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

**REDI CARPET, INC.**
Respondent

and Case 16-CA-292266

**CHARLENE TIARRA DE LEON**[1]
Charging Party

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Counsel for the General Counsel

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for Respondent

# DECISION

## STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. A hearing was held in this matter in Houston, Texas on February 6 and 7, 2023. Charging Party Charlene Tiarra De Leon (De Leon) filed a charge and an amended charge in Case 16-CA-292266 on March 14, 2022, and March 23, 2022, respectively, against Redi Carpet, Inc. (Respondent). Counsel for the General Counsel (General Counsel), through the Regional Director for Region 16, issued a Complaint and Notice of Hearing (Complaint) on November 1, 2022.[2] The Complaint alleges that De Leon engaged in protected concerted activities by discussing wages and Respondent violated Section 8(a)(1) by: Interrogating employees about their protected activities; issuing De Leon a final warning in response to the protected concerted activities; telling De Leon she was issued the final warning because of her protected concerted activities; telling De Leon she would be discharged if she continued to discuss pay with coworkers; and ultimately terminating DeLeon. Respondent filed a timely answer, denying that it violated Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

[1] Charging Party De Leon used her middle name in the workplace, which is reflected throughout the record. I include it here to conform to some of the documentation and testimony.
[2] All dates hereinafter occurred in 2022 unless otherwise stated.

## FINDINGS OF FACT[3]

### I. JURISDICTION

Respondent, a Texas corporation with its principal office and place of business in Stafford, Texas (Stafford facility), is engaged in the business of selling flooring products for multi-family housing units. During the previous 12-month period, Respondent in conducting these operations, purchased and received at its Stafford facility goods and materials valued in excess of $50,000 directly from points outside the State of Texas. 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.

### II. BACKGROUND

Respondent is a nationwide flooring contractor that specializes in multi-family flooring. It operates over 30 locations across the country, including its headquarters in Stafford facility. Respondent characterizes its customer base as demanding and fickle. It believes that competition in this industry is stiff but prices for comparable products are similar throughout the industry. Respondent therefore endeavors to differentiate itself through customer service; otherwise, it would lose customers to the competition.

In November 2018, Respondent hired De Leon as a purchasing inventory clerk in the Stafford facility. During the period of the relevant events, De Leon was directly supervised by Elizabeth Villa-Montes, the customer service store lead in Stafford, and Chris Cooper, the customer service center manager for the Employer's central and mid-west regions.[4] Manager Cooper managed daily functions of customer service, billing and inventory control. Cooper covered Respondent's Texas, Midwest and Southeast branches. He reported to the vice-president of customer services, who initially was Brian Hopkins and later Eddy Williams. (Tr. 18-19.)[5] Respondent's Chief Financial Officer, in charge of the human resources department, was Eric Olsen. (Tr. 323.)

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[3] My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.
When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co*., 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation, Inc*., 330 NLRB 1054, 1063 n. 11 (2000); *Asarco, Inc*., 316 NLRB 636, 640 n. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

[4] Respondent employed Cooper until January 2023, when it dismissed him due to disagreements about efficiency and effectiveness and a reorganization of his department. (Tr. 17-18.)

[5] Although I included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. Abbreviations in the record are: Tr. for transcript; Joint Exh. for joint exhibits; GC Exh. for General Counsel exhibit(s); R. Exh. for Respondent exhibit; GC Br. for General Counsel Brief; and R. Br. for Respondent's brief.

Villa-Montes served as customer service team lead and reported to Cooper when he held the customer service store manager position in Stafford. Before 2019, Villa-Montes worked as an assistant operations manager. Cooper awarded the team leader position to Villa-Montes over De Leon. As team lead, Villa-Montes trained employees, facilitated training and fill in as needed. She supervised De Leon.

When De Leon discovered the promotion was given to Villa-Montes, De Leon confronted Cooper in the break room. De Leon expressed how upset she was that Cooper did not ask or invite De Leon to apply. Cooper encouraged De Leon, told De Leon to work on her skills and get better at the job. Cooper told De Leon that new opportunities would be available in the future and if De Leon "stayed the course" and improved, De Leon might have one of those positions. (Tr. 55-56.)[6]

De Leon told Villa-Montes the position should have been De Leon's. Villa-Montes found De Leon was resentful. (Tr. 119-120.) De Leon admitted being upset but denied showing it because the two were best friends. (Tr. 180.)

## III. De Leon Had Some Demonstrated Issues During Her Employment

Respondent employed De Leon as a purchasing and inventory specialist. The inventory job specialist job description explains that an inventory specialist is responsible for all aspects of inventory management. Among the listed responsibilities are: determine appropriate ordering quantities; place material orders with vendors; enter purchase orders and forward receipt copy to the warehouse; assist salespeople with inventory related questions; generate 'specials' lists for salespeople; and assist with various responsibilities at the branch as requested by the supervisor. (Joint Exh. 9.)[7] In February De Leon only worked on placing orders, with another employee taking on the other duties. (Tr. 249-250.)

De Leon had a disciplinary history before Cooper became her manager. During 2019 and 2020, De Leon received a number of verbal warnings, a written warning and a later half-day suspension for tardiness in 2019 and 2020.[8] (See, e.g., R. Exhs. 1, 4.) De Leon also was given a verbal warning for tardiness and accuracy on October 19, 2019. (Tr. 166-167; R. Exh. 3.)

De Leon received a verbal conduct warning on June 19, 2019. (R. Exh. 2.) The conduct warning occurred after De Leon engaged in some horse play when De Leon putting her hands on the throat of a fellow employee. According to De Leon, the fellow employee challenged her to squeeze harder on the throat. When De Leon acquiesced to this request, the fellow employee then pushed De Leon away. (Tr. 166-167.) De Leon testified that she had no further discipline until 2022. (Tr. 166-167.)

When Cooper took over his position, De Leon was already working in the department. He testified that he reviewed De Leon's personnel file. That file revealed issues with De Leon's performance, including professionalism, tardiness, and complaints from other employees. Cooper

[6] De Leon did not deny that this conversation occurred.

[7] De Leon described her job as a product knowledge specialist. (Tr. 164.)

[8] De Leon testified that the disciplinary actions for tardiness were unwarranted because, although De Leon admittedly was tardy, her hiring manager was aware. She then admitted that it was not true for each of the three tardiness disciplines. (Tr. 215.)

intended to give De Leon a fresh start and work on her professionalism. (Tr. 52-53.) Cooper defined professionalism as operating with mutual respect and being proficient at the job. (Tr. 53.)

De Leon testified that Cooper was committed to her success with Respondent. (Tr. 216.) Cooper tried to develop De Leon's professionalism, and in particular communication skills, during monthly one-on-one meetings. (Tr. 53-54.)[9] He directed her to free, online basic communication writing courses and offered to have her work on them while at work. De Leon never worked on the writing courses.[10]

The Houston branch switched to the new software system for orders in November 2021. To order products, sales personnel and others sent emails to a central email address called Five9 Inventory (Five9). All purchasing and inventory staff, plus Cooper and Villa-Montes, had access to Five9 central email. The emails had attached Excel spreadsheets with the desired orders, which an inventory specialist was supposed to open and review the tabs for placing orders. Cindy Miller was responsible for training the employees on the new software system.

De Leon was required to learn the new software during working time. Training for implementation of the new system involved classroom and online training, which included reading manuals and testing online. (Tr. 110.) After those components, each branch had individualized training with classrooms and instructors and some one-on-one training. (Tr. 93-94.) When De Leon failed to take the online basic training, Cooper required De Leon to sit at the desk in his office and take the basic training before taking the classroom component. De Leon then was given the classroom portion.

In addition, the software subject matter expert stayed for three weeks with the inventory team to answer questions as they arose in real time. (Tr. 54-55.)[11] De Leon was also given the opportunity special training in classroom after the system went live but De Leon did not take full advantage of this opportunity. (Tr. 110-111.) Villa-Montes observed that De Leon attended some trainings, then De Leon left early; even when present, De Leon did not actively participate in the training. (Tr. 111.)

Subsequently De Leon did not like the transition from the previous system, which was no longer technically supported, to this new system and did not understand the forms. De Leon did not achieve the required "turnaround" time of 24 hours for processing new orders and instead took two to two and a half days. (Tr. 116.)[12] These delays caused consternation among account managers and general managers because Respondent lost customers. (Tr. 116-117.)

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[9] De Leon admitted that Cooper coached her "in my professional and my wording in emails." However, De Leon denied that Cooper ever mentioned De Leon's professionalism while interacting with coworkers. She admitted Cooper coached her on needing to follow procedures but denied that Cooper told her to adapt to change or pay attention to details. (Tr. 217-218.)

[10] De Leon did not deny that she never took the writing courses, so I credit Cooper's testimony.

[11] De Leon testified vaguely that Cooper initially took De Leon into his office for training before the classroom component. (Tr. 201) She did not deny that she did not take the basic training as required, which pushed Cooper to require De Leon to sit in Cooper's office. I therefore credit Cooper's testimony about training.

[12] De Leon denied that, despite requests, she had any additional training after three weeks. However, much of her denial is undermined. A later email from the trainer and Villa-Montes assisting her at her desk for a month belie her claim. She further admitted Villa-Montes helped her with questions about the system. (Tr. 202-204; Joint Exh. 6.) De Leon also testified that no one else was in the same situation as her role working inventory but admitted that Villa-Montes made the transition. (Tr. 219, 221.)

De Leon complained about the new computer system to other employees but denied telling others that she was going to perform the job in her own way. (Tr. 219-220.) She agreed that being a proficient and enthusiastic user of the new computer system would be important for the team lead position and that she was not "there yet." (Tr. 220.)

Even before the issues with the new computer system, Villa-Montes observed that De Leon lacked professionalism. De Leon called other employees "stupid." (Tr. 122.) Villa-Montes testified that De Leon was brash with fellow employees. According to Villa-Montes, De Leon would not make use of her time appropriately: Instead of working at her desk, De Leon spent time talking with others around the area. To compensate for time lost with gabbing, De Leon then requested overtime to finish her work. (Tr. 119.)

De Leon also was vulgar with other employees. (Tr. 120.) For example, Villa-Montes observed De Leon telling an operations manager "to suck her left titty." The operations manager laughed and walked away. (Tr. 121-122.) After De Leon called the general manager a "little bitch" at the Christmas party, Villa-Montes counseled De Leon that De Leon could not do so again. (Tr. 122-123.) When Villa-Montes counseled De Leon about her communication style, De Leon improved for a few days and then relapsed to her earlier communication style. (Tr. 123-124.)

Cooper was aware of instances where other employees resigned, all or in part due to De Leon's conduct. An employee hired in September 2021 resigned during the fourth quarter of 2021 because De Leon did not communicate with appropriate skills. Although De Leon sat next to this employee, this employee also found that De Leon could not help when needed, so the employee had to go elsewhere for help. (Tr. 56-57.) Another inventory specialist, hired in early 2021, resigned in January 2022, in part due to De Leon. Cooper did not specifically address either resignation with De Leon. (Tr. 75, 170.) Cooper was concerned that De Leon would send them text messages or act unprofessionally after they resigned. (Tr. 75.)

Villa-Montes similarly testified that, within the six months before De Leon's termination, six employees resigned due to De Leon's failure to assist them with work, or De Leon would take work from them. Employees who resigned blamed De Leon, at least in part, for the resignations. One employee told Villa-Montes the resignation was due to insufficient pay to deal with De Leon. Another said that the resignation was due to De Leon's combativeness and failure to help. (Tr. 106, 108-109.)[13]

These resignations caused Cooper and Villa-Montes to take on duties usually assigned to the inventory specialists. The roles within the department were also changed: The inventory specialist would work either in purchasing or strictly inventory management. By February, De Leon chose to work in purchasing. Before only working in purchasing, De Leon complained that she had too much work on her plate and admitted that Cooper and Villa-Montes helped. (Tr. 204-205.) In the meantime, Respondent posted job openings on job boards. One of those people responding to the advertisements was Valencia Smith. (Tr. 57-58.)

[13] De Leon testified one of those employees said he was leaving to look for a better job with less stress and denied having any interpersonal problems with that employee. (Tr. 169.) De Leon testified that another employee who resigned told her the workload and demand were more than what the pay was and again denied any interpersonal issues. (Tr. 170.) Because Villa-Montes corroborates Cooper's testimony, I credit their testimonies why these employees left.

## III. DE LEON RECEIVES A FINAL WRITTEN WARNING AFTER COMPLAINING ABOUT HER PAY COMPARED TO A NEW EMPLOYEE

In early January, Valencia Smith began working as a purchasing inventory specialist in the same department as De Leon. Cooper noted that Smith had previous purchasing and inventory management in a high level and had experience with the new software system Respondent recently implemented. Because of this experience, Cooper determined to pay Smith at $18.00 per hour. (Tr. 58.) De Leon was earning $16.50 per hour.

Villa-Montes was responsible for training Smith regarding the new computer system and purchasing processes. De Leon also was responsible for training Smith. (Tr. 84.) During training, Smith told Villa-Montes that De Leon was difficult to work with. In turn, Villa-Montes told De Leon that Villa-Montes observed De Leon speaking with Smith and De Leon was being difficult. Villa-Montes admitted that what she told De Leon was not correct because she feared De Leon would retaliate against Smith. (Tr. 84-85.)

About January 7, De Leon, taking advantage of Manager Cooper's open-door policy, entered Manager Cooper's office and closed the door behind her. De Leon said to Cooper she found out that Smith was earning more than she was when she saw Smith's salary on the ADP screen.[14] De Leon said she was helping Smith clock out. DeLeon expressed that she did not think Smith, a new employee, should make more than she. (Tr. 20-21, 59-60, 175.) During the course of the conversation, De Leon told Cooper that the difference in pay was "bullshit." (Tr. 175.) Cooper related Smith's experiences in inventory management and purchasing in the Navy, plus Smith knew the new computer system. (Tr. 175, 236.) He also reminded De Leon she received a generous merit increase during the summer because she was trying to grow into her role, and that she was a valuable team member. Cooper told De Leon to keep improving and she would have a place with the company if she could do so. (Tr. 21.) Cooper reminded De Leon that she would soon receive a cost-of-living increase and she was a valuable team member. (Tr. 22, 60-61.)[15] De Leon could not recall whether she made any derogatory comments about Smith during this conversation. (Tr. 237.) Cooper told De Leon that he understood De Leon's frustrations and did not want her to leave. (Tr. 176.) Cooper gave De Leon no instructions about pay discussions. (Tr. 60, 175.)[16]

After De Leon saw Cooper, De Leon went to lunch. In the lunchroom, De Leon complained to Villa-Montes as well. De Leon confronted Villa-Montes with the same issues as those she told Cooper. De Leon complained that Smith was unqualified. (Tr. 91.) Villa-Montes testified that she did not know Smith's qualifications, but De Leon could discuss it with Cooper. (Tr. 86.) In contrast, De Leon testified that Villa-Montes said Smith had 10 years of experience and understood the new computer system. (Tr. 192.) According to De Leon, Villa-Montes said Villa-Montes

[14] De Leon's testimony was that, during the second week of January, Smith asked De Leon a question, which De Leon answered. Smith then asked if De Leon was paid well. De Leon told Smith was "all right." Smith then wrote 20-25 on a sticky note. De Leon said no. Smith then got on the computer to show that inventory specialists were paid $20-25 and said De Leon could be earning more at a different company. De Leon told Smith that she intended to grow with the company, at which time Smith gave De Leon a sign that indicated Smith was earning $18.00 per hour. (Tr. 172-173.) De Leon maintained that the version given to Cooper was incorrect because De Leon did not want to "rock the boat" and had always heard not to talk about pay. (Tr. 174, 223.)

[15] Cooper testified that Respondent did not maintain any rules again discussing wages.

[16] Cooper testified, to a leading question, that at this point, before Smith determined to resign, he did not consider disciplining De Leon. (Tr. 61.)

validated her concerns and would help De Leon in whatever next steps De Leon wished to take. (Tr. 193.) Villa-Montes later advised Cooper about the conversation with De Leon involving Smith's pay. (Tr. 85-86.)

On January 7, De Leon texted another employee, Michelle Soto,[17] stating Smith was receiving $18.00 per hour. After comparing DeLeon's pay to Smith's, Soto texted that De Leon must be "pissed [sic]," e.g., angry,[18] to which De Leon agreed. De Leon admitted to Soto that Smith had experience with the computer system. De Leon related part of the conversation with Cooper to Soto. De Leon texted that a job hunt was going to occur, and in the meantime, De Leon would take 2 weeks of vacation. (Tr. 177, 305; GC Exh. 3.)

On the same day, De Leon texted another employee, Gabrielle Smith,[19] about the disparity in pay, to which Gabrielle Smith responded, "Better speak up then." (Tr. 177-178; GC Exh. 4.) After lunch, De Leon, Soto and Gabrielle Smith discussed pay openly. (Tr. 229.)

Later on, January 7, De Leon talked to Soto in the work cubicle and repeated that Smith was earning more. At that point Gabrielle Smith stepped into Soto's work cubicle and asked what De Leon was going to do next. De Leon recounted being passed over for promotion and with the workload, was "kind of done." (Tr. 179-180.)[20]

At the end of the workday on January 7, Sales Manager Jessica Douglas[21] approached De Leon's cubicle. Douglas told De Leon that Douglas noticed De Leon had been crying and asked De Leon to accompany her to the restroom. Once in the restroom, De Leon again expressed being upset and ready to leave the company because of the disparity in pay between Smith and De Leon. De Leon said the timing was not fair because of how much De Leon put in for the company. Douglas told De Leon that if De Leon were ready to leave, Douglas would assist De Leon with preparing a resume. (Tr. 183-184.)[22]

During the evening of January 7, De Leon texted Katie Schuh, who worked as the executive administrative for the company cofounder's son. (Tr. 181-183; GC Exh. 5.) This text exchange was longer than the previous two.[23] De Leon again expressed disappointment, to which Schuh replied, ". . . You should ask for more since you're [sic] putting in a lot of time in and only one that is staying here and working through everything." Later in the text chain, De Leon stated, "I done I just need to figure my next moves [I don't know] when but I can't no more Katie I love y'all and that's what make me want to stay but this is bullshit." Schuh responded, "I know girl. I'm sorry. This sucks. Ugh . . ." De Leon, after discussing that approaching Hopkins would not

[17] At the time of hearing, Soto remained in Respondent's employ as a billing payroll specialist. (Tr. 292.) Soto and De Leon had known each other for years.

[18] "Pissed" is slang adjective for angry or irritated, and sometimes used with off. See https://www.merriam-webster.com/dictionary/pissed?src=search-dict-box (last checked April 24, 2023).

[19] At the time of hearing, Gabrielle Smith remained in Respondent's employ as a billing specialist and previously worked as a customer service administrator. Gabrielle Smith testified that, in 2019 during the job interview, the previous customer service supervisor said Gabrielle Smith could not discuss her pay with others. (Tr. 282.) Soto, on impeachment, admitted the same supervisor in 2019 said it was not professional to discuss pay. (Tr. 301.)

[20] Soto denied having further conversations with De Leon other than a text message thread, because Soto was not at work that day.

[21] Douglas is an admitted supervisor and agent. She reports to General Manager Kevin Goodnight.

[22] Douglas testified that De Leon came to Douglas's office about inventory and then De Leon raised the pay issue. Douglas then reported the conversation to Cooper, in Cooper's office. (Tr. 261-262.)

[23] De Leon admitted she gave Shuh incorrect information about how De Leon discovered the wage differences. (Tr. 231.)

work, texted: "Like we are projected to do billions of dollars and the mothefuckers that has put the sweat blood and[sic] tears for y'all fuck  Fuck that. Not y'all like you but you know what I mean."

De Leon also spoke about her disappointment with the disparity in pay to Kim Kalisek, a customer service representative, at Kalisek's cubicle, which was not in De Leon's area. (Tr. 187.)[24] Kalisek's cubicle was closer to Cooper's office, on the second row, and Smith's cubicle was approximately six cubicles away on the first row. De Leon went to Kalisek's cubicle to "check in." (Tr. 189.)  As the conversation progressed, Kalisek asked, "What wrong with you."  De Leon testified that she whispered to Kalisek about the pay disparity between Smith and herself. (Tr. 190.) Kalisek said it was bullshit, because Kalisek earned only $15.00 per hour and had been there 20 years.[25]

The same or following day, several employees within the branch and corporate offices who had discussions with De Leon approached Villa-Montes with the same information: De Leon was telling them how unhappy she was about Smith's higher pay. (Tr. 86-88.)  De Leon denied that she said anything negative about Smith or Smith's ability to perform the job, but later testified she could not recall whether she called Smith an idiot. (Tr. 227, 235.)

De Leon also had a conversation that week with trainer Cindy Miller, who came to De Leon's cubicle. Miller said she noticed De Leon's face and asked what was wrong. De Leon admitted that she must have looked upset. De Leon testified that the ensuing conversation was at a whisper level. De Leon, gesturing towards Smith, said, "The new girl had come in at a higher rate."  (Tr. 185.)  De Leon estimated that Smith sat four feet away. According to De Leon's testimony, Miller more loudly said, "Oh, that's bullshit. Sorry."  De Leon testified that she told Miller to lower her volume because Smith was behind them. Miller then said, "There's nothing wrong with the conversation."  Miller said De Leon had every right to feel "that way."  (Tr. 186.)[26]

On January 10, De Leon texted Gabrielle Smith: "The new girl walked out." (GC Exh. 4.) De Leon also texted Schuh, with the same message. (GC Exh. 5.) Schuh replied "wtf."  De Leon replied: "It wasn't me."  Then De Leon, in texting Schuh, related that De Leon and Paul Pricket were "being Paul and me" and Smith "caught an attitude."  De Leon later texts "[Laugh out loud] they can give me her 18 bucks then."  Schuh texted encouragement and told De Leon not to have an attitude and show "you will do whatever and that you are the one always there staying through it all and that you will help and on and on . . . ."  De Leon texted back: "Oh I know I'm just being petty and tell you that I'm not gonna say that even though my ass would No salt in a wound this year."  Schuch then texted: "Yes I know. But I want you to succeed and you have to go along with me.  I hear a lot of shit."  The text chain ends with De Leon's "Gotcha."  (GC Exh. 5.)

On January 11, Smith resigned. Smith went to Cooper's office and asked if Cooper checked his email. Cooper then found an email, which Smith sent the Human Resources Department (HR) and copied Cooper. (Tr. 22-23.). Smith's email cover stated that she wanted to file a complaint against Paul Pricket and DeLeon and attached the resignation letter, stating:

[24] At the time of the hearing, Kalisek was employed in Respondent's customer service department. (Tr. 266.)  Kalisek initially testified that she did not discuss De Leon's pay, then changed to admitting that they conversed about a coworker making more than De Leon and DeLeon was not happy about it. (Tr. 267-269.)

[25] De Leon testified she may have talked with others about the issue. (Tr. 233.)

[26] Miller did not testify.

> I, Valencia Smith am resigning effective January 25, 2022, this is my 2 weeks' notice. Due to a hostile workplace created by Paul Prickett with his excessive use of profanity towards employees. Also, . . . DeLeon complaining to other employees about my pay being higher than hers and that she must train me and answer questions because I am new . . . . I would like to keep this notice private so I can make it through the next 2 weeks as peaceful as possible . . . .

(Joint Exh. 1.)[27]

Prickett was the operations manager for Respondent's Houston branch and was not under Cooper's supervision. Manager Cooper continued the conversation with Smith and apologized for the working environment.[28] Cooper asked if he could do anything to make Smith more comfortable. He told Smith that if she became too stressed and she could not make it through the two weeks, she could leave early.

On the same day, after Cooper talked with Smith, Cooper advised Villa-Montes of De Leon's complaints about Smith's pay and its relationship to Smith's resignation. Villa-Montes then told Cooper that other employees reported that De Leon complained about Smith's pay. (Tr. 88.) Sales Manager Jessica Douglas separately told Cooper that De Leon was complaining that Smith made more money. (Tr. 26-27.)

About 5:30 p.m. on January 11, Cooper also spoke to Vice-President Hopkins about Smith's resignation after forwarding Smith's email to Hopkins. Hopkins said Smith was not the first employee that De Leon forced out. Hopkins instructed Cooper to discipline De Leon. (Tr. 29-30.)

On the following day, January 12, Cooper, Hopkins and Human Resources (HR) met with the General Manager for Houston and the Region Vice President via Zoom for 20 minutes. They first discussed the discipline for Prickett. Prickett was supervised by General Manager for Houston and the Regional Manager, who said they would handle Prickett. The General Manager and Regional Manager left the call after Prickett's discipline was discussed. (Tr. 32.) The remaining participants then discussed Smith's resignation letter and De Leon's planned discipline. HR told Cooper to give De Leon a final warning, but Hopkins and Cooper already planned to do so. (Tr. 32-33.)

De Leon did not work from January 15 through the end of that week due to illness. (Tr. 171.) Smith completed her two weeks and left as she planned. (Tr. 26.) However, Smith's resignation left that department shorthanded: Instead of having 3 or 4 people working in that department, the department was left with De Leon and Team Leader Villa-Montes. De Leon was not sad to see Smith leave because De Leon had to assist Smith with inventory and that Smith was not doing any of the work; De Leon contended that Smith was not going to learn how to place orders. (Tr. 239-240.)

[27] De Leon classified the incident with Prickett as De Leon and Pricket were being themselves and Smith had an attitude about it, which was Smith's problem. (Tr .237-238.)

[28] Cooper was impeached during General Counsel's redirect examination regarding what Smith said while in Cooper's office. Cooper testified to Respondent's questions that Smith said Smith did not appreciate that De Leon spoke with other employees about Smith; one example in particular was De Leon saying Smith was someone hired off the street and paid more. (Tr. 62-63, 77.)

Cooper wrote the final warning for De Leon.[29] On January 31, in Manager Cooper's office, Cooper, with Villa-Montes present, gave De Leon with an Employee Counseling Form. The form included checked boxes labeled "disruptive work behavior" for the reason for counseling and "written warning" for counseling action taken. In the description Cooper noted:

> Employee engaged in open discussion of a team member's salary which created an environment the teammate [sic] was no longer comfortable working in, resulting in her resignation.

The form stated any further violations would result in termination and De Leon was required to show "[i]mmediate improvement in professionalism and understanding of appropriate office conversation topics . . . ." (Joint Exh. 2.)

Cooper testified that he told De Leon she had a continued lack of professionalism and communication, and that Smith was not the first employee who left due to De Leon's behavior. He also told De Leon that the discipline was a final written warning, and any further violations would result in termination. De Leon signed the disciplinary action form. (Tr. 34- 35.)[30]

In Villa-Montes' version of this meeting, Cooper told De Leon that because De Leon communicated with everyone about her own pay and Smith's pay, Smith no longer felt comfortable working there. Cooper then issued the final warning. Villa-Montes said De Leon could talk about pay and if uncomfortable could talk to a manager; De Leon was not permitted to speak ill about others or harass them about being unqualified to be paid what the other employee received; Villa-Montes referred to past discussions with De Leon but did not explain that inference. (Tr. 89-91, 126.) Villa-Montes witnessed De Leon signing the disciplinary action form, which Cooper also signed. (Tr. 91-92; Joint Exh. 2.)

In De Leon's version, Cooper and Villa-Montes sat down with De Leon. Cooper said HR said De Leon had to be written up because salary could not be discussed among employees. Cooper said that moving forward, "We don't discuss pay and to make sure that when [you] speak, it's more professional." (Tr. 195.)

De Leon, in an email, requested additional training on January 31. (Tr. 157-158; GC Exh. 6.) After the email was received, De Leon received some remote training during that week and the following week. (Tr. 158-160.) De Leon testified that she did not receive additional training, but then admitted that Villa-Montes sat with De Leon at her desk for the month of February to answer questions. Villa-Montes answered the questions De Leon asked. De Leon additionally claimed she had too much work assigned to her. (Tr. 203-204.) Given the information provided by Cooper, Villa-Montes, De Leon and subsequent information in this matter, Respondent provided additional training opportunities to De Leon after her request.

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[29] At the time Cooper wrote the final warning, he was unaware that De Leon had received three disciplines for tardiness. Cooper had no knowledge of these disciplinary actions until after De Leon's termination. (Tr. 64-65.) Based upon this testimony, I find that Cooper did not rely upon the earlier warnings for tardiness when disciplining and terminating De Leon.

[30] Cooper testified during Respondent's cross-examination that De Leon would not have been written up if De Leon said Smith was a good employee who deserved to make $18.00. (Tr. 66.) This testimony is speculative and is not credited. Similarly, Respondent asked Cooper what he was trying to convey in the counseling form. (Tr. 67.) The explanation is not credited when the language of the warning conveys a different message.

## IV. ON MARCH 7, RESPONDENT TERMINATES DE LEON

De Leon was on vacation from February 27 through March 4. Cooper determined to terminate De Leon while De Leon was on vacation after certain performance problems came to light.

Respondent maintains it terminated De Leon for unsatisfactory work performance and policy and procedure violations. Cooper gave this written description in the termination form, dated March 7:

> Multiple instances of inventory not being ordered because she didn't bother opening email attachments. She was confusing Sales Team by not following basic procedures and not asking for help.

(Joint Exh. 7.) Under "involuntary" termination, two boxes were checked: policy/procedure violation and unsatisfactory work performance. Id. The evidence showed De Leon was having significant problems with the orders.

### *A. Cooper is Advised of a Problem with De Leon's Processing an Order from Kansas City*

On February 18, Trainer Cindy Miller forwarded an email chain to Cooper and Villa-Montes. Mark Strom, the general manager in Kansas City, emailed Miller and asked what he had done incorrectly after De Leon told him to change a subject line on an order and that she closed to it; De Leon told him to resend the order. The issue began on February 17, when Kansas City Manager John Sosko emailed the Five9 box with an attachment of a setup order form. De Leon asked whether it was an order, or an item set up. Sosko said he obtained the order number and would be ordering this item repeatedly. The next evening De Leon emailed Sosko that he needed to change the subject line to avoid confusion on orders. De Leon also said he needed to send back the order form to have an order placed. Sosko then emailed Miller, the trainer: "I don't understand what I did wrong can you please resolve this I thought I followed the direction with you on what I needed for a reoccurring order something that's already got an [order] number." (Tr. 43-45; Joint Exh. 6.) On February 18, Trainer Miller in turn forwarded the prior emails to Cooper and Villa-Montes, adding this commentary:

> This is getting ridiculous. How many times must we go over this process with [De Leon]? This is the form the [account managers] have been asked to use. It is a "set up **Order form**." . . . . Is it too much to ask that the Inventory Specialist take two seconds to check the two **Order** tabs of the form submitted?
>
> The only person who seems to have a problem understanding this form is [De Leon]. And [De Leon] in turn is confusing others.

(Joint Exh. 6, **bold in original**.)

Villa-Montes testified that De Leon only had to open a tab to find the order. (Tr. 132.)[31] On February 22, Cooper emailed Villa-Montes, asking whether she addressed the problem yet with De Leon. Villa-Montes replied that she had not. Neither Cooper nor Villa-Montes disciplined De Leon before De Leon left for vacation or gave her other directions. (Tr. 46, 97-99; Joint Exh. 6.)

### *B. Cooper Learns De Leon Caused Another Problem Processing Orders and Decides to Terminate De Leon*

On March 2, Cooper received an email from Scott Stokes, the senior vice president for Respondent's central division. Stokes copied Cooper on prior emails from Oklahoma City General Manager Wyatt Jones. (Tr. 36; Joint Exh. 3.)

On February 15, Jones initially emailed a request that a style number be changed on the inventory sheets for a particular product; this email was sent to the email box Five9, which De Leon received. On March 1, Jones emailed Five9 and asked whether the order was processed. On March 2, Jones forwarded the email chain, without the attachment, to Stokes and said he had not received a response to the email and that it was the third missed order within a month. On March 2, Stokes in turn emailed Cooper and asked what was happening, particularly with three missed orders in the last three weeks. Stokes emphasized, "We cannot operate this way. We are customer obsessive, and we need to deliver." (Joint Exh. 3.)

Cooper quickly investigated and found De Leon had failed to open an attachment to the order. (Tr. 69-70.) Within 45 minutes after receipt of Stokes' email, Cooper responded to Stokes that he met weekly with Jones and Jones had not informed him of any problems. However, Cooper said Villa-Montes found that Jones did not respond to a question from De Leon but that lack of response from Jones should not have stopped De Leon from placing the order. Cooper advised Stokes that De Leon was on a final warning and would get details about the additional problems.[32] Cooper also stated De Leon was on vacation and he would terminate De Leon the following week.[33] (Joint Exh. 3.)

As Cooper promised, Cooper investigated what other order problems existed with De Leon during February. In the first instance, on February 9, Jones emailed Five9 and copied Cooper regarding an order for material. The email contained an attachment that was never opened and a new employee, an inventory specialist asked a question about setting up an item. On the same day, the inventory specialist notified Jones he set up the item in the computer. However, De Leon was supposed to place the order and it was never placed. On February 14, Jones sent another email to Five9, with Cooper copied, asking whether the order was placed. On February 15, De Leon emailed back, stating that the order was now placed and set up as a will call; however, only nine pieces were available for order. De Leon explained that the initial request was only for setting up the item in the computer, not for an order. Jones sent a thank you email. Although Cooper was

[31] Given De Leon's limited understanding of the new computer system and De Leon's admission that Villa-Montes learned the new system, I credit Villa-Montes' explanation of what De Leon missed.

[32] I credit Cooper's testimony about the reasons for the additional investigation to determine whether additional orders were missed or mishandled. Stokes identified a second problem after Cooper already knew about the Kansas City issue. At the time he made his decision to terminate De Leon, Cooper testified he had sufficient information to make that decision because De Leon was not performing basic job functions. (Tr. 71.) Cooper also relied upon De Leon displaying a sour attitude ever since Villa-Montes received the promotion. Id.

[33] Villa-Montes denied any involvement with the decision to terminate De Leon. (Tr. 93.) I credit this explanation as Cooper's texts indicate an almost immediate decision to terminate her.

copied on all the emails in this chain, Cooper had not investigated at the time because Jones sent numerous copies of emails and did not do "deep dive" on every single issue. (Tr. 42-43; Joint Exh. 5.)

The next incident began on February 18, when Bobby Robertson, an account manager in Kansas City, sent to Five9 by email a special order for the purchasing department. De Leon received the email and attempted to process the order. However, De Leon received an error message during her attempt. Instead of asking for assistance in processing the order, she emailed Robertson that Robertson should ask the training department for assistance. Cooper only discovered this incident during the search, so De Leon had not received discipline for it. (Tr. 47; Joint Exh. 8.) During the investigation, Cooper discovered that Respondent lost customers because of De Leon's failure to process properly these orders. (Tr. 79.)

In another incident, on February 22, De Leon placed an order for goods from a vendor but ordered the goods for the wrong property. De Leon was told to clear it up but more than 24 hours later, De Leon had not resolved the matter. Approximately 48 hours had elapsed, and De Leon still had not corrected the client and customer for the order. The Houston general manager ultimately sent Villa-Montes an email with a request to check on the order. In the process of looking into this matter, Villa-Montes discovered that De Leon's email inbox was so full that it could not receive new email. De Leon's voice mailbox also was full and could not receive new voicemails. (Tr. 134-140; Resp. Exh. 7.)[34]

Then Cooper received the March 2 notification. This failure cost Respondent a large customer, worth approximately $3 million in business. (Tr. 147-148; Joint Exh. 4.)

### *C. Cooper Terminates De Leon on March 7*

Cooper planned a termination meeting for March 7 after De Leon returned from vacation. Cooper called De Leon into his office and told her about the errors that came to light during the previous week. Villa-Montes was not present for this meeting. (Tr. 100.) Cooper said De Leon was already on a final written warning and, with the new errors, he decided to terminate De Leon's employment. Cooper then presented De Leon with the termination paperwork. (Joint Exh. 9.) De Leon told Cooper she did not know that the January 31 discipline was a final written warning. (Tr. 211.) Cooper said that discipline was a final written warning and showed her the discipline, which indicated any further violations would result in termination. (Tr. 49-50.) De Leon was upset and asked if Cooper was serious. Cooper talked to De Leon about the results of his investigation and showed her the three email chains.[35] Referring to the emails from Stokes, Cooper said Stokes said De Leon should have checked the attachments regardless of lack of direction in the email and the

[34] Based upon an inventory study covering January and February, Villa-Montes also found a number of purchase orders and warehouse discrepancies that traced back to De Leon, as Villa-Montes and De Leon were the only people working in this area at the time. (Tr. 142-144.)

[35] De Leon initially testified that Cooper did not show De Leon the emails supporting his decision to terminate. (Tr. 208-210.) However, De Leon recalled that she placed the order for February 15, but then testified Robertson did not complete the required field and told Robertson to talk to training to correct and reprocess. De Leon told Cooper, during the termination, what happened. Cooper said De Leon should have done more or copied Villa-Montes or Cooper to have the order placed. De Leon did not think that she had any obligation to do more than what she had done. (Tr. 209-210.) De Leon later admitted that Cooper showed her emails that showed orders were not placed. I therefore do not credit De Leon's initial testimony that Cooper failed to share emails during the termination session.

company lost customers as a result. (Tr. 212.) Cooper gave De Leon the termination paperwork.[36] According to Cooper, De Leon took off the badge and "slammed" it on his desk, uttered some expletives, and said, "Just so you know, I'm not mad at you." De Leon then "stormed" out of Cooper's office. (Tr. 74, 212.)

De Leon called Kalisek after leaving Respondent's facility. De Leon told Kalisek about the termination and the reason given, which was missing orders. (Tr. 276.)

De Leon contacted once with Cooper after the termination. In a text message exchange, Cooper agreed to give De Leon a good reference or letter of recommendation. De Leon requested that Cooper put a recommendation on an online recruiting site, Zip Recruiter. However, Cooper never did so. (Tr. 50-51; GC Exh. 2.)

Villa-Montes had an undated post-termination text exchange with De Leon, in which Villa-Montes told De Leon: "I feel your pain." De Leon texted back that Villa-Montes could have at least given her a heads up but also expressed later that De Leon would not want to jeopardize Villa-Montes' position. Villa-Montes responded:

> As you have every right to be upset with me for however long you want.
>
> I want you to know I tried to fight for you. I thought I could change their minds cause I have receipts but you know white people

(Tr. 100-102; GC Exh. 7.) Villa-Montes testified that the text was her effort to remain amicable with De Leon. In spite of Villa-Montes' representations in the text exchange, Villa-Montes testified no such advocacy on behalf of De Leon took place. (Tr. 102.)[37]

De Leon admitted that failure to place timely orders created problems for customer relationships. (Tr. 247-248.) Cooper previously terminated an invoicing specialist who was not processing invoices for a large customer. Respondent incurred a $300,000 loss due to the invoicing specialist's performance. This invoicing specialist was not on a final warning. (Tr. 72.) [38]

Gabrielle Smith, who also works in the same computer system as De Leon, admitted that she made mistakes during training with the new system but never received any discipline for those errors; those errors did not affect Respondent's business. (Tr. 289-290.) Soto also admitted to making errors in her work with the new computer system but never received discipline. (Tr. 295.) Soto only knew that any errors made in her work did not cause Respondent to lose customers because she did not receive any disciplinary action or counseling and she was never told she made a mistake of that magnitude. Soto also testified that her mistakes were correctable. (Tr. 307-308.)

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[36] De Leon maintained she signed a different termination form than Joint Exh. 7 and never received copies. (Tr. 212-213.) The termination form has no place for an employee to sign. In addition, CFO Olsen testified that Respondent only has one termination form. (Tr. 323.) De Leon did sign the disciplinary action form for the final written warning, which is more likely the case.

[37] Villa-Montes gave conflicting testimony in a Board affidavit: There, she denied that she did not have any verbal or written communications with De Leon, and further denied that she told De Leon she tried to fight for her. (Tr. 103.) With the documentary evidence, I credit the testimony given at trial as what actually happened, but only regarding the Villa-Montes text with De Leon. No evidence, other than the text, shows Villa-Montes actually tried to intervene for De Leon.

[38] De Leon testified that Cooper terminated an employee because "job performance was lacking." De Leon first testified that Cooper said job performance was lacking, and then testified Villa-Montes told her this employee was "let go." (Tr. 168, 171.)

## ANALYSIS

### I. JANUARY 2022: COOPER ALLEGEDLY INTERROGATED EMPLOYEES (COMPLAINT ¶4(B))

General Counsel contends that, about January 7, Cooper unlawfully interrogated De Leon after De Leon came to his office and revealed what she knew about the pay differences between Smith and herself; Cooper then asked how De Leon discovered the difference in pay.

General Counsel bears the burden of proof to show Respondent unlawful interrogated employees. *Starbucks Corp. d/b/a Coffee Co.*, 372 NLRB No. 50, slip op. at 24 (2023). The standard is objective. *Multi-Ad Service*, 331 NLRB 1226 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). A "totality of circumstances" test is applied. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test is fact-sensitive and reviews several factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) The background, i.e., whether the employer has a history of hostility toward or discrimination; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the employer's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007). The Board also considers timing and whether other unfair labor practices were in process or had occurred. *River City Asphalt, Inc.*, 372 NLRB No. 87, slip op. at 2 (2023). The *Rossmore House* factors are not "mechanically applied" and it is not essential that each element is met. The core issue is whether the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights.

The facts here are primarily undisputed. The only dispute is whether Cooper specifically asked De Leon how she discovered these facts. Respondent maintains that Cooper only asked what De Leon was upset about and asked no further questions. (R. Br. at 11.) I cannot credit De Leon because of her contradictory testimony: She said she always heard that she should not discuss pay and "rock the boat, yet De Leon did just what she heard she was not supposed to do.

General Counsel, citing De Leon's testimony, notes that the conversation took place in Cooper's office and Cooper was her supervisor. Its argument also contends Cooper had no other legitimate reason to ask De Leon questions other than to determine if De Leon discussed pay. Respondent implies that De Leon could not have been coerced because she went into the office madder than a wet hen (my words, not Respondent's) about the pay. Respondent argues that De Leon was more than willing to lie for her self-interest. (R. Br. at 11.) Because the standard is objective instead of subjective, I will not make any assessments on these points.

Factor 1, background, shows that in 2019, the prior manager told at least two employees that they could not discuss wages. Until 2022, no other manager or lead advised employees not to discuss pay. This factor is not dispositive of interrogation. Factor 2, the nature of information sought, is about pay discussion, which De Leon initiated. For Factor 3, De Leon confronted her manager, Cooper. Because De Leon sought him out and De Leon was the one who shut the door to the office, I find this factor equivocal. For Factor 4, the truthfulness of the response to the alleged interrogation, General Counsel cites *Spectrum Juvenile Justice Services*, 368 NLRB No. 102, slip op. at 10 (2019); *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 4-5 (2021) (citing *Spectrum*).

*Spectrum* and the cases cited therein support a finding that employee efforts to conceal the truth about protected concerted activity weigh in favor of finding a Section 8(a)(1) violation for interrogation. Given the weight of the evidence plus discrediting De Leon's testimony, I recommend that the complaint allegation for interrogation be dismissed.

## II. WAGE DISCUSSIONS AS PROTECTED CONCERTED ACTIVITY

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees the right 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 purpose of collective bargaining or other mutual aid or protection. Section 7 protects the right of employees to "seek to improve working conditions through resort to . . . channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

Activity is "concerted" if it is engaged in with or on behalf of other employees, and not solely by and on behalf of the employee. *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand, *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activities include "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. See also *Phillips Petroleum Co. & Paper*, 339 NLRB 916, 918 (2003); and *Whittaker Corp*., 289 NLRB 933 (1988). Notably, the requirement that activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. Inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed. See, e.g., *Circle K Corp*., 305 NLRB 932, 933 (1991); and *Meyers II*, 281 NLRB at 887.

Wage discussions are "inherently concerted" and therefore protected, regardless of whether the discussions are with the express object of inducing group action. See *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 (2014) (supervisor unlawfully threatened employee with discharge if employee told anyone about grant of early raise); *Automatic Screw Products Co.*, 306 NLRB 1071 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992) (employer unlawfully promulgated and maintained rule against employees discussing their salaries). An employee need not have an express object of inducing group action. *Alternative Energy Applications*, 361 NLRB at 1206 n. 10.

De Leon engaged in wage discussions, including text messages and discussions with fellow employees about her wage complaints. Although the wage discussions appear to relate only to her wages, the discussions are inherently concerted and protected. *Alternative Energy Applications*, above.

## III. JANUARY 31: COOPER ALLEGEDLY MAKES THREATS TO DE LEON ABOUT PAY DISCUSSIONS (COMPLAINT ¶ 4(C))

Statements that have a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Section 7 rights, when taken in context, violate Section 8(a)(1). *Cascades Containerboard Packaging—Niagra, A Division of Cascades Holding US Inc*., 370 NLRB No. 76 (2021). Accord: *Tesla, Inc. v.* NLRB, 63 F.4th 98, 991-992 (5th Cir. 2023), enfg. in rel. part 370 NLRB No. 101 (2021). Threats of reprisals for engaging in protected concerted activities are coercive. *Castro Valley Animal Hospital, Inc*., 370 NLRB No. 80, slip op. at 17 (2021) and cites therein. Tts do not have to be explicit if the language used can be reasonably construed as threatening. *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 21 (2023).

The standard for assessing alleged 8(a)(1) threats is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Intent is inapplicable to this analysis. *Lush Cosmetics,* LLC, 372 NLRB No. 54, slip op. at 3 (2023). The statements are assessed in the context in which they are made and whether they tend to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). Any subjective interpretation from an employee is not of any value to this analysis. *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997).

I do not credit the testimonies of Cooper and Villa-Montes regarding telling De Leon she was free to discuss pay and the denial of any threats. Villa-Montes, a current Respondent supervisor, was well-rehearsed during Respondent's examination. Respondent elicited testimony about what Villa-Montes meant during the January 31 disciplinary meeting when Villa-Montes allegedly told De Leon that pay could be discussed. For both Villa-Montes and Cooper, those testimonies are discredited in light of the written discipline:

> Employee engaged in open discussion of a team member's salary which created an environment the teammate [sic] was no longer comfortable working in, resulting in her resignation.

(Joint Exh. 2.)

An explicit warning of termination for further conduct follows the written summary. The final written warning does not contain any information about other concerns Smith raised, such as De Leon's complaints to others about training Smith. Instead, it serves as an admission against interest. *Alternative Energy Applications, Inc.*, 361 NLRB at 1204-1205. I therefore find that, in the January 31 meeting, Cooper told De Leon not to discuss pay.[39]

In addition, I find that the written warning itself is a threat of termination for discussing pay. *Ground Zero Foundation d/b/a Academy for Creative Enrichment*, 370 NLRB No. 22, slip op. at 6-7 (2020) (discussing wages concerns all employees). Even if Cooper and Villa-Montes were credited with verbal reassurances that De Leon was free to discuss pay, the written disciplinary action makes clear that a termination was in the offing should De Leon discuss "inappropriate" topics of conversation, which included pay. I find that a reasonable employee

[39] Respondent contends it has no rule against discussing wages. The allegation at issue includes neither promulgation nor maintenance of an unlawful rule and I make no findings regarding any rule.

would find Respondent threatening termination for any further discussion of pay, which violated Section 8(a)(1).

## IV. DE LEON'S WRITTEN WARNING (COMPLAINT ¶4(C)(I)) AND DE LEON'S TERMINATION (COMPLAINT ¶4(D))

In this section, I describe the analytic framework applied to allegations of 8(a)(1) discipline and discharge. I find that Respondent violated Section 8(a)(1) when it gave De Leon a final written warning for talking about Smith's wages and find no violation for the termination.

### *A. Analytic Framework for Wright Line*

The framework for analyzing alleged violations of Section 8(a)(1) turning on employer motivation is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework inherently is a causation test. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*, 251 NLRB at 1089.[40] To prove a discriminatory discharge for protected concerted activity, General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the employer's discharge decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). In cases involving 8(a)(1) discipline, General Counsel satisfies the initial burden by showing (1) the employee's protected concerted activity; (2) the employer's knowledge of the concerted nature of the activity; and (3) the employer's animus toward that activity. *Alternative Energy Applications Inc*., 361 NLRB 1203, 1205 (2014). General Counsel's initial burden must demonstrate that a causal relationship between the employee's protected activity and the employer's adverse action against the employee, particularly with regard to animus. *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1.

After General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have disciplined or discharged the employee even in the absence of the employee's protected activity. *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for the disciplinary action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the employer's action are pretextual, e.g., either false or not in fact relied upon, the employer fails by definition to show that it would have taken the same action for those reasons and its *Wright Line* defense necessarily fails. *Metropolitan Transportation Services, Inc*., 351 NLRB 657, 659 (2007). Also see *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. at 7 (2018), and cases cited therein.

### *B. January 31: Respondent's Final Written Warning to De Leon*

An employer violates Section 8(a)(1) if it disciplines "an employee for engaging in protected activities or attempts to prevent its employees from engaging in such activities in the future." *Cordua Restaurants v. NLRB*, 985 F.3d 415, 423 (5th Cir. 2021), rev. den and affg. 366 NLRB No. 72 (2018), supplemented by 368 NLRB No. 43 (2019). Also see *MCPC Inc. v. NLRB*,

[40] General Counsel requests that *Tschiggfrie* be overruled. I am bound to follow current Board law.

813 F.3d 475, 479 (3rd Cir. 2016), affg. in rel. part 360 NLRB 216 (2014). This allegation is analyzed under *Wright Line* as Respondent puts forth a reason for its actions. However, General Counsel contends that the analysis should be based upon *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981) because Respondent allegedly told De Leon that her discipline arose with her discussion of wages. Instead, I find the more appropriate test is "res gestae" instead of *Burnip & Sims.* I find that Respondent violated the Act under either analysis.

1. *Wright Line* analysis

The previous discussions establish that Respondent was aware of De Leon's pay complaints, which are inherently protected and concerted. Both Cooper and Villa-Montes admit knowledge. Direct evidence of a respondent's animus or motive, while rare, is plain in this case. See *Lhoist North America,* 370 NLRB No. 112, slip op. at 14 (2021). The direct evidence is the written warning itself, which states Respondent's reason, which is based upon De Leon talking about pay. The warning also directly establishes the causal relationship between De Leon talking to other employees about pay and the written warning. *Cordua Restaurants,* 985 F.3d at 424-425; *Strongsteel of Alabama, LLC*, 367 NLRB No. 90, slip op. at 4 (2019) (admonishing employee for discussing wages violates Section 8(a)(1)). General Counsel therefore has a strong showing of animus, without any need to examine any circumstantial evidence.

Respondent emphasizes that the warning was not for discussions of pay but also refusing to assist in training Smith and doing so to the point a new employee resigned. Yet Respondent tolerated De Leon causing others to resign while giving her a raise. Only after pay was involved did Respondent determine that De Leon's conduct warranted a final written warning. *Andronaco, Inc. d/b/a Andronaco*, 364 NLRB 1887, 1899 (2016) (past conduct tolerated until discriminatee participated in protected concerted activity, which demonstrated animus and pretext). Respondent offers little else to justify any business reasons for its actions. The discipline sends a "strong message" that chills further Section 7 activity. *Morgan Corp.*, 371 NLRB No. 142, slip op. at 4 (2022). I therefore find, under *Wright Line*, Respondent violated Section 8(a)(1) when it gave De Leon a written warning for discussing pay. *Morgan Corp.*, 371 NLRB No. 142 (employer violated 8(a)(1) when it discharged employee who initiated wage discussion); *Ground Zero Foundation*, 370 NLRB No. 22, slip op. at 7-9.

2. *Res Gestae* analysis

When an employee is subject to discipline for actions during the course of protected concerted activity, the issue becomes whether the conduct is sufficiently egregious to remove the conduct from the Act's protection. *Cayuga Medical Center at Ithaca, Inc*., 365 NLRB No. 170, slip op. at 23 (2016), enfd. 748 Fed. Appx. 341 (D.C. Cir. 2018). In order to be beyond the Act's protection, the conduct must be "so violent or of such serious character as to render the employee unfit for further service." 365 NLRB No. 170, slip op. at 24. When the conduct at issue arises from protected activity, the Board does not consider "such conduct as a separate and independent basis for discipline." See *Greyhound Lines, Inc.*, 367 NLRB No. 123, slip op. at 21 (2019).

In *Cayuga*, the alleged discriminatee talked about break coverage and bad-mouthed other employees. The employer there maintained it did not discipline the alleged discriminatee for criticisms of break coverage but instead criticizing other employees, even after asking the

employee to stop a few times. The employer still violated the Act because the complaints about breaks and problems with employees' performance were "inextricably" intertwined. *Cayuga*, 365 NLRB No. 170, slip op. at 23. In addition, the specific conduct was not sufficient to remove the discriminatee from the protection of the Act because it was not profane or threatening, and without direct confrontation or physical threats. Id., slip op. at 24 and n. 35.

Even assuming De Leon made the comments for which she is accused,[41] the written final warning makes clear that De Leon received a final written warning due to discussion of wages and is classified as part of her unprofessional behavior. As in *Cayuga*, the protected concerted activity of wage discussion is "inextricably" intertwined. I therefore find that Respondent violated Section 8(a)(1) of the Act with its final written warning of January 31. As in *Cayuga*, above, De Leon's actions were insufficient to lose protection of the Act. I find Respondent violated Section 8(a)(1) when it gave De Leon a final written warning for discussing wages. Also see *Rescue Systems Incorporated*, 284 NLRB 694 (1987) (employer violated 8(a)(1) when it discharged an employee for disclosing wages of another employee to a third person).

### *C. De Leon's Termination*

For De Leon's termination, I find that General Counsel presents a prima facie case, which Respondent successfully rebuts. General Counsel's case is based with the previous discipline: De Leon engaged in the protected concerted activity of discussing wages. Respondent had knowledge of the wage discussions and previously took the action of giving a final written warning for those discussions. Given the timing of the discharge, approximately five weeks after the final warning, General Counsel presents arguable prima facie case for animus. However, Respondent presents sufficient legitimate business reasons to overcome the prima facie case.

Regarding De Leon's failure to place orders, which led to the termination, I credit Cooper and Villa-Montes. Toleration for historically poor performance with little to no discipline usually would give me some pause. In spite of that poor performance, Respondent gave De Leon a raise, which implies Respondent had a high toleration for the poor conduct. *Andronaco,* 364 NLRB at 1899.

Putting that raise into context, De Leon received the raise before the new computer system was implemented. These significant errors occurred after Respondent's repeated attempts to train De Leon in the new computer system. Trainer Miller's email identifies De Leon was only person with continued problems with the new computer system despite Respondent's repeated efforts to train De Leon. During most of the month of February, De Leon admitted that Villa-Montes was available for questions on the system, yet De Leon apparently asked no questions on these orders. For whatever reasons, De Leon could not or would not grasp how to properly navigate and process orders in the system. Respondent's reason for termination did not shift and are valid. *American Mfg. Associates, Inc. v. NLRB*, 594 F.2d 30, 35-37 (4th Cir. 1979), denying enf. 234 NLRB 675 (1978).[42]

[41] The evidence from other coworkers does not support a finding that De Leon called Smith "stupid."

[42] Also see *NLRB v. Eastern Illinois Gas & Securities Co.*, 440 F.2d 656 (7th Cir. 1971) (employer within its rights to terminate employee who told fellow employees it did not matter whether gas lines installed per required standards because the terminated employee said he would not be with the employer much longer), denying enf. 175 NLRB 639 (1969).

I cannot conclude, as General Counsel does, that Cooper's investigation after he made his decision to terminate De Leon or Cooper's failure to talk to De Leon shows no meaningful investigation. When Cooper determined De Leon's termination was warranted, he was already aware of 2 instances in which De Leon made significant mistakes. General Counsel implies that De Leon should have been disciplined for her performance issues. However, training and retraining had not been sufficient to correct De Leon's problems. The additional investigation after Cooper made his decision shows a concern to determine the problems occurred because these problems were reported to him.

Disparate treatment evidence does not favor De Leon. Some of De Leon's colleagues testified that they had not received any discipline for errors or did not know whether they made errors. General Counsel produced no evidence of these errors for a comparison, and I must conclude that, assuming errors were made, they were not significant.

De Leon's termination was no harsher than what was meted out to another person who also had a performance issue and had no final written warning. See generally *Stern Produce Co.*, 372 NLRB No. 74, slip op. at 6 n. 33 (2023). An employer may not rely on prior unlawful discipline when taking subsequent adverse action unless it shows it would have taken the same action without reliance on the prior unlawful discipline. *Dynamics Corp*., 296 NLRB 1252, 1252-1255 (1989), enfd. 928 F.2d 609 (2d Cir. 1991); *Celotex Corp*., 259 NLRB 1186, 1186 n. 2, 1190-1193 (1982). Cooper testified another employee was discharged for poor performance. That discharged employee was neither engaged in protected concerted activities nor had a final written warning. Cooper testified that the other discharged employee cost Respondent over $300,000. De Leon's errors cost Respondent significantly more than $300,000 and included loss of a customer.[43]

*Desert Construction, Inc.*, 308 NLRB 923 (1992), is instructive. The employer selected the alleged discriminatee for layoff because of weak performance. The alleged discriminatee engaged in protected concerted activity of complaining about his paycheck based upon a contractual right. The alleged discriminatee consistently demonstrated poor performance despite management telling him he would have to improve his attitude and performance. These factors were sufficient to rebut any prima facie case of unlawful motivation. Id. Also see *Circuit-Wise, Inc.*, 308 NLRB 1091, 1107 (1992) (employer lawfully issued written warning for violating safety rules notwithstanding the employee's union activities). In the present matter, Respondent repeatedly attempted to train De Leon on the new computer system until De Leon cost Respondent business and took little responsibility for her errors.

I therefore recommend dismissal of the allegation that Respondent violated Section 8(a)(1) when it discharged De Leon.

## CONCLUSIONS OF LAW

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

[43] General Counsel's brief does not address the disparate treatment issue.

2. During the relevant period, the following persons were supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act:

| | |
|---|---|
| a. Scott Stokes | Senior Vice-President |
| b. Brian Hopkins | Vice President |
| c. Chris Cooper | Customer Service Center Manager |
| d. Elizabeth Villa-Montes | Customer Service Center Lead |
| e. Jessica Douglas | Sales Manager |
| f. Wyatt Jones | General Manager |
| g. Amy Gray | Director, Human Resources |
| h. Eyle Cavazos | Human Resources Generalist |
| i. Eric Olsen | Chief Financial Officer |

3. On January 31, 2022, Respondent, by Manager Cooper and Lead Elizabeth Villa-Montes, violated Section 8(a)(1) of the Act by:

   a. Instructing an employee not to discuss wages with other employees;
   b. Threatening an employee with termination for future discussions of wages; and,
   c. Giving Charlotte Tiarra De Leon a written warning for discussing wages.

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

5. The Act has not been violated in any other way.

## REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.[44]

## ORDER

Respondent Redi Carpet, Inc., Houston, Texas, its offices, agents, successors and assigns, shall

1. Cease and desist from
   a. Telling employees not to discuss wages.
   b. Threatening employees with disciplinary action for discussion of wages.
   c. Disciplining employees for talking about wages and/or engaging in protected concerted activities.
   d. 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.

[44]General Counsel requested a notice reading and letter of apology as remedies. As I find fewer violations than General Counsel put forth, a notice reading is unnecessary, and a posting should suffice. Regarding the letter of apology, the Board has yet to order such a remedy.

a. Within 14 days from the date of this Order, remove from its files any references to the unlawful discipline of Charlotte Tiarra De Leon, dated January 31, 2022, and within 3 days thereafter, notify De Leon that this has been done and that the unlawful discipline will not be used against De Leon in any way.

b. Within 14 days after service by the Region, post at its Stafford, Texas facility copies of the attached notice marked "Appendix."[45] Copies of the notices, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by 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 internet site, and/or other electronic means, if 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 Respondent has gone out of business or closed the facilities involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 31, 2022.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleged violations of the Act not specifically found.

Dated at Washington, D.C., June 1, 2023

Sharon Levinson Steckler

Sharon Levinson Steckler
Administrative Law Judge

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

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 the protected activities

WE WILL NOT prohibit you from concertedly discussing wages and/or other terms and conditions of employment.

WE WILL NOT threaten you with discipline for concertedly discussing wages and/or other terms and conditions of employment.

WE WILL NOT discipline or otherwise discriminate against you for engaging in protected concerted activity, including but not limited to discussing wages, hours, and terms and conditions of employment.

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 this Order, remove from our files any reference to the unlawful final warning of Charlotte Tiarra De Leon, and WE WILL, within 3 days thereafter, notify Charlotte Tiarra De Leon in writing this this has been done and that the unlawful final warning will not be used against her in any way.

**REDI CARPET, INC.**
**(Employer)**

Dated:_____ By:_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor

practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office 16 set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m. (Central Time)

The administrative law judge's decision can be found at www.nlrb.gov/case/16-CA-292266 or by using the QR code below. Alternatively, you can obtain a copy of the decision of the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (682) 703-7489.