Bates Paving & Sealing, Inc. *and* Juan Gaxiola. Case 28–CA–142681

July 14, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On July 20, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent and the General Counsel each filed exceptions and a brief in support, an answering brief, and a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge, for the reasons she stated, that the Respondent violated Section 8(a)(1) of the Act by discharging employee Juan Gaxiola.[3] However, for the reasons discussed below, we disagree with the judge's findings that employee Juan Marana was not discharged and that employee Rafael Gastelum was lawfully discharged. Accordingly, we find that the Respondent violated Section 8(a)(1) by discharging Marana and Gastelum.

I. RELEVANT FACTS

The Respondent is an asphalt paving company based out of Tucson, Arizona. Robert Bates is the owner and president of the Respondent. In April 2014,[4] Bates hired Robert Padilla as a supervisor. Shortly thereafter, some employees, including Gaxiola, Marana, and Gastelum, began expressing concerns amongst themselves about Padilla's abusive treatment, which included yelling, cursing, calling the employees "stupid Mexicans" and "fucking wetbacks," and challenging employees to fistfights.

On Friday, September 19, approximately seven of the Respondent's employees, including Gaxiola, Marana, and Gastelum, were assigned to work on a paving job at the University of Arizona's Tech Park. That day, the employees voiced concerns to Padilla that the ground was damp in some areas and therefore unsuitable for paving. Padilla dismissed these concerns, telling them to pave over the damp areas. Padilla yelled and cursed at the crew on this project, as he had done on previous projects. The employees agreed that they would speak to Bates about Padilla's behavior the following Monday. As the employees were leaving for the day, however, Gaxiola got into an argument with Padilla, after which Gaxiola asked for an immediate meeting with Bates. All of the Tech Park crew, except for Gastelum, attended that meeting on Friday afternoon. Gastelum had already left work by the time Gaxiola asked for the impromptu meeting and did not learn of it until later.

During the meeting with Bates, which Padilla also attended, the employees discussed the damp conditions at the Tech Park job and complained about Padilla's mistreatment. Gaxiola pleaded with Bates to stop Padilla's yelling and cursing. Marana also criticized Padilla's treatment of the crew. Padilla admitted yelling at the crew, but claimed it was due to the loud machinery. Bates told the crew that he would talk to Padilla, but said they looked like "little girls complaining" and should listen to Padilla, as he was their supervisor.

As found by the judge, on September 22, the Respondent fired Gaxiola for this protected concerted activity. After he was fired, some of the employees, including Gastelum, discussed Gaxiola's termination and wondered who would be next.

On September 23, Bates held another meeting with the employees. At the hearing, Bates admitted that he called the meeting to respond generally to the complaints raised at the September 19 meeting and particularly to criticize the poor workmanship of Marana and Gastelum. Although Bates did not mention Marana and Gastelum by name during the meeting, he looked at them as he faulted their work at the Tech Park site. Marana then responded by telling Bates that the problems at the jobsite arose because of Padilla's yelling and that Bates should not

[1] The Respondent excepts to the judge's ruling authorizing the General Counsel to amend the complaint to include an allegation that the Respondent unlawfully terminated Juan Marana. There is no merit in this argument. Although this allegation was added at the hearing on April 21, 2015, it is closely related to the charge timely filed on December 11, 2014, alleging that the Respondent unlawfully discharged Juan Gaxiola and Rafael Gastelum for engaging in the same type of protected conduct. See *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

[2] The Respondent and the General Counsel have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We do not, however, rely on the judge's citation to *Jerry Ryce Builders*, 352 NLRB 1262 (2008).

[3] In affirming the judge, we note that *Grand Canyon University*, 359 NLRB No. 164 (2013), cited by the judge, was subsequently affirmed by the Board in a decision reported at 362 NLRB No. 13 (2015).

[4] Unless otherwise noted, all dates are in 2014.

yell at him. In reply, Bates told Marana, "You mother fucker, get the fuck out of here, out of my company right now. You're fired. Get out of here. Go. Go. Get the fuck out of here. I don't want you here. Go." Despite this direction, Marana did not leave the meeting. Bates then asked if any other employee wanted to say anything, and two moved their hands to indicate "no." Once Bates calmed down, Gastelum told Bates that he and Padilla should have known that the damp conditions would affect the quality of their work. Bates responded with sarcasm. After the meeting, Bates informed Marana that he was not fired. Marana continued working the next day for the Respondent.

On October 1, Gastelum was written up for causing damage to a truck. He was given a warning stating that he would be fired for the next safety violation. On October 10, Padilla discharged Gastelum for poor raking on a ramp.[5] Gastelum testified that another employee, Juan Dupont, admitted to raking the part of the ramp that Padilla criticized that day.[6] There is no evidence that Dupont was disciplined. Instead, according to Gastelum, Padilla directed Dupont to rerake the area.

Regarding his disciplinary practices, Padilla stated that, absent a serious infraction, he typically gave two to three verbal warnings, followed by two to three written warnings, and only then discharged the employee.

II. ANALYSIS

A. Discharge of Marana

The judge dismissed the allegation that the Respondent unlawfully discharged Marana. Although the judge found that Marana was engaged in protected concerted activity and that it was clear "that Marana understood, at least for a brief time period, that he was fired and told to leave the workplace," she concluded that he was not actually discharged because he "suffered no actual harm, and his 'firing' was cleared up soon after the September 23 meeting ended." We disagree.

The Board uses an objective standard to determine if an employee has been discharged. See, e.g., *Grosvenor Resort*, 336 NLRB 613, 617–618 (2001); *Ridgeway Trucking Co.*, 243 NLRB 1048, 1048–1049 (1979). In some cases, the circumstances may be ambiguous, but there was no ambiguity in what Bates said to Marana: Bates told Marana he was fired. That suffices to meet the General Counsel's burden of proving an adverse employment action. Contrary to the judge, what happened subsequent to this action—i.e., that Marana remained at the September 23 meeting, that shortly after the meeting Bates told him that he was not fired, and that he suffered no actual harm and returned to work the next day—do not show that an unlawful discharge never took place. These facts demonstrate only that the discharge was reversed after a short while and thus bear on the appropriate relief here. As explained below, we award Marana no make-whole remedy.

Discharge is the "capital punishment" of employment. An employer cannot avoid Board sanction simply by reversing the discharge before an employee suffers financial costs. The message has been sent that the employer is willing to take this extreme action and the employee victim is likely to understand that a "change of heart" may not come so quickly, if at all, if he again engages in protected concerted activity. In this particular case, that message is underscored by the contemporaneous unlawful discharge of Gaxiola a day earlier for voicing the same protected concerted protests as Marana about supervision and the problems at the Tech Park jobsite. Having found that Marana was discharged and that the discharge was a direct response to his concerted protected activity, we conclude that the Respondent discharged Marana in violation of Section 8(a)(1).[7]

[5] The Respondent disciplined all its employees, including Gastelum, for poor raking in 2009. The Respondent also disciplined Gastelum for damaging company property in 2007, 2008, and 2009. The Respondent discharged him for the 2009 incident of damaging company property. The Respondent subsequently rehired Gastelum in April 2014.

[6] The judge did not specifically address this testimony, but found Gastelum to be "a highly credible witness."

[7] See *Georgia Hosiery Mills*, 207 NLRB 781 (1973), where the Board found that a discharge violated the Act even though the discharge was revoked within an hour. Contrary to the judge, we find that this case is not distinguishable on the ground that Marana's discharge was revoked in less time and that he suffered no actual harm. As *Georgia Hosiery Mills* makes clear, a discharge motivated by animus towards protected activity is unlawful regardless of its duration. Further, as we have stated, the issue of actual harm resulting from the discharge relates only to the appropriate remedy for the violation found, not to whether there was a violation.

The Respondent does not argue that it repudiated the discharge under the standard articulated in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). We note, however, that even if the Respondent had attempted to rely on *Passavant*, it clearly failed to meet the standard for repudiation set forth in that case.

We affirm the judge's finding that Bates' September 23 statements to Marana independently constituted an unlawful threat directed at all of the employees present. We note that "[t]o disregard this violation would effectively privilege unlawful statements—which are independently coercive—when the respondent contemporaneously gives effects to its unlawful words." *TPA, Inc.*, 337 NLRB 282, 284 (2001). In finding this violation, we do not rely on the judge's citation to *Station Casinos, LLC*, 358 NLRB 1556 (2012), because that case was vacated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We also note that, prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Eighth Circuit enforced the Board's order in *Relco Locomotives*, also cited by the judge, and there is no question regarding the validity of the court's judgment in that case. See 358 NLRB 298 (2012), enfd. 734 F.3d 764 (8th Cir. 2013).

B. Discharge of Gastelum

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board applies a burden-shifting analysis to determine whether an employer's discharge of an employee was unlawfully motivated and in violation of the Act. The judge found that the General Counsel failed to meet his initial *Wright Line* burden and, accordingly, dismissed the allegation that the Respondent unlawfully discharged Gastelum. Further, she found that even if the General Counsel had met the initial burden, the Respondent met its rebuttal burden of proving that it would have discharged Gastelum even in the absence of protected concerted activity. For the reasons that follow, we disagree and find that the Respondent's discharge of Gastelum violated Section 8(a)(1).

First, we disagree with the judge's assessment that Gastelum's protected concerted activity was "arguable." Gastelum and his coworkers discussed Padilla's abusive conduct and, on September 19, made plans to talk to Bates about it. At the September 23 meeting, Gastelum continued that action by challenging Bates' account of who was at fault for the poor work at the Tech Park site. At the time Gastelum spoke, Marana had just been fired, and Gastelum's statement would have the clear effect of defending Marana, himself, and his coworkers, and aligning himself with Marana's comments and those Gaxiola expressed at the September 19 meeting. Concerted activity directed toward rude, belligerent, and overbearing behavior by a supervisor that directly affects employees' work constitutes protected activity under the Act. See, e.g., *Pier Sixty, LLC*, 362 NLRB No. 59, slip op. at 2, 23 (2015). Employees, including Gastelum, also discussed Gaxiola's termination and expressed concern about who would be next. Such conduct similarly constitutes protected concerted activity See, e.g., *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 1 fn.1 (2015), reaffirming and incorporating by reference 359 NLRB No. 36 (2012). For these reasons, we find that the General Counsel clearly met his burden to establish that Gastelum engaged in protected concerted activity.

Second, contrary to the judge, we find that the General Counsel met his burden to show that the Respondent knew of Gastelum's protected concerted activity. Given the content and the overall context of Gastelum's September 23 comments, we find that Bates would have linked those comments to the group comments made on September 19. As a result, Bates, who believed that the September 23 meeting was his chance to respond to the September 19 comments, would have assumed, correctly, that Gastelum was acting in concert with the group of employees who criticized Padilla's abusive behavior and disputed who was at fault for the Tech Park paving problems. Bates also clearly linked Marana and Gastelum, singling those two out for criticism on September 23. Finally, the timing of Gastelum's discharge and the failure of the Respondent to follow its regular disciplinary practice, as discussed below, support our finding that the General Counsel established the Respondent's knowledge of the protected concerted activity. See *Coastal Sunbelt Produce*, 362 NLRB No. 126, slip op. at 2 (2015) ("knowledge of union activity may be established by circumstantial evidence from which a reasonable inference of knowledge may be drawn").

Third, we find that the General Counsel provided ample evidence of the Respondent's animus toward the employees' protected concerted activity.[8] When the employees met with Bates on September 19 to ask him to improve their working conditions, the Respondent responded by deriding the employees and then firing Gaxiola. When Marana challenged Bates' version of what went wrong at the Tech Park project and criticized Padilla's abuse during the September 23 meeting, Bates fired him and thereby threatened the other employees present, including Gastelum. These contemporaneous unfair labor practices clearly support a finding of animus. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014).

Further, the timing of Gastelum's discharge—only about 2½ weeks after he spoke up at the September 23 meeting—is also indicative of animus. See e.g., *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (finding that an employee's discharge, which occurred 2 months after giving testimony "substantially adverse" to his employer, suggests that the motivation behind his termination was his protected activity—his testimony). Contrary

[8] The judge found that the General Counsel failed to meet his initial burden of proving animus by the Respondent in discharging Gastelum because "[n]otably and significantly," Gastelum did not attend the September 19 meeting where employees first criticized Padilla, and his remarks at the September 23 meeting did not mention Padilla's poor supervision. But, as shown above, at the September 23 meeting Gastelum defended Marana after Marana criticized Padilla and he (Gastelum) criticized Padilla's (and Bates') judgment in going forward with the Tech Park paving despite the damp ground – criticism that was met with extreme hostility by Bates who summarily fired Marana. Accordingly, it is of little moment that Gastelum did not also attend the earlier meeting.

Contrary to the suggestion of the judge, "proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

to the judge, we think it more likely that the gap simply reflected a delay in the Respondent coming up with a pretext for the discharge. See *United Parcel Service*, 340 NLRB 776, 777 fn. 10 (2003) (citing *Naomi Knitting Plant*, 328 NLRB 1279, 1282–1283 fn. 18 (1999) (finding that a 6-month gap between protected activity and discharge was not too long because "[a]n employer might wait for a pretextual opportunity to discipline an employee for engaging in protected activity.")).

Finally, we find that the Respondent failed to meet its rebuttal burden and that its discharge of Gastelum for the poor raking incident on October 10 was a pretext. The discharge was both a departure from established disciplinary practice and disparate treatment. The Respondent did not give Gastelum any written warnings for poor raking, as would be expected based on its progressive discipline practices.[9] Moreover, the discharge for poor raking contrasts sharply with the apparent lack of discipline for coworker Dupont, who was simply directed to rerake the area he had previously failed to rake properly at the same jobsite that day.

In sum, based on factors of contemporaneous unfair labor practices, timing, the failure to follow an established progressive disciplinary practice, disparate treatment, and pretext, we find that the General Counsel made a strong showing of discriminatory motivation for Gastelum's discharge. Inasmuch as the Respondent's asserted justification for the discharge was a pretext, it necessarily failed to meet its *Wright Line* rebuttal burden of showing that it would have discharged Gastelum even in the absence of his protected concerted activity.[10] Even assuming, arguendo, that the Respondent actually relied on a legitimate concern about Gastelum's poor raking, given the strength of the General Counsel's case, we would find that the Respondent failed to meet its substantial burden of proving that it would have taken the extreme action of firing Gastelum, as opposed to some lesser corrective action. See *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) ("[where] the General Counsel makes out a strong showing of discriminatory motivation, the respondent's rebuttal burden is substantial"), enfd. 646 F.3d 929 (D.C. Cir. 2011); see also *Acme Bus Corp.*, 357 NLRB 902, 904 (2011) (finding that, due to the strength of the General Counsel's showing of discrimination, the respondent's rebuttal burden was substantial).

Accordingly, we conclude that the Respondent's discharge of Gastelum violated Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

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

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act when it threatened employees with discharge on September 23.
3. Respondent violated Section 8(a)(1) of the Act when it discharged Gaxiola on September 22.
4. Respondent violated Section 8(a)(1) of the Act when it discharged Marana on September 23.
5. Respondent violated Section 8(a)(1) of the Act when it discharged Gastelum on October 10.
6. By engaging in the unlawful conduct set forth above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(2), (6), and (7) of the Act.

AMENDED REMEDY

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. Additionally, we shall order the Respondent to offer Gastelum reinstatement[11] and to make him whole for any losses he may have suffered in the same manner as described for Gaxiola in the judge's remedy section, as amended in this Decision.

ORDER

The Respondent, Bates Paving & Sealing, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they engage in protected concerted activities.

(b) Discharging employees because they engage in protected concerted activity.

[9] This deviation from the Respondent's disciplinary practice is also indicative of animus. See, e.g., *Santa Fe Tortilla Co.*, 360 NLRB No. 130, slip op. at 4 (2014).

[10] In finding that the Respondent met this burden, the judge emphasized Gastelum's prior disciplinary record, including not only the written warning for the safety incident on October 1, but also disciplinary actions taken in 2007 to 2009, 5 years prior to Gastelum's rehire. There is no evidence that the Respondent relied on this record when discharging Gastelum on October 10 or that his poor raking was a safety violation warranting discipline based on the October 1 warning. To the contrary, Padilla testified only that Gastelum was discharged for poor raking.

[11] The General Counsel has not sought any make-whole remedy for Marana, conceding that he was effectively reinstated after the September 23 meeting and suffered no loss of earnings or other benefits.

We shall modify the judge's recommended Order and substitute a new Notice to reflect these remedial changes.

(c) 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 of the date of the Board's Order, offer Juan Gaxiola and Rafael Gastelum full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Juan Gaxiola and Rafael Gastelum whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Juan Gaxiola and Rafael Gastelum for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 28, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. July 14, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[12] 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."

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities.

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

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

WE WILL, within 14 days from the date of this Order, offer Juan Gaxiola and Rafael Gastelum full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Gaxiola and Rafael Gastelum whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL compensate Juan Gaxiola and Rafael Gastelum for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any references to the unlawful discharges of Juan Gaxiola, Rafael Gastelum, and Juan Marana, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

BATES PAVING & SEALING, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-142681 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.

Sara Demirok, Esq., Cristobal Muñoz, Esq., Leticia Peña, Esq., for the General Counsel.
Eric Hawkins, Esq., for the Respondent.
Shayna Kessler, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Tucson, Arizona, on April 21–22, 2015. Juan Gaxiola (Charging Party or Gaxiola) filed the above-captioned charge on December 22, 2014.[1] The General Counsel issued the complaint on January 30, 2015. At the hearing, I granted the General Counsel's request to amend the complaint. Bates Paving & Sealing, Inc. (Respondent) filed a timely answer denying all material allegations and setting forth affirmative defenses.

The complaint and amended complaint alleges that Respondent violated Section 8(a)(1) of the Act when (1) about September 22, it threatened employees with discharge because they complained about Respondent's criticism of their work performance; (2) about September 22, it discharged Gaxiola; (3) about October 10, it discharged employee Rafael Gastelum (Gastelum); and (4) about September 22, it discharged employee Juan Marana (Marana).[2]

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed

[1] All dates are 2014 unless otherwise indicated.

[2] At the hearing, the parties agreed to settle alleged overly-broad and discriminatory rules in its employee policy manual. I approved the settlement agreement, and the General Counsel withdrew complaint pars. 4(a) through 4(h). I then remanded the settlement agreement to the Regional Director to oversee compliance (Tr. 102).

[3] The transcripts in this case are generally accurate, but the General Counsel in its brief moves to correct the transcript (Tr.) 14, lines (LL.) 2, 4, and 6: the speaker is Hawkins, not Pena; Tr. 35, LL. 14–15: the question, "Well, why don't we start from the very beginning of this meeting through the end of the meeting?", is followed by the answer beginning with "Well, I don't know"; Tr. 170, L. 18: "screen clips" should be "sprinklers"; Tr. 174, LL. 11–22: "binchays" should be "pinche"; Tr. 181, LL. 20, 23: "jug" should be "job." Respondent did not file an opposition, and I grant the General Counsel's request to correct the transcript. In addition, I make the following corrections to the transcript: Tr. 76, L. 18: "Andi" should be "And I"; Tr. 173, LL. 14, 19, 21, 25: the speaker is Mr. Muñoz, not Mr. Hawkins; Tr. 197, L. 5: "took" should be "look"; Tr. 197, L. 21: "too" should be "took"; Tr. 202, L. 21: the speaker is Hawkins, not Judge Tracy; Tr. 311, L. 1; Tr. 313, L. 19; and Tr. 334, L. 25: spelling should be "Rafael."

[4] In making my findings regarding the credible evidence, including the credibility of witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I may have credited some but not all, of what the witnesses said. "Nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). This is particularly the case where the credited portions of the witness' testimony are "consistent with the testimony of credited witnesses or with documentary evidence," constitute an admission against interest,

by the General Counsel and Respondent,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, provides asphalt paving and maintenance services at its office and place of business in Tucson, Arizona, where it annually purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona.[6] 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. STATEMENT OF FACTS

A. Background and Respondent's Operations

Respondent operates an asphalt paving and maintenance business. Specifically, Respondent paves roads, parking lots, and new construction; maintains parking lots; seal coats asphalt; fills cracks; and places stripes and traffic markings on asphalt. Respondent admits, and I find, that the following individuals are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Robert Bates (Bates), Respondent's president and owner, and Robert Padilla (Padilla), Respondent's paving supervisor/manager (GC Exh. 1(c), 1(e)). Padilla became a supervisor for Respondent in approximately April 2014.

Respondent employs 24 to 25 employees. Each paving crew consists of truck drivers, paver operators, a scrieve man, two to three roller men including a finish roller man,[7] and at least two laborers who are also known as rakers and shovelers. Among these paving crew employees included Gaxiola, Marana, and Gastelum. Gaxiola worked for Respondent as a raker (also known as a laborer) and roller operator during various times in the past 10 years including his latest stint from approximately July 2010 until his termination on Monday, September 22. Marana began working for Respondent as a driver, raker and roller operator approximately 3 to 4 years prior to the hearing. Gastelum worked for Respondent various times in his career as a raker and truck driver, and most recently from approximately April 2014 until his termination on Friday, October 10.

When Respondent paves a road or a parking lot, the employees first gather in the yard at Respondent's facility. Padilla, as supervisor, assigns the employees their tasks for the jobs. Respondent also assigns employees vehicles and trailers. Then the necessary equipment is moved to the jobsite. Thereafter, Respondent (for jobs less than a day) or a subcontractor sets up traffic barricades to secure the jobsite. After the equipment has been unloaded and warmed, the employees begin paving the jobsite. After the surface has been graded, compacted, graded, and compacted again, stakes are placed in the ground for fine tuning, upgrading and compaction. Usually the following day, paving occurs. To pave a road or parking lot, a paver followed by a roller goes over the asphalt, which achieves compaction. The paving crew waits for the asphalt to cool before conducting a finish roll with the roller which can remove roller marks (Tr. 129).

With regard to disciplinary actions, Padilla testified that as a common practice he gives two to three verbal warnings, followed by a written warning (Tr. 139). After two to three written warnings, Padilla has authority to fire employees (Tr. 105). Padilla also has authority to fire employees at any time depending on the severity of the infraction. Padilla admitted that he does not always give written warnings or terminations to employees when they damage property but has instead given only verbal warnings (Tr. 106–107).[8] Bates testified that it is cause for termination when an employee leaves a jobsite without permission (Tr. 64).

B. The University of Arizona Tech Park Project

Respondent began paving the University of Arizona Tech Park project (also referred to as "IBM," "U of A Tech Park," and "Rita Ranch") (Tech Park) on Friday, September 19. Per the contract it was awarded, Respondent had been tasked to pulverize and repave the parking lot. For the Tech Park project, the paving crew consisted of seven to eight employees and Padilla, as supervisor.

Prior to arriving at Tech Park, Padilla assigned the employees their duties for the project and set the rolling pattern (Tr. 55). When the paving crew arrived at Tech Park in the early hours of September 19, several employees noticed wetness on the ground in the circular drive or cul-de-sac which they needed to pave (Tr. 24, 157–158, 218, 244, 269–272). To correct this wetness, the wet surface needed to be dug out by as much as 18 inches, the soil replaced, and then the area paved (Tr. 128). Padilla told the employees to pave the ground rather than dig out all of the wet areas (Tr. 171, 221, 246, 273). The paving crew began working at the circular drive (GC Exh. 2; Tr. 111). Throughout the day, the paving crew complained to Padilla about the paving job and how it looked flawed but the paving

or are relied upon by the party against which a particular issue is being resolved. *Upper Great Lakes Pilots*, 311 NLRB 131 fn. 2 (1993). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and untrustworthy.

[5] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

[6] Although initially denying jurisdiction, Respondent at the hearing stipulated to jurisdiction (Tr. 386).

[7] A finish roller man irons out the asphalt to provide a smooth finish to the surface and to remove any roller marks. This task must wait until after the asphalt temperature cools down to the appropriate temperature (Tr. 53–54).

[8] Examples provided included giving a verbal warning to an employee in the summer of 2014 when he broke concrete on a customer's property. This same employee in September 2014 failed to wear a hardhat at a construction site, and was given a warning (Tr. 110–111). Another employee backed the water truck into one of the rollers causing damage to the side wall of the truck's tire; this employee tested positive for illegal drugs and was placed on a 90-day probationary period during which one drug test resulted in an inconclusive finding and another was positive for drug use. Thereafter this employee was fired (Tr. 106–109; GC Exh. 5).

crew was told by Padilla to keep paving (Tr. 176). Padilla remained at the jobsite from approximately 5:30 to 9:30 a.m., and then returned at approximately 1 p.m. (Tr. 128). While supervising, Padilla noticed roller marks and told the employees to fix the roller marks (Tr. 129). At some point during the day, Padilla assigned Gaxiola the duties as the finish roller. Before Padilla left again in the afternoon, he told Gaxiola he would return to help him finish rolling (Tr. 112, 130). Marana actually helped Gaxiola finish the work that day (Tr. 177, 185). Gaxiola also told Padilla that he could not work the following day due to a death in the family (Tr. 132). Padilla then returned to Respondent's facility. At some point, Gaxiola finished his roller work, and the traffic cones were set up before he left the jobsite at around 4:30 p.m. (Tr. 177, 186, 224).[9]

At the end of the workday, Padilla saw Gaxiola from a distance before he expected him to leave the jobsite. Padilla called Gaxiola and asked him if he finished work at the jobsite. Gaxiola responded that he had, and the cones were in place to protect the jobsite (Tr. 113, 130, 177, 204).[10] At some point, Padilla called Bates, who had not been at the Tech Park project that day, to inform him that Gaxiola left the jobsite early even though he was supposed to remain there to complete finish rolling (Tr. 29).

Padilla then confronted Gaxiola about leaving the jobsite early. Based on his experience, Padilla felt that Gaxiola could not have completed the task of finish rolling (Tr. 131). At that moment, the paving crew began arriving back at Respondent's facility. Gaxiola then told Padilla that he wanted to meet with Bates (Tr. 116). Padilla asked Gaxiola what the problem was, and Gaxiola responded that Padilla was the problem. Gaxiola wanted to talk with Bates about how Padilla mistreated them, and consistently screamed at them (Tr. 179). Padilla called Bates and said that Gaxiola and the paving crew wanted to talk with him at Respondent's facility yard (Tr. 32, 62).

1. The paving crew's September 19 meeting with Bates

Bates returned immediately to the yard to meet with the paving crew. Bates and Padilla attended the meeting along with Gaxiola, Marana, Mariano Ramirez and possibly other employees.[11] During this meeting, which lasted approximately 10 minutes, employees discussed the Tech Park project and the wet conditions they found (Tr. 37–38). They explained why they could not perform the work properly. Ramirez showed Bates pictures of the wet conditions and the resulting finished product (Tr. 38, 180).

During this meeting, Gaxiola spoke up, complaining about Padilla's conduct towards them. Specifically, Gaxiola complained about Padilla's yelling and cursing at the employees which affected their ability to perform satisfactorily (Tr. 32–33, 35).[12] Gaxiola told Bates that Padilla expected too much from them. He pleaded with Bates to stop Padilla's derogatory and abusive behavior towards them (Tr. 180–181). Marana also spoke supporting the other employees complaining about Padilla's treatment of them (Tr. 36, 95, 118).

Bates asked Padilla during this meeting if Gaxiola had been telling the truth, to which Padilla responded that he needed to yell at the employees due to the loud machinery. At some point during this meeting, Padilla admitted he sometimes cursed at the employees (Tr. 33). Bates emphasized that Padilla was the supervisor and that the paving crew needed to listen to him. Bates also said that Padilla was responsible for any mistakes, and that he would speak with Padilla (Tr. 117–118).

The following day, Saturday, September 20, Bates went to the Tech Park jobsite to see what had happened (Tr. 37). Upon arriving, Bates accompanied by Padilla reviewed the work completed the previous day, and immediately knew that portions of the job would need to be redone.[13] Bates did not investigate why the paving crew's work performed the day prior failed. Instead, he relied upon his work experience to lead him to the conclusion that the breakdown roller man and the finish roller man did not perform adequately (Tr. 42). The breakdown roller man was Marana and the finish roller man was Gaxiola (Tr. 129). Furthermore, Bates testified that the problems with the workmanship at the Tech Park project were not related to the wet area due to independent testing by a laboratory (Tr. 77–78). However, this testing was performed on September 18, 1 day before the paving crew began their work at Tech Park (R. Exh. 8).

Bates spoke with Padilla, and they discussed the "poor teamwork" of the paving crew (Tr. 38). Bates elaborated, "I mean, it's not just one man. It takes a whole team because, you know, normally, a good team will work together and help each other out" (Tr. 40).

Furthermore, Bates, in his Board affidavit, admitted that on September 20 Padilla and he also discussed terminating Gaxiola based on his performance (Tr. 39–40). Bates stated in his Board affidavit, "We also noticed a change in his attitude for the worse" (Tr. 41).[14] At the hearing, Bates testified that Gaxiola acted in a "defiant and insubordinate" manner when he

[9] Gaxiola clocked out at 5 p.m. (R. Exh. 10).

[10] Padilla's version of events is directly contrary to Gaxiola's version. As explained further in this decision, I did not find Padilla to be a credible witness and do not credit his version of events when it conflicts with the testimony of Gaxiola.

[11] Gastelum did not attend this meeting as he had left earlier when Padilla told the employees they could go home (Tr. 277). Gaxiola called Gastelum and told him that the employees planned to meet with Bates on Monday morning which is why he did not return to the yard after leaving for home (Tr. 279, 282). Gastelum agreed with his coworkers that a meeting with Bates was necessary due to Padilla's behavior towards them (Tr. 280).

[12] Gaxiola, Gastelum, and Marana and their coworkers would discuss amongst themselves Padilla's poor treatment (Tr. 169, 217). Gaxiola testified that Padilla consistently yelled and cursed at them since Padilla began employment with Respondent in the late spring. Gaxiola described Padilla's supervision as a "monster" (Tr. 168). Gastelum testified that Padilla would curse at the employees, tell the employees that they were too old and that he needed a younger crew (Tr. 262–266). The employees agreed to meet with Bates.

[13] One week later, Respondent repaved portions of the Tech Park project jobsite per the client's request. The area repaved included the circular drive area which had gotten wet as well as the roller marks on the roadway (Tr. 70, 76; GC Exh. 2).

[14] Bates' affidavit, given during the Board's investigation of this charge, is more reliable than his testimony during the hearing since his recollection of the events would have been fresher.

failed to put up the traffic barricades and left the jobsite earlier than he should have (Tr. 41–42). Bates testified that Gaxiola's "bad attitude" was exhibited by his failure to place the safety barricades and leaving the jobsite early (Tr. 77).

2. Gaxiola's termination

On Monday, September 22, approximately 15 to 20 minutes after Gaxiola clocked in to work, Padilla called him into Respondent's office (Tr. 119, 182). Padilla also asked the shop mechanic foreman, Mario Marstellar, to join them. Padilla told Gaxiola that he would have to let him go (Tr. 340–341). Thereafter, Gaxiola became angry and cursed (Tr. 341). Gaxiola denied causing the problems at the Tech Park project; Padilla then tried to show Gaxiola some pictures from the job. These pictures showed the roller marks at Tech Park. Padilla told Gaxiola that he was fired for leaving the job early that prior Friday, and leaving roller marks in the asphalt (Tr. 184). Gaxiola denied arguing with Padilla before he was fired but admitted that after he had been fired, Marstellar told him to calm down (Tr. 183).

In contrast, Padilla testified that he fired Gaxiola for arguing with him and telling him he did not have to listen to him (Tr. 120–121). Padilla elaborated that he fired Gaxiola for cursing at him and for being insubordinate which was the only reason why Gaxiola was fired, not for his work performance (Tr. 121, 365–366).

However, Gaxiola's termination notice dated September 22 and completed by Padilla, states:

> Juan left the jobsite U.A. Tech Park without finishing task that was given as finish roller man. Juan got to yard befor[e] entire crew, I asked Juan to go back to U.A. Tech Park he said NO he had finished. So I Robert went to Job site found Job not comtleted [sic] toll marks all over roadway & parking lot also did not put back traffic control back up was big safety hazard.

(R. Exh. 1). Padilla testified that the description in Gaxiola's termination notice was the *reason* why the argument between Gaxiola and himself occurred, but that he *actually* fired Gaxiola for his conduct during this meeting (insubordination) (Tr. 122). Padilla testified that he did not put this reason for Gaxiola's termination on the form because "It slipped my mind" (Tr. 123).[15]

After Gaxiola's termination, many employees including Gastelum discussed Gaxiola's termination, expressing concern about who may be next (Tr. 293). Gastelum never discussed Gaxiola's firing with anyone from Respondent.

3. Bates' September 23 meeting with the paving crew

On approximately Tuesday, September 23, Bates called a meeting with the paving crew. The employees attending the meeting included Marana and Gastelum, along with Bates, Padilla, and Marstellar. Bates scheduled the meeting to discuss Gaxiola's early absence on Friday, September 19, and the paving crew's "workmanship" at the Tech Park project (Tr. 46).

Bates understood from Padilla that Gaxiola had told his coworkers he needed to leave early that Friday because his uncle had passed away (Tr. 47).[16] Bates told the employees that he was concerned that no one had offered to help Gaxiola complete the work so he could leave early on September 19 (Tr. 48–49, 76).

Bates also informed the paving crew that the client for the Tech Park project rejected the work and it needed to be redone. Bates angrily spoke with the employees about their lack of teamwork, what happened at the jobsite, their responsibilities, and what they would do in the future for teamwork (Tr. 76, 290). Bates told the employees how much redoing the Tech Park project would cost him. Bates testified that the problems at the jobsite were due not only to Gaxiola but also to Marana who was the other roller man on September 19 (Tr. 84). Bates elaborated at the hearing, "not to point fingers just at Juan Gaxiola, but also at the other roller man and the raking was terrible on that job" (Tr. 84–85).

At this point during the meeting, Marana said to Bates that the problems at the jobsite arose because of Padilla's yelling, Padilla was to blame for the poor quality, and that Bates should not yell at him (Tr. 85, 96, 256–257). Bates testified that he told Marana, "Listen, I'm telling you to improve your work and, if you don't like it, you get out of here right now. You can leave" (Tr. 85, 97, 230, 232–233, 256, 381). Marana testified that Bates said, "[H]e told me he could yell to me or to anybody that was there. That's when he told me that I was fucking fired" (Tr. 381).[17] Gastelum testified that Marana attempted to speak but then Bates said, "You mother fucker, get the fuck out of here, out of my company right now. You're fired. Get out of here. Go. Go. Get the fuck out of here. I don't want you here. Go" (Tr. 290). However, Marana remained at the meeting (Tr. 234, 291, 324).

Gastelum spoke after Bates calmed down. Gastelum told Bates that with Bates and Padilla's combined experience they should know that the work would not be perfect due to the wa-

[15] Prior to his termination on September 22, Gaxiola voluntarily resigned in February 2013 after he was verbally warned for being late (R. Exh. 2). In June 2013, Gaxiola also quit because it was "too hot" and "too hard," and he did not want to work (R. Exh. 3). In May 2008, Respondent suspended Gaxiola for 2 days after he left a jobsite without notifying anyone (R. Exh. 4). Thereafter, Gaxiola did not return to work. Bates testified that only upon reviewing Gaxiola's personnel records after Gaxiola had been fired did he realize that Gaxiola had worked for Respondent several times in the past, and had quit or resigned several times (Tr. 60). However, subsequent to this testimony, Bates stated that he was aware of Gaxiola's personnel history with Respondent when Padilla called him the afternoon of September 19 to discuss Gaxiola's actions that day (Tr. 61–62). As discussed further, generally I found Bates to be a less than credible witness. This inconsistent testimony is one example of Bates' less than credible testimony.

[16] During his testimony, Bates stated that he "misunderstood" what Padilla had told him and thus, his Board affidavit was incorrect. Bates learned that Gaxiola requested to take Saturday off because his uncle had passed away (Tr. 48). It is irrelevant what Bates later understood Padilla to say regarding Gaxiola's absence. What is significant is what Bates understood at the time of the September 23 meeting.

[17] Bates and Marana disagree on whether Bates told Marana he was fired. Gastelum credibly testified that Bates told Marana to leave and that he was fired (Tr. 290). Whether Bates used the term "fired" is insignificant. Bates admitted that he did tell Marana that he could leave if he could not perform the job. Thus, what is clear is that Marana understood, at least for a brief time period, that he was fired and told to leave the workplace.

ter (Tr. 291). Bates responded with sarcasm (Tr. 292).

After the meeting ended, Bates informed Marana that he was not fired (Tr. 85, 97, 153, 247, 382). Marana came to work the next day, and has continued employment with Respondent (Tr. 236).[18]

C. Gastelum's Termination

On Wednesday, October 1, Padilla issued Gastelum a warning for unsatisfactory performance for his alleged unsafe unloading of equipment, and damage to the dump truck (R. Exh. 11; Tr. 300). That day, Padilla asked Gastelum to get a paver from Respondent's facility (Tr. 87). When Gastelum began to unload the paver from the trailer, the back of the dump truck and the trailer began to jack-knife. Another employee saw what was happening and pushed the safety release button (Tr. 87–88, 298). This incident caused damage to the dump truck (R. Exh. 9; Tr. 299). Gastelum admitted partial responsibility for the incident (Tr. 300). The warning issued to Gastelum for this incident indicated that another safety violation by Gastelum would result in termination. The employee who pressed the safety release button was not disciplined.

Thereafter, Padilla fired Gastelum on Friday, October 10. Padilla assigned Gastelum responsibility for raking a handicap spot (Tr. 302). Padilla told Gastelum his raking was poor that day but Gastelum told Padilla that a new employee caused the problems, not Gastelum (Tr. 302). Padilla testified that he fired Gastelum for his "poor workmanship" in his raking (R. Exh. 12; Tr. 125, 363). Padilla testified that he spoke to Gastelum weekly, beginning before the September 22 meeting, about the poor quality of his raking (Tr. 141–142). Even on the Tech Park project, Padilla spoke with Gastelum about his poor raking (Tr. 364). According to Bates, Padilla began speaking to him about Gastelum's workmanship 3 to 4 weeks before he was fired (Tr. 51). Gastelum admitted that Padilla had told him to work faster (Tr. 305). Padilla testified that he fired Gastelum for his poor raking on several projects, and that he does not "fire somebody because of one project" (Tr. 363).

Prior to his termination, Respondent disciplined Gastelum several times for damaging Respondent's equipment. In September 2007, Gastelum damaged Respondent's property; Respondent issued Gastelum a warning and placed him on probation (GC Exh. 7). In August 2008, Gastelum completed a property damage report when he damaged Respondent's truck (GC Exh. 8). In January 2009, Respondent warned Gastelum that his paving/patches were poorly constructed (GC Exh. 8). Respondent also issued Gastelum a warning in November 2009 for unsatisfactory performance when he brought broken items in his truck load with a subsequent violation leading to a suspension (GC Exh. 6). In December 2009, Respondent suspended Gastelum for damaging equipment when he was in an accident, and then subsequently terminated his employment (GC Exh. 6). The narrative in this suspension explained that Gastelum had been involved in other accidents which damaged Respondent's equipment. These actions were seen as serious safety issues.

I. DISCUSSION AND ANALYSIS

A. Witness Credibility

The witness' testimony varied considerably on the key events. Thus, I must make a decision as to which parts of the sharply differing accounts are credible. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact for this decision, I found the testimony of Gaxiola and Gastelum to be mostly credible. Both Gaxiola and Gastelum testified in an accurate and forthright manner, and provided generally consistent, specific and detailed testimony. In making the above findings of fact, I relied extensively on the testimony given by Gaxiola and Gastelum. I relied partially on Marstellar's testimony but only when it was not contradicted by the credible testimony of Gaxiola and Gastelum.

In contrast, I do not find credible the testimonies of Bates, Padilla, and Marana. Padilla's testimony generally was inconsistent and contrary to the documentary evidence including his own affidavit given during the Board investigation which is more proximate in time to the events in this case than the hearing. Most damaging to Padilla's testimony was his explanation for why he did not provide the "true" reason for Gaxiola's termination in the paperwork; Padilla testified flippantly, "It slipped my mind." I find his lack of candor to be significant, and did not credit any of his testimony.

Second, Marana's testimony at the hearing was contradicted by his Board affidavit. Specifically, Marana denied knowing that he was not actually fired at the end of the September 23 meeting. However, in his Board affidavit Marana stated that Bates told him he was not fired. Even on redirect Marana's version of this event changed. Because his responses changed throughout his testimony, I cannot credit his testimony general-

[18] I do not credit Marana's version of events for the September 23 meeting. Marana's testimony conflicted with his affidavit provided during the Board investigation. During the Board investigation, Marana stated that after the meeting ended, Bates approached him and told him he was not fired (Tr. 247). During his hearing testimony, Marana on direct examination testified that no one from Respondent told him he was not fired, and he came to work the following day because he needed to work. On redirect, Marana then testified that after the meeting Bates came to him and told him he was still fired while using profanity (Tr. 257). Because Marana's testimony differed every time he was asked the same or similar question, I cannot credit his testimony.

ly. However, I credit those portions of his testimony corroborated by the credible testimony of Gastelum.

Third, Bates' testimony lacked candor generally in the critical portions of his testimony. Significantly, Bates testified that he called the September 23 meeting, in part, to discuss why the other crew members did not help Gaxiola finish his work late on Friday, September 19. If this was true and if he had such a concern, then it makes little sense for Bates to have approved Padilla's firing of Gaxiola for leaving early on Friday, September 19. I also could not credit his testimony that he did not tell Marana he was fired at the September 23 meeting since it was contradicted by the credible testimony of Gastelum. However, I do credit his version of the context in which he made this statement. Bates testimony also lacked significant details but these details came to light on cross-examination due to his testimony in his Board affidavit.

B. Respondent Threatened Employees with Discharge Violating the Act

The complaint and amended complaint alleges at paragraphs 5(a) and (b)(1) that Respondent violated Section 8(a)(1) of the Act on about September 22, when through Bates it threatened employees with discharge because they complained about Respondent's criticism of their work performance.[19]

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives*, 358 NLRB 298, 309 (2012), enfd. 734 F.3d 764 (8th Cir. 2013).

In general, the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce protected activities. Id.; *Station Casinos, LLC*, 358 NLRB 1556, 1573–1574 (2012); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000); *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 14 (2014). Apart from a few narrow exceptions, an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. See *Station Casinos, LLC*, supra. The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The burden of proof lays with the General Counsel to prove 8(a)(1) allegations by a preponderance of the evidence.

Here, the only incident where an employee was threatened with discharge occurred during the Tuesday, September 23 meeting called by Bates to discuss the workmanship of the paving crew on the Tech Park project. Bates yelled at Marana during this meeting, and told him that he was partially to blame for the failure on that job. In response, Marana told Bates that it was not his fault, not to yell at him, and that it was the fault of Padilla. Bates then said to Marana, "Listen, I'm telling you to improve your work and, if you don't like it, you get out of here right now. You can leave" (Tr. 85). Marana testified that Bates actually said, "[H]e told me he could yell to me or to anybody that was there. That's when he told me that I was fucking fired" (Tr. 381). Gastelum, who provided credible testimony, could not recall what Marana said to Bates but recalled that Bates clearly told Marana to leave and that he was fired. As discussed later, although Bates retracted his discharge statement to Marana, his statement to Marana constituted a threat.

Marana was engaged in protected concerted activity during this meeting since he protested Bates' treatment of his coworkers and himself during this meeting while also casting blame on Padilla for the failed project. I find that Bates' statement about firing of Marana would tend to restrain or interfere with employees in the exercise of their Section 7 rights. The context in which this statement was made to Marana is significant. Marana, who spoke critically of Padilla during the September 19 meeting, continued his criticism of Padilla's treatment of employees during the September 23 meeting. During the September 19 meeting, Gaxiola and Marana complained that the problems at Tech Park project resulted in defects in the paving; Padilla was to blame due to his abusive behavior towards them. Marana during the September 23 meeting again blamed Padilla for the workmanship at the jobsite. Bates responded to Marana with a threat by telling him he was fired. Even Bates admitted that he told Marana that if he did not perform how Bates expected, then he could leave.

It is well settled that an employer's invitation to an employee to quit in response to protected concerted activity is coercive, because it conveys to employees that engaging in concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved. *McDaniel Ford*, 322 NLRB 956, 956 fn. 1 and 962 (1997) (citing *Stoody Co.*, 312 NLRB 1175, 1181 (1993), *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989), and *L.A. Baker Electric*, 265 NLRB 1579, 1580 (1983)); see also *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) (employer's statement that, if employee was unhappy, "[m]aybe this isn't the place for you . . . there are a lot of job's out there" was an implied threat of discharge); *Paper Mart*, 319 NLRB 9 (1995) (president's statement that if employee "was not happy he could seek employment elsewhere" was implicit threat of discharge); *Intertherm, Inc.*, 235 NLRB 693, 693 fn. 6 (1978) (implied threat to tell employees that if "he was not happy with the company he should look elsewhere for a job") enfd. in relevant part 596 F.2d 267 (8th Cir. 1979); *Chinese Daily News*, 346 NLRB 906, 906 (2006) (implied threat telling employee to resign if she was not happy with her job), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Considering Bates' comments to Marana came after he mentioned Padilla, along with the context of this meeting and the September 19 meeting, I find that Bates' comments reasonably tended to interfere with, restrain, or coerce employees in their protected, concerted activities and thus constituted a threat, and

[19] Respondent failed to address this allegation in its post hearing brief, relying only upon its position that Marana had never actually been fired (R. Br. at 14–15).

thus a violation of Section 8(a)(1) of the Act.

C. Respondent's Discharge of Gaxiola Violated the Act

The complaint and amended complaint, at paragraphs 5(a) and (c), alleges that Gaxiola was terminated because of his protected concerted activities, in violation of Section 8(a)(1) of the Act. Respondent argues that Gaxiola was terminated for a variety of reasons, including failing to finish his work assignment, leaving the work site prematurely, and insubordination. I disagree with Respondent, and find that the General Counsel has sustained its burden of proof.

An employee's discharge independently violates Section 8(a)(1) of the Act when it is motivated by employee activity protected by Section 7. *Lou's Transport*, 361 NLRB No. 158, slip op. at 2 (2014). To prove an adverse action violates Section 8(a)(1), the General Counsel must establish, by preponderant evidence , that: (1) the employee engaged in concerted activity, (2) the employer knew about the concerted activity, and (3) the employer had animus toward the activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Grand Canyon University*, 359 NLRB No. 164 (2013). If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980). See also *Signature Flight Support,* 333 NRLB 1250, (2001) (applying *Wright Line* in context of discharge for protected concerted activity).

The employer cannot meet its burden by merely showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Absent a showing of antiunion, or anti-Section 7 activity, an employer may discharge an employee for a good reason, a bad reason or no reason at all without running afoul of the labor laws. See *Clothing Workers v. NLRB (AMF, Inc.)*, 564 F.2d 434, 440 (D.C. Cir. 1977).

As to the first factor, Gaxiola clearly engaged in concerted activity. Gaxiola spearheaded the meeting with Bates after he and his coworkers could no longer tolerate Padilla's abusive behavior towards them. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 4–5 (2014). Concerted activity directed toward supervisory conduct, such as "rude, belligerent, and overbearing behavior" which directly affects the employees' work, constitutes protected activity under the Act. *Arrow Electric Co.*, 323 NLRB 968, 970 (1997), enfd, 155 F.3d 762 (6th Cir. 1998). As for the second factor, it is undisputed that Respondent had notice that Gaxiola acted in concert with other employees. Gaxiola spoke with Padilla to call Bates to hold a meeting to discuss Padilla's supervision. Furthermore, along with Bates, Padilla attended the September 19 meeting and witnessed who spoke during this meeting and what they said.

There is ample evidence to show that Gaxiola's termination was motivated by his protected, concerted activity. The General Counsel sustained its burden to prove animus toward the protected activity. Improper motivation may be established by circumstantial evidence, inferred from several factors, including pretextual and shifting reasons given for the employee's discharge, the timing between an employee's protected activities and the discharge, inconsistent treatment of employees, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004); *Flour Daniel, Inc.* 311 NLRB 498 (1993). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

The timing of Gaxiola's termination, only 3 days after the September 19 meeting, and his first day back to work, is strong evidence of unlawful motivation. See *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). In fact, the day after the employee's meeting with Bates, Bates and Padilla discussed Gaxiola's changing attitude for the "worse." This comment is a veiled reference to Gaxiola's conduct the day before. Similarly, the Board has found evidence of animus where an employer cited that an employee was a "disruptive force in the workplace." *Skyline Lodge*, 305 NLRB 1097 fn. 1 (1992), enfd. 983 F.2d 1068 (6th Cir. 1992).

Significantly, Padilla provided shifting reasons for terminating Gaxiola. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify its unlawful conduct.'" *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). Padilla noted on Gaxiola's termination paperwork that he was terminated for leaving the jobsite early and for failing to place the safety cones. However, Padilla testified that he actually terminated Gaxiola for insubordination when Gaxiola yelled at him when Padilla sought to talk with Gaxiola about leaving the jobsite early that prior Friday resulting in poor quality at the Tech Park project. Marstellar, currently employed by Respondent, credibly testified that Gaxiola raised his voice at Padilla after he had already been fired. Current employees are particularly credible since they are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital*, 345 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). When asked why he did not include the "real" reason for terminating Gaxiola in the paperwork, Padilla testified, "It slipped my mind." Providing additional reasons for discharge at a hearing provides evidence of pretext. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014).

Based on the foregoing, I find that the General Counsel has met its burden to prove that animus toward Gaxiola's protected concerted activities motivated Respondent's decision to discharge him.

Having concluded that the General Counsel satisfied his initial burden under *Wright Line*, the burden shifts to Respondent to prove, as an affirmative defense, that it would have disciplined Gaxiola in the absence of his protected, concerted activity. Respondent claims that Gaxiola failed to complete his work on September 19, and the resulting termination was justified (R. Br. at 7–11). Respondent has not proven its claim.

First, I have credited Gaxiola's testimony that he completed his assigned tasks before leaving work on September 19. In addition to the reasons set forth above, such as the timing and the shifting reasons for discharge, it is also significant that Respondent chose to terminate Gaxiola rather than give him a warning or other disciplinary measure for allegedly leaving the worksite early and not completing his assignment. Respondent did not follow its progressive disciplinary practice. Furthermore, Padilla testified that he would not terminate an employee for performance on one job alone. In other instances of disciplinary actions, Respondent chose to give several warnings to employees before finally terminating them. For example, one employee failed at least 3 drug tests before he was terminated. Evidence of disparate treatment supports a finding of animus. *Camaco Loran Mfg. Plant*, 356 NLRB 1182, 1186 (2011).

Respondent also argues that Gaxiola's work history showed a pattern of not completing tasks. However, Respondent continued to hire Gaxiola, and during his latest employment with Respondent, Gaxiola worked for the past 6 years without any disciplinary actions.

Finally, Respondent's subsequent actions belie the true reasons for Gaxiola's termination. Bates testified he held the September 23 meeting with the paving crew, after Gaxiola's termination, to discuss, in part, why the employees did not attempt to help Gaxiola since he needed to leave early that day. Bates also admitted that the poor workmanship on the Tech Park project was due to the entire team failing to work together. It makes little sense for Bates to have approved Gaxiola's termination for leaving the jobsite early and causing its poor quality when it was a poor job performed by the entire team and because Gaxiola needed to leave early that day as he understood at the time of the September 23 meeting. It is readily apparent that Gaxiola's protected concerted activity was a motivating factor in Respondent's decision to terminate. Respondent failed to sustain its burden of proof.

Accordingly, I find that the General Counsel proved that Respondent violated Section 8(a)(1) of the Act when it terminated Gaxiola.

D. Respondent Did Not Discharge Marana

The complaint and amended complaint, at paragraphs 5(a) and (e), alleges that Marana was terminated because of his protected concerted activity, in violation of Section 8(a)(1) of the Act. Respondent argues that Marana was never actually fired. I agree with Respondent.

Generally, employees cannot claim discriminatory discharge unless they have been actually discharged. In analyzing this allegation, I must rely solely on credibility. As set forth above, I find that Bates told Marana he was fired, but shortly after the meeting Marana learned that Bates did not actually intend to fire Marana. Marana also never left the meeting. Marana had been engaged in concerted activity when he attended and actively participated in the September 19 meeting discussing Padilla's supervision of the paving staff. Marana also spoke with his coworkers prior to this meeting about Padilla's poor supervision. Furthermore, Marana engaged in concerted activity during Bates' September 23 meeting when he blamed Padilla for the poor workmanship on the Tech Park project. However, in reviewing the totality of the circumstances, as discussed above, Bates threated Marana with job loss violating Section 8(a)(1) of the Act but never actually fired Marana.

The General Counsel essentially argues that because Marana had been engaged in concerted activity prior to the September 23 meeting as well as during the September 23 meeting when he lay the blame of the poor workmanship on Padilla that Bates response to "fire" Marana is both a threat and an actual discharge, resulting in 2 violations of the Act. The General Counsel cited no Board cases where an 8(a)(1) violation had been found for discharge without an actual discharge or constructive discharge.

The only case cited by the General Counsel, *Georgia Hosiery Mills*, 207 NLRB 781 (1973), does not support a finding of a violation of the Act. In *Georgia Hosiery Mills*, the employer terminated an employee the day after she led a group of employees in a work stoppage to protest their working conditions and wages. The employer refused to allow the discharged employee into the workplace. One hour after her discharge, the employer reinstated the discharged employees. The Board determined that although the termination had been substantially remedied before the complaint had been issued, the termination occurred during the course of events involving other violations of the Act, and thus the termination violated the Act. The situation presented here is distinguishable. Marana suffered no actual harm, and his "firing" was cleared up soon after the September 23 meeting ended.

Hence, I find that the General Counsel failed to show that Respondent violated Section 8(a)(1) by discharging Marana, and recommend that this allegation be dismissed.

E. Respondent's Discharge of Gastelum Did Not Violate the Act

In the complaint and amended complaint paragraphs 5(a) and (d), the General Counsel alleges that Gastelum was terminated because of his protected concerted activities, in violation of Section 8(a)(1) of the Act. Respondent argues that Gastelum was terminated for cause. Although I find Gastelum to be a highly credible witness, the General Counsel failed to sustain its burden of proof that Respondent terminated Gastelum for protected, concerted activity.

The same *Wright Line* analysis as discussed above applies to Gastelum's discharge. As for the first factor, Gastelum argua-

bly engaged in concerted activity when he spoke during Bates' September 23 meeting. Once Bates calmed down, Gastelum told Bates that with the combined experience of Bates and Padilla they should know the work would not turn out well due to the water in the ground. Bates responded with sarcasm. Gastelum's comments were a continuation of the employees' problems with Padilla's supervision and failure of the Tech Park project. *Alton H. Piester, LLC*, 353 NLRB 369 (2008). As for the second factor, obviously Respondent was aware of Gastelum's concerted activity since he attended and spoke at the September 23 meeting but the record is devoid of any evidence that Respondent knew that Gastelum agreed with his coworkers regarding Padilla's poor supervision nor that he would have attended the September 19 meeting if he had been aware of it.

Regarding the third prong, the General Counsel failed to prove animus by Respondent when it terminated Gastelum. Notably and significantly, Gastelum did not attend the September 19 meeting where the employees proactively met with Bates to complain about Padilla. Furthermore, even though Gastelum spoke during the September 23 meeting, his comments did not mention Padilla's poor supervision, which was the subject of the September 19 meeting. Thus, there is a failure to prove animus toward Gastelum's activities, and I find that the General Counsel has failed to prove by a preponderance of the evidence that a motivating factor for Gastelum's discharge was his protected, concerted activity.

Moreover, even had the General Counsel shown that Gastelum's protected, concerted activity was a motivating factor, I find that Respondent has shown that it would have discharged Gastelum in any event. Respondent also did not terminate Gastelum until 3 weeks after Gaxiola had been terminated. In the interim Gastelum had not engaged in any other concerted activity. The factual scenario presented here is not analogous the various decisions cited by the General Counsel in which a 3 week gap was factor supporting pretext or animus on the part of the employer.

Even before terminating Gastelum, Respondent issued Gastelum a warning for the safety incident of October 1. Gastelum's disciplinary records show that he had been warned several times regarding various safety violations, including damage to company equipment. When Respondent eventually terminated Gastelum on October 10, Padilla mentioned that Gastelum had performed poorly raking on several projects. Gastelum disagreed with Padilla's assessment but admitted that he had been asked to work faster. In all, the General Counsel has shown no animus on the part of Respondent when terminating Gastelum.

Hence, I find that the General Counsel failed to show that Respondent violated Section 8(a)(1) by discharging Gastelum, and recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

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

2. Respondent violated Section 8(a)(1) of the Act when it threatened Marana on September 23.

3. Respondent violated Section 8(a)(1) of the Act when it terminated Gaxiola on September 22.

4. By engaging in the unlawful conduct set forth above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and Section 2(2), (6), and (7) of the Act.

5. All other allegations are dismissed.

REMEDY

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

Having threatened employees with loss of employment for engaging in protected concerted activities, Respondent is ordered to cease and desist from this action.

Respondent, having discriminatorily discharged employee Juan Gaxiola, must offer him full reinstatement to his former position or, if his position no longer exists, to substantially equivalent position, without prejudice to his seniority or any other right or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

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 addition, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id., slip op. at 3.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Bates Paving & Sealing, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Cease and desist from threatening employees with loss of employment for engaged in protected concerted activities.

(b) Discharging or otherwise discriminating against any em-

[20] 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.

ployee for engaging in protected, concerted activity and/or for violating an unlawful rule.

(c) 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 of the date of the Board's Order, offer Juan Gaxiola full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

(c) Make Juan Gaxiola whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Compensate Juan Gaxiola for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) 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 back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, the attached notice marked "Appendix"[21] on forms provided by the Regional Director for Region 28, 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 September 19, 2014.

(g) 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.

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

Dated, Washington, D.C. July 20, 2015

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 make threats to you that engaging in protected concerted activity could result in job loss.

WE WILL NOT terminate you because of your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Juan Gaxiola full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Gaxiola whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Juan Gaxiola for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Juan Gaxiola, and notify him in writing that this has been done and

[21] 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."

that the discipline and discharge will not be used against him in any way.

BATES PAVING & SEALING, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-142681 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.