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

HOME DEPOT USA, INC.

and Case No. 18-CA-273796

ANTONIO MORALES JR.,
an Individual

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for the General Counsel.
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for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case remotely using videoconferencing technology on November 2, 3, 4, and 5, 2021. Antonio Morales Jr., an individual, filed the charge in this case on March 9, 2021, and filed amended charges on April 7 and July 27, 2021. The Director of Region 18 of the National Labor Relations Board (the Board) issued the original complaint on August 12, 2021, the amended complaint on September 13, 2021, and the second amended complaint (the Complaint) on September 28, 2021. The Complaint alleges that Home Depot USA, Inc., (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA): at all facilities in the United States by applying its dress code and apron policies prohibiting employees from "displaying causes or political messages unrelated to workplace matters" to encompass a prohibition on displaying the messages "Black Lives Matter" and/or "BLM"; in February 2021, by "selectively and disparately" applying the rule against "displaying causes or political messages unrelated to workplace matters" to "employees who displayed the slogan 'BLM' on their aprons and

engaged in other related protected concerted activities"; in the middle of February 2021, by causing the suspension of Morales by requiring "Morales to choose between engaging in protected concerted activity, including displaying the 'BLM' slogan, and leaving the . . . facility"; on February 19, 2021, by causing the termination of Morales employee by requiring "Morales to choose between engaging in protected concerted activity, including displaying the 'BLM' slogan, and quitting [ ][1] employment," and; on February 14 and 15, 2021, by threatening employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment; and, on February 15, 2021, by instructing employees not to discuss at any time an employer investigation.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in New Brighton, Minnesota, that sells and delivers home improvement merchandise. In conducting these business operations, the Respondent annually derives gross revenues in excess of $500,000 and has purchased and received goods valued in excess of $50,000 at its New Brighton location directly from points located outside the State of Minnesota. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] In the Complaint and throughout the hearing, Morales was referred to using male pronouns. In its brief, the General Counsel states that this was in error, and that Morales' pronouns are "they" and "them." Brief of the General Counsel at Page 1 n.1. The General Counsel uses they/them/their pronouns to refer to Morales except to the extent that it is quoting the usage in transcript or exhibit selections. I think the use of the pronouns they/them/their to refer to Morales would be unacceptably confusing in this decision since the parties dispute whether certain activities were "concerted" and reference to actions taken by Morales alone as actions taken by "they" or "them" could give the mistaken impression that those actions were undertaken by multiple persons. Therefore, it is my intention in this decision to avoid using any pronouns to refer to Morales. All they/them/their pronouns in this decision are plural and should be understood to refer to more than one person. See *Little Big Burger*, 2019 WL 831959 footnote 6 (ALJ explains decision to avoid using pronouns to refer to a nonbinary individual who purportedly engaged in concerted activity).

[2] At the start of the hearing, but before any evidence or opening statements were made, I granted the General Counsel's motion to amend the Complaint to add the last of these allegations. Transcript at Page(s) (Tr.) 8–9.

II. THE RESPONDENT'S NATIONWIDE DRESS CODE AND APRON POLICIES

The Respondent is a retail chain that sells home improvement products. It operates approximately 2200 stores in the United States, Canada, and Mexico, and has approximately 400,000 to 500,000 employees across its operations. The Respondent's employees wear orange Home Depot aprons while working in its retail stores. The Respondent's apron bears some pre-printed messages – among them, "I put customers first," the words "I am" above a place for employees to write their names, and a circle listing eight company "values." Employees are encouraged to personalize their aprons by adding written messages and other elements. The record shows that the additions employees make to the aprons are sometimes extensive.

The Respondent's written dress code policy sets forth a number of requirements and prohibitions regarding work attire. The dress code policy has, at all relevant times, been applicable at the Respondent's facilities in the United States. The requirements and prohibitions at-issue in this case are as follows. While in stores, employees are generally required to wear the company apron. Joint Exhibit Number (J Exh.) 1 at Page 1. The dress code states that this apron "is not an appropriate place to promote or display religious beliefs, causes or political messages unrelated to workplace matters." Id. at Pages 1 and 3. The dress code states that employees are prohibited from using the apron for "displaying causes or political messages unrelated to workplace matters." Id. at 4. The dress code's reach is not confined to the apron. For example, the dress code states that it is also "unacceptable" for employees to wear shirts, sweatshirts, or hats with "wording, logos or pictures . . . that address causes or political matters unrelated to the workplace." Id. at Pages 4 to 5.

This case includes an allegation that the Respondent violated the Act by interpreting its dress code prohibitions on the display of cause/political messaging to encompass a prohibition on the display of the messages "Black Lives Matter" and "BLM." The written policy makes no mention of Black Lives Matter or BLM; however, the parties stipulate that across the United States the Respondent interprets the dress code policy prohibition on displays of "causes or political messages unrelated to workplace matters" to encompass a prohibition on displays of the messages "BLM" and "Black Lives Matter." The record does not show, however, that the Respondent has promulgated this nationwide interpretation in writing or otherwise made a general announcement regarding it to managers at the district or store level.

As is discussed later in this decision, the parties presented substantial evidence about the circumstances surrounding Charging Party Morales' display of the message "BLM". Morales worked at one of the Respondent's Minneapolis-area stores. That store is referred to in the record as the New Brighton store or store 2807. The New Brighton store was the only one of the Respondent's locations for which the record provides meaningful evidence about the circumstances surrounding employee displays of BLM or Black Lives Matter, or about local management's response, if any, to such displays. As far as what the dress code meant nationwide to management, the

Respondent presented the testimony of Derek Bottoms the Respondent's chief diversity officer, and vice-president of associate relations. Bottoms, testified that, as a black man with three black sons, he understood BLM to be a "political message, a political statement, a political movement" "unrelated to the workplace." Tr. 789-790,-804. He testified that his understanding was that BLM was about "try[ing] to prevent or raise awareness of police violence towards African-American males" and, in some quarters, about an effort to "defund the police," but that he did not think there was "one view of what BLM stands for." Ibid. He testified that employee displays of the BLM message on their work attire violate the dress code because BLM is a political message unrelated to the workplace.

The General Counsel and the Respondent each submitted media reports and web site print outs in an effort to support their position regarding the question of whether the messages "Black Lives Matter" and "BLM" addressed employees' terms and conditions of employment. See General Counsel Exhibit Number (GC Exh.) 101 to 113; Respondent Exhibit Number (R Exh.) 24(a) to (i). Also included among those exhibits are documents that the Respondent proffers as evidence that the display of Black Lives Matter/BLM and similar messages have led to workplace conflict and that Black Lives Matter/BLM protests and counterprotests have occasioned civil unrest in the vicinity of the New Brighton Store and elsewhere. The General Counsel and the Respondent stipulated to the admission of one another's selections, and the record provides no reason to doubt the authenticity of those selections.[3] I note, however, that there was no testimony or analysis showing that the media and web page selections the parties chose to identify are representative of the public discourse on the meaning of Black Lives Matter/BLM or were authoritative regarding either what that phrase encompasses or everything the Black Lives Matter organization or movement does, or does not, support. For these reasons I find that the materials are entitled to limited weight.

To the extent that I was able to glean something consistent and meaningful from reviewing these materials it is as follows. The Black Lives Matter message and movement originated in 2013 to protest the unjustified killing of unarmed black individuals by law enforcement or vigilantes and the lack of appropriate consequences for the killers. The Black Lives Matter Global Network was created by the persons who originated or popularized the phrase and hashtag "Black Lives Matter," and those persons have used the Black Lives Matter Global Network to advocate for changes aimed at preventing and punishing unjustified state and vigilante violence against black communities and at eradicating societal racism.[4] Subsequently, the phrase Black Lives

[3] In its brief, the Respondent also cites to a web page, not submitted as an exhibit, that sets forth "BLM's 7 Demands." Brief of Respondent at Pages 10, 73-74. That web page was still available at the time of my review of the briefs and record, and is sponsored by the Black Lives Matter Global Network. See https://blacklivesmatter.com/blm-demands/ (viewed on May 12, 2022). The website included recent news stories, showing that the site was actively maintained at the time of my review. I consider the "BLM's 7 Demands" web page along with the other, similar, web pages that were submitted by the parties.

[4] The Black Lives Matter Website, R Exh. 24(d), states: "#BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin's murderer. Black Lives Matter Global Network Foundation, Inc. is a global organization in the US, UK, and Canada, whose mission is

Matter/BLM has sometimes been used to refer not only to the organization created in 2013 and 2014, but also to a political movement that expresses the views of the originators and the organization they created, as well as the views of other groups and individuals who seek to harness the attention and energy that the Black Lives Matter organization and phrase have attracted. Among the additional issues that the parties' submissions indicate have in some instances been associated with the Black Lives Matter political movement are: defunding the police; convicting former President Donald Trump and banning him from political office and digital media platforms; expelling members of Congress who attempted to overturn the results of the 2020 presidential election; appropriately funding the U.S. Postal Service; supporting Amazon employees' efforts to unionize; and calling attention to Black Women's Equal Pay Day. This is not an exhaustive list of the political causes that the materials cited by the parties indicate have been associated to some degree with Black Lives Matter and as noted previously, those materials were themselves not shown to be comprehensive or representative.

III. EVENTS AT NEW BRIGHTON LOCATION

A. BACKGROUND

The Charging Party, Morales, worked at the Respondent's New Brighton store, which is one of the Respondent's multiple locations in the Minneapolis-Saint Paul area. At the time of the hearing in this matter, the Respondent employed 236 persons at the New Brighton store. A number of managers and supervisors at that store played a part in the events of this case. The store manager for the New Brighton store was Jason Bergeland. Assistant store managers who reported to Bergeland included Enrique Ellis (merchandising assistant store manager), Taylor Flemming (specialty assistant store manager), Suzette Johnson (operations assistant store manager), and David Stolhanske (flooring assistant store manager). During the relevant time period, Michelle Theis was a supervisor for the flooring department, and Jordan Meissner was a supervisor who performed some human resources tasks at the store. The Respondent organizes its operations into districts, and the New Brighton store is in a district of eleven retail stores with a total workforce of about 2000 persons. Melissa Belford is the overall manager for the district, and Casey Whitley is the human resources manager for the district.

The New Brighton store is located approximately six and a half miles from where George Floyd, an unarmed black man, was murdered on May 25, 2020, by one or more officers of the Minneapolis Police Department. Floyd's murder triggered protests in May and June 2020 by, among others, persons identifying themselves with the Black Lives Matter movement and persons engaging as counter protestors. In some instances the protests and counter protests led to civil unrest in Minneapolis. Tr. 339. Some of this unrest was visible directly outside the New Brighton store. During the protests, another store in the same shopping center as the Respondent's New Brighton store was looted. On two occasions, the Respondent found it necessary to close the New Brighton store

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to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes."

as a result of protest-related disruptions. Tr. 515-516, 747-748, 751-752. There was another period of heightened concern about unrest in Minneapolis before, and during, the trial in February, March, and April 2021 of an officer responsible for Floyd's death. Tr. 365-366 683-684. Belford was concerned that allowing employees to display BLM messages in a retail setting could lead to them being "involved in situations that were less than favorable, unsafe, very volatile," and, in Morales' case, could lead Morales "to receive some unwanted . . . scrutiny, verbiage . . . from a customer or from anywhere else." Tr. 673. Both Morales and employee Sarah Ward stated that some co-workers at the New Brighton store had expressed hostility towards Black Lives Matter/BLM. Tr. 227, 372-373. The New Brighton store has a very diverse workforce, and the most diverse workforce of the eleven stores that are part of the same Home Depot district. Tr. 70, 434, 663.

B. Morales' Employment at New Brighton Store and Complaints Regarding Co-Worker and Vandalism of Black History Month Displays

Morales, who identifies as Hispanic, Mexican, and a person of color, was employed at the New Brighton Store for approximately 6 months from August 2020 until February 19, 2021. During that time, Morales was a sales specialist in the flooring department. Shortly after beginning work, Morales used a marker to customize the work apron by writing "Antonio" beneath the pre-printed "Hi, I'm" and also by writing the message "BLM." These remained on the apron Morales wore to work throughout the period of employment. Later, Morales drew cartoons on the apron – including a snow man, a spider web, a smiling pumpkin, a skeleton, flying bats, and Santa hats – and those, too, remained on the apron until Morales' employment ended.

Morales observed a more experienced co-worker in the flooring department, Allison Gumm, behaving in what Morales viewed as a racially biased manner. The first such instance occurred soon after Morales started work when Gumm told Morales to watch out for a particular customer because "statistically Somalia people tend to steal more." Morales also noticed Gumm being unhelpful to black customers and also being unhelpful when Morales had a problem submitting a Spanish-speaking customer's credit card.

During the first month of employment, Morales had conversations with Sarah Ward, a co-worker, about Gumm's behavior. On about September 14, Morales and Ward met with Theis in her office to complain about Gumm. These complaints were about Gumm's treatment of customers. Tr. 345. The meeting lasted about 30 minutes and ended with Theis telling Morales and Ward that she would talk to Flemming (an assistant store manager) "and see if anything could be done." Tr. 96. A few weeks after the September 14 meeting – i.e., in early October – assistant store managers Flemming and Meissner approached Ward and requested more details about Gumm's behavior. Tr. 346-347. At that time, Ward reported that employees had begun to engage in a "concerted effort" to "intercept customers of color to prevent [Gumm] from working with customers of color." Ibid.

In November, Morales met with Theis in her office a second time and stated that "the situation" with Gumm was not getting better. Morales now complained about Gumm's treatment of other employees – stating that Gumm would excessively clean any area that Morales touched and also that Nebiy Tesfaldet – a black co-worker – "had some stories about" Gumm's treatment of Tesfaldet himself.[5]

On November 27, Morales was called to Assistant Store Manager Flemming's office. Theis was also present. Flemming stated that Gumm had now made her own complaints, stating that Morales was treating her "differently from other coworkers." Morales denied this and stated that Gumm was the one who was "treating other people differently, specifically people of color." Flemming offered to meet with Morales and Gumm together to address their issues, but Morales declined. Then Flemming offered Morales a transfer to an assignment away from Gumm, but Morales declined that course of action as well, telling Flemming "I would see how the situation played out first before I made my decision." Tr. 111.

Tesfaldet, Jamesha/Kamesha Kimmons[6] (another black co-worker) and Ward also had discussions among themselves about Gumm's behavior. During the Fall or Winter of 2020-2021, Tesfaldet and Ward went to Flemming's office to advise Flemming and Theis that the interactions between Gumm and Morales were "getting worse." Tr. 389. Tesfaldet testified that prior to raising this issue at the meeting, they obtained Morales' "permission" because they "were speaking on [Morales'] behalf." Tr. 390. Tesfaldet also commented on what he described as Gumm's "microagression stuff towards customers of color." Tr. 391. Shortly thereafter, Tesfaldet brought concerns that Gumm was treating black customers in a biased way to the attention of three different assistant store managers – Johnson (who is Black), Ellis (who is Hispanic), and Stolhanske (who is white).

On about February 2, 2021, Morales, Kimmons, and co-worker Blessing Roberts (who Morales identified as Ethiopian) were at the flooring desk when it appeared to them that Gumm took their picture using her phone. Morales, Kimmons and Roberts went to Ellis and complained that Gumm had taken their photograph without obtaining consent. Tr. 126. On February 3, 2021, Morales met with assistant store manager Johnson. Morales recounted the complaints about Gumm and also represented to Johnson that Kimmons, Roberts, and Tesfaldet all had stories about Gumm's conduct. Johnson stated that the allegations about Gumm were "very serious", and she was "going to bring it up with corporate HR." Tr. 134-137.

The record shows that during the period when the Respondent was receiving Morales' complaints about Gumm's behavior, the company took a number of corrective actions with respect to Gumm. On October 22, 2020, Flemming had a documented "verbal performance discussion" with Gumm. On December 19, 2020, Theis issued a

[5] Tesfaldet testified, however, that he had told Morales that Gumm had not "brought" him "any trouble," Tr. 388, and that she "never did any microagressions towards me." Tr. 431.

[6] The record sometimes renders Kimmon's first name as Kamesha and other times as Jamesha. Both refer to the same employee.

"disciplinary coaching" to Gumm. The documentation from that coaching warned Gumm that "further violations would result in further disciplinary action up to and including termination." On February 9, 2021, Stolhanske issued a "counseling" – the next step in the progressive discipline process – to Gumm. The counseling again warned Gumm that further violations could result in termination. Later in February, the Respondent did, in fact, terminate Gumm's employment after completing an investigation into the complaints about her conduct. The reason the Respondent gave for Gumm's termination was that she had failed to uphold the Respondent's values regarding "respect" in her interactions with customers, co-workers, and, in particular, with Morales. Tr. 622-623, 742-743. The Respondent had some communications with Morales and other employees about these corrective steps. During a meeting on about December 18, 2020, Flemming told Morales that "something was being done" about Gumm and the Respondent had given Gumm "an ultimatum, that she has to change her behavior." Tr. 115-116. Ward testified that "we knew that management was having conversations with [Gumm]." Tr. 350-351.

During February 2021, employees posted displays in the New Brighton store's break room to celebrate Black History Month. Some of these were handmade posters developed and constructed by Tesfaldet with assistance from Morales. These were management-sanctioned displays, and Stolhanske and Ellis had authorized employees to use work time and store supplies to create them. The break room displays were subsequently vandalized by unidentified persons. After the vandalism, Stolhanske repaired or re-posted the displays and sent out an email on February 13 to staff, noting the vandalism and stating: "I will continue to replace these items through the end of B[lack]H[istory]M[onth], and would appreciate any help with keeping an eye on them. Intolerance and disrespect will not be tolerated." GC Exh. 7. Morales, Kimmons, and Tesfaldet had discussions about the vandalism and decided to raise concerns with Stolhanske about it. Morales did so, telling Stolhanske that the email was insufficient and that the incident should be the occasion for "a storewide conversation" about racism so that "people of color [would] feel safe at this store." Tr. 148. Stolhanske replied that he considered his email to be sufficient and that he was working to identify who was responsible for the vandalism. Tr. 149.

On or before February 17, assistant store manager Ellis was informed that the Black History Month display had been damaged again. Ellis, sent an email to staff that day acknowledging the incident, and asking employees to keep an eye on the displays to help identify the culprit. Later that day, Morales, after discussions with co-workers, replied to Ellis' email. Morales' reply stated: "I believe it is important to help our fellow coworkers of color feel safer about the environment they work in starting with opening up this discussion in a more public manner that shows us that we are as valued as everyone else at Home Depot." Morales sent the email only to Ellis; however, since Morales sent the email from the flooring department email address, other employees with the proper credentials could find Morales' email by searching the system's sent mail folder.

Later on February 17, Bergeland (the overall manager of the store) and Ellis met with Morales to discuss Morales' email request to "open up the discussion." Bergeland

stated that Morales' email was very well written and asked Morales to help him come up with ideas for celebrating Black History Month. There is conflicting testimony about whether Bergeland made a statement criticizing Morales for sending the email. Morales testified that Bergeland said Morales "shouldn't have sent the email in the first place . . . it was something that the management was taking care of and that [Morales] should just let them handle it." Tr. 171. Bergeland denied that he made any statements criticizing Morales for the email. Tr. 511. Bergeland's denial was corroborated by Ellis, who also witnessed the meeting. Tr. 477. I find that the record does not provide a basis for crediting Morales' testimony over the testimonies of Bergeland and Ellis on this point. To the contrary, I note that Morales made no mention of Bergeland's criticism when spontaneously testifying about what was said during the meeting. It was only when counsel for the General Counsel subsequently prompted Morales – asking "Did [Bergeland] tell you anything about whether you should have or shouldn't have sent the email" – that Morales augmented his account to include Bergeland's purported criticism regarding the email. Tr. 171. Bergeland's and Ellis' testimonies denying the statement were mutually corroborative and confident on this point. I find that the record does not establish that Bergeland made any statement criticizing Morales for sending the February 17 email.

During the February 17 meeting, Bergeland noticed for the first time that Morales' apron had the message "BLM" on it.[7] Tr. 511-512. Bergeland told Morales that the BLM message was impermissible under the dress code because it was "seen as a social cause and in violation of the dress code policy" and that Morales had to remove it from the apron. Tr. 478; see also Tr. 512 (Bergeland testifies that his understanding was that "most" considered BLM to be a cause or political message.) Bergeland expressed the view to Morales that if he allowed Morales to wear the BLM message at work, he would also have to allow an employee who wanted to wear a swastika at work to do so. Tr. 169. He opined that "black lives matter" and that "all lives matter." Tr. 170.[8] Morales declined to remove the BLM message. Instead, Morales left work early, falsely stating that this was necessitated by a family emergency.

[7] Bergeland testified that prior to the February 17 meeting he had not been aware of any of the specific markings on Morales' apron. Tr. 496. I credit Bergeland's testimony that he noticed the BLM message on Morales' apron for the first time at that meeting. There was no contradictory testimony, from Morales or anyone else, indicating that Bergeland had previously done or said anything indicating that he was aware of Morales' display of the BLM message. Indeed, Morales testified that, prior to February 17, no manager had made a comment indicating awareness of Morales' BLM display. Tr. 275. Contrary to the General Counsel's suggestion, I do not consider it implausible that Bergeland would not have noticed Morales' BLM message until the February 17 meeting. The message was written clearly, but not so large as to dominate the apron, and was only one of numerous things that Morales had drawn or written on the apron. Bergeland is the overall manager of the store, which has 236 employees, and he had previously only encountered Morales in passing on the store floor about 2 or 3 times weekly. Tr. 495-496. The Respondent did not perform routine inspections of the aprons or other clothes worn by employees of the New Brighton store, Tr. 868, and the record indicates that many Home Depot employees decorated their aprons.

[8] Morales testified that it would be offensive if co-workers were permitted to wear Make America Great, MAGA, Thin Blue Line, All Lives Matter, or Blue Lives Matter messaging. Tr. 233-234.

C. Morales and Belford Have Virtual Meeting on February 18 And Morales Tenders Resignation the Next Day

Belford (district manager) met with Morales virtually on February 18, to follow up on Morales' meeting with Bergeland. Also participating in this virtual meeting was Whitley, the district human resources manager. Belford manages a district with approximately 2000 employees and Morales had not previously met her. Tr. 181, 605. The February 18 meeting lasted almost 90 minutes and addressed two general topics: (1) Morales' complaints about Gumm's conduct and the vandalism of Black History Month displays; and (2) the Respondent's communication that Morales' display of the BLM message violated the company dress code and the discussion of possible alternatives.[9]

During the February 18 meeting, Belford said she understood that "a lot of things had been happening to Antonio" at the store, and then Morales described some concerns and also recounted communications with supervisors and managers regarding those concerns. Belford stated that she was "sick to my stomach right now at the thought that this is what you have been experiencing," and "we have failed you right now because this has continued to happen . . . . I am so sorry." GC Exh. 4 at Pages 17 and 22.[10] She stated that the Respondent wanted Morales to "feel great about who you are and what you bring to the table" with the Respondent. Id. at Page 19. Belford told Morales that the Respondent had taken "steps" to address Gumm's behavior and asked Morales to assist the investigation by providing a written statement describing any other conduct Morales thought was relevant and the names of witnesses to the conduct. Id. at Pages 17 and 22-24. After these discussions, Belford told Morales:

> Casey[Whitley] reminded me, too. Just obviously, this is confidential. I would ask that you please don't speak about this, you know, to anybody else, not because I don't care, but just out of -- I would like to be able to, as we need to, speak to them and have their own personal story. And I really want this to be something that we do that shows value and respect to you as well as to everybody else involved, okay? So just keep it confidential. I mean, obviously, [assistant store manager Stolhanske] knows that you're here, but that sort of thing, okay?

Id. at Page 26. Belford testified that the reason she asked Morales "to keep it confidential [was] so we could get a good, clean understanding by our investigation." Tr. 669

Belford and Morales then discussed how Morales believed the Respondent should have responded to the vandalism incidents and racial environment at the store,

[9] Morales recorded this meeting, and both that recording and a complete transcript of it were received into evidence at the hearing. See GC Exhs. 4 and 5.

[10] Page references to GC Exh. 4 refer to the transcript's original page numbers, not the subsequently added exhibit page numbers.

GC Exh. 4 at Pages 30-33 and asked if Morales would help the store celebrate Black History Month and other identity-based holidays. Id. at Pages 36-38. Belford told Morales, "[W]e need people that can help with the resolution. And I – I don't have the answers that you would have." Ibid.

About halfway into the meeting, Belford raised the subject of Morales' display of the BLM message on the apron. Morales responded: "I put it on as a signal to show that I support black people; I support people of color. And I think that what happened over the course of the summer, I think that needs to be addressed and how we need to continue to support black people." GC Exh. 4 at Page 39. Belford said, "I think you're absolutely right," Ibid., but told Morales that the display of the BLM message was contrary to the Respondent's dress code. Id. at Page 45. Belford said that if the Respondent allowed Morales to display that message at work, then it would "have to allow the opposite" – she used swastikas as an example – and said that thinking about allowing the opposite made her want "to vomit." Id. at Pages 48-49, 52. Morales responded that Belford's stated concern "doesn't make any sense" and rejected the idea that "allowing employees to wear BLM messages would give other employees the "right" to wear "something like a swastika." Id. at Page 52. Morales declared to Belford that "I will not be taking this [BLM message] off." Id. at Page 53.

Despite Morales' declaration, Belford continued to try to convince Morales to comply with the Respondent's dress code by removing the BLM message so that Morales could continue working at the store. Belford pointed out that BLM "does not mean the same thing to everybody else that you encounter," and then Belford made a number of suggestions for alternative ways that Morales could show "support for people of color or black associates." Id. at Pages 52-54. Those suggested alternatives included the display of messages saying "diversity," "equality," or "inclusion," and also messages celebrating Black History Month. Ibid. Morales agreed that there were "plenty of other ways" to express support for racial justice, but that insisting on continuing to wear the BLM message was "the best way." Ibid. At other points during the meeting, however, Morales expressed a willingness to consider whether there was an acceptable alternative to the BLM message. Id. at Page 73.[11]

When Belford repeated that Morales could not work in the store with the BLM message displayed, Morales responded, "Yep, I know that, and I am willing to be fired over this." Id. at Page 54. Belford responded: "I'm not going to fire you over that. That's not how that's going to work. You haven't done anything wrong." Ibid. She also opined that the issues Morales had raised about Gumm was a "completely separate issue from you having the Black Lives Matter on your apron," Id. at 56 – an assertion that Morales did not contradict then or at any other time in the meeting.[12]

[11] At no point during Belford's discussions with Morales regarding the BLM apron display, did anyone suggest that Morales could display the BLM message on work attire other than the Respondent's trademarked apron.

[12] This despite the fact that Morales freely expressed disagreement with Belford regarding other subjects during this meeting. G Exh. 4 at Pages 34-35 (disagrees that the store's recognition of Black History Month was meaningful); Id. at Pages 43-44 (disagrees that, based on Whitley's height, one would assume that Whitley played basketball); Id. at Pages 46-47

Belford spent much of the rest of the meeting on February 18 entreating Morales to comply with the dress code so that Morales could continue working for the Respondent. Belford's entreaties included telling Morales: "If you leave us, we will lose the good that you could do for us," Id. at Page 57; that she hoped Morales "would be willing to stay with Home Depot and teach us how to be better at supporting our communities and associates of color," Id. at Page 61; "I would hate for you to leave Home Depot when I know that you have a lot to offer us if you're willing," Id. at Page 62; "[I]f you leave, Antonio, you aren't there to help us move forward," Id. at Page 65; if Morales left the people who vandalized the Black History Month displays would have won, Id. at Pages 65-66; "[I]f you tell them you left because you wouldn't adhere to Home Depot dress code, which again, Antonio, that's your choice, but what I feel bad for is that you're someone that has passion around this, and you're somebody that could make a difference for some of your peers. Not every one of your peers that is of color knows how to have a voice, right? . . . . And if you leave, there's – you're not helping them learn how to move forward either. You're not helping us learn how to move forward." Id. at 66-67; "[D]on't leave because . . . [i]t won't change things. Stay and help us be part of the solution, right? . . . . I want you to know that you could have a voice in helping us be better." Id. at 67-68; "Don't leave, Antonio. I want you to stay. Yes, I need you to be in dress code." Ibid.: and "I'd love for you to be part of the committee that helps decide what we celebrate and how we celebrate it at Home Depot in a way that teaches people, engages people, makes them feel respected and supported. I don't want you to leave, okay?" Id. at Page 72.

Belford's entreaties did not persuade Morales to remove the BLM display. The meeting ended with Belford stating that she would arrange for Morales to be "clocked out" for the day and asking Morales to "over the next few hours to just think a little bit about ideas of what you could put on an apron that you would feel confident to show your support for what is important to you but also still uphold Home Depot dress code." Id. at Page 73. Morales responded, "I can think of something." Belford said, "That would be awesome," and then provided Morales with ways to contact her directly.

Morales did not contact Belford with a proposal for an alternative to displaying the BLM message. Rather, in a letter dated February 19, 2021, Morales resigned. Morales' resignation letter stated:

> After allowing myself the time to reflect on the events that have transpired over the course of my 6 months of employment at Home Depot, I have come to the decision that I am resigning from my position as a Sales Associate for flooring effective 2/19/2021.
>
> Home Depot has failed to adhere to their Diversity and Inclusion policy. I endured 6 months of harassment while at work. Additionally, the

(disagrees with comparison of BLM display to a religious display); Id at Pages 48-49, 52-53 (disagrees with Belford's suggestion that if the Respondent permitted BLM display, it would also have to permit the "opposite").

> discrimination towards myself and my fellow POC coworkers has gone on long enough. I have not felt safe, I have not felt supported, and I have not felt heard during my employment. The injustices, micro-aggressions and blatant racism I have experienced will not go unnoticed.

GC Exh. 9. At trial, Morales acknowledged that the resignation letter made no mention of the BLM display and testified that the reason this was not mentioned was that "I don't owe Home Depot a full explanation as to why I am resigning." Tr. 262.

On March 1 – about 2 weeks after Morales resigned – Belford contacted Morales to inform him about the results of the investigation at the New Brighton store. R Exh. 18. Gumm had been terminated for disrespectful behavior towards co-workers and customers. Tr. 622-623, 742-743.

D. Other Applications of the Apron/Dress Code Rules at the Store and Testimony about the BLM Message

The Respondent stipulated that, nationwide, it interprets the dress code policy prohibiting displays of "causes or political messages unrelated to workplace matters," to encompass a prohibition on employees displaying BLM/Black Lives Matter on their aprons or other work attire. The evidence, however, did not show that guidance regarding how the dress code applied to BLM displays had been communicated to the individuals who prohibited employees from displaying the message at the New Brighton store. Indeed, Whitley specifically testified that he had not received such guidance at the time he participated in the decision to apply the dress code to prohibit Morales and others from displaying the BLM message at the New Brighton store. Tr. 701-703, 753-754. Whitley testified that his conclusion that the dress code prohibited the BLM display was based, in part, on the view that it was important to consistently apply the prohibition on causes/political messages. Tr. 753. As an example of consistent application, Whitley stated that he was aware that the Respondent had previously prohibited employees from displaying "*Blue* Lives Matter" messaging. Tr. 753-754. Similarly, Belford testified that before she told Morales not to return to work without removing the BLM message, she had told another employee not to wear "Thin Blue Line" messaging at work. Between May and October 2000, managers required two New Brighton employees other than Morales to remove BLM from their aprons as a condition of continuing to work at the store, and both employees did so and continued working. Tr. 844-845, 848. This type of enforcement continued after Morales' employment ended – for example, when the Respondent required Tesfaldet and Kimmons to remove BLM messages from their aprons.[13] Tesfaldet and Kimmons complied with the dress code instruction and continued working at the store. Tr. 422-424, 513-515, and 699.

[13] Tesfaldet wore the BLM message on his apron during the period from the spring or summer of 2020 until the spring of 2021. Tr. 419-421. Although this means that Tesfaldet and Morales displayed the BLM message during some of the same time period, it does not show that Tesfaldet and Morales discussed displaying the BLM message or agreed with one another to do so, or about the reasons for doing so. Kimmons was not called to testify about the timing of, or reasons for, her display of the BLM message.

A number of witnesses testified about their understandings of the meaning of employees' BLM/Black Lives Matter messaging at the New Brighton Store. Morales testified: "It means Black Lives Matter. It's a symbol of alliance. I have never seen it as something political myself. It's something that I put on so that people know to approach me. I am a person of color myself so it's a form of solidarity. It's a way to keep – for people to feel safe around me." Tr. 68. Morales testified that this was necessary, because "there is a lot of prejudice and racism in our world today and especially in our state, so I want to show that as a symbol of solidarity." Ibid.[14] Morales testified that BLM was an organization that supported, among other things, defunding police departments and better addressing police violence against people of color. Tr. 213.

Ward, a co-worker with whom Morales engaged in discussions regarding racism in the store, stated that she understood BLM to be an organization "that works to bring to light systemic injustices and systems of oppression that affect primarily African-Americans," and is considered part of a movement to prevent police brutality against African-Americans. Tr. 338-339, 371. She testified that employees at the New Brighton store placed the BLM message on their aprons at the time of the murder of George Floyd. Tr. 337. Tesfaldet stated that, to him, the BLM message was about equal treatment for people of color and that he wrote BLM on his apron in the summer of 2020 because "it was a hot time for everybody especially with the protests and the fresh murder of Floyd" and he was "trying to relate to the customers to let them know . . . it's still a safe place and I'm still here willing to work for them, to help them buy whatever they need." Tr. 419. Tesfaldet stated that he was also aware that some people in Minneapolis understood that one aspect of the BLM movement was an effort to defund the police. Tr. 444.

Belford stated that at the time she told Morales that the BLM message would have to be removed from the apron, her understanding was that Black Lives Matters/BLM was "a social organization that focused on diversity and protecting the rights of people of color and in some cases related to . . . police brutality" and therefore "falls under the category of a social organization outside of Home Depot policy which we do not permit on an apron." Tr. 672. Whitley testified that he understood the BLM message to "focus on social injustice and police matters, like defunding the police which creates controversy." Tr. 701.

[14] In response to that answer, counsel for the General Counsel stated, "Okay. You mentioned the world. You mentioned the state. How about the store?" In response to that suggestion, Morales replied, "Yes." Tr. 68. I do not find this answer credible evidence that Morales' BLM display, even subjectively, was motivated by concern over racist working conditions. Morales, when testifying spontaneously about the reasons for making the BLM display, spoke about racism in the "the world" and "the state." It was only in response to the leading questioning of counsel for the General Counsel that Morales acceded to the suggestion that the BLM display was also "about the store." Second, Morales created the BLM apron display very shortly after starting work and at a time when the record does not show that Morales had decided to engage with others to address concerns about working conditions or their lot as employees.

DISCUSSION

I. NATIONAL APPLICATION OF DRESS CODE POLICY TO BLM DISPLAYS

The General Counsel does not allege that the Respondent violated the Act by maintaining its nationwide dress code policy prohibiting employees from displaying "causes or political messages unrelated to workplace matters." Tr. 34-35. What the General Counsel argues, rather, is that the Respondent violated the Act by classifying BLM/Black Lives Matter[15] as a message that falls within the facially lawful dress code prohibition. Ibid.; GC Exh. 1(m) at Paragraph 4. As discussed below, I find that the General Counsel has not met its burden of showing that the Respondent's nationwide interpretation of its dress code violated Section 8(a)(1) by interfering with employees' Section 7 right to engage in concerted activity for their mutual aid and protection.[16]

In order for the General Counsel to establish that prohibiting BLM displays interferes with concerted activity protected by Section 7, it must show both that the prohibited displays were "concerted" and engaged in by employees to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). To establish that activity is concerted, the General Counsel must make a factual showing, based on the totality of the evidence, *National Specialties Installations*, 344 NLRB 191, 196 (2005), that the employees' activity "was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees." *Meyers Industries*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The General Counsel's nationwide challenge stumbles at the outset because the General Counsel does not show, or even attempt to show, that the Respondent prohibited displays that were concerted[17] – i.e., were "engaged in with or on the authority of other employees." *Healthy Minds, Inc.*, 371 NLRB No. 6 (2021), slip op. at 2, quoting *Meyers Industries*, 268 NLRB 493, 497 (1984); *Trayco of South Carolina, Inc.*, 297 NLRB 630, 634 (1990), enf. denied 927 F.2d 597 (4th Cir. 1991). The General Counsel attempts to avoid the necessity of showing concerted activity by asserting that employees' BLM displays are so vital to their efforts to improve terms and conditions of employment that such displays should be added to the list of subjects that the Board considers "inherently concerted" – i.e., presumed to be concerted even absent a showing that employees were acting in concert. Brief of General Counsel at Pages 37- 44. However, it is for the Board, not me, to decide whether to create additional exceptions to the Board precedent requiring the General Counsel to make that evidentiary showing. *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("It is for the Board, not the judge,

[15] In the following discussion, I will refer to these two versions collectively as BLM.

[16] It is a violation of Section 8(a)(1) of the Act for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

[17] The possibility that the result might be different in the specific circumstances relating to the allegation concerning Morales and the New Brighton location is treated separately in Section II of the Discussion section of this decision.

to determine whether precedent should be varied."). In the more than 30 years since the Board held that a subject might be considered "inherently concerted" it has granted that status to only three subjects – wages, work schedules, and job security.[18] As the General Counsel recognizes, none of those three "inherently concerted" subjects bear on the circumstances present here. Since the record does not establish that the nationwide interpretation of the dress code interfered with employee BLM displays that were either concerted *or* inherently concerted, I find that the Respondent's application of its dress code to prohibit BLM messages did not interfere with employees' protected concerted activity in violation of Section 8(a)(1).

Even if one assumes, contrary to the above, that the General Counsel has cleared the hurdle of establishing that the nationwide interpretation interfered with concerted displays of the BLM messaging, the General Counsel would still have failed to prove a nationwide violation because it did not meet the second requirement for establishing protection – that is, showing that employees' displays of BLM messaging had a direct nexus to employee efforts to "improve [their] terms and conditions of employment or otherwise improve their lot as employees." *Eastex*, 437 U.S. at 565. To the contrary, as discussed in the statement of facts, the BLM messaging neither originated as, nor was shown to be reasonably perceived as, an effort to address the working conditions of employees. Rather the record shows that the message was primarily used, and generally understood, to address the unjustified killings of black individuals by law enforcement and vigilantes. That was, the record shows, the understanding of Bottoms, the Respondent's chief diversity officer. A message about unjustified killings of black men, while a matter of profound societal importance, is not directly relevant to the terms, conditions, or lot of Home Depot's employees *as employees.* This would be true even if it were possible to conclude here that employees' subjective motivation for displaying the BLM message was shown to be dissatisfaction with their treatment as employees since, as the General Counsel and the Respondent agree, the question of whether an activity addresses "mutual aid or protection" is analyzed under an objective standard and the employee's subjective motive for the activity is not relevant.[19] See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014) ("Under Section 7, both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard. An employee's subjective motive for taking actions is not relevant . . . . to whether activity is for 'mutual aid or protection."). For these reasons, I find that the General Counsel has

[18] Discussions of those three subjects were granted an exception to the usual requirements because the Board considered them to be particularly "vital" terms and conditions of employment and the "grist upon which concerted activity feeds." *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 fn. 10 (2014) (discussion of wages inherently concerted); see also *Hoodview Vending Co.*, 362 NLRB 690, 690 fn. 1 (2015) (discussion of job security inherently concerted); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (discussion of work schedules inherently concerted), enf. denied in part 81 F.3d 209 (D.C. Cir.); *Trayco of South Carolina, Inc.*, 297 NLRB at 634 (discussion of wages inherently concerted).

[19] See Brief of General Counsel at Page 26 and Brief of Respondent at Page 60.

failed to show the second element necessary for protection – that the Respondent's nationwide interpretation of its dress code policy interfered with messages that were addressed to "improv[ing] terms and conditions of employment or otherwise improv[ing employees'] lot as employees." *Eastex, Inc.*, 437 U.S. at 565.

To the extent that an expanded understanding of the meaning attributed to the BLM message can be seen as implicating employment issues, it is only because that expanded meaning amounts to a broad political or social justice message. The broader range of subjects that have been associated to some degree with the BLM message include not only racial justice, but also squarely political subjects – for example, expelling members of Congress who sought to overturn the results of the 2020 election and barring former President Trump from political office and social media. The display of political messages is, as the United States Supreme Court stated in *Eastex*, not protected when the "relationship to employees' interests as employees" is "so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." 437 U.S. at 567-568. Thus the Board, while recognizing that political outcomes "may have an ultimate effect on employment conditions," has held that employers do not violate employees' Section 7 rights by prohibiting workplace displays supporting a political party or candidate See *Ford Motor Co.*, 221 NLRB 663, 666 (1975) ("While it may be argued that the election of any political candidate may have an ultimate effect on employment conditions," newsletter advocating the election of a particular party "does not relate to employees' problems and concerns *qua* employees" and is not protected by the Act), enforced mem., 546 F.2d 418 (3d Cir. 1976); see also *Firestone Steel Prods. Co.*, 244 NLRB 826, 826-827(1979) (leaflets discussing statewide elections were unprotected under Section 7 because they were political and did not "relate to employee problems and concerns as employees"), affd. 645 F.2d 1151 (D.C. Cir. 1981). Any relationship between BLM messaging in the Respondent's workplaces nationally and employees' interests as employees that can arguably be found in the record here is not meaningfully different than the political messaging involved in *Firestone* and *Ford Motor*. As in those cases, the BLM message here does not relate to "employees' problems and concerns *qua* employees" and any connection to working conditions is too attenuated and indistinct to satisfy the mutual aid or protection requirement for protection. *Eastex*, supra.[20] For these reasons, I find

[20] The General Counsel cites three cases in which a message, although political, had a direct connection to employees' working conditions and was found to be protected under the "mutual aid and protection" clause. See *Eastex*, 437 U.S. at 569 (finding protected a message encouraging opposition to a "right to work" statute that could negatively affect employees by increasing employer's "edge" "at the bargaining table" and also encouraging support for a raise in minimum wage that could impact wages generally), *Nellis Cab Co.,* 362 NLRB 1587, 1588–(2015) (taxicab drivers political activity opposing a regulatory change that could reduce drivers' pay found to be protected), and *Kaiser Engineers,* 213 NLRB 752, 755 (1974), enfd. 538 F.2d 1379 (9th Cir. 1976) (letter to Congress protesting resident visas for foreign engineers is protected since such visas could impact the job security of engineers). Unlike the messages in those cases, the BLM message relates primarily to the unjustified killing of black individuals by police and vigilantes, not to any workplace concerns. To the extent that the message's broad, political, meaning addresses societal ills more generally, that meaning relates to employment only in the sense that the workplace is part of society, rather than to employee "concerns *qua*

that the General Counsel has failed to show that the Respondent's nationwide application of its dress code to BLM messaging interfered with activities protected by Section 7.

The General Counsel has not shown that the Respondent's national interpretation and/or application of its dress code policy violated Section 8(a)(1) of the Act.

II. ALLEGATIONS REGARDING TREATMENT OF MORALES

A. MORALES' CONVERSATIONS AND EMAILS REGARDING EMPLOYEES' RACE-RELATED CONCERNS AT THE NEW BRIGHTON LOCATION

The Complaint alleges that Morales engaged in concerted activities for mutual aid and protection by engaging in activities including "writing emails, engaging in various conversations with coworkers, supervisors and managers about subjects such as ongoing discrimination and harassment." The Complaint further alleges the Respondent violated Section 8(a)(1) by forcing Morales to choose between the protected activities and leaving the New Brighton facility, thereby causing Morales' suspension and termination, and also threatened employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment.

The evidence shows that Morales engaged in protected concerted activities by discussing racial harassment with co-workers and with supervisors and managers. This is clearly the case with respect to the concerns that Morales brought to store manager Bergeland and assistant store managers Stolhanske and Ellis about the vandalization of the Black History Month displays in the employee break room. The evidence shows that Morales raised these concerns with the Respondent in February 2021 after having discussions about the problem with co-workers Kimmons and Tesfaldet. The Board has recognized that discussions that, like these, seek to end ongoing racial discrimination in the workplace fall within the protection of the "mutual aid and protection" clause. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn.2 and 11 (2020); *PruittHealth Veteran Services-North Carolina, Inc.*, 369 NLRB No. 22, slip op. at 1 fn. 1, 8-10 (2020). *Dearborn Big Boy No.3, Inc.*, 328 NLRB 705, 705 fn.2 and 710 (1999); *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

I find that in October or November 2020, Morales was shown to have engaged in protected concerted activity regarding Gumm's conduct. In early October, Ward, who had previously joined Morales in complaining to Theis about Gumm's treatment of customers, told the Respondent that Gumm's conduct was affecting other employees insofar as they found it necessary to engage in a "concerted effort" to "intercept customers of color to prevent [Gumm] from working with customers of color." In November, Morales met with Theis about Gumm's conduct again, this time focusing on

employees." *Ford Motor*, supra.

Gumm's treatment of employees. Morales told Theis that Gumm would make a show of excessively cleaning any area that Morales touched. In addition, Morales told Theis that Tesfaldet – a black co-worker – also "had some stories about" Gumm's treatment of Tesfaldet. These complaints fall within the mutual aid and protection clause. Not only do they raise the issue of the harassment of employees at work, *Nestle USA,* supra, *PruittHealth*, supra, *Dearborn Big Boy*, supra, *Vought*, supra, but also the issue of how Gumm's mistreatment of customers was affecting the way co-workers were able to carry out their own duties, *Holy Rosary Hospital*, 264 NLRB 1205, 1205 fn. 2 (1982) (hospital employee's protest about inadequate staffing affecting patient care is protected concerted activity because staffing also affects employees' ability to carry out their duties) and *Misercordia Hospital*, 246 NLRB 351, 356 (1979) (same) enfd. 623 F.2d 808 (2d Cir. 1980).[21]

The Complaint includes an allegation that the Respondent enforced its dress code "selectively and disparately" against persons who engaged in protected concerted activities. In its brief, the General Counsel asserts that "the facts of this case suggest that, in fact, the Respondent seized upon its apron policy to retaliate against Morales for [the] escalating course of protected concerted activities in the workplace, rather than any alleged violation of the apron policy." Brief of General Counsel at Page 33. The evidence does not support that assertion. The record shows that the Respondent was aware of Morales' protected communications regarding Gumm and the vandalism of Black History Month displays but does not show that the Respondent bore any hostility at all towards those communications.[22] Indeed, supervisors and managers were

[21] But see *Five Star Transportation, Inc.*, 349 NLRB 42, 44-45 (2007) (employee addressing customer safety did not fall within the protection of the "mutual aid and protection" clause), enfd. 522 F.3d 46 (1st Cir. 2008) and *Waters of Orchard Park*, 341 NLRB 642, 643 (2004) (complaints about patient care unprotected where employees "explicitly disclaimed an interest in their own working conditions").

[22] The General Counsel does not discuss the Board's *Wright Line* standard for determining whether the enforcement of the dress code against Morales was motivated by the protected communications about vandalism and Gumm's conduct. Instead, it treats those protected activities as being one and the same as the purportedly protected BLM display, and then analyzes them all using a constructive suspension/discharge analysis. Because I find that the protected activities found above are separate from the BLM display (which, for the reasons I discuss herein, was not protected activity) I am left with the obliquely raised issue of whether the Respondent enforced its dress code against Morales in retaliation for his protected communications relating to Gumm and vandalism. That question is appropriately analyzed under the *Wright Line* framework. Under that framework, the General Counsel bears the initial burden of showing that enforcement was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983) (Section 8(a)(3) and (1)). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity, and there was a causal connection between the discipline and the protected activity. *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 (2020); *Camaco Lorain Mfg. Plant,*356 NLRB at 1184-1185; *ADB Utility Contractors,* 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274-1275

receptive to Morales' complaints and indicated to Morales that they considered the complaints serious and deserving of the Respondent's attention and investigation. The Respondent investigated the complaints, discussed the conduct with Gumm, issued progressive discipline to Gumm, warned Gumm that further such conduct would result in disciplinary action up to and including discharge, and eventually discharged Gumm. The store's management responded to information about the Black History Month vandalism in a similarly appropriate manner. It issued a stern warning to employees about the vandalism, replaced the damaged material, and sought employees' assistance in the store's effort to identify the perpetrator or perpetrators.[23]

Moreover, contrary to the General Counsel's assertion regarding disparate enforcement, the evidence demonstrates consistent enforcement of the dress code with respect to BLM messaging. Months before the Respondent told Morales to remove the BLM message, the Respondent required two other employees of the New Brighton store to remove BLM messages from their aprons. Subsequent to enforcing the dress code with respect to Morales, the Respondent required two additional New Brighton store employees to remove BLM messages from their work attire. Similarly, the Respondent previously enforced the dress code to prohibit "Thin Blue Line" messaging in the workplace. I am not persuaded by the General Counsel's contention that the Respondent's application of the dress code prohibition to Morales should be seen as

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(2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). Animus may be inferred from the record as a whole, including timing and the employer's resort to shifting explanations. See *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 (2017), enfd. 916 F.3d 1095 (D.C. Cir. 2019) and *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *General Motors*, supra; *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra *Senior Citizens*, supra. In this case, the evidence does not meet the General Counsel's initial burden because it does not show that the Respondent harbored animosity towards the Morales' protected concerted activities.

[23] The Complaint includes an allegation that on February 14 and 15, 2021, the Respondent threatened New Brighton employees with unspecified consequences if they engaged in protected concerted activities regarding racial harassment. GC Exh. 1(m), Paragraph 6. The only arguable support I find in the record for this allegation as it relates to activity that was, in fact, protected is Morales' disputed testimony that during the February 17, 2021, meeting Bergeland stated that Morales "shouldn't have sent the email" regarding the vandalism of the Black History Month displays. For the reasons discussed in the findings of fact, above, I find that the record does not show that Bergeland made that statement.

In its brief the General Counsel also alleges that the Respondent made threats in violation of Section 8(a)(1) on February 17 and 18 when it instructed Morales to remove the BLM display. Brief of the General Counsel at Page 53. It is not clear that this allegation fairly falls within the Complaint allegation regarding threats relating to employee complaints of racial harassment on about February 14 and 15. Assuming that it is within the bounds of the Complaint, the claim fails because, as discussed infra, the Respondent did not interfere with protected activity when it applied its dress code to Morales' display of the BLM message.

For these reasons, I find that the allegations that the Respondent violated Section 8(a)(1) of the Act on February 14 and 15, 2021, by threatening employees with unspecified reprisals if they engaged in protected concerted activity regarding racial harassment should be dismissed.

retaliatory because Morales had been wearing the BLM message since August or September of 2020 and was not directed to remove it until February 2021. That timing is not closely linked to protected complaints, or otherwise suspicious, inasmuch as Morales had been making such complaints since October/November 2020 – about 2 months after being hired and 4 months before the Respondent told Morales that the BLM message violated the dress code. Moreover, the record demonstrates an innocent explanation for the delay. It shows that Bergeland could not enforce the dress code with respect to Morales' BLM display prior to the February 17 meeting because he did not know about the display prior to that meeting. Even if I thought the timing raised some suspicion of discrimination against Morales, that suspicion is easily outweighed by the evidence showing that the Respondent enforced the prohibition against other employees at the New Brighton store both before and after doing so with respect to Morales.

For the above reasons I find that the allegation that the Respondent violated Section 8(a)(1) of the Act by selectively and disparately enforcing its dress code against Morales based on Morales' protected concerted communications should be dismissed.

B. Morales' Display of BLM Message

The General Counsel alleges that the Respondent interfered with protected concerted activity in violation of Section 8(a)(1) of the Act when it applied a facially lawful dress code prohibition on the display of "issues or political causes unrelated to the workplace" to Morales' display of the BLM message on the work apron. For the reasons previously discussed with respect to the Respondent's nationwide interpretation of the dress code prohibition, BLM messaging is not inherently concerted. Nor does it have an objective, and sufficiently direct, relationship to terms and conditions of employment to fall within the mutual aid and protection clause. A review of the evidence shows that a different conclusion is not warranted in the case of the Respondent's application of the dress code in Morales' case.

The record here does not show that Morales' display of the BLM message was concerted. The evidence does not establish that Morales and other employees had discussed the possibility of Morales displaying the BLM message, or that other employees had encouraged that display, at the time Morales wrote BLM on the work apron. Nor does the evidence show that other employees subsequently informed Morales that they approved of, or supported, Morales' display of the message.[24] Morales' BLM display cannot reasonably be seen as a "logical outgrowth" of the protected concerted communications regarding Gumm's misconduct and the vandalism

[24] I considered the fact that Tesfaldet wore the BLM message on his apron from the spring/summer of 2020 until he removed it at the Respondent's request in the spring of 2021. However, the evidence does not show that Tesfaldet and Morales discussed displaying the BLM message or had agreed upon the purpose of the display. Tesfaldet testified that he made the display because "it was a hot time for everybody especially with the protests and the fresh murder of [George]Floyd." Ibid. Kimmons also displayed BLM on her apron, but the record does not show much about that other than that Kimmons stopped displaying the message when the Respondent informed her that the dress code prohibited it.

of Black History Month displays. Cf. *C& D Charter Power Systems*, 318 NLRB 798 (1995) (individual employee complaint "constituted concerted activity because they were the logical outgrowth of the prior concerned complaints employees voiced"), enfd. 88 F.3d 1278 (D.C. Cir. 1996), cert. denied 519 U.S. 1006 (1996). The evidence does not show that those group concerns preceded Morales' display of the BLM message. Morales wrote BLM on the apron shortly after beginning work in August – prior to the protected concerted communications that started in October and November. Indeed, the Black History Month vandalism did not even occur until four months later, in February of the following year. Moreover, at the February 18 meeting, Belford opined that the apron display of BLM was a "completely separate issue" from the complaints about Gumm, and Morales did not express any disagreement with that assessment even though Morales repeatedly disagreed with Belford on other subjects during the meeting. The General Counsel's failure to show that the BLM display was concerted precludes a finding that the display was protected concerted activity or that prohibiting it was a violation of the Act.

Even if the General Counsel had shown that Morales' BLM display was concerted, this claim would still fail because the BLM message had, at best, an extremely attenuated and indirect relationship to any workplace issue at the New Brighton store. As discussed earlier, the BLM messaging originated, and is primarily used, to address the unjustified killings of black individuals by law enforcement and vigilantes. To the extent the message is being used for reasons beyond that, it operates as a political umbrella for societal concerns and relates to the workplace only in the sense that workplaces are part of society. The Board has previously held that employees' displays of political messages are not protected by Section 7 since such messages are not about employees' "concerns *qua* employees" even when politics "may have an ultimate effect on employment conditions." *Ford Motor Co.*, supra.

The record does not show that Morales' BLM display was any more directly related to working conditions than are BLM displays in general. Morales created the display at the outset of employment and at a time when, as discussed above, the evidence does not show that Morales had begun to engage in concerted communications regarding concerns affecting employees *qua* employees. Morales did not augment the BLM display with any other messaging that directly referenced a labor dispute or workplace issue. The General Counsel concedes that Morales "did not explicitly connect BLM to any particular incident with Gumm." Brief of General Counsel at Page 29.

The three managers who testified about Morales' display of the BLM message indicated that their understanding of the display was consistent with the view that the message did not address employees' concerns *qua* employees. Whitley the district human resources manager stated that his understanding was that the BLM message "focus[ed] on social injustice and police matters, like defunding the police which creates controversy." Bergeland, the store manager who first told Morales that the dress code prohibited the BLM display, testified that he understood that the BLM message was viewed by "most" people as a cause or political message. Belford, the district manager who also told Morales that displaying the message was a violation of the dress code,

stated that her understanding was that BLM was "focused on diversity and protected the rights of people of color and in some cases related to . . . police brutality." Even Morales described the message in a way that related to societal ills. Morales explained the display by stating "there is a lot of prejudice and racism in our world today and especially in our state, so I want to show it as a symbol of solidarity." Morales' understanding was that the BLM organization's initiatives included better addressing police violence against people of color and defunding police departments. No one – not Morales, other employees, supervisors, or managers – testified that they understood Morales' display of the BLM message to relate to Gumm's conduct, the vandalism, or any other complaints regarding employees' treatment *qua* employees at the New Brighton store.

The conclusion that Morales' BLM display was objectively about addressing the unjustified killings of black individuals, and not about employees' concerns as employees, is buttressed by consideration of the time and place of the display. Morales created and maintained the display at a location only six and half miles from where George Floyd was murdered by a Minneapolis police officer and close in time to the officer's trial and widescale protests near the store. Under all the circumstances, the message can only reasonably be understood as relating to those issues, rather than to any labor dispute or concern about the conditions of employment at the store.[25]

For the above reasons, the allegation that the Respondent violated Section 8(a)(1) of the Act when it applied its dress code to prohibit Morales from displaying the BLM message should be dismissed.[26]

C. Constructive Suspension/Discharge Allegation

An employee resignation "will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001); see also *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018). The General Counsel states that Morales was constructively discharged because the Respondent conditioned Morales' employment on removing BLM from the apron. Brief of the General Counsel at Pages 31-32. The Complaint also includes an allegation that the Respondent forced Morales' suspension in the same manner.

The record does support finding that the Respondent conditioned Morales' return to work on removing the BLM message. The constructive suspension/discharge

[25] I might have reached a different result had Morales' BLM display been augmented with messaging that connected it to working conditions, or if the record otherwise established such a connection. But that was not the case here.

[26] Since I find that the record does not show the BLM display at-issue here was Section 7-protected expression, I need not address the Respondent's novel arguments that requiring an employer to allow employees to engage in Section 7-protected expression in the workplace would violate the U.S. Constitution and federal trademark law. See Brief of the Respondent at Pages 35-57.

argument fails, however, because, for the reasons discussed above, Morales' display of the BLM message was not activity protected by Section 7. Therefore, the Respondent, by enforcing its dress code policy with respect to that display, was not requiring Morales to abandon Section 7 rights.[27]

To the extent that the Complaint can also be read as alleging that the Respondent constructively suspended/discharged Morales by conditioning further employment on ceasing to engage in protected communications regarding Gumm's conduct and the Black History Month vandalism, I find that constructive suspension/discharge was not shown. Although the record does show that Morales engaged in protected concerted activity about those concerns, it does not show that the Respondent required Morales to cease that activity. To the contrary, as discussed above, the Respondent made no attempt to stop Morales from engaging in those protected concerted activities, but rather responded to them in a receptive and appropriate manner.

The allegation that the Respondent violated Section 8(a)(1) of the Act by constructively suspending and/or constructively discharging Morales should be dismissed.

D. Allegation that Respondent Gave Morales an Unlawful Confidentiality Instruction Regarding Investigation

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act during the February 18 investigatory interview when Belford instructed Morales to keep their discussion confidential. While asserting in passing that Belford's instruction is unlawful even under existing Board precedent, the General Counsel's primary argument is that the Board should find a violation based on a return to earlier precedent. Specifically, the General Counsel argues that the Board should return to the standards it set forth regarding confidentiality instructions in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enfd. in part 851 F.3d 35 (D.C. Cir. 2017) and abandon the contrary standards adopted in a recent trio of cases on the subject – *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019) (reversing *Banner Estrella* in the context of written confidentiality rules), *Alcoa Corporation*, 370 NLRB No. 107 (2021) (applying *Apogee* in the context of oral confidentiality instruction), and *Watco Transloading LLC*,

[27] The General Counsel does not allege that constructive discharge is shown under the alternative, "traditional," theory that Morales quit because his employer retaliated for protected activity by "deliberately ma[king] the working conditions unbearable" with the intent of forcing Morales to resign. *Intercon I*, 333 NLRB at 223 fn. 3; *Mercy Hospital*, supra. At any rate, the evidence is overwhelmingly at odds with any suggestion that the Respondent acted with the intention of forcing Morales to resign. During an approximately 90-minute meeting, Belford pleaded with Morales to continue working at the store, praised Morales' abilities, character and value to the store, and encouraged Morales to accept or suggest alternatives that were consistent with the Respondent's dress code. The record shows that four other employees of the New Brighton store were told that their displays of the BLM message violated the dress code and all four ceased the display and continued working.

369 NLRB No. 93 (2020) (same).[28] While the General Counsel offers substantial arguments for returning to the *Banner Estrella* standard, the decision about whether to do that is for the Board to make, not me. *Pathmark Stores*, 342 NLRB at 378 fn. 1; *Waco, Inc.*, 273 NLRB at 749 fn. 14. Therefore, I confine my analysis to the question of whether Belford's statement to Morales was unlawful under the standards set forth in *Apogee*, *Alcoa Corporation, and Watco Transloading*.

In both *Alcoa* and *Watco* the Board stated that, pursuant to the Board's holding in *Apogee*, confidentiality rules that "apply only for the duration of any investigation are *categorically* lawful." 370 NLRB No. 107, slip op. at 2 and 369 NLRB No. 93, slip op. at 8 (emphasis original in *Alcoa* decision, but not *Watco* decision). The Board further stated that in the case of "an oral one-on-one confidentiality instruction" it will decide whether the "only for the duration of any investigation" category applies by assessing "the surrounding circumstances to determine what employees would have reasonably understood concerning the duration of the required confidentiality." *Alcoa*, slip op. at 2; see also *Watco*, slip op. at 9 fn. 25 (finding that employee would have understood that confidentiality instruction applied only during the pending investigation because the instruction was "embedded in a particular set of circumstances"). On the face of it, that describes a relatively open inquiry, but in practice the Board applied this standard to essentially assume that an employee would understand the confidentiality restriction to be limited to the duration of the specific investigation as long as there is "*no record evidence* that th[e confidentiality] instruction was *not* limited to the term of the investigation." *Watco*., slip op. at 8-9 (emphasis added). In *Watco*, the Board noted that the purpose of the confidentiality restriction was to prevent persons from "coordinating their stories or suggesting helpful interview answers to others." Id. at 9. Given that purpose, which the employer was not shown to have articulated to the employee in *Watco*, the Board stated it "would have been apparent" to the employee that the confidentiality instruction "would apply only while the investigation remained active." *Watco*, slip op. at 9 and 9 fn. 25.

Under the standards as articulated and applied by the Board in the cases cited above, I find that the confidentiality instruction Belford gave to Morales was limited to the duration of the investigation and therefore is "categorically lawful." As in *Watco*, there was "no record evidence" here that the instruction "was *not* limited to the term of the investigation." Moreover, Belford did use some language suggesting to Morales that the purpose for the confidentiality instruction was to protect the integrity of the investigation – stating that confidentiality was necessary because "we need to speak to [other witnesses] and have their own personal story." Under *Alcoa* and *Watco*, Morales is presumed to understand that a confidentiality rule imposed for that reason would be limited to the duration of the specific investigation. There was no testimony that Morales believed the confidentiality instruction extended beyond the end of the particular investigation.

[28] The General Counsel also states that the Board should take the opportunity to overrule the related standards that it set forth in *Boeing Company*, 365 NLRB No. 154 (2017).

For the reasons discussed above, I find that the allegation that the Respondent violated Section 8(a)(1) of the Act during the February 18, 2021, investigatory interview should be dismissed.

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 Respondent was not shown to have violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[29]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 10, 2022

PAUL BOGAS
Administrative Law Judge

[29] 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.