STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Sherise Hogan,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. L-CA-16-007
	)	
Chicago Transit Authority,	)	
	)	
Respondent	)	

ORDER

On July 31, 2019, Administrative Law Judge Anna Hamburg-Gal, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its January 9, 2020 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 9th day of January 2020.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
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/s/ Helen J. Kim
Helen J. Kim
General Counsel

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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 16, 2018, Sherise Hogan (Charging Party or Hogan) filed a charge with the Illinois Labor Relations Board's Local Panel (Board) alleging that the Chicago Transit Authority (Respondent or CTA) engaged in unfair labor practices within the meaning of Sections 10(a)(2) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2014), as amended. The charge was investigated in accordance with Section 11 of the Act. On February 13, 2019, the Board's Executive Director issued a Complaint for Hearing.

A hearing was conducted on May 5, 2019, in Chicago, Illinois, at which time the Charging Party presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. The Charging Party did not file a brief. After full consideration of the parties' stipulations, evidence, arguments, and the Respondent's brief, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find that:

1. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the Respondent has been subject to the jurisdiction of the Local Panel of the Board pursuant to Section 5(b) of the Act.
3. At all times material, the Charging Party has been a public employee within the meaning of Section 3(n) of the Act.

4. At all times material, the Union and CTA have been parties to a collective bargaining agreement (CBA) for the Unit that includes a grievance procedure culminating in final and binding arbitration.
5. The Charging Party worked in the Safety Department at CTA as an Accident Analysis Clerk from June 15, 2014, to February 11, 2015.
6. On February 6, 2015, the Charging Party attended a team meeting for the Safety Department.
7. After the meeting referenced in paragraph 6 concluded, Senior Manager Jessica Rio and the Charging Party had a discussion, after which the Charging Party said she would go take a walk.
8. On February 6, 2015, General Manager Cary Hendrix called another office meeting to address a scheduling misunderstanding from the first meeting based on a technical issue.
9. Cary Hendrix and Seth Wilson, who was the Director of Human Resources, informed the Charging Party that CTA would contact her to schedule a disciplinary interview based on her conduct during the conversation referenced in paragraph 7.
10. On or about February 10, 2015, CTA conducted a disciplinary interview for the Charging Party.
11. On or about February 11, 2015, CTA terminated the Charging Party from employment.
12. As a member of the Union, the Charging Party had available to her a grievance and arbitration process, outlined in the CBA between CTA and her Union to protest any treatment or discipline she believed was unfair.
13. The Charging Party filed Grievance No. 15-0145 on February 19, 2015, and CTA responded to the Charging Party's grievance on March 23, 2015.
14. On August 10, 2015, the Charging Party filed an unfair labor practice charge ("Charge") with the Board in Case No. L-CA-16-007. The Charging Party amended the Charge on November 20, 2015, and again on December 29, 2015.
15. On February 13, 2019, the Board issued a Complaint for Hearing.

II. ISSUES AND CONTENTIONS

The issue is whether the Respondent violated Sections 10(a)(2) and/or Section 10(a)(1) of the Act when it allegedly retaliated against the Charging Party for informing the Respondent's

Chief of Staff for Safety and Security Compliance about policy contradictions, disturbing behavior, issues with training procedures, and general disrespect and retaliation she had experienced within the Safety Department since 2010.

Hogan did not file a brief. However, at hearing Hogan contended that the Respondent violated the Act when it terminated her employment because it did not follow the terms of the CTA/ATU collective bargaining agreement and instead terminated her employment after a work altercation, though she had had a clean record. She contended that she should have only received a three-day suspension for her conduct. Finally, she contended that the Respondent treated other, similarly situated employees more favorably than it treated her.

The Respondent asserts that it terminated Hogan's employment because she engaged in behavioral violations and gross misconduct, as defined under the Respondent's disciplinary guidelines. It denies that it terminated her employment because she engaged in protected, concerted activity. The Respondent contends that Hogan's complaints to management did not qualify as concerted activity because she made those complaints solely on her own behalf. The Respondent further contends that Hogan has not demonstrated through either direct or circumstantial evidence that the Respondent's decisionmakers bore any animus against her because of her complaints. In the alternative, the Respondent asserts that it would have taken disciplinary action against Hogan notwithstanding her complaints to management because Hogan engaged in disruptive and insubordinate behavior, which violated a number of work rules.

III. FINDINGS OF FACT

Sherise Hogan worked in the Safety Department at CTA as an accident analysis clerk from June 15, 2014, to February 11, 2015. She was responsible for data entry related to bus accidents an incidents. Freddie Lopez, a more senior accident analysis clerk, was responsible for training her.

At all times material, Dwayne Lane was Chief Safety & Risk Management Officer, Cary Hendrix was the General Manager of the Safety Department, and Jessica Rio was a senior manager and Hogan's direct supervisor. Chief Safety & Risk Management Officer Lane did not testify at hearing because he died prior to hearing. Hendrix also did not testify at hearing; he no longer works for the CTA.

In August 2014, Hogan informed Jessica Rio that she felt she was not receiving enough training, that Lopez was moving too fast in training her, and that she was having trouble processing incident reports. Hogan testified that the issue was corrected for the most part, but that problems again arose because Lopez stopped communicating with her.

In October or November 2014, the Department held a team meeting. Hendrix and Rio were present. At the meeting, Lopez called Hogan a backstabber. No one told him to stop. Hogan informed the Union about this incident so that they would be apprised of it, but did not ask them to take any action on her behalf. There is no evidence that she told any member of management that she had informed the Union about the incident.

In late November 2014, before the Thanksgiving holiday, Rio assigned some work to Lopez and Hogan and placed incident reports on both their desks. Lopez believed that the incident reports had appeared on his desk because Hogan had shifted her work onto him. Lopez became angry. Hogan testified that Lopez "went ballistic." According to Hogan, Lopez stated, "who the heck does she [Hogan] think she is giving me work." Rio confirmed that Lopez said something inappropriate, but asserted that he did not use profanity.

In December 2014, Hogan spoke to Dwayne Lane in his office about her experiences at the CTA between 1999 and 2014 and the atmosphere in the safety department. She described her communications with Lane in the following terms:

> So then Dwayne Lane, the vice president of our department, since he had the open-door policy, I decided to have a sit-down with him. What I did was I created a timeline, and I created a timeline of not just the department but everything that I have been through at the company and why I wasn't really willing to participate in a lot of the personal things. Because I felt like the safety department was pretty much picking up the same way it was in the other departments that I had been in.
>
> So it was just a one-on-one meeting with myself and Dwayne Lane, and I listed everything from '99 to 2014, the major things. And I also kept a timeline of the work that I did with Freddie, if I sent him an email -- Freddie Lopez. Because I needed to keep a paper trail on what I was doing. I needed to start covering myself….
>
> My experience was on the timeline that I gave Dwayne Lane and how I felt that things were starting, and it was like a pot about to boil in the safety department.

In or about February 2015, the Respondent circulated an electronic invite to employees for a Safety Department team meeting on February 6, 2015. Hogan initially received an invitation,

but due to a technical issue, the Respondent erroneously revoked it. The Respondent also erroneously revoked invitations sent to some other employees. Prior to the meeting, Hendrix approached all employees and told them that they should attend the meeting even if they had not received a formal invitation. Hogan attended the meeting.

After the meeting, Senior Manager Jessica Rio approached Hogan, employee Brenda Jackson, and Lopez at their cubicles to explain that the issue concerning the meeting invites was unintentional. She asked them what they thought about that issue. Lopez and Jackson gave Rio their feedback about the issue, but Hogan did not.

Rio then specifically asked Hogan for her opinion on the matter. Hogan stated that she did not wish to provide her personal opinion. Rio responded, "it seems to me that you do want to talk about it because you're being so noncommunicative." Rio made a reference to Hogan's body language and to the quotes posted in Hogan's cubicle.

Rio and Hogan give different accounts of Rio's comments regarding those quotes. I credit Rio's description based on demeanor and because it is inherently more plausible. Rio credibly testified that she pointed out the inspirational quotes posted in Hogan's cubicle and stated, "it seems like you do care because you have reminders in front of you about interpersonal relations and…mindfulness prompts." The quotes were from the poet Xi, Anne Frank, and Martin Luther King. Although Hogan testified that Rio called the quotes aggressive, Rio's description of the quotes as reminders about interpersonal relations and as "mindfulness prompts" is more plausible because it fits with her attempt to coax a response from Hogan.

Hogan responded by tearing down one of the quotes and saying, "well maybe this will make you happy," although Hogan admitted at hearing that Rio had not asked her to take down any of the posted quotes. By the end of this interaction, Hogan was agitated and angry. She stated that she needed to take a walk and left.

After this incident, Rio asked General Manager Hendrix to speak to employees and to reaffirm that the issue with the meeting invites was unintentional. In response to Rio's request, Hendrix called a meeting to address the technical glitch that caused the Respondent to erroneously revoke certain invitations to the earlier meeting. The meeting took place in Hendrix's office. The following individuals were present at the meeting: General Manager Cary Hendrix, Senior Manager Steven Bowles, Senior Manager Rio, Senior Safety Officer Luis Rivera, Data Entry Clerk

Brenda Jackson, and Accident Analyst Freddie Lopez. Hogan was also present but she arrived three to four minutes late.

At the meeting, Hendrix informed employees that the Respondent's failure to send meeting invites to all employees was unintentional. When Hogan arrived, she stated that she did not believe that Hendrix was sincere in his effort to change the culture in the Department and to promote an atmosphere of inclusivity. She then began to inform Hendrix about her interaction with Rio earlier that day. In describing the conversation, she mimicked Rio's voice and called Rio two-faced and a liar.[1] It is undisputed that Hogan used profanity during her exchange with Rio.[2] However, there is insufficient reliable evidence concerning the nature or severity of that profanity. I do not credit Rio's testimony that Hogan called her a "bitch" because Rio's contemporaneously drafted unusual occurrence report does not reference that word. Had Hogan in fact used such personally-directed profanity, Rio likely would have documented it because she was its target and she took care to list other, less aggressive words Hogan had used. Notably, none of the other incident reports admitted into evidence reference Hogan's use of that word.

At some point during the meeting, Steven Bowles said, "I think you're being aggressive" and at some point, Hendrix stated, "that sounds inappropriate." Hogan responded to Hendrix, stating that he did not know what Rio had said to her and that everyone else could act crazy, but her. Hogan concluded by stating, "I'm getting really angry and I better leave before I say something really abusive." She further stated that she needed to go take a walk and then left the meeting before its conclusion.

Immediately after the meeting, Hogan spoke with Hendrix one-on-one. She described her earlier interaction with Rio. She also told Hendrix about her December 2014 meeting with Lane.

Following the meeting, the meeting's attendees drafted incident reports documenting the meeting's events. Two of the reports characterize Hogan's conduct as disrespectful and hostile. Hendrix's report provides details of the event not testified to by either witness in this case or contained in any other report. His report claims that he "told [Hogan] on more than one occasion that this was not the place of time for this conversation" and that she said, "'no I want them to hear it." The reports written by individuals, such as Hendrix, who did not testify at hearing, were

[1] This finding is consistent with Rio's testimony at hearing and Rio's unusual occurrence report.
[2] Hogan admitted this fact when testifying about the unusual occurrence report drafted by Lopez. The report states that "there was 'Profanity' that came from the mouth of Sherise towards Jessica." Hogan testified that Lopez's report was "pretty much" accurate, except that it was missing some details.

admitted into evidence by agreement of the parties, and they therefore can be considered, but are given only their natural probative effect. Jackson v. Bd. of Review of Dept. of Labor, 105 Ill. 2d 501, 508 (1985). The sparse foundation offered regarding these documents weighs against giving them great weight. Vill. Disc. Outlet v. Dep't of Employment Sec., 384 Ill. App. 3d 522, 526 (1st Dist. 2008).

On February 6, at 4:25 pm, five minutes before the end of Hogan's workday, Cary Hendrix and Director of Human Resources Seth Wilson informed Hogan that she was removed from service because of her conduct in the second meeting. They informed her that they would contact her to schedule a disciplinary interview and that they would also contact the Union.

On February 10, 2015, Director Wilson and General Manager Hendrix conducted a disciplinary interview with Hogan. Union representative Michael McBride was also present.

On February 11, 2015, General Manager Hendrix drafted a recommendation for Hogan's discharge asserting that she had engaged in behavioral/gross misconduct by creating a hostile work environment. In his recommendation, he claimed that Hogan called Rio a "bitch, two face ass and a liar." He also claimed that Hogan stated in a comment directed at him, "fuck that culture change thing you're trying to do." Finally, he asserted that he told Hogan that this was "not the time or the place" for her comments and that he "asked [her] to stop." He further asserted that Hogan had violated the following General Rules:

> General Rule No. 7 (a b c) Obedience to Rules
> (a) All rules, orders, bulletins, and instructions must be obeyed
> (b) Ignorance of the rules, orders, bulletins, and instructions will not be accepted as an excuse for failure to comply.
> (c) Violation is cause for disciplinary action.
>
> General Rule No. 14 Personal Conduct
> (d) Insubordination
> (e) Conduct unbecoming an employee
> (m) Use of abusive or obscene language in public
> (x) Disrespect to supervisory personnel, co-workers, or the public
>
> General Rule No. 25 Courtesy
> Employees must be courteous at all times. Patience and self-control must be used to avoid aggravating controversy. In case of misunderstanding arising with a member of the public in the performance of employee duties, employees should

> politely and quietly request the person to apply to the Customer Assistance office of the CTA for further consideration of the point of question.

Hogan received a copy of the General Rule Book. All of the Respondent's employees are responsible for knowing and abiding by its rules. The Respondent's corrective action guidelines further state that "certain violations such as theft, fighting, possession of a weapon, insubordination (i.e., refusing to follow a direct order from supervisory, managerial or executive personnel) will result in referral to the general manager with a recommendation for discharge. The corrective action guidelines also state that "other behavioral-type violations such as, but not limited to, a verbal altercation with a customer or fellow employee, insolence or disrespect to management, leaving assigned work location without permission, refusing a work assignment, may also warrant accelerated discipline depending on any aggravating circumstances."

Rio testified that no other employee had ever used profane language toward her or referred to her using derogatory names. Rio further testified that she had never seen any employee use profane language when addressing Hendrix. Hogan conceded that cursing in a workplace is considered conduct unbecoming of an employee. However, she also testified that all employees cursed and that supervisors also cursed "all the time."

Later in the day on February 11, 2015, Chief Safety & Risk Management Officer Lane accepted General Manager Hendrix's discharge recommendation and issued Hogan a Notice of Discharge. Lane slightly modified the stated basis for the termination. He asserted that Hogan had violated general rule numbers 7 and 14. However, in lieu of asserting that Hogan committed a Rule 25 violation, he asserted that Hogan had violated General Rule 24, Use of Best Judgement, which provides the following: "Should a situation requiring prompt action arise which is not covered by the rules in the General Rule Book, specialized rule books, executive orders, bulletins or instructions, the employees involved must use their best judgment in selecting the best course of action to follow, then report the action taken to appropriate supervision as soon as possible thereafter."

That same day, the Respondent met with Hogan to inform her that the Respondent was terminating her employment. Hogan testified that during this meeting, Hendrix asserted that Dwayne Lane had made the recommendation for Hogan's discharge, not Hendrix himself. Hogan testified that other members of management gave her reasons for her termination that were

different from those set forth in her discharge letter, but Hogan did not describe those stated reasons.

On February 19, 2015, Hogan filed a grievance alleging that her termination was unjust because the Respondent accelerated discipline against her by more than two steps. Hogan also filed a charge against the Respondent with the Illinois Department of Human Rights alleging that the Respondent harassed her because of her race and sex. At hearing, Hogan testified that she believes her race, sex, and age contributed to the Respondent's decision to fire her. She further testified that she believes the Respondent discharged her because she was unpopular. Finally, she attributed the Respondent's actions to a long-standing tension she had with Director of Human Resources Seth Wilson.

IV. DISCUSSION AND ANALYSIS

1. Amending the Complaint

The complaint is amended to allege an independent Section 10(a)(1) allegation to correct a clerical error in the complaint.

The Act gives administrative law judges broad discretion to amend complaints. Section 11(a) provides, in relevant part: "Any such complaint may be amended by the member or hearing officer conducting the hearing for the Board in his discretion at any time prior to the issuance of an order based thereon." 5 ILCS 315/11(a). Section 1220.50(f) of the Board's Rules likewise provides that an "Administrative Law Judge, on the judge's own motion or on the motion of a party, may amend a complaint to conform it to the evidence presented in the hearing or to include uncharged allegations at any time prior to the issuance of the Judge's recommended decision and order." 80 Ill. Admin. Code § 1220.50(f). In interpreting these provisions, the Board has held that it is appropriate to amend a complaint in the following circumstances: (1) where, after the conclusion of the hearing, the amendment would conform the pleadings to the evidence and would not unfairly prejudice any party; and (2) to add allegations not listed in the underlying charge, so long as the added allegations are closely related to the original allegations in the charge, or grew out of the same subject matter during the pendency of the case. Forest Preserve. Dist. of Cook Cnty. v. ILRB, 369 Ill. App. 3d 733, 746 (1st Dist. 2006); Chicago Park Dist., 15 PERI ¶ 3017 (IL LLRB 1999); City of Chicago (Police Dep't), 14 PERI ¶ 3010 (IL LLRB 1998); Cnty. of Cook and Sheriff of Cook Cnty., 6 PERI ¶ 3019 (IL LLRB 1990); Cnty. of Cook, 5 PERI ¶ 3002 (IL

LLRB 1988). However, ALJs have also amended complaints to correct obvious clerical mistakes in a complaint's draftsmanship. County of Cook, 27 PERI ¶ 57 (IL LRB-LP 2011).

Here, the amendment corrects an obvious clerical error in the complaint's draftsmanship. The complaint, as written, contains all the elements of an independent Section 10(a)(1) allegation, but omits key elements of the Section 10(a)(2) allegation actually pleaded. To illustrate, the complaint, as written, specifically alleges that the Respondent terminated Hogan's employment because of her protected activity, to interfere with, restrain, and coerce employees in the exercise of their protected rights. 5 ILCS 31510(a)(1) (making it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their protected rights). By contrast, it does not allege that the Respondent took any action against her to encourage or discourage support for the Union, as is required under Section 10(a)(2) of the Act. 5 ILCS 315/10(a)(2). Under these circumstances, it is reasonable to infer that the Executive Director intended to issue a complaint alleging an independent section 10(a)(1) allegation based on the enumerated facts. Thus, the addition of an independent Section 10(a)(1) allegation cures this clearly inadvertent misstatement in the complaint.

Notably, this amendment does not prejudice the Respondent. The factual allegations that serve as the basis for the complaint remain the same. Moreover, the relevant legal analysis and the Respondent's defenses likewise remain the same. Analysis of the independent section 10(a)(1) allegation tracks the one used in cases arising under Section 10(a)(2) of the Act, referenced in the original complaint. Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002); Vill. of Schiller Park, 13 PERI ¶ 2047 (IL SLRB 1997); County of Jersey, 7 PERI ¶ 2023 (IL SLRB 1991), aff'd, County of Jersey v. Illinois State Labor Relations Board, Docket No. 4-91-0462, 8 PERI ¶ 4015 (4th Dist. June 18, 1992). Moreover, the applicable defenses relevant to both allegations is that Hogan's conduct does not fall within the protections of the Act and that the Respondent terminated her employment for legitimate business reasons. Notably, the Respondent presented precisely these arguments on brief. Vill. of Dixmoor, 33 PERI ¶ 49 (IL LRB-SP 2016) (amendment did not prejudice employer where employer presented evidence on new allegation and presented arguments in its brief on that issue); Cnty. of Lake, 28 PERI ¶67 (IL LRB-SP 2011) (no prejudice where Respondent presented argument on brief which addressed the amendments and where Respondent's defense in the face of the amendments remained unchanged).

2. Section 10(a)(1) allegation

The Respondent did not violate Section 10(a)(1) of the Act when it terminated Hogan's employment because Hogan did not engage in activity that was both protected and concerted.

Section 10(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in [the] Act." 5 ILCS 315/10(a)(1). A public employer's motive or intention is usually not considered in the context of a Section 10(a)(1) violation. Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002). However, where a charging party alleges that the employer violated Section 10(a)(1) of the Act by taking an alleged adverse employment action against an employee because of, and in retaliation for, the exercise of protected rights, the analysis tracks the one used in cases arising under Section 10(a)(2) of the Act. Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002); Vill. of Schiller Park, 13 PERI ¶ 2047. Accordingly, in such cases, the charging party must prove, by a preponderance of the evidence, that (1) the employee engaged in protected, concerted activity, (2) the Respondent knew of that activity, (3) the Respondent took adverse action against the employee; and (4) the employee's protected, concerted activity was a substantial or motivating factor in the adverse employment action. City of Burbank v. Illinois State Labor Relations Bd., 128 Ill. 2d 335, 345 (1989); Vill. of Oak Park, 18 PERI ¶ 2019 (IL SLRB 2002); Vill. of Schiller Park, 13 PERI ¶ 2047 (citing Gale and Chicago Housing Authority, 1 PERI ¶ 3010 (IL LLRB 1985)).

The charging party may demonstrate the requisite causal connection through circumstantial or direct evidence including expressions of hostility toward the union and/or protected concerted activity, together with knowledge of the employee's protected, concerted and/or union activities; timing; disparate treatment or targeting of union supporters; inconsistencies in the reasons offered by the employer for the adverse action; and shifting explanations for the adverse action. City of Burbank, 128 Ill. 2d at 345; Gale and Chicago Housing Authority, 1 PERI ¶ 3010.

Once the charging party establishes a prima facie case, the employer can avoid a finding that it violated the Act by demonstrating that it would have taken the adverse action for a legitimate business reason, notwithstanding the protected, concerted activity. City of Burbank, 128 Ill. 2d at 345; Pace Suburban Bus Div. of Reg'l Transp. Auth., 406 Ill. App. 3d at 500. Merely proffering a legitimate business reason for the adverse employment action does not end the inquiry, as it must be determined whether the proffered reason is bona fide or pretextual. City of Burbank, 128 Ill. 2d at 345. If the proffered reasons are merely litigation figments or were not in fact relied upon,

then the employer's reasons are pretextual and the inquiry ends. Id. However, when legitimate reasons for the adverse employment action are advanced and are found to be relied upon at least in part, then the case may be characterized as a "dual motive" case, and the employer must establish, by a preponderance of the evidence, that it would have taken the action notwithstanding the employee's protected, concerted activity. Id.

Here, Hogan's prima facie case fails under the first prong of the test because she did not engage in activity that was both protected and concerted. An employee can only establish the first element of her prima facie case if the activity in question is both concerted *and* protected. Oak Brook Park District, 31 PERI ¶ 193 (IL LRB-SP 2015). Here, however, Hogan did not engage in concerted activity.

An employee's activity is concerted if she was "acting on behalf of employees in addition to h[er]self in furtherance of a group concern." Oak Brook Park District, 31 PERI ¶ 193 (quoted text); Vill. of Bensenville, 10 PERI ¶2009 (IL SLRB 1993). When an employee's activity invokes a right set forth in a collective bargaining agreement, her activity is concerted because enforcement of a collective bargaining agreement it is an extension of the concerted activity that produced it. Oak Brook Park District, 31 PERI ¶ 193; Pace West Division, 13 PERI ¶ 2027 (IL LRB-SP 1997) (noting principle, also specifying that assertion of a right contained in collective bargaining agreement must be a "reasonable and honest assertion"). However, when an employee's activity does not involve rights contained in a collective bargaining agreement, it is deemed concerted only if "it is engaged in with, or on the authority of other workers and not solely on behalf of the employee himself." Oak Brook Park District, 31 PERI ¶ 193 (quoting Pace West Division, 13 PERI ¶ 2027); Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54 v. Ill. Educ. Labor Rel. Bd., 247 Ill. App. 3d 439, 455 (1st Dist. 1993) (addressing similar language under the Illinois Educational Labor Relations Act, 115 ILCS 5). The standard for establishing concerted activity, outlined above, encompasses those circumstances in which an employee has brought a truly group complaint to the attention of management. Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54, 247 Ill. App. 3d at 457 (citing Meyers Industries, Inc. ("Meyers II"), 281 NLRB 882, 877 (1986) (distinguishing "group concern" from "bringing a group complaint to management").

Here, Hogan has not demonstrated that she invoked a right set forth in the collective bargaining agreement when she complained to Lane in December 2014, as alleged in the

complaint. As a preliminary matter, the precise nature of Hogan's complaints is unclear. She testified that she presented Lane with a timeline of the "major things" she "ha[d] "been through" while working for the Respondent in various departments since 1999. She further testified in broad terms asserting that the Safety Department was "pretty much picking up the same was it was in the other departments" where she had worked, and noted that she felt it was "like a pot about to boil." Finally, she testified that she kept a timeline of her work with Lopez, and she appears to have referenced it during her meeting with Lane. However, Hogan notably did not assert that she complained to Lane about any issues involving training procedures, as alleged in the complaint. Nor did she describe at hearing, any of the "major things" that she allegedly told Lane.

Even assuming that Hogan's complaints included Lopez's disrespectful treatment of her and his failure to provide her with adequate training, matters that Hogan emphasized at hearing, there is still insufficient evidence that her complaints invoked a right set forth in the collective bargaining agreement. Hogan did not present evidence that her complaints about Lopez's discourtesy sought to enforce the equal employment opportunity provision of the collective bargaining agreement. That provision bars discrimination in employment on the basis of race, color, creed, national origin, age or sex, but Hogan did not specify that she informed management that Lopez's disrespect toward her arose because of her membership in a protected class. She likewise failed to present evidence that her complaints about the level of training invoked a right set forth in the collective bargaining agreement because she points to no provision in the collective bargaining agreement that mandates any particular level of training for accident analysis clerks.

Hogan has also failed to demonstrate that her complaints were concerted on the grounds that she made them "with or on the authority of other workers," as opposed to making them simply on her own behalf. In addressing this requirement, the Board may not simply presume that a workplace complaint is concerted by virtue of the fact that it is based on a group concern over wages, hours, terms, and conditions of employment. Oak Brook Park District, 31 PERI ¶ 193 (citing Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54, 247 Ill. App. 3d at 456-57).[3] Rather, the charging party must show that she was actually, and not merely impliedly, representing the views of other employees. City of Decatur, 14 PERI ¶ 2004 (IL SLRB 1997).

[3] Such an approach improperly melds two separate factual inquiries: (1) whether an employee's activity was "concerted" and (2) whether it was "engaged in for mutual aid or protection." Prill v. NLRB, 835 F. 2d 1481, 1483 (D.C. Cir. 1987) aff'g Meyers Industries (Meyers II), 281 NLRB 882 (1986).

An employee need not be formally designated by the others as their representative to satisfy this requirement. Oak Brook Park District, 31 PERI ¶ 193; City of Decatur, 14 PERI 2004. However, the public venting of a personal grievance is not concerted activity, even if it is a grievance shared by others. Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54, 247 Ill. App. 3d at 456 (citing Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d 23, 28 (7th Cir. 1980).

Here, Hogan has not demonstrated that she was actually representing the views of other employees when presenting her complaints to Lane in December 2014. There is no evidence that employees designated her as their representative either formally or informally. There is insufficient evidence that Hogan discussed her complaints with other employees or that they shared her views. Indeed, she did not show that she interacted with any other public employee at any point regarding her December 2014 complaints. Oak Brook Park District, 31 PERI ¶ 193 ("for an employee to act concertedly, he must interact with another employee *at some point"*). Thus, Hogan simply demonstrated that she acted exclusively based on her personal feelings and failed to show that she acted in concert with another employee. Bd. of Educ. of Schaumburg Comm. Consolidated School Dist. 54, 247 Ill. App. 3d at 456-57 (finding no truly group complaint where employee's gripe was based on her personal feelings and where she introduced no evidence that other employees shared the "notions" she expressed to management); City of Decatur, 14 PERI 2004 (employee's letter complaining of inadequate training of dispatchers was not concerted, despite coworker's minor edits, absent evidence that employee discussed complaints with coworkers or that they shared his views).

Accordingly, the Respondent did not terminate Hogan's employment in retaliation for engaging in protected, concerted activity because Hogan did not engage in concerted activity as alleged in the complaint.

3. Analysis in the Alternative

In the alternative, if the Board finds that Hogan's December 2014 complaint to Lane was concerted activity, I recommend that the Board find that the Respondent violated Section 10(a)(1) of the Act as alleged.

Continuing the analysis of the first prong of the test, Hogan's December 2014 complaint to management was also protected. Employee conduct is protected by the Act if the purpose of the conduct is to engage in mutual aid and protection or if the conduct relates to the employees'

terms and conditions of employment. State of Ill., Dep't of Central Mgmt. Servs. (State Police), 30 PERI ¶ 70 (IL LRB-SP 2013); Oak Brook Park District, 31 PERI ¶ 193. Here, Hogan's complaints concerned her conditions of employment to the extent that they may be viewed as relating to the alleged inadequacy of her training and the disrespect she received from her coworkers.

Next, the Respondent's decisionmakers knew of Hogan's complaints. Knowledge of an employee's protected, concerted activity must be specifically imputed to an appropriate agent of the employer who is in some manner responsible for the adverse employment action. Macon Cnty. Bd. and Macon Cnty. Hwy. Dep't, 4 PERI ¶ 2018 (IL SLRB 1988). Although knowledge of protected, concerted activities may not be imputed to an employer merely because a supervisor has such knowledge, a manager's or a supervisor's knowledge will ordinarily be imputed to the employer, unless there is affirmative evidence to the contrary. Cnty. of Cook, 31 PERI ¶ 108 (IL LRB-LP 2014); Macon Cnty. Bd. and Macon Cnty. Hwy. Dep't, 4 PERI ¶ 2018. Here, both Lane and Hendrix knew of Hogan's December 2014 complaint to Lane. Lane clearly knew of Hogan's December 2014 complaint because Hogan brought the complaint to him. Hendrix knew of it because Hogan told him about her 2014 meeting with Lane on February 6, 2015, when explaining her conduct at the earlier meeting.[4]

In addition, it is clear that the Respondent took an adverse employment against Hogan when it terminated her employment. See Rock Island and Sheriff of Rock Island County, 14 PERI ¶ 2029 (IL SLRB 1998); Ill. Dep't of Cent Mgmt. Servs. (Dep't of Emp't Sec.), 11 PERI ¶2022 (IL SLRB 1995) (discharge is an example of an adverse employment action).

Finally, Hogan demonstrated a causal connection between the complaints she made to Lane in December 2014 and the Respondent's decision to terminate her employment on February 11, 2015. Most significantly, at least one of the Respondent's grounds for the termination decision is false. An employer's presentation of a false or untruthful explanation for a termination supports a finding that the basis for the termination was pretextual and that the protected activity was a motivating factor for that termination. County of Rock Island and Sheriff of Rock Island County, 14 PERI ¶ 2029; City of Clifton (Dr. John Warner Hospital), 3 PERI ¶ 2062 (IL SLRB 1987)

[4] CTA counsel misrepresents the record on brief by asserting that Hogan failed to provide any testimony or evidence that Hendrix was aware of her conversation with Lane. In fact, Hogan expressly testified that she told Hendrix about it on February 6, 2015. Tr. P. 59.

(pretextual nature of the employer's asserted justifications can provide the requisite causal link, but finding none); Village of Glendale Heights, 1 PERI ¶ 2019 (IL SLRB 1985), affirmed aff'd Village of Glendale Heights v. Illinois State Labor Relations Board, No. 85-0774 (Ill. 2nd Dist. May 27, 1987); Rockford Township Highway Authority, 2 PERI 2013 (IL SLRB 1986) ("Where the reasons proffered by the employer for its actions are shown to be pretextual the Board should presume that the real reason was unlawful"), affirmed 153 Ill. App. 3d 863 (Ill. App. 2 Dist. 1987).

Here, Hogan did not engage in insubordinate conduct as the Respondent claimed. The CTA's guidelines define insubordination as "refusing to follow a direct order from supervisory, managerial, or executive personnel." However, neither Senior Manager Rio nor Hogan described any direct orders from management to Hogan, nor did they assert that Hogan refused to follow them. Similarly, none of the unusual occurrence reports submitted into evidence describe such conduct. Although Hendrix's unusual occurrence report asserts that he told her on "more than one occasion that this was not the place or time for this conversation," he did not claim to have directed her to stop speaking. This omission is rendered more conspicuous by the fact that Hendrix later claimed in his discharge recommendation that he did expressly "ask…her to stop." Rock Island and Sheriff of Rock Island County, 14 PERI ¶ 2029 aff'd by Grchan v. Illinois State Labor Relations Bd., 315 Ill. App. 3d 459, 734 (3d Dist. 2000) (lack of credible evidence establishing that employee had violated the referenced rules demonstrated unlawful motive); cf. County of Cook and Sheriff of Cook County, 12 PERI ¶ 3011 (IL LLRB 1996) (charging party lawfully disciplined where evidence demonstrated that she was insubordinate in refusing to obey a lawful order).

Hogan likewise did not violate the courtesy rule, referenced by Hendrix in making his recommendation for discharge, and Hendrix's attempt to pad his recommendation with this cited rule violation is likewise evidence of unlawful motive. The courtesy rule on its face appears applicable solely to employees' conduct in relation to members of the public. Yet, none of Hogan's conduct involved interactions with members of the public. City of Harvey, 18 PERI ¶ 2032 n. 2 (IL LRB-SP 2002) (considering motive of individual who was involved in the recommendation to take adverse action). Notably, Lane's failure to rely upon that rule in issuing his discharge decision does not nullify the finding of unlawful motive where Hendrix relied upon it in bringing the matter to Lane's attention and recommending discharge. Indeed, Lane's omission of that rule and substitution of a different one merely emphasizes the fact that the courtesy rule

could not reasonably be viewed as applicable to conduct that did not involve employees' interactions with members of the public.

In addition, some of the Respondent's other stated grounds for the termination decision are exaggerated and shifting. Exaggerated and shifting reasons for an adverse action are likewise evidence of unlawful motive. Shamrock Foods, 366 NLRB No. 117 (2018). Here, the Respondent offered an ever-growing list of objectionable words from Hogan as the grounds for its decision to discharge her. Senior Manager Rio noted in her unusual occurrence report that Hogan had called her "two-faced" and "liar," but asserted later at hearing that Hogan had also called her a "bitch." It stands to reason that if Hogan's use of the word "bitch" was sufficiently egregious to reference in Hendrix's discharge recommendation, then Rio would not have overlooked that word in drafting her unusual occurrence report, particularly when Hogan purportedly directed that epithet at her. Similarly, Hendrix asserted in his discharge recommendation that Hogan had called Rio an "ass" in addition to calling her all the other names, listed above, and he further asserted that she had used the word "fuck" in her communications with him. However, Rio did not mention the use of the word "ass" or "fuck" in her unusual occurrence report or, indeed, at hearing, and Hendrix's own unusual occurrence report mentions none of those profane words. Accordingly, the Respondent's various accounts demonstrate unlawful motive because they grew in the telling.

Third, the Respondent's shifting explanations to Hogan about the identity of the individual who made the underlying recommendation for discharge also warrants an inference of unlawful motive. Shifting explanations of who is responsible for the adverse action permits the inference of unlawful motive. PACE Northwest Division, 25 PERI ¶ 188 (IL LRB-SP 2009) aff'd by Pace Suburban Bus Div. of Regional Transp. Auth. v. Ill. Labor Rel. Bd. (Panikowski), 406 Ill. App. 3d 484 (1st Dist. 2010). Here, Hendrix told Hogan that Lane was the individual who recommended to him that Hogan should be discharged, whereas the documentary evidence provided by the Respondent demonstrates that the impetus for the discharge recommendation came from Hendrix.

The timing of the Respondent's decision to discharge Hogan is likewise suspicious. Here, Hendrix recommended Hogan's discharge just five days after he learned of her December 2014 complaints to Lane, and Lane accepted Hendrix's recommendation approximately two months after Hogan's initial complaint. County of DuPage and DuPage County Sheriff, 31 PERI ¶ 112 (employer took adverse against a couple of weeks after obtaining knowledge of protected activity);

Town of Decatur, 4 PERI ¶ 2003 (IL SLRB 1987) (timing of discharge 3.5 months after union activity was deemed suspicious).

Finally, under these circumstances, the severity of the discipline imposed upon Hogan (discharge) also warrants an inference of unlawful motive where Hogan was a 15-year veteran of the CTA with an unblemished disciplinary record. A charging party will not succeed in establishing her prima facie burden if her case rests on "nothing but the assertion that the Respondent's action was extremely unreasonable" because "unreasonableness alone does not establish a violation of the Act."[5] City of Clifton (Dr. John Warner Hospital), 3 PERI ¶ 2062 n. 8 (no other indicia of unlawful motive). However, the Board may infer retaliatory animus where an employer discharges an employee with a long record of good service after she has engaged in protected, concerted activity. N. Shore Sanitary Dist. v. Illinois State Labor Relations Bd., 262 Ill. App. 3d 279, 290 (2d Dist. 1994). Here, the severity of the penalty weighs in favor of finding that the Respondent acted with an unlawful motive when viewed in the context of the Respondent's inconsistent, shifting, and pretextual descriptions of Hogan's alleged misconduct, and the suspicious timing of the adverse action.

Contrary to the Respondent's contention, Hogan's belief that her race and sex may have contributed to the Respondent's decision to discharge her does not preclude a finding that the Respondent discharged her because of her protected concerted activity. Sheriff of Jackson County, 14 PERI ¶ 2009 (IL SLRB 1998) (employee initially filed an unsuccessful Title VII suit but the union later prevailed on her behalf before the Board).

Turning to the Respondent's affirmative defense, the Respondent has not provided a legitimate business explanation for terminating Hogan's employment because the proffered explanation for the discharge was pretextual and the grounds for the discipline were inflated, as discussed above.

However, even if the Board determines that Hogan's undisputed use of profanity and discourtesy during an interaction with management in the presence of other employees is a legitimate reason for the adverse action, the Respondent has still failed to meet its burden on the affirmative defense. In cases where the cited disciplinary action is supported by both legitimate

[5] In this respect, the Board's inquiry is different from an arbitrator's because the Board does not assess whether the discipline is supported by just cause and instead determines whether the Respondent's discipline was motivated by reasons that are illegal under the Act. Id.

and contrived grounds, the Respondent must show that it would have taken the same action had it considered solely the demonstrably legitimate ones. County of Bureau and Bureau County Sheriff, 29 PERI ¶ 163 (IL LRB-SP 2013) aff'd by unpub. ord. no. 3-13-0271, 31 PERI ¶ 87 (3rd Dist. 2014). Here, however, efforts by the Respondent's agents to exaggerate the nature of Hogan's conduct constitutes strong evidence they believed her isolated use of profane, discourteous language was not sufficiently egregious to justify her discharge. The Respondent's failure to produce evidence that it had previously disciplined employees for similar conduct likewise supports this conclusion where the evidence suggests that the Respondent tolerated such conduct in the past. Hogan credibly testified that both supervisors and employees frequently used profanity and that the Respondent ignored discourteous name-called among employees, even when it occurred in the presence of management. It is therefore reasonable to infer that "foul and abusive language would, on occasion, have been directed by employees towards their superiors, and vice versa." Tra-Mar Communications, Inc., 265 NLRB 664, 666-7 (1982) (drawing such an inference). Yet, there is no indication that the Respondent took any action against other employees for such conduct, and no evidence that it had ever discharged any employee for a first-time offense. Town of Decatur, 4 PERI ¶ 2003 (where Respondent routinely tolerated loud arguments without imposing discharge, where the evidence did not clearly indicate that employee's conduct was more severe than that of other employees, Respondent did not meet its burden on affirmative defense).

In sum, if the Board determines that Hogan's December 2014 complaints were protected, concerted activity, then the Respondent violated Section 10(a)(1) of the Act by terminating Hogan's employment in retaliation for that activity.

4. Section 10(a)(2) and (1) Allegation[6]

The Respondent also did not violate Sections 10(a)(2) and (1) of the Act because Hogan did not engage in union and/or protected, concerted activity.

[6] This allegation is addressed below in the event that the Board determines, contrary to my interpretation of the complaint set forth in part 1 of this decision, that the Executive Director did in fact intend to include a Section 10(a)(2) allegation, despite the absence of language in the complaint asserting that the Respondent took the complained-of action to encourage or discourage support for the union.

Section 10(a)(2) of the Act makes it an unfair labor practice for an employer "to discriminate in regard to hire or tenure of employment…in order to encourage or discourage membership in or other support for any labor organization." 5 ILCS 315/10(a)(2).

To establish a prima facie case that the employer violated Section 10(a)(2) of the Act, the charging party must prove by a preponderance of the evidence that: (1) the employee engaged in union and/or protected concerted activity, (2) the employer was aware of that activity, and (3) the employer took adverse action against the employee as result of his involvement in that activity to encourage or discourage union membership or support. City of Burbank, 128 Ill. 2d at 345; Illinois State Toll Highway Authority, 25 PERI ¶ 4 (IL LRB-SP 2009); City of Elmhurst, 17 PERI ¶ 2040 (IL LRB-SP 2001); Vill. of Schiller Park, 13 PERI ¶ 2047; Macon Cnty. Highway Dept., 4 PERI ¶ 2018; Gale and Chicago Housing Authority, 1 PERI ¶ 3010.

Here, the activity alleged to support the Section 10(a)(2) allegation is the same activity alleged to support the Section 10(a)(1) allegation. Yet, as discussed above, Hogan's activities were not concerted and therefore do not support her prima facie case under either section of the Act.

Even if the Board determines that Hogan's conduct was concerted and that it violated Section 10(a)(1) of the Act, Hogan still failed to present any evidence of union animus sufficient to support a Section 10(a)(2) violation. Although the circumstantial evidence discussed above is sufficient to demonstrate that the Respondent terminated Hogan's employment because of her complaints to management, there is nothing to link those complaints to actions taken by the Union. Accordingly, there is insufficient evidence that the circumstantial evidence referenced above likewise demonstrates union animus. City of Chicago (Police Dep't), 5 PERI ¶ 3017 n. 3 (IL SLRB 1989) (ALJ found reassignments were in retaliation for filing grievances, in violation of Section 10(a)(1), but found that they were not also motivated to discourage support for the union in violation of Section 10(a)(2)); cf. Chicago Transit Auth., 14 PERI ¶ 3002 (IL LLRB 1997)(where employee's grievances were processed in accordance with contractual grievance procedure and settled through negotiations with union, they could support both a Section 10(a)(1) allegation and a Section 10(a)(2) allegation).

Thus, the Respondent did not violate Sections 10(a)(2) and (1) of the Act by terminating Hogan's employment.

V. CONCLUSIONS OF LAW

1. The Respondent did not violate Section 10(a)(1) of the Act when it terminated Hogan's employment.
2. The Respondent did not violate Sections 10(a)(2) and (1) of the Act when it terminated Hogan's employment.

VI. RECOMMENDED ORDER

The Complaint is dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the Board's General Counsel, at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings, at ILRB.Filing@Illinois.gov. All filing must be served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 31st day of July, 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge