JD–38–21
Hanover, MA

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

CURALEAF MASSACHUSETTS, INC.

and **Case 01–CA–262554**

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 328

Catherine A. Terrell and *Eric Duryea, Esqs.*,
for the General Counsel.
Alan I. Model, Esq. and *Cristina Nutzman, Esq., (Littler Mendelson, P.C.)*, for the Respondent.
Marc B. Gursky, Esq. (Gursky Wiens Attorneys at Law, LTD.), for the Charging Party.

DECISION

Statement of the Case

Ira Sandron, Administrative Law Judge. This matter arises from a complaint and notice of hearing (the complaint) issued on October 13, 2020, based on unfair labor practice charges that United Food and Commercial Workers Union Local 328 (the Union) filed against Curaleaf Massachusetts, Inc. (the Respondent or the Company), in connection with the Union's organizing efforts at the Respondent's Hanover, Massachusetts store (Hanover).

Pursuant to notice, I conducted a remote trial by Zoom from May 4–6, 2021, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

Did the Respondent violate Section 8(a)(1) when:

(a) On about April 23, 2020,[1] Laura Martell, assistant dispensary manger, interrogated Sarah Medeiros (Medeiros) about other employees' union activities?

(b) On May 4, Patrik Jonsson (Jonsson), company president, and Kerin Orlandi (Orlandi), director of human resources (HR), solicited complaints and grievances from Samuel Cortezano (Cortezano) and Bailey Snow (Snow), implicitly promising them increased benefits and improved terms and conditions of employment if they refrained from supporting the Union?

(c) In the 1st week of June, Jonsson and Joseph Lusardi (Lusardi), chief executive officer of Curaleaf, Inc., the Respondent's parent company, repeated that conduct with Cortezano and Snow?

Did the Respondent violate Section 8(a)(3) and (1) by:

(a) Notifying Toni Gervasi (Gervasi) on May 18 that she was being transferred to the Respondent's Norwell office (Norwell), because she supported the Union and engaged in concerted activities, and to discourage employees from engaging in these activities?

(b) Terminating Medeiros on May 22 for those same reasons?

The Respondent (R. Br. 33, et. seq.) challenges the legality of the President's removal of former General Counsel Robb and designation of Acting General Counsel (General Counsel) Ohr. I lack jurisdiction to address this issue.

Witnesses and Credibility

The General Counsel called Cortezano; Gervasi; Medeiros; and Union Organizer Megan Carvalho (Carvalho). The General Counsel also called Orlandi as custodian of records regarding the Respondent's compliance with the General Counsel's April 16, 2021subpoena duces tecum.

The Charging Party called Jonsson as a 611(c) witness.

The Respondent called the following witnesses:

(1) Orlandi.
(2) Carly Cole (formerly Carly Hayes) (Hayes), former Hanover dispensary manager and now dispensary manager at the Provincetown, Massachusetts store (Provincetown).
(3) Danny Harper (Harper), who was hired as a compliance associate at the Ware, Massachusetts store (Ware) and is now an account executive.

[1] All dates hereinafter occurred in 2020 unless otherwise indicated or clear from the context.

I will address credibility by section, applying several well-established judicial precepts. Firstly, our system of jurisprudence has what is called the "missing witness rule" that gives a judge discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Natural Life, Inc.,* 366 NLRB No. 53 (2018), slip op. at 1 fn. 1, citing *Electrical Workers IBEW Local 3 (Teknion, Inc.),* 329 NLRB 337, 337 fn. 1 (1999); see also *Reno Hilton Resorts*, 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999). In such event, it is appropriate to draw an adverse inference regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988); see also *Interstate Circuit v. U.S.*, 306 U.S. 208, 225–226 (1939).

The Respondent did not call its admitted Agents Lusardi (now co-chair of the board of Curaleaf, Inc.), Martell, or Diane Albernaz (Albernaz), director of compliance, and advanced no reasons why they could not be present. I therefore draw an adverse inference from their failure to testify. Although the Respondent did not call Jonsson, the Respondent's counsel solicited testimony from him regarding the alleged violations in which he was involved, and I draw no such adverse inference. I find it unnecessary to address the General Counsel's argument (GC Br. 18 fn. 17) that an adverse inference should be drawn against the Respondent for not calling Snow, now assistant manager at Hanover.

Secondly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004); *Excel Containers, Inc.*, 325 NLRB 17, 17 fn. 1 (1997).

Finally, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs of the General Counsel and the Respondent, I find the following.

Respondent's Operations

Board jurisdiction as alleged in the complaint is admitted, and I so find.

The Respondent's parent company is Curaleaf, Inc., headquartered in Wakefield, Massachusetts. It is the largest cannabis (marijuana) company in the United States, operating in 23 states and employing over 4000 employees. The Respondent employs about 350 employees.

Two categories of cannabis are dispensed in Massachusetts: (1) medical use, requiring medical certification; and (2) adult or recreational use. Prior to the impact of the COVID pandemic, the Respondent operated four dispensaries in Massachusetts: Hanover—medical use only; Oxford (Oxford)—medical and adult use; and Provincetown and Ware—adult use only.

During the March to June time frame, Hayes was Hanover's dispensary manager. She oversaw an assistant manager; team leads; dispensary associates, who interacted with customers; and inventory associates (packagers), who packaged product and got it ready to be on the floor for sale. On average, there were 10 employees on the day shift.

On March 23, Massachusetts Governor Baker issued an order entitled "COVID-19 Essential Services" (GC Exh. 16), providing that all nonessential services close their physical workplaces and facilities to workers, customers and the public as of March 24 until April 7. Essential businesses allowed to continue to operate at physical locations included those providing medical (but not recreational) marijuana. In response, the Company shut down Provincetown and Ware. Hanover and Oxford continued dispensing medical marijuana. The order resulted in a huge increase in the number of medical marijuana registrations (see GC Exh. 17, a Boston Globe article of April 23), and the patient intake count at Hanover went up over 400 percent.

Union Organizational Efforts

By letter dated April 17 to Lusardi, 13 Hanover employees, including Cortezano, Gervasi, and Snow, requested that the Company recognize the Union as their bargaining representative (the demand letter). (GC Exh. 2.) They also demanded immediate action to provide hazard pay to essential employees and increased safety through implementation of curbside pickup. On April 17, Carvalho emailed Lusardi introducing herself and attaching the letter. (GC Exh. 3.)

On April 19, Jonsson sent a letter to all store employees. See General Counsel's Exhibit 6, an example. He thanked employees for their service, stated that he wanted to continue to work with them, and referenced the demand letter. He said that the Union could not assure them hazard pay or increased safety precautions and that the Company had already taken steps in those directions. Jonsson testified that the Company explored curbside pickup before receipt of the demand letter and implemented it within a month thereafter.

The Union filed a petition on April 20 (GC Exh. 18) to represent Hanover's marketing coordinator, team leads, dispensing agents, packagers, and admissions associate. In its April 27 statement of position (GC Exh. 19), the Respondent sought to exclude Marketing Coordinator Gervasi for not sharing a community of interest with the other petitioned-for employees.

The Acting Regional Director (Regional Director) issued a decision and direction of (mail-ballot) election on May 7 (GC Exh. 22), deferring a determination on whether Gervasi shared a community of interest and instead holding that she could vote subject to challenge.

The tally of ballots on May 26 was five for the Union and two against. I need not address challenges relating to the validity of signatures. The Union challenged six transferees to Hanover from other facilities, including Harper; and the Company challenged Gervasi as not being in the unit and Medeiros as not being employed on the postmark date. See General Counsel's Exhibit 23, the Regional Director's September 15 order directing a hearing on challenged ballots on September 30. The challenged ballots cast by Gervasi and Medeiros were not included for consideration.

On January 12, 2021, the hearing officer issued a report on challenged ballots. (GC Exh. 24.) He agreed with the Union that the transferees worked at Hanover on a temporary basis and were ineligible to vote. The Regional Director on February 3, and the Board on March 23, affirmed his conclusion. (GC Exhs. 25 and 26.)

On April 19, the Regional Director issued a supplemental decision on objections and certification of representative. (GC Exh. 27.) He overruled the Company's objections, all related to his direction of a mail-ballot election, and certified the Union. The Company filed a request for review on May 3 (R. Exh. 26),[2] which the Board denied on July 6.

Company Meetings with Employees

Prior to the demand for recognition, Hanover management had a practice of holding brief "huddles" or preshift meeting with employees twice daily, to update them on what was going on for the day. The morning meetings were held in the main lobby before the dispensary opened to the public, while the afternoon meetings for the incoming shift took place in the break room or kitchen. Jonsson and Orlandi sometimes attended them. At times, employees raised issues or concerns. At a late March huddle, at the beginning of the COVID restrictions, Jonsson asked what the Company could do, and an employee brought up hazard pay.[3]

Following the demand for recognition and the filing of the petition, management held meetings in the team leads office with one or two employees at a time, for the purpose of discussing employees' issues and presenting the Company's point of view regarding unionization. Orlandi testified that the Respondent had never previously held formal

[2] The Respondent's exhibits were submitted as "C. Ex."

[3] Cortezano's refreshed memory on cross-examination. The Respondent does not contend that this amounted to impeachment.

meetings with employees concerning their issues.

Dispensary Associate Cortezano testified about two such meetings he attended, along with Snow, another dispensary associate at the time. The first was with Jonsson and Orlandi on May 4; the second with Jonsson and Lusardi in the 1st week of June. Jonsson and Orlandi offered testimony about these meetings. For the following reasons, I credit Cortezano's accounts.

Cortezano testified in detail, the gist of his account was the same on direct and cross-examination, and his versions of what was said comported with other evidence. Cortezano testified candidly, as reflected by his testimony on cross-examination that at the two meetings he attended with management, only Jonsson but not Lusardi or Orlandi, made statements about "fixing things."

I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied for other reasons, 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972).

As previously stated, I draw an adverse inference from the Respondent's not calling Lusardi to testify. Jonsson's testimony about the meetings was often vague and nonspecific, particularly in regard to what he said about the Union. See his responses at Transcript 382. Further, he testified that he had handwritten notes concerning the key points he wanted to make to employees but threw them away. I find this suspicious. These meetings with employees were held during the pendency of a union organizing drive, and I would expect that he would have retained them. Although Orlandi gave detailed accounts of conversations and events relating to Medeiros, she was vague and nonspecific in her testimony of what was said at the meeting with Cortezano, leading me to believe that she was not fully forthcoming.

I therefore credit Cortezano and find the following. When the May 4 afternoon huddle ended, Orlandi informed Cortezano that he had a meeting with her and Jonsson in the team leads office. During the meeting, the door was closed. Cortezano had never before had a closed-door meeting with either Orlandi or Jonsson (or Lusardi). The meeting lasted about 30 minutes.

Jonsson thanked Cortezano and Snow for coming. He stated that he felt "blindsided" by the unionization efforts and asked if there was anything the Company could do keep employees from moving forward with the Union. Snow brought up a pay increase and hazard pay during COVID and possible benefits such as a stock option or 401K plan. Orlandi responded that the Company did not have the necessary resources to give hazard pay or a wage increase. Jonsson pointed out that the companies in the marijuana industry had difficulty finding banks that would work with them in creating 401K plans.

On May 7, Jonsson sent emails to Cortezano and Snow, thanking them for taking the time to talk to him and for listening to what he had to say. (GC Exh. 30, CP Exh. 1.) In the email to Snow, Jonsson stated that Snow had brought up some good points regarding Hanover's operations.

In approximately the 1st week of June, again after the huddle ended, Cortezano was informed that Lusardi was in the building and that Cortezano had a meeting scheduled with him. The meeting again occurred in the team leads office and again lasted about 30 minutes.

Both Lusardi and Jonsson thanked Cortezano and Snow for coming. Jonsson and Lusardi switched back and forth, with Jonsson usually talking first. Jonsson mentioned how the Company felt that the employees did not need a union and that the Union would cause an "us versus them" type of situation. He again asked if there was anything that the Company could do to prevent the Union from coming in. Snow again asked about hazard pay and a pay increase, as well as a stock benefit. As far as a pay increase, Lusardi responded that the Massachusetts stores were not doing well financially. Regarding stocks, both Lusardi and Jonsson explained the difficulties involved.

Gervasi's Employment

The Company hired Gervasi as a part-time dispensing associate in October 2017 and made her full time 2 months later. In March 2019, she became a salaried marketing coordinator for all of the Company's Massachusetts dispensaries. She was responsible for the website, online menus, production photos and updates, social media texts, and email marketing. At least once daily, she assisted in the dispensary when needed; dispensing to patients, covering the front desk, or helping to package or move products onto the sales floor. She had a private office with a door that she could close.[4] She traveled only occasionally.

In July 2019, the Company informed her that she was being moved to the new Norwell office, where corporate employees in the South Shore area (south of the Boston metropolitan area) would be situated. The two facilities are approximately three miles away or a 10-minute drive from each other.

Persons working at Norwell included Jonsson and his administrative staff, the Company's chief financial officer, and the HR manager. Gervasi no longer had a private office but instead worked in one of three desks in an open work area. She found performing her tasks more difficult due to background noise and having other people around, and her no longer being immediately available to fix issues at Hanover.

The employee handbook contains a provision on transfers (GC Exh. 14 at 0102), stating that the Company recognizes the importance of people working in jobs "well suited to their interests," and providing that employees in good standing and in their current position for 1 year (managers) or 6 months (all other employees) are eligible to transfer. There is no evidence of any practice regarding employees who request transfers.

[4] Medeiros shared the office with her briefly. Each had a separate desk, 6-10 ft. apart.

In November 2019, Gervasi told her manager, Christine Hennessy (Hennessy), director of retail, that she did not enjoy working at Norwell and wished to return to Hanover. Hennessey responded that she understood, and she informed Gervasi the following month that her transfer request was approved.

Gervasi returned to Hanover in December 2019. Her job duties remained unchanged. Hennessy continued to be her supervisor until February 2020, when Christina Rivera (Rivera), marketing and outreach manager, took over that role. The Respondent no longer employs Hennessy.

From late March through mid-April, Gervasi worked from home. On about April 12, Orlandi informed her that she was being furloughed because of adult use stores having had to shut down due to COVID.

General Counsel's Exhibits 11(a)-(b) and 12 are a series of emails relating to Gervasi's recall to work, as follows.

On May 18, Rivera notified Gervasi that adult use stores would reopen on May 25 and that Gervasi could report on May 26 to work out of Norwell. Gervasi responded that her working out of Hanover was a better fit for everyone and made it easier for her to accomplish her job responsibilities.

Orlandi replied on May 20, explaining that to ensure everyone's safety and mitigate the spread of the COVID virus, only dispensary employees would be working regularly out of dispensaries. She pointed out that Norwell was just a couple of miles away from Hanover and that Gervasi's job responsibilities were never limited to Hanover but covered all of the Company's locations in Massachusetts. Gervasi responded that she had an office with a closed door at Hanover but not at Norwell. She further stated the convenience of doing her job in "real time" at Hanover. Orlandi replied that all corporate employees not on the road would work out of Norwell.

On May 22, Gervasi expressed concerns that she had trained her own manager to take over her job responsibilities and now was being told to change job location. She stated that she would feel safer working from Hanover or home than from Norwell and, if forced to return to Norwell, would have to ask to be dropped to part time "for my own mental well-being." She accused the Company of retaliating against her for her union activity. In response, Orlandi denied that any of the Company's actions had anything to do with Gervasi's union support and told her that she was needed full time to continue to perform her job duties.

On May 25, Gervasi stated that she had a medical condition (named in the email but blacked out in all exhibits) and that return to Norwell, where she would feel unsafe and uncomfortable, would make her physically ill.

On May 26, Orlandi repeated that all nondispensary employees would work out of Norwell because dispensary space was needed for dispensary employees. She stated that Gervasi would return from furlough to exactly the same duties, same schedule, same supervisor, and at the same pay rate as before the furlough. The only difference would be that

on the days she was not visiting a dispensary, she would be working out of Norwell.

Orlandi went on to ask why the physical location of Gervasi's office would cause her [blacked out] given that her job required her to travel to all other locations in the state. Orlandi attached a letter for Gervasi's health care provider to complete and requested that medical documentation be submitted by June 2.

General Counsel's Exhibit 13 consists of email communications pertaining to Gervasi's claim that she could not return to Norwell for medical reasons, and her doctor's note of May 27, as follows.

On June 4, Orlandi referenced a phone call 2 days earlier in which they discussed Gervasi's doctor's note that said she was capable of performing her job anywhere but Norwell. Orlandi stated that during their call, Gervasi had been unable to identify or describe anything that occurred at Norwell that would make her uncomfortable working there. Further, Gervasi had been unable to explain why working at any location other than Hanover would make her [blacked out]. When Orlandi had asked if traveling to and working at the other dispensaries would make her [blacked out], Gervasi had responded that it would but she was willing to push through it. Orlandi pointed out that this contradicted the medical note from the doctor stating that her only limitation was not working at Norwell.

Therefore, Orlandi said, the Company was requiring Gervasi's doctor to provide specific information about her medical condition and how it restricted her ability to work from Norwell or other facilities other than Hanover, or travel to and working at other dispensaries.

Gervasi responded on June 8. Referencing their phone call, Gervasi stated that she had said there was no harassment in Norwell but that she found the environment there tense and a difficult one in which to work. She further stated that she felt as though she was being retaliated against by being put in an office with people who were trying to bust the Union.

Gervasi disputed Orlandi's contention that Gervasi's position during the phone call contradicted the doctor's medical note, stating that the mention of travel was not brought up to the doctor because she traveled only once every 2–3 weeks. Gervasi quoted the statement in the doctor's note that she would be compliant with long-term treatment with prescribed medications but if she was forced to resume her job responsibilities at Norwell, she might need additional treatment in order to keep her condition stable. Gervasi further stated that the doctor had already answered questions Orlandi raised in her June 4 email.

On June 16, Orlandi stated the following. For the balance of the COVID crisis, only employees who actually staffed the dispensaries would be assigned to work in them, and everyone performing corporate support functions, including Gervasi and Rivera, would be based in Norwell. Neither the doctor nor Gervasi had satisfactorily explained why Gervasi could not work out of Norwell for medical reasons. Gervasi would be allowed to temporarily work remotely from her home when not traveling on business, but the Company would periodically revisit whether to continue this accommodation.

Gervasi never physically returned to Norwell after transferring back to Hanover in December 2019. Her termination in September is not alleged as an unfair labor practice. She is now an employee of the Union.

Medeiros' Employment

In early 2020, Diane Albernaz (Albernaz), whose office was in Norwell, was director of compliance. She was responsible for ensuring that all Massachusetts stores complied with all Federal and State laws and regulations, including those issued by the Massachusetts Cannabis Control Commission (the Commission), which licenses cannabis dispensaries. Each store's dispensary manager reported to her on compliance matters.

At that time, Albernaz, Jonsson, and Orlandi made the decision to have full-time compliance associates at each individual stores perform compliance functions, and the Company solicited applicants. Medeiros was hired for Hanover, starting on around February 24, contingent upon a background check; Harper for Ware, starting on around March 23, contingent upon a background check; and Paloma Hobart (Hobart) for Provincetown, starting March 2. See their offers of employment dated February 7 or 13 (R. Exhs. 2–4), which were silent on hours of work. The Company created a job description for the position, entitled dispensary compliance and inventory associate, and a 5-week training schedule. (R. Exhs. 5 and 6.) When COVID resulted in an increased demand for medical cannabis and a shortage of employees, the Company stopped utilizing the compliance associate position. At Hanover, Manager Hayes resumed responsibility for on-site compliance.

I credit Medeiros' accounts of her interviews with Albernaz, Hayes, and Martell. As noted, the Respondent called neither Albernaz nor Martell, and, as described below, Hayes' limited testimony thereon was implicitly contradicted by Respondent's Exhibit 15. I find as follows.

During Medeiros' interviews for hire, Albernaz emphasized how busy they were and how stressed out and overworked she was because the Company was opening a new location in Provincetown. During Medeiros' interviews, Albernaz, Hayes, and Martell all stated that her law enforcement background would be very helpful because she would be in charge of some security features. Hayes testified that she had no knowledge of Medeiros' union support during her employment but conceded that she knew most law enforcement personnel are unionized.

Medeiros explained that she had small children and asked about flexibility in hours and schedule. Albernaz responded that she could work four 10-hour days a week and avoid an extra day of paying for child care and, if needed, do some work from home and come in on a weekend to make up the time. This is indirectly corroborated by Medeiros' February 25 email to Martell and Hayes, stating, "Just want to make sure it's still ok to work 4 days with Friday's[sic] off for my daycare." (R. Exh. 15 at 1.) Neither Martell nor Hayes responded to disavow Medeiros' statement. Therefore, I do not credit Hayes that in her final interview with Medeiros, she told Medeiros that her schedule would be normal retail hours Monday through Friday; Medeiros brought up four 10-hour days; and Hayes replied that she did not think that would work for the Company.

During her interviews, Medeiros told them that she had an upcoming preplanned vacation trip to Mexico. Albernaz asked if she could start before she left because they were in need of her help. Medeiros agreed.

Medeiros' first day on the job was March 2. See R. Exh. 15. She was paid $21 an hour, compared to $16 an hour for dispensary associates. Her general schedule was 8:30 a.m. to 5 p.m. Monday through Friday. She was responsible to ensure that product was properly labeled and packaged and that employee files were up to date with regard to training and security badges. She reported to Hayes and shared the team leads office with Gervasi.

Medeiros worked for 7 days before leaving for Mexico. She was engaged in on-the- job training, observing the operation, and looking at the Commission website. She testified that she dispensed product to about 20 patients, but her name does not appear in Company records of dispensers for the month of March. (R. Exh. 31.) However, Hayes testified that she may have "shadowed" the team leads who were training her.

Medeiros returned from vacation on March 12. The next day, she received an email from her son's school stating that it was closing for 2 weeks due to COVID. She informed Albernaz, and Hayes approved her to work from home for 2 weeks because she had OSHA training that could be done remotely. (GC Exh. 4.) Medeiros never physically returned to Hanover. After she completed the OSHA training, Hayes had her familiarize herself with governing rules and regulations. See GC Exh. 32.

Medeiros testified about an April 1 conversation with Orlandi. Orlandi was not questioned about any potentially damaging statements that Medeiros attributed to her, and I therefore draw an adverse inference and find that Orlandi would not have disputed them. See *L.S.F. Transp., Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000), enfd. 712 F.2d 1074 (7th Cir. 2002); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I therefore credit Medeiros and find that on about April 1, Orlandi called Medeiros and told her that she and other employees were being furloughed for a short period, like a month, but that they wanted and needed her to come back. Orlandi said nothing about her returning as a dispensary associate.

Medeiros received an April 8 letter from Jonsson, confirming that she was being placed on a temporary, unpaid furlough effective April 12 until May 4 or until the Governor lifted restrictions on nonessential business operations. (R. Exh. 11.)

Medeiros received Jonsson's April 19 letter to individual Hanover employees, in which he raised their organizational efforts. (GC Exh. 6.) Medeiros was never involved in those efforts because she did not consider her position to be eligible to be in the unit.

Medeiros' Conversations with Martell and Orlandi

At the outset of the trial, the General Counsel moved to add the allegation that on April 23, Martell interrogated Medeiros about the union activities of other employees. See GC Exh. 1(n). The Respondent objected, contending that the allegation was barred by Section

10(b). I allowed the amendment. The Respondent has renewed this objection (R. Br. 29, et. seq.) and set out more expansive arguments in support of its position.

Section 10(b) does not bar an otherwise untimely complaint allegation if the allegedly unlawful conduct occurred within 6 months of a timely-filed charge and is closely related to the allegations in that charge. *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 2 (2018), reconsideration denied by unpub. Board order issued June 7, 2018 (2018 WL 2761559), citing *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014); see also *Apple Socal, LLC*, 367 NLRB No. 44, slip op. at 2–3 (2018).

To determine if an otherwise untimely allegation is closely related to the timely charge, the Board considers the "*Redd-I*" factors: (1) whether the otherwise untimely allegation and the allegations in the timely-filed charge are of the same class, "i.e., whether the allegations involve the same legal theory and usually the same section of the Act"; (2) whether the otherwise untimely allegation and the allegations in the timely-filed charge arise from the same factual situation or sequence of events; and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely-filed charge. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

I now adhere to my earlier ruling because all three factors are satisfied here. Both timely and untimely filed allegations averred that the Respondent's conduct discouraged employees from engaging in protected activities in violation of Section 8(a)(1). See *Charter Communications*, above; *Metro One Loss Prevention Services Group*, 356 NLRB 89, 100 (2010). The timely and untimely allegations all related to the Respondent's reaction to the union campaign. See *Charter Communications*, above. Finally, the General Counsel relied in part on Martell's alleged 8(a)(1) conduct to show that the Respondent's termination of Medeiros was motivated by union animus. Thus, the Respondent had to defend against that conduct whether or not it was properly alleged as a separate violation. See *Charter Communications*, above; *Smith's Food & Drug Centers, Inc.*, 361 NLRB 1216, 1217 fn. 5 (2004). I note that Martell was named in the complaint and her agency status admitted.

I next turn to Medeiros' unrebutted account of her April 23 conversation with Martell. Medeiros' testimony about this conversation was disjointed because she frequently digressed or editorialized rather than answered directly—despite my frequently reminding her to stay focused in her responses. Some, but not all, of this can be attributed to problems with her remote connection, a not infrequent occurrence in remote hearings. From the way Medeiros testified, I believe that she over dramatized her testimony, which was not fully consistent. On the other hand, she testified in considerable detail, and I do not think that she fabricated out of the blue what Martell said about the Union. Most tellingly, the Respondent's unexplained failure to call Martell, leads me to draw an adverse inference that she would not have rebutted statements that Medeiros attributed to her. I therefore find the following based on Medeiros' testimony.

Martell called and asked how she was doing. Martell described how short staffed and super busy they were. Medeiros asked about returning, and Martell replied that Medeiros had to talk to Albernaz. Martell stated that she was stressed because people were complaining about her as a manager. She asked if Medeiros knew what was going on, to which Medeiros

responded that she had not spoken to anybody. Martell stated that someone had called the Union, and she was trying to figure out who that was. She asked Medeiros if she knew who had called. She went on to say why Medeiros should not vote for the Union—time off and pay raises would have to go through the Union, and Martell would no longer be able to help out. Medeiros responded that she did not understand why she was even allowed to be in the Union but was happy about it because she had worked for a unionized employer for 10 years and thought that a union was one of the best protections that employees could have (later in her testimony, Medeiros added that she told Martell that she was voting yes).

Medeiros testified inconsistently on what happened after she made that statement. She first testified that Martell was "adamant" that the Union would be awful for the Company and continued to give reasons, saying that everything would go through the Union and go by seniority. However, Medeiros also testified that after she made the statement, the conversation "ended abruptly."

By a May 5 email (R. Exh. 12 at 1), Orlandi asked Medeiros if she wanted to come back to work, probably for training in dispensing and other areas within the dispensary, which she would need to know for her compliance role. She added "[m]aybe part time hours" and referenced Medeiros having children at home.

Thereafter, in early May,[5] Orlandi called Medeiros. Their accounts were largely similar as far as the conversation related to Medeiros returning to work but completely at odds and wholly irreconcilable regarding what was said about union matters. I will set out each of their versions and then explain which was more credible.

According to Medeiros, Orlandi began by saying that they were very busy and wanted her back and would work around her childcare needs; she could work nights, weekends, or part time. Medeiros explained that she had torn her ACL when in Mexico and thought it a good idea to get knee surgery while she was on furlough. She had the surgery scheduled for May 15 but could return in 2 weeks provided that she could sit and not be on her feet. Orlandi responded that would be no problem and that May 26 would be her return date. She told Medeiros to contact Hayes to put her on that day's schedule. Orlandi said nothing about her performing dispensary work instead of doing compliance work. I note that Orlandi's May 5 email did explicitly mention that Medeiros would be doing dispensing but also indicated that she needed dispensary training in her compliance role.

Orlandi then asked if there was anything that she could do to explain things to her. Medeiros responded that she did not understand why she would even be allowed to be in the Union because the staff complaints did not really pertain to her. Orlandi went on to talk about how bad it would be for the Company. She asked Medeiros everything she knew about what employees were saying and who had called the Union. Medeiros responded that she did not understand why she was involved and then volunteered that she was in the Union for 10 years and thought it was the best protection. Orlandi's tone then changed to "snippy" as she almost verbatim repeated the arguments against the Union that Martell had made on April 23. At

[5] Medeiros placed it as probably being on May 5, but Orlandi testified that it was on May 12, as reflected in her phone records. (R. Exh. 33.) The exact date is immaterial.

some point in the conversation, Medeiros told her that employees were complaining about pay, not getting weekend off on the schedule, and Martell as a manager. As did the April 23 conversation, this one ended "abruptly."

According to Orlandi, she told Medeiros that the Company was "super busy" and asked if Medeiros would be willing to come back and help. Medeiros asked if she would get stuck in the dispensing role, and Orlandi replied that she did not know because the Company had just rolled out curbside pickup and new processes took two employees per transaction. Medeiros repeated that she did not want to get stuck in dispensing. Orlandi told Medeiros to think about it and reach out to Hayes if she wanted to get on the schedule.

Orlandi testified that there was no mention of Medeiros' knee surgery. Orlandi further testified that the word "union" did not come up but conceded that she stated she was sure Medeiros had heard what was going on in the store and to let her know if she had any questions. Medeiros responded that she was trying to stay out of it.

Several factors lead me to conclude that Medeiros' testimony about this conversation as it pertained to the Union was not reliable and that Orlandi was more credible.

Initially, I will address the General Counsel's assertion (GC Br. 6–7) that Orlandi, as custodian of records, "intentionally narrowed and arbitrarily limited" the Respondent's search for information encompassed by the General Counsel's subpoena and that this should weigh against her credibility. More specifically, the General Counsel points to her testimony that she (1) did not search for text messages; (2) searched only for emails with the words "meetings and union"; (3) did not produce emails that she sent to employees concerning the Union (GC Exhs. 34(a) and 35(a));[6] and (4) failed to complete a good-faith search of her cell phone records.

The General Counsel has not sought sanctions against the Respondent for subpoena noncompliance or demonstrated how any noncompliance prejudiced the General Counsel's case. See *Sisters Camelot*, 363 NLRB No. 13, slip op. at 10 (2015), citing *CPS Chemical Co.*, 324 NLRB 1018, 1019 (1997), enfd. 160 F.3d 150 (3d Cir. 1998). This was not a situation where Orlandi ignored the subpoena or took no or minimal steps to comply, and I cannot conclude that she acted in bad faith. I therefore do not agree with the General Counsel's characterization of her conduct.

Medeiros' account of what she and Orlandi said about the Union was too strikingly similar to her testimony of what she and Martell said in their April 23 conversation. Having such similar conversations with different managers on different dates seems beyond the bounds of plausible. Furthermore, if Medeiros expressed her lack of knowledge and her prounion sentiments to Martell on April 23, Orlandi would have had no reason to question her about the same matters in early May. I also take into account that although Medeiros' testimony flowed smoothly when she described their conversation about her return to work, such was not the case when she related what was said about the Union.

[6] The General Counsel does not contend that anything Orlandi stated in those emails violated the Act.

Orlandi conceded that she stated she was sure Medeiros had heard what was going on in the store and to let her know if she had any questions. This partially corroborates Medeiros' testimony that Orlandi brought up the Union. However, based on the above, I am not convinced that Orlandi interrogated Medeiros in the way Medeiros described.

Finally I note that the General Counsel has never sought to add an allegation that Orlandi committed any violations in the early May conversation, despite Medeiros' testimony that Orlandi said essentially the same things as Martell had in the April 23 conversation.

Medeiros' Termination

Following the call with Orlandi, Medeiros texted Hayes, who did not respond. On May 22, Orlandi called Medeiros. Medeiros offered a rather cursory account of their conversation: Orlandi advised her that they were eliminating the positions of all compliance associates because it was not in the budget, Medeiros asked if this was "forever," and Orlandi replied yes.

I credit Orlandi's considerably more detailed version, which comported with other evidence reflecting the Company's needs at the time. I therefore find that Orlandi asked Medeiros if she planned on coming back to help out in the dispensary. Medeiros again asked about getting stuck as a dispensary associate. Orlandi replied that she did not know. When Medeiros asked if she could stay out on unemployment, Orlandi responded that if this meant she would no longer be working for the Company, she should reach out to Hayes to return her bade and laptop. There was no mention of the Company's budget.

Orlandi testified that she did not discuss Medeiros' wages if she worked as a dispensary associate. The General Counsel contends (GC Br. 6) that Orlandi's failure to say that Medeiros' wages would not be cut bears negatively on Orlandi's credibility. However, Orlandi's silence on the subject does not lead me to that conclusion. I note that in the representation case proceeding, there is reference to Harper keeping his same rate of pay when he performed noncompliance work at Hanover.

After the call, Orlandi administratively terminated Medeiros. On May 28, Medeiros exchanged a series of emails with Hayes and Orlandi (GC Exh. 10), in which there was reference to the May 22 conversation, as follows.

Hayes asked if Medeiros could either mail or drop off her IDs and laptop. Medeiros replied that it seemed discriminatory following her expressing her views on unionization. Orlandi responded by stating that in their (May 22) conversation, she had told Medeiros that they really needed dispensing associates and were not moving forward with the compliance role in the dispensaries. She further stated that Medeiros had responded that she did not want to be a dispensary associate, mentioning that it would not make sense for her to put her children in daycare full time to be a dispensary associate; further, that they had agreed Medeiros would not be returning from furlough. She denied that this had anything to do with Medeiros' views on unionization, about which she had no idea.

Medeiros testified that Orlandi never asked her to be a dispensing agent, that she never said she would not accept such a position, or that they agreed she would not return to work. Both Medeiros and Orlandi testified that Orlandi stated the compliance associate position was being eliminated. To the extent their testimonies diverged, I credit Orlandi. As stated earlier, Medeiros was not a fully credible witness. Furthermore, the undisputed evidence reflects that in May the Respondent was in dire need of staffing to provide dispensing services.

The Compliance Associate Position

Orlandi testified that the decision to eliminate the position was solely due to COVID and the need to pivot the Company's workforce.

Harper, hired to be the compliance associate at Ware, never actually performed work as a compliance associate there because the store was open only briefly before it was shut down as a nonessential business. The Company offered him other work at other stores, and he went to Hanover and Oxford, where he performed no compliance functions. He picked up shifts as a dispensary associate at Hanover, and the Company sought to include him as an eligible unit employee in the election. When Ware reopened in mid-May, he returned and became assistant manager, replacing the former assistant manager. The store manager assumed responsibility for compliance.

Hobart served as compliance associate at Provincetown from March 2 until the store shut down and she was furloughed. When Provincetown reopened on about May 25, she returned as assistant manager.

The Company has not reinstated the compliance associate position.

Analysis and Conclusions

8(a)(1) Allegations

Did Martell unlawfully question Medeiros on April 23 about other employees' union activities?

Interrogation does not per se violate Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176, 1176 (1984), affd. sub nom. 760 F.2d 1006 (9th Cir. 1985). In determining whether a supervisor's questions to an employee about union or concerted activities constitutes unlawful interrogation, the Board examines, whether under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Grand Canyon University*, 362 NLRB 57, 57 (2015), citing *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975); *Heartshare Human Services of New York, Inc.*, 339 NLRB 842, 843 (2003); *Rossmore House*, above.

In analyzing alleged violations under *Rossmore House*, the Board considers what are termed "the B*ourne* factors," first set out in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). *Westwood Health Care Center*, 330 NLRB 935, 938 (2000). They are:

(1) The background, i.e., is there a history of employer hostility and

discrimination?

(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he or she in the company hierarchy?

(4) Place and method of interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply.

These relevant factors "are not to be mechanically applied in each case." Id., quoting *Rossmore House*, above at 1178 fn. 20.

The nature of the information sought weighs in favor of finding the interrogation coercive because it is well settled that interrogation seeking to place an employee in the position of acting as an informer regarding the union activity of fellow employees is coercive, even if conducted in a casual manner during a friendly conversation. See *Abex Corp.*, 162 NLRB 318, 329 (1966); see also *Publishers' Offset, Inc.*, 225 NLRB 1045, 1045 (1976). Another indication of coercive conduct is that Martell initiated the discussion about union activity. *Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002); *Sundance Construction Management, Inc.*, 325 NLRB 1013, 1013 (1998).

However, the interrogation did not meet the other *Bourne* criteria for finding coercion. There is no history of the Respondent committing unfair labor practices. In this regard, I cannot draw any adverse inference against the Respondent for contending in the representation case proceedings that Gervasi lacked a community of interest with unit employees, or for its efforts to include in the unit what the Board ultimately determined were ineligible temporary employees. Martell was an assistant manager to whom Medeiros did not directly report. The interrogation occurred during a phone call and not in a formal setting. The fifth factor is not directly applicable because Medeiros, by her own account, stayed out of involvement with organizing efforts. Additionally, although Martell attempted to present the Respondent's position on unionization, she made no threats of any kind, even after Medeiros volunteered that she was prounion. Indeed, in one of Medeiros' versions, their conversation then ended abruptly.

In all of these circumstances, I conclude that Martell's interrogation was not coercive and therefore did not constitute a violation of Section 8(a)(1).[7] I therefore dismiss this allegation.

Did Jonsson, on May 4 and in the first week of June, unlawfully solicit complaints and grievances?

The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *CPL (Linwood) LLC*, 367 NLRB No. 14, slip

[7] In reaching this conclusion, I have considered Medeiros' account in a light most favorable to the General Counsel. For reasons previously stated, Medeiros' testimony was not entirely reliable.

op. at 1 (2018); *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000).

An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign. However, an employer cannot rely on past practice to justify solicitation of grievances where the employer "significantly alters its past manner and methods of solicitation." *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003), citing *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

A "significant deviation" during an organizing campaign from the employer's customary practice in terms of solicitation of grievances makes an inference that the employer will remedy them "particularly compelling." *Center Construction Co.*, 345 NLRB 729, 730 (2005), enfd. in relevant part, 482 F.3d 425 (6th Cir. 2007). The ultimate issue is whether the change in solicitation amounted to an implicit promise of benefits. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (2010), citing *American Red Cross Missouri-Illinois Blood Services*, 347 NLRB 347, 352 (2006).

Prior to the Union's advent on the scene, Jonsson at times informally asked employees about their issues in huddles or staff meetings that took place in an open area and lasted only minutes. This was a far cry from the meetings that management held with employees for, as Jonsson testified, the purpose of dissuading them from supporting the Union. Clearly, high-level management never previously conducted half-hour meetings with one or two employees at a time in a closed-door office. This constituted a "significant deviation" from the Respondent's customary practice.

It is true that at neither meeting did management impliedly promise to confer any of the benefits that Snow raised. On the contrary, Jonsson. Lusardi, and Orlandi responded that the Company would not be able to provide them. However, "'[T]he fact that an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved.'" *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000), quoting *Capitol EMI Music,* 311 NLRB 997, 1007 (1993). Moreover, Jonsson's email to Snow after the first meeting stated that Snow had brought up some good points in regard to the operations of Hanover, suggesting that the Respondent might consider the benefits Snow had brought up. Significantly, at both meetings, Jonsson asked what the Company could do to prevent the Union from coming in, and he presented arguments against unionization.

The Respondent cites (R. Br. 25), *Maple Grove*, above, for the proposition that an employer rebuts the inference of an implied promise by showing that the statements at issue were not promises. However, the Board in *Maple Grove* concluded that there was nothing in the record to rebut the inference that the employer implicitly promised to remedy employee grievances, and I draw the same conclusion here.

Accordingly, I conclude that on May 4 and during the first week of June, the Respondent violated Section 8(a)(1) when Jonsson solicited complaints and grievances from Cortezano and Snow, implicitly promising them increased benefits and improved terms and condition of employment if they refrained from supporting the Union.

8(a)(3) Allegations

In cases where the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1 (2020); *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, Id.; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

Did the Respondent unlawfully direct Gervasi, on and after May 18, to work out of Norwell?

At the outset, I point out that the General Counsel does not allege that Gervasi was actually transferred to Norwell or aver that she was unlawfully terminated. Rather, the General Counsel alleges as a violation the Respondent's notification to Gervasi on May 18 that she was going to be transferred to Norwell. I will construe the allegation to include the Respondent's continuing directive after May 18 that Gervasi work out of Norwell.

Turning to *Wright Line*, the first two elements are satisfied by the April 17 letter that Gervasi and other employees signed and sent to Lusardi, demanding union recognition.

I have difficulty finding that the third element, animus directed against Gervasi, has been met. There is no direct evidence of such, and I cannot conclude that animus can be implied from the Respondent's contention during the representation case proceedings that she did not share a community of interest with other Hanover employees. The 8(a)(1) violation that I have found involved other employee and had nothing to do with Gervasi, so it cannot be used to satisfy the element of animus. See *Tschiggfrie Properties, Ltd.*, above.

Understanding Gervasi's work history is instructive. She worked at Hanover until July 2019, when all corporate employees in the South Shore area, including Gervasi, were moved to the new Norwell office. Hanover and Norwell are approximately three miles apart. At Gervasi's request, the Company transferred her back to Hanover in December 2019.

On May 20, in response to Gervasi's objection to returning to Norwell, Orlandi explained that to ensure everyone's safety and mitigate the spread of the COVID virus, only dispensary employees would be working regularly out of dispensaries; all corporate employees would work out of Norwell when they were not on the road. There is no evidence that any other corporate employee has been based in an office location other than Norwell since May.[8] Thus, Gervasi suffered no disparate treatment.

Accordingly, I find that the General Counsel has failed to establish the element of animus and, therefore, to make out a prima facie case of an 8(a)(3) violation.

Assuming arguendo a prima facie case, the Respondent has met its burden of showing that it would have transferred Gervasi back to Norwell regardless of her union activity. On this record, I cannot ascertain how Gervasi's physical or mental well-being would have been adversely affected by working out of Norwell, or the reasonableness of the Respondent's response to her claimed medical needs. All corporate employees were originally based in Norwell after the office opened in July 2019, and all corporate employees were returned there after May. Aside from issues relating to the COVID pandemic, I cannot second-guess the Respondent's business decision to have all corporate personnel work out of Norwell as an across-the-board policy.

Therefore, I dismiss the allegation that the Respondent unlawfully notified Gervasi that she would be working out of Norwell.

Was Medeiros unlawfully terminated on May 22?

Medeiros did not get involved in any union organizing activities, but she expressed her pronunion sentiments to Martell on April 23. This satisfies the first two prongs of *Wright*

[8] The General Counsel (GC Br. 25) points out that certain documentary evidence suggests Rivera worked remotely in May and June, but no testimony was elicited on the subject, including how long that may have lasted.

Line in establishing a prima facie case.

I have credited Orlandi that Medeiros voluntarily resigned. The General Counsel has not alleged that Medeiros was constructively discharged but even considering Medeiros' separation as a termination, I have doubts whether the General Counsel has met the third prong of showing animus against Medeiros for expressing her pronunion views.

Most significantly, in early May, Orlandi told Medeiros the Company wanted her to return to work. Thus, in her May 5 email Orlandi not only asked Medeiros if she wanted to come back to work but suggested that it might be on a part-time basis due to Medeiros having children at home. Indeed, Medeiros testified that in their subsequent phone conversation, Orlandi began by stating that they were very busy and wanted her back and would work around her childcare needs; she could work nights, weekends, or part time. On May 22, Orlandi repeated that the Company needed her to return to Hanover to assist in dispensing, stating that the compliance associate position was being eliminated. This was totally inconsistent with a desire to retaliate against Medeiros for her union views. I note that if Medeiros returned in the dispensary associate position, she would have remained in the bargaining unit.

Moreover, there is no evidence of any animus against Medeiros. At no time did Martell, Orlandi, or any other manager or supervisor threaten her in any way. The only 8(a)(1) violation that I have found relates to soliciting grievances from other employees. This fails to satisfy the animus element as per *Tschiggfrie Properties, Ltd.*, above.

Assuming arguendo a prima facie case, the Respondent has met its burden of showing that it would not have retained Medeiros as a compliance associate regardless of her expression of support for the Union. The other two compliance associates hired at the same time as Medeiros never performed compliance work after the temporary closure of recreational use stores in March, and Harper was offered and agreed to perform other work. The Company has never reinstituted the compliance associate position. Medeiros did not dispute Orlandi's testimony that in their May 22 conversation, they did not discuss Medeiros' wages. However even if Medeiros would have been paid less for working as a dispensary associate, the Respondent had no obligation to continue to pay her the higher compliance associate rate.

Accordingly, I dismiss the allegation that the Respondent unlawfully terminated Medeiros.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act: solicited complaints and grievances from employees and implicitly promised them increased benefits and improved terms and condition of employment if they refrained from supporting the Union.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Curaleaf Massachusetts, Inc., Hanover, Massachusetts, its officers, agents, successors, and assigns, shall cease and desist from

(a) Soliciting complaints and grievances from employees and implicitly promising them increased benefits and improved terms and conditions of employment if they refrain from supporting the Union.

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

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

(a) Within 14 days after service by the Region, post at its facility in Hanover, Massachusetts, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed the Hanover, Massachusetts facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

[9] 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.

[10] 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."

all current employees and former employees employed by the Respondent at any time since May 4, 2020.

(b) 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.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. July 15, 2021

Ira Sandron
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 (NLRB) 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 solicit your complaints and grievances and implicitly promise you increased benefits and improved terms and condition of employment if you refrain from supporting United Food and Commercial workers Union Local 328 or any other labor organization.

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

CURALEAF MASSACHUSETTS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

10 Causeway Street, 6th Floor, Boston, MA 02222–1072
(617) 565-6700, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-262554 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, (617) 565-6700.