Respondent asserts that the unfair labor practice charge in this matter was originally dismissed, Charging Party appealed that dismissal, and the Office of Appeals remanded the case to the Region. (R. Br., p. 6.) There is no evidence in the record supporting this. In any event, it is undisputed that the General Counsel, through the Regional Director of Region 20, issued the complaint on the dates stated above.

[2] Abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibits; "R. Exh." for Respondent's exhibits; "Jt. Exh." for joint exhibits; "Tr." for citations to the hearing transcript; and "R. Answer" and "R. Br." for Respondent's answer and brief, respectively. I refer to Counsel for the General Counsel as "General Counsel."

II. THE ALLEGED UNFAIR LABOR PRACTICE

Facts

This case presents an age-old scenario under the National Labor Relations Act: an employee engages in Section 7 activity, his employer is hostile to that protected conduct, and the employer retaliates by discharging the employee. However, this story has been updated for the 21st Century: Respondent is a multibillion dollar cloud computing firm[3] located in Silicon Valley and the alleged discriminatee, Scott Bessler, was an accomplished software engineer who received enormous sums of money in salary and stock options.

Respondent's business operations include the housing of electronic information for its 6000 or so customers, many of them large corporations, including more than half of the Fortune 500. (Tr. 36, 1338–1339.)[4] One of its main products is "Snowsight," a web interface through which customers can run queries, manage users, create virtual warehouses, create and modify databases, and share data with other Snowflake accounts.[5] (Tr. 62.) Respondent employs approximately 850 engineers.[6] (Tr. 1337.)

During the dates material to the complaint, Grzegorz "Greg" Czajkowski was the Senior Vice President of Engineering; Leo Giakoumakis was the Vice President of Engineering; Zheng Mi was the Senior Director of Engineering; Christopher Child was the Senior Director, Product Management; Jason Benterou was the Senior Engineering Manager; and Joshua Jenkins was the Head of Design. The parties stipulated that these six managers were Section 2(11) supervisors. Additionally, Respondent admitted that Shravan Narayen was a Senior Product Manager, but did not admit his status as a supervisor. (R. Answer, Jt. Exh. 24, Tr. 228–229.) Respondent's co-founders are Benoit Dageville and Thierry Cruanes. (Tr. 453, 1361.)

Respondent emphasizes maintaining the high quality and functionality of its product through safeguards such as rigorous testing and review. For example, before new software code can be merged into to existing code, it must first go through several layers of review and testing by designated software engineers. (Tr. 778–779, 1337–1339.) Relatedly, there is a culture of rigorous debate and discussion amongst both managers and engineers in an effort to maintain that high quality product.[7] (Tr. 494–495, 511, 1258–1259, 1348–1349.) In addition to their base salaries, engineers can be eligible to receive bonuses based on their quarterly performance reviews.[8] (Jt. Exh. 3, Tr. 52, 318–320, 1343.)

In March 2019, Respondent acquired a smaller company called Numeracy, whose main product was a user interface that enabled data analysts to connect to data warehouses. Pursuant to this acquisition, Respondent also hired Numeracy co-founders Josh Jenkins and Brian Smith, as well as engineers Artem Nezvigin and Eric Feng. (Tr. 194–195, 1252, 1384.) Once at Snowflake, Jenkins, Smith, and Nezvigin worked on designing and building the company's user interface. Numeracy's product was later incorporated as a key component to Snowsight. (Tr. 10341, 1081, 1326–1327.)

In July 2019, Respondent acquired another small company called Stride Software, Inc. Charging Party Bessler was a co-founder and the chief technology officer of Stride. The acquisition was characterized as an "acqui-hire," a term referencing a corporate acquisition for the purpose of hiring another company's key staff members as a group, not for the acquired company's product. (Tr. 477–479, 1353–1354, 1434–1435.) There were approximately 16 key employees from Stride who came to work for Respondent, including Bessler, his two co-founders, members of the product team, and the entire Stride engineering team, which included senior software engineers Megan Schoendorf, Matt Naides, and Stefan Parker. (Tr. 36–37, 111, 258–259.) Respondent's goal in acquiring Stride was to bolster its front end development. (Tr. 1347–1350.) Because Bessler was an essential part of the acquisition due to his technical expertise, he was given the position of Senior Director—Engineering and was richly compensated by Respondent.[9] (Tr. 191.)

[3] See Snowflake - Snowflake Reports Financial Results for the First Quarter of Fiscal 2024 (last visited September 7, 2023).

[4] To aid review, I have included certain citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive, as my findings and conclusions are based on my review and consideration of the entire record.

[5] See Snowsight: The Snowflake Web Interface | Snowflake Documentation (last visited September 7, 2023).

[6] Various words and phrases common in the software industry were used in this matter. "UI" refers to "user interface," which is the part of a software program that the user sees and interacts with. (Tr. 72.) "Front end" refers to the engineering systems pertaining to the UI. "Back end" refers to the engineering systems pertaining to the search engine; such systems typically run on the service provider's computers and are systems that the consumer does not necessarily see. (Tr. 1048, 1355–1356.) "Software designers" create the visuals, features, and options for the user interface. "Software engineers" write the code needed to bring that design into existence and to function as planned. (Tr. 63–64, 1332–1333, 1454.) A "pull request" refers to the process by which engineers either merge new software code into existing code or modify the existing code. (Tr. 68, 214–216.) "API" stands for "Application Programming Interface" and refers to the systems through which different software systems communicate with each other. (Tr. 419.)

[7] Those debates were mostly civil and business-like. While there was testimony about a few heated or profane outbursts in the workplace, those were largely not reported directly to human resources. In contrast to Respondent's generally congenial work culture, Bessler's approach could sometimes involve dogged inquiries that others viewed as being out of step. More specifically, Bessler could sometimes be unwavering in his viewpoints and rub people the wrong way by constantly asking others to defend their assertions with specific examples. As a manager, this clearly caused others to dislike him. As discussed below, once he was transitioned to a non-supervisory position, this same communication style caused others—notably his supervisor Zheng Mi—to be intolerant of Bessler's protected concerted advocacy.

[8] Respondent's designation of fiscal years is approximately 1 year ahead of the calendar year. Q3 of 2020 covered the period from August 1 through October 31, 2019. Q4 of FY 2020 covered November 1, 2019, through January 31, 2020. Q1 of FY 2021 covered February 1 through April 30, 2020. Q2 of FY 2021 covered May 1 through July 31, 2020. Q3 of FY 2021 covered August 1 through October 31, 2020. (Jt. Exh. 24, Tr. 668–669.)

[9] Pursuant to the terms of his offer letter, Bessler was to receive a base annual salary, was eligible for quarterly bonuses, and stock options in Snowflake if he remained employed for 4 years after the acquisition. After 1 year of employment with Respondent, a portion of the options would vest; over the next 3 years of employment, the remainder of the

Each acquisition requires the new company, its technology, and its personnel to be incorporated over time into Snowflake's larger systems and culture. (Tr. 482, 1043, 1271.) The assimilation of Stride into Snowflake was not a smooth one. As Parker observed, "I don't think Snowflake had a good plan for how to integrate [Stride and Numeracy] . . . so we kind of sort of had to figure it out ourselves, in essence, right? So we [Stride engineers] came in with a lot of code, and a lot of culture, and a lot of camaraderie already, together. And I think it just didn't blend well with the existing engineers that were on the organization." (Tr. 39.) In general, the emphasis at Respondent was one of rigorous testing and checking in an effort to maintain high product quality, while the general approach of the former Stride engineers emphasized speed and meeting deadlines. (Tr. 511–512, 778–780, 1043, 1254–1255, 1278–1279, 1383.)

In mid-2019, shortly after the Stride acquisition, Bessler was assigned as director of the "Apps Team," the group working on upgrading Snowflake's user interface. The team was comprised of approximately 24 engineers from three disparate groups: former Stride employees, former Numeracy employees, and existing Snowflake employees. (R. Exh. 39, Tr. 192–195, 1271.) Getting these three groups of engineers on the same page proved challenging. "[W]e spent the first several months sort of having to agree on everything because we needed to take three completely different teams, different working styles, different developer environments, different code basis, and mush them all into a single thing. . . where we were all working together in one place," said Schoendorf. "And so we had to agree on everything, and we didn't agree on anything." (Tr. 153.)

From the start, Bessler was ineffectual as a director.[10] Owing to Bessler's failure to coalesce the three teams and meet production targets, Senior Director of Engineering Zheng Mi was assigned to take over control of the Apps Team in May or June 2020.[11] A common complaint amongst his supervisory colleagues and team members was Bessler's poor communication style; he was viewed by many as "not listening to us," "combative and aggressive in his tone," "unprofessional," and "dismissive." By July, it was mutually agreed that Bessler would also step down from his position as a director and transition to the position of "independent contributor," a nonsupervisory, principal software engineer position, with no employees reporting to him. This reassignment was effective on August 3. (Jt. Exhs. 9, 10, 13, R. Exhs. 1, 2, 4, 28, 37, Tr. 366–368, 510–511, 514–516, 604–614, 679–682, 696–699, 1129–1133, 1261.)

Unrelated to his struggles as a director, numerous engineers confided in Bessler that they felt that the former Numeracy leaders were subjecting their proposed software code to more rigorous review than what the former Numeracy engineers were facing. (Tr. 211–212, 236-238, 240, 416.) Schoendorf, Parker, and Naides complained to Bessler that they felt that Head of Design Josh Jenkins and engineer Brian Smith were applying a double standard to their work product. For example, Jenkins or Smith might require them to conduct extra testing or get additional design reviews, thereby impeding their ability to meet deadlines. (Tr. 39, 43, 240, 416–417.) It also created uncertainty as to when their proposed code was ready to be merged into the company's existing software systems. "[I]t just made it very hard to know what I needed to do," Naides explained. "[I]f I saw something that the engineer. . . from the Numeracy acquisition could do and would be fine, I would then try to follow that as my lead as how I should behave. And then, I would run into issues where I would be, you know–I would be told, oh, you need to do more. Or it wouldn't be quite the same process, and so that made [it] difficult to know what I should do." (Tr. 416–417.) They feared that this double standard would negatively impact their quarterly evaluations and bonuses. (Tr. 416.) Bessler assured them that he would speak to management on their behalf and, in the meantime, for them to simply meet the heightened standards. Bessler told Naides, "I'll work on trying to address the double standard and try to make things both fairer and more predictable." (Tr. 418–419.) Bessler spoke with both Smith and Jenkins about these employee concerns. (Tr. 217–219, 232, 235.)

The API Change Proposal. On July 22, Senior Vice President of Engineering Greg Czajkowski announced the company's new API Change proposal (the proposal), a guideline for which he was the primary author. To maintain the quality and ease of use of Snowflake's APIs, Czajkowski proposed a new system under which engineers seeking to make certain changes or additions to APIs would need to submit their proposed code for approval. (Jt. Exhs. 6, 11, Tr. 1449–1450.) The proposal named different experts to handle one of four areas of responsibility. For the area relevant to this case, "Apps and Experiences," the designated delegates reviewing all proposed changes were Smith and Jenkins. (Jt. Exh. 6, Tr. 48–49.) The proposal went into effect around that time and has remained in effect. (Tr. 1366, 1449.)

The proposal did not identify the specific API changes which it governed, but rather established a general framework for the types of code which needed to be submitted for review. It was "not a list of specific areas or, you know, more specifics, because it's a very broad definition," Czajkowski testified. "Essentially anything that can break or confuse our customer is in the scope." (Tr. 1451.) Stated differently, any change to the user interface which could affect a customer was subject to this new review process. (Tr. 210, 1451.) Some staff members found the broad, loosely defined scope of the proposal vague or confusing. (Tr. 1038.) The proposal also lacked specific guidance or standards on the features which code needed to pass muster. Rather, the proposal stated that the process of drafting code "exists somewhere at the intersection of engineering and art" and that there was naturally some discretion that had to come into play when deciding which code was acceptable versus which was not. Czajkowski wrote, "We also acknowledge that defining 'ease of use' is difficult, in part because it is somewhat subjective. So our definition is of the 'you know it when you see it' kind." (Jt. Exh. 6.) Additionally, he acknowledged that the proposal would change the way that some engineers approached doing work.

options would vest at regular intervals. At the time of his discharge, Bessler had vested in only a portion of his stock options. (Jt. Exh. 4, Tr. 398–400.) This system of vesting in stock options or restricted stock units over time is a way to retain key individuals hired as part of corporate acquisitions. (Tr. 482, 1436.)

[10] As a director, Bessler was a Sec. 2(11) supervisor. (Jt. Exh. 24.)

[11] All dates are for the year 2020, unless indicated otherwise.

(Tr. 1437–1438.) That change, in turn, could result in opposition: "We realize that this may introduce some friction." (Jt. Exh. 6, Tr. 1364, 1436.)

The proposal was implemented to maintain the high quality and functionality of Respondent's product—it was not intended to create a metric for evaluating employee performance. That said, Czajkowski confirmed that an engineer's repeated and conscious disregard of the proposal could be viewed as a form of insubordination or a performance problem that could result in discipline or even discharge. (Tr. 1352, 1363–1364, 1446.) Similarly, Senior Director of Product Management Prasanna Krishnan explained that, if an engineer regularly failed to follow processes, their ratings would be negatively impacted. "If [they] were not following it regularly and that was not meeting the expectations of their job, yes," she testified. (Tr. 620.) From an employee's perspective, engineer James Lai interpreted the proposal to mean that he could be disciplined for not following it. (Tr. 1038.)

Upon issuance of the proposal, the former Stride engineers feared that it might lead to even more scrutiny of their work. Schoendorf, Naides, and Parker told Bessler on Slack that the proposal's approval system, with its room for subjectivity and its selection of Smith and Jenkins as the gatekeepers, could result in bias. For example, given the perceived distrust of the former Stride engineers, Smith or Jenkins might unfairly demand additional testing of their code. This would impede workflow and could result in lowered evaluations and bonuses. (Tr. 52–56, 238-241, 416-421.) As Parker explained, "this really opened the door for kind of that preferential treatment where given these two newest engineers sort of [having] the final say for what—you know, what was an acceptable change. . . [the proposal] allowed them to have some sort of bias—or preferred treatment to who was making the change." (Tr. 55.) The former Stride engineers also feared the proposal, which mandated multiple reviews by busy, high-level personnel, would further slow the pace of their work. Naides pointed out that simply "finding an hour for all of them can take weeks. And so. . . it doesn't only create more work, but it also can push the timeline. Because I can't deal with all my reviews until I've done my work. So I have to do my work, and then I'm ready to schedule the review, and then that can push it out for weeks." (Tr. 422–423.)

In the midst of these discussions, Bessler transitioned to his new, non-supervisory position as an independent contributor on August 3.[12] (Jt. Exh. 13, Tr. 238–241.) Management was hopeful that, given his abilities and vision, Bessler would be able to excel in a purely technical position, devoid of managerial or leadership duties. Mi said he looked forward to "a nice clean quarter" for Bessler (R. Exhs. 38 and 39, Tr. 195–197, 690, 742–743, 883, 1406.)

The August 4 Complaints About Bias by Jenkins. Parker was the senior software engineer leading the "Core UI" team responsible for creating the user interface that would be utilized throughout the company. (Tr. 35, 61, 1275–1276.) By August, the only team not yet using Core UI was the Snowsight team, so Parker worked with them to migrate over. (Tr. 58, 221.) During this process, called the "Core UI migration," Parker again perceived that Snowsight designer Jenkins was unfairly nitpicking, auditing, and reauditing his work. (Tr. 58–59.) On August 4, Parker messaged Naides and Bessler via Slack to complain, "I [am] getting so fucking fed up with Josh He wants to block everything,"[13] Bessler responded by validating Parker's frustration and by encouraging him to accept this level of oversight as the way Respondent operated and as an aspect of their jobs at Snowflake: "its their world and we are just living in it for better or worse." (GC Exh. 2, Tr. 219–223.) Towards the end of the Slack message, Bessler advised Parker to accept Jenkins' micromanaging as a part of their jobs, let the work stack up, and then show management that it resulted in diminished productivity: "you are better off not slamming but playing nice and showing what their process does. ¶ the only way we can make change here is to play nice, accept that we can't change anything yet, and demonstrate clearly how things are inefficient. Keep receipts." (GC Exh. 2, Tr. 243–248.)

Either later that day or on the following day, August 5, Bessler raised this group concern with management. In a one-on-one conversation with Jenkins, Bessler reported that, "I told Josh, hey, you know, Stefan is feeling like he can't get his work in, and he's working really hard to get this stuff done." He added, "I suggested [to Jenkins], like, let's try to work together with Stefan to come up with some clear rules of engagement. . .which led to some of these further discussions about the core UI migration—or the Snowsight core UI migration approval processes in relation to API change, and how they related to the API change policy." (Tr. 232, 235.)

August 7—Parker's Lowered Evaluation and Bonus. In early August, when Zheng Mi reviewed a pull request that Parker had submitted in connection with the Core UI migration, he discovered multiple deficiencies in it. Mi emailed Bessler on August 7 to tell him about Parker's errors in the pull request, including failing to obtain engineering review, lack of testing, and multiple regressions.[14] Emphasizing the need to maintain high quality and follow good engineering practices in connection with the Core UI migration, he asked Bessler to speak with Parker about this. Bessler agreed to do so even though he was not assigned to work on the UI migration. (Jt. Exh. 14.) Bessler informed Parker of his mistakes by sharing Mi's email. Upon seeing Mi's comments, Parker admitted his errors and explained that he proceeded with the pull request without first getting engineering review because he had misunderstood the directions from Snowsight engineer Matt Higgs, who had reviewed many of the other pull requests. (Jt. Exh. 14. Tr. 72–73.)

Later that day, supervisor Jason Benterou messaged Bessler

[12] From August 3 forward, Bessler was an employee under Sec. 2(3) of the Act and thus protected by the Act. See *Tasty Baking Co.*, 330 NLRB 560, 560 (2000) (Board upheld ALJ's finding that respondent violated Sec. 8(a)(3) by transferring an employee who was previously demoted from her supervisory position).

[13] Some Slack messages, emails, and other informal communications in the record contain minor errors in diction, grammar, spelling, or punctuation. Unless necessary for clarity, I do not correct those minor errors. Some of these messages also contain comments about coworkers expressed in frank and unfiltered terms.

[14] A software regression is defined as a type of error where a feature that had been working stops working. See Software regression - Wikipedia (last viewed on September 7, 2023).

by Slack to tell him that Mi decided to lower Parker's rating and bonus for the second quarter (Q2) based on the pull request. Bessler objected to that since the pull request occurred in August and was therefore beyond the July 31 cutoff date for Q2. Benterou explained management's view that, while the pull request occurred in Q3, it reflected Parker's lapses in judgment in Q2. Bessler continued to disagree with the decision, saying, "if this is the policy, it needs to be public." (R. Answer, Tr. 254-256, 1546.)

It was in the context of these three ongoing disputes—the former Stride engineers' concerns that they were subject to a double-standard, belief that Parker had his Q2 evaluation and bonus lowered unjustly, and fears and uncertainties about how the API Change proposal would work—that the "Apps Trio Meeting" took place. Bessler's advocacy at that meeting would color the views of managers, especially Mi, towards him going forward and would serve as a crucial basis undergirding Respondent's decision to discharge him.

August 7—The Apps Trio Meeting. On August 7, various managers and staff members attended the Apps Trio meeting, a weekly Zoom call for product managers, engineering leads, and designers from four different product teams to have the opportunity to raise issues, discuss developments, and update each other about the progress of their projects.[15] (Tr. 527–528, 1105–1108.) Approximately 25 staff members attended the meeting, which lasted from 1 to 2 p.m. Mi, Child, Jenkins, Bessler, Naides, Schoendorf, Parker, and Product Manager Shravan Narayen were among those in attendance. (GC Exh. 12, Tr. 75–76, 118–119.) Several items were listed on the agenda, but the lead topic for discussion was the API Change proposal. Child discussed the roll out of the proposal, explaining that engineers were now required to get approval from the named software architects or their designees before merging new code into the company's existing code. Changes affecting Snowflake's user interface required getting individual approval from Jenkins, while changes affecting the software's architecture required getting the approval from Smith. (Tr. 119–120.)

Based on his prior conversations with coworkers, Bessler raised four concerns at the meeting.[16] First, the proposal failed to clearly explain whether it applied to all changes to Respondent's software code or only some changes, such as those that could affect customers. (Tr. 125, 260–262, 439–440.) Naides recalled that Bessler pointed out that, "it wasn't necessarily clear that. . . the intention of the policy was to apply to every change. But that's how the policy read. So I think his concern was trying to make it very clear where it would apply." [17] (Tr. 439–440.) Second, Bessler commented that this system in which just two individuals, Smith and Jenkins, were the gatekeepers for review could result in biased review and treatment of work product. "I responded that. . .I had heard feedback that people were concerned that the—a policy like this being vague and enforced inconsistently," Bessler testified. (Tr. 261.) Child admitted that this fear was echoed by others, saying that, "some engineers voiced that, that this would add some friction." (Tr. 535.) Third, the proposal's unclear processes might lead engineers to mistakenly fail to follow company processes, thereby resulting in lowered evaluations and bonuses. Bessler said, "since. . . we judge engineers by how well they follow processes and adjust their bonus ratings based on it, it was important to have a process [that was] very clear, so it wasn't used unfairly." (Tr. 125, 262, 437–438, 800–801.) Schoendorf recalled that Bessler said, "if we are going to punish people. . . financially, like, change their bonuses based on whether or not they follow process, we need to be really clear on what that process is." (Tr. 126.) At this point, Mi interjected that Respondent did not punish employees for failing to follow processes. Mi considered it "highly inappropriate" for Bessler to assert that an engineer's performance rating was lowered for not following company processes. (Tr. 801.) But Bessler pushed back on that assertion based on that morning's downgrade of Parker's quarterly evaluation and bonus. (Tr. 125–127, 439–440, 800.) Fourth, Bessler warned that the proposal could make getting code approved more difficult and time-consuming than it already was by requiring approval from two very senior individuals who were already time strapped. "[T]he handful of people [who were tasked with reviewing everyone's proposed changes], they're very, very senior folks. And so if you had to go and get these super senior, super busy people to sign off on everything that you were going to [do], you'd never ship anything again," testified Schoendorf. (Tr. 122–124.)

Failing to recognize that Bessler was now an employee engaged in protected concerted speech, not a supervisor being difficult and confrontational, Mi and Child exchanged Slack messages critical of his "aggressive tone," which they deemed disruptive and not conducive to a free and open discussion. At 1:29 p.m., Child wrote: "we need to get scott under control some how. It's really hard to have productive group discussions with him in them."[18] Mi replied at 1:33 p.m.: "Yes, I have been giving feedback. He got a bit better and then relapsed. I think I know the reason, particularly about his comment on penalized because of not following the process. I will chat with you during 1:1. This is related to the topic Jason [Benterou] is discussing now."[19] (Jt. Exh. 15, Tr. 538–539.)

During and after the meeting, Bessler and Mi also had a Slack

[15] Some witnesses also referred to it as the "EPD" meeting, referring to "engineering, product, and design" or "end product design." (Tr. 300, 888.)

[16] Employees such as Schoendorf, Lai, and others raised the same or similar questions about the proposal, including which situations it would apply to and how it would be enforced. (Tr. 122, 261–262.)

[17] Supervisor Child conceded that "we had some discussion around what met the bar for needing to go through this process." (Tr. 504.)

[18] Child conceded at the hearing that Bessler was an employee by this date and had raised valid issues from an engineer's perspective: "he was speaking as an individual contributor. And so his—his role at this point was to ship code. And so he was speaking that this was going to make it harder to ship code, which was true. This puts one extra check in place." (Tr. 534.)

[19] Mi testified that English is his second language, after Mandarin Chinese. (Tr. 770.) There were a few instances, in both his hearing testimony and in his written communications in exhibits, where there were minor grammatical errors. But Mi testified without the need for a translator, sought clarification of questions from counsel when necessary, appeared to state his answers only when ready, and otherwise testified competently.

conversation. Between 1:47 and 1:54 p.m., Bessler wrote that he was surprised that Mi was asserting that Respondent had not lowered Parker's evaluation and bonus based on failing to follow company procedures and urged the company to be transparent on this point: "if people need to be worried about stiff financial consequences to every PR merge that should be a known thing." After the meeting, Mi and Bessler continued their messaging. Mi explained his reasons for Parker's downgrade and reprimanded Bessler for speaking out so assertively, "multiple people have given feedback that your interactions during today's EPD meeting is disruptive and intimidating. We have discussed this. You need to make a change to be productive to the team." (Jt. Exh. 16, p. 1.) Mi admitted that he also disapproved of the substance of Bessler's remarks:

A: [F]or some reason he brought up someone's performance rating. The bonus got affected by not following process. In that meeting, which I think is highly inappropriate. So, I told him not to discuss in the—let's discuss offline.

> JUDGE GEE: And—and let me just make sure I understand the word. You told Charging Party that that subject was inappropriate?
>
> THE WITNESS: I don't recall exactly words but in that line. So that's not—that should not be discussed in that meeting.

(Tr. 801–802.) Later on in that Slack conversation, Bessler stated that he was merely offering his opinion, and that he deferred to Mi and Benterou as the supervisory decisionmakers. (Jt. Exh. 10, pp. 2–3.) When Bessler asked what he did at the meeting that was so "disruptive or intimidating," Mi answered that "people may feel afraid to discuss with you during meetings because of your tone." Mi reiterated his objection to Bessler speaking out by saying, "I have no other suggestion than standing in others' shoes and thinking it over. You will only improve if you internalize the feedback. I would not be able to force a change in you." (Jt. Exh. 16, p. 3.)

From the perspective of management, Bessler's advocacy took over the meeting so that there was no time to discuss the other agenda items. (Tr. 533.) But, while his remarks may have been "vociferous," "combative," antagonistic," or "not collaborative," Bessler uttered no threats and used no profanity. (Tr. 82–83, 127, 263, 440–441, 530–531, 538.) Schoendorf observed Bessler's demeanor as, "[f]rustrated but professional." (Tr. 127.)

At 3:30 p.m., Bessler spoke with Schoendorf, Higgs, and engineer David Resnick over Zoom about a separate technical matter. Schoendorf asked why Bessler had pushed back so hard during the Apps Trio meeting, and he explained that an engineer's evaluation had been lowered for not following the proposal. Schoendorf concurred that was unfair. Higgs shared his frustration with the proposal and how it was already hard to get work done. (Tr. 269–271.) Bessler said he would speak further to management about the proposal. (Tr. 271.)

Also, sometime after the meeting, Child sent a Slack message to Schoendorf to ask her why the meeting had been so contentious. Schoendorf explained the context of Bessler's comments (the lowering of Parker's evaluation and bonus for not following process) and said that employees were thus concerned that the proposal was not sufficiently clear, was overly burdensome, and that failure to abide by these vague processes could result in a financial penalty. (Tr. 135–139.)

On August 11, Mi and Bessler held their weekly 30-minute one-on-one meeting to discuss work. Mi brought up the Apps Trio Meeting and reiterated his view that Bessler's conduct was "disruptive and intimidating." Bessler asked for details about this so that he could change his behavior, but Mi replied that Bessler just had to internalize the feedback. (Tr. 272–273.) On August 12, Child and Bessler had their regularly scheduled one-on-one. Child also told Bessler that his comments on the Apps Trio meeting were unproductive.[20] (Tr. 573.) When Child commented that he was surprised that Bessler showed such strong feelings about process, Bessler explained that he had just learned that a colleague had their bonus lowered based on that and "so it became clear to me that having vague processes was —was dangerous for employees." (Tr. 275–276.)

On August 18, during their one-on-one, Mi gave Bessler his evaluation for the second quarter. Q2 was from May 1 through July 31, and thus the evaluation covered Bessler's performance as a director. Mi gave Bessler a rating of "Meets Most Expectations" (MME) as a director. (R. Exh. 47.) As for the upcoming Q3 as a non-supervisory independent contributor, Mi discussed the projects Bessler would be working on. There was no indication that Bessler's job security was in jeopardy. (R. Exh. 47, Tr. 276–279).

August 26—The Testing Meeting. Senior Product Manager Shravan Narayen scheduled a Zoom meeting on August 26 to discuss the Snowsight migration to Core UI. Attendees included Narayen, Parker, Smith, Higgs, and Bessler. Parker asked Bessler to join the meeting as his "back up" who could lend him support. (Tr. 85–86, 279.) Narayen said that he had created a testing checklist for all the features in Snowsight and that it would be applied to the Core UI team. The checklist would be applicable only to the Core UI team, which consisted of Parker and one other engineer. Narayen proposed that, when Parker made any changes to the code as part of the UI migration, then all software features on the checklist would need to be tested, even if those features were untouched by the changes. Narayen said this was necessary to maintain the high quality of Respondent's product, and Smith agreed with that approach. Parker opposed this blanket approach as unnecessary and time consuming. Bessler spoke up to side with Parker, advocating for a more flexible approach that would offer Parker discretion as to what changes to test. Alternatively, Bessler suggested automated testing or "snapshot testing" in lieu of this blanket approach. (Tr. 86–87, 279–282.) Bessler also suggested that the checklist be applied to all teams, not just Core UI. Narayen said that this was good feedback and that he would get back to them. (Tr. 280–282.) During the meeting, Bessler did not use any profanity, did not threaten or shout at anybody, and nobody told him that he was acting inappropriately. Parker described Bessler's demeanor during this meeting as "normal." (Tr. 86–88,

[20] By email dated August 10, Child also told Mi that, in his view, Bessler's conduct at the Apps Trio Meeting was inappropriate because "He questioned the proposal repeatedly, even after you and I chimed in to try to keep things moving." (R. Exh. 12.)

282–283.)

During their one-on-one meeting on September 2, Mi told Bessler that he heard that Bessler had been pushing back on testing, referring to the August 26 meeting with Narayen.[21] This surprised Bessler, since he felt that he had not opposed testing. Bessler clarified that he agreed that testing was important and that he merely suggested automated or snapshot testing. He also said that he suggested that the testing policy be applied evenly to everyone, not just to Parker. Mi implied that Bessler should avoid attending such meetings in the future, and Bessler agreed. (Tr. 283–285.)

During their September 22 one-on-one, Mi told Bessler that he was not a good long-term fit for Snowflake and suggested that it was time to start discussing Bessler's exit from the company.[22] Bessler reported that Mi said, "I'd like to come up with a possible way to part ways." (Tr. 286.) This sudden change in direction caught Bessler unawares, as he was just beginning his new position as an independent contributor. Bessler asked why this was happening and Mi answered, "you know, you're—you're hard to work with." Bessler said that he had improved his relations with Smith, Jenkins, and Child, but Mi retorted that "didn't seem to make a dent" and that Mi had "received plenty of feedback." (Tr. 286.) When Bessler insisted that he still wanted to work for Snowflake, Mi side-stepped the issue and said that, since Snowflake had its IPO,[23] Bessler's vested stock options would be worth millions of dollars. Fearing that Mi had not first consulted with Smith, Jenkins, or Child, Bessler asked if he could "bring others into this conversation." Mi consented to that, saying, "I'm okay being overridden." But, Mi warned, "don't make this messy or there'll be no severance. Don't cause a scene."[24] (Tr. 285–288.)

Following that one-on-one, both Bessler and Mi sought out company leaders to make their opposing cases. Bessler contacted Smith, Child, Jenkins, Czajkowski, then-Technical Program Manager Jennie Louie, Vice President of Engineering Leo Giakoumakis, and Vice President of Product Christian Kleinerman on September 22 and 23 to explain what was happening and to discuss his options going forward. (Tr. 293–295, 371.) On his end, Mi emailed Respondent's top executives—co-founders Dageville and Cruanes, Czajkowski, Kleinerman, and Human Resources Business Partner Genegabus—to notify them that he told Bessler that he would "like to work out a separation plan for him to leave Snowflake." Mi added, "I stand by my decision, and would like to give him a bit [of] time to prepare." Mi also said that Bessler would be reaching out to others, including possibly some of these executives. He would confer with Genegabus to work out a severance package. (Jt. Exh. 18, p. 2.) In response to Mi's email on the evening of September 22, various executive expressed their concurrence on the morning of September 23. Also, that morning, Mi informed the executives of the reasons for his decision, which explicitly included Bessler-'s "disruptive and intimidating" advocacy at the Apps Trio meeting. (Jt. Exh. 18.)

At 11:30 a.m. on September 23, Bessler emailed Mi to report his communications with Smith, Jenkins, and Child; to acknowledge his acceptance of Mi's criticism of his Q2 performance as a director; and to request specific feedback so that he could improve as an independent contributor. (Jt. Exh. 19.)

Later that day at around 5 p.m., Bessler spoke to Czajkowski by Zoom to discuss his options. Czajkowski told Bessler that it was unlikely that he could remain on Mi's team, but that he might be able to transfer to another team. Czajkowski said that "he would not be opposed to a transfer. He would not blacklist me and that he could give me some time to find a new team." Czajkowski said that he would give Bessler one to two weeks to explore the possibility of transferring to a different team. (Tr. 288–289.)

That evening, Mi replied to Bessler's morning email reporting his communications with various team leaders. (Jt. Exh. 19.) With a courtesy copy to Genegabus, Mi listed six "key points" why Bessler could not remain on his team.[25] Reason 1 was based on Bessler being "disruptive and intimidating" at the Apps Trio meeting. Reason 3 stated that Bessler was "disruptive during meetings" in his capacity as an independent contributor, an apparent reference to the August 26 testing meeting. The final reason was because Bessler had reached out to others the night before to ask for their support, something that "caught people off guard." Mi added that Bessler had misrepresented their comments to him. Based on these things, Mi concluded, "I don't see how you can play a principal engineer role [on] *my team*." (Jt. Exh. 19.) (Emphasis added.)

After sending that email, Mi continued to canvass others about Bessler. Narayen responded by saying that his issues with Bessler were as a director and that he lacked any firsthand observations about Bessler as an independent contributor. Undeterred, Mi asked Narayen at 8:43 p.m. about Bessler's conduct at the August 26 testing meeting. But Narayen backed off his earlier critical remarks, saying that after he spoke with Bessler about the matter, he realized that Bessler had spoken up merely to protect less senior team members. (GC Exh. 7.) Later in the

[21] Sometime after August 26, Narayen apparently told Mi that Bessler had been difficult at the meeting. But on September 23, Narayen informed Mi that he had revised his initial negative view of Bessler's comments about testing "after I got more information on the situation. I talked to [Bessler] directly and he explained that him being difficult was more because he thought my proposal would incentivize worse practices for some of the junior members of the team." (GC Exh. 7.)

[22] I have discredited Mi's testimony that he discharged Bessler at this meeting. See the Credibility section below. It was evident to me that Mi's testimony was exaggerated and solely intended to support the argument that this matter is time-barred under Section 10(b) of the Act.

[23] IPO stands for "initial price offering," and historically refers to "the first time a company offers its shares of capital stock to the general public." See ipo-investorbulletin.pdf (sec.gov). Snowflake had its IPO on September 15, 2020. See Snowflake IPO raises $3.36 billion in year's biggest U.S. listing | Reuters. (Both sites were last checked on August 21, 2023).

[24] On cross-examination, Mi admitted that he did not tell Bessler his discharge was effective that day, did not identify any specific date of separation, did not provide Bessler with any termination paperwork, did not review with him any termination processes, did not remove his access to Respondent's facilities, and did not terminate his access to Respondent's computer systems. (Tr. 879–880.) Nor do the notes from this one-on-one make any reference to a discharge. (R. Exh. 47.)

[25] Mi confirmed that this email outlined the reasons why he discharged Bessler. (Tr. 895.)

exchange, Mi conceded that his problems centered on Bessler "being difficult" and "less about the technical skills." (GC Exh. 7.)

On September 29, Mi spoke by Zoom with Bessler and Genegabus. Reading from a script, Mi told Bessler that he was being discharged "due to you creating a hostile work environment by soliciting help from your colleague[s] to retain your job." [26] (Tr. 301.) Prior to this, Bessler had never been disciplined for creating a hostile work environment.[27] (Tr. 301–302.)

Bessler's last day of work at Snowflake was September 29 and his official date of separation was October 2. (Jt. Exh. 22.)

III. CREDIBILITY

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness' testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950). In evaluating each side's proffered facts, I have reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g., *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a material point, my credibility findings are incorporated into my legal analysis below.

While I credit much of his testimony, I conclude that Bessler sought to minimize his lack of success as a manager. Additionally, based on the credible testimony of several witnesses, as well as documentary evidence, he was not frank and forthcoming about how his direct and sometimes incessant communication style could be viewed as off-putting to colleagues.

For much of his testimony, Mi came across as an honest witness. However, when it came to crucial testimony about when and why he decided to recommend that Bessler be discharged, Mi's testimony was marked by hesitancy, uncertainty, improbability, and lack of corroboration by the documentary evidence. The following examples stood out to me as being particularly telling. On direct, Mi testified that, during his one on one meeting with Bessler on August 11, Mi supposedly told Bessler that he was not meeting expectations and that this was his "last chance" and that he had "to improve quickly and significantly." (Tr. 819.) I find that each of these assertions was either unsupported by the record or unlikely. Mi's own summary of that August 11 meeting said nothing about Bessler failing to meet expectations; to the contrary, Mi rated Bessler as "meeting most expectations." On cross-examination, Mi conceded that his notes make no mention of telling Bessler this was his last chance to remain with the company. (Tr. 877.) With regard to the final point that Mi supposedly warned Bessler that he had to improve immediately, there is nothing in Mi's summary to support that—a fact that he also conceded on cross-examination. (Tr. 877.) Instead, Mi's notes from the meeting reflect mundane updates on work projects, such as the Core UI migration and the "AX Arch Migration." Moreover, Mi issuing a last chance warning to Bessler on this date would not make sense, since Bessler had begun his new role as an independent contributor just eight days before and there was hope that he would perform better in that purely technical capacity. As a second example of testimony lacking in plausibility, Mi asserted under oath that he discharged Bessler on September 22. (Tr. 842–843.) I discredit Mi's testimony about this event. Mi's own email to company executives stated that he merely broached the subject of a separation: "I have told Scott today during 1:1 that *I'd like to* work out a separation plan for him to leave Snowflake." (Jt. Exh. 19, p. 2.) (Emphasis added.) There was no mention of any discharge being effectuated. Additionally, nothing in Mi's notes from the one-on-one reference a discharge. (R. Exh. 47.) Given how significant a discharge would have been, I find it improbable that Mi's notes would contain no mention of that. Additionally, Mi's testimony about what he and Bessler said during the September 22 meeting was vague, uncertain, and lacking in detail. (Tr. 843–846.) Based on the foregoing, as well as his demeanor and overall testimony, I discredit Mi's testimony on any facts not included in Facts section above.

I also discredit key portions of Narayen's testimony, based on his inability to recall specifics about various meetings and events, eagerness to give any and all biased or vague testimony harm-

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[26] In the position statement that it submitted in this case to the investigating Board agent on April 16, 2021, Respondent disavowed this basis: "With respect to Mr. Bessler's conduct the evening of September 22nd where he reached out to his coworkers to support his employment at Snowflake, that cannot form the basis of any retaliation claim from a pure timing perspective. Mr. Mi had already finalized and communicated the decision to terminate Mr. Bessler's employment on September 22nd. Therefore, Snowflake could not have terminated Mr. Bessler ***because*** he pressured his coworkers for support on the evening of September 22nd since the termination decision had already been made and communicated to him ***prior to*** those events." (Emphasis original). (GC Exh. 9, p. 4.)

[27] On cross-examination, Mi added new reasons for the discharge. Mi said he decided to discharge Bessler because he was falling short of work expectations in two ways: failing to timely produce work and by engaging in a pattern of "inappropriate behavior," which included his conduct at the Apps Trio meeting. (Tr. 888–892.) On this second point, the General Counsel asked Mi to confirm that the Apps Trio meeting factored into his discharge recommendation. Mi hesitated, saying that he could not answer yes or no to that "trick question." The Administrative Law Judge told Mi that he did not have to say yes or no, but rather could answer in his own words. To this, Mi said that the Apps Trio meeting was just "one continuation of Mr. Bessler's behavior how to interact with other people." General Counsel asked Mi to confirm this testimony:

Q. BY MR. WONG: So—so Zheng, I under—so I understand you didn't—okay. Let me back up. You said that his inappropriate behavior at the meeting was sort of one of a continuation of—of inappropriate behavior, isn't that right?

A. That's correct.

(Tr. 892.)

ful to Bessler, and lack of candor while under oath. On that final observation, when the General Counsel confronted Narayen with his own Slack message that was supportive of Bessler and harmful to Respondent's defense, Narayen incredibly uttered, "I, truthfully, do not know why I typed it." Even given a moment to reconsider his testimony, Narayen persisted with the falsehood: "Yeah. I mean, I make a lot of Slack messages, and I certainly make mistakes in them." (Tr. 1017.) Based on the above, as well as his demeanor and overall testimony, I discredit Narayen's testimony where inconsistent with the facts presented above.

Analysis

Paragraphs 5 through 8 of the complaint allege that Bessler engaged in protected concerted activity on August 4, 7, and 26, and that Respondent discharged him on September 29 in retaliation for that activity, thereby violating Section 8(a)(1). In its defense, Respondent contends that the complaint in this matter is time-barred under Section 10(b), the General Counsel failed to establish a prima facie case, and Respondent showed that it would have discharged Bessler even absent any protected concerted activity.

Under Section 8(a)(1), it is unlawful for an employer to discriminate against an employee in retaliation for their protected concerted activity. When deciding whether an unfair labor practice has been committed, the Board asks whether the employee's conduct was both concerted and protected. *Miller Plastic Products*, 372 NLRB No. 134, slip op. at 3 (2023), *Morgan Corp*., 371 NLRB No. 142, slip op. at 2–3 (2022). The "concerted" inquiry focuses on the manner of the employee's conduct: whether it was engaged in with other employees or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Additionally, concerted activity includes situations "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 II*, 281 NLRB at 887. The "protected" inquiry focuses on the goal of the employee's activity: "chiefly, whether the employee or employees involved seek to improve their terms and conditions of employment or otherwise improve their lot as employees." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014) (citing *Eastex, Inc. v. NLRB*, 437 NLRB 556, 565 (1978)). Activity will be considered for mutual aid or protection simply if it "inures to the benefit of all." Id. at 155 (citing *Meyers II* at 887).

The framework for analyzing Section 8(a)(1) allegations turning on employer motivation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). For the General Counsel to establish a prima facie case, he must present sufficient evidence that the employee's protected concerted activity was a motivating factor in the adverse action. This can be done by showing that the employee engaged in protected concerted conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took an adverse action against the employee motivated at least in part by that animus. If established, the burden shifts to the employer to show that it would have taken the same adverse action, even absent such activity. *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam); *Intertape Polymer Corp*., 372 NLRB No. 133, slip op. at 10 (2023). An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. *Serrano Painting*, 332 NLRB 1363, 1366 (2000). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, 366 NLRB No. 180, slip op. at 2 (2018); *Bally's Park Place, Inc.,* 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929, 396 U.S. App. D.C. 205 (D.C. Cir. 2011).

The analysis in the instant case is nuanced because Bessler had been a Section 2(11) supervisor shortly before the events that led to his discharge and because as a supervisor he engaged in outspoken behavior which was not protected, while in his new capacity as an employee he engaged in outspoken behavior that was protected by Section 7. In the typical discrimination case, an employer learns of an employee's protected concerted activity and retaliates by disciplining or discharging them. Here, however, Bessler had a history of poor interpersonal skills which Respondent did not tolerate and which caused Respondent to lawfully counsel and demote him while he was a supervisor. But once Bessler became an employee on August 3, he came within the protections of the Act. Starting on that date, it was incumbent on Respondent to recognize and respect Bessler's Section 7 right to advocate for improved terms and conditions of employment —even if that advocacy was direct, unwelcome, or confrontational (but not violent or threatening). But Respondent failed to make that distinction. Instead, Respondent, especially Mi, erred by continuing to view Bessler as a supervisor who was being "inappropriate" and "disruptive," and who could lawfully be discharged on that basis.

Prima Facie Case. The General Counsel established a strong prima facie case. On three dates in August, Bessler engaged in conduct that was concerted, protected, and known to Respondent. On August 4, Parker discussed with Bessler and Naides his belief that Jenkins' auditing and re-auditing of his work was the product of bias, a subject that had been widely discussed before by many engineers. That day or the next, Bessler met with supervisor Jenkins to communicate those concerns and to seek changes in Jenkins' approach to reviewing work. This conduct was concerted in that biased review by the former Numeracy staff had been widely discussed by many engineers, and so Bessler was raising a "truly group complaint." *Meyers II*, 281 NLRB at 887. It was for the purpose of mutual aid and protection because Bessler spoke to Jenkins for the purpose of improving the review process by eliminating arbitrary considerations and instituting greater fairness and predictability. Moreover, Jenkins' alleged biased review process could harm Parker's productivity and thus his performance evaluations and bonus pay. *Morgan*

Corp., supra at 3 (discussions affecting wages were for mutual aid or protection). On August 7, Bessler spoke out against the API Change proposal at the Apps Trio meeting. At this meeting, which was attended by supervisors Mi, Child, and Jenkins, Bessler argued that the proposal failed to clearly identify what proposed code it applied to, could result in a biased review process by Smith and Jenkins, might lead to lowered evaluations and bonuses, and could slow down the approval process by mandating review by individuals who were already pressed for time. This conduct was concerted in that Bessler raised issues of group concern, which was evidenced by the fact that other engineers like Schoendorf and Lai echoed his points. The content of his advocacy plainly sought to improve the engineers' terms and conditions of employment, such as productivity, evaluations, and bonus pay.[28] See, e.g., *Carpenters Local 1109 v. NLRB*, 209 Fed. Appx. 692 (9th Cir. 2006)(employer violated Section 8(a)(1) by discharging an employee for his protected concerted advocacy over bonuses and other forms of pay). The proposal also pertained to terms and conditions because an employee's repeated failure to follow it could result in discipline or discharge from employment. *King Soopers, Inc*., 340 NLRB 628, 628–629 (2003) (in the context of a Section 8(a)(5) bargaining allegation, the Board stated that, although the employer was not obligated to bargain over the implementation of its decision, it did have to bargain over the policy since performance standards that can be enforced by discipline have an effect on job security and are therefore terms and conditions of employment). On August 26, Bessler joined the testing meeting. After Parker objected to Narayen's blanket approach to testing, Bessler concurred with him. Bessler then suggested that the testing protocols be applied to all teams, not just Parker's Core UI team, and offered possible alternatives, such as automated testing or snapshot testing. Bessler's conduct was concerted in that he was raising group concerns about biased treatment of the non-Numeracy engineers. It was for the object of mutual aid and protection because Narayen's blanket plan for testing would slow down the work processes of the Core UI team. This, in turn, could impact evaluations and bonus pay. Bessler's advocacy was known to management, as Narayen mentioned it to Mi who then questioned Bessler about "pushing back on testing" just seven days later at their one-on-one meeting. At these three meetings, Bessler did nothing to lose the protections of the Act—he made no threats, used no profanity, and engaged in no other misconduct of such a violent or serious character "as to render the employee unfit for further service." *Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at 2, fn. 12 (2023) (quoting *Beuttcher Mfg. Corp*., 76 NLRB 526, 527 (1948)).

In terms of the adverse employment action, Bessler was discharged on September 29.

The General Counsel presented overwhelming evidence of Respondent's animus towards Bessler's protected concerted activity. There is direct evidence of animus. On cross-examination, Mi admitted that he discharged Bessler because of his "inappropriate behavior" at the Apps Trio meeting. (Tr. 886–888.) This consisted of Bessler pointing out group concerns about the API change proposal which could affect employees' productivity, quarterly evaluations, and bonus pay. In short, what Mi deemed inappropriate was simply a "frank, and not always complimentary, exchange of views" that fell squarely within Section 7's protections. *Beuttcher Mfg. Corp*., supra at 527; *Climatrol, Inc*., 329 NLRB 946, 946 fn. 4 (1999) (citing several decisions where the Board deemed references to employees' "bad attitude," "negative attitude," and "work attitude" to be covert references to Section 7 activity). Mi thus admitted that a basis for his discharge recommendation was Bessler's protected concerted activity. *Austal USA*, 356 NLRB 363, 363 (2010)(discriminatory motive may be established through animus directed to the employee or about the employee's protected activities); *Starbucks Corp*., 372 NLRB No. 50, slip op. at 30 (2023)(animus based on supervisor's "venting email" complaining about the alleged discriminatees' protected concerted activities). Direct evidence of animus can also be found in Mi's September 22–23 email chain with company executives and his September 23 "key points" email to Genegabus and Bessler stating that he was taking action based on Bessler's conduct at the Apps Trio meeting and the testing meeting. The August 7 Slack exchange in which both Mi and Child criticized Bessler for raising concerns about the API Change proposal provides further direct evidence of animus, as did Child's August 10 email to Mi in which Child referred to Bessler's comments about the API Change proposal as "basically [an] attack [on] the entire premise in a meeting of 24 people" and disapproving of the fact that Bessler "questioned the proposal repeatedly." (R. Exh. 12.)

There was also ample evidence from which I infer animus. The timing of the discharge was highly indicative of this. Bessler had just made the transition to independent contributor on August 3, and management was hopeful that he would excel in this new position free of supervisory duties. Despite management's promise of a "clean slate" and hope for "a nice clean quarter" as an independent contributor, Mi jettisoned Bessler after just two months and just part way through the quarter.[29] While Mi made vague and conclusory claims that Bessler "was not performing positively" and that Mi's "recollection" was that Bessler had not completed projects during the brief time period he had been an independent contributor, no indications of such underperformance can be found in the documentary record. (Jt. Exhs. 17 and 19, R. Exh. 47, Tr. 821–822.) Because I have discredited Mi's testimony on Bessler being unproductive as an independent contributor, there is no credible evidence to explain the timing of the discharge based on lawful considerations. Rather, the obvious driver for the timing of the September discharge was Bessler's protected concerted activity in August. See

[28] Respondent asserts that Child's concerns about Bessler's conduct during the meeting pertained to his "aggressive tone" not to the content of his message. (R. Br., p. 57.) But the manner in which Bessler delivered his message cannot be separated from the content of his message —his advocacy was part of the res gestae of his protected concerted activities. *Lion Elastomers*, supra, at 2.

[29] In a Slack message with Child on September 23, it appears that Mi actually wanted to get rid of Bessler earlier but waited until after the company's IPO on September 15. Mi wrote that, with Bessler "well compensated" from the IPO, he implied that Bessler might more readily accept a separation from the company. (R. Exh. 25, p. 2.)

Detroit Newspapers, 342 NLRB 1268, 1271 (2004) (inferring animus based on the employer's rush to discipline open union adherent); *Charter Communications*, 366 NLRB No. 46, slip op. at 7 (2018) (discharge of employee within three months of employer knowledge of Section 7 activity evidence of animus).

Respondent Failed to Establish a Wright Line Defense. Given this strong prima facie case, the burden shifted to Respondent to demonstrate that it would have, not just could have, discharged Bessler, even absent his protected concerted activity. I find that it failed to do so. While Respondent presented reasons for why it could have discharged Bessler, all of them fell far short of showing that it would have discharged for those reasons.

As a threshold matter, Respondent raised the affirmative defense that the complaint is time-barred under Section 10(b) since Mi "unequivocally informed Bessler of his termination on September 22, 2020." (R. Br., p. 78.) This defense was unsupported by the credible evidence because on September 22 Mi merely broached the topic of Bessler separating from the company and started exploring "possible ways to part." No credible testimony and no documentary evidence showed that Bessler was actually discharged on that date. Additionally, on September 23, Czajkowski told Bessler that, while he could not remain on Mi's team, he could have one to two weeks to explore transferring to another team. Czajkowski's offer of a potential transfer was incompatible with Respondent's position that Bessler was discharged on September 22. Based on my finding that Bessler was not discharged until September 29, I reject Respondent's argument that the complaint is time-barred.

Respondent asserted that it discharged Bessler for performance problems. One group of performance problems was purportedly shown by Bessler's "below average performance ratings ***three quarters in a row***." (R. Br., p. 111.) (Emphasis original) But these ratings were based on Bessler's performance as a director, not in his new position as an independent contributor. If Respondent had truly been motivated by this, it would have discharged Bessler at the end of Q2, before converting him to independent contributor. Instead, Respondent waited until Bessler engaged in Section 7 activity. The second group of performance problems was based on the assertion that Bessler "continued to cause disruptions and confusion in meetings, blocked progress on projects, and was not timely delivering on his assigned projects." (R. Br., p. 112.) I find this argument unpersuasive because there is no evidence that Mi actually relied on such claims when deciding to discharge Bessler—he made no mention of them in his "key points" email to Bessler and Genegabus spelling out the bases for the discharge (Jt. Exh. 19) or in his emails to company executives on September 22 and 23 (Jt. Exh. 18) seeking to justify the discharge.

Respondent presented as comparator evidence examples of other employees discharged for allegedly underperforming at work or being disruptive in meetings, but these examples were lacking in detail and documentary support. (Tr. 715–722.) For example, while Human Resources Representative Genegabus spoke generally about the reasons why some of these individuals were let go, her testimony was not supported by any documentary evidence; was so vague as to be unhelpful for purposes of comparison to Bessler (for example, one person was described simply as being "disruptive in meetings" with nothing more); did not identify a timeframe for these actions other than being before September 2020;[30] did not specify whether the individuals were supervisors or employees; and, most critically, failed to indicate the nature of the individuals' purported misconduct. As to the final reason, there was no evidence showing that any of them engaged in protected concerted activity, a distinction that is obviously important to this case given Mi's admission that he relied on Bessler's advocacy at the Apps Trio meeting when deciding to discharge him. Moreover, Respondent presented no documentary evidence, such as counseling notices, that would make possible an informed comparison between these proffered comparators and Bessler.

Respondent raised, as an alternate defense that, if it is found that Bessler was discharged within the Section 10(b) period, Respondent "had reasons to terminate his employment" unrelated to any protected concerted activity: on September 22, Bessler reached out to several others to ask for their support. (R. Brief, p. 120). I find this defense unconvincing because, on September 22, Mi affirmatively gave Bessler permission to contact others to ask for their support or to explore the possibility of transferring to another work team. Moreover, in its position statement to the Region during the underlying investigation of this case, Respondent made clear that it did not rely on this when deciding to discharge Bessler. (GC Exh. 9, p. 4.)

Based on the foregoing, as well as my consideration of the record as a whole, I find that Respondent violated Section 8(a)(1) by discharging Bessler on September 29 in retaliation for his protected concerted activities.

Conclusions of Law

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

2. Respondent violated Section 8(a)(1) of the Act on September 29, 2020, by discharging employee Scott Bessler in retaliation for him having engaged in protected concerted activities.

3. The above violation is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I recommend that the Board order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employee Scott Besler for engaging in protected concerted activity, Respondent shall offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall make Bessler whole, with interest, for any loss of earnings and other benefits suffered as a

[30] Moreover, given that Genegabus' testimony about the dates of discharge was limited to answering leading questions by Respondent's counsel, I am not fully certain these discharges preceded Bessler's.

result of his unlawful discharge, including all stock options that would have vested had Bessler remained employed as an independent contributor. That backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall compensate Bessler for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 20 allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In addition to the backpay allocation report, Respondent shall file with the Regional Director for Region 20 a copy of Bessler's corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

In accordance with the decision in *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23, 429 U.S. App. D.C. 270 (D.C. Cir. 2017), Respondent shall compensate Bessler for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, with search-for-work and interim employment expenses being 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 accordance with the decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), Respondent shall compensate Bessler for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, if any, regardless of whether those expenses exceed interim earnings, with compensation for these harms being calculated separately from taxable net backpay, with the interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, Respondent shall remove from its files any reference to the unlawful discharge of Bessler and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Snowflake, Inc., San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities or to discourage employees from engaging in these activities.

(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 any Board Order, offer Scott Bessler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Scott Bessler whole for any loss of earnings and other benefits (including stock options), and for any other direct or foreseeable pecuniary harms, suffered as a result of his unlawful discharge, in the manner set forth in the remedy section of this decision.

(c) Compensate Scott Bessler for his search-for-work and interim employment expenses, regardless of whether those expenses exceed his interim earnings.

(d) Compensate Scott Bessler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or any Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Scott Bessler's corresponding W-2 form(s) reflecting the backpay award.

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

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

(h) Within 14 days after service by the Region, post at its facility in San Mateo, California, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the

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

[32] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

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 and former employees employed by the Respondent at the facility at any time since September 29, 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

Dated, Washington, D.C. September 15, 2023

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 representatives 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 you because you engage in protected concerted activities or to discourage other employees from engaging in these activities.

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 any Board Order, offer Scott Bessler full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Scott Bessler whole for any loss of earnings and other benefits (including stock options) resulting from our unlawful discharge of him, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Scott Bessler for the adverse tax consequences, if any, of receiving a lump-sum award for backpay and benefits, and WE WILL file with the Regional Director for Region 20, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL remove from our files any references to our unlawful decision to discharge Scott Bessler and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

WE WILL file with the Regional Director for Region 20, 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 Scott Bessler's corresponding W-2 form(s) reflecting the backpay award.

SNOWFLAKE, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 20-CA-274626 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

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."