



**Denver
Labor**

City and County of Denver

201 West Colfax Avenue, #705 • Denver, Colorado 80202
(720) 913-5039 • www.denverauditor.org/DenverLabor

Glenarm Dining Services d/b/a Diamond Cabaret



Sent via first class mail and via e-mail to [REDACTED] and [REDACTED].

January 20, 2025

Denver Labor, Denver Auditor's Office

Liability and Penalty Determination

Re: D.D. and Glenarm Dining Services d/b/a Diamond Cabaret

I. INTRODUCTION AND SUMMARY OF DETERMINATION AND ORDER

Glenarm Dining Services owns and operates Diamond Cabaret (the "Diamond" or the "Club"), a popular strip club located in Denver, Colorado. On May 4, 2023, the Denver Labor division of the Denver Auditor's Office ("Denver Labor" or the "Division") opened an investigation into the Diamond to investigate whether and to what extent it was committing wage theft in violation of Denver's Minimum Wage and Civil Wage Theft Ordinances ("MWO," "DCWTO," and together, the "Ordinances").

This Determination concerns one of the Diamond's former employees in particular: D.D., who bartended at the Club under its current ownership for more than two years without any performance issues. But D.D. nevertheless drew the ire of her employer, which eventually terminated her in retaliation for her workers' rights advocacy.

Between May and December of 2024, D.D. sought to enforce the Ordinances on behalf of herself and her coworkers. She provided Denver Labor with a significant amount of evidence and information regarding the Diamond's wage practices. This evidence included statements, photographs, and video and audio recordings, and largely supported her allegation that the Club commits frequent wage theft against its workers. She also put Denver Labor in touch with other witnesses, filed complaints on behalf of herself and her colleagues, served as a witness for a former coworker, and prepared to serve as a witness at a hearing. Her advocacy was consistent and posed a significant financial risk for the Club.

Shortly after learning about D.D.'s protected activity, the Diamond engaged in a series of questionable, suspect, and retaliatory acts. For the first time, it set out to enforce a previously nonexistent policy to threaten its workers, including D.D., against collecting video, audio, and photographic evidence of wage theft. It specifically held a 2-on-1 manager meeting to notify her, and only her, about this policy. It failed to investigate when she filed a safety report after she found a razor blade hidden in her work area, in a dim location where she regularly places her hands. And on December 5, while D.D. was preparing to testify against the Diamond and mere days after the Division issued a retaliation determination naming D.D. as the complainant, the Diamond placed her on paid administrative leave while it "investigated a complaint."

The investigation's outcome, however, was predetermined. The Club failed to conduct anything resembling a neutral, fair, and thorough investigation. The Diamond's General Manager accepted as gospel undated and weeks-old complaints from a manager and an unidentified coworker; never interviewed the colleagues with whom D.D. worked most closely; refused to tell her the allegations; enforced rules that the Club had never, in the past, used for discipline; and actively prevented D.D. from participating in her own defense.

On December 10, the Diamond fired D.D.. On December 12, it fired two of her coworkers—bartenders who were her friends, confidantes, and who had also provided information to Denver Labor. The ultimate decisionmaker was the Club's General Manager. He, along with other managers, had a clear motivation to silence and get rid of these individuals, who threatened managers' ability to retain tips for services performed by frontline workers. In the face of mounting investigations and significant liability, the Diamond chose to circle the wagons, fire any employees who might speak to the government, and commit further violations of law.

This Determination resolves three of the Division's inquiries into the Club. The first examines whether the Diamond committed wage theft by denying D.D. paid sick leave on three occasions; the second whether the Diamond unlawfully set out to enforce a policy prohibiting recording in retaliation for the protected activity of D.D. and others; and the third addresses the Diamond's decisions to suspend and terminate D.D..

In each instance, the Diamond broke the law. To rectify these violations of D.D.'s civil rights, Diamond Cabaret is **ORDERED** to:

1. Pay D.D. restitution of **\$1,159.16** in damages and interest for the wage theft it committed against her by failing to pay her sick leave for missed shifts on September 29, 2023, February 29, 2024, and June 29, 2024. This accounts for treble damages and applicable interest, reduced by \$7 to account for the fact that the Diamond denied D.D. \$377.09 in wages, but eventually paid her \$384.09. The Diamond must e-mail proof of payment to wagecomplaints@denvergov.org.
2. Pay to the City and County of Denver a penalty equal to **\$1,000** for its paid sick leave violations. See D.R.M.C. § 58-26(e)(1). To induce compliance by the Diamond, this penalty shall increase to **\$3,000** on February 3, 2025, and to **\$5,000** on February 19, 2025 absent payment of the restitution described in

Point 1, above.

3. Pay to the City and County of Denver penalties for retaliation equal to **\$15,000**, based on \$5,000 fines for each retaliatory act committed against D.D.. D.R.M.C. § 58-4(d)(3).

Alternatively, the Diamond may pay D.D. \$4,500 per act of retaliation. For each unlawful act resolved in this manner, the Division will waive the \$5,000 statutory fine for retaliation.

4. Reinstate D.D. and place her in the position she would have been in had the Club never retaliated against her. See D.R.M.C. § 58-26(d); Civil Wage Theft Rule 15.9. At a minimum, the Diamond must present D.D. in writing with a plan to return her to work in her previous position, at a rate of pay at or above Denver's minimum wage. D.D. shall be entitled to the wages, benefits, and seniority that she would have earned had Diamond Cabaret not unlawfully placed her on administrative leave and terminated her employment. Such wages and benefits shall continue to accrue until D.D. returns to work but be reduced by any mitigation of damages obtained by her since the date of this Determination.

Once the Diamond and D.D. have reached an agreement for her to return to work, and no later than 30 days from the date of this Determination, the Club shall provide that agreement to Denver Labor, which will calculate her back pay entitlement. At a minimum, this back pay entitlement shall include the amount listed in point 5, below. Those amounts are due to D.D. immediately.

5. Pay to D.D. **\$949.14** as restitution for the tips she would have earned had the Diamond not unlawfully placed her on paid administrative leave on December 5, 2024, which caused her to miss work shifts on December 5, December 6, and December 7, 2024. This calculation is based on D.D.'s average earned tips during December of 2023. The Division finds that the same month from a year prior is an appropriate comparator to determine the amount of money the Diamond's illegal suspension cost D.D.. On average, during that month she averaged \$52.73 in tips per hour worked and worked shifts that were approximately 6 hours in length.

Each instance in which the Diamond fails to comply with the reinstatement order by refusing to place D.D. on the weekly schedule will result in a \$1,000 fine, accruing on a weekly basis and beginning to accrue starting on February 3, 2025. D.R.M.C. § 58-4(d)(4) (up to \$1,000 fine for any violation of Chapter 58 without a specific penalty attached); D.R.M.C. § 58-26(d) (authorizing the Auditor to order reinstatement); D.R.M.C. § 1-13(c) ("Unless distinct and separate violations can be otherwise established, each day an offense and violation continues shall constitute a separate offense and violation.").

II. JURISDICTION

Denver Labor is authorized and obligated to investigate, remedy, and deter wage theft against workers who work in the City and County of Denver. D.R.M.C. §§ 58-1 *et seq.* A “worker” is a human being who performs work on behalf of or for the benefit of an employer for compensation. An “employer” is any entity that employs a worker. D.D. and Diamond Cabaret meet these statutory definitions. In addition to being a worker, D.D. was also an employee under Colorado law. See C.R.S. § 8-4-101(5). Employers are “strictly prohibited” from retaliating against “any person because the person has exercised in good faith” the rights protected by the Ordinances. D.D. is a “person.”

For the time period in question, D.D. worked at Diamond Cabaret, which is physically located at 1222 Glenarm Place in the City and County of Denver. The Diamond was her employer.

III. BACKGROUND

Diamond Cabaret is a strip club operating in Denver. It is owned and operated by Glenarm Dining Services, a registered trademark of RCI Hospitality Holdings, Inc. (“RCI”). According to admissions by Diamond Cabaret and documents filed with the Denver Department of Excise and Licenses, the Diamond is wholly owned by Big Sky Hospitality, Inc. (“Big Sky”). Big Sky, in turn, is a subsidiary fully controlled by RCI. All three entities are under the ultimate control of [REDACTED], who is the Secretary, Treasurer, Director, and President of the Diamond; the President and sole director of Big Sky; and the President, CEO, and Chairman of RCI. The Club does not contest these facts.

What follows is a summary of key events, many of which are more fully addressed below. For narrative clarity, some of the events are presented out of chronological order.

- On May 4, 2023, Denver Labor opened an investigation into Diamond Cabaret. The purpose of this investigation was to assess the Diamond’s compliance with wage and hour laws, especially as to a) its tipped workers, and b) its entertainers. See Ex. A, DL001-2.

Because the Diamond admits that it does not pay its entertainers an hourly wage at all, and charges them for the privilege of working, the potential liability in this matter is significant.

- On or about May 13, 2024, D.D. submitted a wage complaint to Denver Labor, which then interviewed her. She alleged that the Diamond routinely violates its workers’ rights, including by requiring them to share certain tips with managers.
- On or about August 30, 2024, D.D. introduced the Division’s investigators to K.G., a friend and coworker. K.G. also alleged that the Diamond routinely violated the law by forcing employees to share certain tips with managers.

- D.D. and K.G. have regularly provided Denver Labor with evidence supporting their claims. For example, both sent the Division photographs of “Gratuity Received Declaration” (GRD) forms, which the Club uses to record tip sharing between its managers and other employees. In total, D.D. and K.G. provided Denver Labor with more than 80 GRDs.

They also provided a significant amount of detailed narrative information addressing the Diamond’s wage and hour practices. And frequently, this information was not about their own interests and experiences, but addressed alleged violations of their coworkers’ rights—including entertainers.

- On September 17, 2024, the Division sent a request for information (RFI) to the Diamond. This RFI identified D.D. by name and contained specific allegations. *E.g.*, Ex. A, DL014 (“D.D. has informed us that managers at Diamond Cabaret receive 25% of tips on Diamond Dollars transactions and liquor suites.”).
- On October 1, 2024, the Diamond provided a response to the September 17 RFI. This response largely failed to address the Division’s requests for information. The Club, however, denied her allegations that managers receive a share of tips earned by or given to employees on two particular kinds of transactions. Ex. A, DL017.
- On October 2, 2024, the Division sent the Diamond a response challenging its narrative. Ex. A, DL020-22. This response named D.D. and K.G. as key witnesses. *Id.* at DL021. The Division shared five GRDs and wrote that they “appear to show managers receiving a share of gratuities earned by employees—an event you claim never occurs.” *Id.* It noted that Denver Labor “ha[s] approximately 75 more” GRDs, and that “D.D., [K.G.], and [J.G.] assert that managers require tip sharing on Dance Dollars or Diamond Dollars transactions and liquor suites. They assert that tipped employees and entertainers are the ones who provide service during these transactions [and that] these tips are not voluntary.” *Id.*

The Division also raised the prospect of this tip scheme nullifying the Diamond’s ability to claim the tip credit—an effect that would have raised labor costs by at least \$3.02 per hour, per tipped employee, going back years. *Id.*

- On October 11, 2024, the Diamond responded. Among other things, it asserted its (incorrect) belief that the Division had opened up a new investigation for D.D. as an individual. Ex. A, DL025-31.
- Also on October 11, 2024, D.D. found a razor blade in her “speed rack” at work. The speed rack holds commonly used bottles for making drinks, and D.D. regularly places her hands in it. That evening, she was the only one using that speed rack. She found the presence of a naked blade, in a dim environment, concerning. She immediately reported this event to R.S., a manager at the Club. On or about

October 16, 2024, she sent [REDACTED], the Diamond's General Manager, a written message about the razor blade.

[REDACTED] never directly responded, nor did the Diamond take any action to investigate this incident.

- On October 21, 2024, the Division wrote to the Diamond that it had not opened an individual investigation regarding D.D.. Ex. A, DL032. Rather, she was providing information related to Denver Labor's ongoing investigations into Diamond Cabaret, among other strip clubs in Denver. *Id.*
- On October 23, the Diamond submitted a declaration from [REDACTED] its General Manager. Ex. A, DL051-54. [REDACTED] responded directly to the Division's September 17, October 2, and October 21 communications, all of which named D.D.. *Id.* at DL051, ¶8. He denied D.D. and K.G.'s allegations that managers steal tips, and addressed the GRDs shared by D.D. and K.G. *Id.* at DL051-54.
- Meanwhile, on June 27, 2024, Denver Labor issued a Penalty Determination fining the Diamond \$1,000 per day for refusing to provide any records of hours worked or wages paid to entertainers. Ex. D. The Diamond appealed this Penalty Determination. In the lead-up to that Determination, and in its appeal, the Diamond and its counsel repeatedly insisted that the Club has no records whatsoever of entertainers' work hours or wages earned. *E.g.*, Ex. C, DL159 (asserting the Club does not have entertainers' schedules in its possession); *id.* at DL160 ("Additionally, the [Diamond] does not collect the sought-after wage and hour information.").

These assertions were and are false, and D.D. and K.G. proved the misdirection. They provided significant information to the Division about the Diamond's internal system, ClubTrax, which entertainers are required to use to clock-in and clock-out. ClubTrax tracks historical work data and can generate customizable reports of hours worked—the precise opposite of what the Diamond, and its attorneys, have claimed.

On September 11, 2024, the Division confronted the Diamond about these misleading claims, relying in significant part on information provided by D.D. and K.G. *See* Ex. A, DL005-6. In addition, the October 2, 2024 e-mail naming D.D. and K.G. as key witnesses addressed the Diamond's practice of requiring entertainers to clock in and out via ClubTrax. *Id.* at DL021.

Finally, on or about October 28, 2024, attorneys for Denver Labor shared with the Diamond's counsel a folder of evidence that the Division intended to present at the January 2025 hearing regarding the June 27, 2024 Penalty Determination. This folder included 1) a photograph taken by D.D. establishing that entertainers log in via the Diamond's internal "ClubTrax" system, which tracks those log-ins down to

the minute and the second, and b) a brief video taken by D.D. showing the entertainer log-in process on ClubTrax. See Exs. E and F.

This photo and video had date and timestamps. The video identified that it was taken at “BackBar01,” where D.D. sometimes works, during one of her shifts. Ex. F.

- On November 1, 2024, counsel for Denver Labor e-mailed the hearing officer assigned to the January 2025 hearing. The Division sought administrative subpoenas for K.G. and D.D.. The Club’s counsel was copied on, and responded to, this communication. Ex. G, DL167-70.
- On November 6, 2024, the hearing officer issued subpoenas for K.G. and D.D.. *Id.* at DL171. The Club’s counsel were aware of this fact.
- On or about November 6, the Diamond promulgated a new “No Recording” policy. The Club put up signs that read, in all caps:

NO CELL PHONE RECORDING IS ALLOWED. VIOLATING A COMPANY POLICY
AGAINST RECORDING COULD LEAD TO DISCIPLINARY ACTION, INCLUDING
TERMINATION.

See Exs. K (photos provided by the Diamond); Ex. L (photos provided by D.D.). The Diamond’s attorneys clarified the scope of this policy: It “applies to all individuals associated with Diamond Cabaret, including but not limited to all individuals on the premises,” and prohibits “[a]udio recordings, video recordings, and photographs.” Ex. A, DL064.

- Prior to November 6, employees would routinely use their cell phones to make recordings, including by taking photos and videos. No employee was disciplined for doing so. The Club occasionally took action to stop visitors from recording entertainers, however.
- On November 7, D.D. went to work. As she entered her work area, R.S. instructed her to speak with [REDACTED], the General Manager. [REDACTED] and another manager spoke to D.D. about the new No Recording policy. [REDACTED] informed D.D. that he “was just instructed to make sure that you’re aware of the policy of video recording.” Ex. H. D.D. asserted that the policy was retaliatory, and stated she intended to file a complaint with the Auditor’s Office. She also expressed that the Club had “retaliated against me” and “stolen wages from me,” and that “I’m not safe unless I record.” *Id.* [REDACTED] told her to “take that up with [REDACTED],” who is General Counsel for RCI Management Services, Inc., also controlled by RCI. See *id.*

D.D. was the only employee singled out for a meeting regarding the new policy.

- After November 7, certain employees and patrons at the Diamond continued to routinely use their phones to take photos and videos. D.D. did not. The Diamond did not discipline or counsel these other employees.
- On November 18, 2024, Denver Labor sent a Notice of Investigation (NOI) to the Diamond. This NOI informed the Club that the Division was investigating whether the new No Recording policy was unlawfully retaliatory and intended to chill or threaten against protected activity, and whether the Club “promulgated this policy to threaten workers who had engaged in protected activity and threaten workers against engaging in protected activity.” Ex. A, DL059-62.

This letter specifically raised [REDACTED] November 7 meeting with D.D., and the allegation that since the policy was created, other employees—including R.S.—had continued to take photographs and record videos at Diamond Cabaret. *Id.* at DL060.

- On November 25, 2024, Denver Labor issued a Liability and Penalty Determination regarding “J.G.,” a former employee of Diamond Cabaret. Ex. I. The Division found that the Diamond committed wage theft against J.G. by requiring her to share tips with managers, and retaliated against her after she resisted by 1) firing her and 2) contesting her unemployment claim on false grounds. Denver Labor ordered the Diamond to reinstate J.G., provide backpay, pay her \$2,443 in restitution, and pay \$12,500 in fines. Absent compliance, these fines were set to increase. *Id.*, DL172-74.

This Determination named D.D. as the complainant. *Id.* at DL175. It also identified her as a corroborating witness. *Id.* In finding for J.G., the Division weighed the statements and evidence of J.G. and D.D. against those of Diamond Cabaret and [REDACTED] and determined that D.D. and J.G. were more credible on contested points. *Id.* at DL179. The Division determined that certain of [REDACTED] claims were factually untrue. *Id.*

- On December 5, 2024, D.D. was scheduled to work. This was her first scheduled shift following the November 25 determination. At 1:52 PM, [REDACTED] texted D.D. the following:

We are in the process of investigating a complaint. You will be on paid administrative leave for this week’s schedule and should not come in.

Ex. J. D.D. immediately asked, “What’s the complaint?” [REDACTED] never responded. *Id.*

- Also on December 5, D.D. filed a complaint against the Club alleging retaliation. The Diamond, through counsel, received a Notice of Investigation that day. Ex. A,

DL067-69.

- On December 10, 2024, the Diamond’s counsel sent D.D. a termination letter. This letter accused her of “increasingly rude and disruptive behavior directed towards Diamond employees, staff, and customers.” Ex. A, DL070. It did not name her accusers, describe this alleged behavior, or provide any examples. The letter also asserted that the Club had conducted a “random surveillance audit” and “discovered that you violated Company policy on multiple occasions, including on November 7 and November 9 by over-pouring, not using a jigger, and not accounting for all drinks served.” *Id.*

The Diamond had a full and fair opportunity to respond to the allegations in this Determination concerning paid sick leave-based wage theft and retaliation against D.D.. In addition to posing specific questions, the Division repeatedly invited the Club to present any evidence and arguments it wished. *E.g.*, Ex. A, DL016, 021, 061. In key instances, however, the Club instead chose to withhold evidence and information from Denver Labor.

IV. ANALYSIS

A. Applicable Laws, Rules, and Regulations

The City and County of Denver has invested meaningful time, energy, and resources into the problem of wage theft. Most significantly, it has passed the Ordinances and empowered Denver Labor, as a division of the Denver Auditor’s Office, to enforce wage rights for work performed in Denver. *See generally* D.R.M.C. Chapter 58.

The goal of the Ordinances is to ensure payment of earned wages to as many workers as possible. D.R.M.C. §§ 58-14, 58-22. Wages are all amounts for labor or service performed by workers, so long as such amount is earned, vested, and determinable. D.R.M.C. § 58-23; *see also* Colo. Rev. Stat § 8-4-101(14). As most relevant here, paid sick leave, tips/gratuities, and minimum wages are all “wages” under the Ordinances.

Although the Ordinances allow for proactive investigations in the absence of a complaint, witnesses are crucial for the effective enforcement of wage rights. Information is key to wage investigations and civil rights enforcement. To that end, workers play an indispensable role in Denver Labor’s process, and frequently provide information about violations and employer practices, as well as the contextual facts required to understand when, where, and how wage theft occurs.

To ensure workers are free discuss and assert their rights, the Ordinances include broad anti-retaliation protections. Under the law, nobody may take any adverse action against any person because that person has, in good faith, exercised their rights. D.R.M.C. § 58-2(b)(1). Those rights include, at a minimum:

- Asking about or raising wage rights;
- Informing any other person about an alleged wage violation;
- Filing written complaints with Denver Labor;
- Cooperating with Denver Labor in any investigations; and

- Testifying in proceedings related to wage investigations.

Id. “Adverse action” is defined broadly, and includes:

denying a job or promotion, demoting, terminating, failure to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to a nonemployee, and any other negative change to an aspect of employment, including modification of pay, work hours, responsibilities, or other material change in the terms or conditions of a person's employment.

Id. at § 58-1(1). Put simply, an adverse act is any that would discourage a reasonable worker from engaging in protected activity, and includes express and implied threats. Civil Wage Theft Rule 15.4.

To establish unlawful retaliation, a complainant must show, by a preponderance of the evidence, that 1) they engaged in protected activity, 2) the employer took adverse action, and 3) the adverse action was motivated by their protected activity. D.R.M.C. § 58-2(b)(3). But when an adverse action occurs within 90 days of protected activity, Denver Labor is statutorily required to presume unlawful retaliation. D.R.M.C. § 58-2(b)(3). An employer may rebut this presumption by providing clear and convincing evidence that the adverse action was taken for a lawful purpose. This is a “heightened standard,” “stronger than a mere ‘preponderance,’” and requires “evidence that is highly probable and free from serious or substantial doubt.” *L.S.S. v. S.A.P.*, 523 P.3d 1280, 1288 (Colo. App. 2022); *Destination Maternity v. Burren*, 463 P.3d 266, 271 (Colo. 2020).

Because the Club’s adverse acts occurred close in time to D.D.’s protected activity, the Diamond must provide evidence establishing that it is “highly probable” that it took its actions against D.D. for legitimate reasons. This evidence must also be free of serious doubt.

Finally, if an employer articulates a lawful purpose for its actions, the Division evaluates the totality of the circumstances to assess whether the evidence establishes that the employer’s explanation is pretextual.

B. The Diamond committed wage theft by failing to provide paid sick leave to D.D..

On September 29, 2023, February 29, 2024, and June 19, 2024, D.D. was ill and unable to attend work. She notified her manager in writing and took these days off. However, in violation of Denver and Colorado law, the Diamond never paid her for these missed shifts.

The Healthy Families and Workplaces Act (HFWA) requires all employers to provide employees with paid sick and safe leave. Employees accrue paid sick leave at a rate of 1 hour per 30 hours worked, and may use it for a variety of reasons related to their personal health and well-being. C.R.S. § 8-13.3-403(2)(a); *id.* at § 404. At a minimum, employees may miss work when they are ill and draw upon their bank of accrued leave so they do not suffer a loss of income.

Because paid sick leave constitutes “wages,” employees who do not receive paid sick leave as required by law experience wage theft and may enforce their rights through Denver

Labor's process. Civil Wage Theft Rules 5.5(ii), 9.10. D.D. provided written notice of the wages owed when she texted her manager that she was sick and unable to attend work, but the Diamond never paid her until it fired her on December 10, 2024.

In its defense, the Club asserts that D.D. is at fault because she did not notify [REDACTED] directly. But all that the HFWA requires is that an employee notify their employer of their need to take paid sick leave. *Id.* at § 8-13.3-404(2). They may do so "orally, in writing, or by any other means acceptable to the employer." *Id.* An "employer" includes any agent acting on the employer's behalf, such as managers. Although employers may create written policies containing reasonable procedures for how employees may provide notice, they cannot deny paid sick leave based on noncompliance with such a policy. *Id.*

In any event, the Diamond has no such written policy. D.D. complied with the requirements of HFWA by notifying her manager when she was sick. Her manager confirmed each time. Despite providing written notice of the wages owed to her, the Diamond never paid them until it terminated her. It violated the plain requirements of the HFWA and, in turn, denied D.D. all wages owed to her under the DCWTO.

Because the Club failed to pay D.D. her wages as required by law, damages and interest are appropriate. In this case, the Diamond unlawfully denied D.D. \$377.09. It eventually paid her \$384.09. There is no excuse for this failure, especially because the Diamond further failed to timely pay D.D. even after the Division raised these violations and provided the dates upon which she was out sick. *See Ex. N, DL196-97.* Finally, the Diamond's wage theft against D.D. cannot be disentangled from the retaliation it also leveled against her. That retaliation followed close in time behind D.D.'s paid sick leave-based wage complaint to the Division and, as explained below, was motivated by her protected activity.

For these acts of wage theft, Denver Labor orders the Diamond to:

1. Pay D.D. **1,159.16** in restitution; and
2. Pay **\$1,000** as a fine by sending a check, payable to the City and County of Denver, to

Denver Auditor's Office
201 W. Colfax Ave., Suite 705
Denver, CO 80202

If the Club does not pay these amounts as required, fines shall increase as described in the Introduction and Summary of Determination and Order.

C. The Diamond illegally retaliated against D.D. to punish her for her protected activity.

The Division also finds that the Diamond retaliated against D.D. in three instances. First, in promulgating the No Recording policy and singling her out, the Club threatened her with "DISCIPLINARY ACTION, INCLUDING TERMINATION." This act was both a response to and a warning against her protected activity.

Second, the Club illegally suspended D.D. on December 5, 2024. Finally, the Club unlawfully terminated her on December 10, 2024.

The Club failed to meet its burden to establish by clear and convincing evidence that it undertook these actions for legitimate reasons. But as discussed below, under any standard the evidence establishes that the Diamond's actions were unlawfully retaliatory and motivated by D.D.'s protected activity.

1. D.D. engaged in protected activity

The first prong of the retaliation standard is readily met here. Between May and December of 2024, D.D. engaged in ongoing, sustained, and increasingly consequential protected activity. She filed written complaints with Denver Labor; provided statements and information to assert her and her coworkers' wage rights; submitted a significant amount of documentary evidence to the Division; and prepared to provide testimony against the Diamond at the January 2025 hearing.

Furthermore, Denver Labor finds that D.D. acted in good faith. See D.R.M.C. § 58-2(b)(1). Many of her contentions have been corroborated by other witnesses, and she has frequently supported her claims with documentary evidence. In three Determinations, including this one, the Division has found her statements to be accurate and credible, both standing alone and when compared to the claims of her former employer.

In addition, the Diamond was largely aware of D.D.'s protected activity. On multiple occasions, it received explicit notice of her allegations, evidence, and charges. See, e.g., Ex. A, DL014, 21, 59-60, 67, 120.

These activities are explicitly encompassed within the Ordinances' definition of protected activity. D.R.M.C. § 58-2(b)(1).

2. The Diamond committed adverse acts against D.D. by threatening her employment, placing her on paid administrative leave, and terminating her.

The Division also finds that the Club committed three adverse acts against D.D..

First, the Club created the No Recording policy as a reaction to the protected activity of D.D. (and K.G.). Especially when paired with the November 7 meeting, this policy was a threat that the Club leveled at D.D. (and, again, K.G.). The signs placed around the Club warned that any recording of any kind "COULD LEAD TO DISCIPLINARY ACTION, INCLUDING TERMINATION." Management particularized this threat by speaking to D.D., and **only** D.D., about the policy. A reasonable worker in her position would have understood these facts as constituting a threat sufficient to deter against protected activity. See D.R.M.C. § 58-1(1) (defining "adverse action" to include "threatening"); Civil Wage Theft Rule 15.4 (adverse actions include "express or implied threats of any kind"). And in this instance, D.D. did have that interpretation.

D.D. has also explained that she felt intimidated by this meeting. She was isolated with two managers, and had been instructed to meet with them at the beginning of the first shift she worked following the creation of the No Recording policy. They also waited to speak to her until she was in her work uniform, which she describes as, essentially, "underwear."

She reasonably believed the new No Recording policy was directed towards her (and K.G.). The meeting validated this belief.

Second, when the Diamond placed D.D. on paid administrative leave it effectively suspended her employment. The immediate impact was that D.D. missed her normal Thursday, Friday, and Saturday shifts. This suspension was also an adverse action, both because it affected her pay and because it constituted a threat to her employment. Although the Club paid D.D. minimum wage for the hours she missed, she lost a meaningful amount of money in tips. Like many bartenders, D.D.'s income was largely dependent on gratuities.

Finally, termination is an adverse act. D.R.M.C. § 58-1(1).

3. The evidence establishes that D.D.'s protected activities motivated the Diamond's adverse actions. Its asserted legitimate reasons are not persuasive, but pretextual

The evidence also establishes that D.D.'s protected activity motivated Diamond Cabaret. Again, in this instance the Ordinances require Denver Labor to presume retaliation. It is the Diamond's burden to prove by clear and convincing evidence that it took these adverse actions against D.D. for a legitimate and lawful purpose.

The Diamond has not met its burden here. Although it asserted non-retaliatory reasons for its actions, it failed to meet the clear and convincing evidence standard. Put another way, its position is not "highly probable and free from serious or substantial doubt." *L.S.S.*, 523 P.3d at 1288.

Even setting aside the Diamond's burden, a fair evaluation of the evidence before the Division creates not only "substantial doubt" as to the Diamond's version of events, but strongly supports a conclusion—under any standard—that the Club's asserted explanations are pretextual.

i. The No Recording policy and November 7, 2024 meeting

First, the Division finds that the Diamond promulgated the No Recording policy to threaten against protected activity, especially by D.D. and K.G. In a 2-on-1 meeting on November 7, 2024, the Diamond individualized this threat as to D.D. in particular. Paired with the new signs warning of "DISCIPLINARY ACTION, INCLUDING TERMINATION," this meeting can only be understood as an explicit warning to D.D..

The Diamond makes three claims in its defense. None are persuasive. Some are simply untrue.

First, the Club asserts that the No Recording policy is not new, and was not promulgated after D.D. and K.G. engaged in protected activity. The Diamond insists it is a "longstanding policy" that "has been in effect for years." Ex. A, DL063. It also argues this policy has been "consistently communicated" in writing "through the longstanding posting of 'No Recording' signs." *Id.* at DL064. In support, the Diamond produced two photographs. The first, taken on or after November 18, 2024, is simply a photo of one of the signs that the Club put up in early November. The second is a portion of a "Diamond After Dark" poster,

advertising the Diamond's upstairs, late-night area. This poster states "ABSOLUTELY NO PICTURES OR VIDEO TAKEN." See Ex. K; Ex. A, DL128-29 ("these photos were taken . . . in response to Denver Labor's initial November 18, 2024, Investigation Letter.").

The Diamond's claim that the policy is "longstanding" is not supported by the evidence. In fact, the Diamond contradicts its own narrative and disavows other statements it has made. For more than a year, the Diamond has insisted that there are no written policies for any employees. Its attorneys asserted this on at least three occasions. Now, though, the Club claims that **for years** there has been a written policy prohibiting employees from taking any photos, videos, or audio recordings of any kind while on premises. See Ex. A, DL063-64.

Both statements cannot be true. At best, the Diamond is an unreliable historical narrator. At worst, it misled and stonewalled Denver Labor by claiming no written policies exist when they do.¹ In either case, its bald assertion **without evidence** that the No Recording policy has been in effect for years is not credible.

Setting aside the Club's contradictory narrative, workers credibly dispute its claim. Four individuals told the Division that the Diamond only recently put the signs up about the No Recording policy. In practice, they could not recall such a policy being enforced. They could, however, recall instances of employees taking photos and videos at the Diamond, sometimes with or in front of managers, and not being disciplined. More than that, they asserted that this is and has been a regular occurrence.

In addition, the Diamond's "evidence" consists of a single photograph of the policy sign pinned to the wall of the Club's office. See Ex. K, DL182. The Diamond, through its attorney, claims this sign has been posted "for over two years." Ex. A, DL129. D.D., however, proved this false. She provided two photographs of the same location, from June and August of 2024. Ex. O. There is no sign prohibiting recording in either photo.

Current and former workers also contrasted the new and expansive No Recording policy with a much more limited version that has prohibited taking photos and videos **of entertainers**. This more-limited policy is designed to protect the privacy of the Club's dancers. This means that at some point in the past the Diamond considered whether and to what extent to prohibit recording; decided to limit this prohibition to prevent the recording of dancers; and broadly allowed employees to take photos and videos **until just after** D.D.'s protected activity. Even after promulgating this policy, employees continued to take photos and videos without reprisal—other than D.D. (and K.G.), who reasonably interpreted the No Recording policy as a response to their protected activity.

¹ This appears to be the case, since D.D.'s employee file contains written policies regarding drugs, alcohol, cash handling, and more. When confronted with the fact that written policies do exist, the Club a) still refused to provide them, including missing policies, and b) asserted, wrongly, that the Division had never sought written policies for employees. In fact, Denver Labor did so on June 15, 2023. Ex. A, DL003-4.

In summary: the Division asked for written policies; the Diamond misled it by claiming, wrongly, that there are none; the Diamond still refuses, more than 18 months later, to provide written policies; and as a consequence, the Club has established that its own narrative lacks credibility.

Finally, even R.S. disagrees with the Diamond's story. On December 5, she e-mailed [REDACTED] about D.D.. See Ex. A, DL080-81; *id.* at DL132 (the Club's attorney acknowledging that the e-mail at DL080-81 came from R.S.). In this message, she discussed an event that occurred on November 16, and identified the timeline by writing that this event happened "[s]hortly after all staff and signage were notified and posted" about the No Recording policy. When notified that R.S.'s e-mail contradicted its claims, the Diamond impeached her credibility, writing that her statement "was based on her own account of events, and could have been a typo or mistake." *Id.* at DL132. In context, this is not persuasive because a) the Club discredits its own manager, b) R.S.'s statement accords with the recollections of witnesses who spoke to the Division, and c) common sense dictates that if this policy were truly "longstanding," a manager would have known.

The Diamond's second argument is that [REDACTED] singled D.D. out on November 7 because she was "actively recording in a sensitive area (behind the bar)." Ex. A, DL141. When pressed to identify when D.D. was "actively recording," the Diamond asserted that it was "the night before." *Id.* at DL130.

This claim suffers from the problem of impossibility. D.D. worked on Thursdays, Fridays, and Saturdays. Managers met with her on November 7, which was a Thursday. D.D. did not work on November 6, and could not have been recording the night before managers spoke to her. See *id.* at DL134 (D.D. confirming her last day worked was Saturday November 2, 2024).

In addition, the Diamond failed to address the Division's other questions about this supposed event, including what D.D. was (allegedly) recording, who saw her recording, and who told [REDACTED] she was recording. See *id.* at DL130-31. The lack of straight answers from the Club, paired with its obviously incorrect statement about when she was supposedly recording strongly indicates that the Diamond's explanation is simply pretext.

Furthermore, [REDACTED] opened the meeting by informing D.D. that he was "instructed to make sure" that she knew about the policy. [REDACTED] own words establish that the meeting was pre-planned and came from somebody higher up the chain of authority. This is inconsistent with the idea that [REDACTED] only spoke to D.D. because she was caught violating a longtime rule.²

Third, the Club claims that there has been "ongoing enforcement" of the policy. There is no support for this claim and significant evidence against it. To test the Club's position, Denver Labor sought evidence reflecting any enforcement actions whatsoever of the No

² When asked who instructed [REDACTED] to have this meeting with D.D., the Diamond refused to answer, citing attorney-client privilege. That privilege does not apply to communications disclosed to third-parties, however. Here, [REDACTED] shared the substance of the relevant conversation with D.D.. In context, the individual was likely [REDACTED], RCI's General Counsel. [REDACTED] is an attorney, and [REDACTED] instructed D.D. to raise any questions or concerns about the policy with [REDACTED]. At the very least, the Diamond's response confirms that somebody above [REDACTED] instructed him to have the meeting with D.D., which supports the conclusion that she was specifically targeted.

Recording policy since November 18, 2021. Ex. A, DL124. The Diamond could not provide a single concrete example.³ *Id.*

In fact, Denver Labor provided the Diamond with two photographs that violate the policy as described by the Club. The first was pulled from a video posted on Instagram by R.S. in December 2023. It showed her coworker posing with a large amount of money in the Club's office, which is not open to patrons, and the caption "We're rounding down tonight." Neither R.S. nor her coworker were disciplined. Ex. A, DL125. The second photograph, from September of 2024, included [REDACTED] in it. [REDACTED] did not take any action against any individual taking that photo, nor was he disciplined for his failure to enforce the policy. *Id.* at DL125-26.

The Club has failed to meet its burden to prove by clear and convincing evidence that it promulgated the policy and singled D.D. out for legitimate, non-retaliatory reasons. To the extent it has presented evidence, that evidence is defined by substantial doubt. The Diamond's positions are contradicted by the facts, its own past assertions, and the written statement of one of its managers.

Even under a less stringent standard, the evidence would still strongly support retaliation on this point. The Diamond promulgated the No Recording policy shortly after learning that employees had provided photographs and a video to the Division as part of its investigation—approximately one month after receiving GRDs provided by and allegations from D.D. and K.G., and only days after receiving the photograph and video of entertainer logins taken by D.D.. Close temporal proximity between protected activity and adverse acts is evidence of an employer's retaliatory intent. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001); *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).⁴ The Tenth Circuit has explained that a "retaliation plaintiff may rely solely on temporal proximity to show causation," especially where the adverse action occurs "mere days" after protected activity. *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1191 (10th Cir. 2016).

³ The Diamond claimed, without explanation, that "Denver Labor has no authority" to obtain this information. Ex. A, DL124. But in determining whether there has been unlawful retaliation, the existence or non-existence of comparators is relevant, as is past practice. These details are necessary to determine whether and to what extent the Club treated D.D. differently than other employees.

Nevertheless, the Diamond insists that managers have enforced the policy through "verbal warnings," and that there are no records of those warnings. *Id.* Even accepting the Club's narrative, its actions still support a retaliatory intent. If, as the Diamond claims, it spent two years enforcing the policy through only verbal warnings, its decision to suddenly threaten D.D. and others with termination was a significant escalation. It would still indicate an unlawful threat designed to chill protected activity. The **only** intervening event was the protected activity of D.D., K.G., and others.

But Denver Labor does not credit the Diamond's version of events because it is not credible.

⁴ Throughout this Determination, the Division cites and relies upon authority from other jurisdictions and/or regarding different statutes. The fact that a case is cited reflects that Denver Labor has reviewed it and found its logic, principles, and/or analysis to be sound and persuasive.

In its defense, Diamond Cabaret claims that it could not have enacted the recording policy in retaliation because it did not know about D.D.'s protected activity. On December 2, 2024, its attorney wrote:

As an initial matter, counsel has not provided the Company with five photographs of gratuity declarations allegedly received by Diamond Cabaret. Without access to these materials, any claim that they form the basis of retaliation is entirely unfounded.

Furthermore, counsel has not reviewed the October 28, 2024 "Additional Documentary Evidence" . . . and none of the documents have been provided to Diamond Cabaret or any other club. **It is entirely outside the realm of possibility that the recording policy was enacted as a retaliatory measure when the Company had no knowledge of Denver Labor's photographs or purported evidence.**

...

Diamond Cabaret has not been provided with any photographs or recordings shared with Denver Labor, further disproving any connection between the policy and these activities.

Ex. A, DL140 (emphasis added).

Again, the Diamond shows little care for the facts or its own narrative. The Club was fully aware of the photographs of GRDs that D.D. and K.G. provided Denver Labor, as well as their allegations of wage theft. ██████████ October 23, 2024 declaration specifically referenced Denver Labor's October 2 e-mail. Ex. A, DL051. This e-mail included five GRDs, described them, identified D.D. and K.G. by name, and described their allegations. *Id.*, DL021. ██████████ also directly responded to the allegations that the GRDs reflect unlawful tip stealing by managers. *Id.* at DL051-54.

The claim that "the Company had no knowledge of Denver Labor's photographs or purported evidence" is misleading at best. Paired with the Diamond's other incorrect assertions and its inability or unwillingness to provide basic facts supporting its position, it strongly indicates that the Club's version of events is pretext. *See, e.g., Morgan v. Hilti*, 108 F.3d 1319, 1323 (10th Cir. 1997) ("weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's" explanation supports finding pretext) (quoting *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996); *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 527 (6th Cir. 2008) ("inconsistency and evasiveness seem to be the epitome of pretext"); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1064 (8th Cir. 1988) ("The record also reveals evasion and inconsistency" by the employer).

Other facts support retaliation as well. That D.D. was singled out is noteworthy, especially because a) somebody above the General Manager specifically "instructed" him to speak to D.D., and b) she took the ClubTrax video and photograph "behind the bar," which is precisely what the Club admits its concern was. To the extent she did use her cell phone to take photos or videos while at work, she was in good company. Many other employees also did and do so, including at least one manager, yet none of them were ever warned against it

in a 2-on-1 meeting with managers. In short, the Diamond subjected D.D. to disparate treatment shortly after it learned of her protected activity.

Finally, the Diamond's motivation for stopping photo and video recordings is clear. The evidence shared by D.D. and K.G. has been extremely harmful to the Diamond's legal position and proves that it has made false statements to the Division. Initially, the Club denied that managers receive a share of tips related to employees' work. See Ex. A, DL019 ("Managers do not participate in tip pools [with employees]," and contesting the claim that managers receive 25% of tips on two kinds of transactions). But after being confronted with the GRDs, the Diamond had to backtrack and instead argue that while this practice occurs, it is lawful. *Id.* at DL029-30.

The Diamond has also maintained that there are no records whatsoever reflecting hours worked by entertainers. It has claimed that it does not track hours worked by entertainers, and has no information about their schedules. See Ex. C. These statements are not and were never true. D.D. (and again, K.G.) proved it.

The evidence mandates only one conclusion: the Club's asserted legitimate, non-retaliatory reasons for its actions are pretext, contradicted by the weight of the evidence, the Diamond's own manager, and the Club's own narrative arc. The catalyst for the policy was protected activity by D.D.—and others, especially K.G.—and the Diamond created the policy to threaten against further cooperation with Denver Labor.

ii. *The investigation into D.D., her suspension, and her termination.*

The evidence also establishes that D.D.'s protected activity motivated the Diamond to place her on paid administrative leave and fire her. Once again, because of the timing of these events, Denver Labor presumes unlawful retaliation. D.R.M.C. § 58-2(b)(3). The Club has not met its burden to rebut this presumption by clear and convincing evidence that it took these adverse actions for lawful reasons. In fact, the Diamond withheld significant evidence, much of which would have been exculpatory **if** it reflected what the Club claims.

Even setting aside the Diamond's burden, the evidence strongly supports a finding of retaliation. The Diamond failed to conduct a fair investigation; the timing of events is highly suspicious; management took no action over alleged misconduct for weeks (or more) until D.D. escalated her protected activity; the written complaints in question post-dated [REDACTED] decision to suspend D.D.; the Club treated D.D. differently than other employees; its kitchen-sink approach to leveling accusations at D.D. supports pretext, especially in light of its repeat false statements; and there is significant evidence that [REDACTED]—and R.S.—were motivated to get rid of D.D., whose actions pose a threat to their continued ability to retain tips.

- a. The Diamond refused to provide a significant amount of evidence and information. It failed to meet its burden, and its withholding of evidence supports finding pretext.

As an initial matter, the Diamond refused to provide a significant amount of evidence requested by Denver Labor and relevant to this investigation. Specifically, the Division asked for, and the Club refused to share:

1. Unredacted written complaints about D.D..
2. The surveillance videos which supposedly reveal D.D. breaking Club rules.
3. Any “evidence of any other employees of Diamond Cabaret who have ever been disciplined in any manner for ‘over-pouring,’ ‘not using a jigger,’ or ‘not accounting for all drinks.’”

In refusing to provide these records, the Diamond insisted that the Division agree “to an Attorneys’ Eyes’ Only protective order, explicitly excluding D.D., her representatives, and any attorneys who are not employed by Denver Labor from access” Ex. A, DL074; *see also id.* at DL123; *id.* at 147. It explained that if the Division agreed to this order, the Diamond would “consider” sharing information. *Id.*

Denver Labor explained it could not agree to these terms, as they would prevent the Division from a) testing the evidence by sharing it with D.D., b) sharing the evidence with the City Attorneys who represent the Division, as they are “attorneys who are not employed by Denver Labor,” and c) sharing the evidence with a hearing officer, for the same reason. *Id.* at DL113, 144. Even after the Division made these points and offered to “agree to [a] reasonable confidentiality” agreement, *id.* at DL144, the Club reiterated a version of its demand that **still** would have excluded hearing officers. *Id.* at DL123.

In effect, the Club offered to “consider” sharing evidence only if that evidence could never be offered against it.

The Diamond’s failure to provide this information is devastating to its case. Again, it is the **Club’s** burden to rebut the presumption that it retaliated against D.D., and it must do so by providing evidence establishing that its narrative is “highly probable and free from serious or substantial doubt.” *L.S.S.*, 523 P.3d at 1288. The Club defends its actions based on evidence it refuses to produce. This alone raises “serious or substantial doubt” and makes its version of events significantly less than “highly likely.” *Id.* In context, the Club’s failures on this point are magnified by its repeat false statements of fact. The Division simply cannot take it at its word.

The Diamond’s refusal to provide evidence instead requires Denver Labor to draw adverse inferences against it. The adverse inference rule “provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *Int’l Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). In Colorado, this rule “has been extended to cases involving administrative agencies.” *Romero v. Colo. Dep’t of Human Servs.*, 417 P.3d 914, 922 (Colo. App. 2018); *see also UAW v. NLRB*, 459 F.2d at 1336-37 (collecting cases upholding agency application of the adverse inference rule).

Here, the Diamond has the surveillance videos. It hasn’t produced them. The obvious inference is that the videos would be harmful to its position. And that the Club has not

produced evidence of other employees being disciplined for similar violations creates the inference that these rules haven't been enforced in any meaningful way. In fact, as explained below, the Diamond's own narrative supports this conclusion.

b. The Diamond failed to conduct a fair investigation, and actively prevented D.D. from participating in her own defense.

The "failure to conduct what appeared to be a fair investigation of the violation that purportedly prompted adverse action may support an inference of pretext." *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 542 (10th Cir. 2014) (quoting *Trujillo v. PacifiCorp.*, 524 F.3d 1149, 1160 (10th Cir. 2008)). It is easy for employers to rebut this inference, however; they may do so by "simply asking an employee for [her] version of events." *Dewitt v. Southwestern Bell Tel. Co.*, 845 F.3d 1299, 1314 (10th Cir. 2017).

The Diamond cannot clear even this low hurdle. It never spoke to D.D.. Instead, [REDACTED] actively excluded her from the investigation. Immediately after he told her she was suspended, she asked him what the complaint was. He ignored her. See Ex. J. Without ever interviewing her—or C.B., K.G., or other workers with whom D.D. worked most closely—[REDACTED] fired D.D.. As in *Smothers v. Solvay Chemicals*, he "deliberately prevented [D.D.] from responding to the allegations against [her]." *Gupta v. Okla. Pub. Schools*, 2022 WL 1742048, at *6 (10th Cir. 2022) (discussing *Smothers*).

Notably, D.D. disputes the allegations against her. And four of her former coworkers (J.G., K.G., C.B., and D.D.) contest the basic assertion that runs through these complaints: That D.D. is mean, unprofessional, and made others feel uncomfortable. The only witnesses who spoke to Denver Labor assert that she was consistently kind and collegial. There is, at least, a disagreement about her workplace demeanor—and this disagreement tends to fall in favor of D.D., whose 2 ½ year disciplinary history is entirely clean. But instead of interviewing D.D. or her co-workers, [REDACTED] chose to accept as gospel the allegations against her.

When asked why the Club did not interview her, its attorney stated that it did not need to because "[t]here were written complaints from coworkers and video evidence of her alcohol related policy violations. Her input was not required for the investigation." Ex. A, DL147.

The Diamond failed to satisfy the *Smothers* standard. While that decision is not binding on the Division, the parallels between *Smothers* and D.D.'s circumstance are striking.

The Diamond's failure to conduct a fair investigation is amplified by the deficiencies in the evidence and information it did collect against D.D.. As stated, it refused to produce the "video evidence of her alcohol related policy violations." And, as explained above, the Diamond impeached R.S.. It asserted that the very first sentence of her written complaint contained a material error. Having argued that its own manager's written complaint is not trustworthy in at least one key regard, it maintains that it was reasonable to rely on that same manager's version of events without seeking D.D.'s side of the story. This self-serving and illogical approach strongly supports pretext.

c. The timing of events supports pretext

A retaliation claimant may establish her case by pointing to close temporal proximity between protected activity and adverse acts. Where two such events occur close in time, that fact deserves significant weight, and raises a powerful inference of pretext. *E.g., Foster*, 830 F.3d at 1191.

The Club suspended D.D. **the shift immediately following** an escalation in her protected activity. Her last day worked was November 23, 2024. On November 25, Denver Labor issued a determination against Diamond Cabaret regarding a former employee named J.G. *See* Ex. I. Specifically, the Division found that the Club had illegally stolen J.G.'s tips, paid her less than the required minimum wage, and unlawfully retaliated against her. *Id.* at DL172-73. This determination identified D.D. as the complainant and as a corroborating witness and declared unlawful the Club's practice of having managers take a share of employee tips. *Id.* at DL174-77. It also identified [REDACTED] as having provided inaccurate information to the Division regarding the circumstances of J.G.'s wage theft and termination. *Id.* at DL That determination was the first to expressly declare unlawful the Diamond's wage practices and did so regarding facts that apply to all tipped employees and managers.

The Diamond then took action to ensure D.D. would never again work at the Club. These facts satisfy the "mere days" standard articulated by the Tenth Circuit. *Foster*, 830 F. 3d at 1191. The Division finds this standard persuasive, both because it is consistent with how many other courts approach this issue and because it accords with the presumption the Division is required to adopt under the Ordinance. *See* D.R.M.C. § 58-2(b)(3).

This is only one example. Within the relevant 90-day timeframe, *see* D.R.M.C. § 58-2(b)(3), D.D. engaged in many other instances of protected activity, as detailed in Section III of this Determination. And because D.D. was actively preparing to provide testimony against the Diamond on January 23, 2025, the Club actually retaliated against her **in the midst of** protected activity.

And that protected activity in particular threatens significant consequences. The January hearing will decide the merits of a \$1,000 per day fine that the Division imposed against the Diamond for unlawfully withholding work-related information. Because of her role at the Club, D.D. has highly relevant information. Underscoring this fact, the Diamond tried—and failed—to exclude her testimony.

The Diamond claims, however, that the timeline supports its defense. It asserts that it could not have illegally retaliated against D.D. because she spent months engaged in protected activity without sanction. Most of the protected activity to which the Diamond points is unrelated to the Division's work, and involves D.D. filing a complaint with the Colorado Civil Rights Division alleging sex-based discrimination and harassment.⁵

The Diamond only learned of D.D.'s wage-related protected activity in mid-September of 2024, however. That protected activity **and the Diamond's actions against D.D.** steadily escalated until the Club suspended her.

⁵ That agency found probable cause regarding D.D.'s allegations.

d. The circumstances surrounding the written complaints and the Diamond's adverse acts support pretext.

The timing of the alleged evidence against D.D. is also suspect. The written complaints are both timestamped approximately 8 hours **after** [REDACTED] suspended D.D.. In addition, he did not review surveillance videos until after the suspension. See Ex. A, DL082 (incident report created by [REDACTED] dated December 6, 2024).⁶ While the Diamond insists it did not need to interview D.D., neither the videos nor the written complaints could have possibly supported the decision to suspend her. They did not exist at the time.

The written complaints themselves are thin on the details that would support terminating a 2.5-year employee with a pristine disciplinary record. The Diamond does not—or cannot—identify with clarity when any of the alleged events occur, who was involved, or whether there were any other witnesses. See *id.* at DL078-81.

However, the Division has been able to reconstruct a general timeline based on D.D.'s recollection, contemporaneous notes, and work schedule. See *id.* at DL058. All events must have occurred before November 23, because that was D.D.'s last day of work. Two alleged incidents cannot be specifically dated, but the first one about which R.S. complained occurred on November 16. *Id.* at DL058 (E-mail from D.D. regarding this event, sent at 4:24 AM on November 17 about her November 16-17 shift); see *id.* at DL080 (R.S.'s written complaint). That evening, D.D. had an interaction with two customers who asked her to take their photo. D.D. asked R.S. to do it, because management had warned her that she could be fired if she recorded anything at all. See *id.* at DL058. The Diamond now claims that these two customers verbally complained to [REDACTED] that same evening. See *id.* at DL075 ("There was an initial verbal complaint made to [REDACTED] from a customer at Diamond Cabaret during D.D.'s shift that D.D. was incredibly rude to her and her friend who were sitting at the bar.").

According to the Diamond, two separate managers were notified of and offended by D.D.'s behavior on November 16, yet did nothing. They did not document the event. They did not speak to D.D. about it. They did not open an investigation. They did not ask any of D.D.'s coworkers whether they witnessed what happened. They did not record a statement from the customer in question. Nineteen days later, however, [REDACTED] suddenly decided that this weeks-old "verbal complaint" required D.D.'s immediate removal from the workplace. See Ex. J. Eight hours later, R.S. and another individual submitted written complaints against D.D., both of which addressed alleged incidents that were, at best, weeks old.

Even if Denver Labor accepts the questionable claim that [REDACTED] received a complaint on November 16, this fact pattern is highly suspect. When "facts, if believed, would

⁶ This incident report is of limited use to the Diamond's narrative, both because [REDACTED] statements tend to be factually challenged and because it has a glaring error on its face. [REDACTED] identifies the "Incident Date / Time" as "12/7/2024 12:55:00 PM." That date and time a) happened after [REDACTED] created the incident report and b) does not reflect either a day, or even a time of day, when D.D. worked ever. Diamond Cabaret is not even open for business at 12:55 PM on any day.

allow a [decisionmaker] to think the employer was simply looking for a reason to get rid of the employee, the employer’s proffered explanation may not be worthy of credence.” *Id.* (cleaned up). This is one such circumstance. Even accepting the Diamond’s story as true, [REDACTED] took no action whatsoever for almost three weeks—at which point he felt compelled to immediately suspend D.D..

When an employer demonstrates sudden scrutiny of or action against an employee who has engaged in protected activity, that fact supports finding unlawful retaliatory intent. *See, e.g., Rowlands v. United Parcel Serv. – Fort Wayne*, 901 F.3d 792, 802 (7th Cir. 2018) (various facts suggested unlawful intent, including that employee was “put under a microscope” and subjected to new rules that applied only to her); *Canada v. Samuel Grossi & Sons, Inc.*, 49 F. 4th 340, 347-49 (3d Cir. 2022) (employer’s search of employee’s belongings occurring under suspect circumstances could support pretext); *Cowgill v. First Data Techs., Inc.*, 41 F. 4th 370, 383 (4th Cir. 2022) (manager’s 25-day delay between alleged misconduct and investigation supported finding pretext).

The most reasonable conclusion is that the Club and complainants did not actually view D.D.’s alleged infractions as noteworthy. Instead, the facts indicate that the Diamond “searched for and found” supposed “nugget[s] of misconduct” that it believed would support discipline. *Cowgill*, 41 F.4th at 383.

This all suggests [REDACTED] set out to fire D.D. and then solicited complaints about her—especially when placed in context with the Diamond’s unfair investigation, which provided no scrutiny whatsoever of the allegations and, as explained below, applied unwritten rules that have never been meaningfully enforced. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 236-37 (5th Cir. 2015) (“Evidence of a sudden and unprecedented campaign to document [plaintiff’s] deficiencies and thus justify a decision . . . could raise an inference of pretext”); *Rowlands*, 901 F.3d at 802; *McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (solicitation of letters criticizing workers’ performance); *Kaufman v. Del Toro*, 2024 WL 943432, at *10 (D. Md. 2024) (solicitation of negative comments about worker).

e. The Diamond punished D.D. for rules that are not clearly stated, and treated her differently than other employees

The Club claims it terminated D.D., in part, for alcohol policy-related infractions. Specifically, [REDACTED] contends that the absent surveillance videos show D.D. “over-pouring, not using a jigger and not accounting for all drinks.” Ex. A, DL082-83; *id.* at DL070 (termination letter from the Club’s counsel stating the same). In addition to other problems with the Club’s narrative, it punished her for violating rules that are not written down anywhere and which it has never meaningfully enforced.

The Club has not produced a single document reflecting these rules. When asked to provide evidence that the Club had communicated these prohibitions to employees and warned them that violations could result in termination, the Diamond asserted that “[t]his was provided with D.D.’s personnel file.” Ex. A, DL147.

It was not. D.D.'s personnel file is silent on these issues. Although the Diamond has an alcohol policy, *id.* at DL103, it does not warn employees against over-pouring, not using a jigger, or not accounting for all drinks served.

And while the Club insists that these rules apply, it also failed to produce any evidence whatsoever of any enforcement—consistent with witness statements that there has not been any, that drinks are often comped, and that bartenders frequently do not use jiggers.

In short, the evidence establishes that the Diamond brought to bear rules that have not been clearly communicated and have never been enforced in any significant way. Nevertheless, in this instance the Diamond felt D.D. deserved summary termination, in part for alleged violations of these rules. These facts support finding that the Diamond's explanations are pretextual, and the employer was motivated by D.D.'s protected activity. See *Rowlands*, 901 F.3d at 802 (employer put employee "under a microscope" and applied rules only to her); *Lyons v. Texas Dept. of Criminal Justice*, 581 Fed. App'x 445, 447-48 (5th Cir. 2014) (pretext may be inferred from evidence that employer enforced rules and standards inconsistently).

f. The Diamond's repeat false statements and the sheer volume of alleged infractions supports pretext

After working at the Diamond for 2 ½ years with no documented violations or mistakes, the Club suddenly fired D.D. for no fewer than 6 alleged infractions: overpouring, not using a jigger, not accounting for all drinks served, and the three (weeks- or months-old) allegations contained in the written complaints.

In context this hurts, rather than helps, the Diamond's position. "An employer's strategy of simply tossing out a number of reasons . . . in the hope that one of them will 'stick' could easily backfire." *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998). This backfiring may occur where there is "substantial doubt on many of the employer's multiple" offered reasons justifying adverse acts. *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000).

This reasoning applies here. There is substantial doubt regarding many of the Diamond's statements and claims. And more broadly, the Club and its representatives have repeatedly made false, misleading, or inaccurate statements to the Division⁷ regarding tipping practices; timekeeping; J.G.'s wage theft and retaliation; the No Recording policy; the existence (or non-existence) of written policies; and whether [REDACTED] and/or the Diamond had knowledge of the GRDs and associated allegations leveled by D.D. and K.G.

If past is prologue, the Diamond's explanations are pretext because it has repeatedly made false factual claims. In other words, [REDACTED] and the Club itself have limited credibility—and have earned this lack of trust through consistent misdirection. Their

⁷ As well as the Colorado Department of Labor and Employment, Division of Unemployment Insurance. See Ex. I, DL178 (finding the Diamond "committed an adverse act when it contested [J.G.]'s unemployment claim by falsely claiming she had abandoned her job without notice").

assertions in general deserve little credence. “This is but common sense: if a person is shown to be a liar in an outrageous manner or is shown to have lied about a number of issues, the inference that the person is non-credible, and should not be believed as to other issues, is a reasonable one.” *Id.* (quoting *Chapman v. AI Transp.*, 229 F.3d 1012, 1050 (11th Cir. 2000)).

- g. ██████████, R.S., and other actors with authority had substantial motivation to silence and get rid of D.D..

Finally, ██████████, R.S., and other authority figures had a clear motive to get rid of D.D.. The evidence she has provided the Division is substantial. If D.D.’s allegations bear out, the Diamond faces significant liability under the Ordinances. Denver and Colorado’s elected leaders have established meaningful sanctions for wage theft, including the application of treble damages, mandatory 12% annual interest, and fines of up to \$25,000 per violation. See generally D.R.M.C. §§ 58-16(d), 58-26.

It is not just the Diamond with a vested interest, either. R.S. and ██████████ as individuals have a heavy incentive to stop D.D.. She has accused the Diamond of illegally taking tips and diverting them to managers. If this system ceases, R.S. and ██████████ stand to lose a significant portion of their income. That these managers have this obvious motive, and that ██████████ relied on R.S.’s version of events without question, sounds the alarm on pretext. See, e.g., *Meadors v. Ind. Schl. Dist. No. 1 of Tulsa Cnty.*, 2024 WL 4399427, at *7 (N.D. Okla. 2024) (an authority figure’s motivation, “such as a supervisor’s desire to be rid of an employee who had charged him with discrimination,” supports finding pretext). The Tenth Circuit has specifically recognized that a supervisor’s animus may be a but-for cause of termination where he or she “falsely reports the employee violated the company’s policies, which in turn leads to an investigation supported by the same supervisor and eventual termination.” *Simmons v. Sykes Enterprises, Inc.*, 647 F.3d 943, 950 (10th Cir. 2011).

So here. R.S. and ██████████ were motivated to silence employees and get rid of D.D.. R.S. filed a written complaint under questionable circumstances. ██████████ accepted it at face value. On his own initiative, ██████████ reviewed lengthy, month-old surveillance tapes, then claimed he found additional alleged violations. This “random” audit also occurred under questionable circumstances, particularly given the Club’s refusal to produce the tapes. These facts strongly support pretext.

V. CONCLUSION

After considering all available evidence and applicable law, Denver Labor finds that Diamond Cabaret is liable for violating the Ordinance. Specifically, it denied D.D. paid sick leave, promulgated an unlawful policy to threaten employees against protected activity, specifically threatened D.D. with this policy, and then suspended and terminated her in retaliation for her protected activity.

The Diamond shall fully comply with the requirements detailed in this Determination. Alternatively, D.D. and the Diamond may settle this dispute **within 14 days** and present that full settlement agreement to the investigator of this matter, at which time Denver Labor will

close this case. Absent Denver Labor receiving a copy of an executed settlement agreement, it will take further action to enforce this Determination.

Unless Diamond Cabaret appeals this Determination pursuant to D.R.M.C. § 58-5 and Denver Labor's Rules of Procedure for Hearings and Appeals, it shall be final.⁸

January 20, 2025

Denver Labor

Denver Auditor's Office

Sent via e-mail to the parties' representatives this same date, and via first-class mail to the Club's representatives on January 21, 2025.

⁸ This Determination does not resolve any other ongoing investigations Denver Labor is conducting into Diamond Cabaret regarding other allegations of retaliation or wage theft. Additionally, this Determination does not conclude that D.D. did not experience minimum wage or other violations in any other pay period other than those specifically addressed.