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**Beatrice Loving Heart and Healthcare Agency and
Kirah Powell.** Case 05–CA–301128

September 30, 2026

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY
AND MAYER

On March 21, 2024, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ and the General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting 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 and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.³ For the reasons set forth below, we adopt the judge’s findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by implicitly threatening to discharge, and discharging, employee Kirah Powell on Au-

gust 3, 2022, because she engaged in protected concerted activity. We additionally find, contrary to the judge and as explained below, that the Respondent violated Section 8(a)(1) on August 3 by prohibiting Powell from sharing her Employment Security Agreement on that date. Finally, we have decided to sever the complaint allegation that the Respondent violated Section 8(a)(1) by maintaining an overbroad confidentiality rule in its Employee Handbook and retain it for further consideration to expedite the issuance of this decision regarding the remaining issues in this case.⁴

A. Alleged Unfair Labor Practices of August 3, 2022

The facts are set forth in considerable detail in the judge’s decision, and we summarize them only briefly here. The Respondent assists elderly and disabled clients by coordinating and monitoring the delivery of services from the State of Maryland and local agencies. Kirah Powell was employed by the Respondent as a support planner from June 2022 until her discharge on August 3, 2022.⁵ On several occasions during her brief employment, Powell raised concerns about wages and working conditions to her coworkers and to the Respondent’s agents. For example, during the hiring process, Powell signed an Employment Security Agreement which stated that, if Powell voluntarily quit or was terminated “for cause” within the first year of her employment, the Respondent

¹ The General Counsel moved to strike the Respondent’s exceptions, brief in support of exceptions, Table of Contents, and Table of Authorities. Sec. 102.5(i) of the Board’s Rules and Regulations permits, but does not require, the Board to reject a document not properly served on the parties. “The Board generally will not reject an improperly served document absent a showing of prejudice to a party.” *Paolicelli*, 335 NLRB 881, 882 (2001) (internal quotation marks and citation omitted); see also *Laborers International Union of North America Local 872, AFL–CIO (Various Employers)*, 372 NLRB No. 41, slip op. at 1 (2023). Here, there is no dispute that the General Counsel received the Respondent’s exceptions, brief in support of exceptions, Table of Contents, and Table of Authorities, albeit untimely. The General Counsel has alleged no prejudice from the delay and was granted an extension of time in which to file an answering brief and cross exceptions. Accordingly, we deny the General Counsel’s motion.

In her cross exceptions to the Administrative Law Judge’s decision, the former General Counsel requested that we order the Respondent to provide Kirah Powell front pay should she waive her right to reinstatement to her former position and further requested that the Board modify its standard reinstatement remedy to include the option of front pay in lieu of reinstatement. On February 20, 2026, the General Counsel filed a motion to withdraw that cross exception. We grant the motion.

² 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), enf’d. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) by issuing employee Kirah Powell an exit letter containing over-

broad defamation language and by maintaining that language in its exit letter. The Respondent has excepted to these findings, but it does not state, either in its exceptions or in its supporting brief, any grounds on which the judge’s purportedly erroneous findings should be reversed. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations, we choose to disregard these exceptions. 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), enf’d. 929 F.3d 610 (8th Cir. 2019). Member Prouty further notes that, even if the Respondent had filed properly supported exceptions, he would adopt the judge’s findings for the reasons stated in his decision.

³ We shall amend the judge’s conclusions of law and remedy to conform to the violations found. We shall also modify the judge’s recommended Order to conform to the violations found, to the Board’s standard remedial language, and in accordance with our decisions in *Cascade Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), *Paragon Systems, Inc.*, 371 NLRB No. 104, slip op. at 3–4 (2022), and *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024). We shall substitute a new notice to conform to the Order as modified.

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 id.

⁴ Member Prouty would not sever the allegation regarding the Respondent’s confidentiality rule for further consideration. He believes that the Board’s decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), provides ample guidance to decide this case today without severance.

⁵ All dates are in 2022 unless otherwise indicated.

could deduct \$2500 from her pay for the cost of the training. In July, Powell complained to her coworkers that the training repayment provision was unfair because the training the Respondent provided was inadequate and almost nonexistent. Two of Powell's coworkers agreed, and another coworker confirmed that the Respondent had kept the last paycheck of other employees who quit or were discharged. Powell also complained to her team leader, Andrea Beverly, and Administrative Manager Sarah Abbott that the training was inadequate and that it was unfair that "we" would have to repay the Respondent for training that was not really being provided. Powell informed Beverly that other employees shared her concerns about the quality of the training, and Beverly testified that she relayed Powell's concerns to Compliance Director Catherine Gaskins.

Also in July, during a group training session led by Onboarding Specialist Julia Amick, Powell noticed that the amount a client was billed for a home health aide visit had increased in comparison to the previous week. Powell asked Amick, "why did the pay increase[]? Was that a mistake?" Amick responded that it was not a mistake and that the Maryland Department of Health had authorized a six percent increase for "home health agencies and their staff members." There was no further discussion of the issue during the group training session. After doing some research, however, Powell came to believe that the Respondent's support planners were also eligible for the increase. Powell then separately discussed the matter with two of her coworkers. One of Powell's coworkers said she did not know about the increase. The other coworker said she knew about the increase but did not think the Respondent would give it to support planners.

On August 3, during a regularly scheduled Zoom meeting with Team Leader Beverly, Powell asked when the Respondent's support planners would receive the six percent wage increase authorized by the Maryland Department of Health. Beverly responded that she did not know, and she suggested that Powell ask Compliance Director Gaskins. After the meeting ended, liaison Ching Chang, who was attending the meeting with Beverly and Powell, set up a second Zoom meeting, with Beverly, Gaskins, and Administrator Rose Emelike to discuss Powell's perceived rudeness⁶ and her question regarding the six percent increase.⁷

⁶ Beverly testified that she did not think Powell was rude during the first Zoom meeting.

⁷ The judge found that Administrator Emelike, Team Leader Beverly, Compliance Director Gaskins, Onboarding Specialist Amick, and Administrative Manager Abbott were agents of the Respondent within the meaning of Sec. 2(13) of the Act. The judge additionally found that Emelike was a supervisor within the meaning of Sec. 2(11) of the Act. No party has excepted to these findings. The General Counsel has, how-

During the second Zoom meeting, Gaskins asked Beverly where Powell's information regarding the wage increase had come from. Beverly responded that she did not know. At Gaskins' direction, Beverly then called Powell and instructed her to join the meeting. Gaskins told Powell that she understood Powell had some concerns, and she asked what they were. Powell described her concerns, starting with the six percent increase. Specifically, Powell said that "the Maryland Department of Health authorized a six percent increase for home health agencies and support planners," and she asked when "we" would receive the increase. Gaskins said that Powell's information was not accurate and that she was not eligible for the increase.

Powell also raised her concerns regarding the training repayment provision. Powell stated that she "didn't think it was fair that we would have to . . . repay the agency the \$2500 . . . if we chose to leave." Gaskins responded that Powell had not done her "due diligence" in reviewing her Employment Security Agreement. Gaskins added that Powell seemed unhappy, and she suggested that Powell leave if she was so unhappy. Powell said she could not leave because the Respondent would take her last paycheck.

Powell then asked if she could share her Employment Security Agreement with the others at the meeting. Emelike said that would violate the Health Insurance Portability and Accountability Act (HIPAA), and she would end the meeting if Powell attempted to share the agreement. Powell responded that she did not think it would violate HIPAA for her to share her own employment agreement. Emelike then said, "[t]his seems like a performance issue" and ended the meeting.

That evening, the Respondent sent Powell a Notice of Termination, which listed "inability to perform and intentional gross negligence of not submitting relevant Smartsheet information" as the sole reasons for Powell's discharge. The Respondent subsequently sent Powell another email with an attachment titled Notice of Separation, which contained additional reasons for Powell's discharge. The Notice states, in relevant part

As follow-up, this letter is to inform you that your employment with Beatrice Loving Heart is terminated effective immediately due to

ever, excepted to the judge's failure to find that Beverly, Gaskins, and Amick were Sec. 2(11) supervisors as well as Sec. 2(13) agents. We find it unnecessary to address those exceptions. Finding that Beverly, Gaskins, and Amick had authority to act on the Respondent's behalf as statutory supervisors, as well as agents, would not affect the disposition of any issues in this case. *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1 fn. 3 (2020); *Poly-America, Inc.*, 328 NLRB 667, 669 fn. 6 (1999), aff'd. in relevant part 260 F.3d 465 (5th Cir. 2001).

- Medicaid Fraud—Billing the State of Maryland for services not provided.
- Consistent late POS submission and documentation of non-billable activities.
- Insubordination—Refusal to follow clear instructions provided by a direct supervisor.
- Falsification of activities in the LTSS system.

Team Leader Beverly, who was no longer employed by the Respondent at the time of the hearing, testified that she was “surprised” to learn that Powell had been discharged. In her pretrial affidavit, Beverly testified that she “did not believe Powell had a performance issue.”

1. Implied threat of discharge

The complaint alleges, and the judge found, that the Respondent, through Compliance Director Gaskins, violated Section 8(a)(1) of the Act by impliedly threatening Powell with discharge because she engaged in protected concerted activity. We agree. As described above, after Powell complained about the training repayment provision at the August 3 Zoom meeting, Gaskins commented that Powell seemed unhappy and suggested that she leave if she was so unhappy. The Board has long held that an employer’s suggestion, in response to employees’ union or other protected activity, that the employees should quit or seek employment elsewhere if they are unhappy, is an implicit threat of discharge and thus reasonably tends to restrain or coerce employees in the exercise of the rights guaranteed them under the Act. *Starbucks Corp.*, 373 NLRB No. 123, slip op. at 1 (2024) (collecting cases).⁸ The Respondent’s sole argument on exception to this finding is that Powell was not engaged in protected concerted activity, but rather, individual griping. We reject this argument.

Section 7 of the Act gives employees the right to, among other things, “engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157. Accordingly, for an employee’s activity to be protected under Section 7, two elements must be satisfied: the activity must be “concerted,” and it must be engaged in “for the purpose of . . . mutual aid or protection.” *Id.* The governing standard for determining whether activity is concerted is set forth in the Board’s decisions in *Meyers Industries*.⁹ In *Meyers I*, the Board held that “[i]n general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employ-

ees, and not solely by and on behalf of the employee himself.” 268 NLRB at 497. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity encompasses, among other things, “those circumstances where individual employees . . . bring[] truly group complaints to the attention of management.” 281 NLRB at 887. The Board also expressly stated that an individual employee’s activity may be concerted even though the individual was not “specifically authorized” in a “formal agency sense” to act as a spokesperson for group complaints. *Id.* at 886. Thus, an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of “group activities”—such as prior or contemporaneous discussion of the concern between or among employees—warranting a finding that the employee was indeed bringing to management’s attention a “group complaint.” *Id.*

Activity falls within the scope of the “mutual aid or protection” clause where the employee or employees involved are “seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Proof that an employee’s action “‘inures to the benefit of all’” is considered “‘proof that the action comes within the ‘mutual aid or protection’ clause of Section 7.’” *Id.* at 155 (quoting *Meyers II*, 281 NLRB at 887).

Here, Powell discussed the quality of the training and the training repayment provision with her coworkers, and at least two of her coworkers agreed that it was unfair to require employees to repay the Respondent for training that was inadequate or nonexistent. Powell then communicated the employees’ concerns about the quality of the training and the training repayment provision to Administrative Manager Abbott and Team Leader Beverly, and she specifically informed Beverly of the group nature of her concerns. Finally, at the August 3 Zoom meeting, Powell complained that it was unfair that “we” would have to repay the Respondent for the training if “we” chose to leave. The evidence therefore supports the conclusion that Powell was bringing “truly group complaints” regarding the quality of the training and the training repayment provision to the attention of management and was therefore engaged in concerted activity within the

⁸ Member Mayer agrees that statements, in response to employees’ union or other protected activities, that the employees should quit or seek employment elsewhere may be unlawful depending on the specific wording of the statement and context in which it is made. In this case, the Respondent does not advance any argument on exception that this statement was lawful in the context in which it was made.

⁹ *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

definition of *Meyers I* and *II*.¹⁰ The element of “mutual aid or protection” is also satisfied. In raising group concerns about the quality of training and the training repayment provision, Powell was “seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Fresh & Easy Neighborhood Market*, 361 NLRB at 153. We therefore affirm the judge’s findings that Powell was engaged in protected concerted activity when she raised group complaints about the quality of the training and the training repayment provision and that, by suggesting in response that Powell leave if she was so unhappy, the Respondent violated Section 8(a)(1).¹¹

2. Powell’s discharge

We also adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by discharging Powell because she engaged in protected concerted activity. In assessing whether an employer has violated Section 8(a)(1) by taking an adverse action against an employee because of the employee’s protected activity, the Board has applied the analytical framework set forth in *Wright Line*.¹²

Under *Wright Line*, the General Counsel bears the initial burden of establishing that an employee’s protected activity was a motivating factor in the employer’s adverse employment action.¹³ If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.¹⁴ It is long-established Board law that an employer’s burden cannot be satisfied if the reasons proffered for the adverse action are found to be pretextual. Accordingly, if the evidence as a whole “establishes that the reasons given for the [employer’s] action are pretextual—that is, either false or not relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent protected conduct”¹⁵

We conclude that the General Counsel has established that Powell’s protected concerted activity was a motivating factor in the Respondent’s decision to discharge her. As discussed above, the judge found, and we agree, that Powell engaged in protected concerted activity when she raised group complaints about the quality of the training and the training repayment provision. We also find that the Respondent had knowledge of the concerted nature of Powell’s activity. As described above, the record shows that in July, Powell complained to Administrative Manager Abbott and Team Leader Beverly, both Section 2(13) agents, that the training was inadequate and that it was unfair that “we” would have to repay the Respondent for training that “we” were not receiving. Moreover, Powell specifically informed Beverly that other employees shared her concerns, and Beverly testified that she relayed Powell’s concerns to Compliance Director Gaskins. Finally, at the August 3 Zoom meeting, Powell complained that it was unfair that “we” would have to repay the Respondent for training. These facts show that the Respondent was on notice of the group nature of Powell’s concerns.¹⁶

The record also contains ample evidence of the Respondent’s animus toward Powell’s protected concerted activity. First, the timing of Powell’s discharge raises a strong inference of discriminatory motive. Specifically, the Respondent discharged her on the same day she raised a group complaint about the training repayment provision, shortly after Gaskins impliedly threatened to discharge her for that activity. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (“The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity . . . may raise an inference of animus and unlawful motive.”), *enfd. mem. per curiam* 621 Fed. Appx. 9 (D.C. Cir. 2015). Additionally, as the judge found, we find that the Respondent’s alleged nondiscriminatory reasons for discharging Powell are pretextual. The finding of pretext both reinforces the inference of unlawful motive

¹⁰ It is immaterial that Powell was not acting as a designated spokesperson when she raised group concerns about the quality of the training and the training repayment provision with management. As discussed above, the Board specifically stated in *Meyers II* that it would not require evidence of formal authorization in order to find that steps taken by individuals in furtherance of group goals are a continuation of activity protected by Sec. 7 of the Act. *Meyers II*, 281 NLRB at 886.

¹¹ In finding that Powell engaged in protected concerted activity, we rely only on Powell’s communication of group complaints about the quality of the training and the training repayment provision and find it unnecessary to pass on the judge’s findings that Powell engaged in any other protected concerted activity, as doing so would not affect the disposition of any of the issues in the case.

Member Prouty would affirm the judge’s finding that Powell also engaged in protected concerted activity when she inquired about the six percent pay increase. Specifically, he finds that Powell’s inquiries regarding the pay increase were sufficiently linked to group activity to

constitute concerted activity within the meaning of Sec. 7. He also finds the element of “mutual aid or protection” is satisfied, as Powell was obviously “seeking to improve terms and conditions of employment” for herself and her coworkers “or otherwise improve their lot as employees.” *Fresh & Easy Neighborhood Market*, 361 NLRB at 153 (internal quotation marks omitted).

¹² 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹³ *Id.* at 1089.

¹⁴ *Id.*

¹⁵ *Cadillac of Naperville*, 371 NLRB No. 140, slip op. at 2 (2022) (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)).

¹⁶ In finding that the Respondent had knowledge of Powell’s concerted activity, we do not rely on the judge’s finding that knowledge can be inferred from Powell’s comments at group meetings about smart sheets and the six percent pay increase or from her complaints about smart sheets during one-on-one meetings with Beverly.

and “‘defeats any attempt by the Respondent to show that it would have discharged’” Powell absent her protected activity. *United Parcel Service, Inc.*, 372 NLRB No. 158, slip op. at 16 (2023) (quoting *Rood Trucking Co.*, 342 NLRB 895, 898 (2004)); see also *Golden State Foods*, 340 NLRB at 385 (“[I]f the evidence establishes that the reasons given for the [employer’s] action are pretextual . . . the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.”). As described above, on August 3, the Respondent sent Powell a “Notice of Termination,” which listed “inability to perform and intentional gross negligence of not submitting relevant Smartsheet information” as the sole reasons for Powell’s discharge. The Respondent subsequently sent Powell a “Notice of Separation,” which listed several additional reasons for Powell’s discharge, which were not mentioned in her “Notice of Termination.” Specifically, the “Notice of Separation” stated that Powell was discharged for Medicaid fraud, late “POS” submission, documentation of nonbillable activities, insubordination, and falsification of activities. Based in part on his credibility determinations, which, as noted above, we do not disturb, the judge found that the Respondent’s stated reasons for discharging Powell were false and that the documents the Respondent introduced at the hearing to substantiate those reasons (e.g., performance evaluations, emails, incident reports, and a warning) were fabricated.¹⁷

Although the Respondent excepted to the judge’s finding that its proffered reasons for discharging Powell were pretextual, its exceptions to this finding do not meet the minimum requirements of Section 102.46(a)(1)(i) of the Board’s Rules and Regulations. The Respondent merely cites to the judge’s finding and fails to set forth, either in its exceptions or its supporting brief, the particular error the judge committed or the grounds for reversing the judge’s purportedly erroneous finding. We therefore affirm the judge’s finding that the Respondent’s asserted reasons for discharging Powell were pretextual. Accordingly, we affirm the judge’s finding that the Respondent

discharged Powell because of her protected concerted activity in violation of Section 8(a)(1).¹⁸

3. Emelike’s prohibition on Powell sharing her Employment Security Agreement

The complaint alleges that the Respondent, through Emelike, violated Section 8(a)(1) by prohibiting Powell from sharing her Employment Security Agreement with others. The judge dismissed the allegation because, in his view, Emelike’s remark seemed to be “more a prohibition limited to attendees at the August 3 Zoom meeting,” and it was not clear that Emelike ordered Powell not to share her Agreement with other employees. We disagree.

As described above, the credited testimony establishes that, at the August 3 meeting, Powell raised concerns about the requirement that employees repay the Respondent for training costs if they chose to leave. Gaskins remarked that Powell had not done her due diligence in reviewing her Employment Security Agreement. Powell then asked if she could share her Employment Security Agreement with the others attending the meeting, and Emelike responded that it would violate HIPAA for Powell to share her Employment Security Agreement and that she would end the meeting if Powell attempted to do so.

“The Board has long held that the standard to be used in analyzing statements alleged to violate Section 8(a)(1) is whether they have a reasonable tendency to coerce employees in the exercise of their Section 7 rights.” *Lush Cosmetics, LLC*, 372 NLRB No. 54, slip op. at 3 (2023). Applying that objective standard, we find Emelike’s assertion that Powell’s sharing of her Employment Security Agreement would run afoul of Federal privacy laws would reasonably be interpreted as a broad prohibition on employees sharing their Employment Security Agreement with anyone, including fellow employees, third parties, union agents, and the Board. Contrary to the judge’s finding, there is nothing in Emelike’s statement that would lead a reasonable employee to believe that the prohibition only pertained to the attendees at the meeting. Emelike did not qualify the broad prohibition; for example, she did not say anything that would suggest Powell was permitted to share the agreement with other employees, or to share with them the details of the agreement that related to her

¹⁷ The judge discredited the testimony of the Respondent’s witnesses regarding the reasons for Powell’s discharge, and he found that the documents the Respondent introduced to substantiate those reasons were fabricated, based on the shifting reasons given for Powell’s discharge and other inconsistencies in the Respondent’s documents, its original position statement, the testimony of its witnesses, and Administrator Emelike’s pretrial affidavit. The Respondent filed bare exceptions to the judge’s credibility determinations, his findings that the Respondent fabricated documentary evidence, and his acceptance of Administrator Emelike’s pretrial affidavit into the record and reliance on inconsistencies in her affidavit and her testimony at the hearing. As a result, in ac-

cordance with Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations, we choose to disregard the Respondent’s bare exceptions. 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).

¹⁸ Because we affirm the judge’s finding that the Respondent discharged Powell for engaging in protected concerted activity, we find it unnecessary to pass on the judge’s alternative finding that the Respondent discharged Powell as a “preemptive strike” in order to prevent her from discussing her concerns about terms and conditions of employment with other employees.

wages, hours, or other terms and conditions of employment. In these circumstances, the statement that sharing her Employment Security Agreement would violate HIPAA would tend to cause reasonable employees to refrain from engaging in protected activities rather than risk discipline for violating the prohibition. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by prohibiting Powell from sharing her Employment Security Agreement.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law:

1. Beatrice Loving Heart and Healthcare Agency (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by
 - (a) impliedly threatening Kirah Powell with discharge by inviting her to quit her employment with the Respondent because of her protected concerted activity;
 - (a) discharging Kirah Powell because of her protected concerted activity;
 - (c) prohibiting Kirah Powell from sharing her Employment Security Agreement;
 - (d) sending Kirah Powell an exit letter containing overbroad defamation language which would reasonably tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act;
 - (e) maintaining overbroad defamation language in its exit letter which would reasonably tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act; and
3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall 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) of the Act by discharging its employee Kirah Powell for engaging in protected concerted activity, we shall order the Respondent to offer her full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. We shall also order the Respondent to make Powell whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discharge. 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).

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), the Respondent shall also compensate Powell for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Further, we shall order the Respondent to compensate Powell 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 5 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, we shall order the Respondent to file with the Regional Director for Region 5 a copy of Powell'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).

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

ORDER

The National Labor Relations Board orders that the Respondent, Beatrice Loving Heart and Healthcare Agency, Inc., Lanham, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Threatening to discharge employees by inviting them to quit because they engage in protected concerted activities.
 - (b) Discharging employees because they engage in protected concerted activities.
 - (c) Instructing employees to refrain from sharing information about their terms and conditions of employment, including their Employment Security Agreement.
 - (d) Sending employees exit letters containing overbroad defamation language which would reasonably tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - (e) Maintaining overbroad defamation language in its exit letter which would reasonably tend to interfere with,

restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

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

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

(b) Make Kirah Powell whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Kirah Powell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 5, 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.

(d) File with the Regional Director for Region 5, 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 Kirah Powell's corresponding W-2 forms 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 Kirah Powell in writing that this has been done and that the discharge will not be used against her 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 Lanham, Maryland facility copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 5, 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 August 3, 2022.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) of the Act by maintaining an overbroad confidentiality rule in its Employee Handbook is severed and retained for further consideration.

Dated, Washington, D.C. September 30, 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

¹⁹ 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

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 threaten you with discharge for engaging in protected concerted activities.

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

WE WILL NOT instruct you to refrain from sharing information about your terms and conditions of employment, including your Employment Security Agreement.

WE WILL NOT present you with an exit letter containing overbroad defamation language which prohibits, or reasonably may be read to prohibit, your exercise of the rights listed above.

WE WILL NOT maintain overbroad defamation language in our exit letter which prohibits, or reasonably may be read to prohibit, your exercise of the rights listed above.

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

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

WE WILL compensate Kirah Powell for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 5, 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).

WE WILL file with the Regional Director for Region 5, 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 Kirah Powell'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 our unlawful discharge of Kirah Powell and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

BEATRICE LOVING HEART AND HEALTHCARE AGENCY

The Board's decision can be found at <https://www.nlrb.gov/case/05-CA-3011128> 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



Matthew Nagy, Esq., for the General Counsel.

Bruce Luchansky, Esq. (Towson, Maryland), for the Respondent.

DECISION

STATEMENT OF THE CASE

FINDINGS OF FACT

SUMMARY AND ISSUES

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C. October 24–26, 2023, and on January 19, 2024. Kirah Powell filed the initial charge in this case on August 8, 2022. The General Counsel issued the complaint on April 25, 2023.¹

Respondent is a case management company providing in-home support to disabled and elderly individuals in Maryland. It derives gross revenues in excess of \$250,000, a substantial amount of which comes from the Federal Government. Respondent receives more than \$5000 worth of goods, products and materials directly from outside of Maryland. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I have read and considered the General Counsel and Respondent's post-trial briefs.

¹ Tr. 166, line 2 should read authentication, not authorization. Tr. 214, line 23 should read 612, not 1612.

The Charging Party, Kirah Powell, worked for Respondent for about 2 months as a support planner. During this period, early June to August 3, 2022, Powell was a probationary employee. The General Counsel alleges Respondent discharged Powell during or just after a Zoom video conference on August 3, 2022, because she engaged in protected concerted activity by discussing working conditions, including employee training and wages with other employees.

The General Counsel also alleges the Respondent, by Agency Administrator Rose Emelike, violated the Act during an August 3 Zoom meeting, by telling Powell the Respondent's Employment Security Agreement was confidential and could not be shared with others. Further, the General Counsel alleges that Respondent, by Catherine Gaskins, violated the Act during an August 3 Zoom meeting by telling Powell that if she did not like working for Respondent, she should quit and work elsewhere.

Finally, the General Counsel alleges Respondent is violating the Act by maintaining an over-broad Confidentiality policy in its Employee Handbook and sending Powell an employee exit letter with an illegal defamation policy.

As set forth below, I conclude that Respondent violated the Act in discharging Kirah Powell, inviting her to quit, sending Powell an exit letter with an illegal defamation policy and that it is violating the Act by maintaining that policy.

*Facts Based on Credited Testimony Kira Powell's
employment with Respondent*

As a support planner, Powell was assigned to individual disabled clients to assist them with their needs, such as ordering durable medical equipment and billing. Powell testified she reported to Madison Green and then Andrea Beverly, who she testified were team leaders. Respondent admits that Beverly was her team leader, but not Green, who it states was a file clerk who worked for it for only 15 days.

Powell worked remotely and logged onto Zoom from 8 to 3 or 3:30 p.m. Monday through Friday. She testified that she met weekly with Beverly on Zoom. Powell participated in Zoom training sessions once a week with other newly hired employees, which were led by Julia Amick. Administrative Manager Sarah Abbott also participated in at least some of these group meetings with newly hired support planners, Tr. 114-115.

Powell and Beverly testified that Beverly reported to Catherine Gaskins. Respondent claims that is incorrect. Gaskins testified that team managers reported to Bianca Parker, Tr. 232. If Andrea Beverly's testimony is accurate, as I have found, that testimony is untruthful, at least as of August 2022.

Gaskins testified that she is Respondent's Compliance Director, essentially the liaison between Respondent and the Maryland

Department of Health. She testified that her job is to communicate with the Maryland Department of Health and to insure that Respondent complies with that Department's rules and policies. Gaskins testified, in Powell's presence, that she was not familiar with Kirah Powell, that she could recall no interactions with Powell and at the hearing did not recognize her (Tr. 258-260).²

Respondent contends that Gaskins' computer-generated electronic signature appears on several documents as a supervisor due to an error by Human Resources Specialist Bianca Parker or someone else clicking on the wrong name.³ Among these documents are Probationary Employee Performance Reviews for Powell and another employee dated July 22, 2022, and August 2, 2022 (GC Exhs. 16 & 17).⁴ The import of Powell's testimony, which I credit, is that these documents and Bianca Parker's testimony about them are fabrications (Tr. 203-210). Performance evaluations on new hires are typically done after 90 days of employment, A review might be done earlier if there were egregious performance issues (Tr. 334).

Julia Amick, Respondent's on-boarding specialist, testified that she reports on the progress of new hires to Bianca Parker. At the hearing Amick did not recall any specifics about Kirah Powell's employment with Respondent, including any complaints or criticisms of Powell. Amick testified that since August 2022, she has on-boarded over 100 new hires. Amick testified that she could not recall any conversations with Bianca Parker about Powell.⁵ She also testified that if she complained about Powell to Parker, that should have been documented.

Respondent maintains "Smart Sheets" on each individual client. Powell contends she was unable to complete them in a timely manner due to the press of other work duties. Powell testified that she discussed the difficulty in keeping up with the Smart Sheets with several co-workers and that other employees were having the same problem.

Powell did not receive any formal discipline during her 2 months of employment with Respondent. However, Bianca Parker, Respondent's lead human resources employee, testified that she met with Powell and the three support planners who were hired at the same time, individually on about the 10th, 30th, and 45th day of their employment. These conversations allegedly occurred either via Zoom or telephone. Powell testified that such meetings never occurred. There is no date on the emails by which Parker purportedly transmitted these evaluations (Tr. 463-464). I credit Powell.

Parker testified that these meetings occurred on or about June 26, July 13 and July 27. There are documents that purport to memorialize these meetings (R. Exhs. 5, 6, and 7).⁶ Parker testified that these evaluations were sent to Respondent's administrators, Rose Emelike, Josh Emelike and Chris McBurroughs.

² While Gaskins testified over a year after the events in question, Respondent was on notice 8 days after Powell's termination that the events of August 3, 2022, were at issue. One would expect it to memorialize the accounts of all managers who had any information about the circumstances of Powell's termination, including Gaskins. This is so even if it was not on notice to preserve the recording of the Zoom meetings that day.

³ Parker's testimony suggests the Respondent listed its managers by the first name (Bianca, then Catherine) rather than by last name (Gaskins, Parker). This strikes me as very unusual.

⁴ Gaskins testified she never saw these prior to the hearing and did not authorize anyone to sign them with her name, Tr. 260-263. I discredited her.

⁵ Rose Emelike testified that Bianca Parker and Amick reported to her about Powell's failure or inability to timely complete Smartsheets, Tr. 393-394. I discredited this testimony.

⁶ These documents are illegible due to the small print. However, I was able to discern the portion relating to Powell in R-7 with a magnifying glass.

Parker testified that some of her information came from Powell's team leader, Andrea Beverly. Beverly testified that she doesn't know who Parker is.

The evaluations of Powell are very negative. They mention that clients are consistently reporting that they had never spoken to Powell. In these documents, Parker suggested further investigation by the administrators. They also mention Powell's failure or inability to complete Smartsheets on time. These evaluations were not provided to Powell. I find they are fabricated.

When hired, Respondent provided Powell with an offer letter which she was to use in obtaining housing. Powell contends her landlord noticed a discrepancy between Powell's pay stubs and her offer letter.⁷ The landlord demanded an explanation. According to Powell, she tried on numerous occasions to get Respondent to give her an employment verification letter in order to satisfy her landlord. She testified that despite its promises, Respondent did not do so.

Rose Emelike testified that she made the decision to terminate Powell and that she was unaware of any issue concerning Powell's employment verification letter. I discredit Rose Emelike's testimony in all material respects.

Powell testified that she became aware that home health aides in Maryland were getting a 6% increase in salary. Powell discussed this with co-workers and testified that she inquired to Amanda Beverly and Catherine Gaskins as to whether the support planners would get the same increase. She also asked about the 6 percent increase in a group meeting of newly hired employees which was led by Julia Amick.

Powell testified that she also discussed with coworkers and complained to Respondent's management, including Beverly and Gaskins, about another issue: the obligation to reimburse Respondent for \$2500 for the training it provided if she quit within her first year.

Powell testified that she received no indication that there was anything wrong with her job performance prior to August 3, 2022. She testified she had a 30-day "check-in" with Sarah Abbott, an administrative manager, but never had a performance evaluation or any negative feedback until August 3 (Tr. 209–210). Powell testified that Abbott asked her about any concerns she had about Respondent and nothing else.⁸

Bianca Parker testified that she conducted evaluations with Powell and 3 employees who were hired at the same time on or about June 27, July 14 and 28. Respondent's exhibits R-5, 6 and 7 corroborate this—unless they are fabricated. Powell testified that such meetings/evaluations did not occur (Tr. 579). As stated before, I credit Powell.

On August 2, 2022, Andrea Beverly texted Powell about a Zoom meeting to take place at 1:00 or 1:30 the next day (GC Exh. 7). *The five Zoom calls on August 3, 2022*

Call #1

On August 3, Beverly had a regularly scheduled Zoom meeting with Powell at about 1 p.m. (Tr. 659–860). Much to the surprise of Powell and Beverly, Ching Chang, a liaison between agency staff and Respondent's administrators, was on the Zoom call.⁹ Powell asked Beverly why Chang was on the call. Beverly told Powell that Chang was present to monitor her and give her advice.

According to Powell, Beverly asked her how she was doing with completing the Smart Sheets. Powell replied that she was way behind due to her caseload. Beverly suggested she try to complete 2 Smart Sheets at a time but did not chastise Powell.

Powell testified that she then inquired about the employment verification form. Beverly told her she'd consult higher management. Powell then asked whether the support planners would be getting the same 6% raise as home health aides. Beverly said she was not sure. Powell complained about the quality or consistency of her training to Beverly and stated the other new hires had similar complaints (Tr. 652).¹⁰

Call #2

After this call, Ching Chang called Beverly and stated she thought Powell was rude in asking why Ching Chang was on the first call. She asked for another meeting with Rose Emelike and Catherine Gaskins to discuss Powell's perceived rudeness and Powell's inquiry about a 6 percent raise (Tr. 665).

Call #3

Participants in the third call on August 3, 2022, were Rose Emelike, Beverly, Catherine Gaskins and Chang. (Tr. 663.) During this meeting Emelike and Gaskins asked Beverly where Powell got her information regarding a six percent raise (Tr. 675.) Beverly responded that she did not know. After this call, Beverly set up another meeting, which included herself, Chang, Powell, Rose Emelike and Catherine Gaskins (Tr. 675).

Call #4

According to Powell, Beverly called her 30 minutes after their first call on August 3, and told her there would be another meeting that day. Powell testified that she logged onto the second meeting at about 2:30 p.m. Present at this meeting, according to Powell and Beverly were Powell, Beverly, Rose Emelike, one of Respondent's 3 agency administrators,¹¹ Catherine Gaskins and Ching Chang (referred to as Chen in the transcript). Powell and Beverly, who I credit, testified that human resources specialist Bianca Parker was not on this Zoom call.

Powell testified that Ching Chang and Emelike had their cameras off. Catherine Gaskins testified that she did not recall participating in such a meeting or any Zoom meeting with Powell, and was totally unfamiliar with Powell (Tr. 261, 267).¹² Later

⁷ The offer letter and the Employment Security Agreement appear to be the same document, Tr. 160.

⁸ Abbott did not testify in this proceeding.

⁹ Beverly referred to Ching Chang as "Chen." Ching Chang did not testify in this proceeding.

¹⁰ It is unclear whether Chang mentioned the Powell inquiry about the 6% raise in call #2 or call #3, or both.

¹¹ The 3 Agency Administrators are Respondent's highest-level officials. The other 2 administrators are Josh Emelike, Rose Emelike's brother and Chris McBurrough. The highest-level human resources official, Bianca Parker, is married to Josh Emelike.

¹² Gaskins' name appears on a performance review for another employee, GC Exh. 17.. Gaskins testified that she did not sign it or Powell's. HR director Bianca Parker testified that Gaskins' name appears due to an error by whoever digitally signed the document. Rose

she testified more directly that she was not on a Zoom call with Powell on August 3 (Tr. 267). Rose Emelike also testified that Gaskins was not present on Zoom for this meeting, Tr. 399. Bianca Parker testified that the people at the meeting were herself, Powell, Beverly and Rose Emelike (Tr. 528). Emelike, and Bianca Parker also testified Ching Chang was not present.

Powell testified that Gaskins asked her about Powell's issues with the employment verification. Gaskins told her that this had already been taken care of. Powell and Beverly, who I credit, testified that Powell asked Gaskins about the 6 percent wage increase. Beverly testified that Gaskins told Powell, that Powell's information was not accurate (Tr. 667). According to Powell, Gaskins told Powell she (Gaskins) did not know what Powell was talking about. Later, according to Powell, Gaskins told her that she was ineligible for the raise because she was new.

Powell further testified that she complained about the need to reimburse Respondent \$2500 for her training if she quit before a year was up. Powell testified that Gaskins then said that if Powell did not like working for Respondent, she should quit. Powell then testified that she asked Gaskins if she could share her employment security agreement with those in the meeting (Tr. 160). Beverly corroborated Powell on this. At this point, Powell testified that Rose Emelike interjected and told her that would violate HIPPA and that if Powell shared the employment security agreement, Emelike would end the meeting. Beverly confirms that the meeting ended shortly after this exchange.

Then according to Powell, Emelike said something like this sounds like a performance issue and ended the meeting. Gaskins said she would call Emelike to discuss the next steps.

Rose Emelike testified that Powell did not raise the employment verification letter, the 6 percent raise, recoupment of training expenses or the employment security agreement at the August 3 Zoom meeting (Tr. 420–421). As to what transpired in the Zoom meetings, I credit Powell and Beverly and discredit Rose Emelike, Catherine Gaskins and Bianca Parker.

Call # 5

After the meeting with Powell, Beverly, Chang, Gaskins and Rose Emelike had another Zoom meeting. At this meeting Emelike and Gaskins asked Beverly where Powell got her information regarding the 6 percent raise. (Tr. 675). Beverly responded that she did not know. Beverly was not informed that Powell was going to be terminated.

Powell's termination

Later that day, Powell contacted Beverly to ask about her billing for the day. Beverly discovered that Powell was no longer in Respondent's email system. After that Powell contacted Beverly to tell her Powell had been terminated. Beverly was surprised. There was no indication that Powell would be or

might be terminated in any of the Zoom calls on August 3, or prior to that day. There is no credible evidence that Respondent was considering terminating Powell prior to August 3.

At trial Beverly initially testified that Powell had performance issues, but none that warranted termination. In her affidavit, Beverly stated, "I did not believe Powell had a performance issue" (Tr. 680). I find that Powell did not have performance issues warranting her termination.

At the conclusion of Beverly's testimony, I asked her several questions due to the discrepancy between her testimony and that of Bianca Parker (Tr. 680-681). When I asked her if she knew who Bianca Parker is, she answered No and then "I heard the name, but I'm not sure who she is. I don't recall, like, her title or anything." Beverly said she could not recall having any interaction with Parker while she worked for Respondent. She also testified that she could not recall being in a Zoom meeting with Parker.

Emelike testified that the main reason Respondent terminated Powell was Medicaid fraud, i.e. billing for services she did not provide. The termination letter dated August 3, mentions an alleged failure to submit Smartsheet information, but does not mention fraud. A similar letter sent to another employee (GC Exh. 28), highlights Medicaid fraud (documenting activities that are not billable) as a reason for this employee's termination.

However, Respondent sent Powell another document (R. Exh. 15), entitled Notice of Separation which states that Powell is being terminated due to Medicaid Fraud-Billing the State of Maryland for services not provided, consistently late POS submission and documentation of non-billable activities, Insubordination-refusal to follow clear instructions provided by a direct supervisor, falsification of activities in the LTSS system.

The position statement Respondent submitted on August 29, 2022,¹³ to the Board investigating agent also mentions the Smartsheet issue, but not fraud (GC Exh. 22).¹⁴ Beverly's testimony indicates that there was no discussion of fraud at any of the Zoom meetings she attended on August 3.

After the meeting, Powell sent a text to a coworker in which she stated that she almost had to cuss Catherine [Gaskins] out. An hour or so later, Powell was locked out of her work email account. Powell testified that she called Beverly, who told her that Respondent would be sending her a letter. A few days later, on August 9, 2022, Powell received a termination letter signed by a rank-and-file human resources employee. This letter had an attachment, entitled exit details. The exit details included the warning against defaming Respondent, which the General Counsel asserts violates Section 8(a)(1).

Rose Emelike testified that she decided to terminate Powell on August 2 after determining that Powell billed for services she did not provide.¹⁵ Specifically, Respondent contends Powell claimed to have contacted or visited clients or their representative, who

Emelike's testimony suggests that in its PurelyHR system, individuals are listed by their first name. Thus, Catherine Gaskins would appear right under Bianca Parker, making it easy for one to click onto Gaskins' name when they intended to click onto Parker's name, Tr. 411. I find that Gaskins signed these performance reviews and that the testimony of Gaskins and Parker to the contrary is false.

¹³ This position statement was prepared with the assistance of a different attorney than Mr. Luchansky. He entered his appearance on behalf of

Respondent on July 18, 2023, GC Exh. 34. Respondent was represented by 2 other attorneys before Mr. Luchansky.

¹⁴ Bianca Parker testified that her information that Powell was not contacting her clients came from Beverly, Tr. 511. Beverly's testimony belies that.

¹⁵ She also testified that she decided to fire Powell as early as July 28, but had to consult with the other administrators, her brother Josh and Chris McBurrough. R. Exh. 12 appears to support this. However, I do

reported that they had never seen or heard from her. The record contains 3 documents¹⁶ that appear to corroborate this with regard to 2 clients. Emelike testified these documents are predicated on phone calls she personally made (Tr. 385). I discredit all this testimony.

Further Discussion of Credibility Resolutions

The key witnesses for the General Counsel were the Charging Party/Alleged Discriminatee Kirah Powell and Andrea Beverly, a former employee of Respondent, who was Powell's team leader/supervisor during Powell's employment. While Beverly's testimony does not corroborate all of Powell's testimony it does so in every material respect.

Beverly initially ignored the General Counsel's subpoena and testified pursuant to an order from a United States District Court Judge. When testifying Beverly did not remember many material facts until her recollection was refreshed with an affidavit she gave to a Board Agent on November 8, 2022. In assessing the credibility of the witnesses, the fact that Beverly appears to have no interest in the outcome of this case is very important. Moreover, there is nothing in this record discrediting her or her testimony.¹⁷

The key witnesses for Respondent were Rose Emelike, one of Respondent's Administrators (one of the 3 chief managers of Respondent), Catherine Gaskins, whose title is compliance director and Bianca Parker, a human relations specialist, who is the wife of Josh Emelike, Rose Emelike's brother, another of Respondent's administrators. Julia Amick, Respondent's training specialist, also testified.¹⁸

Ordinarily, the inconsistencies in the testimony of Respondent's witnesses and the shifting reasons in its documents would be reason enough to discredit much or all of Respondent's evidence. The Board has held that when, as here, an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005), *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005), and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997).

However, in this case, I do not have to rely just on the inconsistencies in the testimony of one of Respondent's witnesses compared to another of its witnesses and to its documents. I also rely on the lack of any motive on the part of Andrea Beverly to

fabricate her testimony and the motives for Respondent's witnesses to fabricate theirs. Rose Emelike's February 25, 2023, affidavit, among other things, convinces me that much of Respondent's testimony is false and that some of its documents, e.g. Parker's evaluations and her signature on Powell's performance evaluation are fabrications. Emelike's affidavit gives no indication of evaluations by Parker and instead indicates there wasn't any performance evaluation of Powell until August. Emelike stated in her affidavit that "Powell's first evaluation was on August 2, 2022." (GC Exh. 21).¹⁹

In conclusion, I find Powell and Beverly to be credible in all material respects and that Rose Emelike, Catherine Gaskins and Bianca Parker are incredible witnesses in all material respects. Powell's testimony is credible on its face and is not full of the inconsistencies and contradictions that mar Respondent's testimony. Moreover, her testimony in its material respects is corroborated by the testimony of Beverly, an impartial witness. *Julia Amick's testimony: inconsistency with other Respondent witnesses*

During Powell's employment, Julia Amick, Respondent's onboarding specialist, met with probationary employees regularly over Zoom. She testified that she reported on the progress of new hires to Bianca Parker. Amick testified that Parker typically makes a performance review of a new hire after 90 days of their employment. She testified that one could be done earlier if she informed Parker that there were egregious performance issues, (Tr. 334-335.)

Amick testified that she could not recall any conversations with Bianca Parker about Powell.²⁰ She also testified that if she complained about Powell to Parker, that should have been documented by Bianca Parker or one of the administrators. There is no documentation of criticism of Powell by Amick in this record.

Amick did not recall any specifics about Kirah Powell's employment with Respondent. Amick testified that since August 2022, she has on-boarded over 100 new hires. However, given that Respondent received an unfair labor practice charge regarding Powell's discharge within 8 days, I would expect Respondent to gather whatever evidence it had concerning her alleged poor performance. This would include preserving evidence from Amick, who had regular contact with Powell. I am extremely skeptical regarding Amick's testimony that she has no recollections regarding Powell or if there were indeed performance issues. If Amick was unaware of any such issues, this indicates

not believe this document was prepared on July 28. Emelike's affidavit does not mention the document, or any determination made on July 28. To the contrary Emelike stated in her affidavit that she made the decision to terminate Powell on August 2, 2022, and discovered that that Powell was claiming to contact clients she had not contacted on August 1. Nothing in Emelike's affidavit indicates she was considering terminating Powell in July.

¹⁶ 2 of the documents have the same client #. I assume they pertain to the same person.

¹⁷ The General Counsel subpoenaed Beverly to testify at this hearing. She did not show up at the in-person hearing in October 2023. The General Counsel enforced its subpoena in the United States District Court in Baltimore. Beverly testified on January 19 per court order in a hearing that was conducted via Zoom due to a snowstorm in the D.C. area that day.

¹⁸ All of Respondent's witnesses were initially called by the General Counsel as adverse witnesses, except for Bianca Parker. However, I did not limit Respondent's examination to the scope of the General Counsel's direct examination. Respondent's counsel elicited testimony from Amick and Rose Emelike, but not from Catherine Gaskins.

Rose Emelike also testified for Respondent as a rebuttal witness on October 26, 2023. Ms. Emelike was present for the Zoom session in which Andrea Beverly testified. She did not testify after Beverly.

¹⁹ Emelike's affidavit was not in the first set of General Counsel exhibits put in the case file. The General Counsel filed a revised set of exhibits on January 30, 2024, which contains the affidavit as GC Exh. 21.

²⁰ Rose Emelike testified that Bianca Parker and Amick reported to her about Powell's failure or inability to timely complete Smartsheets, Tr. 393-94.

that there were none.

Other inconsistencies in the testimony of Respondent's witnesses and with its documents

Support planners create a "smart sheet" for each client/participant they serve. This document contains the basic information about the client, name, date of birth, Medicaid or Medicare number and the nature of their disability. It also lists services due a client and when these services are due (Tr. 638.)

The Maryland Department of Health is billed by Respondent through a data base called LTSS. The smartsheet has nothing to do with LTSS.

On boarding specialist Julia Amick testified that Respondent's Smart Sheets do not have to be submitted to the Maryland Department of Health and are not necessary for Respondent to be paid by the Department (Tr. 343). Beverly testified that she was not sure whether smartsheets were crucial to billing or not, Tr. 683. Agency Administrator Rose Emelike and HR specialist Parker testified that smartsheets must be submitted to the Department (Tr. 354–356, 546). This is significant in that Powell's alleged failure or inability to complete smartsheets is relied upon by Respondent in contending that Powell was terminated for nondiscriminatory reasons (Tr. 381–382, 391).

Respondent relied on alleged Medicaid fraud at trial in justifying Powell's termination. However, its August 2022 position statement and its initial termination letter did not mention fraud, only Powell's failure to complete Smartsheets, GC Exhs. 9 and 16, pp. 7 & 8.

Catherine Gaskins testified that she is not involved in employee performance reviews, (Tr. 252.) In her February 5, 2023, affidavit, Emelike stated that Gaskins would sign performance evaluations if they dealt with client complaints. Emelike in that affidavit also stated she sent Powell's performance evaluation to Gaskins on August 2, 2022.

Similarly, Rose Emelike testified that some of her information about Powell came from Julia Amick, but Amick has no recollection of making any complaints about Powell (Tr. 394–396, 329–330, 334). If Amick's input was critical to Powell's termination, Respondent should have documented that in August 2022.

Bianca Parker testified she learned that Powell was not contacting her clients from her team manager, which was Beverly (Tr. 543, 548). Beverly's testimony does not support that assertion. Parker's testimony does not support Rose Emelike's testimony at Tr. 385 that she personally contacted Powell's clients, or their representative.

Finally, Rose Emelike's testimony is nonsensical. Although she claims to have been aware of Powell's alleged Medicare fraud by August 3, she testified that she wanted to give Powell an opportunity to explain her performance deficiencies, including why the Smartsheets were not being completed, Tr. 406–407. If Respondent thought Powell was committing Medicare fraud, there is no reason to believe it would be interested in her explanation for failing to timely complete smartsheets. I would compare this to an inquiry as to why the deck chairs on the *Titanic* were not properly arranged.

Beverly's testimony gives no indication that the fraud issue was discussed with Powell on August 3. Parker, who I find was not at the August 3 meeting, testified Emelike discussed "what she (Powell) needed to work on" (Tr. 528). This is inconsistent with Emelike's testimony that Emelike had already decided to terminate Powell and suggests that Emelike considered the alleged Medicare fraud to be no more important than not keeping up with the smartsheets.

Rose Emelike's February 25, 2023, affidavit: internal and external inconsistencies

I received Rose Emelike's February 25, 2023, affidavit, GC Exh. 21, into the record over Respondent's objection, Tr. 489–90. I believe the limitations I indicated I would place on its use by the General Counsel were unwarranted, *Conley Trucking* 349 NLRB 308, 310 (2007), enfd. 529 F.3d 629 (6th Cir. 2008), *Alvin J. Bart and Co.*, 236 NLRB 242 (1978).²¹ Ms. Emelike had a second opportunity to review the affidavit at trial and her counsel had the opportunity for her to explain any inconsistencies in her affidavit with her testimony, Tr. 379, 401–402, 424.²² Thus, the General Counsel is entitled to cite to any inconsistencies and I am entitled to rely on them regardless of whether Ms. Emelike was specifically asked about them at trial.

There is nothing in this affidavit about Ms. Powell being evaluated prior to the end of the 90-day probationary period. Emelike in her affidavit stated that Powell's first evaluation was on August 2, 2023.²³ Her affidavit continues:

Andrea Beverly and I were on the call. Powell was also on the call. Report supervisor Catherine Gaskins was not present for the August 2, 2022, Zoom meeting.

Emelike's affidavit does not mention Bianca Parker or contend that Bianca Parker participated in any Zoom call with Powell.

Contrary to the testimony of Gaskins and Parker, Emelike's affidavit indicates that Gaskins signed Powell's performance evaluation, as indicated in GC Exh 16 pages 5–6.

In her affidavit Emelike stated that the Smartsheet is part of Respondent's quality assurance and is required by the Employer, but not by the State of Maryland. This is inconsistent with her trial testimony.

Finally, Emelike's affidavit is completely inconsistent with the testimony of Andrea Beverly. Respondent has given me no reason to discredit Beverly's testimony.

The Spoliation Issue

Respondent did not preserve its recordings of the August 3, 2022, Zoom meetings that concern Kirah Powell.²⁴ The General

²¹ Although not relied upon by the Board in affirming him, I highly recommend the discussion of this issue by the late Judge Bernard Ries in *Salem Leasing Corp.*, 271 NLRB 86, 88–90 (1984).

²² This affidavit was apparently taken by telephone. Ms. Emelike took advantage of the opportunity to make changes to it before signing it under oath. She initialed the bottom of each page.

²³ Rose Emelike conceded that the Zoom meeting occurred on August 3, not August 2, Tr. 459.

²⁴ The witnesses' demeanor does not provide a basis for making these credibility resolutions.

Counsel alleges that Respondent was on notice of its obligation to preserve the August 3 Zoom videos, that its failure to do so constitutes spoliation of evidence and that I should draw an adverse inference against Respondent as a result.

The August 3, 2022, Zoom meetings which are critical to this case and all other Zoom meetings were recorded. Respondent's Zoom system at some point auto deletes.

Kirah Powell filed the initial charge in this case on August 8, 2022. The charge alleged that Respondent violated the Act in terminating Powell on August 3 and by maintaining work rules that prohibit employees from discussing wages, hours or other terms or conditions of employment. The initial charge contains no additional details.

On August 11, 2022, Region 5 sent Respondent a copy of the charge with a letter explaining, among other things, Respondent's obligation to preserve all relevant documents and electronically stored information, such as text messages and emails, GC Exh. 1 (c). It does not mention Zoom recordings or indicate that the Region knew of the August 3, 2022, Zoom recordings or considered them relevant to this case. However, I find that on August 11, about a week after it terminated Powell, Respondent was on notice that it was obligated to preserve any documentation of what transpired in respect to Powell's termination. The record does not establish the date upon which the recordings of the August 3 Zoom meetings were auto deleted.²⁵

On January 12, 2023, the Region sent Respondent a copy of Powell's first amended charge with a letter which repeated Respondent's obligations to preserve evidence. That charge added additional allegations that Respondent maintained an overly broad defamation policy in its "Employee Exit Detail" letter, which was sent to Powell on August 9, 2022. It also alleges that Respondent threatened employees by offering them an invitation to quit in retaliation for engaging in protected concerted activity.

On July 24, 2023, the General Counsel served a subpoena, (GC Exh. 23), on Respondent which included a request to produce any Zoom recordings, which included Powell, from June 6, 2022 to the present. She also requested any documents or communications demonstrating the dates of any Zoom meetings between Powell and any of the following persons: Rose Emelike, Catherine Gaskins, Andrea Beverly and Chen or Ching (Ching Chang) (GC Exh. 26).²⁶ The record does not establish that any such documents existed on July 24. Unlike the NLRB Zoom system, Respondent's has a recurring link which does not require an email acceptance which would document when a Zoom call occurred and who participated in it (Tr. 87–88, 405).²⁷

I conclude that the General Counsel did not meet its burden of establishing that Respondent should be sanctioned for its failure to produce the Zoom recordings of the August 3, 2022, meetings. The General Counsel has not established that Respondent had reasonable notice that it was required to preserve these recordings

at any time at which such recording existed, *Reinsdorf v. Skechers, USA, Inc.*, 296 FRD 604, 614, 625–631 (2013) cited in *Queen of the Valley Medical Center*, 368 NLRB No. 116 slip op at 1 fn. 4, 41–44 (2019).

Complaint paragraphs 7 and 9: Confidentiality Provisions in Employee Handbook; Defamation language in Employee Exit Letter.

Paragraph 7 of the complaint alleges that the following provision in Respondent's Employee Handbook (GC Exh. 3), violates Section 8(a)(1) of the Act.

The business of BLH must be respected as strictly confidential. Violation of this rule is cause for immediate dismissal. During your employment here you may have access to commercially valuable technical and non-technical information. It is necessary, therefore, that as an employee, you respect and maintain the confidentiality of such information and other information not available to the public to protect the legitimate interests of the company. Despite the public nature of the services we provide and our interaction with various governmental and private organizations, team members must recognize and acknowledge that information concerning matters affecting or relating to the operation of BLH is considered proprietary information and must be protected. This information includes, but is not limited to provider sourcebooks and manuals, BLH manuals and guidelines, related handouts, personnel files, individual files, notes and other materials relating to the services BLH provides for the individuals it serves. Team members shall not at any time, or in any manner, release or disclose the contents of these materials to persons or organizations outside BLH without the express written permission of BLH. Nor may such information be copied, electronically transmitted, or otherwise removed from BLH premises without the express approval of the Executive Director/CEO or his/her designee. All team members, consultants, and volunteers must sign a confidentiality agreement.

The Employee Exit Letter (GC Exh. 11), contains the following paragraph.

We caution you to refrain from engaging in posting defamatory statements Online. Any statement you make will clearly be defined in the eyes of the law as defamation and firmly false published in an effort to harm the company's legitimate business interests. We take very seriously defamation, both verbally and online, and should we file a claim against you for defamation, you will be subject to liability for compensatory and punitive damages. For information pursuant to possible actionable response to defamation, you may contact our legal team.

Analysis

Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

²⁵ Respondent should also have preserved recordings of Parker's meetings with Powell if they still or ever existed.

²⁶ None of the General Counsel's subpoenas specifically mention Bianca Parker. This I believe corroborates Powell's testimony that Parker played no role in the events leading to her termination. I assume the General Counsel consulted with Powell as to whose documents should

be subpoenaed. I infer that Powell did not mention Parker because she had no connection with Powell's termination.

²⁷ The General Counsel contends that GC Exh. 7 establishes that there was a specific code and thus a record of who participated in all the August 3 meetings. I am not convinced.

purpose of collective bargaining or other mutual aid or protection. (Emphasis added).²⁸

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. On the other hand:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transportation Corp. v. NLRB, 330 F.2d 683 (3d Cir. 1964).

In order to establish a violation of Section 8(a)(3) and/or (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002); *General Motors*, 369 NLRB No. 127 (2022).

The timing of Powell's termination and the lack of any credible evidence that Respondent planned to discharge Powell prior to August 3, 2022 supports the inference of discriminatory discharge, *Case Farms of North Carolina*, 353 NLRB 257, 260-61 (2008). It is clear that Powell's comments in the August 3, 2022 Zoom meetings were a material factor in Respondent's decision to discharge her.

Section 7 protects concerted activity which in its inception involves only a speaker and a listener. Such activity, is an indispensable preliminary to self-organization or other group action, *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

In this case there is an issue as to whether the activity for which Powell was discharged was concerted activity or mere individual griping that was not protected by Section 7, *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023).

Powell's Alleged Protected Concerted Activity

Complaints about the discrepancy between Powell's Employment Security Agreement and her pay stubs.

Powell complained to Respondent that her Employment Security Agreement, which set forth the terms of her employment

misrepresented her compensation and thus inhibited her ability to find housing. The employment security agreement indicated that Powell would be paid \$22.25 per hour or \$46,280 per year. These figures are consistent with Respondent paying Powell for 40 hours a week. In fact, she was paid for 35-37 hours a week. Powell was asked by her landlord to explain the discrepancy between the employment security agreement and her pay stubs. There is no evidence that she discussed this issue with any other statutory employees, other than HR specialist Bianca Parker (GC Exh. 4), and other managers on August 3. Powell was not attempting to make common cause with Parker or any of the individuals she met with virtually on August 3. She was trying to get Parker to mollify her landlord.

Inquiry about a 6 percent pay increase.

Powell believed that support planners working for Respondent were entitled to a 6 percent raise. She testified that she raised this in a group call with other newly hired employees and Julia Amick (Tr. 139-140). Amick confirmed that newly hired employees have group Zoom calls for their first 90 days of employment (Tr. 281). She did not contradict Powell's testimony that Powell raised the 6 percent increase in a group Zoom meeting. Powell also testified that she discussed the 6 percent raise with Abreana Jones, Tay Thanes-Bey and Monica Baucum in a cell-phone conversation (Tr. 141). There is no evidence that Powell told any agent of Respondent about these conversations.

The only other employees of Respondent that she discussed this with are her manager, Amanda Beverly and the other management officials who participated in virtual meetings with her on August 3, 2022: Rose Emelike, Catherine Gaskins, Andrea Beverly and Ching Chang. There is no evidence that any of these individuals would have benefited from the 6 percent increase Powell was seeking. Powell was not seeking to make common cause with any of them.

There is no direct evidence that these managers knew about Powell's inquiries about the raise during a group meeting chaired by Amick. However, I infer Respondent was aware of them via Amick and by Chang's unexplained presence at the 1 on 1 meeting between Beverly and Powell.

Complaints about Respondent's training and employee repayment obligations if employee quit or was discharged within 1 year.

Powell complained about the quality of the training she received from Respondent in conversations with coworkers, Tr. 143. At least 2 coworkers shared her concerns about the adequacy of the training and the obligation to pay Respondent for the training if an employee left within one year. Respondent was on notice as to the concerted nature of Powell's complaints about its training through Amanda Beverly, who was its agent, Tr. 143, 652, and Sarah Abbott, another of Respondent's agents, Tr. 57, 144.

Complaints about Respondent's "Smartsheets"

Smartsheets are documents on which certain information on

²⁸ I do not read the cases cited by the General Counsel at page 87-88 as standing for the proposition that any conversation involving wages, even one between an employee and a supervisor or high-level manager

is inherently concerted. By the terms of the statute, the conversation must be for "mutual aid or protection."

each of Respondent's clients is maintained.

Respondent describes them as spreadsheets that support planners populate with client information and use to track deadlines regarding participants services. Evidence that Powell's concerns were shared with other employees appears at (Tr. 123–127). Powell testified that she discussed the problem with completing timesheets in a timely fashion with coworkers Tay Thaney-Bey, Monica Baucum and Abreena Jones via cellphone. None of these employees testified, thus Powell's testimony is the only direct evidence of her discussing workplace issues with coworkers, with whom she might be making common cause—other than raising the wage increase, training and repayment issues in a group Zoom meeting. Julia Amick and Andrea Beverly were aware of Powell's concerns regarding completing Smartsheets prior to August 3. There is no direct evidence that Respondent was aware of her cellphone discussions with Tay Thaney-Bey, Monica Baucum, and Abreena Jones.

There is an issue as to whether Powell's complaints and statements at the August 3, 2023 Zoom meetings constitute protected concerted activity. Her statements were made within earshot of Gaskins, Beverly and Ching Chang, all of whom were statutory employees. None of them appear to have been impacted by any of the issues raised by Powell. Powell had also discussed her concerns earlier with Julia Amick in group meetings with other new hires. Amick is, insofar as this record shows, a statutory employee, but also an agent of Respondent. Respondent was aware of Powell's complaints and their concerted nature via Amick.

Respondent's awareness of the concerted nature of Powell's complaints

Several agents of Respondent, Emelike, Gaskins and Chang, may have been involved in the decision to terminate Powell. They knew of her concerns about the Employment Security Agreement (pay discrepancy and recoupment of training expenses), the 6 percent increase and her contention that Smartsheets were difficult to keep up with.

I infer that Respondent was either aware that they were concerted or fired Powell to prevent her from raising these issues with other employees—particularly the 6 percent increase. Assuming that Respondent did not know of Powell's communication about these issues with other employees, I find that it discharged her as a preemptive strike to prevent her from doing so, *Parexel International*, 356 NLRB 516 (2011).

I find that Respondent decided to terminate Powell during or after the August 3, 2022 Zoom meetings. Nothing other than its reaction to her complaints and inquiries regarding the 6% raise account for Respondent's decision to fire Powell, or the great lengths it has gone to cover up the reasons for her discharge.²⁹

²⁹ I discredit Respondent's testimony that it had plans to discharge Powell prior to August 3, 2022. If Respondent knew that Powell committed fraud, one would expect that it would have fired her immediately and certainly at the beginning of the August 3 Zoom meeting at which Powell and Rose Emelike were present.

I also find that Respondent ignored its Positive (Progressive) Discipline Policy, another indicia of discriminatory treatment.

³⁰ The Board's decision in *Electrolux*, 368 NLRB No. 34 (2019) is a departure from this rule. However, that case is distinguishable by the

The inquiry about the 6% raise appears to be Respondent's major concern in that it was a reason given by Chang to Beverly for having more than 1 meeting. I find that the reasons Respondent advanced for Powell's discharge are pretextual, thus suggesting an illegal reason for her termination, *Laro Maintenance Corp. v. NLRB*, 56 F. 3d 224, 229 (D.C. Cir. 1995); *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1996); *Rood Trucking Co.*, 342 NLRB 895, 897–898, (2004).³⁰

In sum, I find that Respondent violated Section 8(a)(1) in discharging Powell. She raised issues that were protected because they involved wages, hours and/or working conditions, i.e., the 6% raise and the obligation to repay training costs.

Respondent was aware of the concerted nature of Powell's complaints by, for one thing, the fact that she raised them in group meetings chaired by Amick.

I find Respondent was motivated to terminate Powell due to her protected concerted activity by virtue of its reaction to these complaints in the August 3 Zoom meetings and the pretextual reasons it has given for her discharge.

Respondent, by Catherine Gaskins, violated Section 8(a)(1) by inviting Kirah Powell to quit.

When an employer invites an employee to quit in response to protected activity, it constitutes an implied threat of discharge and violates Section 8(a)(1), *Alton H. Piester, LLC*, 353 NLRB 369, 371 (2008). I find that Gaskins' remark was precipitated by Powell's remarks as a whole, including those that were protected. Thus, I find the Respondent, by Gaskins, violated Section 8(a)(1).

The General Counsel did not establish that Respondent violated the Act by forbidding Powell from sharing her Employment Security Agreement with the other attendees at the August 3, 2022 Zoom meeting.

It is not clear that Rose Emelike was ordering Powell not to share her Employment Security Agreement with other employees. The remark seems to be more a prohibition limited to the attendees at the Zoom meeting. For that reason, I decline to find a violation in this regard.

The General Counsel has not established that Respondent's confidentiality rule violates the Act.

Respondent's confidentiality rule is clearly aimed at information its employees have about its clients.

...team members must recognize and acknowledge that information concerning matters affecting or relating to the operation of BLH is considered proprietary information and must be protected. This information includes, but is not limited to pro-

period of time that had elapsed between the alleged discriminatee's protected activity and her discharge. It does appear, however, that the *Electrolux* decision stands for the proposition that in some circumstances an employer may not need to prove a non-discriminatory reason for a discharge or discipline, even in cases in which the General Counsel arguably makes an initial showing of discrimination. This is so particularly when the real reason violates some other statute, *Electrolux* slip op. at 3.

vider sourcebooks and manuals, BLH manuals and guidelines, related handouts, **personnel files, individual files, notes and other materials relating to the services BLH provides for the individuals it serves.**

A reasonable employee would not interpret this to restrict Section 7 rights.

Respondent violated Section 8(a)(1) by sending Kirah Powell an exit letter with the defamation warning and by maintaining such a defamation policy.

The defamation language in the exit letter sent to Powell violates Section 8 (a)(1) not only under the Board's recent decision in *McLaren Macomb*, 372 NLRB No. 58 (2023) but under much older Board decisions. The defamation language clearly restricts Section 7 rights in that it holds out the possibility that Respondent may take legal action against the employee for any critical comments the employee may make regarding wages, hours and working conditions. Respondent's defamation language would be illegal even under Member Kaplan's dissent in *McLaren Macomb*. In this case, this warning was sent to Kirah Powell after Respondent terminated her in violation of the Act. Even if the discharge were found to be lawful, the defamation language would be illegal in that it restricts a terminated employee from voicing his or her opinion on issues regarding Respondent's wages, hours and working conditions. Member Kaplan opined that the employer in *McLaren Macomb* was not threatening employees. Respondent herein clearly was threatening Powell.

I find that Respondent violated Section 8(a)(1) not only by sending the defamation language to Powell, but in maintaining it in any form. Any employee who read this language would reasonably consider it a threat.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by discriminatorily terminating the employment of Kirah Powell.

Respondent, by Catherine Gaskins, violated Section 8(a)(1) in inviting Kirah Powell to quit her employment with Respondent.

Respondent violated Section 8(a)(1) by sending Kirah Powell an exit letter containing coercive and overly-broad language warning her not to defame Respondent.

Respondent is violating the Act by maintaining a rule with the overly-broad defamation language sent to Kirah Powell.

REMEDY

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

(a) The Respondent having discriminatorily terminated Kirah Powell must offer her reinstatement to her former position, or if such position no longer exists, to a substantially equivalent position.

(b) Make Kirah Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against

her computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) as computed in *New Horizons*, 283 NLRB 1173 (1987).

(c) Respondent shall file a report with the Regional Director for Region 5 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Kirah Powell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). Also, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, Respondent shall file with the Regional Director for Region 5 a copy of the corresponding W-2 forms reflecting the backpay award.

(d) 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³¹

ORDER

The Respondent, Beatrice Loving Heart and Healthcare Agency, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily terminating the employment of any employees in retaliation for activity protected by the Act.

(b) Inviting employees to quit their employment because they engaged in protected concerted activity.

(c) Sending employees coercive communications threatening them with legal action for defaming Respondent.

(d) Maintaining an overly-broad rule or policy threatening employees with legal action if they defame Respondent.

(e) 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 actions necessary to effectuate the policies of the Act

(a) Within 14 days of the Board's Order, offer reinstatement to Kirah Powell to her previous position or, if such position no longer exists, to a substantially equivalent position.

(b) Make Kirah Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the Board's decision.

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful termination of Kirah Powell and within 3 days thereafter, notify her in writing that this has been done and that the termination will not be used

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.

against her.

(d) Compensate Kirah Powell, for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(e) Compensate Kirah Powell for all direct or foreseeable pecuniary harms that she suffered as a result of Respondent's unfair labor practices, regardless of whether these expenses exceed interim earnings.

(f) Compensate Kirah Powell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(g) Rescind its overly-broad rules concerning defamation by employees.

(h) File with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(i) File with the Regional Director for Region 5 a copy of the corresponding W-2 form(s) reflecting the backpay award as set forth in the remedy section of this decision.

(j) 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.

(k) Within 14 days after service by the Region, post at its Lanham, Maryland offices copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the 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. In the event that, during the pendency of these proceedings, 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 August 3, 2022.

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

Dated, Washington, D.C. March 21, 2024

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 discriminatorily terminate your employment due to union or other protected concerted activities.

WE WILL NOT invite you to quit your employment for engaging in protected concerted activity.

WE WILL NOT threaten you with legal action for defaming us based on over-broad policies concerning defamation.

WE WILL NOT maintain an overly-broad rule or policy threatening you with legal action for defamation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer immediate reinstatement to Kirah Powell. If the position she held no longer exists, we will offer her employment in a substantially equivalent position.

WE WILL make Kirah Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful termination of Kirah Powell.

WE WILL, within 3 days thereafter, notify Kirah Powell in writing that this has been done and that the termination will not be used against her.

WE WILL file with the Regional Director for Region 5, 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 the corresponding W-2 form(s) reflecting the back pay award.

WE WILL compensate Kirah Powell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, for all direct or foreseeable pecuniary harms that she suffered as a result of Respondent's unfair labor practices, regardless of whether these expenses exceed interim earnings.

BEATRICE LOVING HEART AND HEALTH CARE AGENCY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-301128 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.

