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

TESLA, INC.

and Case 12-CA-293359

JAMES EYMAN, AN INDIVIDUAL

Steven Barclay, Esq., for the General Counsel
David R. Broderdorf and Lauren M. Emery, Esqs.
(Morgan Lewis & Bockius, LLP), for the Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Tampa, Florida on February 7, 2023. The Charging Party, James Eyman, filed the charge on April 1, 2022,[1] alleging that the Respondent, Tesla, Inc., discriminated against him by suspending him on January 20 and discharging him on January 31 in retaliation for engaging in protected concerted activities. On June 9, Eyman filed an amended charge, which added the allegation that the Respondent instructed employees not to discuss wages and other terms of employment. On August 1, Eyman withdrew the allegations in the original charge relating to his suspension and discharge.

The General Counsel issued the complaint on September 2 and the amendment to the complaint on January 23, 2023. As amended, the complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by: (1) telling employees in December not to discuss their wages with others or complain about pay to higher level management**;** (2) telling employees on dates in January, including January 20, not to discuss newly hired employees with others, complain to higher level management about terms and conditions of employment, or discuss the suspension of an employee with others; and (3) telling employees on January 31 not discuss an employee discharge with others.

The Respondent denies the material allegations, except for the allegation that a manager told employees in December not to discuss their pay with others. With respect to that allegation, however, the Respondent contends that is time-barred, was effectively repudiated, and is not the subject of a filed charge.

[1] All dates are between December 2021 and September 2022 unless otherwise indicated.
[2] 29 U.S.C. ¶¶ 151-169.

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

I. JURISDICTION

The Respondent, a corporation, engages in the design, manufacture, sale, service, and repair of electric vehicles and other products. At the Respondent's Collision Center in Orlando, Florida (the facility), the Respondent annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Florida. 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The facility is one of 12 collision centers operated by the Respondent in the United States. The facility's approximately 25 employees, including 22 collision technicians, perform structural repairs and light collision work on vehicles manufactured by the Respondent. James Eyman, hired as a collision technician in May 2017, worked at several assembly plants outside of Florida until the facility opened in September 2021. Matt Brant was also a collision technician at the facility.[3]

Andre Ayala was the facility's manager until he was promoted to regional manager in August.[4] Cedric Leith was the associate manager until he left the company in June. The Respondent also employed three team leaders at the facility. Team leaders are higher level collision technicians who assist and train newer employees, and answer technical questions if managers are not available on the floor.[5]

[3] Eyman and Brant were generally credible. Eyman conceded that he was angry about being terminated. (Tr. 47-48.) Although he did not have full recollection of everything that transpired, Eyman was able to provide consistent testimony regarding his interactions with Ayala. Moreover, his testimony regarding the disputed interactions were corroborated by the notes of the Respondent's human resource investigator, Imani Meyers-Ferdinand. (Tr. 33-41.) Brant, who resides and works in Texas, appeared pursuant to subpoena by the General Counsel. His testimony was consistent and corroborated Eyman's version of the disputed events. (Tr. 93-98.)

[4] Ayala, who was present throughout the testimony of Eyman and Brant, was not generally credible. Much of his direct testimony responded to leading questions with flat denials and was riddled with inconsistencies, while his testimony on cross-examination was often evasive. (Tr. 122, 125-126, 132-135, 145-148.) Most glaring was his denial that he made the December statements about pay and was unaware of the ensuing investigation—an allegation admitted in the Respondent's answer to the complaint and its supplemental position statement. (Tr. 145-150.)

[5] It is undisputed that team leaders are not supervisors under Section 2(11) of the Act.

At the material times, Ayala reported to Patrick Terry, the regional manager. Terry reported to Carl Deaton, the Director of Collision. Deaton reported to Troy Jones, Vice President of Sales, Service and Delivery. Imani Myers-Ferdinand supports the facility as its human resources manager.[6]

B. The Respondent's "Open Floor" Policy

During the hiring process, the Respondent provides new employees with information regarding company policies. The policy at issue here, the "Open Floor" policy, states, in part:

> Employees have the right to freely discuss their wages, benefits and terms and conditions of employment, and to raise complaints internally or externally. Tesla encourages you to bring any concerns or complaints you may have to any member of management. This open communication is a reality at Tesla and your concerns will be given attention as promptly as possible.[7]

In furtherance of the Open Floor policy, employees can report concerns anonymously to the human resources department through an integrity line. Additionally, management regularly holds town hall meetings, where employees are provided with business updates and allowed to ask questions. Employees who prefer to communicate directly with managers and corporate officials, however, are free to do so.

C. Team Leader Divulges Wage Rates of New Employees

The Respondent has five pay levels. During onboarding, a recruiter, as well as Ayala and Leith, informed employees that they were all starting at Level 3, which was an hourly pay rate of $33.60. After a year, employees would be able to move to a higher hourly wage rate at Level 4. Nevertheless, employees frequently discussed their wage rates in the shop and during shop meetings with Ayala.

During the week of December 13, Brant walked up to Eyman at his work area and said that he heard Ayala was bringing in new employees to replace them and at a higher rate of pay. Eyman and Brant then discussed contacting human resources.[8]

Eyman got additional details later that afternoon when another coworker, George Fraser, came to him with the same concerns. Fraser shared that employees saw the wage rates of the new employees while helping them log into their laptops. Sometime later, a team leader, Carlos Serrano, confirmed the rumor. Serrano told Eyman that he recommended some of the new hires

[6] Myers-Ferdinand's testimony was also not credible, as her testimony denying reports to her by Eyman and other employees about suppressed speech regarding pay conflicted with her investigatory notes. (Tr. 165, 173-174; GC Exh. 6.)

[7] R. Exh. 6.

[8] I partially credited Eyman's testimony that Brant first approached him during the second week in December—one week after he returned to work on December 6. Brant did not recall the date but otherwise corroborated that part of his testimony. However, I do not credit Eyman's testimony, uncorroborated by Brant, that it was Brant who initiated the idea of Eyman speaking with human resources if they contacted him, and then refused to say why. (Tr. 28-30, 92-95.)

and, while helping them log into the UltiPro timesheet system, saw that they were getting paid at a higher pay level than current employees. Sometime later that week, another coworker approached Eyman with the same wage concerns.[9]

D. The Mid-December Meeting

Within several days, Serrano informed Ayala about Valenzuela's concerns over the disclosure of his pay to other employees. Serrano provided Ayala with the details, including the assistance provided by Serrano and another team leader, Heriberto, to new employees in electronically accessing the timesheets on their laptops. Ayala also spoke to Valenzuela regarding the concerns he expressed to the two team leaders about his pay being disclosed to other employees.[10]

Several days later, Ayala convened an all-hands shop meeting where he instructed employees not to discuss their pay rates or the newly hired employees or have anyone other than Ayala or Leith assist with laptop issues. He also told the employees, notwithstanding the company's Open Floor policy, to refrain from complaining about pay or any other issues to anyone above Terry's management level.[11]

E. Ayala Speaks with Employees About Human Resources

Sometime in January, Ken Persson, an automotive service writer, approached Eyman on the shop floor. Persson told Eyman that he was concerned about his job security because Ayala and Leith were belittling him in the presence of other employees as he performed a quality control check on a vehicle. Persson was also worried because Ayala previously removed him as manager in his previous employment at Caliber Collision. Finally, Persson asked if he would be willing to speak with human resources about an unspecified matter. Eyman agreed and asked what it was about. Just like Brant, however, Persson did not say what the matter was.[12]

Within the next week, Ayala approached Eyman while he was eating lunch in his work area. Ayala said that Eyman knew about everything that was going on and then asked, "what's HR about?" Eyman replied that he only knew that several employees told him that human resources would be calling him, but he did not know why. Ayala asked who the employees were and Eyman told him that it was Brant and Persson.[13]

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[9] I credit Eyman's undisputed testimony regarding the information he received from coworkers, including Fraser and Serrano (Tr. 28-33, 49-52.)

[10] Although vague on the sequence of his discussions with both employees, Ayala indicated that Valenzuela first brought up the issue to Serrano and Heriberto. (Tr. 114-117, 120-122..)

[11] Eyman and Brant could not recall everything that was said in the meeting. Nevertheless, I credit their generally consistent versions over Ayala's denial that he prohibited employees from discussing pay. (Tr. 33-34, 48-54, 84-85, 92-94, 101, 103.) Ayala, on the other hand, consistently evaded questions about such a meeting, insisting that he never made such a statement, and only had a meeting to discuss the pay issue with the team leaders and Terry, who was on the telephone. (Tr. 122, 145-150.)

[12] Although Persson did not testify, Eyman's testimony on this point was corroborated by the ensuing investigation, which revealed that Persson was named as a "possible witness" to an anonymous complaint that human resources had been looking into regarding smoking at the facility. (Tr. 36-37; R. Exh. 11 at 2.)

[13] I credited Eyman's undisputed version of this encounter with Ayala. (Tr. 34-36.)

Almost immediately, Ayala pulled Brant off the floor and met with him in the back office. During the meeting, Ayala asked Brant if Eyman was going to speak with human resources. When the meeting concluded, Ayala instructed Brant not to say anything to anyone about their discussion. Brant left the meeting and walked past Eyman's work area. Eyman tried to talk to him, but Brant said that he was not allowed to talk to Eyman.[14]

Persson was out sick when Ayala spoke to Brant. When he returned to work on or around January 19, Persson asked Eyman if he had called human resources. Eyman replied that he did not contact human resources. He then asked if management called Persson while he was out because they had spoken to Brant. Persson told Eyman that Leith called him at home and asked why Persson told Eyman that human resources was going to call Eyman.[15]

Following his conversation with Persson, Eyman emailed Jones. Eyman explained that he saw Jones in a virtual town hall meeting and was taking him up on his statement that any employee "could reach out with concerns." He provided his name and work location, stated that he had "some specific concerns that I would like to talk to you about," and asked to meet later that week. Jones agreed and had his assistant schedule the meeting for that Friday, January 21. Several hours later, Jones forwarded Eyman's email to Rachel Kaplan, the head of human resources. Kaplan replied a few minutes later, copying Myers-Ferdinand: "Thanks for flagging Troy. Let us know how we can support/concerns once you speak to James."[16]

F. The January 20 Meeting

The following morning, January 20, Eyman had just arrived at his work area when Leith told him to come to the back office for a meeting. Once there, he found Ayala, and Persson. Ayala asked Eyman why human resources was going to call him. Eyman said he did not know. He then asked Eyman why Brant was going to call human resources. Again, Eyman said he did not know. Persson interjected that Brant knew what was going on.

At that point, Ayala had Leith summon Brant to the meeting. As Brant arrived, Persson and Eyman were arguing, with Persson insisting that Eyman previously told him that that he would be contacting human resources and Jones. Ayala deferred that discussion and proceeded to question Brant about disparaging comments he made regarding the qualifications of the newly hired employees. Ayala told Brant he would not tolerate employees disrespecting their coworkers. That portion of the discussion concluded with Brant apologizing for his statements and agreeing not to talk about the new employees.

The conversation then turned to Eyman. Leith accused Eyman of having an issue with him over his pay while on leave due to a work injury. Eyman replied that he got paid and did not have an issue with him. Leith insisted Eyman was lying. Persson then argued with Eyman over statements previously made by Eyman. At one point, Persson shared Eyman's statement that he was going to write a "bag of shit," a "novel's worth," and "heads are going to roll." Ayala then

[14] Brant credibly recounted the meeting with Ayala, but did not say what, if anything, he told Ayala in response to his question about Eyman reaching out to human resources. (Tr. 36, 94-95.)

[15] Considering the corroborated testimony in context, I did not credit the remainder of Eyman's version of this conversation with Persson. (Tr. 36-37.)

[16] GC Exh. 2; R. Exh. 9.

said that someone was lying about contacting human resources. He said that no one was leaving the room until he "[got] to the bottom of it." Ayala also instructed that whatever was "said in this room stays in this room." Eyman replied sarcastically by asking if Ayala was going to subject the participants to lie detectors in a locked cage and have them "hash it out."

Ayala then asked if Eyman was scheduled to meet with Jones. After Eyman conceded that he was scheduled to meet with Jones, Ayala initially said, "okay" and acknowledged that the company had an open-door policy. However, he then repeatedly told Eyman that he was not telling him what to do, but if he were Eyman, he would not be calling Jones. To emphasize his point, Ayala took out his phone and read a message from Terry sharing his work philosophy: "We all shit on the back of the toilet seat, we just wipe it off and go." As the meeting ended, Ayala asked Eyman again if he was still going to speak with Jones. Eyman replied that he intended to do so.[17] In an email to himself after the meeting, Ayala summarized the highlights:

> [I'm] writing a book of shit and going straight to [T]roy [J]ones. [Novel's] worth and heads are going to roll.
> Quality of techs coming in. Caliber guys coming in. [S]hops usually only have one good tech
> Matt called recruiting and recruiter told her to call HR
> James interaction with [Heriberto] – in paint booth
> Over producing
> Troy [J]ones assistant has time scheduled
> Issue one disability pay[18]

G. Eyman' Suspension

A few hours later, Leith told Eyman to bring his laptop to the front office. When Eyman got there, Ayala, took his laptop and told Eyman him that he was suspended for threatening someone during the earlier meeting. Eyman denied threatening anyone. Ayala told Eyman that human resources would contact him and justified the action by referring to a California employee who threatened and then murdered a coworker. Eyman rejected the analogy, but Ayala replied that statements have consequences. As Eyman left the room, Leith told him, "don't talk to anybody." Following the meeting, Ayala reported the encounter through Teams chat.[19]

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[17] I based these findings on the credible testimony of Eyman and Brant over Ayala's inconsistent and barebone description of the encounter. Moreover, the testimony of Eyman and Brant regarding Ayala's statements are corroborated by his notes of the meeting, and his messages to Myers-Ferdinand after the meeting. In his messages to Myers-Ferdinand, Ayala stated that Eyman brought up the idea of bringing in a cage for him and Persson to "duke it out"—which confirms the fact that Eyman's statement was a sarcastic reply to Ayala's comment that no one was leaving the room until he "[got] to the bottom it." (Tr. 37-42, 45-46, 95-98, 101, 132-135, 151-152; GC Exh. 3-5; R. Exh. 11.)

[18] GC Exh. 5.

[19] Contrary to Ayala's testimony, Leith did not do all the talking at this meeting. Eyman credibly provided significant details regarding statements by Ayala, which Ayala did not dispute. Nor did I credit Ayala's denial that Leith told Eyman not to discuss his suspension with coworkers since Ayala did not explain if he was able to hear everything that Leith said or did not say to Eyman as he left the room. (Tr. 42-43, 136-139.)

On January 21, Jones briefly spoke with Eyman at their scheduled time. However, Jones told Eyman that since he was suspended and under investigation, he could not discuss his concerns. Eyman asked for human resources support, and Jones told Eyman he would have human resources call him. On January 26, Eyman left a message with Jones' assistant, explained that he had been out of work for six days, had not heard anything from human resources, and asked for a number to contact that department.[20]

H. Ayala and Leith Prohibit Discussion about Eyman's Suspension

Employees learned of Eyman's suspension on the same day, January 20. A few days later, Ayala and Leith held a shop meeting where they informed employees that Eyman had been suspended. They also instructed employees not to discuss Eyman's suspension with anyone other than Ayala and Leith.[21]

I. The Investigation

On January 20, Myers-Ferdinand reached out to Ayala first. Ayala initially connected with her during the morning via Teams chat. In the afternoon, Ayala reported to Myers-Ferdinand that he "suspended James Eyman for threat of violence . . . During our meeting, he threatened Ken . . . Said [let's] bring a cage and we can take it outside and duke it." In response to her question as to "[w]hat prompted her to say that" Ayala replied, "he was caught in a lie and became hostile." About an hour later, Myers-Ferdinand informed Jones and Kaplan about Eyman's suspension and said she "would circle back once I have spoken to the other employees who were present.[22]

Later that day and/or on January 21, Myers-Ferdinand spoke to Ayala, Leith, Eyman, Persson, and Brant. Myers-Ferdinand's notes of her interview with Eyman state, in pertinent part:[23]

> People going around shop going to HR
> People in shop new tecs making more
> Andre asked who told him this . . .
> Ken asked if HR called him
> Asked if going to call HR said you could write a book
> Cedric and Andre start asking about HR
> Start to question someone is lying

[20] Eyman's communication with Jones was undisputed and corroborated by his telephone message to Jones' assistant the following week. (Tr. 55-57; R. Exh. 1.)

[21] I credited Brant's testimony that he heard from a coworker that Eyman was suspended after he returned from lunch on January 20, and the instructions by Ayala and Leith a few days later that employees were not to talk about it. (Tr. 98-99, 102.)

[22] Myers-Ferdinand testified that she conducted the investigation between January 20 and January 23. However, her documentation establishes that she completed it by January 21. Moreover, although she testified that Eyman did not tell her that Ayala made a statement about discussing pay, her notes confirmed that Eyman raised those issues, as well as his concern that he was terminated because he discussed pay with Heriberto. (R. Exh. 11; GC Exh. 3; Tr. 158-159, 162-165, 173-175.)

[23] I did not include Myers-Ferdinand's notes about statements by Ayala during the afternoon all-hands meeting on January 20 since Eyman had already left the facility. (GC Exh. 6.)

Ken says James made appoint to talk to Troy Jones
Asked if he wanted to get in the cage and hash it out.
Around 3 Cedric says grab laptop after
after morning meeting.
HR will call let him know . . .
Ken returned to work asked if HR had called.
Don't know
Before he left he said HR is going to call you is that alright . . .
Said no not going to HR
Went to Cedric–2 people coming to him HR going to contact don't know what is going on . . . Asked issues – pay concern was fired
told them about conversation with [Heriberto] back and forth . . .
Made statement "do you want to get in the cage" intend for Ken to knock it off and stop lying
Andre was staying on his story . . .
State his intent was not to fight he took it wrong
Before we left
He said Troy Jones . . . if I . . .
Keep everything in house.
States don't have a problem – just blew up.
Says it was nothing.
Someone in CA – watch what you say to people.
Assumed it was in reference to Troy Jones . . .
New team members standing around not doing anything.
We want to keep it in house . . . Heated conversation.[24]

Myers-Ferdinand emailed a "recap" of her investigation to Kaplan at 6:52 p.m. "Concern 1" addressed Eyman's statement to Persson about getting in a cage and hashing it out. She noted that Eyman admitted making the statement, never intended it to be perceived as a threat.[25]

"Concern 2" addressed Eyman's comments about communicating with Jones and being terminated. Myers-Ferdinand's notes reflected the following statements by Eyman about the January 20 meeting: Eyman acknowledged he would be meeting with Jones; Ayala stated "at least three times during the meeting that he can speak to who he wants but if it were him he would talk to [Terry];" Leith and Ayala told him "you have to watch what you say to people and there was an incident in [California] where an employee harmed another employee;" Ayala and Leith did not say "in so many words but statements had been made that they should keep things in the shop in house."

[24] Myers-Ferdinand's notes reflect that Eyman shared various concerns relating to working terms and conditions of employment, including employee "pay concern." As such, her notes and the Respondent's admission corroborate Eyman's testimony that Ayala was concerned about employees contacting human resources or Jones or speaking with each other about the "new tecs making more." (Tr. 164-165.)

[25] Myers-Ferdinand's background details stated that the meeting was held because Eyman went to Leith and Ayala after Persson and Brant told Eyman that human resources was going to contact him. That was a misstatement, however, as the record established that Ayala convened the meeting to find out why Eyman was contacting human resources.

Myers-Ferdinand also reported Persson's statements that Ayala "did say that there is a Skip level process but if it were him he would go to [Terry] first to try and address any issues or concerns;" and the previous regional manager assured employees that employees could reach out to anyone if they had concerns. In response to Persson's statement, Myers-Ferdinand wrote, "I think this concerns (sic) may need a little more digging to better understand the feeling of the shop do they feel they can speak to anyone. What has been communicated."[26]

Myers-Ferdinand also noted "New Concerns" raised during her investigation relating to work production, ventilation, new employee referral bonuses, and Eyman's concern about returning to work with Ayala and Leith. She reported that human resources had been looking into an anonymous complaint about smoking in the facility and believed that Persson was a "possible witness," but Eyman was not mentioned at the time. Myers-Ferdinand concluded with a comment about Eyman's latest performance appraisal and noted, "There is also risk with exit."

I. The Respondent Terminates Eyman

On January 31, Leith notified Eyman by telephone that he was terminated and told him to come to the facility to pick up his personal tools. Eyman went to the facility within the next day or two. As Eyman arrived, Leith met him outside and told him that he was not allowed into the facility and would have someone bring out his tools. An unidentified employee then brought out Eyman's tools. However, before Eyman left, Leith said, "if I were you, I wouldn't talk to anybody."[27]

J. The Respondent Issues Salary Adjustments

In February, after reviewing applicable data, the Respondent implemented a market pay rate adjustment for the facility's employees. Ayala met with employees individually to communicate the adjustment to their pay.[28]

K. The Respondent's Position Statements

On May 9, Region 12 requested the Respondent provide evidence regarding the April 1 charge alleging Eyman's discriminatory suspension and discharge. The letter stated the following:

> Although not yet alleged, the investigation has revealed some evidence that around December 2022, manager Andre Ayala instructed employees not to discuss their pay with others. Further, there is some evidence that at about this same time, manager Ayala

[26] Even though several employees reported to Myers-Ferdinand that managers were restricting them from talking with each other or to anyone outside the facility, she testified that she did not find any evidence to corroborate Eyman's allegation. (GC Exh, 6; R. Exh. 11; Tr. 165, 172-174.).

[27] I credit Eyman's detailed and undisputed testimony that Leith told him not to discuss his termination with anyone when he arrived to pick up his tools with his wife. Ayala's denial of such a statement was not credible. He testified that he told Leith to deal with the handover of Eyman's tools. However, he then said that he went outside, while Leith stayed inside the facility, and failed to identify who engaged with Eyman. (Tr. 43-44, 62-63, 65, 139-143, 153-154.).

[28] R. Exh. 7.

instructed employees not to take their concerns and complaints above district manager Patrick Terry ("P.T.")

In response to Region 12's request for evidence, the Respondent investigated the allegation that Ayala told employees not to discuss their pay with others. On June 12, the Respondent's counsel responded to the Region's request:

> Tesla, Inc. ("Tesla" or the "Company") provides this supplemental position statement[1] regarding an alleged statement by Collision Manager Andre Ayala to employees not to discuss their pay with others.
>
> Although there is no pending charge with this specific allegation, and even though the allegation may be barred by Section 10(b), Tesla investigated the allegation. Tesla's investigation revealed that Mr. Ayala may have made a statement regarding not discussing pay with other employees. Such a statement, if made, conflicts with Tesla's written policy, which explicitly allows employees to discuss pay in alignment with NLRA rights. *See* Company's June 6, 2022 Position Statement, at 3, Exhibit B.[29]
>
> In order to proactively resolve this allegation, Tesla plans to issue the attached notice to Orlando Collision Center employees, which directly and unmistakably disavows any such statement about not discussing their pay.[2] *See* Exhibit G. Tesla would post the notice in the Orlando Collision Center and also mail a copy to James Eyman. Through this public repudiation of the potential statement made by Mr. Ayala, Tesla intends to ensure that no employee feels restricted in discussing their pay with others. Tesla also will direct Mr. Ayala not to make such statements going forward and to align himself with Tesla's written policy on this issue.
>
> Upon repudiation, there would be no substantive basis for a new or amended charge involving the alleged statement. An employer may voluntarily resolve alleged unlawful conduct by repudiating that conduct. *Passavant Mem'l Area Hosp.*, 237 NLRB 138 (1978). *See also TBC Corp. & TBC Retail Group, Inc.*, 367 NLRB No. 18, slip op. at 2 (2018); *Atlas Logistics Retail Servs. (Phoenix)*, 357 NLRB 353 (2011). An effective repudiation requires the following: (1) it must be timely; (2) it must be unambiguous; (3) it must be specific in nature to the course of conduct; (4) it must be free from other proscribed illegal conduct; (5) it must be adequately published and there must be no proscribed conduct on the employer's part after the publication; and (6) it should give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights.
>
> The attached notice, which will be signed by a Tesla HR Business Partner and a Director, complies with the *Passavant* criteria. Tesla is prepared to publish the notice as soon as this Monday, June 13, having just completed its review of the unalleged allegation after receiving the Region's May 9 letter. The notice is unambiguous, specifically addresses the alleged statement, and – as discussed in Tesla's June 10, 2022 position statement – is free from any other unlawful conduct. Tesla plans to publish the notice by posting it in the Orlando facility, and to mail a copy to Eyman. Finally, the notice makes the requisite

[29] The June 10 position statement was not offered into evidence.

assurance to employees regarding their future exercise of Section 7 rights. Under these circumstances, the notice adequately remedies any potential unfair labor practice charge or amended charge associated with the alleged statement. *See Stanton Indus.*, 313 NLRB 838 (1994); *Gaines Elect. Co., Inc.*, 309 NLRB 1077 (1992); *The Broyhill Co.*, 260 NLRB 1366 (1982).

Please let us know if you have any questions.

At footnote 2 of the letter, the Respondent's counsel requested that the Region discuss the notice, which was signed by Deaton and Myers-Ferdinand, before posting the notice. On June 13, Myers-Ferdinand had the following notice mailed only to Eyman—even though other employees employed at the same time as Eyman had also separated from the company—and posted in the breakroom for 60 days:[30]

Notice to All Tesla Employees
at the Orlando, Florida Collision Center

Tesla recently learned that an Orlando manager may have verbally instructed employees not to discuss their pay with others in around December 2021.

Such statements or related statements violate the National Labor Relations Act. Tesla does not condone any such statement by any manager or supervisor, and the Company did not intend to make such statements. Tesla's policy on employee discussions concerning pay is set forth in the "Open Floor" policy, which states in relevant part that "Employees have the right to freely discuss their wages, benefits and terms and conditions of employment." Tesla regrets that this incident occurred.

Section 7 of the National Labor Relations Act gives all employees the following rights: to organize; to form, join or assist any union; to bargain as a group through a representative they choose; to act together for other mutual aid or protection; and to choose not to engage in any of these activities. We will not interfere with employees exercising their Section 7 rights.

Specifically, we will not tell employees not to discuss their pay with others.[31]

The Respondent's efforts to repudiate Ayala's December statements instructing employees not to discuss pay were rejected by the Region and the complaint issued.

LEGAL ANALYSIS

I. THE SECTION 8(A)(1) VIOLATIONS

A. Discussions of Pay and Other Terms and Conditions of Employment

[30] Myers-Ferdinand's testimony that the notice was mailed to Eyman and posted in the facility's breakroom for 60 days is undisputed. (GC Exh. 7; Tr. 167-168, 174-175.)

[31] Although the notice did not admit that Ayala made the December statements, the Respondent's answer to the complaint admits that he did.

During an all-hands shop meeting around mid-December, Ayala violated Section 8(a)(1) by instructing employees not to discuss their pay rates or the newly hired employees. He also told the employees to refrain from complaining about pay or any other issues to anyone over Terry's level. The Board has long held that wage discussions are "inherently concerted" and, thus, protected, regardless of whether they are engaged in with the express object of inducing group action. See *Alternative Energy Applications, Inc.,* 361 NLRB 1203, 1203 (2014) (supervisor unlawfully threatened charging party with discharge if he told anyone else about being granted an early raise); *Automatic Screw Products* Co., 306 NLRB 1072 (1992), enfd. Mem 977 F. 2d 582 (6th Cir. 1992) (employer unlawfully promulgated and maintained rule prohibiting employees from discussing their salaries).

After suspending Eyman for making a threatening comment to a coworker in a meeting on December 20, Ayala instructed the attendees that, "what's said in the meeting stays in the meeting." Ayala repeated that instruction to Eyman as he was leaving the office, "I am going to tell you this just because I like you, don't talk to anybody." Applying the objective standard used by the Board in assessing the impact of such statements, Eyman would have reasonably understood the statement as a directive to refrain from talking about his suspension with coworkers. See *Miller Electric Pump,* 334 NLRB 824, 825 (2001) (speculation as to the subjective reactions of employees is irrelevant in determining whether employer's statement tends to interfere with protected speech).

Ayala's efforts to quell discussion of Eyman's suspension were for naught, however, as employees learned of this development on the same day. A few days later, Ayala and Leith called a shop meeting where they informed employees that Eyman had been suspended but instructed employees not to discuss the matter. If employees had any questions, Ayala, told them to come to him or Leith.

Employees have a Section 7 right to discuss discipline, including the suspension and discharge of employees, with each other. *Inova Health System,* 360 NLRB 1223, 1228 (2014) (employer unlawfully instructed employee not to discuss her suspension with anyone except her husband), citing *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). In *Inova Health System*, the Board noted that an employer may demonstrate in certain instances that an instruction to employees to maintain confidentiality regarding a disciplinary investigation is based on a "substantial and legitimate business justification" that "outweighs the rule's infringement on employees' rights." However, as was the case here, the employer did not have a legitimate business purpose for restricting discussion of an employee's suspension. There is no evidence that confidentiality was required to protect the safety of witnesses, maintain evidence, or ensure the veracity of testimony. Id. at 1228-1229. He simply did not want word of Eyman's suspension to get out into the workforce. Cf. *Desert Palace, Inc. d/b/a Cesar's Palace,* 336 NLRB 271, 272 (2001) (employer's impromptu imposition of a confidentiality rule regarding a drug investigation was justified to protect witnesses, preserve evidence, and prevent fabricated testimony).

On January 31, Eyman was discharged and returned to the facility to pick up his tools. After picking up his tools and turning to leave, Leith told him, "If I were you, I wouldn't talk to anybody." In the circumstances, Leith's statement also violated Section 8(a)(1). See *Cast-Matic Corporation, d/b/a Intermet Stevensville,* 350 NLRB 1349, 1371 (2007) (supervisor's statement to employee that he would take off union button "if I were you," tended to restrict Section 7 rights);

Avondale Industries, Inc., 329 NLRB 1064, 1096 (1999) (supervisor unlawfully threatened employee with unspecified reprisal by advising him to remove pro-union pin because "if you-know-who found out, he would have a fit about that sticker") Moreover, an employer cannot continue to require that employees maintain the confidentiality of an investigation following its conclusion. *Apogee Retail LLC d/b/a Unique Thrift Store,* 368 NLRB No. 144, slip op. at 8-9 (2019) (investigative confidentiality rules are lawful under *Boeing* to the extent they apply to open investigations). The Respondent had completed its investigation regarding Eyman's January 20 statements by the time he was discharged and could not lawfully prohibit him from discussing his discharge or suspension with others.

B. Employees Rights to Talk to Higher Level Management

Ayala's statements discouraging employees from complaining to higher level management were not grounded in any company rule. Nor did the Respondent establish a legitimate business justification for stifling employee communications in that manner. By restricting employee complaints regarding work-related issues to a chain of command that started and ended with facility managers, Ayala violated Section 8(a)(1). See *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 2, fn. 6 (2019) (employer unlawfully restricted a wide range of Section 7 protected communications by requiring employees "to raise issues or concerns only through the Respondent's chain of command"); *Hyundai American Shipping, Inc.,* 357 NLRB 860, 860, (2011) (employee handbook unlawfully required employees to voice complaints regarding work-related matters directly to immediate supervisor or human resources and prohibited them from discussing with others any matters under investigation by human resources).

II. THE RESPONDENT'S DEFENSES

A. The Section 10(b) Defense

The Respondent asserts that all but one of the allegations in paragraph 4(a)—Ayala's December statements to employees not to discuss their pay with other persons—are time-barred and present due process concerns. Section l0(b) Act provides that "no complaint shall issue based on any unfair labor practice occurring more than six months before the filing of the charge with the Board and the service of a copy thereof upon the person against whom such a charge is made." The conduct at issue occurred on or after December 13, when Ayala told employees not to discuss pay or complain to higher level managers. The amended charge was filed on June 9 and a copy was served on the Respondent on June 10—just inside the six months window.

In determining whether an allegation is closely related to a timely filed charge allegation, the Board applies the analysis in *Redd-I,* 290 NLRB 1115, 1116 (1988): whether the otherwise untimely allegation and the allegations in the timely-filed charge are legally related; whether the allegations are factually related; and whether the respondent would raise the same or similar defenses to the allegations at issue.

The timely filed amended charge on June 9 alleges, in part "[w]ithin the past 6 months, the ER has instructed employees not to discuss wages and other terms and conditions of employment with coworkers." On September 2—more than six months after the alleged conduct—the complaint issued and alleged: in December, Ayala told employees not to discuss their pay with

other persons or complain to higher level managers about pay or other terms and conditions of employment; on January 20, Ayala told employees not to discuss the employee hiring with others or complain to higher level managers about terms and conditions of employment; on January 20, Leith told employees not discuss an employee's suspension with others; and on January 31, Leith told employees not to discuss an employee discharge with others. On January 23, 2023, the amended complaint issued, further alleging that Ayala told employees in January, including January 20, not to discuss employee hiring with others, complain to higher level managers about terms and conditions of employment, or discuss the employee suspensions with others.

In *Starbucks Corporation d/b/a Starbucks Coffee,* 372 NLRB No. 50, slip op. at 2-3 (2022), the Board found the *Redd-I* factors were met where: (1) the added allegations of loss of training opportunities involved the same legal theory—Section 8(a)(3)—as the timely filed charges relating to discipline and discharge; (2) the factual predicate for the timely and added allegations involved the same store and manager and occurred around the same time. The *Redd-I* factors were also met for the added Section 8(a)(1) allegations; and (3) the respondent's defense to the added allegations would have been like the timely filed allegations. Although the alleged surveillance and interrogation involved a different store than the timely filed charges, they alleged similar conduct occurring during the same period.

In this case, the timely filed charge broadly covers the complaint allegations that Ayala and Leith instructed employees not to discuss wages and *other terms and conditions of employment*, including discussing with others or complaining to upper management about newly hired employees and discipline. First, the Respondent's unlawful statements suggesting employees not complain to upper management about pay or other terms and conditions of employment, and refrain from discussing wages, newly hired employees, and Eyman's suspension, involve the same legal theory—unlawful statements that interfered with employees Section 7 rights in violation of Section 8(a)(1). Second, the allegations are factually related, as they stem from Ayala's statements at the mid-December prohibiting employees from engaging in protected speech, and involve the same two managers and time frame. Lastly, the Respondent's defense to all the allegations involved similar evidence and testimony—that neither Ayala nor Leith attempted to shut down protected speech.

The Respondent also contends that its defense of the timely filed charge is different from the remaining allegations because it effectively repudiated that charge by posting a *Passavant* notice (addressed below). That argument lacks merit, however, since the effective repudiation of unlawful conduct would be a factual development that is part of the *res gestae* of the controversy, not a legal strategy. *Redd-I*, 290 NLRB at 1118 (requiring determination as to whether "a reasonable respondent would have preserved similar evidence and prepared a similar case defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge").

The Respondent also asserts that the allegations in paragraphs 4(b), 5(a)-(b), 6, and 7 present due process concerns because Leith, Brant, and an unspecified employee at the January 20 meeting were no longer in its employ. As a result, the Respondent contends that it no longer had access to these individuals to obtain information. First, the timely filed amended charge alleged that "[w]ithin the past 6 months, the ER has instructed employees not to discuss wages and other terms and conditions of employment." It also listed the facility as the location where the acts took

place. Second, there were only two Section 2(11) supervisors at the facility—Ayala and Leith. Leith and Brant were gone by the time the complaint issued on September 2. However, the Respondent could have subpoenaed those individuals, just like the General Counsel did with Brant.

Nor was it improper for the General Counsel to plead allegations that were not contained in Eyman's initial charge or included in any charges for that matter. Such a development as the result of a post-charge investigation is not unusual in Board proceedings. In fact, it consistent with the General Counsel's investigative procedures set forth in Section 10062.5 of NLRB Casehandling Manual (Part 1) (Unfair Labor Practice Proceedings).[32] See *Leukemia & Lymphoma Society***,** 363 NLRB No. 1082 (2016) (amended charge involving handbook rules, unrelated to initial charge and signed by charging party at Region's suggestion, was legally sufficient). Due process was afforded in this instance because the Respondent received sufficient notice by the specificity of the complaint, as amended, describing the unlawful conduct, the approximate dates of the acts, and the names of the supervisors or agents who committed the acts. See Section 102.15 of the Board's Rules and Regulations.

B. Repudiation of Unlawful Acts

The Respondent contends that the allegation at paragraph 4(a) should be dismissed because it effectively repudiated the statement through its notice posting. Ayala's unlawful statement instructing employees not to discuss pay with others occurred in December. The notice at issue was mailed to Eyman on June 13 and posted that day in the employee breakroom for 60 days.

The Board has long held that an employer may effectively repudiate its unlawful conduct if the notice is timely, unambiguous, specifically describes the coercive conduct, is free of other illegal conduct, is adequately disseminated to the employees involved, is not followed by further unlawful conduct thereafter, and assures employees that in the future it will not interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital,* 237 NLRB 138, 138-139 (1978) (employer's disavowal of unlawful threats ineffective where it delayed in issuing the statement seven weeks after the first threat, published the notice only once in an employee newsletter that did not reach all employees, did not admit wrongdoing, and did not mention the individual who made the threats or the related circumstances) (citations omitted).

In the circumstances, the Respondent's Section 10(b)(6) defense fails. Its attempted repudiation of Ayala's statement regarding pay was timely since it was disseminated on June 13—a little over a month after it first learned of the Region's investigation regarding the statement and four days after the amended charge issued on June 9. However, the notice was deficient it all other respects. First, the notice merely stated that an unnamed facility manager "may have verbally instructed employees not to discuss their pay with others in around December 2021" and informed employees that the Respondent " did not intend to make such statements." Second, the Respondent committed several additional unfair labor practices which are not addressed in the notice, including managers' statements prohibiting employees from discussing new hires, prohibiting employees from discussing employee suspensions and discharges, and going to higher level managers with

[32] The Respondent's motion on brief for reconsideration of my ruling precluding it from inquiring into the circumstances relating to Eyman's signing of the amended charge is denied for the reasons stated in the record. (GC Exh. 1(d); Tr. 70-80.)

complaints about pay and other terms and conditions of employment. Finally, the disavowal was not adequately disseminated. The notice was posted in the breakroom on June 13 and stayed up for 60 days. By then, however, several employees who were around in December and January had left the Respondent's employ. Of those employees, only Eyman received a copy of the notice.

CONCLUSIONS OF LAW

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

2. The Respondent committed unfair labor practices in violation of Section 8(a)(1) by instructing its employees not to discuss their wages, discipline, suspensions, discharges, newly hired employees, or other terms and conditions of employment with coworkers and/or outside parties.

3. The Respondent committed unfair labor practices in violation of Section 8(a)(1) by requiring its employees to follow the chain of command by prohibiting them from bringing grievances or concerted complaints with coworkers about terms and conditions of employment to the attention of higher-level managers.

4. The unfair labor practices found affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent shall be ordered to cease and desist from engaging in unlawful conduct, post Notices to employees in all locations within the Orlando facility where it normally posts notices, in English and Spanish, and other languages if the Regional Director determines it is appropriate to do so, email the Notice to employees employed at said facility, and mail the Notice to the last known address of any employees who were employed by the Respondent at the facility at any time after December 13, 2021, and who are no longer employed by the Respondent.[33]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

[33] I deny as unnecessary the General Counsel's requests that (1) the Respondent be ordered to provide its supervisors, managers, and employees employed at the facility with a copy of the Board's Decision and Order and Notice, and (2) obtain from each supervisor and/or manager a certification indicating that they have reviewed and understand the contents of the Decision and Notice to Employees.

[34] 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.

ORDER

The Respondent, Tesla, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from concertedly discussing or raising complaints about employees' terms and conditions of employment, including wages, discipline, suspensions, discharges, and newly hired employees.

(b) Requiring its employees to follow the chain of command by prohibiting them from bringing grievances or concerted complaints with coworkers about terms and conditions of employment to the attention of higher-level managers.

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

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

(a) Within 14 days after service by the Region, post in all locations within its Orlando, Florida facility where notices are regularly posted, copies of the attached notice marked "Appendix."[35] Copies of the notice, in English and Spanish, and other languages if the Regional Director determines it appropriate to do so, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The notice shall also be mailed to the last known address of any employees who were employed by the Respondent at the facility at any time after December 13, 2021, and who are no longer employed by the Respondent. If, during the pendency of these proceedings, the Respondent has gone out of

[35] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notices, the notices shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 13, 2021.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 25, 2023

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from talking about wage rates, disciplines, suspensions, discharges, newly hired employees, or other terms and conditions of employment with coworkers and/or outside parties. **YOU HAVE THE RIGHT** to freely speak with coworkers and third parties about wages, hours of work, and other terms and conditions of employment.

WE WILL NOT require you to follow the chain of command by prohibiting you from bringing grievances or complaints you share with coworkers about terms and conditions of employment to the attention of higher-level supervisors and managers.

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

TESLA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-293359 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.