

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

GUTHRIE THEATER

and

Case 18-CA-215022

**INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
LOCAL 13**

Kaitlin E. Kelly, Esq.,

for the General Counsel.

Douglas R. Christensen, Esq. and

Alice D. Kirkland, Esq.,

for the Respondent.

Justin D. Cummins, Esq.,

for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on November 13 and 14, 2018. The International Alliance of Theatrical Stage Employees, Local 13 (Charging Party or Union), filed the charge on February 26, 2018, and a first amended charge on April 20, 2018, and the General Counsel issued the complaint on June 22, 2018. The complaint alleges that Guthrie Theater (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act¹ (Act) by downgrading the performance evaluation of an employee for engaging in protected, concerted activity. (GC Exh. 1(e).) The complaint further alleges that Respondent violated Section 8(a)(1) of the Act on various occasions by threatening employees. (Id.) Respondent timely answered the complaint, denying that it violated the Act.² (GC Exh. 1(g).)

¹ 29 U.S.C. §§151-169.

² General Counsel moved to amend some of the allegations contained in par. 7 of the complaint at trial. (Tr. 10.) Respondent's counsel objected to the amendments, stating that the allegations contained in par. 7 were not mentioned in the charge or amended charge. (Tr. 10-11.)

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,³ and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Guthrie Theater, a non-profit theater and arts organization, has been engaged developing and staging theater productions at its facility in Minneapolis, Minnesota, where it annually derives gross revenues in excess of \$1 million, and purchases and receives goods valued in excess of \$5000 directly from points outside of the State of Minnesota. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations and Management

Artistic Director Joe Haj holds the highest position at the Guthrie Theater. (Tr. 132.) At all relevant times, Jean Leuthner held the position of human resources director and Jennifer Bielstein served as managing director for the Guthrie Theater. (Tr. 131, 134, 173.) Also, during the relevant time period, David Stewart⁴ served as Respondent's director of production, Josh Peklo served as Respondent's technical director, Sean Walters served as Respondent's assistant technical director, and Jim Gangl served as Respondent's associate technical director. (Tr. 21, 72-73.) Respondent admits, and I find, that Haj, Leuthner, Bielstein, Stewart, Peklo, Walters, and Gangl were supervisors of Respondent as defined in Section 2(11) of the Act. (Tr. 129.) Of these individuals, only Leuthner and Peklo testified at the hearing. During the hearing, the General Counsel moved to amend the complaint to add Sadie Ward, human resources generalist, and Monica Servi, human resources coordinator, as alleged supervisors and/or agents of Respondent. (Tr. 237.) No other party objected to the amendment and I allowed it. (Tr. 237-238.) Respondent admitted, and I find, that Ward and Servi are supervisors of Respondent within the meaning of Section 2(11) of the Act or agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 238.)

After Haj became Respondent's artistic director, he articulated four key values (or "pillars") for the organization. (Tr. 132.) These four key pillars were: fiscal responsibility; artistic excellence; equity, diversity, and inclusion; and community engagement. (Tr. 132.) Haj specifically published a document stating why equity, diversity, and inclusion was a core value

³ Although I have 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 on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

⁴ Stewart is sometimes identified in the record as "DStew." (Tr. 94.)

and his roadmap to work toward it. (R. Exh. 2; Tr. 133-134.) A committee for equity, diversity, and inclusion was headed by Patricia Mitchell and Sara L'Heureux, employees of Respondent. (Tr. 134.) Respondent has held affinity group meetings, revamped its hiring practices, and presented several workshops in support of this core value. (Tr. 135-136.)

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Leuthner was employed by Respondent from September 2004 until September 2018. (Tr. 131.) For most if that time, she was Respondent's human resources director. (Tr. 131.) From 2016 to 2018, Sadie Ward, a human resources generalist, and Monica Servi, a human resources assistant, reported to Leuthner. (Tr. 131-132.)

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The Guthrie Theater employs about nine carpenters in its scene shop. (Tr. 21, 72.) The carpenters in the scene shop are represented by International Alliance of Theatrical Stage Employees Local 13 (Union). (Tr. 22, 73.) Peklo was the technical director over the scene shop from June 2013 until May 2018. (Tr. 21, 72, 239.) Peklo had two assistants: Gangl and Walters. (Tr. 21, 72-73.) Peklo reported to Stewart. (Tr. 21-22, 73.) Stewart reported to Haj. (Tr. 22, 73)

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B. Employment of Molly Diers and Nathan Saul

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Molly Diers worked in Respondent's scene shop as a scenic carpenter and craftsperson from 2015 to 2018. (Tr. 20-21, 64-65.) Diers has served as a member-at-large on the Union's executive board for about 5 years. (Tr. 22-23.) Diers had concerns with what she deemed a sexist culture in the scene shop for the length of her tenure with Respondent. (Tr. 25.) She did not raise her concerns to Respondent until 2016. (Tr. 25.)

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Diers frequently discussed her concerns with Kristen Larsen, the other full-time female carpenter in the scene shop, and Rose King, a female "overhire" in the scene shop.⁵ (Tr. 25-26.) She also discussed her concerns with her shop steward, Chris Sibilias, and Nathan Saul, another carpenter in the scene shop. (Tr. 26.)

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Diers left her employment with Respondent in January 2018. (Tr. 60.) At that time, Peklo hired a new scene shop supervisor and his choice made Diers believe that he had no interest in changing the shop culture. (Tr. 60.) As a result, Diers resigned. (Tr. 60.)

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Nathan Saul worked as a carpenter in Respondent's scene shop from 2002 to 2018. (Tr. 71.) He was hired as a craftsperson and was promoted to lead craftsperson in 2007. (Tr. 71.) He served as a trustee for the Union from 2010 to 2016 and was a member of its executive board from 2013 to 2016. (Tr. 74.)

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Saul initially believed that the atmosphere in the scene shop was jocular. (Tr. 74.) However, after talking with others in the shop, particularly women, he became aware that what he perceived as jocular was not perceived the same way by others. (Tr. 74.) Over time, he grew to believe that the atmosphere in the scene shop was inappropriate, harassing, disrespectful, and dismissive. (Tr. 74-75.) He credited Diers, Larsen, and King with directing his attention to this problem. (Tr. 75.)

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⁵ Overhires are occasional employees hired when the workload is heavy. (Tr. 21.)

Saul resigned his employment with Respondent in 2018. (Tr. 109.) When Respondent hired a new scene shop supervisor, Saul believed there was no chance for meaningful change in the scene shop and felt he could no longer work there.⁶ (Tr. 110-111.)

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C. Promotion of Mark Mauer to Scene Shop Supervisor

Mark Mauer was promoted to scene shop supervisor in August 2016. (Tr. 26.) Diers described Mauer as difficult to work with, especially for women, as he was dismissive and rude. (Id.) Saul characterized Mauer as the scene shop bully, making people uncomfortable and reacting defensively and angrily to women in the shop. (Tr. 76.) Diers was upset when Mauer's promotion was announced and discussed her concerns with Larsen, King, and Saul. (Tr. 26-27.)

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Saul discussed his concerns over Mauer's promotion with Peklo in late August 2016. (Tr. 77.) Saul had a second conversation with Peklo about his concerns during his annual review meeting. (Tr. 78.) During this conversation, Saul mentioned that women in the scene shop had mentioned that they did not feel comfortable bringing issues to management's attention because they did not believe anything would be done. (Tr. 79.)

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In November 2016, Saul brought his concerns to Leuthner. (Tr. 79.) Saul told Leuthner about his conversations with Peklo and concerns with Mauer. (Tr. 79.) Leuthner said she needed to investigate Saul's concerns and that she knew people weren't happy. (Tr. 81.) Saul followed up this conversation with an email. (GC Exh. 11; Tr. 81.) Saul asked Leuthner to follow up with Diers. (GC Exh. 11; Tr. 81.)

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D. Offensive Joke and Respondent's Response

In October 2016, during a morning meeting, Mauer told a series of "redneck" jokes. (Tr. 27, 65.) Diers described his last joke as a "rape joke."⁷ (Tr. 27.) Diers and Larsen were very upset by the joke. (Tr. 27.) Diers noticed that Gangl and Walters chuckled at the joke. (Tr. 27.) Diers and Larsen left the meeting and began talking about the joke on the shop floor. (Tr. 27.)

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About 30 minutes later, Diers went to talk to Gangl and Walters in their office about the joke. (Tr. 28.) Diers told them that she was upset. (Tr. 28.) She further told Gangl and Walters that she couldn't believe that supervisors would chuckle at a joke like that and didn't do anything about it. (Tr. 28.) Gangl and Walters apologized and promised to talk to Mauer about the joke. (Tr. 28.) Gangl and Walters later spoke to Mauer about the joke and Mauer apologized to Diers. (Tr. 66, 241.) When Peklo arrived at work later that day, Gangl and Walters told him about the joke, and that they had spoken with Mauer and Mauer had apologized to Diers. (Tr. 241.) Peklo then contacted Leuthner to report what had happened. (Tr. 241.)

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That evening, Diers received an email from Peklo. (GC Exh. 3; Tr. 28, 242.) Peklo asked Diers if they needed to discuss the meeting and stated that Gangl and Walters filled him in about

⁶ The other finalists for the supervisor position were Diers and Saul. (Tr. 110.)

⁷ Mauer's statement was "What do you call a redneck girl who can run faster than her brothers? A virgin." (Tr. 68.)

it. (GC Exh. 3.) Diers responded that Mauer had apologized for the joke and that she thought everything was fine. (GC Exh. 3.) She reiterated her position that such jokes are not appropriate for the workplace and that she hoped that supervisors would shut down such jokes if they heard them in the future. (GC Exh. 3.)

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Leuthner met with Peklo about Diers' concerns. (R. Exh. 5; Tr. 142.) Leuthner was made aware that Mauer had told the joke and apologized to Diers. (Tr. 143.)

10 In December 2016, Leuthner, Stewart, Diers, and employee Sara L'Heureux met to brainstorm ideas about how to fix the problems in the scene shop.⁸ (R. Exh. 7; Tr. 150-151.) The meeting took place in Stewart's office and lasted about an hour.⁹ (Tr. 151.) Following the brainstorming session, a women's affinity group was created. (Tr. 152.) Diers led the women's affinity group, which was open to all female employees of Respondent. (Tr. 153.)

15 Diers and Larsen went to see Leuthner regarding their concerns.¹⁰ (R. Exh. 6; Tr. 32-33, 142.) Diers was frustrated that nothing had happened in the shop regarding the joke. (R. Exh. 6; Tr. 33, 142, 147.) Diers also raised frustration that women in the scene shop were not heard when problem solving. (R. Exh. 6.) Larsen was upset that Mauer had revealed personal information to others against her wishes. (Tr. 33.) Leuthner listened and took notes. (R. Exh. 6; 20 Tr. 33, 142.)

Following this conversation, Respondent held training on respect in the workplace. (Tr. 34.) Diers did not find this training effective.¹¹ (Tr. 35.) Respondent also held mandatory trainings on subtle sexism in March and April 2017. (R. Exh. 8; Tr. 34, 154.) Diers found the subtle 25 sexism training good, but too brief. (Tr. 35.) Diers and Saul did not notice a change in the atmosphere of the scene shop following these training sessions. (Tr. 35, 86.)

30 On April 17, 2017, Stewart sent an email to all supervisors in Respondent's production department. (R. Exh. 8; Tr. 156-157.) Stewart's email discussed Respondent's addressing a culture of sexism. (Tr. 156-157.) The email also announced upcoming subtle sexism training. (Tr. 156-157.) All employees in the scene shop were required to attend this training. (Tr. 157.)

E. Unhappiness in the Scene Shop

35 In May 2017, Diers noticed that everyone in the scene shop was noticeably unhappy. (Tr. 35-36.) Diers approached the other employees and asked if they wanted to have a happy hour to brainstorm ideas about the unhappiness in the shop. (Tr. 36.) Diers followed up these verbal invitations with an email invitation. (GC Exh. 5; Tr. 86-87.)

⁸ R. Exh. 7 is a photo taken of a post-it note created at the brainstorming session.

⁹ Leuthner's testimony about this meeting was uncontroverted and I credit it.

¹⁰ Beginning in 2016, Leuthner began using a tool called, "Validation 101" to facilitate conversations involving conflict. (R. Exh. 3; Tr. 138.) This tool was sent by Ward to Peklo to help facilitate scene shop meetings. (Tr. 140.) It is not clear whether the tool was sent to other employees. (Tr. 140-141.) Respondent also issued a communication credo in 2016. (R. Exh. 4; Tr. 139.) This document was sent to all employees around November 2017. (Tr. 141.)

¹¹ After the first training, Saul sent an email to Leuthner, indicating that the training was a step in the right direction, but was not helping create a better environment in the scene shop. (GC Exh. 12; Tr. 85.)

Within a few weeks of Diers' email, scene shop employees and a few frequent overhires had a meeting. (Tr. 37.) Diers did not invite Mauer or Peklo. (Id.) The group discussed their frustrations with Mauer and Peklo and possible solutions. (Tr. 37, 87.) The group did not come up with any solid plan and no action was taken after the happy hour. (Tr. 37, 88.) However, the possibility of taking their concerns to human resources was raised. (Tr. 37, 87-88.)

F. Meetings with Management

In June 2017, Diers had a meeting with Director of Production Dave Stewart. (Tr. 38.) Diers was upset over an incident with Gangl. (Tr. 38.) During the build of a show, Diers, Larsen, and King told Gangl that something wouldn't work, and he dismissed them. (Tr. 38.) Later, when Saul told Gangl this same idea wouldn't work, Gangl immediately agreed with him. (Tr. 38.) During the meeting, Diers told Stewart that she felt like she was going to quit if he did not do something about the culture in the scene shop. (Tr. 39.) Stewart said he did not want Diers to quit and asked why she was frustrated. (Tr. 39.) Stewart asked if he could hold a meeting with just the men in the scene shop.¹² (Tr. 39.) After conferring with King, Diers told Stewart that such a meeting was warranted.¹³ (Tr. 40.) Diers communicated her decision about the meeting via email. (GC Exh. 6; Tr. 40.)

In mid-June, Stewart held a meeting with the male employees of the scene shop. (Tr. 41, 89.) Stewart started the meeting by discussing the treatment Diers had described, including disrespect and dismissive treatment of the women in the scene shop. (Tr. 89.) Stewart said that the treatment of the women in the scene shop was unacceptable. (Tr. 89.) He also said that everyone deserved to have a respectful place to work and that they had to figure out ways to improve the situation. (Tr. 90.) When asked if Respondent was willing to provide training and resources, Stewart replied that the employees should figure out how to fix the problem. (Tr. 90.) Diers later thanked Stewart for having the meeting. (GC Exh. 6.)

A few weeks later, Saul sent Stewart an email, stating that he felt that the meeting of the male scene shop employees had been positive. (GC Exh. 13; Tr. 90.) Saul felt that things seemed better following the meeting, with people openly discussing issues. (Tr. 91.) Saul wanted Stewart to keep the momentum from the meeting going and asked if Stewart would be willing to facilitate more meetings. (GC Exh. 13; Tr. 91.) Stewart responded that, as supervisor, he was not the person to lead more meetings. (Id.) Stewart did not schedule any further meetings. (Tr. 92.)

Later that month, Peklo approached Diers and asked her to sit down with him because he had heard about her meeting with Stewart. (Tr. 42.) They discussed the shop culture, why the women were unhappy, and they brainstormed ideas on how to address the shop culture. (Tr. 42.) They eventually agreed to have meetings, as a group, to work on the shop culture. (Tr. 42-43.)

¹² As Stewart did not testify at the hearing, Diers testimony about the meeting stands uncontroverted.

¹³ Initially, Diers had told Stewart that she felt that having a meeting with only male scene shop employees was not a good idea. (R. Exh. 9; Tr. 158.)

On June 28, 2017, Leuthner sent an email to Diers asking to chat. (R. Exh. 11; Tr. 154–155, 162.) The two were unable to set up a meeting. (R. Exh. 11.) On July 6, Leuthner sent a follow-up email to Diers, asking if there had been any progress in the shop culture. (R. Exh. 11.) Diers replied that “I think [Peklo] is open to change, we talked about some ideas on how to move forward. I’m afraid to say I don’t have a ton of hope, but I’m trying to keep an open mind.” (R. Exh. 11.)

On August 1, 2017, Saul sent Stewart an email about scheduling a scene shop meeting. (GC Exh. 14; Tr. 92–93.) Saul felt that backsliding had occurred and that people were as miserable as ever. (GC Exh. 14; Tr. 92–93.) Saul felt it was important that Stewart take some action to mitigate these circumstances. (Tr. 93.) Stewart responded that he did not have time to deal with the problem at that time, but not to let it slip away. (Tr. 93.)

When Diers returned from a vacation in August 2017, she learned from King about some issues that occurred in her absence that made her upset. (Tr. 43.) Diers emailed Peklo, copying Leuthner and Stewart, asking him to schedule scene shop meetings. (GC Exh. 7; Tr. 43–44.) Peklo replied that he planned to schedule a meeting that month, after employees returned from their vacations. (GC Exh. 7.)

Prior to scheduling the scene shop meetings, Leuthner and Ward met with Diers.¹⁴ (Tr. 163, 271.) At that time, Diers expressed that she did not think that a human resources representative needed to be present at the upcoming meeting. (Tr. 163, 271.)

G. *Scene Shop Meetings*

Peklo scheduled the first meeting in August 2017 for scene shop employees, supervisors, and a few overhires.¹⁵ (Tr. 44–45, 163.) Walters volunteered to moderate the meeting. (Tr. 45.) At the outset of the meeting, Peklo asked employees to write down things they were doing well and things that needed improvement and to put the ideas into an envelope. (Tr. 45.) Employees expressed frustration with the way supervisors spoke to them, a lack of respect in the shop, sexism, and shop cleanup. (Tr. 45–46.) After the comments were read, the group discussed them. (Tr. 46.) Diers commented that Peklo did not have respect for anyone in the shop; Peklo did not respond. (Tr. 46.) Following the first meeting, Ward sent Diers an email asking her how the meeting went. (R. Exh. 12; Tr. 164.) Diers and Peklo felt that the meeting was a step in the right direction.¹⁶ (R. Exhs. 12, 23; Tr. 164, 244.)

On August 10, 2017, Leuthner sent Saul an email asking if he would be attending an equity, diversity, and inclusion (EDI) meeting. (GC Exh. 15.) Saul responded to Leuthner on August 29, addressing his concerns regarding scene shop morale. (GC Exh. 15.) Saul emphasized that the problems in the scene shop were not merely a conflict between Diers and Peklo. (GC Exh. 15.) Instead, Saul stated that everyone in the scene shop was miserable because of the way Peklo

¹⁴ Diers did not testify about this meeting.

¹⁵ Saul did not attend this meeting, as he was on vacation. (Tr. 97.)

¹⁶ Peklo did not testify regarding the first scene shop meeting, so Diers’ testimony stands uncontradicted. Peklo sent an email to scene shop employees following the first meeting attaching his notes, but the notes were not part of the exhibit admitted at the hearing. (R. Exh. 24.)

treated people. (GC Exh. 15.) Saul also stated that he had missed the first scene shop meeting, but that nothing had changed since then. (GC Exh. 15.) Leuthner agreed that the problems in the scene shop were not a result of conflict between Diers and Peklo. (GC Exh. 15.) She stated that, “My understanding is that there are cultural issues around sexism in the shop, as well as communication challenges all around.” (GC Exh. 15.) Leuthner also stated that Saul needed to be patient, and that Saul and other employees needed to consider how they were “contributing to the problem and to the solution.” (GC Exh. 15; Tr. 95.) She further asked Saul to “work on finding constructive ways to communicate with [Peklo] while respecting the fact that he is the supervisor.” (GC Exh. 15.) Leuthner copied Stewart on her response to Saul. (GC Exh. 15.)

In September 2017, a second scene shop meeting was held. (Tr. 46, 163, 246.) All full-time scene shop employees and supervisors, as well as at least one overhire, attended this meeting. (Tr. 46, 97.) Attendees wrote down frustrations on post-it notes and put them into categories on a white board. (Tr. 47, 99, 246–247.) Frustrations raised included respect, communication, and sexism. (Tr. 47.) At the end of the meeting, Diers stated, “Now what?” (Tr. 47, 99.) Diers felt like she had been talking about these issues for months, but Respondent wasn’t doing anything.¹⁷ (Tr. 47.) Other employees responded to Diers’ question with ideas for future action.¹⁸ (Tr. 47, 99.)

A third scene shop meeting was held in October 2017. (Tr. 56, 99, 163.) This meeting was attended by scene shop personnel, overhires, Peklo, Walters, and Gangl. (Tr. 56, 100.) At this meeting, management wanted to establish team norms for respectful communications. (Tr. 56.) Those present tried to use the things they had written on post-it notes at the prior meeting to create actions for the group. (Tr. 100.) The discussion devolved into people complaining about things they didn’t like, such as employees failing to clean up the shop. (Tr. 100.) No one from Respondent’s human resources department was present, so Diers chose not to speak up at the meeting. (Tr. 56, 101.)

Diers was upset by the lack of human resources presence at the third meeting. (Tr. 56.) Diers spoke to King, Larsen, and Saul after the meeting. (Tr. 57, 101.) They all agreed that the tone of the meeting was not constructive. (Tr. 57.) They were all surprised that no one from human resources attended the meeting. (Tr. 57, 102.) Diers warned the others not to speak up at the meeting because of an issue that had arisen with her recent performance evaluation.¹⁹ (Tr. 57, 102.)

Diers then went to speak with Gangl and Walters in their office. (Tr. 57.) Diers told them she was frustrated with the tone of the meetings. (Tr. 58.) She told them what happened during

¹⁷ Saul believed that Diers stated, “What’s next?” or “Now what?” (Tr. 99.) Peklo testified that he believed that the energy of the meeting was good until the end, when Diers commented that would only be progress if, “we were actually going to do it.” (Tr. 247.) Peklo felt this was a negative punctuation to the work at the meeting. (Tr. 247.)

¹⁸ Peklo was not asked whether Diers’ statement prompted a discussion among those present. He did not testify about the subsequent conversation and, thus, the testimony of Diers and Saul on this point stands unrefuted.

¹⁹ Diers received a lower rating in the area of effective communication on her August 30, 2017, performance evaluation. (GC Exh. 8.) As an example of Diers’ negative communication style, Peklo mentioned her, “Now what?” comment made at a previous scene shop meeting. (Tr. 50, 251.)

her evaluation meeting with Peklo and that she did not think she could speak at the meetings any longer. (Tr. 58.) She said she felt silenced and that the women in the scene shop needed help. (Tr. 58.) Gangl and Walters also did not like the tone of the meeting. (Tr. 58.) Diers did not remember if they promised to take any action. (Tr. 58.)

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On October 11, 2017, Diers, Larsen, and King met with Bielstein about the atmosphere in the scene shop. (R. Exh. 20; Tr. 54-55.) The group discussed sexism in the shop and the culture of the shop. (Tr. 55.) They also raised their frustrations with Peklo; his defense of the men in the shop, and his failure to do anything to address the culture in the shop. (Tr. 55.) Larsen raised her fear of retaliation by Peklo. (Tr. 55.) Bielstein seemed concerned with the issues raised and promised to follow up. (Tr. 55-56.) Bielstein followed up with an email, indicating that she had met with Leuthner, Stewart, and Peklo regarding the concerns. (GC Exh. 20, 21; R. Exh. 20.) Bielstein's email also outlined future steps that would be taken to address the concerns, including meetings and more training. (R. Exh. 20.)

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On October 11, 2017, Diers sent Leuthner an email regarding the scene shop meetings and her recent performance evaluation. (GC Exh. 18; R. Exh. 14.) In her email, Diers stated, "I asked for HR representation at the meetings but even with that I don't think it would be wise for me to participate for fear of my job here at the Guthrie." (Id.) Leuthner replied that she was not aware of a request for a human resources representative at the scene shop meetings. (R. Exh. 14.) Leuthner forwarded Diers' message to Stewart, adding that Diers remained an "unwilling spirit." (GC Exh. 18.) Leuthner and Stewart further discussed the meeting between Diers, Larsen, King, and Bielstein. (Id.) Leuthner commented that it was interesting that Diers had brought others to the meeting with Bielstein.²⁰ (Id.)

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On October 26, 2017, Peklo sent an email to Stewart in which he asked to meet because he thought, "as an idea I think this ship is sinking." (R. Exh. 25.) Stewart said they would find time. (Id.)

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On October 27, 2017, following the third scene shop meeting, Diers sent an email to Leuthner (GC Exh. 10; R. Exh. 14; Tr. 58.) Diers was upset because no one from human resources was present at the meeting even though, she believed, she had requested and Peklo had promised this.²¹ (Tr. 58-59.) Diers copied Ward on her emails. (Tr. 59.) Leuthner was not aware of any request for a human resources representative at the scene shop meetings. (GC Exh. 10.) Leuthner also asked Diers to be a "[W]illing spirit in this process." (GC Exh. 10.) Diers responded that the third scene shop meeting had been offensive to the women present and that she did not want to attend meetings that made her uncomfortable.²² (GC Exh. 10.) Leuthner then provided Diers with her cell phone number in order to make herself more accessible. (GC Exh. 10.)

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²⁰ Bielstein is referred to as "jbiel" in GC Exh. 18.

²¹ Leuthner testified that she did not believe that Diers had requested a human resources representative at the meetings at that point. (Tr. 173.) Leuthner characterized this as a misunderstanding. (Tr. 173.)

²² Diers mistakenly denied having any contact with Leuthner or Ward since the first scene shop meeting. (GC Exh. 10; R. Exh. 14.) This statement is contradicted by Ward's email of August 18, 2017. (R. Exh. 12.) I do not find that this minor misstep detracts from Diers' overall credibility.

On November 1, 2017, Leuthner sent an email to Peklo asking if Diers had asked for a human resources representative at the scene shop meetings. (R. Exh. 13; Tr. 172.) Peklo stated in his email, “[Diers] said she thought it would be useful if we had an outside moderator going forward and I agreed that it was not a bad idea but did not commit to definitely do it . . . I was hoping that since we were in the middle of a process that had been going well that we could complete our norms on our own and then incorporate external help with whatever was next.” (R. Exh. 13.)

On November 10, 2017, Saul sent an email to Leuthner requesting a meeting. (GC Exh. 16; Tr. 103.) Saul was upset about inappropriate behavior by another employee and about the environment in the scene shop. (Id.)

Saul and Leuthner met that same afternoon. (Tr. 104; 176.) During the meeting, Leuthner asked Saul why Diers had not been communicating to the extent she had been in the past and why she [Diers] was so upset. (Tr. 104.) Saul stated that Diers had a serious trust issue after requesting human resources representation at the third scene shop meeting that was not provided. (Tr. 104-105; 176.) Leuthner denied ever receiving an email requesting human resources representation at the scene shop meeting. (Tr. 105.) Saul replied that maybe Diers had not sent an email, but instead spoke to Josh [Peklo], testing him to see if he would follow through with it. (Tr. 105.) Leuthner responded, “Yeah, she’s testing a lot of people.”²³ (Tr. 105.) Saul told Leuthner that he believed her comment was inappropriate. (Tr. 105.) Unsure of how else to respond to Leuthner’s comment, Saul went on to discuss trust issues with management and human resources. (Tr. 105.) Leuthner said that every time an issue was brought to her attention, she acted on it. (Tr. 105.)

Leuthner went on to ask Saul how much of situation Diers was bringing on herself by being so angry and negative all the time.²⁴ (Tr. 105.) Saul became very angry and began yelling at Leuthner. (Tr. 105-106; 176.) Saul yelled, “Was her skirt too short? Was she asking for it? You’re blaming the victim.” (Tr. 106.) Leuthner responded that this was not her intention. (Tr. 106.) Other employees called Leuthner’s office during this meeting to make sure she was safe because of Saul’s yelling. (Tr. 119; 176.) The meeting continued for another hour regarding these issues. (Tr. 106.) Leuthner spoke to Stewart and Bielstein after the meeting. (Tr. 177.)

On Monday, November 13, Saul again met with Leuthner in her office. (Tr. 106; 177.) Leuthner advised Saul that he had yelled at her loud enough at their previous meetings loudly enough to make the people in adjacent offices uncomfortable. (Tr. 106-107.) Saul stated that he felt bad for making Leuthner and the others uncomfortable and apologized. (Tr. 107; 177.) Leuthner emphasized that she had not received an email requesting human resources representation at the scene shop meeting and that they should all try to be team players on this and that Diers was not being a team player by not participating.²⁵ (Tr. 107.)

²³ Leuthner testified that she did not believe she made this statement. (Tr. 181, 231.) Leuthner later testified that she couldn’t recall whether she made the statement or not. (Tr. 232.)

²⁴ Leuthner denied making this statement. (Tr. 181.)

²⁵ Id.

On November 13, Peklo sent an email to the scene shop employees and supervisors. (R. Exh. 19.) Peklo indicated that momentum had been lost in creating collective norms and that in the future human resources representatives would be included in scene shop meetings. (R. Exh. 19.) That same day, Ward sent an email to Diers, asking her several questions about the atmosphere in the scene shop. (R. Exh. 26.) Diers did not respond. (Tr. 278.)

Later, that same afternoon, Saul sent Leuthner an email. (GC Exhs. 17, 36; R. Exh. 15; Tr. 107, 178.) Saul again pointed out that Diers had asked for human resources representation at a scene shop meeting, a request that was not acted upon by Leuthner. (GC Exh. 17, 36; Tr. 108.) Saul noted that this same request had been made to Peklo and he had not acted upon it. (Tr. 108.) Saul also wanted to be clear that Leuthner's attitude, demonstrated by rolling her eyes and "blaming the victim," was inappropriate.²⁶ (Tr. 108-109.) Saul apologized to Leuthner for his behavior during their meetings of November 10 and 13.²⁷ (GC Exh. 17; Tr. 120.)

Leuthner forwarded Saul's email to Ward, stating, "I no longer feel 'safe' without having a witness to my conversations with Nate Saul." (GC Exh. 36.) Leuthner forwarded Saul's email a second time to Ward, commenting, "What I really want to say is: Wow. This is such a misrepresentation of our conversation that I no longer feel safe having any further conversations with you without a witness."²⁸ (R. Exh. 16; Tr. 183.) Although Leuthner maintained that she responded to these misrepresentations, no document containing such a response is in evidence. Leuthner drafted a response to Saul but did not send it. (R. Exh. 17.) Instead, Leuthner forwarded her draft response to Stewart. (Id.)

Diers sent an email to Leuthner, Bielstein, and Stewart on November 17, asking what Respondent was doing to address equity, diversity, and inclusion. (R. Exh. 21.) Diers asked for clarification regarding consequences for perpetrators of harassment and protection from retaliation. (R. Exh. 21.) Leuthner responded with an email of her own, copying Bielstein and Stewart, addressing Diers' concerns. (R. Exh. 21.) Leuthner also attached excerpt from the company handbook and Respondent's equity, diversity, and inclusion core value document. (R. Exh. 21.)

On November 21, after meeting with Bielstein, Saul sent an email to Leuthner, again apologizing for his behavior at their earlier meeting. (R. Exh. 18; Tr. 186-187.) Leuthner forwarded the email to Stewart. (R. Exh. 18; Tr. 187-188.)

Respondent's human resources department played a role in subsequent scene shop meetings. (Tr. 121-122; 174.) Sadie Ward facilitated three scene shop meetings in December 2017. (Tr. 122, 273-274.) Saul praised Ward's performance in facilitating the meetings. (R. Exh. 1; Tr. 122-123.) Ward sent out an email with attachments following the December meetings. (R. Exhs. 27, 30.) Saul sent a reply to Ward's first email, indicating that problems in the scene shop needed to be addressed before employees could move on. (R. Exh. 28.) Ward stopped

²⁶ Saul candidly admitted that he did not mention Leuthner's comments that Diers was testing people, bringing things on herself, or was not a team player in his email. (Tr. 120.)

²⁷ Leuthner testified that the email misrepresented the conversations she had with Saul. (Tr. 180.)

²⁸ Leuthner drafted a response to Saul, but never sent it to him. (R. Exh. 17.) Leuthner instead forwarded the draft response to Stewart. (Id.)

facilitating the meetings in January 2018, when Respondent hired an outside consultant to do so. (Tr. 217, 274.)

H. Diers' Evaluations

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Scene shop employees receive annual performance evaluations from Peklo. (Tr. 23.) Prior to 2017, Diers received positive evaluations. (Tr. 24.) In November 2015, Peklo stated, "It was a busy and fractured season with lots of overlapping projects and I appreciate your hard work and continued high level of craftsmanship." (GC Exh. 2.) In August 2016, Diers' performance appraisal contained ratings of "good" or "exceptional" in all areas. (GC Exh. 4.) She received a rating of "good" in communication with no comments or examples given. (Id.) Her overall rating for 2016 was "exceptional." (Id.)

10

At the time she received her 2016 evaluation, Diers raised concerns regarding Mauer with Peklo. (Tr. 32.) Diers said that she was concerned with Mauer's leadership and that she felt that the shop was unhappy and sexist and that it was hard for women to work there. (Tr. 32.) Peklo stated that he stood by his choice in hiring Mauer.²⁹ (Tr. 28.)

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Prior to giving Diers her 2017 performance evaluation, Peklo met with Leuthner and Stewart. (Tr. 165, 248.) Peklo stated that he had concerns about Diers' communication style and wanted to know if it would be appropriate to include these in her performance review. (Tr. 166.) Leuthner and Stewart believed that Peklo's concerns were accurate. (Tr. 166; 248.) As examples, Peklo cited comments by Diers that "things are never going to get better" and, "it's never going to change."³⁰ (Tr. 166-167.)

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In 2017, Diers received ratings of "good" or "exceptional" in all areas, save two. (GC Exh. 8.) In the area of effective communication and ability to work flexibly, Diers received a rating of "did not meet expectations." (Id.) Diers also received a rating of "did not meet expectations" in the area of shop organization, cleanliness, and efficiency.³¹ (Id.)

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Diers' overall rating in 2017 was "good/solid performance." (Id.) In the area of effective communication, Peklo stated

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I appreciate that you are direct in communication but it is not always in the most constructive tone. i.e. Defensive in morning meetings, not assuming best intentions with engineering or design approaches presented etc.

(GC Exh. 8.) In the evaluation summary, Peklo stated, "I do have growing concerns about communication approaches and choices that are not constructive and are tending more towards the divisive than unifying." (GC Exh. 8.) Peklo did not discuss any problems with Diers' communication style with her at any time prior to her receiving this rating in 2017.

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²⁹ Peklo did not testify regarding this meeting.

³⁰ The latter comment was made during contract negotiations wherein the parties were working toward wage parity between male and female employees. (Tr. 167.)

³¹ Peklo mentioned that everyone in the scene shop received a lower rating in cleanliness, as he was upset with the shop's disorganization. (Tr. 50-51.)

Diers and Peklo met to discuss her August 2017 evaluation. (Tr. 48.) Peklo handed Diers her evaluation and said that she seemed miserable. (Tr. 48.) She agreed with him and told him that the shop culture was making her miserable. (Tr. 48.) Peklo told her that if she was fed up with the culture that perhaps it wasn't the place for her. (Tr. 48.) Peklo specifically stated that he did not like Diers' negativity and gave as an example her, "Now what?" comment made at a scene shop meeting. (Tr. 50, 251.) Peklo did not cite any other examples of Diers' negativity.³² (Tr. 50, 252.)

Diers was upset that Peklo brought up her comment made at a scene shop meeting during her review. (Tr. 51.) She then asked Peklo for another meeting. (Tr. 52.)

The following week, Diers met with Peklo in his office. (Tr. 52.) She told him that the example he used regarding her negativity was from a scene shop meeting. (Tr. 52.) Peklo acknowledged that he made a poor choice with that example. (Tr. 52.) She stated that she did not feel she could speak freely at scene shop meetings without human resources representation. (Tr. 52.) Peklo said that he would make that happen for the next meeting.³³ (Tr. 52.)

On October 11, 2017, Diers sent an email to Leuthner about her review. (GC Exh. 9; Tr. 52, 168.) Diers stated that something she said at a scene shop meeting was used against her in her evaluation. (GC Exh. 9.) She felt she could not safely express her feelings at future meetings. (GC Exh. 9.) She also stated that she had asked for human resources representation at future meetings, but that, even with HR representation, she did not think it would be safe for her to participate for fear of her job. (GC Exh. 9.)

Later, Leuthner forwarded her email exchange with Diers to Stewart. (GC Exh. 18.) Leuthner mentioned that there are other examples of Diers' problematic attitude and that she is an unwilling spirit. (GC Exh. 18; Tr. 198.) Leuthner forwarded the exchange to Peklo. (GC Exh. 19.) Leuthner characterized her exchange with Diers with one word, "Ugh." (GC Exh. 19.) Leuthner also forwarded her exchange with Diers regarding having a human resources presence at scene shop meetings to Stewart, again characterizing the exchange with, "Ugh." (GC Exh. 22.)

After Diers advised Leuthner that she did not feel that Leuthner's office was a safe space to talk, Leuthner forwarded her email exchange with Diers to Stewart with a single word describing the exchange, "Awesome." (GC Exh. 23.) Stewart opined, "She is helping absolutely nothing." (GC Exh. 23.) Leuthner advised Stewart that she did not feel safe from Diers.³⁴ (GC Exh. 23.)

³² Peklo testified that he did not give other specific examples to Diers. (Tr. 252.) However, Peklo testified that he was concerned with Diers' communication style because it was defensive, argumentative, and got in the way of the flow of information. (Tr. 250.)

³³ Peklo did not testify regarding this meeting and Diers' testimony stands un rebutted.

³⁴ Despite using the word safe in quotation marks, Leuthner refused to admit that she was being sarcastic. This is an obvious jab at Diers' statement that Leuthner's office was not a safe space. Leuthner later placed the word safe in quotation marks when forwarding an email exchange with Diers to Ward. (GC Exh. 36.) Based on this exchange and others, I found Leuthner to be a difficult witness and did not credit her testimony except when it was uncontroverted, inherently plausible, or supported by other reliable evidence.

According to Leuthner, she had a conversation with Diers about her performance evaluation.³⁵ (Tr. 168.) Diers was upset about an example Peklo used in her performance evaluation form a scene shop meeting because she thought the meeting had been a safe space to speak. (Tr. 168.) Leuthner then went to Peklo and they agreed that the example from the scene shop meeting had not been the best one to use. (Tr. 168.) According to Leuthner, Peklo had “multiple other examples that he was going to use . . . but he felt like the conversation was positive and . . . he didn’t feel the need to give multiple other examples.”³⁶ (Tr. 168–169.)

Leuthner responded to Diers the next day. She indicated that she had spoken to Peklo and that “[T]his was not the best example to use.” (GC Exh. 9; Tr. 171.) She further stated, “I would encourage you to be open to allowing people to make mistakes, and to be a willing spirit in this process.” (GC Exh. 9; Tr. 171.) Diers responded to Leuthner, acknowledging that people make mistakes, but stating it was unwise to speak candidly in front of a superior. (GC Exh. 9.) Diers reiterated that she did not see how she could participate in future meetings.³⁷ (GC Exh. 9.)

On January 31, 2018, Leuthner forwarded a link to an MPRN article entitled, “Guthrie Scene Shop was Hostile Workplace Say Departed Workers” to Servi.³⁸ (GC Exh. 24.) Servi responded with an angry emoji. (Id.)

On June 13, 2018, Bielstein forwarded a copy of a Facebook post by Diers to Leuthner and others. (GC Exh. 30.) In her post, Diers was asking people to protest Respondent’s annual gala over its “silencing women’s voices.” (GC Exh. 30.) Leuthner forwarded the email to Akemi Graves, an employee of Respondent, stating, “The gift that keeps on giving . . .” (GC Exh. 30.) Graves responded that Diers needed to “move on.” (GC Exh. 30.)

DISCUSSION AND ANALYSIS

A. *Witness Credibility*

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 record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Corp.*, 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 need not be 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 Corp.*, 335 NLRB at 622.

³⁵ Whether the conversation was in person, via email, or both, Diers and Leuthner (and the email) agree that they discussed Peklo’s use of Diers’ comment at a scene shop meeting in Diers’ performance evaluation.

³⁶ No other such examples were ever given, save the example above taken from union contract negotiations.

³⁷ Leuthner admitted telling Diers she was not being a willing spirit. (Tr. 182.)

³⁸ This article was forwarded after Diers had resigned.

Most of my credibility findings are incorporated into the findings of fact above. Based on my observations at trial, I found Diers to be a generally credible witness. She testified in a forthright and candid manner. I also found Saul to be a credible witness. His testimony was detailed and thoughtful. He also candidly admitted information that might not be favorable this position, such as his yelling at Leuthner in their meeting and his failure to mention certain things in an email to Leuthner. The testimony of Diers and Saul did not waver on cross-examination. Both appeared resolute and comfortable while giving their testimony. Therefore, I credit the testimony of Diers and Saul.

I did not find much of Leuthner's testimony to be credible. Her testimony was vague and appeared self-serving. She was a difficult witness. She sometimes gave confusing testimony. For example, she engaged in the following exchange with the General Counsel:

Q. Isn't it also true that the way that the employer filled the scene shop supervisor position with Mr. Mauer, the teller of the rape joke, was not consistent with the core value?

A. No, I don't agree with that. We had a position that was open until filled, and we saw a diverse and qualified slate of candidates for that position.

Q. Doesn't the core value that you're supposedly adopting here require that the position be held open until you've received a sufficiently diverse pool of candidates?

A. Yes, that is part of our core values.

Q. And to that end, you would post the opening?

A. We would keep it open, yes.

Q. But that didn't happen here, did it?

A. You're talking about when Mark Mauer was appointed?

Q. Right.

A. Yeah, you know, there was a restructure and an internal restructure. That was treated differently than this last round of hiring for that position.

(Tr. 222.) Based upon Leuthner's testimony as listed in the findings of fact and here, and her demeanor, I did not credit her testimony, unless it was unrefuted or supported by other, more credible testimony or evidence.

I found some of Peklo's brief testimony credible. He admitted matters that might seem damaging to Respondent's case, such as using the example of Diers' allegedly poor communication skills from a scene shop meeting. I do not credit his self-serving testimony given in response to a lengthy question from Respondent's counsel, that he never discouraged Diers

from vocalizing her concerns about perceived sexism. Furthermore, where he denied telling Diers that the Guthrie might not be the place for her, I credit the more detailed account of Diers over that of Peklo. Much of Peklo's testimony was given in generalities, such as his testimony about his meeting with Diers regarding her 2017 performance evaluation. Instead of discussing who said what during the conversation, Peklo described the conversation as "good" and "constructive." (Tr. 251-252.) He also had difficulty directly answering questions under cross-examination. (Tr. 258-262.)

I credit the brief testimony of Ward. The General Counsel did not cross-examine her. Her testimony did not waver under cross-examination by the Charging Party's counsel. However, I do not find Ward's efforts to facilitate scene shop meetings relevant here. Although Respondent took some measures to respond to sexism in the scene shop, those efforts have no bearing on whether Respondent committed unfair labor practices.

B. *Amendment to the Complaint*

At the hearing, the General Counsel moved to amend a date in paragraph 7 of the complaint. (Tr. 10.) Specifically, the General Counsel moved to change the date of November 10, 2017, to November 2017. (GC Exh. 1(e); Tr. 10.) Respondent's counsel objected to the amendment, asserting that the allegations contained in paragraph 7 of the complaint were not contained in the charge or amended charge. (GC Exh. 1(a), 1(c); Tr. 10-11.) Respondent denied the allegations contained in paragraph 7 of the complaint in its answer. (GC Exh. 1(g).) Respondent also raised a timeliness defense under Section 10(b) of the Act in its answer. (GC Exh. 1(g).) I allowed the amendment at the hearing over the objection of Respondent.³⁹ (Tr. 11.)

As correctly pointed out by Respondent, the allegations contained in paragraph 7 of the complaint are not contained in the charge or amended charge. However, I find that these allegations were properly before me. Additionally, I find that the General Counsel's amendment to the complaint was proper.

The Board requires that complaint allegations be factually related to the allegations in the underlying charge. *Nickels Bakery of Indiana*, 296 NLRB 927, 928 (1989). In considering whether a charge supports an allegation in the complaint, the Board requires that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge. 296 NLRB at 927. In *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959), the Supreme Court held that a complaint alleging violations not specifically alleged in the charge is proper if the matters asserted in the complaint "are related to those alleged in the charge and . . . grow out of them while the proceeding is pending before the Board." 296 NLRB at 927.

In deciding whether complaint amendments are closely related to allegations made in the underlying charge, the Board considers the factors set forth in *Redd-I, Inc.*, 290 NLRB 1155

³⁹ Par. 7 of the complaint alleges that Respondent violated the Act when Human Resources Director Jean Leuthner threatened that an employee who raised concerns about concerted complaints about the workplace tested people and was not a team player and threatened that an employee who raised concerted complaints about the workplace brought negative consequences on herself.

(1988). 296 NLRB at 928. First, the Board considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely-filed charge. *Id.* Second, the Board considers whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the timely-filed charge. *Id.* Finally, the Board may examine whether a respondent would raise similar defenses to both allegations.⁴⁰ *Id.*

In this case, the first amended charge alleges that Respondent violated the Act by a supervisor threatening an employee. Thus, the legal theory of the complaint allegations is the same as those in the timely-filed amended charge: a violation of Section 8(a)(1) of the Act. (GC Exh. 1(c) and (e).)

In addition, the complaint allegations arise from the same factual circumstances and sequence of events as those in the amended charge. The amended charge asserts that Respondent violated the Act by retaliating against Diers with a negative performance evaluation and by Peklo threatening an employee. The violations at issue allege that Respondent twice threatened an employee. The allegations in the amended charge and complaint both involve threats against employees for engaging in protected, concerted activity. All the alleged violations grow out of a series of events that transpired after Diers, Saul, and others began complaining about sexism in the scene shop. The alleged violations all arose during a 2-month period, from October through November 2017. Thus, I find that complaint allegations involve the same legal theory and factual circumstances as those in the amended charge.

As the allegations in the amended charge and complaint involve violations of Section 8(a)(1) of the Act, Respondent would be expected to raise similar defenses to them. Although the conversations involved different actors, I find that they are closely related. The allegation contained in the amended charge and complaint involves a conversation between Peklo and Diers. During that conversation, Peklo allegedly told Diers that if she was fed up with the scene shop culture that perhaps it wasn't the place for her. Peklo also allegedly cited Diers' "Now what?" comment at a scene shop meeting as the basis for downgrading her performance evaluation in effective communication. The allegations contained in the complaint, but not the charge or amended charge, involve Leuthner's alleged statements to Saul, in two separate conversations, that Diers was testing a lot of people and bringing things on herself and that Diers was not being a team player. Although the allegations that were not contained in the charge or amended charge involve separate conversations and actors, I find them closely related. See *Charter Communications, LLC*, 366 NLRB No. 66, slip op. at 3 (2018) (finding timely and untimely allegations closely related when they alleged that the respondent's conduct discouraged employees from engaging in protected activities in violation of Sec. 8(a)(1).) All of the comments allegedly made by Respondent's managers implicate Diers' behavior in engaging in protected, concerted activity. Specifically, Peklo and Leuthner both stated that Diers' actions in raising concerns about the workplace environment caused her to incur negative consequences.

⁴⁰ Although *Redd-I* involved a complaint amendment, the precedent relied upon in *Redd-I* applies a similar closely related requirement to both initial complaints and amended complaints. See *Nickels Bakery of Indiana*, 296 NLRB at 928, citing *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952), as discussed in *Redd-I, Inc.* 290 NLRB at 116.

Therefore, I find that the allegations in the complaint that were not asserted in the underlying amended charge are closely related to the allegations made in the complaint.

C. *Discussion of Concertedness and Mutual Aid or Protection*

In order to be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Although these elements are closely related, they are analytically distinct. *Id.*

A respondent violates the Act if, having knowledge of an employee’s concerted activity, it takes adverse employment action motivated by employee’s protected, concerted activity.⁴¹ *Lou’s Transport*, 361 NLRB 1446, 1447 (2014). Although Section 7 does not specifically define concerted activity, the legislative history of Section 7 reveals that Congress considered the concept in terms of “individuals united in terms of a common goal.” *Meyers Industries*, 268 NLRB 493 (1983) (*Meyers I*), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), cert. denied 487 U.S. 1205 (1988). The Board broadened the scope of the definition of concerted activity in *Meyers II* to include “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers II*, 281 NLRB at 887.

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005); and see, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

The Board has long found that activity is concerted where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Alchris Corp.*, 301 NLRB 182, 182 fn. 4 (1991). In certain circumstances, the Board has acknowledged that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action or seeking changes affecting the group. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984).

Whether an employee’s activity is concerted depends on the manner in which the employee’s actions may be linked to those of his or her coworkers. *Fresh & Easy Neighborhood Market*, supra at 153. The Supreme Court has observed that there is no indication that Congress intended to limit Section 7 protection to situations in which an employee’s activity and that of his fellow

⁴¹ It is axiomatic that not all concerted activity is protected, including that which is unlawful, violent, or in breach of contract. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

employees combine with one another in any particular way. *Id.* citing *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984).

5 Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, *supra*, at 154. An employee’s subjective motivation for taking action is not relevant to whether that action was concerted. *Id.* Indeed, as noted by the Board, employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. *Id.* citing *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enfd. mem.* 989 F.2d 498 (6th Cir. 1993). Further, the concerted nature of an employee’s complaint is not dependent on the merits of the complaint. *Id.*
10 citing *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), *enfd.* 478 F.2d 1401 (5th Cir. 1973).

15 Recently, the Board has held that concerted activity includes cases ““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.”” *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019), citing *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), *affd. sub. nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Quicken Loans*, the Board found that a profanity laced statement by a single employee regarding a customer call routed to him and the customer wasting his time was not protected or concerted. 367 NLRB No. 112, slip op. at 1. This conversation took place in a
20 public restroom in the respondent’s office, while a supervisor and another employee were present. 367 NLRB No. 112, slip op. at 1. The Board found that there was no evidence that employees as a group had any preexisting concerns about the routing of customer calls. 367 NLRB No. 112, slip op. at 3. Moreover, the Board found, there was no evidence supporting a finding that either employee was seeking to initiate or induce group action about this issue. 367
25 NLRB No. 112, slip op. at 3.

The concept of “mutual aid or protection” focuses on the goal of the concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Id.* citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Employee motive is not relevant to whether the activity is engaged in for mutual aid or protection. *Fresh & Easy Neighborhood Market*, *supra* at 156. The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees’ interests as employees. *Id.* Although personal vindication may be among the soliciting employee’s goals, that does not mean that the soliciting employee failed to
30 embrace the larger purpose of drawing management’s attention to an issue for the benefit of all of his or her fellow employees. *Dignity Health*, 360 NLRB 1130, 1132 (2014).

In *Quicken Loans*, the Board found that the bathroom conversation was not undertaken for the purpose of mutual aid or protection, and thus was unprotected. 367 NLRB No. 112, slip op.
40 at 4. The Board noted that there was no evidence adduced at hearing regarding the goal of the alleged discriminatee’s statement and there was no evidence that it involved a goal of improving the working conditions shared by them or with coworkers. *Id.* Furthermore, there was no evidence that the two employees or any other employee had experienced or anticipated referrals similar to those objected to by the alleged discriminatee or that such referrals adversely affected
45 their terms and conditions of employment. *Id.*

D. *Respondent Violated the Act by Downgrading Diers' Performance Appraisal (Complaint Par. 5)*

5 An employer violates Section 8(a)(1) of the Act by taking adverse action against an employee because of his or her protected, concerted activity. The critical question in such cases is whether the employer's challenged action was motivated by the employee's protected, concerted activity, which the Board assesses by applying *Wright Line*.⁴² Under *Wright Line*, the General Counsel bears the initial burden to show that the employee's protected activity was a motivating factor for the adverse action by demonstrating: (1) the employee's protected activity; 10 (2) the respondent's knowledge of that activity; and (3) the respondent's animus. See *Austal USA, LLC*, 356 NLRB 363, 363 (2010). A discriminatory motive or animus may be established by circumstantial evidence, inferred from several factors, including the timing between the employees' protected activities and the adverse employment action, pretextual and shifting reasons given for the adverse action, statements showing the employer's general or specific animus, and other unfair labor practices. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 15 1984) (timing); *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (shifting or pretextual defenses); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (contemporaneous 8(a)(1) violations). The burden then shifts to the respondent to show that it would have taken the same action, even in the absence of the 20 employee's protected activity. *Austal USA, LLC*, 356 NLRB at 363-364. Under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

25 Diers' evaluation in the area of effective communication was downgraded from "good" in 2016 to "did not meet expectations" in 2017. (GC Exhs. 4, 8.) Prior to this, Diers had always received a rating of at least good in this area. Respondent did not discuss any problems with Diers' communication style with her at any time prior to her receiving this rating in 2017. 30

35 In Diers' 2017 evaluation meeting, Peklo directly referenced her protected, concerted activity. In the evaluation document, Peklo referenced Diers' lack of "constructive tone" and her being "defensive in morning meetings." (GC Exh. 8.) During his meeting with Diers about the evaluation, Peklo specifically stated that he did not like Diers' negativity and gave as an example her, "Now what?" comment made at a scene shop meeting. Diers was engaged in protected, concerted activity when she made this comment. Other employees responded to Diers' question with ideas for future action. Thus, Diers asked a question at an employee meeting regarding sexism in the scene shop which sparked a conversation among the employees present. This is clearly protected, concerted activity. 40

45 Respondent asserts that this complaint allegation should be dismissed because the General Counsel has failed to establish that the downgraded performance rating was an adverse employment action. However, Peklo specifically enmeshed Diers' protected, concerted activity with the downgrading of her rating in the area of effective communication. Peklo did not provide any other examples of Diers' failure to meet expectations in this area. The written

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

remarks that Diers was defensive, argumentative, and divisive in her appraisal further belie Peklo's position that Diers' engaging in protected, concerted activity caused him to downgrade her evaluation. Peklo coupled the downgraded performance evaluation with threats to Diers. During the meeting concerning Diers' appraisal, Peklo told Diers that if she was fed up with the scene shop culture that perhaps it wasn't the place for her. This downgraded performance evaluation was clearly meant to chill Diers' exercise of protected, concerted activity and to discourage her from making such comments in the future.

Respondent's reliance on *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006), is misplaced. (R. Br. 19.) Respondent cites this case for the proposition that the General Counsel must establish by a preponderance of the evidence that the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse. 346 NLRB 465, 476. Although the administrative law judge in that case used the language quoted by Respondent, no exceptions were taken regarding this particular finding. 346 NLRB 465, 465 fn. 2. In the absence of relevant exceptions, judge's decisions have no precedential value. *Colorado Symphony Assoc.*, 366 NLRB No. 122, slip op. at 1 fn. 3 (2018); see also *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 fn. 2 (2000) ("It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed is not precedent for any other case.") Thus, Respondent cannot rely upon the portion of the judge's decision in *Northeastern Iowa Telephone Co.* to which no exceptions were taken.

Respondent's citation to *Colburn Electric Co.*, 334 NLRB 532, 540 (2001), is similarly misplaced. Respondent again cites to a portion of a judge's decision in its brief. The Board overturned the judge's decision in that case. 334 NLRB at 533-534. Thus, the cited portion of the judge's decision in *Colburn Electric* is of no precedential value. The third case⁴³ cited by Respondent in its brief in support of the assertion that the General Counsel must prove a tangible harm to an employee's employment status is a judge's decision, which, again, has no precedential value. (R. Br. at 19.)

Therefore, as I have found, the evidence establishes that Diers suffered an adverse employment action as a result of Peklo giving her a downgraded performance appraisal. The evidence clearly establishes that Diers engaged in protected, concerted activity and that Respondent was acutely aware of this activity. Diers participated in brainstorming sessions with members of management and other employees. She met with other employees to discuss workplace issues on multiple occasions. Both Diers and Saul brought concerns regarding sexism in the scene shop to the attention of management on multiple occasions. Diers met with Saul and other employees about sexism and the culture in the scene shop. Diers brought concerns of sexism to Stewart, which prompted him to have a meeting with the male employees in the scene shop. Diers met with Larsen, King, and Bielstein about workplace concerns. Leuthner admitted that the problems in the scene shop were a result of sexism and the culture there. During scene shop meetings, at which managers were present, Diers and others raised concerns with the scene shop culture and sexism. At the scene shop meeting in September 2017, Diers, growing frustrated with the process, said, "Now what?" This prompted a discussion among those present

⁴³ *Mississippi Action for Progress, Inc.*, 26-CA-20650, 2002 WL 31386007 (NLRB Div. of Judges 2002).

regarding how to address the issues raised at the meetings. Thus, I find that Diers engaged in an obvious course of protected, concerted activity and that Respondent was aware of this activity.⁴⁴

I further find that the evidence establishes that Respondent bore animus toward Diers' protected, concerted activity. First, Peklo directly linked Diers' "Now what?" statement, made at a scene shop meeting, to her downgraded performance evaluation. Second, sarcastic remarks made by Leuthner regarding Diers (i.e., "ugh" and "awesome") demonstrate animus. (GC Exhs. 19, 22, 23.) Leuthner's further sarcastic statements, seemingly mocking Diers, that she did not feel "safe" demonstrate animus.⁴⁵ (GC Exh. 23.) Leuthner's comments in the same email exchange repeatedly mention that Leuthner did not consider Diers to be a "willing spirit." Third, Peklo's comments in Diers' performance evaluation that she was defensive, and that her communications were divisive reflect animus toward her protected, concerted activity. See *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) (explaining that an employer's comments that an employee does not have the right spirit, has a bad attitude, and is argumentative and uncooperative can be veiled references to the employee's protected activities, and thus circumstantial evidence of animus). Fourth, as discussed in more detail below, I find that Respondent independently violated Section 8(a)(1) of the Act through statements made by Leuthner and Peklo. Furthermore, the timing of the meeting in September and Diers' evaluation 1 month later provides circumstantial evidence of animus. Taken together, all of these actions and statements establish that Respondent bore animus toward Diers' protected, concerted activity. Thus, the General Counsel has met her initial burden. The burden now shifts to Respondent to establish that it would have taken the same action in the absence of Diers' protected, concerted activity.

Respondent has not met its burden. Although both Peklo and Leuthner stated that there were other examples supporting the downgrading of Diers' performance evaluation in the area of effective communication, no such examples were ever provided, either to Diers or at the hearing.⁴⁶ Thus, the only reason cited by Respondent for downgrading Diers' appraisal was her statement made during a scene shop meeting, while she was engaged in protected, concerted activity.

Respondent's argument that Diers' performance appraisal lists other examples of Diers' unacceptable communication style supporting the downgrading of her evaluation is unavailing. Diers' performance evaluation states, "I appreciate that you are direct in communication but it is not always in the most constructive tone. i.e. Defensive in morning meetings, not assuming best intentions with engineering or design approaches presented etc." Peklo testified that he downgraded Diers' evaluation because her communication style was defensive, argumentative, and got in the way of the flow of information. Both Diers and Saul testified that women in the scene shop were not taken seriously when making design or engineering suggestions. It stands to

⁴⁴ In its answer to the complaint, Respondent admitted the allegations contained in par. 5(a) of the complaint that Diers raised concerns regarding workplace culture and alleged sexism and spoke with members of management about these concerns. (GC Exh. 1(g).)

⁴⁵ Even after Diers left Respondent's employ, Leuthner and others expressed frustration with Diers' protected, concerted activity in emails. (GC Exhs. 24, 30.)

⁴⁶ Although Peklo mentioned an example of a statement by Diers at union contract negotiations as a possible example of her negativity, this would mean that Peklo was retaliating against Diers for her union activity. Such retaliation also runs afoul of the Act.

reason that Diers would not assume the best intentions of others and might be defensive when faced with sexism and dismissiveness.

5 Additionally, Peklo's written references to Diers' defensiveness, communication approaches that were more divisive than unifying, and verbal reference to her negativity, seem to be covert references to her protected, concerted activity. The Board has a long history of understandable skepticism regarding employers' justifications of adverse employment actions based upon an employee's attitude. The Board has viewed an employer's reference to an employee's attitude as a disguised reference to the employee's protected, concerted activity. *Rock Valley Trucking Co.*, 10 350 NLRB 69 (2007); see also *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004) ("The Board has long considered similar comments, such as accusing an employee of having a 'bad attitude,' to be a veiled reference to the employee's protected activities.") Similarly, in this case, I find that Peklo's references to Diers' defensiveness and argumentative style to be veiled references to her protected, concerted activity.

15 In short, I do not find that Respondent established that it would have downgraded Diers' performance evaluation in the area of effective communication in the absence of her protected, concerted activity. Therefore, I find that Respondent violated Section 8(a)(1) of the Act by downgrading Diers' performance evaluation.

20 *E. Respondent Violated the Act by Peklo's Statements to Diers (Complaint Par. 6)*

25 While discussing her performance appraisal, Diers told Peklo that the shop culture was making her miserable. Peklo responded that "if [she] was so fed up with the culture that perhaps it wasn't the place for [her]." (Tr. 48.) In this same conversation, Peklo further stated that he did not like Diers' negativity and that her "Now what?" statement at a scene shop meeting was an example of her negativity. (Tr. 50.) Peklo's statements independently violate Section 8(a)(1) of the Act.

30 The Board has found violations of Section 8(a)(1) of the Act when an employer observes to an employee that he or she appears to be unhappy with their job and should seek other employment. See *Hialeah Hospital*, 343 NLRB 391, 394 (2004)(finding that a supervisor implicitly threatened employees by suggesting that if the employees were "not happy" they should quit); *Paper Mart*, 319 NLRB 9 (1995)(statement that employee should seek work elsewhere if he was not happy working for the employer, in the context of a discussion about union activity, implies that employee's union activities were incompatible with continued employment); and *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006) ("Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.") In this case, during a discussion about Diers' performance evaluation, Peklo stated that if she was miserable, perhaps the Guthrie wasn't the place for her. The record is replete with examples of Diers raising protected, concerted complaints regarding the environment of the scene shop. During this same conversation, Peklo referenced an incident of protected, concerted activity by Diers in support of his decision to downgrade her 40 performance evaluation. Peklo linked Diers' complaints regarding the environment in the scene shop and a statement that Diers should consider leaving. Thus, I find that Peklo's statement to 45

Diers that perhaps the Guthrie wasn't the place for her was an implicit threat of discharge and violated Section 8(a)(1) of the Act.

Moreover, Peklo's statement to Diers that her "Now what?" statement at a scene shop meeting was an example of her negativity and a reason that her performance evaluation was downgraded, violated the Act. Peklo's statement reflects that he was upset with Diers' protected, concerted activity. During this same conversation, Peklo specifically told Diers that her performance evaluation was downgraded because of a statement which I have found to be protected, concerted activity.

Therefore, I find that Peklo's statements to Diers during their meeting of October 6, 2017, violated Section 8(a)(1) of the Act.

F. Respondent Violated the Act by Leuthner's Statements to Saul (Complaint Par. 7)

The Board has long held that an employer violates Section 8(a)(1) of the Act when it engages in conduct that might reasonably tend to interfere with the free exercise of employee rights under Section 7. *Greenbrier Rail Services*, 364 NLRB No. 30, slip op. at 35 (2016), citing *American Freightways Co.*, 124 NLRB 146 (1959). The test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed. *Greenbrier Rail Services*, at 35, citing *American Tissue Corp.*, 336 NLRB 435, 441 (2001).

In a meeting with Saul on November 10, 2017, Leuthner asked why Diers had not been communicating to the extent she had been in the past and why [Diers] was so upset. Saul and Leuthner discussed whether Diers had requested the presence of a human resources representative at the scene shop meetings. During the discussion, Leuthner stated, "Yeah, [Diers is] testing a lot of people." Saul immediately told Leuthner that he believed her comment was inappropriate. Leuthner went on to ask Saul how much of situation Diers was bringing on herself by being so angry and negative all the time. Saul became very angry and yelled at Leuthner loud enough to be heard in adjacent offices.

A credibility resolution is in order regarding Leuthner's statements to Saul on November 10, 2017. I credit the version of this meeting testified to by Saul over that provided by Leuthner. First, I note that Leuthner did not specifically deny saying that Diers was testing people, instead stating that she did not believe that she made the statement. Leuthner later testified that she could not recall whether she made the statement or not. Leuthner's initial direct testimony about the meeting was brief and centered on Saul's anger. (Tr. 176.) Saul provided a much more detailed account of the conversation and he candidly admitted that he became loud and angry with Leuthner. (Tr. 104-106.)

On November 13, 2017, Leuthner and Saul had another meeting. Saul stated that he felt bad for making Leuthner and the others uncomfortable through his yelling at their previous meeting and he apologized. Leuthner told Saul that, "it was important that we all try to be team players in this, and [Diers] really wasn't being a team player because she wasn't participating. Leuthner denied making this statement. Saul followed up the meeting with Leuthner with an email. (GC Exh. 17.) Again, I credit the testimony of Saul over that of Leuthner regarding this conversation.

Saul provided a detailed and candid account of this conversation. (Tr. 106–107.) Leuthner gave a brief and nonspecific account of the meeting. (Tr. 177–178.) Furthermore, Saul’s follow-up email mentioned Leuthner’s focus on Diers’ negativity as the problem and what he deemed Leuthner’s victim blaming.⁴⁷ (GC Exh. 17.)

I find that Leuthner’s references to Diers’ testing people, bringing negative consequences on herself, and failure to be a team player violate the Act. Leuthner and Saul were discussing Diers’ protected, concerted activity when Leuthner made her comments. Accusing employees of having a bad attitude or not having the “right spirit” provide evidence of unlawful motivation. *Children’s Studio School Public Charter School*, 343 NLRB 805 (2004). Leuthner’s comments could reasonably be expected to restrain or coerce employees in the exercise of their Section 7 rights. Having heard Leuthner’s opinions of Diers’ could reasonably be expected to cause Saul to curtail his protected, concerted activity to avoid similar treatment. Therefore, I find Leuthner’s statements to Saul in November 2017 violated Section 8(a)(1) of the Act.

G. Respondent’s Affirmative Defenses

In its answer to the complaint, Respondent raised 11 affirmative defenses. I have already addressed Respondent’s timeliness defense. Respondent’s other affirmative defenses include an alleged failure to state a valid claim under the Act, waiver and estoppel, vagueness, bad faith by the Charging Party, and the lawfulness of its conduct. In its brief, Respondent did not mention any of these affirmative defenses. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Sec. 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its remaining affirmative defenses at the trial, and did not discuss them in its brief, I will not address them further.

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. International Alliance of Theatrical Stage Employees, Local 13 (Union), has been a labor organization within the meaning of Section 2(5) of the Act.
3. By downgrading the effective communications rating of Molly Diers to “did not meet expectations” in her performance evaluation on October 6, 2017, Respondent violated Section 8(a)(1) of the Act.

⁴⁷ In agreement with the General Counsel, I do not find that Saul’s failure to mention Leuthner’s specific comments that Diers was not a team player, tested people, and brought things on herself detract from his overall credibility or from my finding that Leuthner made these statements. Saul admitted that he did not mention these instances in his email.

4. By threatening employees by stating that protected, concerted activity is not consistent with continued employment, Respondent violated Section 8(a)(1) of the Act.
5. By threatening employees by stating that performance appraisals will be negatively impacted by because of employees' protected, concerted activity, Respondent violated Section 8(a)(1) of the Act.
6. By threatening employees by stating that an employee who raises protected, concerted concerns about the workplace tests people, Respondent violated Section 8(a)(1) of the Act.
7. By threatening employees by stating that an employee who raises protected, concerted concerns brings negative consequences on himself or herself, Respondent violated Section 8(a)(1) of the Act.
8. By threatening employees by stating that an employee who raises protected, concerted concerns is not a team player, Respondent violated Section 8(a)(1) of the Act.
9. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend Respondent be ordered to remove from its files any reference to Diers' downgraded performance appraisal and to notify her in writing that this has been done and that the unlawful downgraded performance appraisal will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

Respondent, Guthrie Theater, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴⁸ 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.

- (a) Downgrading the performance evaluations of employees because they engaged in protected, concerted activity.
- 5 (b) Threatening employees that their protected, concerted activity is not consistent with continued employment by Respondent.
- (c) Threatening employees by stating that their performance appraisals will be negatively impacted because they engaged in protected, concerted activity.
- 10 (d) Threatening employees by stating that employees who raise protected, concerted concerns about the workplace test people.
- (e) Threatening employees by stating that employees who raise protected, concerted concerns about the workplace bring negative consequences on themselves.
- 15 (f) Threatening employees by stating that employees who raise protected, concerted concerns are not team players.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 20 (a) Rescind the effective communication rating of “did not met expectations” from the performance evaluation of Molly Diers, given on October 6, 2017.
- 25 (b) Remove from its files any reference to the unlawful downgrading of the effective communication rating of Molly Diers in her performance appraisal given on October 6, 2017 and notify her in writing that this has been done and that the rating will not be used against her in any way.
- 30 (c) Within 14 days after service by the Region, post at its facility in Minneapolis, Minnesota, copies of the attached notice marked “Appendix.”⁴⁹ Copies of the notice, on forms provided by the Regional Director for Region 18, 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. Reasonable steps shall be taken by the Respondent to ensure that
- 35 the notices are not altered, defaced, or covered by any other material. In addition, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current bargaining unit employees and former bargaining unit employees employed by the Respondent at any time since September 1, 2017. The notice shall be mailed to the last known address of each such employee after being signed by the Respondent’s
- 40 authorized representative.

⁴⁹ 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.”

(d) 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.

5 Dated, Washington, D.C. July 5, 2019

10



Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose 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 downgrade your performance appraisal because you engage in protected, concerted activity.

WE WILL NOT threaten that your protected, concerted activity is not consistent with continued employment.

WE WILL NOT threaten that your performance appraisals will be negatively impacted because you engage in protected, concerted activity.

WE WILL NOT threaten you by stating that employees who raise protected, concerted concerns about the workplace test people.

WE WILL NOT threaten you by stating that employees who raise protected, concerted concerns about the workplace bring negative consequences on themselves.

WE WILL NOT threaten you by stating that employees who raise protected, concerted concerns are not team players.

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

WE WILL remove from our files all references to the downgraded performance appraisal in the area of effective communication given to Molly Diers on October 6, 2017, and **WE WILL** notify her in writing that this has been done, and that the downgraded rating will not be used against her in any way.

GUTHRIE THEATER

(Employer)

Dated _____ By _____
(Representative) (Title)

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

Federal Office Building, 212 3rd Avenue, S. Suite 200, Minneapolis, MN 55401-2221
(612) 348-1797, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge’s decision can be found at www.nlr.gov/case/18-CA-215022 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER (414) 930-7203.