From: POLITICO"s Morning Shift
To: Ring, John
Subject: #MeToo takes on McDonalds — Dream Act markup today — Cuccinelli in new immigration job?
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BY **REBECCA RAINEY**

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QUICK FIX

— Workers filed 25 sexual harassment complaints against McDonalds on

Tuesday.

— The House Judiciary Committee will mark up three immigration bills today, including the "Dream Act."

— Former Virginia Attorney General Ken Cuccinelli is expected to take a senior immigration post but won't be an "immigration czar."

GOOD MORNING! It's Wednesday, May 22, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com , and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

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DRIVING THE DAY

MCDONALDS HARASSMENT COMPLAINTS: The Fight for $15 organization, with support from the Time's Up Legal Defense Fund and other organizations, filed 25 sexual harassment complaints Tuesday against franchised and corporate-owned McDonald's restaurants alleging "an array of conduct, from unwanted touching to retaliation," POLITICO's Ian Kullgren reports.

"The complaints, the majority of them filed with the Equal Employment Opportunity Commission, argue that McDonald's is a joint employer, making it liable for the alleged harassment." Eve Cervantez, an attorney for the victims, said the complaints were filed under Title VII of the Civil Rights Act, so they won't be affected by DOL and NLRB proposals to make the joint employment legal standard more favorable to businesses (under the Fair Labor Standards Act and the National Labor Relations Act, respectively).

The announcement followed a company letter to Sen. Tammy Duckworth (D-Ill.) on Monday promising that it would roll out a new set of sexual harassment procedures, including training and a reporting hotline. Dissatisfaction with the company's handling of sexual harassment accusations prompted McDonalds workers last year to stage a walkout in 10 cities. Earlier this year, a group of women McDonald's workers interrupted Robert Gibbs, former White House press secretary under President Barack Obama, at a POLITICO event to complain about sexual harassment at McDonald's, where Gibbs is now an executive vice president. Gibbs met privately with the group after the event, but one of the workers said it "felt like he wasn't actually listening." McDonalds workers filed ten complaints with the EEOC last May alleging retaliation when they reported sexual harassment, including groping and propositioning. Another 15 harassment complaints were filed in 2016. More about the complaints, first reported by The New York Times, here. More from POLITICO here.

IMMIGRATION

IMMIGRATION MARKUP TODAY: The House Judiciary committee today will mark up three Democratic-backed bills that offer a path to citizenship for individuals classified as Temporary Protected Status, Deferred Enforced Departure, and Deferred Action for Childhood Arrivals. The bills are H.R. 2820 (116) (the "Dream Act of 2019"), H.R. 2821 (116) (the "American Promise Act of 2019"), and H.R. 549 (116) (the "Venezuela TPS Act of 2019," which would extend TPS to Venezuelan nationals fleeing the current regime in that country). Find more info on the markup here.

AROUND THE AGENCIES

DOL MOVES: Molly Conway will replace Nick Geale effective June 1 as chief of staff to Labor Secretary Alexander Acosta, POLITICO's Timothy Noah reports. White House officials directed Acosta to fire Geale after complaints about Geale's management style (which, two former Trump administration officials last week told POLITICO's Ian Kullgren , included frequent profanity-laced tirades and belittling of subordinates) prompted an investigation by the Office of Management and Budget. The White House also blamed Geale in part for the slow pace of deregulation at DOL. Conway was previously deputy chief of staff at DOL, a post she's held since May 2017. More here.

CUCCINELLI IN NEW IMMIGRATION JOB?: Former Virginia Attorney General Ken Cuccinelli is expected to assume a senior position on immigration at DHS, but officials signaled that he wasn't expected to be an "immigration czar," POLITICO's Andrew Restuccia and Anita Kumar report. "Policy czars are typically based out of the White House," they note, "where they oversee issues across multiple agencies." That role is already played by Stephen Miller and, to some extent, Jared Kushner. "White House officials cautioned that Cuccinelli's title and duties remain in flux."

Restuccia and Kumar write that Cuccinelli's hiring reflects administration worries that Kevin McAleenan, the acting Homeland Security secretary, "isn't aggressive enough to address the crisis at the border." McAleenan reportedly clashed last week with Miller, overruling Miller's last-minute attempt to shift Mark Morgan, who was about to be installed as director of U.S. Immigration and Customs Enforcement, to acting commissioner of U.S. Customs and Border Protection instead (displacing McAleenan's own choice for acting CBP commissioner, John Sanders). "You can bet that Cuccinelli's power will be limited in D.C.," Playbook writes, especially in the Senate, "since he led a group that tried to defeat Senate Majority Leader Mitch McConnell. And we can't imagine Democrats are going to be too interested in his views on immigration policy." More from POLITICO here.

UNIONS

SEIU LOCAL GIVES VP SLOT TO OFFICIAL ACCUSED OF HARASSMENT: A year after Tyrék D. Lee Sr. was accused of sexual harassment and demoted from his role of executive vice president of 1199SEIU United Healthcare Workers East, he's about to be promoted to vice president of the local, Priyanka Dayal McCluskey reports for the Boston Globe. Women who filed complaints with the union against Lee told the Globe that his inappropriate conduct spanned several years.

"They said Lee pursued sexual relationships with female co-workers, including by sending vulgar messages about sexual acts he wanted to perform with them. He allegedly pursued women who were younger and subordinate to him." Lee and the union's staff were required to complete anti-harassment training last year, but a woman who works at 1199SEIU's New York

headquarters told the Globe: "If anything happens to me, I'm on my own."

"I probably won't be believed, won't be supported, if I were harassed," she said. More from the Globe here and more of the Globe's past reporting on Lee here.

SANDERS WORKS WORKING PEOPLE: Bernie Sanders will host a video town hall with striking McDonalds workers tomorrow in Dallas. The event is organized by Fight for $15. Then, on June 5, Sanders will travel to Arkansas "to introduce a shareholders' proposal that would give hourly Walmart workers a seat on the company's board," The Washington Post reports. "If hourly workers at Walmart were well represented on its board," Sanders told the Post, "I doubt you would see the CEO of Walmart making over a thousand times more than its average worker." More from the Post here.

TRUMP THREATENS MEXICO: After backing off threats to close the U.S.-Mexico border last month, President Donald Trump on Tuesday threatened to take some unspecified action against Mexico for doing "virtually nothing" to curb illegal migration to the United States, POLITICO's Katie Galioto reports.

"Mexico's attitude is that people from other countries, including Mexico, should have the right to flow into the U.S. & that U.S. taxpayers should be responsible for the tremendous costs associated w/this illegal migration," Trump tweeted. "Mexico is wro ng and I will soon be giving a response!" Republicans, business groups and the president's own aides talked Trump down from shutting down the southern border last month, warning him of a "potentially catastrophic economic impact." Trump then threatened to slap more auto tariffs on Mexico. Instead, he moved to lift steel and aluminum tariffs on Mexico and Canada, so it doesn't seem likely Mexico will take this latest threa t very seriously. More from POLITICO here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the

ideas that might just propel us forward. Subscribe to receive the first episode at launch.

REGULATIONS

STATE AGS EXPRESS CONCERN OVER OVERTIME RULE: Some 16 state attorneys general urged DOL not to move forward on its proposal to expand overtime eligibility to 1.1 million additional workers, arguing that DOL's proposed rule would make it difficult to enforce state labor laws. In a comment letter submitted Tuesday, AGs from New York, California, D.C., Maryland, and others argued that the proposed rule's salary ceiling of $35,308 (under which nearly all workers would have to be paid time-and-a-half whenever they worked more than 40 hours), is set too low, much like the current ceiling of $23,660.

The Obama administration increased the ceiling to $47,476 in 2016, but was enjoined from letting that new ceiling take effect by a federal court in Texas. Raising the ceiling only to $35,308, the AGs said, would "expose millions of workers" to misclassification as exempt from overtime protections. That's because, they explained, flaws in the "duties test" make it comparatively easy for an employer to claim that a low-wage worker's job is sufficiently managerial to deny that worker overtime pay. "States have a limited ability to remedy this issue for our constituents," they wrote, "due to resource constraints and reliance on federal authorities to set a guiding example." The comment period on DOL's proposal closed on Tuesday and the agency will now begin reviewing comments in preparation of a final rule. Read the letter here.

WHAT WE'RE READING

—"U.S. Slows Hiring of Chinese Nationals by Chip Makers," from The Wall Street Journal

— "SOLITARY VOICES: Thousands of Immigrants Suffer in Solitary Confinement in ICE Detention," from The Intercept

— "California Democrats Face Off Over Health Care for Illegal Immigrants," from The Wall Street Journal

— "B ank regulator battles union over benefits, underscoring tensions," from POLITICO

— "Thompson: If TSA and CBP need staffing cash, ask for it," from POLITICO

— "United Airlines Accused of Mistreating Disabled Workers," from Bloomberg Law

— Report: "Unchecked corporate power - Forced arbitration, the enforcement crisis, and how workers are fighting back," from the left-leaning Economic Policy Institute

THAT'S ALL FOR MORNING SHIFT!

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Date:	Friday, May 31, 2019 3:08:21 PM
Attachments:	Windsor Redding v NLRB (18-1299) Respondent Brief.pdf

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Attached please find an electronic copy of the Board's brief in the following case Windsor Redding Care Center, LLC v. National Labor Relations Board.

Thanks,

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Nos. 18-1299, 19-1010

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015,
as successor to SEIU UNITED HEALTHCARE
WORKERS-WEST, CTW, CLC**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC	)	
	)	Nos. 18-1299, 19-1010
Petitioner/Cross-Respondent	)	
	)	
v.	)	Board Case Nos.
	)	20–CA–070465
NATIONAL LABOR RELATIONS BOARD	)	20–CA–070964
	)	20–CA–075426
Respondent/Cross-Petitioner	)	20–CA–082287
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015, as successor to SEIU UNITED HEALTHCARE WORKERS-WEST, CTW, CLC	)	
	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, Amici

Windsor Redding Care Center, LLC ("the Company") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Service Employees International Union Local 2015, as successor to SEIU United Healthcare Workers-

West, CTW, CLC ("the Union") was the charging party before the Board and is the intervenor before the Court. The Company, the Board's General Counsel, and the Union appeared before the Board in case numbers 20–CA–070465, 20–CA–070964, 20–CA–075426, and 20–CA–082287. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on July 17, 2018, reported at 366 NLRB No. 127.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/ David Habenstreit
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Dated at Washington, DC
this 30th day of May, 2019

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* Authorities upon which we chiefly rely are marked with asterisks.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

A.	Joint appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Company's opening brief
Company	Windsor Redding Care Center, LLC
Resident B	A particular resident of the Company's facility; usually referred to as "Resident B" in the administrative proceedings to protect her privacy
SA.	Supplemental appendix
Union	Service Employees International Union Local 2015, as successor to SEIU United Healthcare Workers-West, CTW, CLC

UNITED STATES COURT OF APPEALS
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Nos. 18-1299, 19-1010

WINDSOR REDDING CARE CENTER, LLC

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and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015,
as successor to SEIU UNITED HEALTHCARE
WORKERS-WEST, CTW, CLC

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Windsor Redding Care Center, LLC ("the Company") to review, and the cross-application of the National Labor Relations Board to enforce, a Board Decision and Order (366 NLRB No.

127) issued against the Company on July 17, 2018. (A. 1161-89.)[1] Service Employees International Union Local 2015, as successor to SEIU United Healthcare Workers-West, CTW, CLC ("the Union"), has intervened on the Board's behalf.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Company's petition and the Board's cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board's final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in Addendum 1 to this brief.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portions of its Order that are based on the uncontested finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally suspending its merit raise program.

[1] "A." references are to the joint appendix; "SA." references are to the supplemental appendix. "Br." refers to the Company's opening brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Angelia Rowland because of her union activity.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Union filed charges and, following an investigation, the General Counsel issued a complaint, alleging that the Company committed numerous unfair labor practices while the parties were negotiating their first collective-bargaining agreement. Those allegations included that the Company unilaterally suspended its merit raise program, unlawfully suspended and discharged employees Angelia Rowland and Denise Whitmire for engaging in union activity, and refused to engage in pre-disciplinary and post-disciplinary bargaining for both employees.[2] Following a hearing, the judge dismissed the complaint in its entirety. In doing so, the judge found that although Rowland's union activity was a motivating factor in her suspension and discharge, the Company would have taken the same adverse actions even absent that protected activity. The General Counsel and the Union filed exceptions to the judge's decision. The Company filed an answering brief, but no exceptions or cross-exceptions.

[2] As the Company notes (Br. 10), Rowland is referred to in the record as both "Angelia" and "Angela."

On review, the Board, in disagreement with the judge, found that the Company unlawfully unilaterally suspended its merit raise program. It also found that the Company unlawfully suspended and discharged Rowland for engaging in union activity, rejecting the judge's finding that the Company would have taken the same actions absent her union activity. It is these two violations that are before the Court.

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; the Union Prevails in a Representation Election and is Certified as Employees' Bargaining Representative

The Company, which employs about 109 employees, operates an 80-resident skilled nursing facility in Redding, California. (A. 1171-72; A. 344, 670, 682.) SNF Management, a separate business owned by the same principals as the Company, manages the Company. The Company's administrator, Anne Gilles, oversees all day-to-day operations of the Redding facility. Gilles reports to Ken Cess, the regional director of operations for SNF Management. (A. 1162, 1172-73; A. 313-15, 550-51, 671, 682.)

The Company maintains written policies advising employees that it has "zero tolerance" for resident abuse, and providing that any employee "suspected of alleged abuse will be suspended during the investigation and ultimately terminated if investigation confirms willful abuse." (A. 1173; A. 933, 953.) Under California

law, the Company must report known or suspected instances of resident abuse to the state. (A. 1172; A. 347-48, 407, 471-72, 953.)

Following a campaign to organize the Company's employees, the Union prevailed in a Board election. In January 2011, it was certified as the collective-bargaining representative of bargaining units consisting of the service and maintenance employees and the licensed vocational nurses. (A. 1172; A. 30, 559, 671-73, 682.)

B. During Negotiations for an Initial Collective-Bargaining Agreement, the Company Unilaterally Suspends Its Merit Raise Program

Since at least 2005, the Company maintained an annual merit raise program. (A. 1163, 1165; A. 557-58.) Under that program, the Company's parent corporation would authorize the Company to grant employees yearly merit raises within a certain percentage range. Around the anniversary of employees' respective dates of hire, the Company would then award individual employees merit raises within the permitted range and commensurate with the employee's annual performance evaluation. (A. 1163-65; A. 558-60, 567, 583-84, 602, 789, 802.) Most employees would receive a merit raise of some amount—typically an increase of around 3 percent. (A. 1164-65; A. 577, 600-01, 962-74.)

In February 2011, the Company and Union commenced negotiations for a first collective-bargaining agreement. (A. 1172; SA. 9-11.) In August 2011, during ongoing negotiations, the Company, citing recently announced cuts to

government reimbursement rates, informed the Union that it was suspending all merit raises, effective immediately. (A. 1164, 1184; A. 558-62, 565, SA. 12-14, 16-17.) The Company refused the Union's demands to bargain over this decision. (A. 1164-65, 1184; A. 570-71, SA. 14-15, 17-18.)

C. Rowland's Tenure and Employment Record; Her Extensive Union Activity; Administrator Gilles Repeatedly Tells an Employee Not to Take Breaks with a Coworker Who Was "Part of the Union"

Rowland worked for the Company for 11.5 years before her discharge in May 2012. After starting as a housekeeper, she worked as a nursing assistant for more than 9 years—serving first as a certified nursing assistant, then as a restorative nursing assistant, providing restorative physical therapy treatments and other care for residents. (A. 1161, 1175-76; A. 29-30, 695.)

It is undisputed that Rowland was an "excellent" employee and a kind and gentle caregiver who did "superior" work. (A. 1175-78, 1181; A. 98-104, 410, 430-32, 493, 696-97, 715-24.) Over her years as a nursing assistant, Rowland's supervisors evaluated her as "the kind of person I'd want taking care of my mother" and someone who "can handle some of our most difficult residents and does so with a smile," specifically commending her "patience and kindness" in the face of challenging resident behavior. (A. 697, 721-22.) Likewise, Rowland's evaluation issued in 2011, preceding her 2012 termination, praised her as exhibiting "real caring and concern for her residents." (A. 696, 717.) Rowland

was, accordingly, well liked by residents and their families, as the Company knew. (A. 1175, 1181; A. 67-70, 432, 721, 724, 762, 764.)

From the advent of the Union's organizing drive through the time of her discharge, Rowland openly engaged in extensive union activity. (A. 1161-62, 1176, 1181; A. 30-34, 71-74, 397.) Prior to the representation election, Rowland campaigned in support of the Union, collecting employee signatures and distributing union literature, pens, and stickers to coworkers. (A. 1161, 1176; A. 30-31.) After the election, Rowland continued distributing union literature, participated in two union-organized picketing events, and was the only employee featured on local television news as a Union spokesperson. (A. 1161, 1176; A. 31-34.) Rowland also displayed pro-union signs on her car when it was parked near the facility in view of coworkers, management, and the public—including on multiple occasions in May 2012. (A. 1161-62, 1176; A. 71-74.) She additionally served as a member of the Union's bargaining committee and as a Union steward. In those capacities, Rowland attended numerous collective-bargaining sessions from February 2011 through her May 2012 discharge, and served as coworkers' union representative during disciplinary meetings with management. (A. 1162, 1176; A. 31-34, 397.) The Company knew about Rowland's extensive union activity. (A. 1176, 1181; A. 31-34, 71-74, 397, 451, 490-91, 591-92.)

Employee Denise Whitmire, like Rowland, openly supported the Union and served on its bargaining committee. In late 2011 and early 2012, Gilles repeatedly told employee Denise Henschel that she should not have lunch or take smoking breaks with Whitmire because she was "part of the Union." (A. 1173, 1179, 1181; A. 396, 598, SA. 1-8.)

D. Resident B's Frequent Screaming, Threats, and Profanities; Rowland Accompanies Resident B to a Doctor's Appointment

Resident B, one of the Company's residents, suffers from dementia.[3] The Company knew that Resident B was prone to frequent bouts of yelling, screaming, and threatening others with bodily harm—sometimes using different voices, and generally accompanied by profanity. (A. 1162, 1176-77, 1181; A. 38-42, 46, 51, 111, 125, 159-60, 250-51, 256-58, 411-12, 483-84, 499-500, 618, 637-38, 763.) She was confined to a wheelchair and was sensitive to movement. (A. 1176, 1181; A. 38, 49, 165, 492-93, 763.) Rowland frequently cared for Resident B and was accustomed to her behaviors. (A. 1176; A. 38-42, 51.)

On May 24, 2012, Rowland accompanied Resident B to an offsite doctor's appointment. (A. 1162, 1176; A. 35.) They travelled to the appointment in a van driven by Lewis Johnson, who was employed by Merit MediTrans. (A. 1176; A.

[3] During the administrative proceedings, the resident usually was referred to as "Resident B," rather than identified by her name, to protect her privacy. (A. 1173 n.9; A. 23-25.)

36-38, 163, 166-67.) Resident B was especially agitated during this transport, apparently due to the level of movement involved in being loaded into and out of the van, as well as the windy weather conditions. Resident B began screaming as she was loaded into the van, and she continued doing so at frequent intervals throughout the short drive to the doctor's office. The screaming continued as she was unloaded and transported by wheelchair into the building's foyer and lobby. She screamed phrases such as "knock it off," "shut up," and various other similar comments, interspersed with profanities. (A. 1176; A. 38, 42-51, 106-07, 121.) Rowland attempted to comfort Resident B during the trip. (A. 1176; A. 42-45.) As Johnson, Rowland, and Resident B entered the office's foyer and then its lobby, Resident B's screaming and profanities became more extreme. (A. 1176; A. 46-51, 106-07, 111, 191, 536, 548.) Once inside the lobby, Rowland positioned Resident B's wheelchair, sat at her side, and continued trying to comfort her. (A. 1176; A. 49-51.)

Soon thereafter, Johnson left and Resident B's daughter arrived. During the appointment, Rowland and the daughter accompanied Resident B into the examination room. (A. 1176; A. 52, 111-12, 170.) Afterwards, Johnson and Rowland brought Resident B back to the facility. (A. 1176; A. 54, 170.)

E. Doctor's Office Staff Report that They Heard, but Did Not See, Rowland Scream a Threat Toward Resident B; the Company Begins Investigating the Accusation and Suspends Rowland

While Rowland was at the doctor's office, Terra Pagnano, the doctor's biller/office coordinator, called the Company's director of nursing, Jane Thimmesch. Pagnano reported that as Rowland and Resident B were entering the doctor's office, Resident B was yelling and Rowland screamed, "If you don't knock it off, I am going to beat your ass." (A. 1162, 1176; A. 504-07, 614-16.) Shocked by this accusation, Thimmesch called Pagnano back to ensure it had not been a crank call. Pagnano repeated the claim. Thimmesch asked if the threatening statement might have been spoken by Resident B rather than by Rowland, but Pagnano insisted that the speaker was Rowland. (A. 1162, 1176; A. 616-18, 756.) Pagnano additionally asserted that two of her coworkers also had heard the threat. (A. 1162, 1176; A. 618.) Pagnano was referring to medical assistants Erica Catona and Lindsay Murphy, who had been working at the lobby's reception desk while Pagnano sat in her office behind the desk. Prior to Pagnano's call, the three coworkers had discussed among themselves what they believed they had heard. (A. 1162, 1176-77; A. 504-06, 514, 518, 520-23, 533-37, 547.)

Thimmesch relayed Pagnano's report to Administrator Gilles, who was stunned by the claim—especially given Rowland's track record as a superior caregiver who had never been accused of any inappropriate conduct toward a

resident. (A. 1162, 1176, 1178; A. 34-36, 96-97, 408-11, 430, 489, 617.) Gilles immediately drove to the doctor's office. When she arrived, Pagnano had left for the day, and Rowland and Resident B were still in the examination room. (A. 1162, 1176; A. 410-12.)

Gilles questioned Catona and Murphy together about what they had heard. Both women said that they heard Rowland scream at Resident B in a rude manner, "If you don't knock it off, I'm going to beat your ass." (A. 1162, 1176; A. 412-13, 485, 519-21, 524-27, 535-40, 544, 757.) Catona and Murphy admitted to Gilles that they could not see who was speaking when the threat was made and had only heard it. (A. 1162, 1176; A. 46-48, 53-54, 490, 520, 529-30, 546-49.) Nonetheless, they said they were sure it was Rowland who had made the threat because they heard two distinct voices yelling at the same time, and they claimed to be familiar with Resident B's voice, having heard it during one or two prior office visits. (A. 1162, 1176-77; A. 412-13, 505, 515-16, 519-21, 525, 535-37, 546-49.) Gilles stressed the seriousness of the accusation, telling the women that it could cost Rowland her livelihood and even her certification. She asked if they were "really, really sure" of what they claimed to have heard. Catona and Murphy insisted they were certain. (A. 1162, 1177; A. 412-13, 525, 528-29, 540, 757.)

Gilles then approached Johnson, who had returned to the doctor's office and was seated in the lobby looking at an electronic device. Gilles asked Johnson if he

had heard or seen "anything wrong" when bringing Resident B into the office. Johnson did not look up from his device and replied: "I know nothing. Nothing happened." Gilles then returned to the facility. (A. 1162, 1177, 1182; A. 170-71, 184-85, 413-16, 484-85, 761.)

When Rowland had returned to the facility, Thimmesch advised her to meet with Gilles. (A. 1176-77; A. 55-57, 621.) Soon thereafter, Rowland and her union representative, Ron Rich, met with Gilles and Thimmesch. (A. 1177; A. 57-59, 248-49, 419, 622.) Gilles informed Rowland that three staff persons from the doctor's office had reported that Rowland threatened Resident B when entering the office. Rowland denied making any threat and remarked that she did not understand why the staff would say that. Gilles responded that she did not know why either, and that Rowland should think about what had transpired at the doctor's office and whether something she said might have been misinterpreted. (A. 1177; A. 59-65, 249-50, 419-20, 769.) Gilles advised Rowland that she was being suspended pending an investigation of alleged verbal abuse, and she gave Rowland a written notice to that effect. (A. 1162, 1177; A. 63-64, 420-21, 686.) Rowland wrote on the notice: "I did not say or do anything out of line to [Resident B]. The Merit driver was [with] us while entering & leaving [the] building." (A. 1177; A. 64-65, 686.) In accord with state requirements, Gilles reported the

alleged incident concerning Rowland and Resident B as an instance of suspected abuse. (A 1179; A. 447-49, 773.)

F. The Company Continues Its Investigation; During a Conversation About Rowland's Suspension, Gilles Criticizes Employees' Union Activity and Claims that "This Is All About the Union;" Hours Later, the Company Decides To Discharge Rowland

The next day, May 25, Gilles returned to the doctor's office to continue her investigation. (A. 1162, 1177; A. 421-23, 757.) She spoke to Pagnano, Catona, and Murphy together. Gilles again emphasized the seriousness of the accusation against Rowland and urged them to consider if they were certain of what they had heard. Gilles noted that Resident B frequently screams and uses profanity and, in particular, that she sometimes screams in different voices. She asked the three witnesses, multiple times, if they were "really, really sure" that the threat they heard "was the voice of [Rowland] as opposed to the voice of [Resident B]." (A. 1162, 1177; A. 423-24, 427, 447, 485, 499-500, 508-09, 528-31, 540-42.) The employees continued to insist that they heard two voices, one from Resident B and one from Rowland yelling at the same time, and that it was Rowland's voice that made the threat.

The three then prepared written statements, which were consistent with their prior oral statements, and gave them to Gilles. (A. 1162, 1177; A. 424-28, 508-10, 526-29, 540-42, 758-60.) All three written statements described that Resident B and Rowland were in the foyer at the time of the incident, and Gilles understood

that Pagnano, like Catona and Murphy, could not see who was speaking when the threat was made. (A. 1162, 1176-77; A. 46-48, 53-54, 489-90, 514-15, 520, 529-30, 546-49, 758-60.) Catona and Murphy's statements also noted that the van driver (Johnson) was in the foyer when the threat occurred. (A. 759-60.)

The Company additionally investigated the accusation against Rowland by briefly collecting examples of Resident B's typical comments, as recalled by Company employees. Consistent with the Company's standing knowledge of Resident B's frequent behaviors, these examples included several vulgar or profane threats to inflict physical harm on an employee, including, as noted by multiple employees, threatening to "kick your ass." (A. 1162, 1177; A. 78-79, 449-50, 492, 622-23, 763, 768, 770-71.)

Also on May 25, Rowland came to the facility to have Gilles sign a note authorizing her absence due to her suspension. A coworker, Alice Martinez, accompanied Rowland to Gilles' office. (A. 1162, 1177-78; A. 65-67, 130-36, 195-96.) Gilles signed the note as requested, and the three then discussed the circumstances surrounding Rowland's suspension. Gilles commented that Resident B's daughter and husband had contacted management and praised Rowland's care of Resident B, stating that they did not believe that Rowland had made the alleged threat, and that it sounded like something Resident B would say. (A. 1162, 1178, 1181; A. 67-70, 138-40, 196, 430-33, 762, 764, 849.)

Gilles then turned the conversation to the Union. She opined that it was wrong for the Union's signs—referring to the signs that Rowland and others displayed on their cars—to criticize the Company's care of residents, as such criticisms hurt the Company's public image. Instead, Gilles said, the messages on such signs should focus on the parties' ongoing contract dispute. (A. 1162-63, 1178, 1181; A. 70-74, 139-43, 196-97, 212-14.) Martinez objected that she and Rowland had not come to see Gilles about the Union, but rather, were there for Rowland's job. Gilles replied: "Oh, no. This is about the Union. This is all about the Union." The meeting then ended. (A. 1162-63, 1178, 1181; A. 75, 143, 197, 213.)

Later that day, Gilles, Regional Director of Operations Cess, and two human resources managers held a conference call to discuss Rowland's situation. During that call, Gilles and the others collectively decided to discharge Rowland. (A. 1162, 1178; A. 429-34, 441-42, 491, 591.)

G. The Company Discharges Rowland; the Company Further Investigates the Accusation

On May 29, Rowland and Rich met with Gilles and Thimmesch. As the meeting began, Rowland handed Gilles a written statement denying that she had threatened or yelled at Resident B and stating that she believed her suspension was in retaliation for her union activity. (A. 1178; A. 75-78, 687.) Gilles expressed that based on the accounts of the doctor's office staff, she had no choice but to

discharge Rowland. (A. 1162, 1178; A. 35, 78, 437-39.) Rowland reiterated her denials of wrongdoing. Gilles gave Rowland a termination notice stating that she was discharged because she "was observed by three witness[es] from [the doctor's] office to have violated the Elder Abuse Policy by yelling at [Resident B]." (A. 1178, 1181; A. 438-39, 688.) Gilles then asked Rowland what the van driver (Johnson) had been doing at the time of the incident. Prompted by this question, Rowland wrote on the termination notice that Gilles had not properly investigated the incident by failing to interview Johnson. (A. 1178; A. 79-80, 148, 438-40, 688.)

The following day, May 30, Gilles further investigated whether Rowland had threatened or yelled at Resident B. Specifically, she called Johnson's dispatcher and asked to speak with Johnson about what happened at the doctor's office, and whether Johnson had witnessed either Rowland or Resident B say or scream anything threatening. (A. 1162-63, 1178; A. 172-73, 436-39, 442-45.) The dispatcher later called Gilles back and, according to Gilles' notes, relayed a message from Johnson that Resident B yelled the entire time, that he did not pay any attention to it, and that he did not hear anything from Rowland. (A. 1162, 1178; A. 172-73, 436-37, 442-45, 765.)

Cess also continued the investigation. In the days following Rowland's discharge, he, like Gilles, attempted to speak with Johnson, leaving a message with

the dispatcher. (A. 1162-63, 1178; A. 173-74, 189, 441.) Also after the discharge, Cess went to the doctor's office and interviewed Pagnano and Murphy, asking them what happened on May 24 and if they were certain that they had heard Rowland make the threat. Cess additionally sought to interview Catona, but she was unavailable. (A. 1162-63, 1179; A. 441, 510-11, 542-43, 587-92, 605, 608-10.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On July 17, 2018, the Board (Members McFerran and Kaplan, Member Emanuel dissenting in part) issued its Decision and Order. (A. 1161-89.) Disagreeing with the judge, the Board panel unanimously found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally suspending its merit raise program. (A. 1163-65.) Members McFerran and Kaplan further found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Rowland because of her union activity. (A. 1161-63.) The Board affirmed the judge's dismissal of the remaining allegations.

The Board's Order directs the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. Affirmatively, the Order requires the Company, among other things, to offer Rowland reinstatement and make her whole, and to make other affected employees whole for any losses

suffered as a result of the unlawful suspension of the merit raise program. It also requires the Company to post a remedial notice. (A. 1166-67.) The Company filed a motion for reconsideration, which the Board denied. (A. 1191.)

SUMMARY OF ARGUMENT

1. In its opening brief, the Company does not contest the Board's finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally suspending its merit raise program. Therefore, under settled law, the Board is entitled to summary enforcement of this portion of its order.

2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging longtime employee Rowland because of her protected union activity. Applying its well-established *Wright Line* framework, the Board first reasonably determined that the Company's decisions to suspend and discharge her were unlawfully motivated. The Company indisputably knew about Rowland's extensive union activity. Moreover, Administrator Gilles—who directly participated in the suspension and discharge decisions—expressed blatant anti-union hostility, repeatedly admonishing an employee not to take breaks with a pro-union coworker and candidly admitting to Rowland, hours before the discharge decision was made, that her suspension was "all about the Union." The Board reasonably determined that this remarkable admission, together with the circumstantial evidence outlined

above, demonstrated that the Company's actions against Rowland were unlawfully motivated.

Substantial evidence also supports the Board's finding that the Company failed to prove that—notwithstanding the evidence demonstrating its unlawful motive—it nonetheless would have suspended and discharged Rowland even absent her union activity. To support its adverse actions towards Rowland, the Company relies on an accusation by three neutral ear-witnesses that Rowland screamed a threat of violence at a resident. But as the Board found, the Company was doubtful at the time it discharged Rowland that she had engaged in such misconduct—so doubtful, in fact, that it continued to investigate the veracity of the accusation even after the discharge. Moreover, the Company treated Rowland more severely than other employees accused of abuse, including physical abuse. And it utterly failed to explain this disparate treatment. Thus, the Board reasonably determined that, although the Company likely could have discharged Rowland for engaging in the conduct for which she was accused, it failed to prove that it would have done so on that basis alone, regardless of her protected activity.

Before the Court, the Company's meritless contentions—some of which also are jurisdictionally barred from review—rest on mischaracterizations of the law, the record evidence, and the Board's decision. They provide no basis to deny enforcement of the Board's Order.

STANDARD OF REVIEW

This Court's review of Board decisions is "narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (quotation marks omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence on the record as a whole. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is "less than a preponderance of the evidence, albeit more than a scintilla." *Inova*, 795 F.3d at 80 (quotation marks omitted). Indeed, this Court will reverse the Board for lack of substantial evidence "only" if it determines that the record is "so compelling that no reasonable factfinder could fail to find to the contrary." *Id.* (quotation marks omitted). In making that determination, moreover, the Court gives substantial deference to the inferences drawn by the Board from the facts. *Bally's*, 646 F.3d at 938. Where, as here, the Board has disagreed with the administrative law judge, "the standard of review with respect to the substantiality of the evidence does not change." *Id.* at 935 n.4 (quotation marks omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (substantial-evidence standard "is not modified in any way" when Board disagrees with judge).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER THAT ARE BASED ON THE UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY SUSPENDING ITS MERIT RAISE PROGRAM

The Board found (A. 1163-65) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally suspending its merit raise program, without affording the Union notice and an opportunity to bargain. *See NLRB v. Katz*, 369 U.S. 736, 742-47 (1962) (employer's unilateral change in term or condition of employment contravenes statutory duty to bargain in violation of Section 8(a)(5)); *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 410-14 (D.C. Cir. 1996) (employer's unilateral suspension of merit raise program violated Section 8(a)(5)); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) (a violation of Section 8(a)(5) also derivatively violates Section 8(a)(1)). In its opening brief, the Company fails to contest this Board finding. Under well-settled law, the Company's failure constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to this violation. *CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) ("[I]t is [this Court's] longstanding rule that [t]he Board is entitled to summary enforcement of the uncontested portions of its order[s].") (quotation marks omitted); *accord Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING ROWLAND BECAUSE OF HER UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) by Taking Adverse Action Against an Employee for Engaging in Union Activity

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations," and to "bargain collectively through representatives of their own choosing . . . ." 29 U.S.C. § 157. Section 8(a)(3) of the Act protects those rights by making it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).[4] Thus, an employer violates Section 8(a)(3) "by taking an adverse employment action . . . in order to discourage union activity." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217-18 (D.C. Cir. 2016) (quotation marks omitted).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test to determine motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 889

[4] A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]." 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

(1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016). Consistent with that test, if substantial evidence supports the Board's finding that protected activity was "a motivating factor" in the employer's adverse action, a court must uphold the finding that the action was unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 400-05; *accord Fort Dearborn*, 827 F.3d at 1072.

An employer's unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Such evidence may include the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the adverse action. *Ozburn-Hessey*, 833 F.3d at 218; *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Ultimately, drawing an inference of unlawful motive "invokes the expertise of the Board" (*Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995)), and this Court is "especially deferential" to such Board findings. *CC1 Ltd. Partnership*, 898 F.3d at 32 (quotation marks omitted); *accord Ozburn-Hessey*, 833 F.3d at 217, 221.

B. The Company's Suspension and Discharge of Rowland Was Unlawfully Motivated

The Board properly found that Rowland's union activity was a motivating factor in her suspension and discharge. In doing so, the Board, in agreement with the judge, relied on significant circumstantial evidence demonstrating the Company's unlawful motive as well as Gilles' telling admission that the adverse actions against Rowland were "all about the Union." As shown below, the Company, having failed to file exceptions to the judge's decision, cannot now contest those animus findings, and, in any event, its challenges lack merit.

1. Rowland's union activity motivated her suspension and discharge

Substantial evidence supports the Board's finding (A. 1162-63, 1181) that Rowland's union activity was a motivating factor in the adverse actions taken against her. To begin, Rowland engaged in "extensive" union activity. (A. 1161-62, 1176, 1181.) She strongly supported the Union during the election campaign, prominently served as one of two Union stewards and as one of five employees on the Union's bargaining committee during the ongoing contract negotiations, and was the sole employee to appear on local television news as a Union spokesperson during picketing. In addition, as recently as May 2012, she publicly displayed pro-union signs on her car when it was parked near the Company's facility. (*see* p. 7.) And as the Board additionally found (A. 1161-62, 1176, 1181), the Company was "well aware" of these activities. (A. 1176.) *See Ozburn-Hessey*, 833 F.3d at 218

(employer's knowledge of protected conduct is relevant factor in assessing motive); *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1368 (D.C. Cir. 1997) (employee's "extensive" and "outspoken" union activity "set him apart from most [other employees]" and supported inference that discharge was unlawfully motivated).

Moreover, the Board found that Gilles—who played a central role in the suspension and discharge—"expressed animus towards the Union, including specifically certain union activity engaged in by Rowland." (A. 1181.) Gilles repeatedly instructed employee Henschel not to take breaks with a coworker who was a known union supporter because that employee was "part of the Union." (A. 1173, 1179, 1181.) *See Ozburn-Hessey*, 833 F.3d at 218 (evidence that employer "harbored animus toward the [u]nion and its supporters" supported finding that adverse actions were unlawfully motivated). Furthermore, during the May 25 conversation with Rowland and Martinez, Gilles voiced her displeasure concerning employees' display of pro-union signs on their cars—specific protected activity in which Rowland had recently engaged—asserting that it was wrong for such signs to criticize the Company's care of residents. (A. 1162-63, 1178, 1181.)

Substantial evidence also supports the Board's additional finding that the overall "progression" of the May 25 conversation—including its culmination in Gilles' remarkable "all about the Union" statement—along with the fact that the

conversation "occurred so near in time to the decision to terminate," established "a substantial showing" of unlawful motivation. (A. 1162-63.) As the Board found (A. 1162-63, 1177-78, 1181), Rowland and Martinez went to see Gilles solely about Rowland's suspension, and, "[a]fter discussing that topic," Gilles "gratuitously turned the conversation to the Union," denouncing certain messages on the pro-union signs that Rowland and others had displayed on their cars. (A. 1163.)

Indeed, "[e]ven after Martinez tried to steer the conversation back to the issue at hand, Gilles would not be deterred." (A. 1163.) Thus, when Martinez objected that she and Rowland had come to see Gilles not about the Union, but rather, about Rowland's job—thereby asserting that those two topics were distinct and unrelated—Gilles emphatically rejected that assertion, insisting: "Oh, no. This is about the Union. This is all about the Union." (A. 1162-63, 1178, 1181.) Accordingly, the Board reasonably concluded that, in context, Gilles' retort constituted an "extraordinarily candid statement" and deemed it an "admission" that "the [Company's] motivation for taking action against Rowland" was "'all about the Union.'" (A. 1162-63.) (*see also* A. 1178, 1181.) Moreover, the Company decided to discharge Rowland that same day, within hours of Gilles' extraordinary admission, and Gilles herself participated in that decision. *Cf. Inova*, 795 F.3d at 82 ("The Board and this court have long recognized that the close

proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation.”).[5]

2. The Court cannot consider the Company’s meritless challenges to the Board’s animus findings

The Company challenges the Board’s reliance on Gilles’ “all about the Union” statement as powerful evidence of animus, claiming that the Board gave the statement “too much weight.” (Br. 76). But the Company failed to file any exceptions not only to the judge’s findings regarding that statement, but also to any of his findings supporting his determination that Rowland’s protected activity was a motivating factor in her suspension and discharge. (A. 1181.) Section 10(e) of the Act therefore bars the Court from considering the Company’s arguments contesting the Board’s finding of unlawful motive. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

[5] The Company claims (Br. 75) that because the discharge decision came “several hours” after Gilles’ statement, the timing is not close enough to show animus. This absurd assertion flies in the face of established precedent. *See, e.g.*, *Inova*, 795 F.3d at 82-83 (timing “could hardly be more proximate” and strongly supported finding of unlawful motive where employee’s suspension came two days after she engaged in protected activity and manager expressed hostility toward that activity); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005) (timing supported finding of unlawful motive where employer took adverse action “two weeks after” employee’s protected activity); *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 563-64 (6th Cir. 2019) (same, where action taken “just under a month after” protected activity).

of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (courts "lack[] jurisdiction to review objections that were not urged before the Board"); *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (same).

Specifically, the Company contends that the Board unreasonably concluded that Gilles' "all about the Union" statement "pertain[ed] directly" (Br. 74) to the Company's motivation for taking action against Rowland, thus amounting to an admission. (Br. 76.) But the Board was merely agreeing with the administrative law judge's findings that Gilles' statement constituted a "reference to the matter of Rowland's suspension being 'about the Union'" and "very telling[ly]" demonstrated a "connection between Rowland's union activity and her . . . discharge." (A. 1178, 1181.) The Company also (Br. 74-75) criticizes the Board's finding that Gilles "'gratuitously turned the conversation to the Union'" (Br. 74 (quoting A. 1163)), and notes that Rowland's recollection of Gilles' "all about the Union" statement did not include the word "all." (Br. 75.) But, again, the Board was simply agreeing with the judge's finding that after the three women "discussed the circumstances surrounding Rowland's suspension," Gilles "gratuitously brought up the subject" of the Union signs (A. 1181), and adopting the judge's decision to credit Martinez's recollection of Gilles' climactic "all about the Union" retort. (A. 1178, 1181.) The Company did not challenge those findings in

exceptions or cross-exceptions to the judge's decision, as is required by the Board's rules. *See* 29 C.F.R. §§ 102.46(a)(1)(ii) ("Any exception . . . not specifically urged will be deemed to have been waived."); 102.46(c) (any cross-exceptions must be filed "in accordance with the provisions of [section 102.46(a)]"); 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."). Nor did the Company raise any such challenge in its answering brief. (A. 1072-1121.) The Company's arguments contesting the Board's motive determination are therefore jurisdictionally barred from review. 29 U.S.C. § 160(e).

Although the Company did raise (A. 1153-55) its contentions regarding the weight of Gilles' "all about the Union" statement in its motion seeking reconsideration of the Board's Order, that first-time challenge was untimely. In order to preserve an issue for review under Section 10(e), a party must present the issue to the Board "in a procedurally valid way." *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008); *accord Spectrum Health--Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). Here, the Company had the opportunity to challenge the relevant findings of the judge in exceptions or cross-exceptions, or in its answering brief to the exceptions of its opponents, yet it failed to do so. Thus, the Company's belated assertion of those contentions in its motion for reconsideration does not save it from Section 10(e)'s jurisdictional bar.

Parkwood, 521 F.3d at 410 (because employer failed to raise challenge at its "first opportunity," in answering brief to exceptions, later raising it in motion for reconsideration was "too late"); *see also Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (Section 10(e) "is an example of Congress's recognition that . . . 'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice'") (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

In any event, the contentions are meritless. As demonstrated, the Board reasonably inferred that Gilles' "all about the Union" statement, considered in context, directly pertained to the Company's motivation for its adverse actions against Rowland, and thus constituted an "extraordinary admission." (A. 1162-63 & n.11.) The Court gives "substantial deference to the inferences drawn by the [Board] from the facts" (*Bally's*, 646 F.3d at 938 (quotation marks and emphasis omitted)), and the Court's review of the Board's motive determinations, "including inferences of improper motive drawn from the evidence," is "especially deferential." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). (*See also cases cited at* p. 23.) Accordingly, the Company has presented no grounds to disturb the Board's reasonable determination—based on Gilles' extraordinary admission as well as the strong circumstantial evidence detailed

above—that the record in this case powerfully demonstrates the Company's unlawful motivation.

C. The Company Failed To Prove that It Would Have Suspended and Discharged Rowland Absent Her Union Activity

As this Court has recognized, in order to meet its affirmative defense under *Wright Line* (see pp. 22-23), an employer must "prove . . . that despite any anti-union animus," it "*would* have" taken the same adverse action, "not that it *could* have done so." *Cadbury Beverages*, 160 F.3d at 31; *accord Bally's*, 646 F.3d at 937 n.5. Thus, it is not enough merely to establish that the adverse action "also served some legitimate business purpose;" rather, the employer must demonstrate that "the legitimate business motive would have moved [it] to take the [same] action absent the protected conduct." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22-23 (D.C. Cir. 2015) (quotation marks omitted). Furthermore, in assessing whether an employer has met that burden, it must be remembered that "[a] judge's personal belief that the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on [the nondiscriminatory] reason alone." *Kitsap Tenant Support Servs., Inc.*, 366 NLRB No. 98, 2018 WL 2461412, at *16 (May 31, 2018) (quotation marks omitted), *enforced*, D.C. Cir. Nos. 18-1187, 18-1217 (April 30, 2019). Moreover, where, as here, the evidence of unlawful motivation is especially strong, the employer's affirmative-defense burden is commensurately heightened. *See*

Bally's, 646 F.3d at 936; *NLRB v. CNN Am., Inc.*, 865 F.3d 740, 759 (D.C. Cir. 2017).

With those principles in mind, the Board reasonably determined (A. 1162-63) that the Company "failed to prove" its affirmative defense, as it "failed to establish that it *would* have discharged Rowland absent her protected union activity." (A. 1163.) In making that determination, the Board first appropriately recognized that it was "unnecessary to determine whether Rowland actually made the [alleged] threat" that constituted the purported basis for the Company's adverse actions. (A. 1163 n.9.) As discussed, *Wright Line* is a test of motivation. Accordingly, evaluating an employer's affirmative defense entails examining not "what [the] employee actually did," but rather, "what the employer believed, whether [those] beliefs were reasonable, and whether [its] [disciplinary] actions" were "based on those beliefs," as well as "consistent with [the employer's] policies and past practice" and "parceled out . . . as [the employer] normally would." *Fort Dearborn*, 827 F.3d at 1076 (quotation marks and emphasis omitted). Thus, contrary to the Company's claim (Br. 62-63), the Board did not err in finding it "unnecessary to determine" whether Rowland "actually made" the threat in question. (A. 1163 n.9.)[6]

[6] Accordingly, the Board did not "ignore[]" (Br. 62) the judge's decision to credit Pagnano, Catona, and Murphy over Rowland and Johnson; the Board correctly deemed such a determination irrelevant to the inquiry of whether the Company

The Board, moreover, properly acknowledged that "the statements by the three ear witnesses" from the doctor's office provided the Company with "a reasonable basis" to have believed that Rowland made the threat. (A. 1163 n.9.) Nonetheless, the Board reasonably concluded that the Company, in fact, did not form such a belief. (A. 1163 & n.10, n.11.) Rather, the evidence—particularly the post-discharge investigation—shows that the Company remained skeptical of the accusation against Rowland at and through the time that it discharged her. (A. 1163 & n.10, n.11.)

Thus, while the Board found that the Company "likely *could*" have discharged Rowland based on the abuse allegation that was lodged against her, that does not satisfy the Company's affirmative defense. (A. 1163.) Instead, the Board, relying on the Company's post-discharge investigation and its unexplained disparate treatment of Rowland, reasonably concluded that the Company failed to carry its burden of proving that it *would* have discharged Rowland based on the abuse allegation alone, even in the absence of her union activity. (A. 1162-63.)

The Company's challenges to the Board's conclusion are unavailing. In large part, these challenges "merely reflect [the Company's] preferred

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would have discharged Rowland absent her protected activity. The Company therefore errs in suggesting (Br. 57) that the Court should review the Board's decision with "special scrutiny" because the Board purportedly "reject[ed]" the judge's credibility finding. The Board did not reject the finding; it properly declined to pass upon it.

interpretation of the record evidence." *Fort Dearborn*, 827 F.3d at 1076. "The question before [the Court]," however, "is not whether [the Company's] view of the facts" supports its position, but rather, "whether the Board's interpretation of the facts is reasonably defensible." *Inova*, 795 F.3d at 80-81 (quotation marks omitted). Accordingly, the Court here need only decide—affording the Board the "heightened deference" that it is due (*Ozburn-Hessey*, 833 F.3d at 221)—"whether the evidence can be read, as the Board reads it, to support the conclusion that [the Company] did not show it would have terminated [Rowland] absent [her] union activity." *Bruce Packing*, 795 F.3d at 22; *accord Bally's*, 646 F.3d at 939.

1. The Company's post-discharge investigation undermines its affirmative defense

Substantial evidence supports the Board's finding that the Company's "continuation of the investigation even after the discharge" manifests the Company's continued uncertainty regarding Rowland's conduct and "undercuts" any claim that it would have discharged Rowland absent her union activity. (A. 1163.) Gilles acknowledged, as the Board found, "that she harbored significant doubt as to the veracity" of the accusation that Rowland had screamed a threat at Resident B. (A. 1163; A. 409-10, 419-20, 423-24, 430, 432-33, 436-39, 442-45, 447, 499-500.) The record demonstrates why Gilles would harbor such doubt. There is no dispute that she knew Rowland as a "longtime," "excellent employee," who in more than a decade of service, had "never previously been accused of any

inappropriate conduct towards a resident," and had "always" been considered a "kind caregiver . . . [who] performed [her duties] with gentleness." (A. 1162, 1175, 1178, 1181.) Gilles additionally knew that Resident B frequently screams threats and profanities, sometimes using different voices. (A. 1162, 1176-77, 1181.) She further knew, in particular, that the resident's profane threats frequently include a reference to someone's rear end—as Gilles herself testified, Resident B makes threats "about your ass all the time," and is "always talking about what she's going to do to your bottom." (A. 411-12, 483-84.) Thus, when Gilles heard on May 24 that *Rowland* had been accused of screaming *at Resident B*—"If you don't knock it off, I'm going to beat your ass"—her admitted reaction was "disbelief." (A. 409-10.)

And Gilles remained skeptical, as the Board found. (A. 1163.) She immediately learned that the doctor's office employees who claimed to have heard the threat did not see who was speaking. And at every step in responding to their accusation, through the time of discharging Rowland, Gilles demonstrated that she continued to "harbor[] significant doubt" that it had been Rowland, rather than Resident B, who had screamed the alleged threat. (A. 1163.) For example, on May 25, Gilles admittedly volunteered to Rowland that Resident B's family members had expressed that they did not believe the accusation, and had noted that the alleged threat sounded like Resident B. (A. 1162, 1178, 1181; A. 67-70, 138-

40, 432-33.) Similarly, when interviewing the doctor's office staff for the second time, also on May 25, Gilles emphasized to them that Resident B screams in different voices and repeatedly asked if they were "really, really sure" that the threat they heard "was the voice of [Rowland] as opposed to the voice of [Resident B]." (A. 1162, 1177; A. 423-24, 447, 499-500.) As Gilles testified: "I really tried very hard with the witnesses *to dissuade them* from what they were saying. Tried to describe the resident as much as I could to them and say, 'this is how she is.'" (A. 447 (emphasis added).)

Likewise, Gilles expressed ongoing doubt during the May 29 discharge meeting, admittedly asking Rowland—after having terminated her—what the van driver (Johnson) had been doing at the time of the incident, "just to be clear in my mind," as Gilles testified. (A. 1178; A. 79-80, 148, 438-40, 688.) Moreover, as the Board further noted (A. 1162, 1178), Gilles testified that she was "very distress[ed]" by Rowland's discharge—and she specifically cited, in explaining that distress, Rowland's exemplary employment record, Resident B's frequent screaming of threats and profanities, and Gilles' ultimate failure "to dissuade" the doctor's office staff from claiming that it was Rowland, rather than Resident B, whom they heard make the threat. (A. 432-33, 447, 486.)

Against that background, the Board reasonably found that the Company's admitted actions after the discharge meeting—continuing to investigate whether

Rowland had screamed the alleged threat—confirmed, and further demonstrated, that its managers' substantial skepticism about the accusation persisted at and through the time of the discharge. (A. 1163 & n.11.) *Cf. Lowery Trucking Co.*, 200 NLRB 672, 677 (1972) (employer's "continuation of the investigation after the discharge" suggested its "continued uncertainty about [the reported] events" and that employer "was unsure of its grounds for discharge").[7] Indeed, Gilles admitted that, in attempting to interview Johnson the day after she terminated Rowland, she specifically sought to probe whether any threating statement that Johnson may have heard had been made by Resident B or, conversely, had been made by Rowland. (A. 442-45.) And as the Board further found, Cess—who, after the discharge, attempted to interview Johnson and Catona, and did interview Pagnano and Murphy, about the May 24 incident—"testified that he took the highly unusual step of becoming personally involved in the interview process because he wanted to ensure that a thorough investigation was conducted." (A. 1163; A. 586-87, 590-92, 608-10.) In particular, Cess elaborated that his "role" in the post-discharge investigation was to "check[]" or "establish" the "veracity" of the claims made by

[7] The Board properly found *Lowery* illustrative in that there, as here, the employer's continued post-discharge investigation showed its ongoing uncertainty about events on which the employer purportedly relied in carrying out the discharge. Contrary to the Company's claim (Br. 71-72), the mere fact that in *Lowery* additional factors also undermined the employer's position does not establish that the Board unreasonably relied on otherwise analogous precedent.

the doctor's office witnesses, and to "find out if they were credible in [his] mind." (A. 608-10.)

Thus, the Board reasonably concluded that Gilles' and Cess' "stated reasons" for the post-discharge investigation—which lay bare their ongoing "significant doubt" about the "veracity" of the accusation against Rowland—"cannot be reconciled" with the claim that the Company would have "taken the same action based on [that accusation] alone," proceeding, as it did, to terminate Rowland "before the investigation was concluded." (A. 1163 & n.11.) Indeed, "[t]his conflict suggests that, in fact, an unlawful motive was behind Rowland's termination—a motive confirmed by Gilles' extraordinary admission." (A. 1163 n.11.)

2. The Company cannot refute the substantial evidence showing its significant ongoing doubt

There is no merit to the Company's numerous contentions (Br. 68-73) attacking the Board's reliance on the post-discharge investigation. The Company misreads the Board's rules and its decision in this case; it also misinterprets the record evidence and seeks to impose its own preferred view of the facts.

The Company, citing 29 C.F.R. § 102.46(f) (see p. 29 above), claims that the Board was prohibited from relying on the post-discharge investigation because the parties did not raise that issue below, and it asserts that the Board improperly played an adversarial role by introducing the issue into the proceedings. (Br. 73.)

The Company misreads the cited Board rule, which is applicable only to parties, and prohibits them from later urging matters that they have failed to raise in exceptions. 29 C.F.R. § 102.46(f). The rule constrains the parties, but not the Board. *Id. See also NLRB v. WTVJ, Inc.*, 268 F.2d 346, 347-48 (5th Cir. 1959). The Board may properly raise issues not argued by the parties. *See, e.g.*, *Spectrum Health*, 647 F.3d at 349 (discussing Board's sua sponte raising of issues); *Local 58, IBEW*, 365 NLRB No. 30, 2017 WL 680502, *5 n.17 (Feb. 10, 2017) (noting that "[t]he Board, with court approval, has repeatedly found violations for different reasons and on different theories from those of administrative law judges or the General Counsel, even in the absence of exceptions") (emphasis omitted), *enforced on other grounds*, 888 F.3d 1313 (D.C. Cir. 2018).

Next the Company misreads the record evidence in attacking (Br. 69, 71) the Board's findings concerning Gilles' substantial doubt and her part in the post-discharge investigation. As shown above, the record evidence belies the Company's broad claim that Gilles harbored significant doubt "only . . . *before* she interviewed the three neutral witnesses and obtained written statements from each of them." (Br. 69.) More narrowly, the Company assigns (Br. 69, 71) undue significance to Gilles' testimony indicating that her post-discharge effort to interview Johnson was prompted "in part" by the "criticisms [that] Rowland asserted [on her termination notice] at the time of her discharge." (Br. 71

(emphasis omitted).) Despite the Company's suggestion (Br. 69, 71), this does not show that just before Rowland lodged these criticisms, Gilles was free of significant doubt. To the contrary, substantial evidence demonstrates that, if Rowland's criticisms played a part in moving Gilles to action, they did so precisely because of Gilles' enduring skepticism that Rowland had made the threat. There is likewise no merit to the Company's further suggestion (Br. 69) that, because Gilles "only" sought to interview Johnson and no other witnesses after the discharge, such actions do little to demonstrate her continued doubt. That suggestion ignores that Johnson was a critical witness to the alleged incident, and that, in seeking to interview him, Gilles' admittedly sought to further investigate whether the threat at issue was made by Resident B rather than by Rowland.

The Company similarly misinterprets (Br. 70) the evidence, as well as the Board's decision, concerning Cess' post-discharge investigatory actions. Contrary to the Company, the Board did not "omit[]" Cess' testimony that his desire to ensure a thorough investigation, and his decision to personally interview witnesses, were motivated "in part" by "Rowland's high union profile . . . and the desire to avoid [an unfair-labor-practice] charge based on an allegedly inadequate investigation." (Br. 70 (quotation marks omitted).) The Board specifically acknowledged that testimony. (A. 1162.) But as the Board further noted, Cess also testified that he was motivated by "the fact that individuals not employed by

the [Company] reported the abuse" (A. 1162), which he described as "extremely rare." (A. 587.) Moreover, none of his testimony shows that Cess was doubt-free at the time of the discharge, and the Company ignores that his admitted purpose in personally interviewing the doctor's office staff was to test their "credibility" and assess the "veracity" of their claims. (A. 608-10.) Thus, contrary to the Company's assertion, the Board did not "penalize[]" it for "ensuring that its investigation was thorough" (Br. 70)—rather, the Board reasonably determined that Cess' investigatory actions, taken only after Rowland had been discharged, showed that he, like Gilles, harbored significant doubt at the time of the discharge.

The Company also misreads the Board's decision by contending that the Board "ignored [dissenting] Member Emanuel's point that there was no suggestion [the Company] was uncertain about the discharge decision," and that the Board thus "failed to explain why" the post-discharge investigation undermined the Company's affirmative defense. (Br. 70-71.) As demonstrated, the Board majority reasonably found that the post-discharge investigation showed that the Company *was* "uncertain about the discharge decision" (Br. 71), and that is precisely "why" (Br. 70) the continued investigation undercut the Company's defense. Thus, the Board did not "ignore[]" (Br. 71) the dissenting member's assertion—it simply disagreed with it, interpreting the record evidence differently, and in doing so,

reaching a contrary conclusion. As demonstrated, the Board's interpretation is reasonable, and therefore entitled to acceptance.

Finally, the Company simply reflects its preferred view of the evidence in attributing importance to the Board's failure to find that the pre-discharge investigation was insufficiently thorough, and to the fact that the post-discharge investigation "uncovered nothing new." (Br. 70-71.) Neither observation undermines the Board's well-supported finding that, on this record, the Company's post-discharge investigatory actions cannot be reconciled with its claim that it discharged Rowland because of the alleged threat. As explained, the Board reasonably determined that those actions confirm, and further reinforce, that Gilles and Cess harbored substantial uncertainty regarding the accusation against Rowland at the time that they made the discharge decision and carried it out.

3. The Company's unexplained disparate treatment of Rowland undermines its affirmative defense

Substantial evidence supports the Board's additional finding (A. 1163) that the Company's disparate treatment of Rowland, as compared to other employees accused of abuse, also undercuts its affirmative defense. *See, e.g.*, *Fortuna Enterprises, LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011) (disparate treatment "foreclose[d] any argument that [the employer] would have taken the same action in the absence of the unlawful motive") (quotation marks omitted).

"For instance," as the Board reasonably found, "the [Company] treated Rowland more severely than certified nursing assistant Nancy Antonson, . . . [who] was also accused of abuse." (A. 1163.) Unlike Rowland, Antonson had previously been disciplined for conduct towards residents (A. 1163; A. 458-59, 751-52)—conduct that the Company described as "unacceptable care" and "neglect[ing] residents' needs." (A. 751-52.) Specifically, in February 2012, the Company issued Antonson a warning "for making inappropriate comments and facial expressions to residents, for leaving residents who were fall risks sitting on the edge of their beds, and for not taking residents to the bathroom with sufficient frequency," as the Board found. (A. 1163; A. 751-52.)

Just two months later, a resident reported that Antonson roughly handled her during her morning routine, and that—despite the resident's plea to be gentler—Antonson continued her rough treatment. When the resident had a bowel-movement accident, she further reported, Antonson rolled her eyes and exclaimed, "[y]ou've got to be kidding," then handled the resident roughly once more as she cleaned her. (A. 1163; A. 741-50.) In response, the Company took an abuse investigation statement from Antonson (A. 744), filed a report of suspected abuse with the state, and disciplined Antonson based on the resident's account of her behavior. (A. 1163 & n.10; A. 741-43, 750.) The Company also mandated that Antonson receive supplemental anti-abuse training. (A. 741, 746, 749.) "In

contrast to Rowland," however (A. 1163), Antonson was not discharged—rather, the Company merely issued her a final written warning. (A. 1163; A. 741.) *Cf. Bruce Packing*, 795 F.3d at 22-23 (employer failed to establish affirmative defense where record "suggest[ed] that at least one other employee" engaged in similar behavior "but was not [terminated]").

Moreover, as the Board further found (A. 1163), the Company "failed to explain" why it reacted more leniently to Antonson's conduct—which included "arguable . . . physical abuse"—than it did to Rowland's alleged act of verbal abuse, which, as demonstrated (pp. 34-42), the Company doubted had even occurred. (A. 1163 & n.10.) Indeed, the Company presented no testimony whatsoever concerning Antonson's rough physical treatment of the resident, let alone testimony explaining the Company's comparatively lenient reaction in light of that conduct. Incongruously, the Company faults (Br. 45-46, 52, 65, 67) the Board for the lack of testimony, implying it lessens the strength of the comparator evidence. That argument not only turns a blind eye to the detailed documentary evidence setting forth Antonson's conduct, it also forgets that such "silence in the face [of] compelling disparate treatment evidence" defeats the Company's affirmative defense. *Lee Builders, Inc.*, 345 NLRB 348, 350 & n.11 (2005) (employer "failed to provide any explanation for why it did not discharge"

comparator employee).[8] The Company's total failure to explain its more lenient treatment is especially damaging in light of Gilles' admission that touching a resident in an abusive manner is more serious than abusively yelling at or threatening a resident. (A. 496.) *Cf. Kitsap*, 366 NLRB No. 98, 2018 WL 2461412, at *19-20 (employer "failed to explain why it treated [the two alleged discriminatees] far more harshly than [two other employees] for committing comparable, if not lesser, instances of patient neglect and mistreatment"), *enforced*, D.C. Cir. Nos. 18-1187, 18-1217.

4. The Company cannot explain its disparate treatment of Rowland

The Company raises numerous arguments in support of its claim that the allegations against Antonson are not comparable to the allegations against Rowland and do not show disparate treatment. Those arguments are either jurisdictionally barred, unsupported by the record, or simply meritless. The

[8] Moreover, assuming arguendo that the absence of testimony on this point results in a degree of record ambiguity concerning the Company's disparate treatment of Antonson, any such ambiguity would cut against the Company, not the Board as the Company suggests (Br. 65), because the evidence is being considered for purposes of evaluating the Company's affirmative defense. *See Publix Super Markets, Inc.*, 347 NLRB 1434, 1439 n.24 (2006) ("ambiguity in the record evidence, especially if it is due to the lack of explanatory documents or testimony, weighs against the [employer] and negates its [affirmative] defense").

Company also ignores additional record evidence regarding other employees accused of abuse whom the Company treated more leniently than Rowland.

First, the Company wrongly claims that there is a "false equivalency" (Br. 67) between the situations involving Antonson and Rowland because the allegations against Antonson were supported only by "documentary evidence" reflecting the account of "a single, interested source" whereas the claims against Rowland were corroborated by "three neutral witnesses."[9] (Br. 66-67 (quotation marks omitted).) To the extent that the Company relies on those evidentiary differences to portray the allegations against Antonson as less credible, the Board specifically noted that the Company "[did] not advance such an argument" in its answering brief to the General Counsel's exceptions (A. 1163 n.10), and the Court therefore is barred from considering the argument now. *See* 29 U.S.C. § 160(e). Although the Company did raise the argument for the first time in its motion for reconsideration, that came "too late" to preserve it for judicial review. *Parkwood*, 521 F.3d at 410. (see pp. 27-30.) Moreover, in its opening brief to the Court, the Company appears to "disclaim[] any . . . suggestion" that "[it] 'found the accusations against Antonson less credible than those against Rowland.'" (Br. 66 (second quotation quoting A. 1163 n.10.)).

[9] Notably, the "interested source" who reported Antonson's mistreatment was the affected resident.

In any event, as the Board further explained, "that suggestion" is "belie[d]" by "the records of Antonson's discipline and the reasons advanced for the [Company's] continued investigation of Rowland post-discharge." (A. 1163 n.10.) Thus, the underlying record refutes the Company's contention (Br. 52, 65-66) that there is "no evidence" that it believed Antonson had committed "willful abuse," or that it "disbelieved" Antonson's innocent explanation for why the resident reported being handled roughly. The Company does not dispute that Antonson's rough physical treatment of the resident constituted at least "arguable . . . physical abuse" (A. 1163), and—despite Antonson's protestations—the Company both disciplined her for that conduct and reported it to the State of California as suspected abuse, describing, in both instances, how Antonson's "rough" actions "continued" despite the resident's complaint. (A. 741, 750.) While the Company attempts to downplay its report to the state, and faults the Board for relying on it (Br. 46, 67), there is no dispute that such reports are required only for "known or suspected" instances of abuse. (Br. 15.) (See also A. 347-48, 471-72.) The Company's report therefore demonstrates at least that it suspected Antonson of abuse, as the Company appears to concede. (Br. 46, 67.) Moreover, although the Company also reported the alleged incident involving Rowland and Resident B to the state, ample record evidence, discussed above (pp. 34-42), shows that the Company consistently

doubted the veracity of that allegation, whereas there is no evidence of similar doubt or uncertainty regarding the accusations against Antonson.[10]

The record evidence also belies the Company's attempt (Br. 65) to minimize Antonson's conduct toward the resident. As explained, the resident's account, credited by the Company, was that Antonson: (1) handled the resident roughly, causing her physical pain, and continued doing so despite the resident's plea to be gentle; and (2) rolled her eyes and (3) stated "[y]ou've got to be kidding," when the resident advised her of a bowel-movement accident. Tellingly, the resident vowed, when reporting this ordeal to the Company: "I will lay in my [excrement] before I will ever let [Antonson] touch me again." (A. 746-48.) Additionally, although Antonson's physically rough conduct was the most serious of the reported issues, the Company misrepresents the record to the extent it suggests (Br. 65) that the "separate issue[s]" of her facial expression and verbal statement were not also cited in the Company's report of suspected abuse to the state, as well as in its final warning—for they indisputably were. (A. 741, 750.) The Company also errs in claiming (Br. 65) that the Board "exaggerated" the number of times that Antonson

[10] The Company also errs in attempting to cast the accusations against Antonson as less credible by noting (Br. 67) that the administrative law judge found that Rowland actually engaged in the alleged abusive conduct. As explained (p. 32), the Board declined to pass on that finding, appropriately recognizing that the question of whether Rowland actually made the threat is irrelevant to the *Wright Line* analysis. (A. 1163 n.9.)

handled the resident roughly. Substantial evidence supports the Board's finding (A. 1163) that Antonson roughly handled the resident more than once during or before her shower, and then again, after the resident had a bowel movement. (A. 741-42, 744-48.) In any event, the critical point is that Antonson handled the resident roughly more than once, and that her rough treatment continued even after the resident complained.[11]

The Company also ignores that Antonson was not the only comparator employee whom it treated less harshly than Rowland.[12] (A. 1163.) For example, substantial evidence demonstrates that the Company "chose not to investigate" reports that two other employees physically abused residents. *Fortuna*, 665 F.3d at 1304 (employer's failure to investigate reports that other employees had violated same policy as discriminatees "foreclose[d]" affirmative defense); *see also Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011) (employer failed to meet affirmative defense in part because "[a]lthough other

---

[11] While the Company did not find it problematic to downplay Antonson's conduct, it incongruously chastises the Board for purportedly minimizing Rowland's alleged conduct by finding that Rowland was alleged to have "said" the threatening statement, rather than "scream[ed]" it in a "harsh tone." (Br. 62.) The Company's baseless claim relies on a selective quotation and ignores that the Board, earlier in its decision, referred to the conduct as "yelling." (A. 1162.)

[12] Contrary to the Company's claim, the Board did not base its finding of disparate treatment "solely" on the evidence concerning Antonson. (Br. 64.) Rather, the Board highlighted that evidence as one striking "instance" of the Company's disparate treatment. (A. 1163.)

employees engaged in conduct similar to [discriminatee's], [employer] neither investigated nor punished any one of them"). In July 2012, Gilles received two letters from the state advising her of anonymous allegations that, on or about a specified date in June, certified nursing assistants Terra Los and Ron Rich physically abused residents. Specifically, the letters contained allegations that Los "hit a resident" and that Rich "pinched a resident's cheeks telling her to ea[t] or else." (A. 452, 462-63, 698-99, 774-75.) In Rich's case, the resident at issue was Resident B. (A. 259-62, 296, 452.) Remarkably, Gilles admitted that the Company failed to investigate either of those allegations of physical abuse and imposed no discipline on the accused employees. (A. 262-63, 304, 452-54, 463, 494-97, 700, 784.) This wholly uncontroverted evidence strongly reinforces the Board's disparate treatment finding.

Gilles sought to justify the Company's failure to investigate by suggesting that the complainants' anonymity rendered any investigation impossible. (A. 454-55, 494, 700, 784.) But simple common sense refutes that suggestion. Most obviously, the Company could have interviewed the two accused employees. It also could have attempted to identify potential witnesses to the alleged abuse. In the case of Rich, for example, Gilles testified that she understood that the abuse was alleged to have occurred in a common area, the facility's dining room, where

others may have been present. (A. 453-54, 494-95.) Yet the Company chose to take none of these actions.[13]

Moreover, Gilles went so far as to try to clear Los and Rich of wrongdoing with the State of California—no matter that she had not investigated either allegation. In both cases, Gilles sent a written response to the state asserting that the employees had not engaged in abuse, and that the persons who reported the allegations must have been unfamiliar with the residents' conditions and misunderstood what had occurred. (A. 261-63, 453-54, 494-97, 700, 784.) Thus, in stark contrast to Rowland's situation, where the Company discharged her even though its investigation left it doubtful about the alleged verbal abuse, the Company absolved Los and Rich of alleged physical abuse without bothering to conduct an investigation.

The Company claims that its absolution of Rich actually "demonstrate[s] the *absence* of disparate treatment," since Rich was "a very active Union member who served as shop steward and attended disciplinary meetings as a Union representative." (Br. 67 (quotation marks omitted).) But it is well established, as

[13] In the case of Los, the Company also could have tried to interview the allegedly abused resident. Gilles testified that the resident in question suffers from a "cyclical" mental condition, and that "when she is cycling," the resident hallucinates and cannot tell what is real. (A. 463-64, 784.) But per Gilles' admission that "an investigation was not done," the Company did not attempt to talk to the resident about the allegation, or otherwise to determine whether she was "cycling" at the time of the alleged abuse. (A. 784.)

this Court has recognized, that "an employer's discriminatory motive is not disproved by evidence showing that it did not weed out all union adherents." *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989) (quotation marks omitted); *accord FedEx Freight E., Inc. v. NLRB*, 431 F.3d 1019, 1030 (7th Cir. 2005).

Moreover, the comparator evidence undercuts the Company's argument (Br. 50, 60-61, 63) that it satisfied its *Wright Line* burden based on its written policy, which mandates termination of employment "if [the] investigation confirms willful abuse." (A. 953.) Indeed, the Company's disparate treatment of Rowland as compared to others accused of abuse negates any claim that the Company's mere paper policy compelled the acceptance of its affirmative defense. *See, e.g.*, *Lee Builders*, 345 NLRB at 349-50 (employer failed to meet affirmative defense given disparate treatment, notwithstanding that employee "tested positive for drugs after a workplace accident" and that employer's policy "required termination" in that circumstance); *see also United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 825-26 (D.C. Cir. 2006) (discharge unlawful notwithstanding employee's attendance violation after signing "a last-chance agreement making her employment contingent on perfect attendance," where employer "had sometimes been lenient with other employees" in similar circumstances).

Furthermore, the Company's heavy reliance on its written policy ignores that, as shown, the Company's investigation of Rowland's alleged abusive conduct left it doubtful that such conduct had occurred, and thus, hardly "confirm[ed]" the purported abuse. More broadly, the Company's argument fails to recognize that it cannot meet its affirmative defense merely by showing that its adverse action "also served some legitimate business purpose"—purported adherence to a zero-tolerance policy—but instead, it must demonstrate that "the legitimate business motive would have moved [it]" to take the same action absent Rowland's union activity. *Bruce Packing* 795 F.3d at 22-23. Accordingly, the Company likewise errs (Br. 60-61, 63) in chiding the Board for failing to expressly acknowledge its undisputed, yet largely inconsequential policy.

In sum, there is no question that Rowland was accused of serious misconduct that would constitute abuse. The severity of purported misconduct, however, does not relieve an employer of its affirmative-defense burden under *Wright Line*. And the Board here properly determined, for the reasons discussed above, based on a careful review of the record evidence, that the Company failed to meet that burden.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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May 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1299 &
	)	19-1010
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION	)	
LOCAL 2015, as successor to SEIU UNITED	)	
HEALTHCARE WORKERS-WEST, CTW, CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,300 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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this 30th day of May, 2019

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STATUTORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REGULATIONS

29 C.F.R. § 102.46(a)(1)(ii) provides:

Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

29 C.F.R. § 102.46(c) provides:

Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

29 C.F.R. § 102.46(f) provides:

Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

ADDENDUM 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1187 **September Term, 2018**

FILED ON: APRIL 30, 2019

KITSAP TENANT SUPPORT SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1217

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the NLRB's cross-application for enforcement be granted.

On May 31, 2018, the Board found that petitioner Kitsap Tenant Support Services had unlawfully disciplined four employees and violated its statutory duty to bargain during and after its caregiving employees' successful unionization campaign. The Board's remedy required Kitsap to bargain with the union for fifteen hours per week and to submit periodic progress reports, and to reinstate the disciplined employees with backpay. We conclude that all of Kitsap's challenges in its petition for review lack merit.

First, the Board correctly applied its *Wright Line* test to all four disciplined employees, and its findings are supported by substantial evidence.

(a) *Bonnie Minor*. The Board reasonably concluded that substantial evidence supports the prima facie case, relying on Minor's membership in the union's organizing committee, her extremely strong annual performance review just one week before her discharge, her lack of any previous discipline, her termination the same day she spoke at Kitsap's mandatory meeting regarding unionization, and Kitsap's other actions demonstrating anti-union animus. J.A. 117-19; *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). Kitsap failed to meet its burden in rebuttal because Program Manager Alan Frey never mentioned forthcoming discipline when reprimanding Minor for canceling a client Christmas party and engaging in "triangulation" with clients; Kitsap did not identify any other employee ever discharged for "counter-therapeutic" conduct; and the Board showed that Kitsap tolerated worse conduct by other employees. J.A. 119-20, S.A. 1-3.

(b) *Alicia Sale and Hannah Gates*. The General Counsel met his initial burden by showing that Kitsap knew Sale and Gates were members of the union-organizing committee, placed Sale and Gates on administrative leave two days after receiving notice that the union campaign had been successful enough to support an election petition, and disciplined Sale and Gates more harshly than other employees who intentionally harmed clients. J.A. 121, S.A. 1-3. Kitsap's argument in rebuttal, that it had a good-faith belief that Sale and Gates engaged in misconduct, fails because Kitsap did not "parcel[] out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred." *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (citation omitted).

(c) *Lisa Hennings*. Finally, the Board reasonably concluded that Hennings' demotion was unlawful because Kitsap was aware of Hennings' union membership and issued several pretextual letters of discipline against her, including for tardiness (though the General Counsel demonstrated that other tardy employees were not so disciplined), for scheduling beyond the scope of her role (though Frey admitted that such scheduling was routine), and for failing to complete client narratives (though Kitsap so disciplined no other employees in Hennings' house). *See* J.A. 124-27; S.A. 4-7; *Ozburn-Hessey*, 833 F.3d at 219-20.

Second, substantial evidence supports the Board's conclusion that Kitsap violated § 158(a)(3) of the Act by increasing its enforcement of disciplinary rules due to its employees' union support. Kitsap does not dispute that a deviation from prior practice coincided with the union election, and its purported concern about a potential state audit was pretextual. *See* J.A. 127-29; *Jennie-O Foods*, 301 N.L.R.B. 305, 311 (1991).

Third, we find that the Board adequately supported its conclusion that Kitsap did not "meet at reasonable times" and bargained in bad faith. 29 U.S.C. § 158(d); *see id.* § 158(a)(5) (recognizing "refus[al] to bargain collectively" as an unfair labor practice). Kitsap's negotiator repeatedly failed to respond to union scheduling requests and canceled or cut short several meetings. J.A. 109-12. Kitsap also engaged in regressive tactics by accepting and then rescinding an agreement to include heads of household in the bargaining unit. J.A. 115. Kitsap further violated its duty to bargain by failing to turn over information relevant to evaluating its proposal with respect to wages. *See KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Given that the "drawing of inferences

as to good or bad faith in the bargaining process is largely a matter for the Board's expertise," the Board has adequately supported its conclusion in this case. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted).

Fourth, we reject Kitsap's challenges to the Board's remedial order. We lack jurisdiction to consider Kitsap's challenge to the mandated bargaining schedule and status reports because Kitsap did not raise that argument in a motion for reconsideration before the Board. *See* 29 U.S.C. § 160(e). Kitsap also claims that the Board's remedy of reinstatement with backpay for the four employees is punitive. But this is the Board's conventional remedy, *see, e.g.*, *Precoat Metals*, 341 N.L.R.B. 1137, 1138 (2004); Kitsap's suggestion that the employees were disciplined "for cause" conflicts with the Board's settled interpretation of this term, 29 U.S.C. § 160(c); *see Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 647 (2007); and Kitsap's argument that these employees were "unfit" for reinstatement fails because Kitsap did not deem unfit other employees who engaged in considerably worse misconduct, *cf. NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 460 (9th Cir. 1978).

Finally, we lack jurisdiction to consider Kitsap's claim that the complaint was not properly ratified because that objection was not raised before the Board. *See* 29 U.S.C. § 160(e).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WINDSOR REDDING CARE CENTER, LLC Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015, as successor to SEIU UNITED HEALTHCARE WORKERS-WEST, CTW, CLC Intervenor	)	Nos. 18-1299 & 19-1010

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 30th day of May, 2019

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Subject:	(Brief) Board Case No. 21-CA-135683; Docket Nos. 18-1247; 18-1267; Con-Way Freight, Inc. v. National Labor Relations Board
Date:	Thursday, May 16, 2019 3:18:19 PM
Attachments:	Con-Way Freight Inc v NLRB (18-1247) Respondent Brf e-file.pdf

Attached please find an electronic copy of the Board's brief in the following case Con-Way Freight, Inc. v. National Labor Relations Board.

Thanks,

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Final Brief Oral Argument Not Yet Scheduled

Nos. 18-1247, 18-1267

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CON-WAY FREIGHT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CON-WAY FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1247, 18-1267
	)	
v.	)	Board Case Nos.
	)	21-CA-135683
NATIONAL LABOR RELATIONS BOARD	)	21-CA-140545
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, Amici

Con-Way Freight, Inc. ("the Company") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Jaime Romero and Juan Placencia were the charging parties before the Board. The Company, the Board's General Counsel, and counsel for Mr. Placencia appeared before the Board in Case numbers 21-CA-135683 and 21-CA-140545. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on August 27, 2018, reported at 366 NLRB No. 183.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC
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GLOSSARY

A.	Joint appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Company's opening brief
Company	Con-Way Freight, Inc.
CWF	Con-Way Freight, Inc.
d/s	Driver side
DSR	Driver sales representative
e/b	Eastbound
HWY	Highway
p/s	Passenger side
SOS	Safe operations system
Union	International Brotherhood of Teamsters, Local 63
V2	Vehicle two; that is, the other vehicle in the accident involving Jaime Romero

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1247, 18-1267

CON-WAY FREIGHT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

Con-Way Freight, Inc. ("the Company") petitions for review of, and the National Labor Relations Board ("the Board") cross-applies to enforce, a Board Order (366 NLRB No. 183) issued on August 27, 2018. (A. 590-621.)[1]

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[1] "A." references are to the joint appendix. "Br." refers to the Company's brief. References preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) ("the Act"). The Company's petition and the Board's cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board's final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by instructing employee Juan Placencia not to wear a union lanyard, threatening him with unspecified reprisals, and implicitly threatening him with physical harm for supporting the Union.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Jaime Romero because of his union activity.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves the Company's unlawful actions in response to its employees' union-organizing activities preceding a Board-conducted election that the International Brotherhood of Teamsters, Local 63 ("the Union") won. Two

employees filed unfair-labor-practice charges, and after the election, the Company filed election objections. After investigating the charges, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting an employee from wearing union insignia, threatening an employee with unspecified reprisals, and implicitly threatening an employee with physical harm for supporting the Union; and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging employee Jaime Romero because of his union activity. The unfair-labor-practice allegations and election objections were consolidated for a hearing, after which the administrative law judge found that the Company violated the Act as alleged and overruled the Company's election objections. On review, the Board found no merit to the Company's exceptions and adopted the judge's findings and recommended order, as modified. It also certified the Union.[2]

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; Romero's Tenure as a Driver

The Company transports freight across North America. This case involves the Company's Los Angeles facility, where it employs about 44 drivers. (A. 590, 602; A. 24, 27, 407-08, 418.) Service Center Manager Paul Styers is the facility's

[2] The Board granted the parties' joint motion to sever allegations concerning additional violations. (A. 590 & n.2, 619-21.) Those violations, and the election objections, are not before the Court. (A. 590, 596.)

highest-ranking manager, and Rick Licon is the personnel supervisor. (A. 592, 602; A. 12-17, 31, 227, 233.) Kevin Huner is the human resources director for the Company's western area. (A. 602; A. 12-17, 346-47.)

Jaime Romero began working for the Company as a driver in 1990. At all material times, he worked at the Los Angeles facility. The Company awarded Romero a 10-year safety award in 2000 and a million-mile safety award in 2010. (A. 590, 602; A. 24-30, 340-41.)

B. The Union Begins an Organizing Campaign; Romero Leads Organizing Efforts; the Campaign Gains Momentum; the Company Escalates Its Opposition

The Union began a campaign to organize drivers at the Company's Los Angeles facility in 2009. In September 2014, the Union filed a petition seeking a representation election, which the Board conducted the following month. (A. 590 & n.5, 594, 602, 605; A. 31, 33-34, 374-75, 385, 394, 401-05.) Romero was the leader among employee organizers throughout the Union's campaign. (A. 590, 602; A. 31-33, 100-05, 115-16, 385, 394.) Among other activities, Romero communicated extensively with coworkers about unionization, and attended numerous union meetings. He also assisted in union-organizing initiatives at other Company facilities. (A. 590, 602; A. 32-33, 100, 102-03, 115-16, 124-29, 384-87.) The Company's managers and supervisors knew about Romero's role as leading

union organizer—including his activities in 2014, during the months leading up to the Union's election petition. (A. 590-92, 602, 613; A. 34-42.)

Around late 2013, continuing into 2014, the campaign intensified. The employees formed an organizing committee, which included Romero and fellow driver Juan Placencia. (A. 590, 592, 602, 614; A. 46, 99, 102-05, 122-23, 126, 163-65, 387-88, 390-91.) In December 2013, Romero and other committee members began soliciting employees to sign union authorization cards. (A. 590, 602; A. 34, 100-01, 130, 156, 392.) Over the next several months, Romero collected about 20 signed authorization cards. (A. 590, 602; A. 34, 392.)

The Company grew concerned about the escalation in its drivers' union-organizing activities. (A. 590-92, 603, 614; A. 37-40, 43-46, 94-99, 228-31.) In March 2014, Styers asked Romero why the employees were looking for third-party representation. In responding, Romero commented that he believed he was being targeted for his union activities. (A. 590-91, 602; A. 37-39, 94.) The Company also undertook new efforts to express its anti-union viewpoint. From March through May, Styers met with the drivers one-on-one or in pairs and read them a prepared, seven-page script conveying the Company's opposition to the Union and emphasizing its concern about the solicitation of union-authorization cards. (A. 592, 603, 614; A. 40, 43-46, 95-99, 228-31, 447-53.)

C. The Company's DriveCam System; After a Minor Traffic Accident, Romero Follows the Company's Protocols

The Company's trucks are equipped with DriveCam, a recording device that has two lenses—one facing inward, toward the driver, and another facing outward, toward the road ahead. DriveCam continually records but does not save the footage unless triggered by an external event, such as an accident or a sharp brake or turn, or if the driver manually activates a save. Once a save is activated, DriveCam retains footage from 8 seconds before the trigger until 4 seconds after. (A. 591, 603; A. 51-52, 66, 255-57, 278.) DriveCam sends the Company a notification for automatic saves, but not for manual ones. (A. 603; A. 257, 338-39.) The Company does not review the saved DriveCam footage for every reported road accident. (A. 593 & n.18, 614; A. 258-59, 261, 263-64, 266-69, 329-333.)

On the evening of August 15, 2014, Romero was driving a tractor-trailer from the Los Angeles facility to another terminal. Romero was driving in a center lane when contact was made between his passenger-side mirror—which extended about 18 inches from the body of his truck—and a tractor-trailer passing Romero on the right. (A. 591, 603; A. 21-23, 47-66, 75-76, 92-93, 397.) At the time of contact, the other tractor-trailer was drifting toward Romero's lane. (A. 603; A. 53, 397.) Within a few seconds, Romero manually activated DriveCam's saving feature, per Company protocol. He also flashed his headlights to get the other

driver's attention, but the driver did not stop. (A. 591, 603; A. 57, 60-61, 64-68, 306, 397.)

Continuing to follow protocol, Romero pulled over and called the Company to report the accident, speaking with Tricia Plonte. Romero described the incident to Plonte, stating that the other vehicle had drifted to the left and that there were no injuries and no significant damage. (A. 591, 603; A. 66-72, 106-10, 116-18, 259-61, 265, 340, 344, 469-70.) Romero also filed a telephone report with the California Highway Patrol and informed Plonte that he had done so. (A. 591, 603; A. 70-72, 469-70.)

Romero then continued to perform his work assignment. Upon his return the next morning, August 16, to the Los Angeles facility, he filled out an accident-report form with a written description of the accident:

> I was going on the number three lane, driving eastbound on 60 Freeway when a truck in the 4th lane passed by me hitting the rear view mirror on the passenger side. As a result, paint residue from the hit is visible. I flashed the headlights on the other driver; however, the driver of the other truck did not stop. He continued driving.

(A. 591, 603; A. 72-76, 119-20, 333, 423-24.) Romero drew a diagram of the accident on the form, then slid it under Licon's office door. (A. 591, 593, 603; A. 76-77, 119-20, 423-24.)

There was no damage to Romero's truck other than the paint residue on the passenger-side mirror. (A. 591, 603, 614; A. 68, 76.) Romero never asserted, in

any of his accident reports, that the other truck had left its lane. (A. 593, 614; A. 75-76, 423-24, 461-62, 469-70.)

D. The Company Reviews DriveCam Footage; Then Suspends and Discharges Romero, Claiming Falsification

Also on August 16, Plonte sent an email concerning Romero's accident to a safety event notification group that included Styers, Regional Safety Manager Don Andersen, and Director of Operations Mike Wattier. Plonte stated that she had ruled the accident non-preventable. She also included her description of Romero's roadside report, which stated:

> SOS Description: Hit/Run V2 side swiped. V2 – tractor pulling a container trailer, no other information. CWF damage – tractor #432-3575 – p/s mirror pushed forwards, paint scuffed; No V2 damage. No injuries. DSR was traveling e/b HWY 60 in the third lane (of six lanes) when V2 started to drift to the left. The d/s of V2's container trailer made contact with DSR's p/s mirror. V2 did not stop. DSR called police but they said he would have to go to police station to make a report. A reference # was given. #1002319.

(A. 591, 603-04; A. 223, 225-26, 232, 241, 254-55, 259-60, 263-67, 320-22, 461-62.)

Wattier replied, asking: "Any way to verify that V2 left their lane?" (A. 591, 593, 604; A. 266-67, 462.) Styers responded by suggesting that Andersen check DriveCam. (A. 591-92, 604; A. 258-59, 266-67, 462.) Per Styers' suggestion, Andersen located the DriveCam footage that Romero had manually saved; he reviewed the footage that same day. (A. 591-92, 604; A. 258-59, 261, 263-64, 266-69, 329-33, 338-39, 461-62.)

The DriveCam video shows the other tractor-trailer drifting to the left in the moments leading to impact, its front left tires overlapping the dividing line that separated the two lanes at the time that contact was made with Romero's passenger-side mirror. (A. 603; A. 21-23, 397.) The video also shows that Romero was holding an electronic device in his hand while he was driving. It is impossible to discern the type of device based on the video. (A. 591, 593, 603, 614; A. 56-57, 298, 328-29, 397.) The footage shows that 1.25 seconds before impact, Romero glanced down at the device for one half of one second, and pressed down on it once with his thumb. (A. 603, 614; A. 57-59, 277-80, 301-03, 397.) From that point until the time of impact, Romero was looking forward. (A. 603; A. 57-60, 290, 303, 397.)

The electronic device in Romero's hand was an iPod. Before impact, as shown in the video, he pressed on it to change a song. (A. 591, 603, 614; A. 56-57.) Romero did not mention the iPod in his accident reports. (A. 591, 615; A. 111, 117-18, 423-24, 469-70.)

After reviewing the DriveCam video numerous times, Andersen emailed Styers, Wattier, and Huner, and revised Plonte's accident report. In his emails and revisions, Andersen claimed that Romero had falsified his report because: (1) the other vehicle "never left their lane and came into ours;" and (2) Romero omitted mention of being distracted by an electronic device. (A. 591, 604; A. 268-76, 320-

24, 328-29, 337, 347-48, 461-62, 464-65, 469-70.) In Andersen's initial email—which he sent after having studied the video frame by frame about a dozen times—he stated that Romero was holding "an electronic device" and looked down at it for 0.5 second. (A. 591, 593, 604, 614; A. 269, 328-29, 337, 461.) A few hours later, Andersen sent an additional email stating that, having scrutinized the video further, he "believe[d]" the device was a cell phone, and that Romero was "actually texting using his thumb." (A. 593, 604, 614; A. 272-73, 337, 461.) Ultimately, in his final revisions to the accident report, Andersen asserted that Romero was "seen with a cell phone in his right hand texting" before the accident. (A. 591, 593, 604, 614; A. 276, 470.) The emails and final revised report further stated that "both trucks move[d] towards each other and because of [Romero's] driving distracted he failed to react to the other truck coming close to his unit while at the same time [Romero] is seen drifting to the far right of his lane . . . ." (A. 591, 593, 604; A. 461, 470.) Andersen acknowledged in his initial email that Romero had manually preserved the DriveCam footage under review, as the footage itself depicts. (A. 604; A. 60-61, 306, 397, 461.) Prompted by Andersen's emails, Huner also reviewed the footage numerous times. (A. 604; A. 347-50.)

On August 20, Romero met with Andersen, Styers, and Licon. Andersen read Romero the accident report, showed him the DriveCam footage, and said that he believed Romero was at fault. Romero disagreed that he was distracted or at

fault. (A. 591, 604; A. 78-80, 111-13, 232-35, 246-47, 250, 310-17.) Andersen also accused Romero of falsifying his report by failing to mention that he had been distracted by texting on his cell phone. Romero denied that he was texting or using a cell phone, but acknowledged that he was holding his iPod and pressed down on it to change a song. (A. 591, 604; A. 80-81, 314-15, 334.) Styers then suspended Romero. (A. 591, 604; A. 25, 84, 113-14, 236-37, 318, 455-56.) Licon asked Romero to provide a written statement, and Romero wrote: "I'm being suspended for other reason this is being created to terminate me." (A. 591, 604; A. 81-84, 318, 426.)

Later that day, Styers drafted an "Out of Service Message" stating that Romero was suspended because he had falsified his accident report. To support that conclusion, Styers adopted and inserted verbatim Andersen's comments from the final accident report. Styers then emailed the suspension notice to Huner. (A. 591-92, 604; A. 236-39, 240-41, 357, 455-56, 458-59.) Huner made the final decision to discharge Romero, as memorialized in his email forwarding Styers' suspension email and instructing, without further elaboration, to "[p]roceed with termination" on the grounds of falsification. (A. 591, 604; A. 347, 357-58, 360, 377-78, 458-59.) On September 3, Styers advised Romero that he was discharged effective immediately, purportedly for falsifying his accident report. (A. 591, 604; A. 25, 85-91, 241-44.)

On September 9, Styers prepared an employee separation checklist in connection with Romero's discharge. Styers indicated, by checking a box on the document, that Romero did not "work well with customers and others." (A. 591, 592 & n.15, 604; A. 247-49, 432.)

E. The Union Files an Election Petition; Styers and Licon Instruct Placencia Not to Wear a Union Lanyard; Styers Threatens Placencia

On September 11, the Union filed its petition for a representation election. Around that time, Placencia and other employees began wearing union lanyards at work that bore lettering stating: "LOCAL 63." (A. 594, 605; A. 133-35, 157-62, 174-75, 209, 389, 430.) Other drivers wore similar, non-union lanyards, such as those that bore the logos of sports teams. (A. 605 n.15; A. 137, 141-42.)

On about September 15, Styers approached Placencia in the facility's break room, pointed at his union lanyard, and asked him what it was. After Placencia responded that it was his lanyard, Styers told him to take if off because it was against Company policy. (A. 605, 610; A. 135-36.)

A few minutes later, Placencia went to Licon's office and complained about the way Styers was treating him, specifically citing the lanyard incident. Placencia further commented that the "drama" going on because of the union campaign was unnecessary. (A. 605; A. 137-39.) Licon told Placencia that he could wear a union button, but not a lanyard. (A. 605, 610; A. 139.) Styers then entered the office and asked what the two were discussing. Placencia again stated that the "drama"

occurring between the drivers and management was unnecessary. Styers responded, "[y]ou haven't seen nothing yet." (A. 605, 610; A. 140-41, 152.) Placencia replied: "What else can you do[?] You already harassed me. Are you going to fire me?" (A. 605; A. 141.) Styers did not answer. (A. 605; A. 141, 152.)

F. The Company Hires an Anti-Union Campaign Consultant Who Threatens Placencia with Physical Violence

In response to the Union's election petition, the Company hired labor consultant Luis Camarena to disseminate its anti-union message to employees. (A. 594, 605, 611-12; A. 176-83, 187-90, 202-04.) On October 6, Placencia and Camarena had an extended conversation regarding the organizing campaign. Placencia expressed his support for the Union and his conviction that the employees needed union representation. In doing so, he stated that the drivers "felt like battered wives." (A. 594, 606, 612 & n.44; A. 143-47, 168-69, 191-92, 210-14, 216, 221-222, 428, 444-45.) Camarena responded by describing himself as "the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and . . . kick the door down, come up, push you to the ground, put his foot on your chest and . . . stick a gun out, pull my .45, put it to your head and I'll get my money one way or the other." (A. 594, 606, 612; A. 147, 153-55, 428.) Camarena pantomimed the actions of kicking down a door, pushing someone down, placing his foot on that person's chest, grabbing that

person by the hair, and aiming a gun at his head. (A. 594, 606, 612-13; A. 147-48.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2018, the Board (Members Pearce and McFerran, Chairman Ring dissenting in part) issued its Decision, Order, and Certification of Representative. The Board panel unanimously found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by instructing Placencia not to wear a union lanyard and by threatening him with unspecified reprisals. Members Pearce and McFerran further found, also in agreement with the judge, that the Company violated Section 8(a)(1) by implicitly threatening Placencia with physical harm, and violated Section 8(a)(3) and (1) of the Act by suspending and discharging Romero.

The Board's Order directs the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. Affirmatively, the Order requires the Company, among other things, to offer Romero reinstatement and make him whole. It also requires the Company to post a remedial notice. (A. 595-96.)

SUMMARY OF ARGUMENT

The Board found that the Company responded to the intensifying union-organizing campaign among its drivers by committing multiple unfair labor practices. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) by twice instructing Placencia, a member of the Union's organizing committee, to remove his union lanyard, threatening him with unspecified reprisals if he continued to engage in union activity, and implicitly threatening him with physical violence for supporting the Union. Based on the credited evidence and the governing objective standard for assessing whether employer statements unlawfully tend to coerce employees' exercise of protected rights, the Board reasonably determined that the Company committed these violations.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) by suspending and discharging Romero—the 24-year employee who led the Union's organizing campaign. Applying its well-established *Wright Line* framework, the Board first determined that Romero's prominent union activity was a motivating factor in the Company's adverse actions. The Company knew about Romero's leading role in the organizing campaign, and his suspension and discharge occurred as the campaign's increasing momentum engendered escalating concern among the Company's management.

Moreover, the Company exhibited anti-union hostility through the Section 8(a)(1) violations that it directed at Placencia—Romero's junior partner on the organizing committee. And furthermore, Service Center Manager Styers, the facility's top manager who was intimately involved in the suspension and discharge as well as the 8(a)(1) violations, injected into Romero's termination paperwork the claim that he did not work well with others—an utterly false and post hoc assertion, conjured without basis or precedent in Romero's near quarter-century of service, that, in context, constituted no less than code for his union activity.

Substantial evidence also supports the Board's finding that the Company could not meet its *Wright Line* affirmative defense of proving that it would have discharged Romero even absent his union activity, because the Company's proffered justification for its adverse actions—which was solely that Romero had falsified an accident report—was mere pretext. Indeed, the record amply supports the Board's findings that the Company demonstrated pretext throughout its course of action in responding to Romero's minor accident—from the implausible commencement of its accident investigation, to its exaggerations, distortions, and outright misrepresentations of Romero's conduct, as well as its transparent attempts to buttress its actions with shifting, post hoc, and false explanations.

Before the Court, the Company's meritless contentions—many of which also are jurisdictionally barred from review—rest on mischaracterizations of the

law, the record evidence, and the Board's decision. They provide no basis to deny enforcement of the Board's Order.

STANDARD OF REVIEW

This Court's review of Board decisions is "narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (quotation marks omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence on the record as a whole. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is "less than a preponderance of the evidence, albeit more than a scintilla." *Inova*, 795 F.3d at 80 (quotation marks omitted). Indeed, this Court will reverse the Board for lack of substantial evidence "only" if it determines that the record is "so compelling that no reasonable factfinder could fail to find to the contrary." *Id.* (quotation marks omitted). In making that determination, moreover, the Court gives substantial deference to the inferences drawn by the Board from the facts. *Bally's*, 646 F.3d at 938. Finally, this Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26, 31 (D.C. Cir. 2018) (quotation marks omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INSTRUCTING PLACENCIA NOT TO WEAR A UNION LANYARD, THREATENING HIM WITH UNSPECIFIED REPRISALS, AND IMPLICITLY THREATENING HIM WITH PHYSICAL HARM FOR SUPPORTING THE UNION

A. Applicable Principles

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations," and to "bargain collectively through representatives of their own choosing . . . ." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements those rights by making it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1).

The test for whether an employer's statement violates Section 8(a)(1) is whether, considering the totality of the circumstances, the statement had a "reasonable tendency" to coerce or interfere with employees' Section 7 rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). The employer's statements "must be judged by their likely import to [the] employees." *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978); *accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544-45 (D.C. Cir. 2006) (assessing legality of employer statements based on how the employees "could reasonably perceive" them). The critical inquiry, then, is what an employee could reasonably

have inferred from the employer's statements in context. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1073-74 (D.C. Cir. 2016); *Progressive*, 453 F.3d at 544-45. Moreover, this Court "recognize[s] the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Progressive*, 453 F.3d at 544 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

B. Styers and Licon Unlawfully Instructed Placencia Not to Wear a Union Lanyard

Substantial evidence supports the Board's finding (A. 610) that the Company violated Section 8(a)(1) by twice instructing Placencia not to wear a union lanyard. Employees have a Section 7 right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-04 (1945); *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009). An employer therefore violates Section 8(a)(1) by restricting employees' wearing of such insignia, unless the employer establishes a "special circumstances" defense. *Id.*

Here, the Board found that Styers and Licon directed Placencia to remove his union lanyard. The Company does not dispute these findings or contend that "special circumstances" excused its actions. Thus, the Company plainly violated Section 8(a)(1). *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999) ("directing employees to remove their union buttons constituted an unfair labor practice"); *MEK Arden, LLC v. NLRB*, No. 17-1237, 2018 WL 6721352, at *4

(D.C. Cir. Dec. 7, 2018) (employer violated Section 8(a)(1) by telling employee to take off his union scrubs).

The Company contends (Br. 50)—without citation to any supporting authority—that the Court should not uphold the finding of a violation because of Licon's suggestion to Placencia to wear a union button instead of a lanyard. But Styers made no similar suggestion, and, in any event, an employer's unlawful restriction of an employee's Section 7 rights is not rendered lawful merely because the employer suggests that the employee exercise his rights in a different manner. *See Serendippity-Un-Ltd.*, 263 NLRB 768, 774-75 (1982) (Act "allows employees to engage in concerted activity which they decide is appropriate") (quotation marks omitted).

The Company likewise errs in urging that its coercive instructions "had no deleterious effect" because Placencia "continued to wear the lanyard without incident." (Br. 50-51.) Under this Court's precedent—which the Company fails to acknowledge—the issue is "a remark's tendency to coerce, not . . . its actual impact." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991); *accord United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (in finding reasonable tendency to coerce, Board "need not find that the employer's language or acts were coercive in actual fact") (quotation marks omitted).

Finally, established Board precedent undermines the Company's claim that its instructions, issued to a single employee, are "*too de minimis*" (Br. 51) to warrant a violation. *Golub Corp.*, 338 NLRB 515, 516-17 (2002); *Regency at the Rodeway Inn*, 255 NLRB 961, 961-62 (1981). Unlike in *American Federation of Musicians, Local 76*, 202 NLRB 620 (1973)—cited by the Company (Br. 51)—there is no evidence here that the Company later took actions that "substantially remedied or effectively contradicted" its unlawful instructions. *Golub*, 338 NLRB at 517 & n.18; *accord MEK Arden*, 2018 WL 6721352, at *3 (manager's instruction not to wear union scrubs was not de minimis violation, where instruction was made "during the height of a hotly contested campaign for union representation" and was not retracted or corrected).[3] Moreover, as the Board here noted (A. 610), any contention that these two violations are de minimis is defeated when they are considered together with the Company's other unfair labor practices discussed below.

[3] In *Dallas Mailers Union, Local No. 143 v. NLRB*, 445 F.2d 730, 732-33, 735 (D.C. Cir. 1971), cited by the Company (Br. 51), although the Court referred to the controversy before it as involving an "infinitesimally small abstract grievance[]," it nonetheless enforced the Board's order.

C. Styers Unlawfully Threatened Placencia with Unspecified Reprisals

Under the objective test for assessing potential Section 8(a)(1) violations (pp. 18-19), an employer's statement is unlawful if an employee could reasonably perceive it, in context, as a threat to retaliate against protected activity. *E.g.*, *Progressive*, 453 F.3d at 544-45. It is well settled that "coercive threats may be implied rather than stated expressly." *Nat'l By-Prod., Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). Likewise, an employer's threat need not specify the form of retaliation; threats of unspecified reprisals also violate the Act. *See, e.g.*, *Tasty Baking*, 254 F.3d at 124-25 (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). Additionally, "[t]he presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to [an] employer's remarks." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981) (quotation marks omitted).

Here, substantial evidence supports the Board's finding (A. 610) that Styers unlawfully threatened Placencia with unspecified reprisals by telling him "[y]ou haven't seen nothing yet." Indeed, the context in which Styers made this admonition amply reveals its threatening character. Only a few minutes after Styers unlawfully instructed Placencia to remove his union lanyard, Placencia complained to Licon about Styers' unlawful order and more generally about the

"drama" surrounding the union campaign. In immediate reply, Licon echoed Styers' unlawful instruction. Placencia—having just been subjected to two coercive directives, and having just expressed an association between Styers' unlawful directive and the general campaign "drama"—then similarly commented to Styers, who had just entered, about the unnecessary "drama" between the drivers and management. It was at this moment that Styers forewarned Placencia, "[y]ou haven't seen nothing yet." (A. 605, 610.) Thus, viewing Styers' statement in context and from the employee's perspective—as the law requires—Placencia could reasonably have perceived it as a warning that unspecified reprisals could ensue if he continued to engage in union activity, particularly given the unlawful treatment he had just suffered for having engaged in such activity. *See Liberty House Nursing Homes*, 245 NLRB 1194, 1199 (1979) (unlawful threat where, as employees discussed tension surrounding ongoing union campaign, manager interjected, "you ain't seen nothing yet . . . things are going to get more up tight, and you all are going to be more nervous").

The Company's challenges (Br. 52-55) are meritless. The Company erroneously invokes its free-speech rights under Section 8(c) of the Act (29 U.S.C. § 158(c)). Consistent with Section 8(a)(1)'s bar on coercive conduct, Section 8(c) provides that an employer may state its opinion about unionization, but only if its statements do not contain an express or implied "threat of reprisal or force or

promise of benefit." 29 U.S.C. § 158(c). *See generally Gissel*, 395 U.S. at 617-20. The Company fails to acknowledge that the standard for determining whether an employer statement contains such an implied threat—and is therefore unlawfully coercive rather than protected by Section 8(c)—is an objective one that focuses on the employee's perspective. As shown, substantial evidence supports the Board's finding that, under this standard, Styers' remark had a reasonable tendency to coerce Placencia, and Section 8(c) therefore provides the Company no refuge. *See, e.g.*, *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924-25 (D.C. Cir. 2005) (rejecting 8(c) defense because employer failed to show that "no reasonable factfinder could find" that its statements "amounted to implications" that employer "might" take action to render unionization futile).

The Company does not help itself by citing (Br. 54) plainly inapposite election-objections cases that characterize threats between employees as "mere bravado." The Company's attempt (Br. 54) to analogize Styers' comment to exchanges between employees ignores Styers' status as a high-ranking management official. Likewise, depicting his statement as mere "puffery" (Br. 55) fails to take into account "the economic dependence of [] employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 617. Finally, the Company's suggestion

(Br. 53) that the Board deserves "no deference" in determining whether Styers' statement violated Section 8(a)(1)—merely because the Company has invoked Section 8(c) and its incorporation of First-Amendment rights as a defense—is contrary to settled precedent. *See Gissel*, 395 U.S. at 620; *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1364-67 (D.C. Cir. 1997).

D. Camarena Implicitly Threatened Placencia with Physical Harm

Substantial evidence supports the Board's finding (A. 594, 611-13) that the Company violated Section 8(a)(1) by implicitly threatening Placencia with physical harm. As the Board found, when Placencia, in the context of a discussion concerning the union-organizing drive, expressed that the employees needed the Union because they felt like battered wives, Camarena directly responded with a "pointed statement about his . . . aggressive and vengeful nature in the face of opposition." (A. 594.) Thus, Camarena told Placencia that he was the type of person that "if you owe him money," he would "go down to your house," "kick the door down," "push you to the ground," "put his foot on your chest," and "stick a gun . . . to your head," and that he would get his money "one way or the other." (A. 594.) Camarena, moreover, pantomimed these violent actions while or immediately after he spoke. (A. 594.)

The credited evidence therefore amply supports the Board's finding that Camarena's statements and gestures "reasonably . . . tend[ed] to interfere" with

employee rights under the Act. (A. 594 (quotation marks omitted).) As the Board explained, Camarena—"who had been hired to disseminate the [Company's] antiunion message"—reacted to Placencia's protected comment about the employees needing a union by expressing "a graphic account of his . . . propensity for violence when opposed," complete with "lurid . . . accompanying gestures." (A. 594.) Thus, the Board properly found that Camarena's conduct violated Section 8(a)(1), as it could reasonably be construed to imply that he "was willing to do anything—including committing acts of physical violence—to stop the Union." (A. 594.) *See Thalassa Restaurant*, 356 NLRB 1000, 1017 (2011) (implicit threat of physical harm where, in response to protected activity, employer agent referred to his military training and said he could "take care" of employee).

The Company's credibility-based challenges (Br. 45-46) are unavailing. Contrary to the Company (Br. 45-46), the mere fact that supervisor Armando Rosado, whom the judge found credible, testified that he did not witness Camarena's threatening conduct does not compel a conclusion that the conduct did not occur. As the judge found and Rosado testified, Rosado was not present for approximately 7-8 minutes of the conversation, and the judge reasonably concluded that Camarena's threatening behavior occurred outside of Rosado's presence. (A. 606, 612-13; A. 216, 221-22.) In doing so, the judge properly credited Placencia's testimony that Camarena behaved as described above and

discredited Camarena's denial. Placencia's testimony was "clear and forthright," whereas Camarena, who "generally lack[ed] credibility," provided testimony that was "evasive, slippery, and at times outright dishonest." (A. 612-13.) The Company has not shown that this credibility determination was "hopelessly incredible, self-contradictory, or patently unsupportable." *CC1 Ltd.*, 898 F.3d at 31.

The Company likewise errs in arguing (Br. 48-50) that Camarena's conduct did not violate Section 8(a)(1) because it did not "actually affect[] union organizing," and Placencia did not actually "[feel] threatened." (Br. 49-50.) As explained (p. 20), the conduct's actual impact or effect is not the issue, and the Company's claim (Br. 48) that the Board's inquiry is a "solipsistic exercise" misunderstands the objective nature of the test.

Before the Court, the Company asserts (Br. 44, 47-48) three additional challenges to the Board's finding. Specifically, the Company contends (i) that Camarena's conduct was shielded by "the First Amendment protections guaranteed by Section 8(c) of the Act" (Br. 48); (ii) that his conduct could not have constituted an unlawful threat because Camarena's separate, lawful statement about fighting his own fight and knocking down doors purportedly preceded the threatening conduct (Br. 47); and (iii) that the Court should displace the Board's finding as to how Placencia could reasonably have interpreted Camarena's conduct with an

alternative interpretation articulated by dissenting Chairman Ring. (Br. 44, 47.) The Court lacks jurisdiction to consider these arguments.

Section 10(e) of the Act provides in relevant part: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Courts thus "lack[] jurisdiction to review objections that were not urged before the Board." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1107 (D.C. Cir. 2019) (refusing to consider argument not raised to Board that finding of unlawful interrogation "violate[d] [employer's] free-speech rights under the First Amendment and Section 8(c)"). Moreover, a party "may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself." *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 551 (D.C. Cir. 2016) (quotation marks omitted); *accord HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1068-69 (D.C. Cir. 2015). Because the Company did not raise any of these contentions to the Board in its exceptions to the judge's decision or show any "extraordinary circumstances" excusing its failure to do so, the Court does not have jurisdiction to consider them.

In any event, the Company's contentions lack merit. First, its Section 8(c) argument—apart from being inadequately developed and therefore waived[4]—fails because Camarena's statements were coercive and plainly without Section 8(c) protection. Second, the notion that an employee cannot reasonably perceive a statement as threatening merely because an unthreatening statement preceded it is unsupported and irrational. And third, even if the Company's alternative interpretation of Camarena's conduct were "equally plausible," the Court must uphold the Board's finding of an unlawful threat "as long as [it] rest[s] upon reasonable inferences, and . . . may not reject [it] simply because other reasonable inferences may also be drawn." *Tasty Baking*, 254 F.3d at 124-25.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY SUSPENDING AND DISCHARGING ROMERO BECAUSE OF HIS UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) by Taking Adverse Action Against an Employee for Engaging in Union Activity

Section 8(a)(3) of the Act protects employees' rights to engage in union activity by making it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to

[4] *See New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

. . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).[5] Thus, an employer violates Section 8(a)(3) "by taking an adverse employment action . . . in order to discourage union activity." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217-18 (D.C. Cir. 2016) (quotation marks omitted).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Fort Dearborn*, 827 F.3d at 1072. Consistent with that test, if substantial evidence supports the Board's finding that protected activity was "a motivating factor" in the employer's adverse action, a court must uphold the finding that the action was unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 400-05; *accord Fort Dearborn*, 827 F.3d at 1072. If the employer's proffered reasons for its action were pretextual—that is, if they either did not exist or were not in fact relied upon—the employer "fails as a matter of law" to establish its affirmative defense. *Ozburn-Hessey*, 833 F.3d at 218-20 (collecting cases).

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[5] A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

An employer's unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Indeed, "circumstantial evidence alone may establish unlawful motivation in a § 8(a)(3) case." *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (citing *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941)); *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). Such evidence may include the employer's knowledge of protected activity, *Ozburn-Hessey*, 833 F.3d at 218, hostility toward protected conduct, including by the commission of other unfair labor practices, *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996), the timing of the adverse action, *Inova*, 795 F.3d at 80, 82, and the pretextual nature of the employer's justifications, *Laro*, 56 F.3d at 230. Pretext may be shown in a variety of circumstances, including where an employer's explanations are implausible or illogical;[6] unfounded or untrue;[7] exaggerated or inflated;[8] or inconsistent, shifting, or post hoc.[9] Ultimately, drawing an inference

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[6] *Allegheny Ludlum*, 104 F.3d at 1368; *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993).

[7] *CC1 Ltd.*, 898 F.3d at 32 & n.*; *Inova*, 795 F.3d at 88.

[8] *Sprain Brook Manor Nursing Home, LLC*, 359 NLRB 929, 942-43 (2013), *incorporated by reference in* 361 NLRB 607 (2014), *enforced*, 630 F. App'x 69 (2d Cir. 2015); *Jackson Corp.*, 340 NLRB 536, 588-89 (2003).

[9] *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005)*; Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

of unlawful motive "invokes the expertise of the Board" (*Laro*, 56 F.3d at 229), and this Court is "especially deferential" to such Board findings. *CC1 Ltd.*, 898 F.3d at 32 (quotation marks omitted); *accord Ozburn-Hessey*, 833 F.3d at 217, 221.

B. The Company Unlawfully Suspended and Discharged Romero Because of His Union Activity

The Board reasonably found that the Company violated Section 8(a)(3) and (1) by suspending and discharging Romero because of his prominent union activity. Substantial evidence supports the Board's inference that Romero's protected activities as a "recognized leader" of the ongoing union-organizing campaign motivated the Company's adverse actions against him, and likewise supports the Board's determination that the Company's proffered justification for suspending and discharging Romero was no more than a pretext to conceal its discriminatory motive. (A. 592-94 & n.13.) The Company's challenges to the Board's findings are unavailing. Several are not properly before the Court, and all are meritless. The Company, in large part, would have the Court supplant the Board's reasonable view of the record evidence with the Company's preferred alternative view. "The question before [the Court]," however, "is not whether [the Company's] view of the facts supports its version of what happened," but rather, "whether the Board's interpretation of the facts is reasonably defensible." *Inova*,

795 F.3d at 80-81 (quotation marks omitted); *accord Fort Dearborn*, 827 F.3d at 1076; *Bally's*, 646 F.3d at 938-39.

1. Romero's union activity was a motivating factor in his suspension and discharge

In finding that the Company acted with an unlawful motive, the Board relied on "multiple sources of animus" (A. 592 n.13) and not just pretext, as the Company erroneously contends. (Br. 29.) Indeed, ample evidence—including knowledge, suspicious timing, other unlawful conduct, and a pretextual explanation that doubles as a euphemism for anti-union animus—supports the Board's finding (A. 591-92) that Romero's union activity was a motivating factor in the Company's adverse actions against him. To begin, it is undisputed that Romero engaged in extensive union activities, *see* pp. 4-5, and was "the leader among employee organizers" in the Union's campaign. (A. 590, 592.) And as the Board found, the Company was "well aware" of these activities. (A. 590, 592, 613.) *See Ozburn-Hessey*, 833 F.3d at 218 (employer's knowledge of protected conduct is relevant factor in assessing motive); *Allegheny Ludlum*, 104 F.3d at 1368 (employee's "outspoken and aggressive support for the [u]nion . . . set him apart" from others and supported inference that discharge was unlawfully motivated).

Nor does the Company contest the Board's well-supported finding (A. 592, 614) that the timing of Romero's suspension and discharge was suspicious. As the

Board found, the Company took adverse action against Romero only weeks before the Union's election petition was filed, at a time when the Company "clearly knew [that] the organizing campaign was gaining strength," and as it "became increasingly concerned about the [campaign]—of which Romero was a recognized leader." (A. 592, 614.) *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993) (timing suggested unlawful motivation when discharges "occurred just as [the organizing] campaign was picking up steam").

The Board also reasonably found that the Company's other violations of Section 8(a)(1) support a finding of unlawful motivation. (A. 592, 613-14.) Indeed, this Court has held that "[a] company's open hostility toward [u]nion activity, and its 8(a)(1) violations, are clearly sufficient to establish anti-union animus on the part of that company." *Parsippany Hotel*, 99 F.3d at 423 (quotation marks omitted); *see also Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735-36 (D.C. Cir. 2000). As demonstrated above (pp. 18-29), the Company here violated Section 8(a)(1) by telling Placencia—who was "Romero's partner on the Union organizing committee"—to remove his union insignia, threatening him with unspecified reprisals, and implicitly threatening him with physical harm. (A. 592.) Furthermore, as the Board emphasized, the inference of unlawful motivation arising from these other unlawful acts is significantly strengthened by the fact that "Styers, the highest-ranking manager at the facility and the person who initiated

the . . . review [of Romero's DriveCam video] and drafted Romero's suspension notice and termination report, was also responsible for [unlawfully] ordering Placencia to remove his union lanyard and [unlawfully] threatening Placencia." (A. 592.)

Moreover, substantial evidence supports the Board's finding (A. 592) that Styers' assertion in Romero's discharge paperwork that he did not "work well with customers and others" reveals the Company's unlawful animus. As the Board explained (A. 592), this "telling[]" assertion was "unrelated" to the accident, "unfounded," and a "recognized euphemism for union animus." Indeed, this claim of Romero's alleged difficulties working with others "came out of nowhere," had nothing to do with Romero's reporting of the accident, and had not once been raised by the Company prior to Styers completing the termination form. (A. 592.) *See Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (shifting explanations support inference of unlawful motive); *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (same).

Further, Styers' assertion "had no predicate in Romero's 24-year career with [the Company]." (A. 592.) As the Board found, there is not a shred of evidence to substantiate Styers' claim. At the hearing, when pressed to explain the claim, Styers was unable to provide specific examples or documentation and offered only vague and conclusory assertions. (A. 592 & n.11; A. 247-49.) *See CC1 Ltd.*, 898

F.3d at 32 (Board "can infer from falsity of employer's stated reason for discharge that motive is unlawful") (quotation marks omitted); *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1034 (10th Cir. 2003) ("a flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation") (quotation marks omitted).

Moreover, in the context of the ongoing organizing campaign, Styers' assertion that Romero—a known union advocate—did not "work well with . . . others" amounted to no less than a "euphemism for union animus," as the Board found. (A. 592.) *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 458 (1995) (claims that employee did not work well with his team and had a bad attitude were euphemisms for union animus); *see also SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 989-90 (7th Cir. 2004) (comment about employee's "attitude" suggested unlawful animus). This is especially so given that "there is no credited evidence of an alternative explanation" for Styers' assertion. *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998) (comment about employee's "attitude" supported finding of animus).

2. The Company's arguments do not undermine the Board's finding of unlawful motive

The Company cannot muster a successful challenge to the Board's finding of unlawful motivation. Some of its arguments are jurisdictionally barred, and all lack either precedential or evidentiary support.

The Company broadly contends (Br. 27-29) that its other violations and Styers' termination-report assertion that Romero did not work well with others do not support the Board's unlawful motive finding because there is no nexus between the Company's actions and Romero's discharge. But this Court has held that there is no requirement "to demonstrate a 'nexus' between each item of employer conduct evidencing anti-union animus and a reprisal taken against an employee." *Parsippany Hotel*, 99 F.3d at 424. Rather, the employer's anti-union conduct "*acts as the link* between an employer's knowledge of an employee's union activities and reprisals taken against that employee." *Id. See also, e.g.*, *Ozburn-Hessey*, 833 F.3d at 217-18 (upholding Board's motive findings as to adverse actions against two employees because substantial evidence showed "that [the two employees] were active supporters of the [u]nion, that [the employer] had knowledge of their union-related conduct, and that [the employer] harbored animus toward the [u]nion and its supporters").

The Company's narrower attacks on the Board's motive finding are equally unavailing. As to the other 8(a)(1) violations, the Company first notes that these violations occurred after Romero's discharge. The Court lacks jurisdiction to consider the claim that subsequent violations cannot be used to support unlawful motive because the Company never raised it before the Board and, as explained,

the majority and dissenting Board members' discussion of the issue does not excuse the Company's failure. 29 U.S.C. § 160(e). (*see* p. 28.)

And in any event, the contention is meritless. "[E]vents occurring after [a] termination" are relevant "to determining [the] company's motivation at the time of the discharge." *SCA Tissue*, 371 F.3d at 990. Thus, contrary to the Company, "it would be fatuous to ignore [the] violations that [it committed] subsequent to [Romero's] discharge in attempting to determine the real reason for that discharge." *Cont'l Radiator Corp.*, 283 NLRB 234, 238, 249 (1987); *accord Farm Fresh Co.*, 361 NLRB 848, 862 & n.31, 864-66 (2014) (post-discharge 8(a)(1) violations supported finding that discharge was unlawfully motivated).

The Company is wrong that its subsequent violations are too "attenuated" (Br. 28) to infer unlawful motive. As the Board found (A. 592 n.10), the Company's adverse actions and 8(a)(1) violations alike occurred during the climax of the union-organizing campaign of which Romero was the leader. In these circumstances, as the Board explained, the Company's "post-petition" unfair labor practices are relevant to the actions that it took "against the primary employee proponent of that petition in the period shortly before its filing." (A. 592 n.10.)

Furthermore, contrary to the Company, its subsequent violations do not lose their potent relevancy simply because Huner—the person who made the "final decision" to discharge Romero—did not commit those violations or otherwise

display anti-union animus.[10] (Br. 28-29.) As this Court has recognized, there is no "require[ment] . . . that the final decisionmaker must independently have . . . animus toward the protected activity." *Inova*, 795 F.3d at 83. As demonstrated, the Board here reasonably inferred—based on the wealth of circumstantial evidence detailed above—that Romero's union activity was a motivating factor in his suspension and discharge; the absence of additional evidence that Huner personally exhibited anti-union animus is therefore immaterial. Moreover, the Company's argument ignores that Styers was "the highest-ranking manager at the facility," and that he "played a central role" both in Romero's suspension and discharge as well as in the unlawful post-petition conduct. (A. 592 & n.10.) *See Inova*, 795 F.3d at 83-84 (Board properly relied on animus held by "high-level managers" who were "directly and intimately involved" in events leading to employee's discharge, notwithstanding that ultimate discharge decision was made by someone else); *cf. Parsippany Hotel*, 99 F.3d at 423-24 (finding it "eminently reasonable" to attribute to the employer the anti-union animus expressed in "high-level" manager's 8(a)(1) speech, even though manager not involved in discharge).

[10] The Company does not dispute that Huner knew about Romero's union activities. Nor could it, given its broad stipulation at the hearing (A. 41-42) and its failure to except to the judge's broad findings concerning the Company's knowledge. (A. 613.)

The Company fares no better in challenging (Br. 29, 42-43) the Board's reliance on Styers' termination-report assertion that Romero did not work well with others. As an initial matter, these challenges are also not properly before the Court. The Board's sua sponte reliance on this factor as further evidence of improper motive does not excuse the Company's failure to challenge that reasoning before the Board by filing a motion for reconsideration. Consequently, pursuant to Section 10(e) of the Act (*see generally* p. 28), this Court is jurisdictionally barred from considering challenges to that reasoning now. 29 U.S.C. § 160(e); *see Woelke*, 456 U.S. at 666 (holding that Section 10(e) "bar[red]" argument that could have been raised to Board in a "petition for reconsideration or rehearing"); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding that where party could not have raised issue on exceptions, it must raise it in motion for reconsideration in order to preserve it for review); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012) (same).

In any event, as shown, and contrary to the Company (Br. 29, 42-43), the fact that Styers, a high-level manager who openly displayed animus, was not the final decision-maker in Romero's discharge does not undermine the reasonable inferences that the Board drew from his termination-report assertion. *See Inova*, 795 F.3d at 83-84; *Parsippany Hotel*, 99 F.3d at 423-24. The Company likewise errs in contending (Br. 29, 42-43) that the assertion is irrelevant because it did not

constitute an explanation or reason for the discharge. As the Board aptly observed, "[t]his begs the question"—which the Company has not adequately answered—"of why Styers would check the box at all if not to bolster [the Company's] primary assertion that Romero falsified his accident report." (A. 592 n.15.) Further, there is no merit to the Company's apparent suggestion (Br. 29, 42-43) that Styers' assertion is immaterial because he completed the termination form after Romero's discharge. As explained, an employer's post-disciplinary statements and conduct may show that a discipline was unlawfully motivated (*see* p. 38), and a "post hoc attempt to rationalize . . . a [discharge] decision, [is] suggestive of a pretext." *Inter-Disciplinary Advantage*, 349 NLRB at 509.

The Company (Br. 30-33) likewise misses the mark in seeking to undercut the Board's finding of unlawful motive by attacking the Board's reliance on the investigation into Romero's accident. The Company misreads the Board's decision, which does not rely on the investigation in concluding that Romero's union activity was a motivating factor in his suspension and discharge. (*See* A. 592 & n.13.) Rather, as explained below (pp. 42-51), the Board relied on the investigation—and the dubious grounds supporting it—as one of several points demonstrating that the Company's proffered reason for its adverse treatment of Romero was mere pretext.

3. The Company's professed reason for suspending and discharging Romero was pretextual

Substantial evidence supports the Board's finding that the Company's purported reason for suspending and discharging Romero, which was solely that he falsified his accident report, "was pretextual—that is, it was not in fact relied upon." (A. 594.) Indeed, the Board reasonably concluded that the Company's "entire course of action" demonstrated that it "manipulated the situation to trump up a disingenuous claim of falsification" against Romero. (A. 592, 594.) As shown below, the Company launched its investigation "for an implausible reason" (A. 593), and it then engaged in a "sustained effort" to "inflate and mischaracterize the nature of Romero's conduct" and to "supplement and bolster" the rationale for its disciplinary actions with "shifting," "post hoc," and "false" explanations. (A. 592-94.) Thus, the Board reasonably determined that the Company seized on an opportunity to develop a pretext for dismissing Romero—"in order to discharge the leader of the Union's organizing campaign as it reached its climax." (A. 592.)

To begin, the Board reasonably found (A. 593, 614) that the "initial impetus" for the investigation was "suspect." As the Board noted (A. 592-93, 614), the circumstances of the accident do not explain Wattier's interest in investigating it. The accident was minor, had been ruled non-preventable, and involved no injuries or damage other than some paint residue on a mirror. And although Wattier requested to review the accident specifically "to verify" that the

other vehicle "left their lane," Romero "had never asserted—in his report to Plonte, his written statement, or his diagram—that the other vehicle had left its lane." (A. 593, 614; A. 75-76, 423-24, 462, 469-70.) Thus, the Board reasonably concluded that the investigation "was initiated for an implausible reason." (A. 593, 614.) *See Kidde, Inc.*, 294 NLRB 840, 849-50 (1989) (employer's explanations for initiating investigation shown pretextual by their inconsistent and implausible nature). Moreover, Wattier was not called to testify at the hearing, Styers was not asked to explain Wattier's request, and Andersen's testimony—that he did not know why Wattier was interested in verifying that the other vehicle left its lane—only accentuates the request's implausible nature. (A. 593 n.18, 604, 614; A. 331.) *See Allegheny Ludlum*, 104 F.3d at 1368 (implausibility of employer's explanations suggests pretext to mask unlawful motive); *Prop. Res. Corp.*, 863 F.2d at 967 (same).

Further, there is no dispute that Styers—who, as demonstrated above, displayed ample animus—"initiated the video review" by prompting Andersen to check DriveCam in specific response to, and for the specific stated purpose of fulfilling, Wattier's implausible and unexplained request. (A. 592-93 & n.18.) It likewise is undisputed, as the Board moreover found, that "absent Wattier's request, the inquiry into Romero's accident would have been closed without any review of the [DriveCam] footage." (A. 593 n.18.) The Board thus reasonably

inferred that the Company investigated Romero's accident because of his union activity, and therefore that the DriveCam footage—as purported evidence of falsification discovered only pursuant to that unlawfully motivated investigation—could not render the Company's disciplinary actions lawful. (A. 593 & n.18, 614.) *Kidde*, 294 NLRB at 840 n.3 ("employee[] misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful"); *see also Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007) (where employer unlawfully singled driver out for testing, that driver's discharge for failing improperly-motivated test was also unlawful), *enforced*, 577 F.3d 467 (2d Cir. 2009); *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 1-3 (2003) ("employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline").

Having launched its investigation for a pretextual reason, the Company then conducted itself in a manner demonstrating pretext during the investigation and beyond. As the Board found (A. 591, 593, 604, 614), the Company perpetuated the implausible stated impetus for the investigation, and effectively "misstate[d] . . . what Romero reported" (A. 614), by claiming that he falsified his report in part because the other truck "never left their lane and came into ours." (A. 455, 470.) Once again, Romero never asserted that the other vehicle had left its lane. Indeed,

the Company's suspension notice reflects that Romero merely reported that the other vehicle "started to drift to the left."[11] (A. 455.) Despite this, and contrary to all available evidence, the Company irrationally persisted in attributing to Romero a claim he never made, and then charging him with falsification for having made it. (A. 455, 458-59.)

Additionally, as the Board reasonably found, Andersen further revealed the Company's pretext by claiming for the first time at the hearing that Romero left his lane and struck the other vehicle. (A. 593, 614.) The final accident report and suspension notice stated only that Romero "drift[ed] to the far right of his lane"—while at the same time the other truck "move[d] towards" and "[came] close to [Romero's] unit," and then "contact [was] made between both trucks." (A. 455, 470.) By contrast, Andersen testified at the hearing that Romero "veered over into [the other driver's] lan[e] and struck him" (A. 317), or that Romero "cross[ed] over into the [other vehicle's] lane" and "hit vehicle two"—whereas "vehicle two didn't hit [Romero]." (A. 270, 314-15, 342, 345.) As this Court has held, "the lack of clarity and consistency in explaining reasons for termination is an important factor in evaluating the proffered justifications," and "when an employer vacillates in

[11] Notably, the DriveCam video shows (A. 603; 397), and the Company concluded, that this was true—as stated in the suspension notice, the other vehicle "move[d] towards" and was "coming close" to Romero's truck in the moments before impact. (A. 455.)

offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Citizens Inv.*, 430 F.3d at 1202 (quotation marks omitted); *accord Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003).

Moreover, Andersen's belated claim that Romero veered into the other lane also is "contradicted by [the] evidence that there is no way to tell where in the lane Romero's vehicle was by looking at [the] DriveCam [footage]" (A. 614; A. 335, 397), as Andersen himself admitted. Thus, as the Board additionally found (A. 614), the belated claim not only is shifting and inconsistent, but also constitutes an "embellishment[] and misrepresentation[]," *Jennings & Webb, Inc.*, 288 NLRB 682, 695 (1988), *enforced*, 875 F.2d 315 (4th Cir. 1989), thereby further highlighting the Company's pretextual effort to "seize[] [on an opportunity] to mask its true reason for its actions." *Id.*; *accord Mid-Mountain Foods. Inc.*, 332 NLRB 251, 260-61 (2000) (employer's exaggerated testimony evidenced pretext), *enforced*, 11 F. App'x 372 (4th Cir. 2001).

Similarly, substantial evidence supports the Board's finding that the Company also mischaracterized and exaggerated Romero's conduct with respect to the electronic device. (A. 593, 614.) As the Board found, "it [was] completely impossible to discern from the [DriveCam] video what type of device Romero was holding," and the video shows that Romero glanced down at the device for just one

half of one second, pressing it once with his thumb. (A. 593, 603, 614.) From this evidence, the Company claimed that Romero was "seen with a cell phone in his right hand texting" as he drove (A. 455, 470)—a distortion that conveyed a degree of interaction with and focus on the device far greater than warranted by the video evidence. (A. 593, 614.) "The aggrandizement of the offense is, itself, indicative of pretext." *Yukon Mfg. Co.*, 310 NLRB 324, 340 (1993); *accord Sprain Brook Manor*, 359 NLRB at 942-43.

Indeed, as the Board observed (A. 593, 614), "over the course of the [Company's] investigation, it appeared to escalate the severity of [the] assertion—from holding an electronic device, to holding a cell phone, to texting." (A. 593; A. 461, 470.) (*see* pp. 9-11.) And, in attempting to justify Romero's discharge, the Company unreasonably adhered to its exaggerated account of the facts in its disciplinary documents (A. 455, 458-59)—even after Romero had credibly denied at the August 20 meeting that he was texting, and clarified, consistent with the video evidence, that he only had changed a song on his iPod. (A. 593, 614.)

Moreover, as the Board further explained, Andersen's testimony at the hearing underscores the unreasonableness of the Company's ultimate depiction of Romero's device usage. (A. 593, 614.) Thus, although the Company's final accident report and suspension notice averred that Romero was "seen with a cell phone in his right hand texting" (A. 455, 470), Andersen, when forced to explain

the DriveCam footage under oath, scaled back this account significantly—testifying only that Romero was shown holding an "electronic device," and that his "thumb [went] in a downward motion and appear[ed] to touch the device" exactly once, while he looked down at it for half a second. (A. 593, 614; A. 298, 301-03.) (*see also* A. 272.) Accordingly, Andersen's testimony reinforces that the version of events relied on by the Company in suspending and discharging Romero "was an inflated and distorted interpretation of Romero's recorded conduct that was specifically intended to form a . . . basis for disciplinary action." (A. 593.) *See Materials Processing, Inc.*, 324 NLRB 719, 719 (1997) (employer "grossly exaggerated" employees' behavior "as a pretext in order to discipline them because of their union activities").

Substantial evidence also supports the Board's additional finding that other circumstances underscore the disingenuousness of the Company's claim that Romero was suspended and discharged for falsifying his accident report. (A. 593 & n.19, 594, 614-15.) Romero was "a longtime employee with a track record of safe driving," and he "followed the [Company's] accident protocol in full." (A. 593.) Specifically, Romero manually "activated [the] DriveCam after the collision, [] reported the incident through the appropriate channels, and [] cooperated with the [Company's] investigation." (A. 593.) As the Board found, the Company's professed good-faith belief that Romero engaged in willful deception by omitting

mention of the iPod in his reports is especially undermined by the Company's full knowledge that Romero *voluntarily* "activated the [DriveCam] recording device even though it . . . obviously [would] show him using an iPod." (A. 593 n.19.) Thus, as the Board observed, the Company "[p]aradoxically" founded its assertion that Romero deceptively "omitted key information from his accident report" on evidence "that Romero himself chose to record as part of his accident report."[12] (A. 593 n.19.)

Finally, the Board properly relied on perhaps "[t]he most jarring example" of the Company's pretextual conduct. (A. 592.) As explained above (pp. 35-36, 40-41), Styers sought to bolster the Company's falsification rationale by asserting on Romero's termination form, 6 days after his discharge, that he did not "work well with customers and others"—a claim that was, blatantly, both shifting and false. (A. 592.) *See Inova*, 795 F.3d at 88 (management notation that employee denied promotion in part because "prone to gossip" undermined affirmative defense, where manager had no idea what notation referred to); *Vincent*, 209 F.3d

[12] Contrary to the Company, there is no evidence that Romero ever "acknowledged" (Br. 35) trying to hide the device. (*See also* Br. 41.) Andersen ultimately clarified in his testimony that at the August 20 meeting, Romero did not agree with Andersen's assertion that he had tried to conceal the device, but instead expressed only that he had moved the device to his left hand so that he could activate the DriveCam with his right hand. (A. 316, 325-27.) In any event, as the Board found, "had [Romero] wanted to hide the fact that he was holding something, it is curious [that] he would choose to record himself." (A. 614.)

at 736 (employer's "cryptic" and shifting or inconsistent explanations amounted to "inartful pretext" and evidenced unlawful motive). As the Board reasonably found, "[t]he fact that Styers added this information . . . after Romero's actual discharge only lends credence to [the] conclusion that, even after the fact, the [Company] continued to generate new rationales to support its disciplinary action against Romero." (A. 592 n.15.)

The Board acknowledged that Romero "may not have been blameless in failing to mention that he was holding an iPod before the accident." (A. 593.) Nonetheless, based on the several well-supported reasons detailed above, the Board reasonably concluded that the Company did not in fact rely upon that failure in suspending and discharging Romero, and indeed, that its entire professed falsification justification was a pretext. (A. 592-94.) As discussed (p. 30), an employer does not establish its *Wright Line* affirmative defense merely by showing that its adverse action "also served some legitimate business purpose;" rather, the employer must demonstrate that "the legitimate business motive would have moved [it] to take the [same] action absent the protected conduct." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22-23 (D.C. Cir. 2015) (quotation marks omitted); *accord Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). Accordingly, as previously explained (p. 30), if the Board reasonably finds, as it did here, "that the employer's purported justification[] for adverse action against

an employee [is] pretextual," then the employer "fails as a matter of law" to establish its affirmative defense. *Ozburn-Hessey*, 833 F.3d at 218-20.

4. The Company cannot defeat the Board's pretext determination

The Company fails to undermine the Board's findings that its investigation was implausibly initiated and that its ultimate reliance on falsification as the basis for Romero's discharge was "simply not credible." (A. 593-94.) Challenging the Board's finding that it investigated the accident solely because of Romero's protected activity, the Company claims that the Board failed to consider evidence demonstrating that its investigation was reasonable and that its review of the DriveCam video was not unusual. (Br. 30, 32, 35, 40.) This argument ignores the Board's findings—which the Company notably does not contest (Br. 32-33)—that the Company "[does] not review the DriveCam footage for every road accident," and critically, that "absent Wattier's request, the inquiry into Romero's accident would have been closed without any review of the footage." (A. 593 & n.18.) These uncontested and well-supported findings, in conjunction with the Board's determination that the reason for Wattier's request was implausible, render irrelevant the Company's claims about what was "not unusual."

Additionally, contrary to the Company's suggestion (Br. 33, 40), the Board found pretext not in the mere *fact* that the Company initiated an investigation into Romero's accident but in the implausible *manner* in which it did so. The record

evidence undermines the Company's assertion (Br. 39 & n.7) that Wattier requested the investigation only because he "wanted to ascertain how far [the other vehicle] drifted," not necessarily whether the other vehicle left its lane. This explanation is contrary to Wattier's email, which specifically requested "to verify" that the other vehicle "left their lane." It also is in tension with the Company's eventual conclusion that Romero falsified his report because although the other vehicle did in fact drift to the left, it "never left their lane and came into ours." Moreover, the Company failed to call Wattier to testify as to his purpose for requesting the investigation. And furthermore, whether the Board "derived the wrong inference" concerning Wattier's request is "not the question," as the Court "ask[s] only whether . . . it would have been possible for a reasonable jury to reach the Board's conclusion[s], *giving substantial deference to the inferences drawn by the [Board]* from the facts." *Bally's*, 646 F.3d at 938.

The Company further argues that "comparators defeat pretext" and faults the Board for failing to consider purported comparator evidence demonstrating that it treated Romero similarly to other individuals charged with falsification. (Br. 32.) Given the Board's finding that the Company here launched its investigation for an illicit purpose, to create an "aura of legitimacy" to Romero's discharge, the Board did not fail to consider this evidence, but instead properly rejected it as inapplicable. *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121 (1979) (discharges

unlawful when premised on investigation undertaken to create lawful reason for terminating union supporters). Contrary to the Company, those other individuals are simply not "comparators." (Br. 30-32, 35, 43.) As the Board explained, "[u]nlike the employees in those cases, Romero's conduct was investigated solely because he engaged in protected concerted activity, and the purported . . . falsification . . . was discovered pursuant to that unlawfully motivated inquiry." (A. 593 n.18.) The Company's claim, therefore, that it "treated comparables as it did Romero" (Br. 19, 30), ignores the substantial evidence showing that it investigated Romero for a pretextual reason to conceal its unlawful motive, rendering any "comparator" evidence irrelevant. *See Trump Marina Assocs., LLC*, 353 NLRB 921, 953-56 & n.99 (2009) (finding, where pretext determination not based on disparate treatment, that because the case "sound[ed] in pretext" it was "[t]herefore . . . irrelevant . . . how [the alleged discriminatee] was treated vis-a-vis other employees who were disciplined for arguably similar . . . misconduct"), *incorporated by reference in* 355 NLRB 1277 (2010), *enforced*, 445 F. App'x 362, 364 (D.C. Cir. 2011) (affirming violation, holding that Board "properly concluded that [employer's] proffered, nondiscriminatory explanation for the [discipline] was mere pretext").

There is thus no merit to the Company's wholly unsupported suggestion (Br. 32-33, 35, 37) that the Board could not find pretext in the initiation of Romero's

investigation without finding that it constituted disparate treatment or a deviation from established practice. It is well settled that pretext may be shown in a variety of circumstances, including where an employer's explanation for its actions is implausible. (*See* pp. 31, 43.) Furthermore, it bears repeating that the Board's finding of pretext in the commencement of the investigation was only one of several bases for the Board's overall pretext determination.

Similarly unavailing is the Company's oft-repeated claim (Br. 34, 36-37, 41-42) that the Board failed to consider its "reasonable beliefs" as to Romero's conduct. The Court cannot address this contention because the Company failed to present it to the Board. 29 U.S.C. § 160(e). (*See* p. 28.) In any event, the contention is meritless. As an initial matter, the Company "shortchanges [its] burden of proof" to the extent it suggests that it could establish its affirmative defense merely by showing that it held a "reasonable belief" that Romero engaged in misconduct. *Inova*, 795 F.3d at 84. Rather, the Company must "show not only that it reasonably believed [Romero] had engaged in [misconduct], but that the nature of that behavior 'would have' caused [his] suspension and termination regardless of [his] protected conduct." *Id.* And as discussed (pp. 30, 50-51), the Company of necessity cannot meet that burden—because the Board reasonably found that its purported justification for taking adverse action against Romero was disingenuous and pretextual.

The Company is also wrong in claiming (Br. 41-42) that the Board erroneously focused on what actually happened rather than on what the Company reasonably believed concerning Romero's usage of the electronic device. To the contrary, as the Board specifically noted (A. 593), and as explained above, the Board found pretext in the Company's stated conclusions concerning the device precisely because they were "*not* reasonable" and instead constituted "an inflated and distorted interpretation of Romero's recorded conduct." (A. 593.)

Finally, the Company mischaracterizes the Board's decision in claiming that the Board "substitute[d] its business judgment for [the Company's]" and "fail[ed] to grasp" that "accident-related falsification" is a legitimate concern. (Br. 37-38.) "While it is a truism that management makes management decisions, not the Board, it remains the Board's role, subject to [courts'] deferential review, to determine whether management's proffered reasons were its actual ones." *Uniroyal Tech. Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). Thus, contrary to the Company's misguided claims (Br. 39), the Board's decision does not "impose a policy" that would ban the Company from investigating or taking disciplinary action concerning its drivers' accident reports. The Board requires only that the Company comply with the Act in doing so.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
May 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CON-WAY FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 18-1247 &
v.	)	18-1267
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,769 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 16th day of May, 2019

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 8(c) of the Act (29 U.S.C. § 158(c)) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
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CON-WAY FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 18-1247 &
v.	)	18-1267
	)	
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	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 16th day of May, 2019

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Subject:	(Brief) Board Case No. 26-CA-092192; Docket Nos. 19-1054; 19-1090; Ozburn-Hessey Logistics, LLC v. National Labor Relations Board
Date:	Thursday, May 23, 2019 12:36:29 PM
Attachments:	Ozburn-Hessey (19-1054) Brief to e-file.pdf

Attached please find an electronic copy of the Board's brief in the following case Ozburn-Hessey Logistics, LLC v. National Labor Relations Board.

Thanks,

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Nos. 19-1054, 19-1090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants Ozburn-Hessey's request for oral argument, the Board requests the opportunity to participate.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 19-1054, 19-1090

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Ozburn-Hessey Logistics, LLC to review, and the cross-application of the National Labor Relations Board to

enforce, a Board Order issued against Ozburn-Hessey on August 27, 2018, reported at 366 NLRB No. 177. (JA 2-22.)[1] The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO (the Union) has intervened on the Board's behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(e) and (f) because the unfair labor practices occurred in Tennessee. Ozburn-Hessey's petition and the Board's cross-application were timely because the Act does not impose time limits on those filings.

ISSUES PRESENTED

(1) Is the Board entitled to summary enforcement of the unchallenged portions of its Order?

(2) Does substantial evidence support the Board's findings that Ozburn-Hessey violated Section 8(a)(5) and (1) of the Act by unilaterally changing its

[1] "JA" refers to the parties' joint appendix, "SA" refers to the Board's supplemental appendix, and "Br." refers to Ozburn-Hessey's opening brief. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

timekeeping system and by discharging Lauren Keele as a consequence of that change?

(3) Does substantial evidence support the Board's findings that Ozburn-Hessey violated Section 8(a)(3) and (1) of the Act by terminating employees Nannette French, Shawn Wade, Jerry Smith Sr., and Stacey Williams for their union or other protected, concerted activities?

(4) Do the Board's enhanced remedies fit within its broad remedial discretion?

STATEMENT OF THE CASE

For the past decade, Ozburn-Hessey has engaged in an extraordinary pattern of violating its Memphis employees' rights under the Act. The decision under review is the seventh Board decision issued against it during that period, all of which involve unlawful conduct intended to undermine the Union during its organizing drive and subsequent first-contract bargaining. Five Board orders were enforced in full by the D.C. Circuit. *See Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532 (2015), *enforced mem.*, 689 Fed. Appx. 639 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 362 NLRB 977 (2015), *enforced*, 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014), *incorporating by reference* 359 NLRB 1025 (2013), *enforced*, 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), *enforced mem.*, 609 Fed.

Appx. 656 (D.C. Cir. 2015); and *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011), *enforced mem.*, 605 Fed. Appx. 1 (D.C. Cir. 2015). A sixth Board order is currently under review in this Court in Case Nos. 18-2103 and 18-2217, which is fully briefed and pending oral argument.

This case primarily involves conduct that occurred immediately after May 14, 2013, when the Union learned that it had won a 2011 election and resumed organizing employees to re-establish its presence after litigation over the election. The Board found that Ozburn-Hessey committed 22 separate violations of the Act. Of those, Ozburn-Hessey challenges only 6 in its opening brief. The Board's findings of fact and conclusions of law as to the contested violations are described below; the uncontested violations are discussed under the Argument heading.

I. THE BOARD'S FINDINGS OF FACT

A. Ozburn-Hessey Changes Its Timekeeping System Without Notifying the Union, then Discharges Lauren Keele for Being 1 Minute Late Clocking In

Before 2013, Ozburn-Hessey used timeclocks with physical buttons to record employees' start and end times. (JA 10; 342.) Those timeclocks had separate buttons for each recordable event, including signing in and out for shifts and lunch. (JA 10; 342.) If employees pushed the wrong button on those systems when clocking in, they did not have to wait for a new screen before pushing the correct button to fix the issue. (JA 10; 355.) On April 22, 2013, Ozburn-Hessey

replaced its timekeeping equipment with a system called Kronos. Unlike the previous system, Kronos had a touchscreen and had more functions, such as requesting leave and job transfers. (JA 10; 345, 591-93.) The Kronos system came with a 50-page manual describing its different functions and Ozburn-Hessey's managers anticipated that employees could initially have some difficulties clocking in. (JA 10; 540-89, 591.)

Before the change to Kronos, employees requested time off by submitting paper forms to a manager, who hand-returned those requests the same or the next day. (JA 11; 347-48.) After the change, employees were initially required to use the Kronos system to submit leave requests and would find out if their requests had been granted by later checking Kronos. (JA 11; 348-49, 351.) It is undisputed that Ozburn-Hessey did not notify the Union before changing its timekeeping equipment. (JA 11.)

On April 30, employee Lauren Keele attempted to sign in via the Kronos system after lunch. (JA 11; 352.) When she hit the wrong button on the touchscreen, she was directed to a new page. (JA 11; 353-54.) She hit the "home" button to return to the original screen. (JA 11; 354-55.) While she was waiting for the homepage to load, the clock had turned to the next minute, rendering her one minute late. (JA 11; 355.) Ozburn-Hessey assessed her an attendance point under its policy, which stated that employees will receive particular forms of discipline

when they accumulate specified numbers of points, culminating in discharge when an employee exceeds 12 points. (JA 8; 525.) Keele's April 30 attendance point brought her total to 13, and Ozburn-Hessey discharged her on May 13. (JA 11; 525.)

B. After the Union's Election Victory is Determined, Employees Solicit Authorization Cards in Parking Lots and Ozburn-Hessey Orders Them To Stop

The Union started organizing Ozburn-Hessey's Memphis, Tennessee warehouse employees in 2009, and on July 27, 2011, the Board held a representation election for a unit of those employees. Due to litigation over challenges to certain employees' ballots, the Board did not issue a final tally of ballots until May 14, 2013. (JA 2.) *See Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025, 1025 (2013), *incorporated by reference*, *Ozburn-Hessey Logistics*, 361 NLRB at 921. The tally showed that the Union had won the election and the Board certified the Union as the warehouse employees' representative on May 24. (JA 2, 24.)

After attending the ballot count, employees Glenora Whitley and Jerry Smith, Sr. went to several of Ozburn-Hessey's parking lots to tell employees about the result and drum up additional support for the Union. (JA 24; 151-53.) Whitley and Smith Sr. also distributed authorization cards that employees could sign to become union members. (JA 24; 523.) After speaking to employees on the main

campus, they went to the parking lot of the Yazaki building, a nearby warehouse where some unit employees worked. (JA 24; 151-53.) They were joined by several employees who worked at the Yazaki warehouse, including Nannette French. (JA 24-25; SA 625, 628-31.) Two of Ozburn-Hessey's supervisors and a customer saw them there and called Operations Manager Margaret Bonner to tell her that "union people" were in the Yazaki lot. (JA 4; 438.) Bonner immediately interrupted her lunch break to inform Director of Operations Phil Smith, who was in charge of all of the Memphis warehouses. She then went to the parking lot and asked Whitley and Smith Sr. to leave. (JA 27-28; 438-41.) Phil Smith arrived shortly thereafter. (JA 28; 441.)

C. Nannette French Distributes Union Authorization Cards; 3 Days Later, Ozburn-Hessey Discharges Her

French was an open union supporter who wore a union button to work. (JA 8; 196.) On May 14, French met with Whitley and Smith Sr. to help spread news of the Union's victory to employees who worked in the Yazaki building. (JA 24-25, 59; SA 625, 628-31.) French openly distributed union authorization cards to several employees while she was in the parking lot. (JA 8; 184.) French left before Bonner came out to order Whitley and Smith Sr. to leave. (JA 8, 25; 439-41.)

On May 17, French clocked in 1 minute late from her lunch break. (JA 8, 59; SA 633.) French already had 12 points when she returned late from lunch. (JA

8; 511.) Ozburn-Hessey assessed her an additional point for her May 17 infraction, bringing her total to 13, and discharged her. (JA 8; SA 633.)

Before French's discharge, Ozburn-Hessey typically allowed employees to exceed 13 attendance points. (JA 9.) It often allowed employees to accumulate nearly double or more points than its policy officially allowed before terminating the employee, including employees Davis (27 points), Faulkner (29 points), Shaw (34.5 points), Shipp (24 points), Rhodes (33 points), Watson (46 points), and Blade (23 points). (JA 9; *Ozburn-Hessey*, 362 NLRB at 1554.) The only employee other than French who Ozburn-Hessey has discharged for reaching only 13 points is Keele, discussed above. (JA 8 n.30.)

D. Shawn Wade Signs an Authorization Card; Ozburn-Hessey Discharges Him the Next Day

After hearing about the Union's victory on May 14, employee Shawn Wade met with employee Anita Wells in one of Ozburn-Hessey's parking lots to sign a union authorization card. (JA 7-8; 237, 312.) While Wade was doing so, manager Randall Coleman drove by and saw Wade and Wells in the parking lot but did not directly look at them. (JA 7, 49; 237, 312.) Coleman did not know Wade but knew that Wells was involved in the Union's organizing efforts. (JA 7; 341, 434, SA 632.)

The next day, Wade was running late to work. (JA 49; 244.) He parked in a visitor parking spot, clocked in on time, then left to move his car to the employee

lot. (JA 49; 244-48.) Manager Ken Ball observed Wade moving his car after clocking in and reported it to Wade's manager. (JA 7; 421-23.) At the end of his shift, Wade was asked to report to human resources. (JA 49; 250.) Ozburn-Hessey informed Wade that he had been seen leaving the building to move his car after he had clocked in, that doing so was forbidden, and that he would be terminated. (JA 49; 250-51.) His termination notice states that he was discharged for violating Ozburn-Hessey's time-and-attendance policy. (JA 49; 515.)

Before Wade's discharge, employees regularly left Ozburn-Hessey's buildings for a short period without consequences. According to employees Nelson, Balderrama, Wells, and Jennifer Smith, many or all employees clocked in, then left to move their cars when they were running late. (JA 8; 209, 232, 317-18, 385.) Nelson's supervisor saw him doing so and did not discipline him. (JA 8; 210.) Employee Pressman also briefly left the building to get a box cutter or roll up her windows and was not disciplined for doing so even when her supervisor saw her. (JA 8; 221-23.) Wells left the building to get her asthma pump in front of her supervisor with no repercussions. (JA 8; SA 626-27.) Wells did not know that Ozburn-Hessey had any rule against leaving the building to move a car until after Wade was discharged for doing so. (JA 8; 382.)

Ozburn-Hessey's records reveal that before Wade's discharge, it had not discharged any employees for a first offense of leaving the building for a brief time

during their shifts. After a manager caught employee B. Smith leaving the building to move his car, the manager told him not to do so but did not discipline him. On a subsequent occasion, Smith sought to leave the building to move his car, his manager told him not to, and he did so anyway. Ozburn-Hessey then discharged him for insubordination. (JA 7; 464, 603-04.) When a different manager caught employee Banis leaving the building to move her car, Ozburn-Hessey treated her as arriving late for her shift and assigned her an attendance point under its time-and-attendance policy. (JA 8; 598-601.)

E. Stacey Williams Requests Union Representation at a Disciplinary Meeting and Ozburn-Hessey Discharges Him

On June 20, 2013, managers Sara Wright and David Maxey called employee Stacey Williams into a conference room to issue him a disciplinary warning for a prior incident. (JA 6; 254, 519.) After Maxey started accusing him of misconduct in the prior incident, Williams requested a union representative. (JA 6; 255-56.) Williams knew to request representation because the Union had distributed cards informing employees of their right to union representation in a disciplinary interview and Williams kept his card with his employee identification badge. (JA 292.) When Wright denied his request, Williams left to return to his workstation. (JA 6; 255.)

Both managers then approached Williams at his desk and Wright asked him to return to the conference room. (JA 6, 62; 257-59, 264-65.) Williams requested

union representation, which Wright again denied, and one of the managers asked Williams to return to the conference room a second time. (JA 6; 374.) Williams again requested representation and, this time, Wright told him to clock out. (JA 6; 264-65.) While Williams gathered his things and started to shut down his computer, Maxey unplugged it. (JA 6; 261, 376.) Both Wright's and Maxey's voices were raised during the encounter. Williams was neither loud nor disruptive. (JA 6; 261, 376-77.) Ozburn-Hessey subsequently discharged Williams for his allegedly "[u]nprofessional, inappropriate conduct/insubordination." (JA 6; 521.)

F. Ozburn-Hessey Increases Enforcement of its Rule Against Leaving the Building During a Shift, Distributes Questionnaires to Employees Who Have Done So, and Discharges Primary Union Organizer Jerry Smith, Sr.

In September 2013, Ozburn-Hessey unlawfully increased enforcement of its policy prohibiting employees from leaving their warehouse during working hours. (JA 9, 92; 180-81, 215-16.)[2] As part of that increased enforcement, Ozburn-Hessey's managers reviewed its security footage to determine which employees had left the warehouse without clocking out and distributed questionnaires to each employee. (JA 9; 395.) The questionnaires asked employees if they had left the facility after clocking in on specific days— days on which, unbeknownst to the

[2] As discussed below (pp. 18-24), Ozburn-Hessey's opening brief does not challenge the Board's finding that unilaterally increasing the enforcement of its policy violated Section 8(a)(5) and (1) of the Act.

employees, Ozburn-Hessey had caught them on video leaving; if so, whether they had permission; and whether they knew of any other employees who left the building after clocking in. (JA 9; 501-02, 504-05.)

One employee who received questionnaires was Jerry Smith, Sr.[3] (JA 9; 501-02, 504-05.) Smith Sr. was one of the two "presumed chairs" of the Union's organizing campaign, and Ozburn-Hessey had previously unlawfully discharged him for his union activities. *Ozburn-Hessey*, 357 NLRB at 1653-54. When Smith Sr. received his questionnaires, he answered that he had not left the building during his shift. (JA 9; 501, 504.) Ozburn-Hessey subsequently discharged him and his termination notice states that he was discharged for lying on the questionnaires. (JA 9; 507.) There is no evidence of any other employee receiving discipline for providing false information on a questionnaire. (JA 9.)

II. PROCEDURAL HISTORY

Acting on charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that Ozburn-Hessey committed dozens of violations of the Act, including, in relevant part, by changing its timekeeping equipment without notifying or bargaining with the Union and by discharging Keele, French, Wade, Smith Sr., and Williams. (JA 468-86.) After a hearing, an

[3] There are two Jerry Smiths in this case. The Board referred to the elder Jerry Smith as "Smith Sr." and his son as "Smith Jr.." (JA 3 n.7.)

administrative law judge dismissed some allegations and found numerous violations of the Act. More specifically, the judge found, in relevant part, that: (1) Ozburn-Hessey's timekeeping-equipment change was not material and substantial and therefore was lawful; (2) Keele's discharge therefore did not violate the Act; (3) the discharges of French, Wade, and Smith Sr. did not violate the Act; and (4) Ozburn-Hessey unlawfully discharged Williams. (JA 23-100.) The Union, the General Counsel, and Ozburn-Hessey all filed exceptions to the judge's decision. (JA 2 n.1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Ring and Members Pearce and McFerran) unanimously reversed the judge's finding that Wade's discharge did not violate Section 8(a)(3) and (1) the Act. (JA 6-8.) The Board majority (Chairman Ring, dissenting) also affirmed the judge's finding that Williams' discharge violated Section 8(a)(3) and (1), reversed the judge's findings that French's and Smith Sr.'s discharges did not violate the Act, and found that the change to the timekeeping equipment was material and substantial, so that change and the resulting discharge of Keele violated Section 8(a)(5) and (1). (JA 6, 8-11.) The Board also found 16 additional violations of the Act that are not contested. (JA 2-6, 10-12.)

To remedy the violations, the Board ordered Ozburn-Hessey to cease-and-desist from those violations and from violating the Act "in any other manner." (JA

14.) It also ordered Ozburn-Hessey to offer reinstatement to Keele, Wade, French, Smith Sr., and Williams, and to make them whole. (JA 13.) The Board further ordered Ozburn-Hessey to provide requested information it unlawfully withheld from the Union, bargain with the Union before implementing any changes to employees' terms and conditions of employment, make employees who suffered losses as a result of its unilateral changes whole, and, at the Union's request, rescind those changes to employment terms. (JA 15-16.) The Board's Order requires that Ozburn-Hessey post a remedial notice to employees and that either its top-ranking Memphis manager or its top-ranking human resources official read the notice aloud or that a Board agent read the notice in the presence of one of those managers. (JA 16.) Finally, due to Ozburn-Hessey's "extraordinary record of law breaking," the Board ordered it to post the remedial notice for 3 years, publish the notice in two publications of broad circulation and local appeal, and require all supervisors and managers to attend at least one reading of the notice. (JA 14-16.)

SUMMARY OF ARGUMENT

Ozburn-Hessey's change to the Kronos timekeeping system materially affected employees' terms of employment. It required them to submit leave requests electronically rather than in person, thereby extending the time it took to hear back. It also involved more screens and functions that could render employees late if they pressed the wrong button. Indeed, Keele was late to work

because she had to wait for the homepage to load on the Kronos timeclock, which she would not have had to do with the old equipment. Given those circumstances, substantial evidence supports the Board's findings that the change to Kronos and Keele's resulting discharge violated Section 8(a)(5) and (1).

Substantial evidence also supports the Board's findings that Ozburn-Hessey violated Section 8(a)(3) and (1) by discharging French and Wade. French's open union activity at a time and place when at least two supervisors were observing such activity reasonably led the Board to infer that Ozburn-Hessey knew of her actions. Moreover, the timing of her discharge and Ozburn-Hessey's disparate treatment of her also supports the Board's finding. The disparate treatment—discharging her for reaching 13 attendance points when it rarely did so—also supports the Board's finding that Ozburn-Hessey did not carry its burden of proving it would have discharged her absent her union activity. As to Wade, similarly, the timing of his discharge just a day after he signed a union card, Ozburn-Hessey's opportunity to view his open union activity, and his disparate treatment—discharging him for briefly leaving the building during his shift when it did not discharge other employees—supports the Board's finding that Ozburn-Hessey knew of his union activity.

As to Smith Sr.'s discharge, the Board reasonably rejected Ozburn-Hessey's defense that it discharged him for lying on a questionnaire. It had never done so

with any other employees despite widespread use of investigatory questionnaires. Smith Sr.'s status as the primary union organizer, whom Ozburn-Hessey had unlawfully discharged in the past, indicates that Ozburn-Hessey had a high hurdle to overcome to carry its burden of proof. In such circumstances, substantial evidence supports the Board's finding that Smith Sr.'s discharge violated Section 8(a)(3) and (1).

Both substantial evidence and extant precedent support the Board's finding that Williams' discharge violated Section 8(a)(3) and (1). As the Board found, whether Williams was entitled to a union representative and whether Ozburn-Hessey could discharge him simply for requesting one are separate questions. As to the latter, the Board reasonably found that the Act protected Williams' attempt to further the Union's campaign to notify employees of their representational rights and his enlistment of Smith Sr. in doing so. Because his activity was protected, Ozburn-Hessey could not lawfully discharge him for it absent opprobrious conduct. The Board reasonably found that Williams' alleged insubordination in the course of his protected activity did not constitute such opprobrious conduct, so his discharge violated Section 8(a)(3) and (1).

The Board acted within its discretion by ordering Ozburn-Hessey to post the notice for 3 years, require supervisors and managers to attend its reading, and publish it in two publications. Ozburn-Hessey's extraordinary record of

lawbreaking requires extraordinary remedial measures. All three measures chosen by the Board are aimed at informing current, past, and future employees, supervisors, and managers of employees' rights under the Act, which Ozburn-Hessey has now failed to respect for the seventh time. As such, the Board reasonably exercised its broad remedial discretion.

STANDARD OF REVIEW

The Court must uphold the Board's factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). "The Board's application of the law to the facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review." *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). Such findings of fact include determining an employer's motive for taking adverse employment actions against employees. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019).

Contrary to Ozburn-Hessey's claimed standard of review (Br. 15), unless the Board overturns the administrative law judge's credibility determinations, this Court does not treat Board decisions overruling an administrative law judge's decision differently from those that agree with the administrative law judge. *NLRB*

v. Galicks, Inc., 671 F. 3d 602, 607 (6th Cir. 2012) ("When the Board does not overturn the ALJ's credibility findings, the sole question for us on appeal is whether substantial evidence supports the Board's findings. Whether the record also supports the ALJ's conclusions is irrelevant to the inquiry."). This Court thus examines all Board decisions equally carefully, "regardless of whether the Board and ALJ reached opposite inferences and conclusions." *Id*.

With respect to legal findings, "this Court is deferential to the Board's interpretation" of the Act and, as "long as the [Board]'s interpretation of the statute is reasonably defensible, this Court will not disturb such interpretation." *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006) (internal quotation omitted). The Court "may not reject the Board's interpretation 'merely because the courts might prefer another view of the statute.'" *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

Ozburn-Hessey does not contest most of the violations the Board found. The uncontested violations include the Board's findings that Ozburn-Hessey violated Section 8(a)(1) by:

- Operations Manager Margaret Bonner ordering Smith Sr. and Whitley to leave Ozburn-Hessey's premises while they were soliciting union support on May 14, 2013 (JA 2-3, 26-28; 445-49);
- Director of Operations Phil Smith removing union literature from the employee break room on May 15 (JA 3, 29-31; 293-302);
- Bonner telling employees that they should quit on May 17 (JA 3, 34-35; 435, 443);
- Human Resources Manager Sara Wright telling employees they did not have representational rights on September 5 (JA 4-6, 36-38; 171); and,
- Manager Ken Ball removing union literature from an employee break room on two occasions. (JA 11-12; 432-33.)

Similarly uncontested are the Board's findings that Ozburn-Hessey violated Section 8(a)(5) and (1) by:

- Unilaterally increasing its match to employees' 401(k) contributions (JA 10, 82; 476, 491);
- Unilaterally implementing a mandatory exercise program (JA 3, 83-84; 216-17);
- Unilaterally implementing an advance-notice requirement for requesting leave (JA 3, 87-89; 168-69, 303-05);
- Unilaterally changing its policy of allowing employees to use leave for early dismissal (JA 3, 89-90; 183, 308-11);
- Unilaterally changing shift times for two employees (JA 11; 323-24);
- Unilaterally changing the Shipping Department employees' schedules from 4 days to 3 days (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally splitting the Shipping Department employees into two teams (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally cutting Shipping Department hours (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally changing the start time in the Inventory Department (JA 3, 91-92; 327, 428-29);
- Unilaterally increasing enforcement of its policy against leaving the warehouse during work hours (JA 3, 92; 210-15, 318-21); and,

- Refusing to provide the Union with information relevant to its duties as bargaining representative. (JA 3, 93; 478-79, 492.)

Because Ozburn-Hessey did not contest those violations in its opening brief, it has waived any challenge to those findings. *See Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (where employer "does not argue in its appellate brief against the validity of the Board's rulings . . . [a]ny challenges to those rulings have thus been waived"). The Board is therefore entitled to summary enforcement of the portions of its Order corresponding to the uncontested violations. *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991). Moreover, the uncontested violations "do not disappear altogether," but "lend[]" their aroma to the context in which the contested issues are considered." *Gen. Fabrications*, 222 F. 3d at 232.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OZBURN-HESSEY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY CHANGING ITS TIMEKEEPING EQUIPMENT AND DISCHARGING LAUREN KEELE

Section 8(a)(5) of the Act requires employers to bargain with their employees' unions over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964); *Vanguard Fire*, 468 F.3d at 960. Section 8(d) defines those mandatory subjects as "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. An employer who violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1), which makes it unlawful for an

employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act, 29 U.S.C. § 158(a)(1). *Galicks*, 671 F.3d at 608 n.2.

An employer thus violates its bargaining obligation if it unilaterally changes its employees' terms or conditions of employment. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)); *Loral Def. Sys.-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999) ("If an employer changes wages or other terms without affording the Union an opportunity for adequate consultation," it violates the Act). An employer's obligation to bargain before changing employees' terms and conditions of employment commences on the date of the union's election, not the date of the union's eventual certification. *Alta Vista Regional Hosp.*, 357 NLRB 326, 326-27 (2011), *enforced sub nom.*, *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012).

To be unlawful, a unilateral change must be material and substantial. *See NLRB v. Brown-Graves Lumber Co*., 949 F.2d 194, 197 (6th Cir. 1991); *Indian River Mem'l Hosp., Inc*., 340 NLRB 467, 473 (2003). Here, Ozburn-Hessey admits that it changed its timekeeping equipment and that it failed to notify and bargain with the Union. The only issues are whether the change was material and substantial, and, if so, whether Keele's discharge was a result of the unilateral change. As shown below, substantial evidence supports the Board's findings that they were.

A. The Change to the Kronos Timekeeping System Substantially and Materially Affected Employees' Terms and Conditions of Employment

The bar to show that a unilateral change materially affected employees' terms and conditions of employment is not particularly high. Indeed, the Board has characterized a change as material and significant so long as it is not de minimis. *See Rangaire Co.*, 309 NLRB 1043, 1043 (1992), *enforced*, 360 F.3d 206 (D.C. Cir. 2004) (unilateral withdrawal of an extra 15-minute lunch break once per year violated Section 8(a)(5)). Even minor increases in the burdens that employees face, such as eliminating employees' ability to donate blood while on the clock twice per year, violate Section 8(a)(5). *Verizon New York, Inc.*, 339 NLRB 30, 37-38 (2003), *enforced*, 360 F.3d 206 (D.C. Cir. 2004). The change to Kronos meets that undemanding standard.

As the Board found, one significant aspect of the new system was that it changed employees' process for requesting leave. (JA 11.) Before Kronos, employees physically submitted leave requests to their supervisors and could discuss that leave with those supervisors. If their supervisors had problems with the leave request or intended to deny it, employees heard about those problems immediately. With the Kronos system, employees had to wait up to a day to find out if their leave requests would be granted because the managers had to log into

the system to do so. Although managers had the option to wait to sign a leave request under the old system, Kronos rendered that option a necessity.

Delays in granting leave requests can cause employees to either prematurely rearrange their affairs or can force them to wait until the last minute to do so. Such delays have far more than a de minimis effect on employees who have to arrange child care or call out from a second job. Indeed, Ozburn-Hessey does not dispute the Board's finding that it violated Section 8(a)(5) by implementing an advance-notice requirement for requesting leave, and that requirement may have affected at least one employee who testified at the hearing. (JA 87-89.) A system that takes longer to grant leave requests affects employee interests as much as a formal rule imposing a waiting time.

In addition, Kronos is a sophisticated system with more functions than a simple three-button timeclock. Employees who accidentally hit the wrong button on the touchscreen have to navigate a menu of options to return to the home screen, while waiting for each separate page to load. (JA 10.) Manual clocks impose no such burden; there is no loading time or complicated menu. As the Board pointed out, Kronos "came with a 50-page instruction manual" to describe its various functions. (JA 10.) Employees used that sophisticated system at least four times per day. Thus, the increased burdens on employees constitute more than a minimal change in their terms and conditions of employment.

Ozburn-Hessey's reliance (Br. 18) on *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), is misplaced. As the Board pointed out, that case solely involved a change from handwritten timecards to a timeclock, two technologies that "accomplish the same task of recording an employee' start and stop times" and "place approximately the same burdens on employees." (JA 10 n.36.) By contrast, Kronos included a significant additional function—submitting leave requests—and came with an increased risk of delays due to mistakenly hitting the wrong button. The penalty for such delays could be severe, as in Keele's case. For that reason, *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978), and *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220-21 (2005), are also distinguishable; an employer's decision to cease providing coffee to employees or make a minor change to the location and surface of the parking lot that employees use cannot lead to an employee's discharge the way changes to timekeeping equipment can.

There is no merit to Ozburn-Hessey's contention (Br. 18) that the only aspect of its unilateral change to Kronos that matters is its change to the touchscreen. The change to how employees request leave was just as much part of the change to Kronos as the change to touchscreen buttons. It is irrelevant that Keele's discharge had nothing to do with the change to leave requests; the questions of whether the change itself violated the Act and whether Keele's

discharge resulted from the change are separate. The Board appropriately considered all circumstances of the change to Kronos rather than the touchscreen alone.

Far from displaying a "remarkable lack of confidence in [Ozburn-Hessey's] employees' ability to deal with 21st century technology" (Br. 20), the Board's decision appropriately relies on its expertise in determining the effect of changes in the workplace. Employees who are familiar with touchscreens are also doubtlessly familiar with how pressing a button on a sensitive screen can lead to more mistakes than doing so on a clock with physical buttons. Moreover, the Board is particularly suited to determining whether a change from interacting with a supervisor in person to interacting solely through a virtual timeclock imposes additional burdens on employees. *See Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863 (6th Cir. 1990) (Board's determination of what constitutes a change to conditions of employment "is entitled to considerable deference") (internal quotation omitted). Ozburn-Hessey has provided no convincing reason to displace the Board's judgment.

Nor does it matter that the change to Kronos did not cause a "lasting" change to employees' work. (Br. 20). Simply because a change may have a greater effect at first does not mean it does not affect employees' terms and conditions of employment at all. Changes to employee schedules, for instance, can

cause far greater disruption in the short term than later, when employees have had time to adjust to the change. And although there was some record testimony that Ozburn-Hessey reversed part of the change and allowed employees to use paper leave slips again (JA 372), neither the judge nor the Board found that the change had been fully rescinded. In such circumstances, the Board reasonably concluded that the change to Kronos was material and substantial and that Ozburn-Hessey therefore violated Section 8(a)(5) by implementing it without notifying or bargaining with the Union.

B. The Change to Kronos Was a Factor in Keele's Additional Attendance Point and Subsequent Termination

If an unlawful unilateral change is "a factor" causing an employee's discharge, the discharge violates the Act. *See Behnke, Inc.*, 313 NLRB 1132, 1139 (1994), *enforced*, 67 F.3d 299 (6th Cir. 1995). Ozburn-Hessey does not dispute that proposition but contends that Keele was not discharged as a result of the change to Kronos. Substantial evidence supports the Board's finding that she was. (JA 11.)

It is undisputed that Keele had accumulated 12 attendance points before April 30, 2013. Keele testified, without contradiction, that she was on time when returning from lunch on that day. (JA 352.) She attempted to clock in, hit the wrong button, and needed to press the "home" button to return to the original screen. (JA 353-54.) But while she was waiting for the home screen to load, the

clock turned to the next minute, rendering her one minute late. (JA 355.) Ozburn-Hessey gives no reason why the Board should not have relied on her testimony. Thus, the record evidence establishes that Keele became late when she was waiting for the home screen to load. It takes no great inferential leap for the Board to find that if she had not been late to her shift, she would not have received an additional attendance point, and would not have been discharged for accumulating 13 points.

Although Ozburn-Hessey labels the Board's conclusion as "pure speculation" (Br. 22), its argument that Keele could have hit the wrong button on the old timeclock is far more speculative than the Board's finding. Keele's testimony establishes that hitting the wrong button on the old clock would not have mattered, because the old clocks did not cause extra pages to take time to load when employees hit the wrong button. That she had successfully hit the correct button on the new timeclock at other times (Br. 23) does not erase her failure to do so on April 30. Nor does it matter that she cut it close that day (Br. 23); she was not running late enough to preclude clocking in on time if she did not have to wait for the homepage to load. Thus, it was eminently reasonable for the Board to conclude that Keele would not have been late if she had used the old timeclock. (JA 11.) Particularly given that the change need only be *a* factor in her discharge, not *the only* factor, Keele's testimony is dispositive.

Finally, Ozburn-Hessey's argument (Br. 22-23) that the change to touchscreen buttons from physical buttons should be analyzed separately from the other aspects of the change to Kronos is meritless. The question is whether the change Ozburn-Hessey actually implemented was a factor in Keele's discharge, not whether it could have lawfully implemented a less material or substantial unilateral change that also would have resulted in her discharge. Here, the record provides uncontroverted evidence that the change to Kronos was a factor in Keele's discharge. The Board therefore reasonably concluded that her discharge violated Section 8(a)(5) and (1).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT OZBURN-HESSEY VIOLATED SECTION 8(a)(3) AND (1) BY DISCHARGING EMPLOYEES FRENCH, WADE, SMITH SR., AND WILLIAMS FOR THEIR UNION OR PROTECTED, CONCERTED ACTIVITY

A. Discharging Employees for Their Union Activities Violates Section 8(a)(3) of the Act

An employer violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by taking adverse action against an employee for engaging in union activity. A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 430-31 (6th Cir. 1997). In most discrimination cases, the critical inquiry is whether the employer's actions were motivated by union animus. Courts are particularly "deferential when

reviewing the Board's conclusions regarding discriminatory motive." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000). "Simply showing that the evidence supports an alternative story is not enough; [the employer] must show that the Board's story is unreasonable." *Galicks, Inc.*, 671 F.3d at 608.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, courts will enforce the Board's finding of an unlawful discharge if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395. In accordance with *Wright Line*, to establish its initial burden before the Board, the General Counsel "must demonstrate that (1) the employee was engaged in protected activity; (2) that the employer knew of the employee's protected activity; and (3) that the employer acted as it did on the basis of anti-union animus." *Airgas*, 916 F.3d at 560-61. If the lawful reasons advanced by the employer for its actions are a pretext—that is,

if the reason either did not exist or was not in fact relied upon—the employer has not met its burden, and the inquiry is logically at an end. *Airgas*, 916 F.3d at 561, 565; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). In doing so, the Board may rely on a variety of factors, including the questionable timing of the adverse action, inconsistencies between the proffered reason for the adverse action and other actions of the employer, and the disparate treatment of certain employees. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

Ozburn-Hessey does not challenge the Board's finding that it bore animus against its employees' union activities. It evinced that animus immediately after the May 14, 2013 vote count when the Union re-established its presence after protracted litigation over the election and years of Ozburn-Hessey unlawfully undermining it, including by discharging key union supporters. Ozburn-Hessey unlawfully ordered employees engaged in union activity to leave one of its parking lots that day, and later that week, it unlawfully removed union literature and told employees they should quit rather than support the Union. The Board appropriately considered that backdrop in analyzing Ozburn-Hessey's discharges

of French and Wade immediately after they participated in the renewed union activity, as well as the subsequent discharges of Williams and Smith Sr., the primary union supporter. As shown below, the Board reasonably concluded that all four discharges violated the Act.

B. Ozburn-Hessey Knew of French's Union Activity and Discharged Her Because of It

i. The Board reasonably inferred that Ozburn-Hessey knew of French's open union activity in its parking lot

Just 3 days after French's May 13 pro-union solicitation in the Yazaki parking lot, Ozburn-Hessey discharged her, purportedly for being late returning from lunch and accumulating 13 attendance points. Ozburn-Hessey challenges the Board's findings that the General Counsel established that it knew of French's union activity and that it did not prove its defense that it discharged her for attendance reasons. The Board "may rely on circumstantial evidence and all relevant facts surrounding an employer's action to establish knowledge of employees' pro-union activities[.]" *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986). Such knowledge may be inferred from "the timing of the alleged discriminatory actions; the [employer]'s general knowledge of its employees' union activities; the [employer]'s animus against the [u]nion; and the pretextual reasons given for the adverse personnel actions." *N. Atlantic Med. Serv.*, 329 NLRB 85, 85 (1999), *enforced*, 237 F.3d 62 (1st Cir. 2001). Indeed, the

Board, with court approval, has inferred that an employer knew of an employee's open union activity in parking lots shared by employees and managers absent direct evidence that particular managers saw that activity. *See Holsum De P.R., Inc. v. NLRB*, 456 F.3d 265, 270 (1st Cir. 2006) (Board could infer knowledge of employee's union activities where employee openly solicited in employer's parking lot, "in plain view of those entering or leaving"). Here, circumstantial evidence—the reporting of the solicitation, how Ozburn-Hessey reacted to it and similar instances, timing, and the disparate treatment of French—strongly supports the Board's finding that one or more supervisors observed French distributing union cards. (JA 8-9.)

French openly distributed union authorization cards in Ozburn-Hessey's Yazaki parking lot with Smith Sr. and Glenora Whitley. At some point while Smith Sr. and Whitley were distributing cards, two different supervisors called Bonner, French's manager, to tell her of their actions. Bonner identified Smith Sr. and Whitley, whom she and the supervisors reporting to her had no reason to know, as "two union people." (JA 4; 438.) French was an employee the supervisors who reported the solicitation knew. Thus, French's solicitation occurred both where and when managers knew such solicitation was taking place, which strongly supports the Board's inference that Ozburn-Hessey knew of her activity.

As the Board found, other circumstantial evidence also indicates that Ozburn-Hessey knew of her activity. It unlawfully ordered other employees to cease doing the exact activity French had done, then discharged her just 3 days after reports of solicitation the same day in the same location as hers. (JA 8.) *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (upholding Board's inference of knowledge from, in part, "the timing of the discharges" and "the employer's manifestation of hostility as adduced from [Section] 8(a)(1) violations"). And, as shown below, Ozburn-Hessey treated French far differently from most employees who accrued 13 attendance points. That disparate treatment further supports the Board's inference; the record reveals no reason to treat French differently except for her recent union activity. In short, Ozburn-Hessey's general knowledge of union activity in its parking lots, its animus against that activity, and its disparate treatment of French all indicate that it knew of her union activity. *See Health Care Logistics*, 784 F.2d at 236 (evidence permitting an inference of employer knowledge includes, *inter alia*, "(1) open discussions about the union on the premises during work hours; (2) the timing of the discharge; [and] (3) adequacy of the employer's reasons for discharge").

Although Ozburn-Hessey strenuously contends that the Board rejected the judge's credibility determinations in inferring knowledge (Br. 36), it fails to identify any specific credibility-based factual finding that the Board overturned.

Ozburn-Hessey misreads the judge's factual findings in contending (Br. 34-35) that the Board gave no reason to distinguish its finding that Osburn-Hessey had no knowledge of Nate Jones' union activities from its finding that knowledge was established with respect to French's union activity. Jones' only protected activity was a comment he made about employee wages at a meeting 4 months before his discharge for leaving equipment running. (JA 77.) The judge specifically credited the testimony of the manager who discharged Jones that she did not know about those comments or any other protected activity and the Board adopted the judge's credibility resolutions. (JA 2 n.2, 3 n.9, 77.) In contrast, the judge did not specifically credit French's managers' similar denials; instead, he based his analysis solely on the lack of credited direct evidence of knowledge. (JA 48-49, 59-60.)

Ozburn-Hessey's claim (Br. 36) that Whitley's testimony contradicts the Board's finding that supervisors likely knew of French's activity is similarly meritless. Bonner testified that two different supervisors reported union activity in the parking lot to her. Whitley testified that after French, who openly wore union buttons, stopped handbilling and returned to the warehouse, some unknown person—who was not shown to be one of the two supervisors who reported the handbilling to Bonner—approached Whitley and Smith Sr. to tell them to move. (JA 26.) Whitley's testimony does not, nor does any other evidence, preclude the

Board's inference that one of the reporting supervisors or someone else saw French, especially given the other circumstantial evidence of knowledge. Thus, the record does not support Ozburn-Hessey's claim that it had "no other potential source" (Br. 37, quoting JA 17) of information about French's union activity.

ii. The Board reasonably rejected Ozburn-Hessey's affirmative defense that, absent her union activity, it would have discharged French for her poor attendance

The Board also reasonably rejected Ozburn-Hessey's contention that it carried its burden of proving that it discharged French because she had accumulated too many attendance points. (JA 8-9.) An employer does not carry that burden merely by showing that—in addition to the existence of its unlawful reason—it also had a legitimate reason for its action. Rather, the employer must demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *See Transp. Mgmt*., 462 U.S. at 395; *NLRB v. Ky. May Coal Co.*, 89 F.3d 1235, 1241-42 (6th Cir. 1996); *W.F. Bolin Co*., 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996). Here, although Ozburn-Hessey's written policy stated that it could discharge employees who reached 13 attendance points, it rarely did so. The Board relied on seven examples of employees who had not been discharged after exceeding 13 attendance points. (JA 9.) Against those seven, Ozburn-Hessey's only example of any other employee it had discharged for accumulating only 13 points is Keele,

whose discharge was unlawful for the reasons discussed above, pp. 27-29. Given those circumstances, it was reasonable for the Board to find that the single example of enforcing the attendance policy, given the history of non-enforcement, was insufficient to carry Ozburn-Hessey's burden of proof.

Ozburn-Hessey's claim (Br. 38) that the Board did not analyze the "actual comparability" of the seven employees who exceeded 13 points before being discharged is perplexing. The Board cited the points they received without being discharged, which reached as many as *46*, an amount far more than 13. Ozburn-Hessey has not contended that something about French's attendance points made those points any worse than another employee's. Thus, no further examination was necessary to conclude that Ozburn-Hessey disparately enforced its attendance policy.

Contrary to Ozburn-Hessey's argument (Br. 38-39), the Board did not rely on unadmitted evidence. It relied on its own factual findings from a prior proceeding. The Board may properly consider its prior factual findings as substantive evidence. *NLRB v. Harrah's Club*, 403 F.2d 865, 873 (9th Cir. 1968) (citing cases). As this Court has stated, "[t]he findings of agencies made in the course of proceedings which are judicial in nature should be given the same preclusive effect as findings made by a court." *NLRB v. Master Slack*, 773 F. 2d 77, 81 (6th Cir. 1985). Here, the Board found in a prior case that Ozburn-Hessey

allowed employees to receive far more than 13 attendance points without discharging them and that it only met its *Wright Line* defense by showing that the two employees at issue were on pace to "amass more points than any of the comparables." *Ozburn-Hessey*, 362 NLRB at 1534. In its opening brief, Ozburn-Hessey gives no reason why the Board could not rely on its prior factual findings. (Br. 38.)

Nor does it matter that the cited comparators were from 2011 instead of 2013. (Br. 38.) As the Board found, the attendance policy in place was the same in both years. Moreover, the Board specifically found that Ozburn-Hessey did not prove that it made any decision to start enforcing its attendance policy more strictly in the interim, which would have been unlawful in itself. (JA 9.) Ozburn-Hessey does not challenge that finding in its opening brief. Thus, the Board was left with one more recent example weighed against seven examples that came under the same attendance policy. Substantial evidence thus supports the Board's judgment that the single example did not meet Ozburn-Hessey's burden of proving its *Wright Line* defense, so its discharge of French violated Section 8(a)(3) and (1).

C. Ozburn-Hessey Knew of Shawn Wade's Union Activity and Discharged Him Because of It

Ozburn-Hessey discharged Wade just a day after he signed a union card, claiming he had stolen time despite never before treating briefly leaving the building as stealing time. As with French, circumstantial evidence supports the

Board's finding that Ozburn-Hessey knew of Wade's union activity. In showing knowledge, the Board need not show "that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information" about those activities. *Martech MDI*, 331 NLRB 487, 488 (2000), *enforced*, 6 F. App'x 14 (D.C. Cir. 2001). Here, based on the circumstances and Ozburn-Hessey's probable information, the Board reasonably inferred that it knew that Wade signed a union card in its parking lot.

As the Board found, after the tally of ballots demonstrated the Union's victory, several pro-union employees, including Anita Wells, openly solicited signatures on authorization cards in Ozburn-Hessey's parking lots. Ozburn-Hessey "witnessed some of this activity and was undoubtedly aware of it." (JA 7.) At the request of Wells, Wade openly signed a union authorization card on May 14 in a parking lot that managers, supervisors, and employees shared. (JA 6-7.) Wells was so well-known as a union supporter that even Randall Coleman, a senior executive who had no reason to work directly with unit employees, knew who she was. (JA 7.) The Board found that Coleman drove by while Wade was signing his card and "likely saw Wells and Wade." (JA 49.)

Thus, Coleman saw Wells and Wade together in a parking lot where Ozburn-Hessey knew that pro-union employees were soliciting authorization cards.

Managers generally recognized Wells as a union supporter who was soliciting such cards. And "[b]oth managers and employees used the parking lot" where Wade signed the card (JA 7). The record shows that managers monitored employees in the parking lot. After all, although there is no evidence that anybody specifically saw manager Ken Ball observing Wade, Ball did see Wade leaving the warehouse to move his car in that same parking lot the next day. Thus, Ozburn-Hessey's managers had ample opportunity to observe Wade's union activity.

And as the Board found, the circumstantial evidence here strongly shows that they did observe it. As discussed above (pp. 32-33), the Board may infer employer knowledge through the timing of the discharge, the employer's general knowledge of union activity, the employer's animus, and disparate treatment. *See also Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enforced*, 97 F.3d 1448 (4th Cir. 1996). Here, Wade was discharged the day after he signed a union card. Ozburn-Hessey knew that employees were signing union cards on May 14, when Wade signed one, and bore admitted animus against that activity; it had unlawfully ordered Smith Sr. and Whitley to stop soliciting signatures earlier that same day. Thus, timing, general knowledge, and animus all support the Board's inference that Ozburn-Hessey observed Wade's union activity on May 14.

Ozburn-Hessey's disparate treatment of Wade also supports the Board's finding that it knew of his May 14 union activity. As the Board found, and

Ozburn-Hessey does not contest (Br. 30-35), it treated Wade differently from other employees who left for a few minutes during their shifts. Employees B. Smith and Banis both left their shifts to move their cars. Ozburn-Hessey did not punish Smith the first time he did so and only assessed Banis a single attendance point. (JA 7-8.) Moreover, employees "almost uniformly testified that before Wade's discharge, employees regularly left the building without consequence, sometimes in full view of supervisors." (JA 8.) The fact that Ozburn-Hessey treated other employees leaving the building for a short time as, at most, a minor offense, but discharged Wade for a first offense, indicates that his union activity was a reason for his discharge. *See Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011) (finding that knowledge can be inferred from, *inter alia*, "disparate treatment").

Despite Ozburn-Hessey's claim (Br. 31-32), the Board did not overturn any of the judge's credibility determinations. The judge found that Coleman likely saw Wade. Wade was the only witness to testify that Coleman saw him, as Wells testified only that Coleman passed the two of them in the parking lot. (JA 48-49.) Accordingly, it was reasonable for the Board to read that finding as crediting Wade's statement that Coleman saw him. Nor did the Board fail to address the testimony that Coleman did not know who Wade was. The Board specifically noted that testimony (JA 7) but relied on other circumstantial evidence, discussed above, to establish knowledge. Because the Board did not tie that knowledge to

any particular supervisor, Coleman's lack of involvement in Wade's discharge (Br. 33-35) is not relevant. And as discussed above regarding French's discharge (pp. 34-35), that the Board credited a manager's testimony that she did not know of Nate Jones' protected activity did not require the Board to also credit Ozburn-Hessey's managers' testimony that they did not know of Wade's union activity.

Ozburn-Hessey's sole contention before this Court is that it did not know of Wade's union activity. It does not dispute the Board's finding that it failed to meet its *Wright Line* defense of showing it would have discharged him absent that activity. Therefore, because substantial evidence supports the Board's inference that Ozburn-Hessey knew of Wade's union activity, his discharge violated Section 8(a)(3) and (1).

D. Ozburn-Hessey Did Not Prove That It Would Have Discharged Smith Sr. Absent His Union Activity

Ample evidence also supports the Board's finding that Ozburn-Hessey unlawfully discharged Smith Sr. for purportedly lying on questionnaires it distributed to employees after unlawfully increasing enforcement of its policy against leaving the facility during work hours. Ozburn-Hessey had previously unlawfully discharged Smith Sr. *Ozburn-Hessey*, 357 NLRB at 1633. The Board observed at that time that Ozburn-Hessey viewed Smith Sr. was one of the two "presumed chairs" of the Union's organizing campaign. *Id*. at 1643. Smith Sr. had returned to work only as the result of a court order. Moreover, several of the

uncontested violations Ozburn-Hessey committed in this case were aimed specifically at Smith Sr.'s union activity. Indeed, Ozburn-Hessey unlawfully ordered Smith Sr. to cease handbilling in the Yazaki lot and unlawfully removed union literature he distributed from the employee break room. (JA 2-3, 26-31.) Shortly before his discharge, an Ozburn-Hessey manager unlawfully told Smith Sr. that he lacked representational rights. (JA 4-6, 36-38.) Smith Sr. was also the employee Stacey Williams asked to represent him during the incident that led to Williams' unlawful discharge, discussed below (pp. 48-49).

It is undisputed that Ozburn-Hessey knew of Smith Sr.'s union activity and bore animus against it. The only question here is whether Ozburn-Hessey met its burden of "show[ing] by a preponderance of the evidence that it would have taken the same action even if [Smith Sr.] had not engaged in protected activity." *Ky. May Coal Co.*, 89 F.3d at 1241. Showing that it had a different partial motivation "does not erode the substantial evidence that anti-union animus also contributed[.]" *Galicks*, 671 F.3d at 610. Given Ozburn-Hessey's history of severe animus against Smith Sr.'s union activity, the Board reasonably concluded that it did not meet its substantial rebuttal burden. *See Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011).

Ozburn-Hessey ostensibly discharged Smith Sr. for lying on a questionnaire it required employees who had been seen leaving the warehouse during working

time to complete. As the Board reasoned, Ozburn-Hessey "had no need to rely on Smith Sr.'s answer to the questionnaire" because it already had video evidence of his leaving. (JA 9.) Further, as the Board found, there is no record evidence that Ozburn-Hessey had *ever* discharged an employee for giving false information on a questionnaire despite its "widespread use" of such questionnaires. (JA 9-10.)

Rather, as the Board pointed out (JA 9-10), Ozburn-Hessey has concluded that an employee gave false information on a questionnaire without subjecting that employee to discipline. Thus, it did not discipline Jennifer Smith after concluding that she had lied about touching another employee in the bathroom. (JA 10.) The Board reasonably determined that an employer following a nondiscriminatory policy "would have disciplined employees the same regardless of how it had determined untruthfulness." (JA 10 n.33.) That Jennifer Smith's situation was not exactly the same as Smith Sr.'s does not mean Ozburn-Hessey carried its burden of proving that it would have discharged Smith Sr. absent his union activity. There is no record evidence that Ozburn-Hessey ever disciplined an employee for falsely answering a questionnaire and it did not discipline the closest comparator to Smith Sr. that the Board was presented with. In that circumstance, the Board could reasonably conclude that Ozburn-Hessey did not meet its burden.

Ozburn-Hessey claims (Br. 41-42) that the Board overruled the judge's credibility determinations without pointing to any specific credibility finding that

the Board ignored. The facts are undisputed: Smith Sr. gave incorrect information on a questionnaire and Ozburn-Hessey discharged him, purportedly for providing that information. The Board drew different conclusions from the circumstances surrounding Smith Sr.'s discharge, which is not the same as crediting different evidence. *See Galicks*, 671 F.3d at 608 (where Board and judge disagreed, Court's role is not to determine whose "interpretation of the facts is correct, but only whether there is substantial evidence in the record to support the Board's findings").

Ozburn-Hessey also mischaracterizes the Board's findings (Br. 42-43) in contending that the Board incorrectly relied on Smith Sr.'s status as the primary union organizer to heighten the rebuttal burden. The Board did not find that discipline issued to a union organizer always violates the Act. The Board reasoned that where the employer has shown particularly strong animus against an employee's union activity, the employer's reason for discharge should be examined more carefully. (JA 10 n.34.) That proposition is consistent with the Board and reviewing courts' case law. *See Bally's*, 646 F.3d at 936 ("Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial."); *NLRB v. Hotel Emps. & Rest. Emps. Int'l Union Local 26*, 446 F.3d 200, 209 (1st Cir. 2006) ("the stronger the

General Counsel's case," the harder it is to meet rebuttal burden); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1207 (2014) (same).

In short, there is strong evidence that Ozburn-Hessey wanted to discharge Smith Sr. for his union activity. The evidence it offered of a different reason—that Smith Sr. gave false information on a questionnaire—is comparatively weak absent evidence that Ozburn-Hessey ever disciplined anybody else for doing so despite its widespread use of questionnaires. Because Ozburn-Hessey has not "shown that the Board's story is unreasonable," *Galicks*, 671 F.3d at 608, its finding that Smith Sr.'s discharge violated Section 8(a)(3) and (1) should be enforced.

E. Ozburn-Hessey Unlawfully Discharged Stacey Williams for His Protected Activity of Requesting a Union Representative

i. The Act protected Williams' request for a representative

Williams repeatedly requested union representation, first in a conference room when meeting with two managers, then when they followed him to the shop floor. Section 7 of the Act explicitly protects both union activity and concerted activities taken for the purpose of "other mutual aid or protection." 29 U.S.C. § 157. An individual employee's action is concerted when "the employee acted with the purpose of furthering group goals." *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998). This Court gives "great deference" to the Board's determination of whether Section 7 protects an employee's activity. *Id*. As shown

below, the Board reasonably concluded that Williams engaged in union and protected, concerted activity.

Unionized employees have the right to representation at investigatory meetings that the employee reasonably believes might result in discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264-68 (1975). The Board explicitly extended that right to situations where a union has been elected but not yet formally certified. (JA 4-6, citing *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980).) Ozburn-Hessey has not challenged that finding on appeal. Here, the Union distributed cards to employees to wear with their badges informing them of their rights, including asking for union representation if management questioned them. Williams did exactly that when, as described above (pp. 10-11), Maxey and Wright called him into a conference room to receive discipline.

As the Board pointed out, Williams reasonably believed that he had been called into an investigatory meeting that might result in discipline. (JA 6 n.21.) There is no evidence that either manager told him the purpose of the meeting before calling him into the conference room. Thus, Williams had no reason to know that Ozburn-Hessey had already decided on what discipline to impose. As the Board found, although Ozburn-Hessey "was not obliged to grant the request" for representation, "[t]he protected nature of an employee's request for a union

representative does not depend on whether the employer is obliged to grant the request." (JA 64.)

As the Board explained, a contrary rule would make no sense. If an employee does not know that the employer has already decided to impose discipline, the employee has every reason to believe that he has a right to union representation. It would be "a very pernicious innovation" to allow employers to *discharge* employees in such circumstances. (JA 64.) Employers would then have an easy workaround for ignoring their employees' *Weingarten* rights; it is unlikely that employees would continue to request union representation if they knew that, regardless of the reasonableness of their requests, they could be discharged for doing so.

Moreover, as the Board reasoned, the circumstances here even more strongly support a finding that the Act protected Williams' requests. His requests for representation "furthered the Union's efforts to defend its representative status from [Ozburn-Hessey's] continuing unfair labor practices." (JA 64.) The record is clear that the Union engaged in a campaign to notify employees of their rights and encourage them to request representation. Williams relied on that campaign in asserting his right to representation. Doing so "constituted action in furtherance of the Union's effort to assert its continuing presence in the workplace, an effort the Union initiated by giving the employees the 'Weingarten cards.'" (JA 64.) Thus,

his request constitutes union activity, the heart of what the Act protects. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 575 (1978) (union's actions to "boost its support and improve its bargaining position" are "closely tied to vital concerns of the Act").

Even if Williams had requested representation on his own, apart from any concerted union action, it still would have been protected in these circumstances. As the Board found, Williams beckoned to Smith Sr., the primary union organizer, to help represent him. (JA 64.) He was therefore clearly attempting to initiate group activity and "express[] the sentiments of the other employees whose votes had resulted in the Union's certification." (JA 65.) To allow Ozburn-Hessey to discharge him solely for doing so would eviscerate Section 7's protections.

Ozburn-Hessey largely ignores (Br. 24-27) the Board's actual reasoning in favor of a straw man. At no point does it contest the Board's reasoning that "whether Section 7 of the Act protects an employee who requests a representative's presence" and "whether an employer has a legal duty to honor the employee's request" are separate issues. (JA 64.) Instead, it simply assumes that if it did not have to grant Williams' request then it must also have had the right to discharge him for making the request. Notably, the Board explicitly found that Williams did not have a right to have a union representative present during his interview. (JA 6 n.21, 64.) Ozburn-Hessey's strenuous contention that the Board misapplied its precedent is thus mistaken.

Similarly, Ozburn-Hessey's claim that the Board's "*Interboro* doctrine" does not apply where there is no collective-bargaining agreement in place misreads the Board's use of that doctrine. The Board drew an *analogy*. When an employee mistakenly asserts a contractual right, the employer cannot discharge the employee for doing so. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). Thus, where assertion of a reasonable but mistaken belief in a *contractual* right does not warrant discharge, it makes sense that where an employee reasonably but mistakenly asserts a *statutory* right, the employer cannot discharge the employee for doing so. (JA 6 n.21.) The Board did not claim that Williams asserted a contractual right; instead, it reasoned that simply because he was not entitled to a representative did not mean Ozburn-Hessey could discharge him for requesting one. (JA 6 n.21.) That is fully consistent with Board precedent regarding a reasonable mistaken belief in statutory rights. *See Int'l Transp. Serv., Inc.*, 344 NLRB 279, 288 (2005) (employee's picketing to compel employer to recognize her as one-person unit constituted concerted protected activity even though employer had no statutory duty to recognize one-person unit). Ozburn-Hessey has therefore given this Court no reason to overturn the Board's reasonable construction of the Act.[4]

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[4] Ozburn-Hessey's claim (Br. 26) that *Anchortank* shows that "Williams was not entitled to a union representative" misses the Board's point that whether he was entitled to union representative and whether he could be fired for requesting one

ii. Williams did not lose the Act's protection

Employees can lose the Act's protection if, during the course of their protected activity, they engage in sufficiently "opprobrious conduct." *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In determining whether an employee's conduct is so egregious that it forfeits the Act's protection, the Board balances two competing policy concerns: allowing employees some latitude for impulsive conduct in the course of protected activity and respecting employers' need to maintain order in the workplace. *DaimlerChyrsler Corp.*, 344 NLRB 1324, 1329 (2005); *accord Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 546-47 (6th Cir. 2016). Accordingly, in striking an appropriate balance, the Board weighs the following *Atlantic Steel* factors: the place of discussion; its subject matter; the nature of the employee's outburst; and whether it was provoked by an employer's unfair labor practice. *Caterpillar*, 835 F.3d at 547; *Atlantic Steel*, 245 NLRB at 816. Applying those factors, the Board reasonably found that Williams did not lose the Act's protection here.

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are separate issues. And its claim that this Court has "rejected the *Interboro* doctrine" (Br. 26) relies on a line of cases explicitly overruled in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). *See City Disposal Systems v. NLRB*, 766 F. 2d 969, 970 (6th Cir. 1985) (on remand, recognizing Supreme Court's "holding that the *Interboro* doctrine represents a reasonable interpretation of the [Act]'s purposes").

Indeed, Ozburn-Hessey does not dispute that two of the four factors favored protection, one factor is neutral, and one weighs against protection. (JA 66.) The subject-matter of the interaction—Williams' request for union representation—favors protection although the request to return to the conference room does not. Moreover, there "was no outburst," as Williams was calm throughout the interaction despite his irate managers, and the interaction was provoked in part by Ozburn-Hessey's "long history of unfair labor practices," including repeatedly cutting off the Union from its bargaining role. (JA 66.) In such circumstances, substantial evidence supports the Board's finding that Williams' requests for union representation did not lose the Act's protection.

Ozburn-Hessey does not challenge the Board's application of the *Atlantic Steel* factors but contends (Br. 27-30) that the Board should have applied the *Wright Line* analysis instead because its motive for discharging Williams is in dispute. That argument slices Williams' conduct far too finely. This Court has characterized *Atlantic Steel* as applying when an employee engages in misconduct "during otherwise protected activity." *Caterpillar*, 835 F.3d at 547 (quotation marks omitted). It is undisputed that Williams insisted on union representation and that Ozburn-Hessey discharged him for actions taken while insisting on that representation. Thus, "Williams' alleged insubordination occurred in the course of [his] protected conduct[.]" (JA 6.)

Indeed, the typical *Atlantic Steel* case involves a confrontation between an employee and management where the employee engages in some conduct that management could point to as a reason for the employee's discharge. For instance, the Board applies *Atlantic Steel* to cases where an employee swears while engaged in protected conduct. *See, e.g.*, *Thor Power & Tool Co.*, 148 NLRB 1379, 1388 (1964), *enforced*, 351 F.2d 584 (7th Cir. 1965) (employee did not lose the Act's protection by telling a coworker, as they were leaving a grievance meeting, that a company official was a "horse's ass"). An employer could claim in such cases that it discharged the employee for swearing and not for the protected conduct, but that does not change the standard the Board applies.

In that regard, the Board aptly noted that it has applied *Atlantic Steel* when an employer has called an employee's protected activity insubordinate. (JA 6 n.24, citing *Omni Commercial Lighting*, 364 NLRB No. 54, slip op. at 18 (2016).) Here, the Board reasonably followed its precedent. Therefore, absent any challenge to the Board's application of the four-factor test, substantial evidence supports the Board's finding that Williams' discharge violated Section 8(a)(3) and (1).

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING ENHANCED REMEDIES

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard*, 379 U.S. at 216; *accord NLRB v. Jackson Hosp. Corp.*, 669 F.3d 784, 787 (6th Cir. 2012). As the Supreme Court has explained, "in fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *accord NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1983). Thus, the authority to fashion remedies under the Act "'is for the Board to wield, not for the courts.'" *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

This Court has recognized that the Board "may impose sua sponte a remedy different than that suggested by an ALJ[.]" *NLRB v. Americare-New Lexington Health Care*, 124 F. 3d 753, 760 (6th Cir. 1997). The Court will not disturb the Board's remedy unless "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Adair Standish*, 912 F.2d at 864 (6th Cir.1990). Ozburn-Hessey challenges three of the Board's ordered remedies, all dealing with the remedial notice to employees: that it post the notice for 3 years, that it publish the notice in two publications of broad circulation and local interest, and that it require all supervisors and managers to attend the reading

of the notice. Here, the Board adequately explained the reasons for the remedy ordered, all of which further the policies of the Act.

Extraordinary cases call for extraordinary remedies. As the Board explained in exhaustively cataloguing Ozburn-Hessey's prior violations, "[b]y any measure," Ozburn-Hessey has "an extraordinary record of law breaking[.]" (JA 14.) As noted above (pp. 3-4), the Board's order under review is the *seventh* it has issued against Ozburn-Hessey, and D.C. Circuit has fully enforced the five orders that it considered. Ozburn-Hessey has repeatedly discriminated against the same union supporters and manager Phil Smith has now three times unlawfully removed union literature, including a copy of a judge's order requiring him to cease and desist from doing so. (JA 29-31.) The Board had already ordered enhanced remedies in prior cases (JA 14.), but those remedies have proven ineffective, as Ozburn-Hessey has continued to engage in the same conduct.

The Board reasoned that the "lingering effect" of Ozburn-Hessey's multiple violations over several years required a longer remedial notice period than usual. (JA 14.) As to the publication of the notice, the Board explained that prospective and former employees should be notified of their rights in order to dispel the unlawful effects of Ozburn-Hessey's unfair labor practices. (JA 15.) Finally, the Board noted that Ozburn-Hessey has failed to ensure that its managers and supervisors, who keep repeating the same misconduct, understand employees'

rights under the Act. (JA 15.) Thus, the Board ordered Ozburn-Hessey to have all managers attend the notice reading. All of those reasons directly relate to the Act's purpose of eliminating the effects of unfair labor practices.

Ozburn-Hessey faults the Board for relying on *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), *enforced in relevant part sub nom.*, *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). But the Board merely relied on *Pacific Beach* to establish that past extraordinary cases warranted an increased notice-posting period and publication of the notice. (JA 14-15.) It did not state that the cases are exactly the same. Every extraordinary case involves a unique set of circumstances. Accordingly, Ozburn-Hessey's complaint (Br. 48) that the Board failed to enunciate specific standards for when it would apply those remedies falls flat. The Board cannot prescribe the exact circumstances under which it will find an employer's conduct so egregious as to require remedies that it applies extremely rarely. Ozburn-Hessey's pattern of law-breaking, requiring seven different Board orders, several injunctions, and involving dozens of violations of its employees' rights, is uniquely outrageous, and the Board is entitled to tailor its remedies to the circumstances. That it did not engage in the exact conduct at issue in *Pacific Beach Hotel* (Br. 46) does not preclude the Board ordering some of the same remedies.

Ozburn-Hessey's claim (Br. 46-47) that because Ken Ball was a new

manager, the Board should not consider his conduct in determining whether to impose extraordinary remedies is similarly meritless. While he may have been new, his conduct was not; it was part of a pattern of Ozburn-Hessey's managers confiscating employees' union materials. The Board's traditional remedies have already proven inadequate to halt that pattern. As the Board found, Ozburn-Hessey has not trained its new managers such as Ball to follow the Board's orders, so the Board reasonably determined that it should require those managers to attend the notice reading. (JA 14.)

Finally, nothing about the Board's ordered remedies are punitive or aimed at embarrassing Ozburn-Hessey or particular managers. Requiring uniform attendance at a notice-reading effectuates the Board's goal of ensuring that all of Ozburn-Hessey's management knows its employees' rights. And requiring publication of the notice ensures that new employees, supervisors, and managers will also understand those rights. Given Ozburn-Hessey's repeated, flagrant disregard for its employees' rights and Board orders, the Board reasonably imposed those enhanced remedies.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Ozburn-Hessey's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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May 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 19-1054
	*	19-1090
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	26-CA-092192
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,	*	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL	*	
& SERVICE WORKERS INTERNATIONAL UNION,	*	
AFL-CIO/CLC	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,962 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 19-1054
	*	19-1090
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	26-CA-092192
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,	*	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL	*	
& SERVICE WORKERS INTERNATIONAL UNION,	*	
AFL-CIO/CLC	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Subject:	(Brief) Board Case No. 28-CA-120975; Docket Nos, 18-1201; 18-1211; Circus Circus Casinos, Inc. v. National Labor Relations Board
Date:	Monday, May 13, 2019 10:58:41 AM
Attachments:	Circus Circus Casinos, Inc v NLRB (18-1201) Respondent"s Brief.pdf

Attached please find an electronic copy of the Board's brief in the following case Circus Circus Casinos, Inc. v. National Labor Relations Board.

Thanks,

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Nos. 18-1201, 18-1211

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CIRCUS CIRCUS CASINOS, INC.
d/b/a CIRCUS CIRCUS LAS VEGAS
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas was the respondent before the Board and is the petitioner/cross-respondent before the Court.

2. The Board is the respondent and cross-petitioner before the Court; the Board's General Counsel was a party before the Board.

3. Michael Schramm, an employee, was the charging party before the Board.

B. Rulings Under Review: This case is before the Court on Circus's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on June 15, 2018, and reported at 366 NLRB No. 10.

C. Related Cases: This case has not previously been before the Court.

/s/ David Habenstreit

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FINAL BRIEF GLOSSARY

References to the Record	Designation
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Organizations	
Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas	Circus
National Labor Relations Board	Board
Occupational Safety and Health Administration	OSHA
United Brotherhood of Carpenters and Joiners of America, Southwest Regional Council of Carpenters and its affiliated Local Union #1780	Union

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1201, 18-1211

CIRCUS CIRCUS CASINOS, INC.
d/b/a CIRCUS CIRCUS LAS VEGAS
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This unfair-labor-practice case is before the Court on the petition of Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued

on June 15, 2018, and reported at 366 NLRB No. 110. (JA 1063-78.)[1]

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, which authorizes the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. §§ 151, 160(a). The Board's Order is final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Circus's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that Circus unlawfully threatened carpenter Michael Schramm for engaging in protected concerted activity by complaining with a coworker about second-hand marijuana smoke and demanding a policy for dealing with it?

2. Does substantial evidence support the Board's finding that Circus unlawfully suspended and discharged Schramm for engaging in that protected concerted activity?

[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Does substantial evidence support the Board's finding that Circus unlawfully denied Schramm's valid request for a union representative during an investigatory interview?

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

Michael Schramm, who was employed by Circus as a temporary journeyman carpenter, filed an unfair-labor-practice charge alleging that Circus threatened, suspended, and discharged him in retaliation for his protected concerted activity and denied his request for a representative at an investigatory interview in violation of Section 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1). The Board's General Counsel issued an unfair-labor-practice complaint, and an administrative law judge conducted a hearing and issued a recommended decision, finding that Circus's conduct violated the Act. (JA 1066-78.) After reviewing the parties' exceptions, the Board adopted the judge's findings and recommended order as modified. (JA 1063-65.)

II. THE BOARD'S FINDINGS OF FACT

A. Circus Hires Schramm as a Temporary Carpenter; Circus Threatens Schramm with Discharge after He and Another Employee Complain about Second-Hand Marijuana Smoke

Circus operates a hotel and casino in Las Vegas. Its engineering department is headed by Chief Engineer Rafe Cordell and employs 176 laborers, painters, carpenters, and engineers in four bargaining units. (JA 1066; JA 36-37, 40-41.) In September 2013, Circus hired seven temporary journeymen carpenters, including Schramm, to perform work on doors and windows in all 3,767 hotel guest rooms. (JA 1066; JA 43-48.) Schramm is in the carpenters' bargaining unit and is a member of United Brotherhood of Carpenters and Joiners of America, Southwest Regional Council of Carpenters and its affiliated Local Union #1780. (JA 275.)

Engineering department employees, including the temporary carpenters, are required to attend weekly safety meetings. At a safety meeting in early November, engineer Fred Tenney raised the issue of second-hand marijuana smoke. He told Assistant Chief Andrew Nelson, Cordell's deputy, that the engineers had "been finding this second-hand marijuana smoke everywhere" and asked for a procedure to deal with it. (JA 1067; JA 145, 280-81, 490.) Schramm seconded Tenney's concerns, and Nelson said he would look into it. (JA 1067; JA 325.) On November 12, Tenney filed a grievance over engineers' daily exposure to second-

hand marijuana smoke and requested that Circus institute a procedure to address the problem. (JA 1067; JA 266.)

At a second safety meeting later in November or early December, Tenney again raised the issue of marijuana and expressed his concern that second-hand smoke exposure might lead to positive drug test results.[2] (JA 1067; JA 145-47.) Cordell laughed and assured employees they would not test positive from such exposure. (JA 147, 153.) Schramm spoke up, questioning whether Cordell was "qualified to say that . . . because [he is] not a professional in that field." (JA 1067; JA 147, 282.) Schramm further shared his experience at another casino, where employees were also subjected to marijuana smoke. Cordell declared that employees did not have to worry about positive drug tests because "that's not going to happen." (JA 1067; JA 147-48, 283.) Schramm persisted and told Cordell that he could not know this for certain. Tenney interjected and asked, "what's the policy?" (JA 283.) Cordell then told employees to call security if they smelled marijuana smoke. (JA 1067; JA 146, 283.) Tenney pointed out that he had called security on several occasions to no avail. Cordell responded that

[2] Employees, including temporary employees, who are involved in any on-the-job accident resulting in property damage or physical injury are required to undergo drug testing. (JA 1067 & n.8; JA 49, 204.)

employees should call their supervisors. (JA 1067; JA 146, 283.) Schramm objected, asking "What's the supervisor going to do about it?" (JA 284.)

At this point, Cordell became red-faced and said Circus would just move Schramm to another work area. Schramm noted that moving him would not solve the problem because other employees would still be exposed. Schramm told Cordell that employees did not want to be moved around; instead, they "want[ed] an answer to this. We want a policy." (JA 1068; JA 148, 153-54, 284.) In reply, Cordell told Schramm, "Well, you know what, maybe we just won't need you anymore." (JA 1068; JA 148, 284.) Tenney said that sounded like a threat. Schramm responded, "No, that didn't sound like a threat; that was, in fact, a threat." (JA 1068; JA 148, 284.) Cordell, who became "redder and redder in the face," abruptly left the meeting. (JA 1068; JA 148, 284.)

On December 6 at a pre-shift meeting, Cordell presented Circus's new marijuana smoke policy to employees. Under the policy, if engineering employees smell marijuana smoke, they "must notify security." (JA 1067; JA 111-12, 268, 805.) Circus's preexisting corporate security policy specified how security officers would respond to reports of marijuana. (JA 117-18, 267.)

B. Circus's Respiratory Protection Program

Parts of Circus's facility contain asbestos, and engineering employees working in those areas are required to wear a respirator. (JA 1070; JA 85, 405.) Because wearing a respirator can be stressful and trigger a medical emergency, employees who may work with hazardous materials first undergo a medical evaluation and fit-testing, after which they receive a personal respirator mask. (JA 1070; JA 406, 430, 701.) Circus employs a contractor to conduct the medical evaluation. (JA 1070; JA 413.)

The process begins with an annual questionnaire, which engineering employees submit in a sealed envelope to the program administrator, who sends it, unopened, to the contract doctor. (JA 1070; JA 90-93, 234.) The questionnaire is required and developed by OSHA. (JA 1070; JA 415.) In completing the questionnaire, employees must "identify any health issues that may complicate the wearing of a respirator." (JA 1070; JA 234.) Under the written program guidelines, employees have "the right to contact the Contract Doctor to discuss the content of the questionnaire." (JA 1070; JA 234.) The contract doctor, after reviewing the questionnaire, will perform a medical examination if she "questions the ability of the employee to perform assigned tasks while wearing a respirator." (JA 1070; JA 234.) If the doctor has no concerns, or concludes after an

examination that the employee can wear a respirator, Senior Watch Engineer Henry Simms fits the employee with a respirator mask. (JA 1070; JA 90-93, 458.)

Just as employee reports of cardiovascular or respiratory disease can trigger an examination by the doctor, so can reports of anxiety or fear. (JA 449, 451, 703.) Employees who cannot wear a respirator mask for whatever reason are not issued one and are not assigned work where a respirator would be required. Employees are not disciplined or discharged because of their inability to wear a respirator. (JA 1071; JA 420-21.)

C. Schramm, Anxious and Afraid of Wearing a Respirator, Is Ordered To Take a Respirator "Exam" and Denied the Opportunity To Talk to a Doctor First, Contrary to Circus's Policy

During Schramm's new employee orientation in September, Simms handed out the respirator medical questionnaires and told the permanent employees to return them in a sealed envelope. He told the temporary carpenters not to return them because they were not going to be fitted for respirators. Nevertheless, he instructed the temporary employees to "hold on" to the questionnaires because Circus "might need them in the future." (JA 287-88.) Schramm's duties in the hotel rooms would not expose him to asbestos or other contaminants. (JA 288, 444-45.)

On December 10, shortly after Schramm and Tenney complained about second-hand marijuana smoke and Cordell threatened to discharge Schramm, Simms notified Schramm that he "was going to have a fitting today" and would have to take a "respirator exam" that afternoon. Simms did not tell him what that "exam" entailed. (JA 1070-71; JA 288-90, 384-86.) Simms directed him to report to the contract respirator clinic between 2 and 2:30 p.m. (JA 1071; JA 289-90.) Brandon Morris, Schramm's supervisor, told him to report to the clinic right after lunch at 1:30 p.m. so he would not have to waste time returning to work. (JA 1071; JA 290.)

Schramm, who had completed the written questionnaire, reported to the clinic right after lunch. Because of anxiety about putting a mask over his face, Schramm wanted to "slip in and talk to the doctor." (JA 1071; JA 290-92, 530.) At the clinic, two contract employees gave Schramm forms to fill out. Schramm told them that he first wanted to see the doctor, but they refused his request. (JA 1071; JA 292-93.) The clinic personnel told him they needed to take his height and weight and "stuff like that" but provided no further explanation of the process. (JA 340-41.) Schramm said he would talk to his supervisor then return at his actual appointment time "because I got to see [the doctor]." (JA 1071; JA 293.)

The contract personnel called Safety Manager Karl Beeman and told him that an employee "refused to take the exam and instead wanted to see the physician

directly," a request they had refused. (JA 1071; JA 397, 438-39.) Beeman reported this incident to Cordell. Simms also made a routine visit to the clinic that day and was told by clinic personnel that Schramm "refused to undergo the medical exam." (JA 1071; JA 475.) Simms also reported this to Cordell. (JA 476.)

After his initial visit to the clinic, Schramm reported back to work and waited for his supervisor to make his regular rounds at 2 p.m. (JA 293-94.) While waiting, Schramm told employee Saxton what had occurred in the clinic. When Saxton said he had failed his respiratory mask test, Schramm responded that he "wish[ed] they'd exempt me. I want an exemption." (JA 1071; JA 295.) At this point, Supervisor Morris called and told Schramm to come down to the shop. (JA 1071; JA 295.)

D. Circus Suspends Schramm

Schramm and Morris reported to Cordell's office between 2 and 2:10 p.m.—the same time as Schramm's respirator exam appointment. Cordell informed Schramm that he was suspended pending investigation for refusing to take the respirator exam. Schramm insisted that he had not refused but had gone down early to talk to the doctor. Schramm further said he was still within the appointment window, and he would go right away and take the exam. Cordell

refused, telling Schramm it was "too late now to take the exam," and suspended Schramm instead. (JA 1071; JA 296-98.)

Cordell also emphasized that this was "not the time or the place" for Schramm to explain; the only purpose of the meeting was suspension. (JA 1072; JA 67.) Cordell gave Schramm a notice of suspension pending investigation, stating that Schramm would have the opportunity to attend an investigatory meeting later. (JA 1072; JA 177, 298.) As they were leaving Cordell's office, Morris wished Schramm good luck and gave him the phone number for the Union. (JA 1072; JA 299, 772.) Following the meeting, Cordell submitted an internal memorandum to employee relations stating that Schramm had refused to go through the respirator evaluation. (JA 1072.)

Following this meeting, Schramm telephoned the union hall and left a voicemail message, explaining that he had been suspended and seeking assistance. The Union did not return his call. (JA 1072; JA 299, 329.)

E. Circus Investigates the Incident and Denies Schramm a Union Representative at His Due-Process Meeting

Airth Colin, a human resources employee, conducted the investigation of Schramm. (JA 1072; JA 512-13.) She interviewed Beeman and Simms and reviewed the emails they sent to Cordell. (JA 513-14.) In his email, Beeman wrote that clinic personnel told him Schramm "wanted to see the doctor" and

"refused to take the physical exam." (JA 1072; JA 261.) Simms's email reported he had been told by clinic personnel that Schramm said he "could not wear a respirator and that he would not go through the testing." (JA 1072; JA 260.)

In their interviews, Beeman and Sims reported what they had been told by clinic personnel. Colin's notes from those interviews show that Beeman said Schramm would "not allow the pre-screening to be done. He just wanted to go see the [doctor]." (JA 1072; JA 714.) Beeman wondered whether Schramm knew his "job is secure" and he would "just get reassigned to tasks that don't require [a] respirator." (JA 1072; JA 714.) Simms reported that Schramm told the clinic personnel he "cannot wear a respirator so I don't need to go through the test." (JA 1072; JA 715.) Colin did not interview the clinic personnel themselves or any other employees who were present in the testing area at the time. (JA 1071 n.14; JA 738.)

On December 12, Colin called Schramm and told him to report for a due-process meeting the next day. (JA 1072; JA 300, 522.) She also told him that if he wanted union representation, he should bring a representative with him. (JA 1072; JA 522.) Once again, Schramm called the Union hall and again reached voicemail. This time, he left a message stating the date and time of the meeting with human resources. The Union did not return his call. (JA 1072; JA 301, 349.)

Schramm reported for the due-process meeting on December 13. When he reached human resources, he looked around to see if any union representative had showed up in response to his messages. He found no one. Schramm then entered the meeting room where Cordell, Colin, and another human resources employee, Sandra Mower, were assembled. He told them that he "called the Union three times [and] nobody showed up, I'm here without representation." (JA 1073; JA 301.) Neither Cordell, Colin, nor Mower responded to Schramm's statement, and the meeting went forward. (JA 301.)

Schramm explained to the managers that he had reported to the respirator clinic at 1:35 p.m., prior to his scheduled testing time, and "pleaded" with the personnel to let him see the doctor. (JA 1073-74; JA 748.) When clinic personnel denied his request, he said he would return during his 2-2:30 p.m. time slot. Managers repeatedly asked him why he had refused to take the exam and why he had not contacted human resources. Schramm explained that Cordell suspended him at 2:15 p.m. without giving him an opportunity to go back to the clinic. It did not occur to him to contact human resources. (JA 1073; JA 302.)

Schramm further explained that he wanted to see the doctor because of his "anxiety and [ ] phobias" about putting the mask over his face. (JA 302.) Because he did not want his co-workers to know about his fear, he wanted to talk to the doctor privately, but "now everybody knows my business." (JA 1073; JA 303.)

Schramm was "embarrassed" but knew he would "freak out" having a respirator over his face, and he wanted an exemption from wearing the respirator. (JA 1073; JA 355.) Schramm told the managers that if he were returned to work, he would take the exam. (JA 1074; JA 748.)

At the end of the meeting, Schramm submitted a written statement explaining that when he reported to the clinic, he asked to see the doctor. Clinic personnel told him no, that he could not see the doctor "without first going through the exam." (JA 1073; JA 178-79.) He tried to explain to the personnel that he had "personal and important questions for the doctor," but they again told him no. His written statement ends with a summary of all that occurred: "For the simple request of asking to see the doctor before we begin (so I can keep some privacy) I was denied. I tried to make it right but was preempted with a suspension." (JA 1073; JA 178-79.)

F. Circus Discharges Schramm

Following the due-process meeting, Circus decided to discharge Schramm for failing to take the respirator exam. (JA 1074; JA 542.) Cordell called the union's business agent to inform him of the decision. The business agent asked Cordell to lay Schramm off instead so that he would be eligible for rehire. In response, Cordell noted on Schramm's separation notice that he was being let go because the "project ended." (JA 1074; JA 108, 180.)

On December 20, Schramm returned to the casino for a meeting with Cordell, Colin, and Mower, who gave him the separation notice. Union steward Jerry Mong tried to reverse the discharge, but Mower told him the matter was closed. (JA 1074; JA 371, 508.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce and McFerran, Chairman Ring dissenting in part) found that Circus violated Section 8(a)(1) of the Act by threatening, suspending, and discharging Schramm in retaliation for his protected concerted activity of complaining about workplace health and safety, and by denying his request for a representative at an investigatory interview which Schramm reasonably believed could result in discharge. (JA 1063-64.) The Board also denied Circus's motion to reopen the record to submit additional documents related to the unlawful threat. (JA 1063 n.1.)

The Board's Order requires Circus to cease and desist from the unfair labor practices found and from, 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. (JA 1064.) Affirmatively, the Order directs Circus to make Schramm whole for any loss of earnings and other benefits; remove from its files any reference to Schramm's unlawful suspension and discharge and notify him that this has been done; and post the Board's remedial notice. (JA 1064-65.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's finding that Circus violated Section 8(a)(1) of the Act by threatening Schramm with discharge. The Board credited the mutually corroborative testimony of Schramm and a coworker that, after they complained about second-hand marijuana smoke and demanded a policy for dealing with it, Chief Engineer Cordell threatened Schramm with discharge, telling him "maybe we just won't need you anymore."

Substantial evidence also supports the Board's finding that Circus again violated Section 8(a)(1) by suspending and discharging Schramm for concertedly making those complaints about workplace health and safety. It is undisputed that Circus knew about his activity. Further, Cordell's threat to discharge Schramm as he voiced those complaints—a threat that Circus soon carried out—firmly establishes that Circus had an unlawful motive for taking the adverse action.

Hoping to rebut this strong evidence of its unlawful motive, Circus claimed that it would have gotten rid of Schramm even if he had not engaged in protected concerted activity because he purportedly refused to take a respirator exam. The record, however, amply supports the Board's finding that this proffered rationale was false and therefore merely a pretext to mask Circus's true, unlawful motive. Thus, as the Board emphasized, Circus suspended Schramm before his appointed time to take the exam had expired and refused his requests to talk with a doctor

beforehand (as was his right). Schramm then offered to proceed with the exam as scheduled and repeated his offer at a so-called due-process meeting, but Circus refused both requests. As the Board aptly explained, if Circus's "true concern" had been testing Schramm, it would have "allowed [him] to speak to the doctor prior to testing or, at a minimum, sent [him] back for testing while he was within his testing period." (JA 1076.) Circus, of course, did neither. In these circumstances, the Board reasonably found that Circus necessarily failed to meet its burden of showing it had a benign reason for targeting Schramm, and therefore that his suspension and discharge were unlawful.

Circus challenges the Board's well-documented and logical findings of fact primarily by taking issue with its credibility resolutions. But a party seeking to overturn credibility determinations must mine the record and show that the credited testimony was "hopelessly incredible, self-contradictory, or patently unsupportable." Circus utterly fails to meet this heavy burden.

Finally, Circus again violated Section 8(a)(1) by refusing Schramm's request to have a union representative present during his due-process investigatory meeting prior to his discharge. Under the Board's well-established *Weingarten* rule, Circus was obligated to grant Schramm's request, discontinue the interview, or inform him that he was free to either participate in the interview unaccompanied by a union representative or have no interview at all. Instead, Circus simply proceeded

to interview Schramm, thereby further violating Section 8(a)(1) of the Act. Although Circus argues that Schramm did not request a union representative until after the meeting and alternatively that his request was inadequate, the credited evidence shows he put Circus on notice by making an adequate request at the start of the meeting.

STANDARD OF REVIEW

The Court "accord[s] a very high degree of deference to administrative adjudications by the [Board] and [will] reverse its findings only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (internal quotation marks omitted). Under that deferential standard, the Court will uphold the Board's findings if they are supported by substantial evidence and will overturn them only if the Board "acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted). *See also* 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*." *Id*. at 488.

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (internal quotation marks omitted). Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016) (internal quotation marks omitted).

The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted). Additionally, the Court reviews under an abuse of discretion standard the Board's rulings on motions to reopen the record. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). And finally, given the Board's broad discretion over determining the appropriate remedy for unfair-labor-practice violations, the Board's remedial determinations are "subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

ARGUMENT

I. CIRCUS VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING SCHRAMM WITH DISCHARGE FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. The Act Prohibits Employers from Interfering with, Restraining, or Coercing Employees Engaged in Protected Concerted Activity

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is an objective one, analyzing whether "considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with those rights." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Proof of animus or actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931-32 (D.C. Cir. 1991).

Thus, an employer violates Section 8(a)(1) by threatening employees with job loss or other reprisals. *See, e.g.*, *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1176, 1178 (D.C. Cir. 1987). The employer's statements are assessed based on whether employees would "reasonably perceive" them as threats. *Progressive Elec., Inc. v.*

NLRB, 453 F.3d 538, 544 (D.C. Cir. 2006). A coercive threat may, therefore, be implicit or explicit. *Tasty Baking*, 254 F.3d at 124. In applying this standard, the Board considers "the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

B. Circus Coercively Threatened Schramm with Discharge

Substantial evidence supports the Board's finding that Circus unlawfully threatened Schramm with job loss. As Schramm and Tenney both testified, they robustly challenged Chief Engineer Cordell about second-hand marijuana smoke in the facility, and Cordell responded by asking whether moving Schramm to another area would solve his problem. When Schramm demurred, explaining that other employees would still be exposed, Cordell then told Schramm, "well, you know what, maybe we just won't need you anymore." (JA 1068; JA 148, 284.)

The Board appropriately affirmed the administrative law judge's finding that Circus violated Section 8(a)(1) of the Act when Cordell made this "unambiguous" threat. (JA 1075.) *See, e.g.*, *Progressive Elec*, 453 F.3d at 544 (employer violated Act by telling employees that protected activity would "cost all you guys your jobs"). In making her finding, the judge reasonably credited Schramm and Tenney's mutually corroborative testimony that Cordell threatened Schramm with

discharge for expressing concerns about marijuana smoke in the facility. As the judge explained, she found Schramm and Tenney to be "forthright and thoughtful" as well as "non-argumentative witnesses whose demeanors evinced thoughtful reflection of each question." (JA 1069.) Moreover, she found their testimony to be "more inherently probable" because, for them, the meeting at which Cordell threatened Schramm was a "memorable occasion," whereas for other witnesses, it was just another weekly safety meeting. (JA 1069.) Their testimony was further corroborated by a company witness, employee Machala, although Circus never specifically asked him about the threat. (JA 1069; JA 821-24.) Because the judge's credibility determinations were based "[o]n the entire record, including [her] observation of the demeanor of the witnesses" and the content of their corroborative testimony (JA 1066 & n.5), those rulings should not be disturbed. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003).

Circus erroneously claims that it presented six witnesses who "rebutted" Schramm's and Tenney's testimony about the threat. (Br. 37.) In fact, the judge found that only two of Circus's witnesses (Cordell and Machala) were testifying about the same meeting as Schramm and Tenney. The other four (Tejeda, Cole, Simms, and Nelson) presented testimony "so vague" the judge found it "impossible" to determine whether they were present at the same meeting. (JA 1068.) Moreover, contrary to Circus's bald claim that its witnesses "rebutted"

Schramm's testimony, the judge found that while Cordell himself denied making the threat, "no other witness presented by [Circus] was specifically asked about this statement." (JA 1069.) The judge found it "telling" that, other than Cordell, none of Circus's witnesses "was tested on this point." (JA 1069.)[3]

Circus gains no more ground in arguing that the Board should have drawn an adverse inference from the General Counsel's failure to call carpenter Andrew Saxton. (Br. 40.) Whether the Board draws an adverse inference is a matter within its discretion. *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 n.1 (D.C. Cir. 1998). Here, the Board did not abuse that discretion. Two witnesses—Schramm and Tenney—credibly testified that Cordell threatened Schramm. The General Counsel, therefore, had no need to call yet another employee to corroborate that testimony. Nor did the judge have any obligation to draw an adverse inference from the absence of cumulative evidence. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1344 (D.C. Cir. 1972) ("[W]here a party has good reason to believe he will prevail without introduction of all his evidence, it would be unreasonable to draw any

[3] Circus's suggestion that Schramm and Tenney somehow collaborated on their testimony is unsupported by the record. (Br. 36-37.) For example, Schramm did not describe discussing "their version of events" with Tenney. (Br. 37. *See* JA 356-58.) Nor did Tenney testify "specifically" that he and Schramm "discussed the supposed 'events' in detail." (Br. 37. *See* JA 165-68.)

inference from a failure to produce some of it."); *accord Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006) (finding adverse inference to be of little value where testimony is "essentially cumulative").

Moreover, Circus misunderstands a key aspect of the adverse inference rule, which "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." *UAW*, 459 F.2d at 1336. Here, Saxton is simply a Circus employee, and as such, was equally available to Circus and not within the General Counsel's control. Particularly in these circumstances, the judge was hardly required to draw an adverse inference against the General Counsel for not calling Saxton as an additional witness. *See Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *accord Advocate S. Suburban Hosp.*, 468 F.3d at 1049.[4]

Given the judge's explicit and detailed credibility resolutions, Circus has failed to demonstrate that her findings are "hopelessly incredible," as it was required to do. *PruittHealth*, 888 F.3d at 1294. *See also Parsippany Hotel Mgmt.*

[4] Nor is there any merit to Circus's unsupported assertion that the administrative law judge "could have and should have called other witnesses." (Br. 33.) Circus participated in the hearing, called its own witnesses, and cross-examined the General Counsel's witnesses. It "cannot palm off on the ALJ its apparent failure to properly question" those witnesses. *Advocate S. Suburban Hosp.*, 468 F.3d at 1048.

Co. v. NLRB, 99 F.3d 413, 426 (D.C. Cir. 1996) ("The mere fact that conflicting evidence exists is insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required."); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135 (D.C. Cir. 2003) (finding credibility determinations to be supported by substantial evidence despite uncredited, contradictory testimony). Thus, the Board's finding that Cordell unlawfully threatened Schramm, a finding based on credited, corroborated testimony, is supported by substantial evidence and should be upheld.

C. The Board Did Not Abuse Its Discretion by Denying Circus's Motion To Reopen the Record

Contrary to Circus's claim (Br. 52), the Board properly denied its motion to reopen the record to introduce previously available documents that it could have presented at the hearing. (JA 1063 n.1.) The Court will uphold the denial of such a motion unless the Board abused its discretion and "it 'clearly appear[s] that the new evidence would compel or persuade to a contrary result.'" *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (quoting *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988)). Circus made no such showing here.

Briefly, during the hearing, Tenney testified that he routinely used Circus's work order tracking system (called HotSOS) to record notations about meetings, and he used the system to note that Cordell threatened Schramm. (JA 1070; JA 148.) Attempting to rebut this testimony, Circus provided HotSOS records for just two dates (November 21 and December 6); neither date showed any notation by Tenney about a threat.[5] (JA 1069; JA 855-77, 879.) It was not until after the administrative law judge issued her recommended decision that Circus decided to move to reopen the record to introduce HotSOS records for all of November 2013.

The Board did not abuse its discretion in denying Circus's motion. As it noted, under its Rules, a "motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." 29 C.F.R. § 102.48(c)(1). In addition, "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing."

[5] As shown in the Statement of the Case, Circus holds safety meetings for engineering employees on a weekly basis. Schramm and Tenney testified that they believed Cordell made the threat at a safety meeting before Thanksgiving, possibly November 21. (JA 1069; JA 163, 335, 375-76.) Cordell testified that he believed Schramm first spoke up about marijuana smoke at a December 6 pre-shift meeting, but Schramm did not attend pre-shift meetings. (JA 1067 & n.9; JA 335, 805.)

Id. Newly discovered evidence is that which existed at the time of hearing and "of which a party was excusably ignorant." *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978). Moreover, the evidence "must be material, and not cumulative or impeaching, and it must be such as to require a different result." *Id*. at 364.

As the Board explained, the records that Circus belatedly sought to adduce do not meet these requirements. (JA 1063 n.1.) They were not newly discovered or unavailable at the time of the hearing. To the contrary, they are records that Circus "routinely created and maintained" in its computerized system, and the company "was certainly aware of their existence" before the hearing closed, since it introduced such records for select dates. (JA 1063 n.1.) As the Board further noted, Circus failed to adequately explain why, with reasonable diligence, the additional records could not also have been presented at the hearing. (JA 1063 n.1.)

Circus does not challenge the Board's well-reasoned basis for denying its motion. Instead, Circus asserts that the records it belatedly sought to add show Tenney "lied under oath," and argues that the judge erred by crediting his testimony. (Br. 52-53.) This argument, however, does not get Circus around its fundamental failure to meet the established criteria for reopening the record: the evidence was not newly discovered, and at most Circus was merely trying to

impeach a witness. The Board "will not reopen a record so that a party may attack a judge's credibility resolutions." *Michigan State Employees Ass'n*, 364 NLRB No. 65, 2016 WL 4157599, at *1 n.2 (Aug. 4, 2016); *accord Labor Ready, Inc.*, 330 NLRB 1024, 1024-25 (2000), *enforced*, 253 F.3d 195 (4th Cir. 2001).

In any event, and contrary to Circus's claims, the judge explained that the lack of corroboration in the HotSOS records would not change her determination that Cordell made the threat. She noted it was "possible" that Tenney "simply mis-remembered the substance of his memo." (JA 1070.) She also found that even if the records "completely contradicted" Tenney's testimony that he made a memo, "this fact alone does not require" rejection of his testimony, given prior findings that his testimony was "inherently credible and entitled to greater weight than that of [Circus's] witnesses." (JA 1070.) As shown above, the judge credited Tenney and Schramm's "forthright and thoughtful" testimony that Cordell threatened Schramm. Whether Tenney subsequently wrote a note about that threat on his employer-provided cell phone does not negate the judge's decision to credit his corroborated testimony that Cordell made the threat. *See Parsippany Hotel*, 99 F.3d at 426 ("The mere fact that conflicting evidence exists is insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required").

II. CIRCUS VIOLATED SECTION 8(a)(1) OF THE ACT BY SUSPENDING AND DISCHARGING SCHRAMM FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. The Act Prohibits Employers from Taking Adverse Actions against Employees for Engaging in Protected Concerted Activity

As described above, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act, which protects employees engaged in concerted activities for the purpose of mutual aid or protection. 29 U.S.C. §§ 157, 158(a)(1). Concerted activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)). It includes employee comments that arise as a "logical outgrowth of concerns expressed by the employees collectively." *Five Star Transp., Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008). An employer that suspends or discharges an employee for engaging in protected concerted activity violates Section 8(a)(1) of the Act. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 81 (D.C. Cir. 2015).

In determining whether an employer has taken an adverse employment action against an employee because of the employee's protected activity, the Board

applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 404 (1983); *accord Shamrock Foods*, 346 F.3d at 1135-36. Consistent with that test, if substantial evidence supports the Board's finding that protected activity was a "motivating factor" in the employer's adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected activity. *Id.* at 397, 401-03; *accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). If the employer's proffered reasons for its actions are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to establish its affirmative defense. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998); *see also Wright Line*, 251 NLRB at 1084.

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988). In doing so, the Board may rely on a variety of factors, including the employer's knowledge of and hostility toward protected activity, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer." *Southwest Merch. Corp.*

v. NLRB, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB at 1088 n.12); *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001). Ultimately, because motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

Here, the Board found that Circus suspended and discharged Schramm because of his protected concerted activity, and its stated reason for taking those actions was pretextual. Accordingly, Circus violated the Act. As we now show, those findings are supported by substantial evidence and should be upheld.

B. Circus Suspended and Discharged Schramm because of His Protected Concerted Activity

As an initial matter, there is no dispute that Schramm, by raising concerns about second-hand marijuana smoke in concert with Tenney, was engaged in protected concerted activity and that Circus knew about it. *See, e.g., N.W. Rural Elec. Coop.*, 366 NLRB No. 132, 2018 WL 3495117, *5 (finding employee comments about workplace safety and health to be protected); *Burle Indus.*, 300 NLRB 498, 501 (1990) (employee's conduct related to concerns over exposure to

fumes constituted protected concerted activity), *enforced*, 932 F.2d 958 (3d Cir. 1991) (table).[6]

Circus's suspension of Schramm—which precipitated his discharge just 10 days later—was an adverse employment action, contrary to its claim. (Br. 42.) Section 10(e) of the Act bars Circus from raising this new argument for the first time on review. *See* n.6. In any event, contrary to Circus (Br. 42), this case is unlike *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017), where the employee simply "went back to his job as normal" and was "fully compensated" for the work he missed. *Id*. at 711. In those very different circumstances, the Court found that issuing a "suspension pending investigation" form, "without more, does not have any adverse impact on the employee who receives the form." *Id*. at 710. Here, of course, Circus not only suspended Schramm but discharged him and did not compensate him for the work he missed while suspended. (JA 177, 180.) Accordingly, Schramm's suspension was an adverse employment action. *See Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987) (affirming Board's

[6] Circus did not argue otherwise before the Board or in its opening brief. *See* 29 U.S.C. §160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *See also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

findings that suspensions and discharges were unfair labor practices because the employees' protected conduct was a substantial or motivating factor for the actions).

Moreover, the Board found strong evidence of Circus's discriminatory motivation in Cordell's unlawful threat—uttered moments after Schramm and a coworker complained forcefully about secondhand smoke—that "maybe we just won't need you anymore." (JA 1068; JA 148, 284.) Indeed, by discharging Schramm, Circus "made good" on that threat. *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000). Particularly given this direct threat of discharge, the Board was fully "entitled to draw an inference" of unlawful motive. *Fort Dearborn*, 827 F.3d at 1074.

On these facts, Circus seriously errs in asserting, without argument, that there was no "intrinsic connection" between Schramm's concerted complaints about working conditions and Cordell's responsive threat of discharge, which he soon carried out. (Br. 42.) The timing of these interconnected events well supports the Board's finding of an unlawful motive. *See, e.g.*, *Inova*, 795 F.3d at 82 ("The Board and this court have long recognized that the close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation."); *accord NLRB v. S.E. Nichols, Inc.*, 862 F.2d

952, 959 (2d Cir. 1988) ("An inference of anti-union animus is proper when the timing of the employer's actions is 'stunningly obvious.'").

In any event, as shown, the Board did not rely solely on timing as Circus suggests. (Br. 42.) Circus's bare assertion fails to account for the Board's finding that its "animus toward [Schramm's] activities is demonstrated by its threat"—"a threat of discharge which persuades that a substantial or motivating reason for [Circus's] discharge of Schramm was his protected concerted activity." (JA 1076.) Indeed, Circus promptly proceeded to make good on its threat. In these circumstances, Circus is mistaken in asserting that the Board based its findings on timing or "mere coincidence." (Br. 42.)

C. Because Circus's Stated Reason Was Pretextual, Circus Necessarily Failed To Meet Its Burden of Showing that It Would Have Suspended and Discharged Schramm Even Absent His Protected Activity

Faced with this compelling evidence of unlawful motive, it was incumbent on Circus to show that it would have suspended and discharged Schramm even if he had not vociferously complained, in concert with a coworker, about the problem of second-hand marijuana smoke. Attempting to meet this burden, Circus asserted that it would have taken those actions in any event because Schramm refused to take a respirator exam. Ample evidence supports the Board's finding (JA 1076)

that Circus's asserted reason was merely a pretext and thus "wholly without merit." *Wright Line*, 251 NLRB at 1084 n.5. (JA 1076.)

As the Board found, Circus's claim that it discharged Schramm for refusing to take the respirator exam does not withstand scrutiny: its written policy specifically gives employees the right to discuss the respirator questionnaire with a doctor before completing it. (JA 1070 & n.12, 1076.) Circus, however, did "not afford [Schramm] this opportunity." (JA 1076.) Instead, as the Board emphasized, Circus suspended him before his appointment time to take the exam had even expired. Moreover, although Schramm then squarely told Cordell he would go ahead and take the exam during the testing period, Cordell refused. (JA 1076.) On these facts, the Board reasonably concluded that Circus "was predisposed to discharge Schramm and the motivation had nothing to do with Schramm's respirator test." (JA 1076.) As the Board aptly noted, if the test had been Circus's "true concern," it would have let him speak to the doctor "or, at a minimum, sent [him] back for testing while he was within [his testing] period." (JA 1076.) Circus's failure to honor its own policy further supports the Board's finding of pretext. *See Fort Dearborn*, 827 F.3d at 1076.

In addition, the Board properly relied on Circus's conduct during the "due-process meeting" to support its finding of pretext. (JA 1076.) At that meeting, Schramm stated he wanted to see the doctor "due to a medical condition," as he

was "unambiguously" allowed to do under Circus's written policy. (JA 1070 & n.12, 1076.) Colin, a human resources staff member who attended the meeting, testified that she believed Schramm was being honest when he described his "significant fear" of wearing a respirator. (JA 746.) And as Safety Manager Beeman testified, an employee report of anxiety or fear related to wearing a respirator normally triggers an evaluation by the doctor. (JA 449, 451, 703.) But instead of offering Schramm assistance, human resources staff members Colin and Mower "stone walled" Schramm and repeatedly asked why he had not taken the issue to human resources previously. (JA 1076; JA 302, 524-25.) The Board reasonably found that Colin and Mower's conduct during the meeting "indicates a strong probability that [Circus] was merely going through the steps . . . but had already determined that Schramm would be discharged." (JA 1076.) *See Inova*, 795 F.3d at 84 ("one-sided investigation" supported Board's finding that employer's justification for firing employee was pretextual).

The Board's finding of pretext is further supported by Cordell's second refusal to allow Schramm to take the respirator exam. During the "due-process meeting," Schramm once again offered to take the exam. Once again, Cordell denied him the opportunity. (JA 1076; JA 74.) Given that Schramm's purported refusal to take the exam was "the only ground" Circus relied upon in discharging him, "Schramm's offer should have satisfied its concerns." (JA 1076.) *See NLRB*

v. Lone Star Textiles, Inc., 386 F.2d 535, 536 (5th Cir. 1967) (upholding Board's finding of pretext where employer claimed it would not have discharged employee if he had rectified his timeclock error one day earlier).

Based on this compelling evidence of pretext, the Board reasonably found that Circus's stated reason for taking action against Schramm was not in fact its real reason, and therefore that Circus "fail[ed] as a matter of law to carry its burden at the second prong of *Wright Line*." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016). To meet that burden, Circus had to show that, despite its animus, "[it] *would* have fired [Schramm], not that it *could* have done so." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 937 n.5 (D.C. Cir. 2011) (emphasis in original; internal quotations omitted). On this record, Circus completely failed to demonstrate that it would have discharged him for purportedly refusing to take the respirator exam even absent his protected concerted activity.

Circus gains no ground, and cannot meet its burden under *Wright Line*, by asserting that it "reasonably believed" Schramm engaged in misconduct by refusing to take the respirator exam. (Br. 43, quoting *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (D.C. Cir. 2012).) Given Circus's failure to argue below that the Board should have analyzed this case under *Sutter*, Section 10(e) bars it from making this claim on review. *See* n.6 above. In any event, Circus cannot circumvent the Board's finding of pretext by repackaging its *Wright Line*

defense as a reasonable belief that Schramm's purported refusal to take the respirator exam amounted to misconduct. When the smoke from Circus's claim clears, the credited evidence establishes that far from refusing to take the exam, Schramm offered to take it—twice. Accordingly, the Board reasonably rejected Circus's claim of misconduct as false and pretextual and thus "wholly without merit." *Wright Line*, 251 NLRB at 1084 n.5.

Moreover, Circus's argument "shortchanges [its] burden of proof" under *Wright Line*. *Inova*, 795 F.3d at 84. Circus needed to demonstrate not only that it reasonably believed Schramm refused to take the test but also that this purported "behavior would have caused [his] suspension and termination regardless of [his] protected conduct." *Id*. (internal question marks omitted). Whether Circus reasonably believed Schramm refused to take the test, then, is irrelevant because that is not the actual motivation for his discharge. As the judge found, if Schramm's purported refusal to take the respirator test had been Circus's "true concern," it would have let him take it during his testing period, as he offered to do. (JA 1076.)

Finally, Circus gains no more ground in arguing that it met its burden of showing it discharged Schramm for legitimate reasons because Cordell and Colin testified that Schramm would "lie" on the respirator test in order to fail it. (Br. 21, 45 n.12.) The Board affirmed the judge's determination to discredit Cordell and

Colin's testimony, finding it was "blatantly fabricated" (JA 1074), and Circus utterly fails to meet its heavy burden of disturbing that credibility ruling. Thus, the judge found there was "no dispute" that Schramm informed managers at the due-process meeting that he would take the respirator exam if returned to work. (JA 1074.) As the judge aptly noted, Cordell and Colin's contrary testimony "defies inherent probability" because it was unlikely that Schramm would defend himself by telling managers he would lie. (JA 1074; JA 72-73, 524.) As she also found, Colin's notes of the due-process meeting, which stated Schramm planned to lie, were not verbatim and were "seriously compromised" by Colin scratching out key words. (JA 1074; JA 547-48, 746.) The judge further relied on their unfavorable demeanor, finding that Cordell and Colin "hesitated" before claiming that Schramm said he would lie and "appeared to be grasping for a life raft when making their assertions." (JA 1074.) In short, given the judge's explicit and well-reasoned explanations for her credibility determination, and Circus's failure to show this determination to be hopelessly incredible, the Court should uphold the credibility resolution and with it, the Board's conclusion that Circus failed to show it would have suspended and discharged Schramm in the absence of his protected

concerted activity. *See Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1105 (D.C. Cir. 2019).[7]

D. The Board Acted Within Its Discretion by Deferring Questions of Seniority to Compliance

Section 10(c) of the Act provides that the Board, upon finding that an unfair labor practice has been committed, shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act." 29 U.S.C. § 160(c). This remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

The Board acted well within the bounds of its broad remedial authority. After finding that Circus unlawfully suspended and discharged Schramm, the Board ordered its standard remedy in such cases, directing Circus to reinstate him "to his former job, or if that job no longer exists, to a substantially equivalent

[7] Similarly, there is no basis for Circus's claim that the judge erred by disregarding the testimony of employees Romero and Tejeda. (Br. 44 n.11.) As the judge explained, she found "no evidence" that Circus interviewed either employee. Accordingly, she concluded that their testimony could not have been a basis for Circus's supposed belief that Schramm engaged in misconduct by purportedly refusing to take the respirator exam. (JA 1071 n.14.) In addition, she disregarded their testimony because it would not have corroborated the reports given to Cordell by Beeman and Simms. (JA 1071 n.14.)

position, without prejudice to his seniority or any other rights or privileges previously enjoyed," and to "make Schramm whole for any loss of earnings and other benefits suffered as a result of the discrimination against him." (JA 1064.) As the Board noted, this language sets forth "its standard reinstatement and make-whole remed[y]."[8] (JA 1063 n.4.) *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (approving the Board's "conventional remedy of reinstatement with backpay").

Circus misses the mark in asserting that the Board should not have ordered Schramm's reinstatement "without prejudice to his seniority" because he was a temporary employee at the time of his unlawful discharge, presumably without any seniority rights. (Br. 53-54.) In making this claim, Circus reveals its fundamental misunderstanding of the well-accepted, two-stage process long utilized by the Board in unfair-labor-practice cases, with judicial approval. In the initial stage, the Board determines—as it did here—whether violations occurred and issues a remedial order. If a reviewing court upholds the Board's unfair-labor-practice findings and enforces its order, and a controversy subsequently arises over the

[8] *See* NLRB Casehandling Manual, Part III (Compliance), §10530.1 (the Board's standard remedy in cases of unlawful adverse employment action "is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed.").

terms of the remedy, the particulars can then be litigated in a subsequent compliance proceeding before the Board. 29 C.F.R. § 102.54-.59. *See also Sheet Metal Workers Int'l Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 500 (D.C. Cir. 2009) (describing the Board's compliance process). As the Board noted, disputes over specific matters—such as seniority and the impact of the parties' collective bargaining agreement, which permitted an extension of Schramm's temporary employment—are properly reserved for the compliance proceeding. (JA 1063 n.4.)

Circus's claim also shows its basic misunderstanding of the Board's Order. The Board did not, as Circus asserts, order it to reinstate Schramm to a full-time position with seniority. (Br. 53.) Rather, the Board ordered Circus to reinstate him to "his former job" or a substantially equivalent position "without prejudice to his seniority." (JA 1064.) And seniority is a matter best reserved for the compliance stage, where Circus "remains free to advance any appropriate arguments" about the nature of employees' contractual seniority rights and whether Schramm would have received them. *See Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996).

Specifically, as noted above, the parties' collective-bargaining agreement allowed Schramm's employment to be extended, and the record did not show that they would have declined to do so absent his unlawful discharge. (JA 1063; JA

213.) Moreover, but for his unlawful discharge, Schramm's employment could have continued even beyond the extension. If it had, Schramm would have become a full-time employee with seniority rights. (JA 213.) Further, the collective-bargaining agreement gives temporary employees a preferential right to be interviewed for full-time positions. (JA 188.) In these circumstances, Circus errs in asserting that Schramm's employment "would have ended with the completion of the project." (Br. 54.)

But more importantly, specific questions about how long Schramm would have remained employed and whether he would be entitled to seniority are exactly the type of determinations the Board, with Court approval, leaves to compliance. *See Sure-Tan*, 467 U.S. at 902 ("compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any," to which employees are entitled); *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 629-30 (D.C. Cir. 1992) (rejecting as "premature" employer's argument that Board erred by ordering it to offer jobs to all former predecessor employees and leaving to compliance determination whether particular employees were unsuitable for rehire); *accord Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 537 (7th Cir. 2003) (leaving to compliance the details of the remedy to be provided to temporary employees); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291-92 (6th Cir. 1998) (leaving to compliance the determination whether a

temporary employee would have been retained beyond the end of project). The Court should enforce the Board's order with its standard reinstatement and make-whole remedy, leaving seniority for the compliance stage.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CIRCUS UNLAWFULLY DENIED SCHRAMM'S REQUEST FOR A UNION REPRESENTATIVE

A. An Employer Violates the Act by Interviewing An Employee, After Denying His Valid Request for a Union Representative, without Advising Him that He May Leave or Voluntarily Remain Unaccompanied by a Representative

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court forcefully approved the Board's construction of Section 7 of the Act as creating "a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. 251, 256 (1975). Likewise, the Court endorsed the Board's clear guidelines that "shaped the contours and limits of the statutory right." *Id*. In doing so, the Court ensured both that employees are able to determine what they must do to invoke the right to a representative, and what options are available to an employer once that right is invoked.

Unquestionably, an employee's right to engage in Section 7 activity includes the right to be accompanied by a union representative to an investigatory interview

that the employee reasonably believes will result in disciplinary action.[9] *Weingarten*, 420 U.S. at 256-60; *accord United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992). As the *Weingarten* Court explained, the Board's construction of the Act in this regard "effectuates the most fundamental purposes of the Act," which "declares that it is the goal of national labor policy to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.'" *Weingarten*, 420 U.S. at 261-62 (quoting 29 U.S.C. § 151). Requiring an employee to attend such an interview alone "perpetuates the inequality [of bargaining power] that the Act was designed to eliminate," and creates the potential that an employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id*. at 262-63.

Just as an employee has a right to representation, the Supreme Court recognized that an employee's exercise of this right "may not interfere with legitimate employer prerogatives" such as imposing discipline for employee misconduct. *Id*. at 258. Accordingly, when an employee asserts his *Weingarten*

[9] Circus did not dispute before the Board, nor has it disputed in its opening brief, that Schramm reasonably believed that the investigatory due-process interview on December 13 could lead to discipline. (JA 1075.)

right to representation during an investigatory interview, the employer may lawfully proceed in one of three ways. It may: (1) grant the employee's request for representation; (2) give the employee the option of proceeding with the interview without representation; or (3) discontinue the interview and make a disciplinary decision based on the information already available or obtained through other means. *Weingarten*, 420 U.S. at 258-59; *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 148 (3d Cir. 1991). "Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented." *Washoe Med. Ctr., Inc.*, 348 NLRB 361, 367 (2006) (citations omitted). Here, Circus ignored the Board's clear *Weingarten* rule by refusing Schramm's request and continuing with the interview without advising him of his rights, thereby violating Section 8(a)(1) of the Act.

B. Circus Unlawfully Continued Questioning Schramm, Notwithstanding His Request for Representation

Substantial evidence supports the Board's finding that Circus, in violation of the Act, continued questioning Schramm after ignoring his request for a *Weingarten* representative. (JA 1063-64.) Schramm credibly testified that he telephoned the Union and left messages informing them that he had a due-process meeting and requesting assistance. When he arrived for the meeting, he saw that

his efforts had been in vain: no union representative had appeared. He then announced to the assembled company representatives, at the beginning of the meeting, that he "called the Union three times [and] nobody showed up, I'm here without representation." (JA 1064; JA 301.) As the judge found in crediting his testimony, Schramm "convincingly provided context" for his statement when he explained that he had been looking for the union representatives before entering the meeting room. This context, the judge found, made it "inherently reasonable that his first remarks would be about expecting a union representative to be present in response to his messages." (JA 1074.)

"The Board has consistently held that a request must only be sufficient to put the employer on notice that the employee desires representation." *New Jersey Bell*, 936 F.2d at 149; *accord Consol. Edison Co. of New York, Inc.*, 323 NLRB 910, 916 (1997). Moreover, "[n]o magic or special words are required to satisfy this element of the *Weingarten* rationale. It is enough if the language used by the employee is reasonably calculated to apprise the Employer that the employee is seeking such assistance." *Houston Coca Cola Bottling Co.*, 265 NLRB 1488, 1497 (1982).

Applying this long-held standard, the Board found that Schramm's statement that he had called the Union and was at the meeting "without representation" was sufficient to put Circus on notice that he desired Union representation. Contrary to

Circus's suggestion (Br. 50), there is no requirement that employees, like contestants on *Jeopardy*!, make their requests in the form of a question. A statement, such as Schramm made here, is sufficient to put an employer on notice. For example, the Board has found that an employee who refused to sign a statement without "representation or legal advice" effectively requested representation under *Weingarten*. *S. Bell Tel*., 251 NLRB 1194, 1196 (1980), *enforced in relevant part*, 676 F.2d 499 (11th Cir. 1982). *See also Modern Mgmt. Servs., LLC*, 361 NLRB 228, 230 n.3 (2014) (employee's statement that "I need someone to be with me" was sufficient to invoke *Weingarten* right), *enforced*, No. 14-1160, 2016 WL 3040484 (D.C. Cir. May 18, 2016), *reh'g en banc denied*, July 14, 2016); *Southwestern Bell Tel. Co*., 227 NLRB 1223, 1223 (1977) (employee's statement that "I would like to have someone there that could explain to me what was happening" was sufficient to invoke *Weingarten* right).

Further, even if phrased as a question, the employee's request does not have to be precise. Thus, the Board and courts have found that questions such as "if he needed a witness," *Bodolay Packaging Mach., Inc*., 263 NLRB 320, 325 (1982), or "should [she] have a union representative present," *New Jersey Bell*, 936 F.2d at 149, were sufficient to put the employer on notice that the employee desired representation.

Once he made his desire for a union representative known, as the Board found, Circus was required to "present Schramm with the choice of participating in the interview unaccompanied by his representative or having no interview at all; instead, it unlawfully continued with the interview without affording him representation." (JA 1064 n.10.) Circus does not dispute that it failed to present these options to Schramm. Instead, it argues that because the Union did not send a representative to the meeting, Schramm's "choice" of representatives was unavailable, and Circus had no further responsibilities unless and until Schramm made an affirmative request for an alternate. (Br. 50.) But while the Board has made clear that an employer has no responsibility to provide an alternate representative, it is required to give the employee the option of foregoing the interview entirely or continuing without a representative. *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 275 & n.12 (4th Cir. 2003); *accord GHR Energy Corp.*, 294 NLRB 1011, 1041 (1989), *enforced*, 924 F.2d 1055 (5th Cir. 1991) (table).

What an employer cannot do, as Circus did here, is ignore the employee's request altogether and continue with the interview without giving the employee the procedural options specified in *Weingarten*. Schramm did not lose his *Weingarten* right simply because his chosen representative did not appear at the meeting, and Circus violated the Act by failing to inform him of his options before proceeding with the interview. (JA 1063-64.)

Finally, Circus's claim that "[t]he record shows that Schramm did not even mention [the Union] until after" the meeting is simply incorrect. (Br. 48.) The Board upheld the administrative law judge's determination to credit Schramm's testimony that, "at the beginning of the meeting," he told managers he had called the Union and was there without representation. (JA 1073-74.) Indeed, as the judge noted, human resources staff member Mower agreed that Schramm said he had called the Union but was there without representation, although she mistakenly believed he made the statement at the end of the meeting. (JA 1074.) Cordell testified only that Schramm did not "request a union steward," which is undisputed. (JA 1074; JA 106.) As the judge also observed, the notes taken by human resources staff member Colin failed to make any mention of the Union and were admittedly not verbatim. (JA 1074; JA 547-48, 746.) In these circumstances, the judge appropriately found Schramm's testimony more "inherently reasonable" than Mower's and noted that "[n]either the absence in Colin's notes nor Cordell's denial literally negates Schramm's statement that he called the Union and he was there without representation." (JA 1074.) Thus, Circus has provided no basis for disturbing the judge's credibility resolution, much less shown that it is "hopelessly incredible." *PruittHealth*, 888 F.3d at 1294.[10]

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[10] Circus gains no ground by noting the judge's decision not to credit Schramm's statement on cross-examination that he told a human resources employee he

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In sum, Circus's primary arguments come down to credibility. In its view, the Board should have credited its witnesses over the General Counsel's. But such arguments are "almost never worth making." *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000). As the Court has noted, a party that wishes to overturn credibility determinations that have been adopted by the Board must show, not only that the credited testimony "carries . . . its own death wound," but also that the "discredited evidence . . . carries its own irrefutable truth." *UAW v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). This Circus has failed to do.

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wanted a union representative at the meeting. (Br. 49.) As she explained, she simply found that Schramm's statement on cross-examination, when viewed in context, was merely "a reiteration of his earlier statement that he had called the Union three times and no representative was present." (JA 1074.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Circus's petition for review and enforce the Board's Order in full.

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May 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CIRCUS CIRCUS CASINOS, INC. d/b/a CIRCUS CIRCUS LAS VEGAS	)))	
Petitioner/Cross-Respondent	))	Nos. 18-1201, 18-1211
v.	))	
NATIONAL LABOR RELATIONS BOARD	))	
Respondent/Cross-Petitioner	))	Board Case No. 28-CA-120975

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 11,550 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of May, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CIRCUS CIRCUS CASINOS, INC. d/b/a CIRCUS CIRCUS LAS VEGAS	)	
Petitioner/Cross-Respondent	)	Nos. 18-1201, 18-1211
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 28-CA-120975

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of May, 2019

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

***

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

***

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and

enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board

with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

***

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.54-.59. Compliance Specifications

29 C.F.R. § 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional

Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to § 102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

29 C.F.R. § 102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

29 C.F.R. § 102.56 Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days

from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.
(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

29 C.F.R. § 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

29 C.F.R. § 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

29 C.F.R. § 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

THE BOARD'S CASEHANDLING MANUAL, PART 3, COMPLIANCE PROCEEDINGS

Available at: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/chm3_0.pdf (last visited March 18, 2019)

Section 10530.1.

When a respondent has unlawfully terminated an employee or taken other action to adversely change terms or conditions of employment, the standard Board remedy is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed. The underlying remedial principle is that the employee be restored to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action. The following sections address procedures and issues in effectuating reinstatement.

From: Employment Law360
To: Ring, John
Subject: 1st Circ. Flips $34M FCA Award To New Whistleblower
Date: Tuesday, May 7, 2019 3:34:54 AM

EMPLOYMENT

Tuesday, May 7, 2019

TOP NEWS

1st Circ. Flips $34M FCA Award To New Whistleblowe r

The First Circuit on Monday rejected a lower court's view of how the federal government learned of allegedly fraudulent billing by drug-testing giant Millennium Health, flipping a $34 million False Claims Act award from one whistleblower to another.

Read full article »

Mass. Cracks Down On Employers Flouting 'Ban The Box' Law

Brooks Brothers was among 19 storefront businesses in Massachusetts that agreed to change their hiring practices after they asked for job applicants' criminal histories in violation of state law, state Attorney General Maura Healey said Monday.

Read full article »

6th Circ. Rejects Ohio Teacher A pplicant's Age Bias Appeal

An Ohio school district didn't discriminate against a prospective teacher when it rejected her employment application several years in a row, the Sixth Circuit held Monday, saying the applicant didn't show that age played a role in the district's evaluations of her.

Read full article »

Ex-Northwestern Mutual Agent A C ontractor In NJ, Judge Says

Northwestern Mutual on Monday dodged a proposed class action claiming it misclassified a group of its agents as independent contractors when a New Jersey federal judge found the company didn't have enough say over how the former insurance agent who brought the suit sold insurance products.

Read full article »

Straight Woman Wants Redo In 5th Circ. Orientation Bias Case

A straight woman who was fired after mocking transgender women on Facebook has asked the full Fifth Circuit to reconsider a panel ruling that federal law allows employers to fire workers because of their sexual orientation, which she claims was the real basis for her termination.

Read full article »

Interview

15 Minutes With Checkr's General Counsel

To Irene Liu, the GC at background screening company Checkr, the most rewarding part of being an attorney is often being the only leader with a law degree sitting around an executive table. Here, she explains how her government background has prepared her for spotting regulatory issues and how Checkr inspires trust in its customers.

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DISCRIMINATION

Solar Co. Fired Black Workers Who Protested Slurs, Suit Says

Law360 Pro Say Podcast

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New Cases

Discrimination (70)
ERISA (43)
Labor (38)

LAW FIRMS

Alston & Bird
Anapol Weiss
Arnold & Porter
Bartko Zankel
Berger Montague
BrownGreer PLC
Cozen O'Connor
Derek Smith Law Group
Drinker Biddle
Dwyer Connell
Fisher Phillips
Ford O'Brien
Goldstein Borgen
Greene LLP
Jomarron Lopez
Joseph & Kirschenbaum
Kirkland & Ellis
Locks Law Firm
Lucas Magazine
Meehan Boyle
Mintz Levin
Morgan Lewis
Norris McLaughlin
Norton Rose Fulbright

A group of black former Momentum Solar employees sued the company in New York federal court Monday, alleging that their managers regularly hurled racist slurs at them and fired them after they complained about it.

Read full article »

Law Firm Secretary Says She Was Fi red Over Cancer Time Off

Dwyer Connell and Lisbona LLP was slammed Monday in New Jersey federal court with an age and disability discrimination suit from a former longtime secretary alleging she was unlawfully terminated after she had requested a schedule change to accommodate her cancer treatment.

Read full article »

WAGE & HOUR

Calif. Truckers' Wage Action Trimmed Under DOT R ules

A California federal judge trimmed a certified class action alleging U.S. Xpress Enterprises Inc. denied truck drivers proper wages and meal and rest breaks, saying the U.S. Department of Transportation recently determined that federal regulations trump California's meal and rest break rules.

Read full article »

Strip Club's Sanctions Bid Fai ls In 'Cookie-Cutter' FLSA Suit

A Florida federal judge on Monday adopted a magistrate's recommendation denying a strip club's bid to sanction an exotic dancer and her lawyers for pursuing what the strip club called a "cookie-cutter" Fair Labor Standards Act lawsuit.

Read full article »

WORKER SAFETY

Claims Agent Defends New Rules In NFL Co ncussion Deal

The claims administrator for the NFL's landmark concussion settlement has come out in defense of new medical rules that sparked opposition from players' attorneys, calling them only tweaks that will help claims "glide through" the process and further underscoring the gap between both sides' rhetoric.

Read full article »

BANKRUPTCY

ASML Scores $845M IP Judgment Against Bankrupt XTA L

Dutch semiconductor maker ASML will take over much of the intellectual property belonging to its bankrupt rival XTAL after a California judge on Friday issued an uncollectable $845 million judgment for XTAL's alleged inducement of ASML employees to breach their contracts and reveal various trade secrets.

Read full article »

US Trustee Opposes Windstream's Ch . 11 Worker Bonus Plans

The federal bankruptcy watchdog has urged a New York bankruptcy court to deny requests by troubled telecom provider Windstream Holdings to pay key employees up to $25 million in bonuses, calling the requests vague and unnecessary.

Read full article »

EXPERT ANALYSIS

How Paycheck Fairness Act Would Bols ter US Equal Pay Law

While the Paycheck Fairness Act — which recently passed in the House — is unlikely to become law anytime soon, employers would do well to comply with the spirit of the pay disparity and salary history inquiry provisions, says Jennifer Queliz of Cozen O'Connor.

Paul Weiss
Pepper Hamilton
Podhurst Orseck
Schenck Price
Scopelitis Garvin
Seeger Weiss
Smith & King LLC
Smith Law Services
Squire Patton Boggs
Swartz Swidler
Wigdor LLP
Wilson Sonsini

COMPANIES

ASML Holding
Ace Hardware Corp.
Activision Blizzard Inc.
American Hospital Association
American Trucking Associations Inc.
Black Elk Energy LLC
Brooks Brothers Group Inc.
Chimei Innolux Corp.
Comcast Corp.
Deloitte Touche
DowDuPont Inc.
Edible Arrangements LLC
Equifax Inc.
Exterro Inc.
Facebook
Five Guys Holdings LLC
Google Inc.
Gulf Oil Limited Partnership
Intermountain Healthcare Inc.
International Brotherhood of Teamsters
L'Occitane International SA
Micron Technology Inc.
Millennium Health LLC
NFL Enterprises LLC
National Association of Professional Background Screeners
National Employment Law Project
Northwestern Mutual Life Insurance Co.
Platinum Partners LP
Professional Footballers Association Enterprises Ltd.
S.A.C. Capital Advisors LP
Seagate Technology
Seal Software Ltd.
U.S. Xpress Enterprises Inc.
United Parcel Service Inc.
Windstream Holdings Inc.

Read full article »

FCA Challenge Poses 2 Potential Questions For Justices

If the U.S. Supreme Court accepts Intermountain Healthcare v. U.S., it is unlikely to consider the constitutional challenge to the False Claims Act, but may address the Tenth Circuit's incorrect analysis of how Federal Rule of Civil Procedure 9(b) should apply to FCA cases, says Laurence Freedman of Mintz.

Read full article »

An Overview Of The Debate Over L itigation Finance Disclosure

In light of a New York federal court's recent decision in Benitez v. Lopez, which joins a growing body of case law denying forced disclosure of commercial litigation finance, Stephanie Spangler of Norris McLaughlin and Dai Wai Chin Feman of Parabellum Capital break down the arguments commonly raised for and against disclosure.

Read full article »

LEGAL INDUSTRY

Titan Of The Plaintiffs Bar: Berger's H. Laddie Montague Jr.

It was 1989, and just as soon as the tanker Exxon Valdez slammed into the shoals of Bligh Reef, spewing oil into the depths of Alaska's Prince William Sound, a sprawling class of the injured was born in one of U.S. history's worst energy-sector disasters.

Read full article »

House Judiciary Panel Moves To Hold A G Barr In Contempt

The House Judiciary Committee will vote to hold Attorney General William Barr in contempt this week after he refused to comply with a subpoena for an unredacted version of special counsel Robert Mueller's report, the panel said Monday.

Read full article »

Ex-Platinum Boss Jailed Over Altercat ion With Prosecutor

A New York federal judge revoked Platinum Partners co-founder Mark Nordlicht's bail on Monday in the wake of an allegedly curse-filled and intimidating encounter the former hedge fund executive had last week with one of the prosecutors in his securities fraud trial.

Read full article »

Drinker Biddle's Andrew Kassner Notch es 2nd Chairman Term

Drinker Biddle & Reath LLP's chairman and CEO Andrew Kassner will serve a second four-year term as chairman, the firm announced Monday.

Read full article »

Former FDIC General Counsel Joins Arnold & Porter

Arnold & Porter on Monday expanded its financial services and legislative and public policy practices with the addition of a former general counsel for the Federal Deposit Insurance Corporation.

Read full article »

Legal Tech Download: Industry Investments Reach $ 1B

The world of legal technology is evolving quickly, with new products coming to market in rapid succession. Here, Law360 takes a look at six recent developments.

Read full article »

JOBS
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GOVERNMENT AGENCIES

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Equal Employment Opportunity Commission
European Union
Federal Aviation Administration
Federal Deposit Insurance Corp.
Federal Motor Carrier Safety Administration
Federal Trade Commission
Office of Federal Contract Compliance Programs
U.S. Army
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Transportation
U.S. Department of the Treasury
U.S. House of Representatives
U.S. Supreme Court
United States Bankruptcy Court for the Southe rn District of New York
United States District Court for the Eastern Dist rict of Pennsylvania
Vermont Natural Resources Agency

mid level L&E assoc/40 yr old 50 atty NYC firm
Schoen Legal Search
New York, New York

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Mid-sized White Plains firm seeks mid-senior litigation associate
KLR Davis
White Plains, New York

Employment Litigation Defense Attorney
Kaufman Dolowich & Voluck, LLP
Los Angeles, California

Labor & Employment Associate - (1+ yrs Exp.)
Jones Day
San Diego, California

Litigation Associate
Keesal, Young & Logan
San Francisco, California

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Employment Litigation Associate
Ogletree Deakins Law Firm
Washington, District of Columbia

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

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From: Employment Law360
To: Ring, John
Subject: 5 Attorneys On Being The Only Woman In The Room
Date: Thursday, May 30, 2019 3:55:50 AM

EMPLOYMENT

Thursday, May 30, 2019

GLASS CEILING REPORT

5 Attorneys On Being The Only Woman In The Room

Female attorneys are underrepresented throughout the legal industry, but in some practice areas, they often find they are literally the only woman in the room. Here, Law360 hears from five top women on what it's like to still be considered a rare sight in their field.

Read full article »

Motherhood & Making Partner: The View From 2 BigLaw Moms

In a Law360 original video, two BigLaw attorneys reflect on being mothers while trying to make partner in a culture that has made slow progress towards increasing female representation in the highest ranks.

Read full article »

Opinion

Millennials Are Pushing Back Against Law Firm Sexism

A recent survey of millennial attorneys shows men and women are having very different BigLaw experiences, but share similar goals. It's imperative that partners recognize that they're the ones in a position to change the culture, says Michelle Fivel of Major Lindsey.

Read full article »

TOP NEWS

Interview

EEOC's Lipnic Recalls #MeToo Progress, Equal Pay Regrets

The U.S. Equal Employment Opportunity Commission made strides in combating sexual harassment and age discrimination during Commissioner Victoria Lipnic's 28 months as acting chair, but the recent court-ordered revival of the Obama administration's divisive pay equity initiative stirred regrets, she told Law360.

Read full article »

DOL Floats Rule To Beef Up Unions' Reporting Requirements

The U.S. Department of Labor on Wednesday unveiled a rule imposing financial disclosure requirements for certain trusts that unions set up, scrutiny the agency says will "deter fraud and corruption" that purportedly occurs when such trusts are used to evade existing reporting requirements.

Read full article »

Starbucks 'Blindsided' Manager After Back Surgery, Jury Told

A former Starbucks district manager who claims the coffee giant violated disability discrimination laws by firing her after her back surgery told a California federal jury Wednesday that she was "blindsided" when her work ethic was suddenly questioned after she made a single mistake on the job.

Read full article »

NLRB Judge Clears 'Scabby' But Extermination Still Possible

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New Cases

Discrimination (80)
ERISA (25)
Labor (34)

LAW FIRMS

Bailey & Glasser
Blank Rome
Bracewell
Cleary Josem
Cohen Milstein
DLA Piper
Davis Wright Tremaine
Duane Morris
Eversheds Sutherland
FisherBroyles
FordHarrison
Gass Weber
Harder LLP
Hogan Lovells
Holland & Knight
Horvitz & Levy
Jomarron Lopez
Joseph Aleem
Kirkland & Ellis
Lawyers for Justice PC
Levy Law Group
Mayer Brown
McCarter & English
Menter Immigration Law

The National Labor Relations Board may soon have a chance to shoo Scabby the Rat after an agency judge teed up the question of the critter's legality by ruling that a union didn't violate federal labor law by deploying the well-known labor protest symbol outside a Philadelphia hotel.
Read full article »

Trump Fights Class Cert. In Suit Saying He Paid Women Less

President Donald Trump's attorneys urged a Florida federal court Tuesday not to certify a class of women who say they were underpaid while working on his presidential campaign, arguing that the sole evidence for the allegations are unsupported declarations and miscalculated wage data.
Read full article »

DISCRIMINATION

Transgender Women Challenge Pa. Name-Change Rules

A trio of transgender women filed suit in Pennsylvania court on Wednesday alleging that state rules regarding name changes for ex-felons created unfair complications in seeking health care and employment opportunities.
Read full article »

WAGE & HOUR

Child Care Co. Agrees To $1.25M Calif. Wage Deal

A child care chain has agreed to pay $1.25 million to end a proposed class action alleging it violated California wage law by shorting workers there out of minimum wage and overtime and denying them rest and meal breaks.
Read full article »

Merrill Lynch OT Suit Going To Mediation For Potential Deal

Merrill Lynch and a former company employee have agreed to engage in mediation to try to resolve class claims that parent Bank of America NA improperly failed to pay overtime to "email reviewers," months after a New Jersey federal judge granted conditional certification but said receiving final certification would be tougher.
Read full article »

Immigrant Workers, Wash. Minimum Wage Suits Merged

A Washington federal judge has kept alive a class action alleging GEO Group Inc. used immigrants held at a Washington state detention center as cheap labor, but combined parts of it with a suit the state brought making similar claims.
Read full article »

LABOR

Electric Co. Can't Sidestep Union Contract, 3rd Circ. Says

The National Labor Relations Board correctly held that an electrical contractor was tardy in withdrawing from a multiemployer collective bargaining association and illegally refused to honor a collective bargaining agreement the association subsequently struck with a workers' union, the Third Circuit has ruled.
Read full article »

TRADE SECRETS

Antero Wants Trade Secret Row Against Okla. Co. Revived

Antero Resources Corp. told the Texas Supreme Court that a lower court opened a "dangerous loophole" when it held Texas courts don't have authority to hear the oil and gas company's trade secret theft claim against an Oklahoma-based rival.
Read full article »

Morgan Lewis
Morris James
Niles Barton
Ogletree Deakins
Pechman Law Group
Reed Smith
Schroeter Goldmark
Simpson Thacher
Skadden
Steptoe & Johnson PLLC
Tycko & Zavareei
Varnell & Warwick
Vinson & Elkins
White & Case
Wilkinson Walsh

COMPANIES

AARP Inc.
AXA SA
AXA XL Ltd.
American Bar Association
American Federation of Labor and Congress of Industrial Organizations
Ames & Gough
Antero Resources Corp.
Bank of America Corp.
Burlington Stores Inc.
CSX Corp.
Consolidated Rail Corp.
Crum & Forster Holdings Corp.
Hazelden Betty Ford Foundation
International Brotherhood of Electrical Workers
Kirkland's, Inc.
Liberty Mutual Insurance Group
LinkedIn Corp.
Major Lindsey & Africa
Markel Corp.
Neiman Marcus Group
Securitas Security Services USA Inc.
Sompo Holdings Inc.
Starbucks Corp.
Twitter Inc.

GOVERNMENT AGENCIES

California Labor and Workforce Development Agency
California Supreme Court
Equal Employment Opportunity Commission
Illinois Supreme Court
National Labor Relations Board
Office of Labor-Management

WORKER SAFETY

Pa. Panel Says Indiana Man's FELA Case Can Stay In Philly

Conrail's headquarters and executives in Philadelphia are enough to let a former Indiana rail worker's family bring a Federal Employers Liability Act case against the company in Pennsylvania over the worker's fatal, allegedly work-related cancer, the state's Superior Court ruled Wednesday.

Read full article »

INSURANCE

Insurer Owes Car Dealership $4.3M Over Ex-Employee's Suit

A Maryland federal jury has awarded an East Coast car dealership chain $4.3 million in its dispute with insurer Universal Underwriters Insurance Co. over the latter's failure to defend the dealership from a lawsuit brought by the daughter of one of the owners who alleged she was denied a promised share in the company.

Read full article »

EXPERT ANALYSIS

Assessing The Availability Of Jury Trials For PAGA Claims

Although California's appellate courts have yet to decide whether litigants are entitled to jury trials for Private Attorneys General Act claims, several trial court decisions can help litigants as they evaluate this issue in their own PAGA cases, say Felix Shafir and John Querio of Horvitz & Levy.

Read full article »

9 Ways To Improve The Employee Evaluation Process

As summer approaches, many human resources departments are gearing up for employee performance evaluations, but not all evaluation programs are created equal and legal issues can arise from the review process, say Jim McMackin and Allyson Britton DiRocco of Morris James.

Read full article »

3 Law Firm Business Tactics To Support A Niche Practice

Once you've chosen a strategy for your law firm, what tactics will promote success? There are three tactical areas important to all firms, regardless of specialty or size, but particularly critical for today's niche firms, say Yussuf Aleem and Jacob Slowik of Joseph Aleem.

Read full article »

LEGAL INDUSTRY

Firms Face Surge In Big-Ticket Malpractice Claims

More complex matters and higher costs for law firms to defend malpractice allegations are top contributors to a surge in claims resulting in larger multimillion-dollar payouts, according to insurer data released Wednesday.

Read full article »

Dodgy Cites, 'Kitchen Sink' Briefs Among 7th Circ. Pet Peeves

If Seventh Circuit Judge Michael Y. Scudder, a former Skadden Arps Slate Meagher & Flom LLP partner, could change anything about how he once approached legal briefs in private practice, he'd "double down" on quality control around citations to the record, he said Wednesday.

Read full article »

Kirkland Latest In BigLaw To Unveil Mental Health Initiative

Kirkland & Ellis on Wednesday unveiled a new firmwide wellness initiative to proactively work with its 2,500 attorneys and staff on issues related to mental health and substance misuse, joining a list of BigLaw firms that have recently rolled out programs targeting those growing areas of concern in the legal

Standards
Pennsylvania Department of State
Texas Supreme Court
U.S. Army
U.S. Attorney's Office
U.S. Department of Labor
U.S. Supreme Court
United States Court of Appeals for the Third Circuit
Vermont Natural Resources Agency

profession.

Read full article »

Eversheds Sutherland Opens Chicago Office With BigLaw Vets

Eversheds Sutherland announced Wednesday that the firm has opened a Chicago office, its first in the Midwest, with leaders recruited from Kirkland & Ellis, White & Case, and the firm's own New York office.

Read full article »

Firm Leaders: FisherBroyles' James Fisher & Kevin Broyles

The founding partners of cloud-based law firm FisherBroyles LLP speak to Law360 about the shortcomings of the traditional law firm structure and why the "virtual" model is built for success.

Read full article »

JOBS

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Schwabe, Williamson & Wyatt
Seattle , Washington

Mid-sized White Plains firm seeks mid-senior litigation associate
KLR Davis
White Plains, New York

Part-time Employment Law Litigation Attorney
Simpson, Garrity, Innes & Jacuzzi APC
South San Francisco, California

Attorney
U.S. Securities & Exchange Commission
Washington, District of Columbia

Experienced Employment Associate
Lane Powell PC
Portland, Oregon

Associate Litigation Attorney (2-4 yrs.)
Gordon & Rees
Wilmington, Delaware

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Experienced Attorney
Wolk & Levine, LLP
Glendale, California

mid level L&E assoc/40 yr old 50 atty NYC firm
Schoen Legal Search
New York, New York

Labor and Employment Associate
Duane Morris LLP
San Diego, California

Enforcement Attorney
U.S. Securities & Exchange Commission
Philadelphia, Pennsylvania

Assistant Counsel II, Talent - The Estée Lauder Companies
The Estee Lauder Companies
New York, New York

Litigation Associate
Keesal, Young & Logan
San Francisco, California

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

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From: Employment Law360
To: Ring, John
Subject: 9th Circ. Applies Dynamex Retroactively, Revives Wage Suit
Date: Friday, May 3, 2019 4:16:27 AM

EMPLOYMENT

Friday, May 3, 2019

TOP NEWS

Analysis

9th Circ. Applies Dynamex Retroactively, Revives Wage Suit

The Ninth Circuit said Thursday the California Supreme Court's landmark Dynamex decision making it harder for businesses to classify their workers as independent contractors applies retroactively, setting the stage for a potential spike in wage-and-hour suits.

Read full article »

MoFo Gets Claims Trimmed In Pregnancy Bias Suit

A California federal judge has trimmed claims from some of the female attorneys accusing Morrison & Foerster LLP of gender and pregnancy-based discrimination as either too late or unsupported, although the women will have a chance to fix those shortcomings.

Read full article »

EEOC Opts To Collect 2017 Employee Pay Data

The U.S. Equal Employment Opportunity Commission said Thursday that it will collect wage data from employers for 2017 in addition to 2018, as the agency continues to flesh out the details for its expanded pay data collection ahead of a court-mandated Sept. 30 deadline.

Read full article »

Robinson Bradshaw Seeks To Trim Black Atty's Bias Suit

Robinson Bradshaw & Hinson PA asked a North Carolina federal court on Thursday to trim state law claims from a black female attorney's civil rights and deceptive trade practices suit, saying that her allegations of mistreatment are essentially just a groundless "public attack" on its diversity policies.

Read full article »

HHS Finalizes Rule Shielding Anti-Abortion Health Providers

The U.S. Department of Health and Human Services on Thursday announced a final rule meant to ensure the "vigorous enforcement" of existing federal anti-discrimination laws that allow doctors and nurses with moral or religious objections to not take part in abortions, assisted suicides, sterilization and certain other procedures.

Read full article »

Ousted Temple Business School Dean Sues For $25M

The ousted dean of Temple University's Fox School of Business launched a $25 million lawsuit on Thursday, alleging that his reputation was wrongly tarnished after he was scapegoated in a scandal over inflated rankings in U.S. News & World Report.

Read full article »

DISCRIMINATION

9th Circ. Greenlights EEOC Bias Probe Into Wrangler Jeans

The Ninth Circuit on Wednesday blocked a VF Corporation unit's attempt to

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New Cases

Discrimination (61)
ERISA (20)
Labor (41)

LAW FIRMS

Baker McKenzie
BakerHostetler
Boies Schiller
Bredhoff & Kaiser
Brotman Law (San Diego, CA)
Carmen D. Caruso Law Firm
Clare Locke
Clifford Chance
Comegno Law Group
Conchin Cloud
Console Mattiacci
Cravath Swaine
Dilworth Paxson
Fisher Phillips
Fox Rothschild
Gibbs Law Group LLP
Gibson Dunn
Jenner & Block
Jones Day
Keller Lenkner
Lichten Liss-Riordan
Littler Mendelson
Matern Law Group
McConnell Valdes

limit the Equal Employment Opportunity Commission's investigation into allegations the denim maker harassed a female ex-employee and reserved top management positions for men, saying the probe can extend beyond the woman's individual claim.

Read full article »

Bellagio Seeks To Toss 'Fat Andy' Verdict, Claiming Perjury

Bellagio Hotel & Casino on Wednesday asked a Nevada federal court to overturn a half-million-dollar jury award for a former employee, claiming that he lied and fabricated evidence that showed Bellagio intentionally inflicted emotional distress by leaving a sign up for months calling him "Fat Andy."

Read full article »

CEO's Assistant Says She Was Fired For Reporting Racial Slur

A woman of Mexican descent who worked as the assistant to the CEO of Vivaria Group, which owns and operates several Sbarro pizza franchises throughout Florida, has filed a lawsuit claiming she was fired after she complained to the CEO about a racial slur directed at her by his wife.

Read full article »

WAGE & HOUR

Dollar Tree's Pay Stub Trial Win Stands After 9th Circ. Review

The Ninth Circuit has declined to revive class claims that Dollar Tree's practice of providing pay stubs on cash register receipts violated a California law requiring employers to provide accessible wage statements, rejecting claims that erroneously excluded evidence led to a jury's decision clearing the retailer.

Read full article »

Uber Can't Use DOL Guidance, Philly Drivers Tell 3rd Circ.

Philadelphia-based Uber limo drivers told the Third Circuit Thursday that the ride-hailing giant cannot use recent U.S. Department of Labor guidance to snuff their proposed class action alleging they're misclassified as independent contractors, saying the guidance isn't binding.

Read full article »

Delivery Drivers May Be Entitled To Expenses In Wage Suit

A class of delivery drivers who say they were wrongly classified as independent contractors instead of employees may be entitled to reimbursement for certain work-related expenses after a Massachusetts federal judge shot down a shipping company's argument that federal statute should trump the state's wage laws.

Read full article »

LABOR

Dems Target Class Waivers In Sweeping New Labor Bill

A host of Democratic lawmakers unveiled a wide-ranging bill Thursday that would block companies from making workers sign away their rights to pursue class action claims and give workers the ability to sue employers directly in court for National Labor Relations Act violations.

Read full article »

NJ Gov., Teachers Union Fight Post-Janus Bid To Escape Dues

New Jersey Gov. Phil Murphy and the state's largest teachers union have urged a federal court to squash a bid by educators for a ruling that would enable former union members to stop paying dues immediately, saying such payroll deductions are required for a certain additional period of time under their membership agreements.

Read full article »

McDonnell Boehnen
Meister Seelig & Fein
Morgan & Morgan
Morgan Lewis
Morrison & Foerster
Nilan Johnson
Norton Rose Fulbright
O'Hagan Meyer
Ogletree Deakins
Parker McCay
Paul Hastings
Pisanelli Bice
Richards Kibbe
Richards Layton
Robinson Bradshaw
Sacks Weston Diamond
Sanford Heisler
Scopelitis Garvin
Sidley Austin
Snell & Wilmer
Stradley Ronon
Strategic Health Law
Talcott Franklin
Van Kampen Law PC
Vorys Sater
Wargo & French
Wigdor LLP
Winston & Strawn
Womble Bond Dickinson
Zazzali Fagella
Zelle LLP

COMPANIES

Alstom SA
American Airlines Group Inc.
American Civil Liberties Union
American Federation of State, County and Municipal Employees
Auntie Anne's Inc.
BP p.l.c.
Bellagio LLC
Dollar Tree Inc.
Dynamex, Inc.
Google Inc.
GrubHub Inc.
Huawei Technologies
L'Oreal SA
MGM Resorts International
Mattel Inc.
NBCUniversal Inc.
NFL Enterprises LLC
National Education Association
National Employment Law Project
National Right to Work Legal

NONCOMPETES

DOJ's No-Poach Stance Called 'Wasteful And Inappropriate'

A left-leaning antitrust think tank pushed back Thursday on U.S. Department of Justice calls to apply a harder-to-prove legal standard on lawsuits accusing franchise-based businesses of anti-competitive no-poach deals with individual franchisees, arguing the DOJ's approach protects agreements that "make no economic sense on their face."

Read full article »

Jiffy Lube Says No-Poach Suit Belongs In Texas

Jiffy Lube has told a Pennsylvania federal court that a former worker's suit challenging a no-poach provision in its past franchise agreements has almost no connection to the district where he filed it and should be sent to Texas.

Read full article »

EXPERT ANALYSIS

What To Expect From New EEOC Pay Data Demands

A recent D.C. federal court order requires the U.S. Equal Employment Opportunity Commission to collect pay data from employers by Sept. 30. This reporting burden is significant, and there will likely be errors and inconsistencies as companies interpret the requirements in the context of their workforce demographics, says Jeffrey Heller of Vorys Sater.

Read full article »

How To Identify And Deal With Narcissists In Law

Given that a large swath of the legal profession may display some narcissistic tendencies, it is important for lawyers to know how to address the narcissist in the room — and it may be you, says Jennifer Gibbs of Zelle.

Read full article »

LEGAL INDUSTRY

Analysis

The Battles And Bickering On The Way To 100 Trump Judges

The Senate confirmed President Donald Trump's 100th judicial nominee on Thursday, a milestone on a path of partisan bickering, the occasional failed court pick and massive struggles over the future of the U.S. Supreme Court.

Read full article »

Senate OKs Judges For Fla., Puerto Rico, Pa.

The Senate confirmed President Donald Trump's choices for trial court vacancies in Florida, Pennsylvania and Puerto Rico on Thursday, giving him more than 100 judges confirmed under his administration.

Read full article »

Clifford Chance To Test Nixing Billable Hour From Evaluations

Clifford Chance LLP said Thursday that it has launched a pilot program in its two Middle East offices to take the billable hour out of the equation for assessing associate performance and instead reward innovation, business development and effectiveness at realizing the firm's internal goals.

Read full article »

Diverse Legal Teams Take Work, Top In-House Attys Say

Diverse legal teams are happier and more productive, top in-house attorneys from NBCUniversal, Turner Broadcasting and Mattel agreed during a panel discussion Wednesday, while emphasizing that they don't just happen — they take hard work to create.

Read full article »

Sidley Atty, Ex-DOJ No. 2 Faces Secretive DQ Bid In Huawei

Defense Foundation
National Women's Law Center
Parker Hannifin Corp.
Royal Dutch Shell PLC
S&P Global Inc.
T-Mobile USA Inc.
Temple University
Turner Broadcasting System Inc.
Uber Technologies Inc.
VF Corp.
Wal-Mart Stores Inc.
ZTE Corp.

GOVERNMENT AGENCIES

California Supreme Court
Equal Employment Opportunity Commission
Executive Office of the President
Federal Aviation Administration
Federal Trade Commission
National Institutes of Health
National Labor Relations Board
New Jersey Attorney General's Office
Office of Foreign Assets Control
Tennessee Valley Authority
U.S. Attorney's Office
U.S. Department of Health and Human Services
U.S. Department of Justice
U.S. Department of Labor
U.S. Supreme Court
United States Court of Appeals for the Third Circuit
United States District Court for the Eastern District of Pennsylvania
Wage and Hour Division

Prosecutors asked a New York federal court in a "sealed classified" motion Thursday to disqualify a Sidley Austin LLP partner, and former U.S. deputy attorney general, from defending Huawei against claims it was deceptive about its dealings in Iran.

Read full article »

GE Litigators Who Probed Alstom Deal Launch NY Firm

Two litigators who managed General Electric's probe into possible corruption by an acquisition target have founded O'Prey Wen LLP, a New York-based firm that will focus on commercial litigation and internal investigations.

Read full article »

Law360's Weekly Verdict: Legal Lions & Lambs

A small Alabama law firm secured this week's top legal lions spot with a big win in a client's sovereign immunity lawsuit at the U.S. Supreme Court, while BakerHostetler ended up among the legal lambs after client Trading Technologies lost a patent case before the Federal Circuit.

Read full article »

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Keesal, Young & Logan
San Francisco, California

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Mid-sized White Plains firm seeks mid-senior litigation associate
KLR Davis
White Plains, New York

Employment Litigation Associate
Ogletree Deakins Law Firm
Washington, District of Columbia

Employment Litigation Defense Attorney
Kaufman Dolowich & Voluck, LLP
Los Angeles, California

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

Labor & Employment Associate - (1+ yrs Exp.)
Jones Day
San Diego, California

mid level L&E assoc/40 yr old 50 atty NYC firm
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New York, New York

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From: (b) (6) [redacted]
To: Ring, John
Cc: Bashford, Jo Ann
Subject: 2019 Littler Executive Employer Conference Hotel Confirmation
Date: Wednesday, May 1, 2019 3:10:55 PM

590NEW19_EE_Littler_CventBanners_NewLogo_590x150

Dear John,

We look forward to welcoming you to the 2019 Littler Executive Employer Conference in Phoenix. Please see your hotel confirmation, arrival information, conference details and agenda below.

Hotel Arrival/Departure Details

Hotel Reservation Details

John Ring

JW Marriott Desert Ridge

5350 East Marriott Drive
Phoenix, AZ 85054 USA

Room Type - King

Confirmation Number
97749086

Check-In Date	Check-Out Date	Quantity
07-May-2019	09-May-2019	1

Hotel Check-In Time: 4:00 p.m.
Hotel Check-Out Time: 11:00 a.m.

The JW Marriott is sold out over our conference dates. If you need to cancel or make changes to your hotel dates, please contact (b) (6) [redacted] immediately.

Transportation

On Wednesday, May 8th we have arranged for complimentary transportation to take guests from Phoenix's Sky Harbor Airport to the JW Marriott Desert Ridge Resort between the hours of 10:00 a.m. & 8:00 p.m. departing approximately every half hour. Look for greeters with Littler Mendelson signs in the baggage claim area and they will direct you to the shuttle. If you cannot find the shuttle, call (b) (6) [redacted].

Please note: If you require transportation outside of the above shuttle schedule, you will need to arrange your own transportation. You can take an UberX ($30 fare non-surge pricing), a taxi ($65 fare) or contact the hotel's recommended car service Transtyle Sedan Service at 480.948.6131 to arrange a transfer. The one-way charge is approximately $65 for curbside pickup and $90 for meet & greet in baggage claim.

Complimentary return transportation will be offered on Friday, May 10th, from 10:30 a.m. until 2:00 p.m. departing approximately every half hour.

Conference Details
Main Event Dates: May 8, 2019 - May 10, 2019
Event Confirmation Number: FFNTDRXHDVP

Registration Information:		
Sessions		
John Ring	Traditional Labor Symposium: What Union and Nonunion Employers Need to Know About Today's Unions	08-May-2019 2:00 PM
Additional Information		
John Ring	I agree to provide the information requested during this registration process and receive event emails for my participation in the 2019 Littler Executive Employer Conference I agree	
	Littler Shareholder Who Invited You? (b) (6) [redacted]	
	Upload Headshot Chairman Ring Headshot.jpg	
	Upload Speaker Bio Ring Biography.pdf	
	Industry Public Administration	
	Company Website Address www.nlrb.gov	
	Does your company have international operations? No	
	Do you personally have international responsibilities? No	
	CLE Credit Requested No	
	Dietary Requirements None	
	Special Requests None	

Conference App
Please look for conference app details later this week!

What to pack!

If you've ever been to Phoenix in the spring, then you know the desert in bloom is truly a thing to behold, but for allergy sufferers, it can also be something less than pleasant. If you have allergies, don't forget to bring your allergy medication. Also, the weather at this time of year is typically pleasant, but this is the desert and temperatures could reach the high 90's during the day and cool off precipitously when the sun sets, so please pack accordingly and don't forget your sunscreen.

The dress attire for the event is business casual. Meeting rooms can be cool, we recommend a light sweater or jacket.

Thursday evening's party theme will be "Derby in the Desert" - our tribute to the traditions of the Kentucky Derby. We will provide hats and bowties for our guests and encourage everyone to come dressed for the occasion in your own Derby attire.

Please review this information and advise (b) (6) [redacted] with questions and updates. You may reach (b) [redacted] by phone or text as well at (b) (6) [redacted].

We wish you safe travels and we look forward to seeing you in Phoenix!

From: (b) (6)
To: Ring, John
Cc: Bashford, Jo Ann
Subject: 2019 Littler Executive Employer Conference Hotel & Arrival Details
Date: Thursday, May 2, 2019 12:48:02 PM

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Dear John,

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JW Marriott Arrival/Departure

Hotel Reservation Details

John Ring

JW Marriott Desert Ridge

5350 East Marriott Drive
Phoenix, AZ 85054 USA

Room Type - King

Confirmation Number
97749086

Check-In Date	Check-Out Date	Quantity
07-May-2019	09-May-2019	1

Hotel Check-In Time: 4:00 p.m.
Hotel Check-Out Time: 11:00 a.m.

The JW Marriott is sold out over our conference dates. If you need to cancel or make changes to your hotel dates please contact (b) (6) immediately.

Airport Transfers

We have arranged a car service to transfer you and Christine Lucy to and from the JW Marriott. Your driver will meet you in baggage claim upon your arrival. If you have difficulty connecting with your driver please call (b) (6) [redacted] will confirm your return transfer once you are onsite.

Conference Details
Main Event Dates: May 8, 2019 - May 10, 2019
Event Confirmation Number: FFNTDRXHDVP

Registration Information:		
Sessions		
John Ring	Traditional Labor Symposium: What Union and Nonunion Employers Need to Know About Today's Unions	08-May-2019 2:00 PM
Additional Information		
John Ring	I agree to provide the information requested during this registration process and receive event emails for my participation in the 2019 Littler Executive Employer Conference I agree	
	Littler Shareholder Who Invited You? (b) (6) [redacted]	
	Upload Headshot Chairman Ring Headshot.jpg	
	Upload Speaker Bio Ring Biography.pdf	
	Industry Public Administration	
	Company Website Address www.nlrb.gov	
	Does your company have international operations? No	
	Do you personally have international responsibilities? No	
	CLE Credit Requested No	
	Dietary Requirements None	
	Special Requests None	

What to pack!
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Please review this information and advise (b) (6) [redacted] with questions and updates. You may reach (b) [redacted] by phone or text as well at (b) (6) [redacted]

We wish you safe travels and we look forward to seeing you in Phoenix!

From: POLITICO"s Morning Shift
To: Ring, John
Subject: A new proposal could deny asylum to thousands — New court filings raise questions over 2020 census citizenship question — Unfair labor practice charges filed against SEIU
Date: Friday, May 31, 2019 10:03:22 AM

May 31, 2019 View in browser

2018 Newsletter Logo: Morning Shift

BY **REBECCA RAINEY**

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Trump's Homeland Security advisers are mulling a proposal that would

deny asylum to thousands of migrants waiting at the U.S.-Mexico border.

— A new court filing suggests Trump officials knew that adding a citizenship question to the 2020 census could favor Republicans in redistricting.

— Unionized staff at the Service Employees International Union filed an unfair labor practice charge against the union Thursday.

GOOD MORNING! It's Friday, May 31, and this is Morning Shift, your daily tipsheet on labor and immigration news. Your Morning Shift author is headed off to the Big Easy for the next week. Don't worry, Ted Hesson and Ian Kullgren will have you covered. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

NEW PROPOSAL COULD DENY ASYLUM TO THOUSANDS: "President Donald Trump is considering sweeping restrictions on asylum that would effectively block Central American migrants from entering the U.S.," POLITICO's Ian Kullgren, Ted Hesson and Anita Kumar report. A draft proposal circulating among DHS advisers would prohibit migrants from seeking asylum if they have traveled through a country other than their own before coming to the U.S. — a policy which would deny asylum to thousands of migrants waiting just south of the border.

While Trump aides say the changes can be made through an administrative rule, they are also seeking a legislative fix in Trump's new immigration bill, a move that would be far less vulnerable to a court challenge that advocates for immigrants are expected to file. The White House expects to release the legislation in the coming days.

Trump hinted at immigration changes Thursday as he departed for Colorado, telling reporters he is "going to do something very dramatic on the border." Late Thursday night Trump announced that he would impose a 5 percent tariff next week on all imports from Mexico until the country addresses the influx of

migrants coming to the United States."The president said he would give Mexico one year to curb illegal border crossings before pulling the trigger on new tariffs," Kullgren writes, "a softening of his earlier threat to close the border entirely, but one that could still inflict economic damage on both countries." More here.

More border headlines:

— "ACLU seeks to block more sections of Trump's border wall," from POLITICO's Ian K ullgren

— "Judge denies Trump administration request to keep wall construction underway," from POLITICO's Ian Kullgren

IMMIGRATION

NEW EVIDENCE SHOWS COMMERCE KNEW CENSUS QUESTION COULD BENEFIT REPUBLICANS, WHITES IN REDISTRICTING: New evidence laid out in a court filing Thursday suggests that a Republican redistricting strategist "played a significant role in orchestrating" the Trump administration's effort to add a question about citizenship to the 2020 census, contradicting the Commerce Department's explanation for the addition, I reported here. Attorneys for the ACLU argue in the filing that Thomas Hofeller, a longtime Republican redistricting guru who passed away in August 2018, "played a significant role in orchestrating" the addition of the citizenship question "in order to create a structural electoral advantage for, in his own words, 'Republicans and Non-Hispanic Whites.'"

The evidence suggests that Commerce Secretary Wilbur Ross' adviser Mark Neuman and a Justice Department official "obscured" Hofeller's involvement in the decision "through affirmative misrepresentations," the ACLU, which sued on behalf of immigrants' rights groups in the Southern District for New York, said. Ross has said he added the question "solely" at the request of the Justice Department as part of an effort to better protect voting rights. DOJ sent the formal request in a December 2017 letter, which said in the question would help it better enforce parts of the Voting Rights Act. However, critics contend that the question is intended to strip immigrant communities of voting power and federal funding.

The ACLU filing states that in August 2017, Hofeller "helped ghostwrite a draft DOJ letter to Commerce" and the letter eventually sent by DOJ "bears striking similarities" to a 2015 study by Hofeller that concluded that adding a citizenship question to the 2020 census "would clearly be a disadvantage to the Democrats" and "advantageous to Republicans and Non-Hispanic Whites" in redistricting. A DOJ spokesperson said in a statement that the study "played no role" in DOJ's request to reinstate the citizenship question to the 2020 census. "These unfounded allegations are an unfortunate last-ditch effort to derail the Supreme Court's consideration of this case," the spokesperson said. More from me here.

Sick and tired of traffic? Relief may not be as far off as you think. POLITICO Magazine's "What Works" series looks at innovative ways that cities are trying to reduce traffic, from density-focused light rail to congestion pricing to an outright car ban on the busiest streets. If you could change anything to reduce congestion or improve transportation in your city, what would it be? Tell us here and we'll publish the most thoughtful responses.

UNIONS

STAFFERS FILE UNFAIR LABOR PRACTICE CHARGES AGAINST SEIU: Unionized staffers at the Service Employees International Union filed an unfair labor practice charge Thursday against the union over "management's failure to bargain the current contract dispute in good faith." The workers represented by the OPEIU Local 2 allege in the complaint that SEIU management "failed to properly respond to an information request" which "has impeded the ability of unionized staff to successfully bargain over key issues" and provided "false information" to Local 2 members.

Last week, Local 2 voted to reject the SEIU's latest contract offer and reauthorize a strike. "At a time when SEIU is courting presidential candidates to make it easier for workers to join unions, SEIU management is behaving more like the irresponsible employers it calls out on a daily basis than the progressive labor union it portrays itself to be," said Omar Martinez, an SEIU communications staffer and Local 2 bargaining committee member. In a statement to SEIU spokesperson Sahar Wali said: "We absolutely respect

OPEIU Local 2's right to reject this contract and to take collective action, including striking. We are a union that is also an employer who must serve as responsible stewards of our members' resources and maintain their ability to fight for a better life through their union." Read the charge filed with the NLRB here.

IN THE WORKPLACE

JP MORGAN TO PAY $5 MILLION TO MALE EMPLOYEES DENIED PARENTAL LEAVE: JPMorgan Chase agreed to pay $5 million to male employees who alleged they were discriminated against when they were denied access to the same paid parental leave as female employees from 2011 to 2017, The American Civil Liberties Union announced Thursday. In a proposed class action complaint filed Thursday along with the settlement, a male employee alleged that when he sought to take "primary caregiver" leave "he was told by Chase's H.R. department that mothers were presumptively considered primary caregivers , eligible for the full 16 weeks of paid parental leave, while fathers were eligible for two weeks of paid parental leave unless they could show that their spouses or partners were incapacitated or had returned to work."

Chase is not admitting liability in the settlement, according to the ACLU. Read a press release from the ACLU here.

Related read: "Victory for Fathers in a Parental Leave Case That Could Be a Harbinger," from The New York Times

WOMEN ALLEGE DISCRIMINATION AT FBI ACADEMY: "Sixteen women who trained to become FBI agents and analysts have come forward in a lawsuit filed Wednesday accusing the bureau of gender discrimination in how it trains and evaluates female candidates," NBC News reports. The lawsuit claims that women who recently enrolled at the FBI's Basic Field Training Course in Quantico faced gender discrimination "and that the problem is worse for women of color or those with disabilities."

One woman told NBC that when she reported "excessive discrimination" against a female co-worker to her female unit chief, "She looked me in the eyes and said: 'You coming forward and speaking up will not go without consequence. I hope it was worth it.' ... And from there on out I was targeted. . .I

was harassed constantly." More here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the ideas that might just propel us forward. Subscribe to receive the first episode at launch.

2020 WATCH

SOME 2020 DEMOCRATS SUPPORT DECRIMINALIZING PROSTITUTION: Four 2020 presidential candidates say that they support decriminalizing sex work, which is currently illegal in the United States with the exception of a handful of counties in Nevada, BuzzFeed News reports. Rep. Tulsi Gabbard, Sen. Cory Booker and Sen. Kamala Harris all told Buzzfeed they support decriminalization. Rep. Seth Moulton also said he supports it, "though he has a caveat — he wants to maintain strict penalties for people who solicit prostitution." BuzzFeed also points to a recent poll conducted by an advocacy organization and a progressive think tank Data for Progress, found that among Democrats, 55 percent support the decriminalization of consensual sex work and across all parties, 45 percent support it. More here.

A DEPARTURE FROM VOX: Immigration reporter Dara Lind is headed to ProPublica, according to Playbook. She starts July 1, but will remain co-host of Vox's policy podcast, "The Weeds." Read the announcement here.

SEXUAL HARASSMENT

EXECUTIVES DEPART NATURE CONSERVANCY FOLLOWING HARASSMENT CLAIMS: "Two senior officials at The Nature Conservancy, one of the world's most influential environmental groups, have exited the organization after an investigation into allegations of sexual harassment and workplace misconduct," according to documents obtained by POLITICO's Zack

Colman. The Conservancy's CEO announced the departure of Mark Burget, who headed the group's North American operations, and Kacky Andrews, who led global programs, in an email Tuesday.

An internal investigation into the conservancy's workplace culture found that "[s]pecifically, in several instances where there were serious allegations of misconduct, TNC opted for no or minor discipline because TNC perceived the event as 'he said/she said' with no corroborating evidence. In these instances, the accused was given the benefit of the doubt," the report said. More from Colman here.

WHAT WE'RE READING

— "Hundreds of minors held at U.S. border facilities are there beyond legal time limits," from The Washington Post

— "Tennessee governor against union vote at Volkswagen plant," from The Associated Press

— "In Worker Center Battle, Business Seeks Ally in Labor Board," from Bloomberg Law

— "I'm one of 25 people who fil ed a sexual harassment complaint against McDonald's. Here's my story." from Vox

— "American Airlines Mechanics Are Threatening the 'Bloodiest, Ugliest Battle' in Labor History," f rom In These Times

— "Trump administration makes major push on Congress to pass new NAFTA," from POLITICO

— "Federal employees soon will have more options to withdraw money from their retirement accounts," from The Washington Post

THAT'S ALL FOR MORNING SHIFT!

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Subject: A new snag in postal reform; a fight over HHS"s efforts to implement a partial union contract including telework cuts
Date: Wednesday, May 1, 2019 8:30:12 AM

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GovExec Today

May 1, 2019

Union Vows to Fight HHS Effort to Implement Partial Contract, Including Telework Cuts // Erich Wagner

Officials at the National Treasury Employees Union argue the department cannot legally implement new provisions until the entire contract is ratified.

Latest Effort to Overhaul the Postal Service Hits New Snag // Eric Katz

Lawmakers want more details on USPS' long-term plans before committing to legislative relief for cash-strapped agency.

Join us for Google Cloud's Federal Healthcare Day on 5/2

The **Federal Healthcare Day** is designed to help attendees explore the game-changing tech behind many of the health IT's most transformative developments. Join us on May 2 to hear directly from government health technology leaders and Google Cloud experts, experience demonstrations of innovative platforms and network with peers.

This event is complimentary, but spaces are limited. Reserve your spot now or learn more on our event site.

Learn more!

Interior Department Defends Reorg Plan Critics Call Wasteful, Ideological // Charles S. Clark

Deputy tells House members the still-secret plan localizes decision-making.

How Sending Security Clearance Checks to Defense Will Affect the Workforce // Erich Wagner

Personnel transfers will begin by June 24, but the details aren't all hammered out yet.

American Military Duties Grow at the Mexico Border // Ben Watson

Service members will have permissions that go beyond "observe and report," the Defense Department announced late Monday.

Homeland Security Department Keeps Wraps on Border Security Plan // Charles S. Clark

Two legal groups sue to get it under Freedom of Information Act.

To Tackle Complex Problems, Escape Your Coworkers // Rich Barlow

Slack and in-person teamwork are great, but you should probably close your office door once in awhile, too.

DHS Tries Again to Build a Contract for Agile Development // Aaron Boyd

The department is pushing components to buy more off governmentwide contracts—except when it comes to the cloud and agile development.

Trump and Democrats Agree to More Talks on $2 Trillion Infrastructure Package // Bill Lucia

They're slated to convene again in three weeks to discuss funding options.

Pentagon's $8 Billion DEOS Contract Out for Bid // Frank Konkel

Despite its size and scope, DEOS is only the first phase of the Defense Department's plan to buy common communication, collaboration and productivity capabilities.

Why Data Privacy is a Matter of Economic Justice // Michele GIlman

COMMENTARY | Congress may pass federal privacy laws to prevent a patchwork of state laws from arising. That's important for low-income Americans.

Join us for Google Cloud's Federal Healthcare Day on 5/2

The **Federal Healthcare Day** is designed to help attendees explore the game-changing tech behind many of the health IT's most transformative developments. Join us on May 2 to hear directly from government health technology leaders and Google Cloud experts, experience demonstrations of innovative platforms and network with peers.

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Subject: Accenture Beats In-House Atty"s Age Discrimination Suit
Date: Wednesday, May 1, 2019 3:58:53 AM

EMPLOYMENT

Wednesday, May 1, 2019

TOP NEWS

Accenture Beats In-House Atty's Age Discrimination Suit

A Maryland federal judge threw out a former Accenture in-house lawyer's age bias suit Tuesday, saying the management consulting firm fired him because he was scatterbrained and combative with bosses and wouldn't follow directions.

Read full article »

EEOC To Start Collecting Employers' Pay Data In July

The U.S. Equal Employment Opportunity Commission officially reinstated its employer pay data survey, letting businesses know that it plans to start accepting submissions in mid-July so it can have the data in hand by a court-mandated Sept. 30 deadline.

Read full article »

IHOP Run By Muslim Man Beats Christi an Waitress' Bias Suit

A Kansas federal judge on Tuesday tossed a white Christian waitress' race, religion and sex bias suit against an IHOP run by a Muslim manager, detailing the litany of personal and professional transgressions he said were the real reasons she got the boot.

Read full article »

Wynn Resorts Fined $35M But Can Still Open Mas s. Casino

The Massachusetts Gaming Commission hit Wynn Resorts Ltd. with a $35 million fine Tuesday for failing to disclose sexual assault allegations against its founder, Steve Wynn, but said the company will still be able to open its Boston-area casino in June as planned.

Read full article »

UnitedHealth Group Scores Quick Win In Race Bi as Suit

A Maryland federal judge has tossed a race bias suit against UnitedHealth Group, rejecting an African-American data analyst’s claims the company gave her a bad review and assigned her to work with an alleged harasser as punishment for claiming it gave white workers more leeway to telework.

Read full article »

Dollar General Defeats Fired Cancer Surv ivor's ADA Suit

An Indiana federal judge has let Dollar General out of a disability discrimination suit from a former district manager, finding his arguments that he was fired because he was diagnosed with cancer were unpersuasive.

Read full article »

DISCRIMINATION

Intel Beats Ex-Worker's Retaliation Suit At 10th Circ.

The Tenth Circuit on Tuesday refused to revive a former Intel system analyst's suit claiming she was mistreated at work after making complaints about supervisors during an internal company investigation, saying she tried to bring up a new legal theory she never raised at a lower court.

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New Cases

Discrimination (72)
ERISA (27)
Labor (41)

LAW FIRMS

Aeton Law Partners
Baker Donelson
Beasley Allen
Benesch Friedlander
Bondurant Mixson
Christian & Barton
Crowell & Moring
Davis Polk
Davis Wright Tremaine
Day Pitney
Dickinson Wright
Dickstein Shapiro
Duane Morris
Eron Law PA
Foley Hoag
FordHarrison
Fuqua Willard
Gray Reed
Guerrieri Clayman
Hall Bloch
Harrang Long
Haynes and Boone
HeplerBroom LLC
Hogan Marren

Read full article »

Zurich Owes On Sexual Harassment Payouts , 6th Circ. Says

The Sixth Circuit ruled Tuesday that Zurich American Insurance Co. must fully cover two of three settlements that a vacuum cleaner company reached with salespeople who alleged they were sexually abused by a colleague, saying the three women's claims were a single "occurrence" and the company only had to pay one policy deductible.

Read full article »

3rd Circ. Won't Rehear Challenge To ADA Trial Win

The Third Circuit on Tuesday denied a Delaware nonprofit's bid for rehearing after a panel ruled that the organization is not entitled to a new trial following an ex-employee's win on claims that her dyslexia was not accommodated under the Americans with Disabilities Act.

Read full article »

WAGE & HOUR

11th Circ. Denies Fla. Paraleg al Retrial In FLSA Overtime Suit

The Eleventh Circuit refused Monday to disturb a judgment against a Florida paralegal who lost her dispute with her former employer over allegedly unpaid overtime work, ruling that a witness who was unavailable during the bench trial could not be considered "newly discovered evidence" for the purposes of a new trial.

Read full article »

Disney's Arbitration Win In Tips Dispu te Backed By Court

A Florida federal court Tuesday upheld an arbitration decision for Walt Disney Parks and Resorts in a dispute over tip calculations for certain restaurant servers, finding the workers failed to show sufficient grounds for vacating what they claimed was an incomplete award rejecting their grievance.

Read full article »

LABOR

Wash. Gov. To Sign Law Blunting Janus Ruling's Imp act

Washington Gov. Jay Inslee is expected to soon sign legislation that limits public workers' ability to sue unions to recover so-called fair share fees that were collected before the U.S. Supreme Court ruled in its landmark Janus decision that workers can't be forced to pay those fees.

Read full article »

United Airlines Hit With Union S uit Over Profit-Sharing Plan

The Association of Flight Attendants on Monday asked an Illinois federal judge to vacate an arbitration award it says has cost its members millions of dollars in profit-sharing payments from United Airlines.

Read full article »

TRADE SECRETS

SS&C Wins $44M In Damages In Trade Secrets Suit

A Cook County jury on Friday found Clearwater Analytics misappropriated the trade secrets of competitor SS&C Technologies Holdings Inc., determining it owes $44 million in damages for its use of information provided to the company by a former SS&C employee.

Read full article »

Texas House Votes To Narrow Anti-SLAPP Law

The Texas House of Representatives on Tuesday nearly unanimously passed a bill that would rein in the Texas Citizens Participation Act, excluding attorney discipline and certain trade secret cases from the scope of the

Holland & Knight
Hunton Andrews Kurth
Jackson Lewis
Jones Day
Jones Walker
Kasowitz Benson
Kennedy Berkley
Kilmer Voorhees
Kirkland & Ellis
Latham & Watkins
Littler Mendelson
Mayer Brown
McCormick Law Firm
Morrison & Foerster
Munger Tolles
Norton Rose Fulbright
Offit Kurman
Ogletree Deakins
Orenstein Law Group
Quantum Legal LLC
Robbins Russell
Rodey Dickason
Roetzel & Andress
Schulte Roth
Shearman & Sterling
Squire Patton Boggs
Stone Mattheis
Vogel Slade
Winston & Strawn
Wyche PA

COMPANIES

Amazon.com Inc.
American Federation of Labor and Congress of In dustrial Organizations
American Federation of State, County and Municipal Employees
Apple Inc.
Association of Flight Attendants
Burlington Stores Inc.
CSX Corp.
Caterpillar Inc.
Citizens for Responsibility and Ethics in Washington
Community Health Systems Inc.
Dollar General Corp.
Electronic Frontier Foundation
EmCare Inc.
Encore Enterprises Inc.
Facebook
Federal Bar Association
Goodyear Tire & Rubber Co.
Google Inc.

powerful dismissal tool.

Read full article »

Door Maker Says Rival Taking A lready Settled Fight To Texas

Rather than accept an unfavorable ruling, door maker Jeld-Wen Inc. is trying to take its beef with a rival to Texas even though Jeld-Wen's trade secrets claim has already been dealt with in Virginia, the competitor told a Virginia federal judge Monday.

Read full article »

WHISTLEBLOWER

DOJ Denies 'Antipathy' For FCA Whistleblower Co.

An Illinois federal judge erred badly by refusing to end a False Claims Act case alleging drugmaker kickbacks, the U.S. Department of Justice argued, denying that its dismissal request reflects hostility toward a whistleblower company that brought the case.

Read full article »

Ex-Hospital Exec Inks $3.5M Deal To End MD Bribery Claims

A former hospital chain CEO accused of orchestrating a scheme to pressure and bribe doctors in exchange for patient admissions has agreed to pay $3.46 million to resolve a False Claims Act suit, the U.S. Department of Justice said Tuesday.

Read full article »

Pratt & Whitney Wants Out Of Suit Over Fau lty Jet Engines

Pratt & Whitney and its parent company United Technologies Corp. have asked a Connecticut federal judge to toss a suit alleging they sold the military defective fighter jet engines that exposed pilots to the risk of catastrophic engine failures.

Read full article »

WORKER SAFETY

CSX Fails To Nix Worker's $1.8M In jury Award At 11th Circ.

The Eleventh Circuit on Monday brushed off a bid by CSX to undo a nearly $1.9 million injury award for a CSX train engineer, succeeding only in reducing the award by about $90,000.

Read full article »

WRONGFUL TERMINATION

Free Speech Law Can't Stop CFO's W rongful Termination Suit

A real estate company cannot use a state free speech law to end its former chief financial officer's wrongful termination suit, a Texas appellate court held Monday, explaining the company hadn't shown the CFO's suit relates to the company's exercise of protected speech.

Read full article »

PEOPLE

Baker Donelson Adds Jones Walker Emp loyment Attys In La.

Baker Donelson Bearman Caldwell & Berkowitz PC has bolstered its labor and employment team in Louisiana by picking up a duo of employment litigators from Jones Walker LLP.

Read full article »

EXPERT ANALYSIS

Title VII And LGBT Discriminat ion: The Path To The High Court

Health Management Associates Inc.
Intel Corp.
International Business Machines Corp.
International House of Pancakes LLC
JELD-WEN Inc.
Juul Labs
Major League Soccer LLC
McKesson Corp.
NFL Enterprises LLC
National Football League Players Association
National Healthcare Corp
National Women's Law Center
PepsiCo Inc.
Phillips 66
PricewaterhouseCoopers
Public Storage
SS&C Technologies Holdings Inc.
Sinclair Broadcast Group Inc.
StubHub Inc.
T-Mobile USA Inc.
The Walt Disney Co.
Twitter Inc.
UCB SA
United Continental Holdings Inc.
United Technologies Corp.
UnitedHealth Group Inc.
Unum Group
Wal-Mart Stores Inc.
Walt Disney Parks & Resorts Worldwide Inc.
Wynn Resorts Ltd.
Zulily Inc.

GOVERNMENT AGENCIES

Commodity Futures Trading Commission
Equal Employment Opportunity Commission
Executive Office of the President
Federal Aviation Administration
Internal Revenue Service
Massachusetts Gaming Commission
Office of Foreign Assets Control
Securities and Exchange Commission
Texas House of Representatives
Texas Supreme Court
U.S. Attorney's Office
U.S. Department of Education
U.S. Department of Health and Human Services

The U.S. Supreme Court recently agreed to hear three cases involving the extent of Title VII's protections for LGBT discrimination. Melissa Legault of Squire Patton Boggs discusses the circuit court splits that brought the issue to the justices, as well as regulatory developments that contributed to inconsistent interpretations of the law.

Read full article »

Looking For The Hows And Whys Of FCA C ooperation Credit

Recent statements from the U.S. Department of Justice hint that formal guidance regarding cooperation in False Claims Act cases is coming. Recurrent themes found in the Justice Manual and other agencies' cooperation policies suggest how the DOJ may frame cooperation and its benefits, says Megan Jeschke of Holland & Knight.

Read full article »

LEGAL INDUSTRY

The Legal Writing Habit Judges Say They Can't S tand

The legal industry has a writing problem and judges and justices are speaking out, detailing exactly what it is that bothers them most about the documents they encounter on the bench.

Read full article »

Evolution Of GC Role May Come At A Cost , MoFo Study Finds

As modern general counsel seek to play a bigger role in their companies' senior leadership, those in-house lawyers are focused more on business and technology and far less on soft skills and the people in their own department, a new study by Morrison & Foerster LLP says.

Read full article »

4 More Trump Judicial Nomin ees Appear Set For Confirmation

Four more of President Donald Trump's judicial nominees appear to be on the road to confirmation, as they faced little pushback from Republicans during a Senate Judiciary Committee hearing Tuesday.

Read full article »

Analysis

All Eyes On Barr As Fight Over Mueller Moves To Congress

U.S. Attorney General William Barr will step into a two-day gauntlet of testimony about special counsel Robert Mueller's report Wednesday, facing a pair of congressional committees brimming with questions on Russia's interference in the 2016 election and President Donald Trump's attempts to interfere with Mueller's investigation of it.

Read full article »

DOJ Legal Opinions Can Stay Under Wraps, DC C irc. Says

In a split decision Tuesday, the D.C. Circuit rejected a watchdog group's bid to gain access to legal opinions issued by an office of the U.S. Department of Justice, saying the group had not proven the memos were subject to the disclosure requirements in the Freedom of Information Act.

Read full article »

Accused Shooter Of Mayer Brown At ty Wants To Sell His Guns

The accused killer of Mayer Brown LLP partner Stephen Shapiro asked a court on Tuesday to let him sell the firearms that police confiscated from his apartment the night of his arrest so he can pay his bills.

Read full article »

Ex-Dickstein Atty Loses Disability Benefits Suit Versus Insurer

Unum Life Insurance Co. of America on Monday beat a lawsuit claiming it wrongly denied a former attorney at Dickstein Shapiro LLP long-term

U.S. Department of Housing and Urban Development
U.S. Department of Justice
U.S. Department of Labor
U.S. Department of State
U.S. Department of the Treasury
U.S. Environmental Protection Agency
U.S. Supreme Court

disability benefits, when an Oregon federal judge ruled that the attorney failed to show she was continuously disabled.

Read full article »

The Top In-House Hires Of April

The high-profile legal department hires and promotions of April included appointments at Facebook, StubHub, Sinclair and Goodyear. Here, Law360 looks at these and some of the other top in-house announcements from the month.

Read full article »

JOBS

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U.S. Securities & Exchange Commission
Washington, District of Columbia

Attorney Adviser
U.S. Securities & Exchange Commission
Washington, District of Columbia

Mid-sized White Plains firm seeks mid-senior litigation associate
KLR Davis
White Plains, New York

Employment Litigation Associate
Ogletree Deakins Law Firm
Washington, District of Columbia

Employment Litigation Defense Attorney
Kaufman Dolowich & Voluck, LLP
Los Angeles, California

NYC Big-Law litigation assoc (3-4 yrs exp)
KLR Davis
New York, New York

Labor & Employment Associate - (1+ yrs Exp.)
Jones Day
San Diego, California

mid level L&E assoc/40 yr old 50 atty NYC firm
Schoen Legal Search
New York, New York

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From: Employment Law360
To: Ring, John
Subject: An Epic Year? High Court"s Class Waiver Ruling Turns 1
Date: Tuesday, May 21, 2019 3:40:00 AM

EMPLOYMENT

Tuesday, May 21, 2019

TOP NEWS

SCOTUS 2_Ted Eytan.jpg

Analysis

An Epic Year? High Court's Class Waiver Ruling Turns 1

A year ago today, the U.S. Supreme Court answered one of employment law's most hotly debated questions when it blessed class action waivers in its 5-4 Epic Systems Corp. v. Lewis ruling. Here, in the first in a 4-article series marking the anniversary of the blockbuster split decision, Law360 looks at the impact Epic Systems has had so far.

Read full article »

Jones Day Seeks To Unmask Jane Doe Attys In Sex Bias Suit

Jones Day is looking to identify the former associates behind a $200 million pregnancy and gender discrimination suit against the firm, arguing Monday that the women haven't demonstrated sufficient grounds or evidence to hide their identities from the public.

Read full article »

11th Circ. Rejects Ex-Amtrak Worker's Race Bias Appeal

The Eleventh Circuit said Monday that Amtrak fired a black route director because her job was cut and the company preferred other candidates for vacancies she sought to fill, not because of her race or because she took

Law360 Pro Say Podcast

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New Cases

Discrimination (85)
ERISA (28)
Labor (71)

LAW FIRMS

Alston & Bird
Alterman & Boop
Armstrong Teasdale
Ballard Spahr
Carella Byrne
Consovoy McCarthy
Cooper Levenson
Covington & Burling
Elliot Morgan Parsonage PLLC
Fears Nachawati
Held & Hines
Hinckley Allen
Hughes Hubbard
Jackson Lewis
Jomarron Lopez
Jones Day
Kelly Hart
Lichten & Liss-Riordan
Lieff Cabraser
Littler Mendelson
Loevy & Loevy
McDermott Will
Morgan Lewis
Nichols Kaster

protected medical leave.
Read full article »

No Mulligan For Salt Lake City Golf Pro's Race Bias Suit

The Tenth Circuit on Monday declined to revive a black Salt Lake City golf course worker's claims he was refused a promotion because of his race, dismissing concerns about negative feedback a selection panelist — the accuser's ex-boss — had compiled in case he "play[ed] the race card."
Read full article »

Md. Beats Suit Over Racy Email To Hospital Worker

The state of Maryland has defeated a former employee's suit alleging she was retaliated against and ultimately fired after reporting that she believed her supervisor's husband sent her a sexually explicit email, with a federal judge ruling that the state adequately addressed the situation.
Read full article »

Boston Labor Lawyer Looks To Unseat US Sen. Markey

Prominent Massachusetts employment attorney Shannon Liss-Riordan announced on Monday that she will challenge longtime legislator and incumbent Sen. Ed Markey in the Democratic primary election next year.
Read full article »

DISCRIMINATION

Longtime 'Borgata Babes' Sex Bias Case Pegged For Trial

The so-called "Borgata Babes" who claimed a New Jersey casino's personal appearance policy for drink servers unlawfully targeted women can take their 11-year-old case to trial, a state appeals court ruled Monday, finding disputed facts made a lower court's dismissal premature.
Read full article »

Worker's $285,000 ADA Verdict Is Vacated In Pa.

A woman whose employer refused to accommodate her post-traumatic stress disorder should lose her $285,000 jury award but will still be considered the winner of the case and allowed to seek reimbursement of her legal bills, a Pittsburgh federal judge ruled Monday.
Read full article »

Uniform Co. Beats Ex-Worker's FMLA, ADA Suit At 9th Circ.

The Ninth Circuit on Monday affirmed G&K Services' win in a former human resources worker's suit accusing the company of firing her for taking time off after she experienced health complications from giving birth, in violation of the Family and Medical Leave Act and the Americans with Disabilities Act.
Read full article »

Ex-VH1 Exec Fired After Race Bias Complaints, Suit Says

An African American former executive at Viacom's VH1 network was fired because he complained about racial bias and limited advancement opportunities for people of color at the company, according to a New York federal suit filed Monday.
Read full article »

DOJ Names Ex-US Atty Investigated For In-Office Affair

The name of a former U.S. attorney in Illinois who retired while under investigation for having an affair with a subordinate has been released by the U.S. Department of Justice, which produced the information following a protracted legal fight with BuzzFeed News.
Read full article »

WAGE & HOUR

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Outten & Golden
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Sanford Heisler
Schertler & Onorato
Setareh Law Group
Seyfarth Shaw
Simpson Thacher
Skadden
Stanley M. Stein PC
Stember Cohn
Stinson Leonard
Strindberg & Scholnick
The Law Offices of Neal Brickman
Vinson & Elkins
White & Case
Womble Bond Dickinson
Zelle LLP

COMPANIES

American Airlines Group Inc.
American Arbitration Association
American Bar Association
American Federation of State, County and Municipal Employees
Apple Inc.
Bank of America Corp.
Borgata Hotel Casino & Spa
BuzzFeed Inc.
Calgary Flames
Casino Pauma
Chevron Corp.
Cintas Corp.
Columbia Sportswear Co.
Dynamex, Inc.
Early Warning Services LLC
Epic Systems Corp.
Equinox Holdings Inc.
Facebook
G&K Services, Inc.
Google Inc.
GrubHub Inc.
International Association of Machinists and Aerospace Workers
International Franchise Association
JPMorgan Chase & Co.
Knorr-Bremse AG
Lyft Inc.
Microsoft Corp.
National Hockey League
National Right to Work Legal Defense Foundation
Netflix Inc.

Calif. Eateries Get No-Tip Conspiracy Suit Tossed

A California federal judge Monday dismissed a consumer's suit accusing upscale California restaurants of cooking up a no-tipping scheme to boost prices, saying the suit presented no facts to show an injury had occurred.

Read full article »

Wells Fargo Accused Of Stiffing At-Home Workers On OT

Wells Fargo Bank violated state and federal wage laws with pay policies for its work-from-home mortgage consultants that failed to account for all their overtime, according to a proposed class action lawsuit filed in Pennsylvania federal court Friday.

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LABOR

High Court Won't Weigh In On NLRB's Power Over Tribal Cos.

The U.S. Supreme Court on Monday declined to consider whether the National Labor Relations Board has power over tribal employers, rejecting a California casino's challenge to a ruling that it illegally blocked workers from passing out pro-union leaflets.

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American Airlines Sues Mechanics Over Travel 'Slowdown'

American Airlines mechanics and their unions have been illegally dragging their feet at work and causing hundreds of delayed and canceled flights in a concerted travel "slowdown" meant to gain leverage in contract negotiations, according to a lawsuit the airline filed Monday in Texas federal court.

Read full article »

Stop & Shop Worker Lodges New Charge Against Union

A Stop & Shop employee has filed a second charge against a Massachusetts chapter of the United Food and Commercial Workers union, saying its officers have moved to discipline him in response to his decision to work during a strike last month.

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Ballard Spahr Guides Push For Women's Hockey League

A group of women's professional hockey players on Monday said they have formed a new trade organization to promote the development of a viable professional women's hockey league after a Canada-based league folded with little warning earlier this year.

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BACKGROUND CHECKS

Health Co. Beats Ex-Worker's Background Check Class Suit

A California federal judge has ended a proposed class action accusing a health care provider of obtaining background checks on job applicants without properly informing them, saying the former employee behind the case should have filed it sooner.

Read full article »

NONCOMPETES

DOJ Looks To Join Duke No-Poach Settlement

The U.S. Department of Justice on Monday asked to join a settlement agreement between Duke University and a class of faculty members in a private suit alleging the university had an anti-competitive no-hire arrangement with a nearby medical school.

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TRADE SECRETS

New Jersey Devils
New York City Bar Association
New York Rangers
St. Louis Blues
State Bar of California
State Bar of Texas
Stop & Shop Supermarket Co.
Transport Workers Union of America
Twitter Inc.
Union Square Hospitality Group LLC
United Food & Commercial Workers International Union
United States Soccer Federation Inc.
VCG Holding Corp.
VH1
Viacom Inc.
Washington Post Co.
Wells Fargo & Co.
eBay Inc.

GOVERNMENT AGENCIES

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Equal Employment Opportunity Commission
Executive Office of the President
Federal Trade Commission
Library of Congress
Maryland Attorney General's Office
National Labor Relations Board
National Railroad Passenger Corp.
U.S. Attorney's Office
U.S. Department of Justice
U.S. Supreme Court

Alcor Looks To Overturn $6.5M Blood Testing IP Verdict

Diagnostics company Alcor Scientific has asked a Rhode Island federal court to overturn a $6.5 million verdict over trade secrets related to blood testing, saying the award wasn't supported by the trial evidence.

Read full article »

WORKER SAFETY

Ex-NHL Player's Head Injury Suit Against Devils Is Tossed

A former New Jersey Devils hockey player has lost his suit against the team alleging it concealed the risk of head injuries from him after a federal judge dismissed the complaint on the grounds he never served the team with the suit.

Read full article »

EXPERT ANALYSIS

What 9th Circ.'s Take On Dynamex Means For Calif. Employers

In Vazquez v. Jan-Pro, the Ninth Circuit ruled that the California Supreme Court's Dynamex decision should be applied retroactively, reminding employers of the hurdles presented by Dynamex's so-called ABC test for worker classification, and of the potential exposure for employee misclassification, says Grant Alexander of Alston & Bird.

Read full article »

LEGAL INDUSTRY

Chief Justice On Newest Colleague: 'A Very Hard Worker'

At an event Monday, Chief Justice John Roberts had warm words for freshman Justice Brett Kavanaugh and explained why having a new colleague makes the remaining justices "behave better."

Read full article »

Attys Should Get Credit For Diversity Efforts, Task Force Says

Legal employers should credit attorneys for the time they devote to improving the pipeline of diverse talent into the profession the same way they offer credit for pro bono work, according to a New York City Bar Association task force report released Monday.

Read full article »

Ex-BigLaw Atty Launches Suit Over Nixed Lewdness Charge

The former Hughes Hubbard partner charged last year with exposing himself in an Equinox steam room launched a $10 million defamation and negligence suit on Monday in New York state court against the gym and his accuser, saying the allegations have continued to damage his reputation even after the case was dropped.

Read full article »

Ex-White House Counsel Told Not To Testify Before Congress

The White House has directed its former chief lawyer Donald McGahn not to testify before Congress despite a subpoena to appear Tuesday, escalating a bitter dispute between President Donald Trump and House Democrats trying to pursue their probe into matters uncovered by the special counsel's Russia investigation.

Read full article »

Delegate's Ex-Atty Put Under Monitor After Nude Pics Plea

The former counsel of a U.S. Virgin Islands congressional delegate received new electronic monitoring orders from a D.C. federal judge on Monday as part of his supervised release conditions, following his 2018 conviction over posting nude pictures nabbed from her phone.

Read full article »

White & Case Names Chair To A Fourth Term

Global powerhouse White & Case LLP has reelected its chairman, New York-based Hugh Verrier, who has already helmed the firm for the past 12 years, the firm announced Monday.

Read full article »

More Than Two-Thirds Failed Calif. Bar Exam In February

Less than a third of the aspiring attorneys who took the California bar exam in February passed the test, marking the second-lowest pass rate in more than a decade, according to data released by the Golden State's bar association.

Read full article »

Analysis

Texas Bar, State AG At Odds In Post-Janus Fees Fight

The Texas attorney general is backing a constitutional challenge to the State Bar of Texas' requirement that lawyers join the organization and pay dues, a move that has roiled the bar and caused a stir among lawyers in the state.

Read full article »

Interview

15 Minutes With Columbia Sportswear's General Counsel

Columbia Sportswear general counsel Peter Bragdon took part in the company's decision to advocate for reopening the national parks during the most recent government shutdown, one effort that demonstrated how his duties often transcend legal strategy. Here, he shares how he views a general counsel's role in corporate responsibility and how disruptive politics affects his business.

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From: Martin, Andrew
Subject: Bloomberg: Labor Board Plans Rules on Worker Protests, Student Organizing
Date: Wednesday, May 22, 2019 12:30:38 PM

Labor Board Plans Rules on Worker Protests, Student Organizing

- Short-term agenda includes regulations on student organizing, worker protests
- Joint employer effort remains on long-term to-do list

By Hassan A. Kanu and Robert Iafolla | May 22, 2019 12:28PM ET | Bloomberg Law

The National Labor Relations Board is planning to undertake major new rulemakings in 2019 that could curb union power while continuing to work on a controversial regulation to limit companies' liability for collective bargaining and unfair labor practices.

The labor board unveiled an ambitious new slate of proposed rules in its spring 2019 regulatory agenda. That includes a proposal to create new standards on worker picketing and other collective actions on an employer's private property. Another rule would determine when student workers are covered by federal labor laws that grant private sector workers organizing and union rights. The Republican-majority board's eventual rules are likely to be favorable to businesses.

The board's high-profile proposal to define "joint employment" remains listed in the "Long-Term Actions" section of the NLRB's agenda. That designation is typically reserved for rules the NLRB doesn't plan to get to in the coming year. The closely watched policy is expected to have a significant impact on franchise business models, gig economy businesses such as Lyft and Postmates, and companies that rely on contractors.

The multiple proposals reflect the board's pivot to making labor and workplace policy via the formal rulemaking process. The agency has traditionally determined the contours and bounds of the National Labor Relations Act by interpreting the law in individual case decisions. Those rulings are considered easier for future boards to undo as majority control shifts among political parties.

"The Agenda reflects the Board majority's strong interest in continued rulemaking," Chairman John Ring said in a statement announcing the new regulatory agenda. "Addressing these important topics through rulemaking allows the Board to consider and issue guidance in a clear and more comprehensive manner."

Property Rights

Board member William Emanuel (R) commented on the issue of union and

worker action on employers' private property at a February conference held by the American Bar Association.

"The courts and the board have issued a vast number of decisions affecting the right of employees and unions to engage in union activity on the private property of an employer. This has resulted in an extremely complicated set of rules that are very difficult, we feel—I feel—for employers, employees, and unions to completely understand and to follow," Emanuel said.

The rules also tend to vary as the NLRB majority—the board has five seats—changes, depending on whether a Republican or Democrat is in the White House, Emanuel said.

"All of this has resulted in many inadvertent violations of the act and substantial litigation expenses. It's our preliminary view that we could avoid much of this by adopting a rule that clearly defines the rights of employers, employees, and unions in this complex area of the law."

Some business representatives have long argued that the NLRB should issue more formal rules because the federal rulemaking process creates more solid and longer-lasting policy than regulating via case law. Board Chairman John Ring (R) has said he's a "big proponent" of rulemaking. The process of issuing formal rules is complicated and subject to more oversight than when the board establishes new precedents in cases.

The agency's spring agenda also lists two other deregulatory actions the NLRB previously announced.

Those include changes to the NLRB's "blocking charge" policy, which calls for elections to be paused if workers or unions file complaints alleging employers interfered with the elections. It also includes changes to its "voluntary recognition bar," a policy that workers must wait at least six months before they can file petitions seeking to oust a union their employer had voluntarily recognized as their bargaining representative.

The NLRB didn't immediately respond to a request for comment.

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From: Martin, Andrew
Subject: Bloomberg: Labor Board Restructuring Plan Includes Nationwide Demotions
Date: Wednesday, May 29, 2019 4:17:56 PM

Labor Board Restructuring Plan Includes Nationwide Demotions

- Plan will promote some admin staff, demote others
- Agency union moves to challenge planned action

By Hassan A. Kanu | May 29, 2019 04:13PM ET | Bloomberg Law

The heads of the National Labor Relations Board are planning a restructure of administrative staff at the agency's roughly 26 regional offices, including demoting employees in certain job classifications nationwide.

The plan would reclassify almost all NLRB administrative professionals as general "program support assistants," and place those employees into the same grade within the government's General Schedule pay system, according to a notice from the NLRB Union to members obtained by Bloomberg Law. The move means some of those employees would receive an effective promotion, although over half of the workers would be demoted, with many dropping from a GS 7 to a GS 6 classification.

The restructuring of board field offices comes as the agency's career staff continues to protest what they've called an unprecedented staffing crisis, and shortly after Congress signaled an intent to raise the agency's budget for the first time in six years.

Democratic politicians and many among the career staff have suggested that recent staff buyouts and other decisions by the NLRB's Republican members and general counsel are another way to accomplish a far-reaching overhaul of the agency after certain initialproposals received strong criticism. The NLRB adjudicates certain workplace disputes between workers, unions, and employers, and also administrates unionization elections.

The board has apparently pivoted from some of the earliest proposals by President Donald Trump's appointees to change how the agency operates, including a reported plan to consolidate regional offices and demote regional directors.

NLRB Chairman John Ring and top prosecutor Peter Robb have said that cuts and restructuring of staff and case procedures are necessary because of the NLRB's declining caseload and flat budget.

The agency declined to comment on the latest plans to reorganize administrative staffers.

Staff Opposed Move in Petition

The NLRB had about 1,320 full-time employees at the end of fiscal year 2018.

It lost about 18% of its field office staff between fiscal years 2011 and 2017. Staffing losses grew by an additional 17% in “just the two short years” since Office of Management and Budget Director Mick Mulvaney issued a memorandum directing agency heads to reduce the size of the civilian federal workforce, the NLRB Union said in a recent letter to Congress.

The planned restructuring would affect roughly 100 workers in positions such as assistant to the regional director, docket clerk, case-processing assistant, and elections clerk.

The plan would effectively eliminate almost all of those positions and place employees who currently hold the posts into a new hybrid position at a GS 6 grade level. Agency heads have indicated that employees who are currently classified at a higher pay grade than GS 6 would retain their salary, according to the union’s message to staff.

The plan includes training the new program support assistants to perform all the duties of the various other positions, the union said.

“The intent to demote GS 7s is extremely mean-spirited, at best, and we intend to make all efforts to either stop this from occurring, or, if we cannot legally accomplish that, to put in place as many protections as possible for those affected,” Burt Pearlstone, president of the NLRB’s field staff union, said in the message to members.

Roughly 90% of the agency’s field staff signed a petition opposing leadership’s plans for administrative workers, Pearlstone told Bloomberg Law May 29.

The NLRB is also dealing with attrition among some key staffers at the headquarters in Washington, D.C. The agency’s congressional liaison recently left for a new opportunity, and its director of congressional and public affairs is planning to leave the NLRB this summer—which could leave the agency without a press shop for at least some time.

The latest restructuring plan won’t affect the agency’s “language specialists” or its “compliance assistants,” who are responsible for ensuring that parties carry out the NLRB’s orders and remedies after the members rule on a dispute.

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From: Martin, Andrew
Subject: BNA: Trump's Labor Board Has Unions Shelving Complaints
Date: Friday, May 10, 2019 7:00:19 AM

Trump's Labor Board Has Unions Shelving Complaints

- Unfair labor practice charges down 11% since Trump took office
- Some unions forego, withdraw cases to avoid pro-business rulings

By Andrew Wallender and Hassan A. Kanu | May 10, 2019 05:56AM ET | Bloomberg Law

Two-plus years into the Trump administration, labor unions are more often choosing to forego one of the primary tools they use to push back against companies they feel are mistreating workers or failing to bargain in good faith.

Union filings of unfair labor practice (ULP) charges to the National Labor Relations Board have fallen by nearly 11 percent since President Donald Trump took office, according to NLRB data obtained via a Freedom of Information Act request. Some unions have withdrawn unionization petitions as well as cases pending before the board, including some cases where an agency judge initially ruled in their favor.

The pullback comes at least in part because unions are worried the GOP-majority board will rule against them or that their case could even become a vehicle for the NLRB to establish new legal precedents that would disadvantage workers with a similar case down the road.

"We don't want to go into a legal battle and set a precedent that would ultimately jeopardize the union rights of folks across the country," Megan Piccirillo, a spokesperson for the Service Employees International Union Local 509, told Bloomberg Law. The SEIU local had been pushing an organizing petition for non-tenured faculty at Northeastern University, but dropped the effort because organizers feared the NLRB could use their petition to rule that non-tenured faculty are "managerial workers," a category exempted from the NLRA's rights and protections.

Filing ULP charges is "actually dangerous," Communication Workers of America President Chris Shelton said at a labor event earlier in the year. The CWA represents over 600,000 workers in telecommunications, news media, and other businesses. Bloomberg Law reporters are represented by a CWA-affiliated union. "You have to be very careful," Shelton said. "And we have just about stopped going to the NLRB to file unfair labor practice charges because it backfires almost always now because of Trump's NLRB." The CWA declined to make Shelton available for comment after the event and declined a response to later inquiries.

In general, ULP filings have been declining since 2002, following increases in 2000 and 2001. The number of ULPs filed by companies, individuals, and unions hit a high in 2002 at about 33,000 charges, according to NLRB data. But the downward trend has accelerated in the last two years.

Charges filed plummeted to fewer than 19,000 by the end of the 2018 fiscal year —a 43 percent drop compared with the 2002 peak.
The NLRB declined to comment on the findings.

Near 11% Drop in Filings Since 2016

Unions, individual workers, or companies can file ULP charges if they believe their rights under the National Labor Relations Act—the central federal law about unionization—are being infringed on. The most consequential cases often allege that a business has interfered with or retaliated against employees working to join a union—disputes that often decide whether a workplace will become unionized or not.
Regional NLRB offices investigate charges and can dismiss them or issue a formal, government-backed complaint if there's merit to the allegations. Parties can appeal those decisions to the full board in Washington, which ultimately decides how the NLRA will apply in practice. ULPs also are filed to compel companies to bargain with their employees' union, obtain financial damages for illegal labor practices, and to prevent employers from changing policies without consulting the union.
In fiscal year 2016—Oct. 1, 2015 to Sept. 30, 2016—unions filed about 11,100 ULP charges. Prior to Trump taking office, the number of charges filed by unions hadn't dipped below 10,000 since at least 2011—the latest date for which the NLRB could provide itemized data. After Trump took office in 2017, charges in that fiscal year dropped to about 9,900. The rates fell again to 9,600 in fiscal 2018.

Downward Trend

In some cases, unions tried to keep issues away from the board they feared could be a vehicle to reverse existing precedent.
Unions settled a handful of cases after noticing that board General Counsel Peter Robb allegedly was looking for an appropriate case to limit unions' use during protests of an inflatable balloon known as Scabby the Rat. Robb ultimately revived a case that had been dismissed, took the issue to federal court, and is arguing that use of the inflatable rat should be unlawful in most circumstances.
In another case, a Pennsylvania union claimed Loshaw Thermal Technology, LLC was refusing to bargain with the International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23. An agency administrative judge ruled in favor of the union based on several key precedents about collective bargaining in the construction industry.
The company appealed the decision to the NLRB, which then asked for public input on whether it should change existing rules. Those rules permit construction companies to withdraw from what's known as a pre-hire agreement with a union once it expires, but compels them to maintain the bargaining relationship unless the union loses majority support among employees.
The union local withdrew its case in an apparent attempt to avoid an appeal

where the NLRB may have changed that precedent.
“Although a complaint was issued and an Administrative Law Judge found that an unfair labor practice had been committed, the employer has done nothing to remedy the violation. And, now I understand that the Board has asked the public for briefs on how this case should be decided,” the union’s business manager said in a letter to the NLRB, adding that the union has limited resources and requesting “withdrawal of the charge.”
The manager didn’t respond to requests for comment.
“As far as filing charges, there’s a lot of cases that’ve come across my desk where I’ll say it’s a waste of time,” said David Rosenfeld, a Weinberg Roger & Rosenfeld attorney who’s represented unions before the NLRB since the mid-1970s. In certain types of cases, unions aren’t likely to get a favorable ruling, “like rules cases, anything challenging an employer’s workplace rules,” he said.

Organizing Slowdown

Fear of the Republican-controlled NLRB also is affecting organizing drives to form or join a union. Workers can ask the NLRB to administer an election to form a union by filing what’s known as a “representation petition.”
Multiple organizing bids involving different faculty or student organizers recently were abandoned once it became apparent the board could use those cases to establish new precedent that wouldn’t favor workers or unions.
Last year, student organizers at Grinnell College in Iowa withdrew a petition to unionize all undergraduate workers after the school promised to challenge the inclusion of certain categories of employees. Organizers worried the board would use the case to reverse an Obama-era ruling that gave student-workers union rights.
Other unions and workers—including the Northeastern group—have tried seeking voluntary union recognition by universities, or having union elections administered by third parties to work around the NLRB.

No Immediate Threat

Not all unions see the labor board in its current makeup as a threat.
One of the top lawyers at the International Association of Machinists, which represents over 570,000 members, said any changes instituted by the NLRB will take so long to go into effect that they could be amended by 2020 if a Democrat wins the presidency.
“I can’t think of a circumstance where we’ve hesitated to file a ULP charge because of current changes in the law that the Trump board has initiated,” IAM Associate General Counsel William Haller said.
According to NLRB records, the Machinists Union has filed about two dozen ULP charges against Boeing after it refused to negotiate with a group of technicians and inspectors in South Carolina that voted to unionize last year. An appeal by Boeing is pending at the NLRB.
Other unions and worker advocates remain cautious.
“I think we have a lot more distrust of Peter Robb, the general counsel, and what

the board's going to do on many issues," Rosenfeld said.

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From: Martin, Andrew
Subject: BNA: Uber Drivers Are Contractors, Not Employees: NLRB Top Lawyer
Date: Tuesday, May 14, 2019 11:05:45 AM

Uber Drivers Are Contractors, Not Employees: NLRB Top Lawyer

- Second federal agency opinion says gig workers are contractors
- States have begun to enact measures to reclassify gig employment

By Hassan A. Kanu | May 14, 2019 10:57AM ET | Uber Drivers Are Contractors, Not Employees

The federal labor board's general counsel said in an opinion released May 14 that a group of Uber drivers aren't legal "employees" for the purposes of federal labor laws.

The National Labor Relations Board's advice memo means the agency will take the position in cases that employees for companies such as Uber are excluded from federal protections for workplace organizing activities, like trying to form or join a union. In practice, that means Uber workers will have a much harder time trying to unionize or file what's known as unfair labor practice charges with the federal government.

The decision comes as Uber has struggled this week to meet expectations for its widely anticipated initial public offering.

The Department of Labor has also previously concluded that so-called gig workers are independent contractors not entitled to minimum wages and overtime pay.

Regulations about worker classification have massive impact on gig economy companies and franchised businesses. Federal agencies have been working to loosen up rules in employers' favor, while some liberal states like California are working to increase regulation in the area.

The NLRB notes in its memo that Uber has "significantly revised its operations and policies numerous times" since the company was founded in 2013, and says its analysis relates "to the period of February 27, 2015, to August 11, 2016."

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From: Martin, Andrew
Subject: BNA: Mark Gaston Pearce to Lead Georgetown Law's New Worker Rights Center
Date: Wednesday, May 8, 2019 4:31:20 PM

NLRB Ex-Chair to Lead Georgetown Law's New Worker Rights Center

By Hassan A. Kanu | May 8, 2019 04:28PM ET | Bloomberg Law

Mark Gaston Pearce, former Chairman of the National Labor Relations Board, soon will head to Georgetown University to chair a new Workers' Rights Institute at the college's law school.

Pearce spent most of his roughly 40-year career at the agency, which is responsible for adjudicating labor disputes between unions, workers, and businesses, and administrating unionization elections. He held positions as an agency attorney, a member of the five-seat board, and was chairman under President Barack Obama between 2011-2017.

Pearce is widely considered an ally of unions and the labor movement, and the NLRB produced some of its most pro-worker rulings and policy in decades during his leadership. He was criticized just as strongly by other stakeholders throughout his tenure as chairman—Republican lawmakers and business advocates continue to urge the current board to undo much of the policy-making that came under Pearce and the then-Democratic majority on the NLRB.

A new Workers' Rights Institute will be added to Georgetown University Law Center's issue-focused departments to promote the school's "commitment to justice and the common good, and support for the most vulnerable and disadvantaged members of society," the university said in a job posting for the institute.

Pearce will serve as executive director and will be responsible for developing and overseeing projects, events, and research aimed at furthering workers' rights, and will teach at least one course focused on labor policy. Pearce worked briefly as a professor at Cornell University's School of Industrial and Labor Relations after withdrawing his nomination by President Donald Trump for another term on the NLRB.

Pearce and the Law Center didn't immediately respond to a request for comment.

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Hassan Kanu News Alert

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From: Martin, Andrew
Subject: BNA: Scary Balloons, Downed Dues: NLRB Counsel Scrutinizes Unions
Date: Thursday, May 16, 2019 7:22:26 AM

Scary Balloons, Downed Dues: NLRB Counsel Scrutinizes Unions

- Advice memos show general counsel's view of labor law
- Two memos called for charges against unions

By Robert Iafolla and Hassan A. Kanu | May 16, 2019 06:16AM ET | Scary Balloons, Downed Dues

The National Labor Relations Board general counsel's office signaled its intention to continue tightening the screws on labor unions in a trio of advisory memos.

The advice memos instructed regional board attorneys to find that unions violated federal labor law by displaying a balloon of a cat at a construction site and failing to properly track a member's grievance. A third memo advised that a coal power company could stop deducting union dues from employees' paychecks after their local affiliate merged with another union.

All three cases closed without a ruling from an administrative law judge or the board. Nonetheless, the memos provide a view on how the NLRB's prosecutorial division under General Counsel Peter Robb views legal obligations in labor-management relations—and the approach his office will take in similar cases.

Memos from the NLRB's Division of Advice, under Robb's purview, are essentially directives to lower regional offices as to how board lawyers should implement the GC's interpretation of the National Labor Relations Act.

The memos, released May 14, came in a batch that also included a directive saying drivers for Uber Technologies Inc. are independent contractors rather than employees protected by the NLRA.

Workplace policy out of the NLRB tends to skew in favor of workers or businesses, depending on whether a Democrat or Republican controls the White House. But Robb's critics say he's advanced an aggressive, anti-union and anti-worker agenda that goes beyond the standard pro-management leanings of past GOP general counsels. Some NLRB watchers, though, say Robb is simply swinging the pendulum back from the pro-labor positions of the GC's office during the Obama administration.

The NLRB and the general counsel's office didn't respond to a request for comment.

Cats and Rats

Consistent with Robb's distaste for Scabby the Rat, the general counsel's office said a Chicago-based affiliate of the International Brotherhood of Electrical Workers violated federal labor law by setting up a large, inflatable cat clutching a

construction worker at a job site. The union also displayed a banner proclaiming a labor dispute with the general contractor of the construction project, but its quarrel was actually with one of the subcontractors on the project, the GC's office said.
The memo told the NLRB regional director in Chicago to issue a complaint against the IBEW local for picketing a secondary employer. The GC's office also said the union engaged in illegal signal picketing because its "placement of a large, frightening cat and a misleading banner at a construction site was intended as a signal to neutral employees not to enter or work at the jobsite."
The complaint, the GC's office said, should urge the board to overturn several Obama-era rulings that were more lenient on picketing.
But by the time the regional director issued a complaint, the union had stopped picketing, which made it easier to reach a settlement, said Irving Geslewitz, who represented the general contractor in the case.
Nevertheless, the advice memo is significant because it spells out the GC's views on secondary and signal picketing, Geslewitz said. Unions are on notice that they're vulnerable to an unfair labor practice case if they engage in similar conduct, he said.

Mergers and Dues

A second memo, involving a coal power company called Vistra Energy, states the general counsel's view that an employer didn't violate the law by refusing to deduct and remit dues to the union following the original local's merger into another.
Vistra closed a plant represented by the International Brotherhood of Electrical Workers, Local 2078, in 2018. The move reduced the size of the local's membership "to such an extent that Local 2078 was unable to support its union hall and paid staff," according to the memo. The international parent IBEW union then decided that Local 2078 should merge into IBEW Local 2337, which represented Vistra's employees at about a dozen other work sites.
The general counsel instructed lower officials to conclude that the employer was within its right to stop collecting union dues for Local 2337 under those circumstances because the existing contract only named Local 2078.

Policing Union Grievances

In a case involving a Service Employees International Union affiliate representing health-care workers in California, the general counsel's office said the union breached its duty of fair representation by losing track of a worker's grievance.
The union violated labor law by failing to notify the worker of the denied grievance until well after it could be appealed, according to the advice memo.
The memo follows Robb's policy change on union negligence. Last fall, he instructed regional directors to pursue cases against unions for conduct that previously would have been considered harmless errors.
The SEIU affiliate's failure to inform a worker about a grievance outcome "is more than mere negligence," the general counsel's office said.
To contact the reporters on this story: Robert Iafolla in Washington at riafolla@bloomberglaw.com; Hassan A. Kanu in Washington at

hkanu@bloomberglaw.com
To contact the editors responsible for this story: Simon Nadel at snadel@bloomberglaw.com; Terence Hyland at thyland@bloomberglaw.com

From:	National Labor Relations Board
To:	Ring, John
Subject:	Board Rescinds Invitation to File Briefs in Loshaw Thermal Technology
Date:	Saturday, May 4, 2019 4:38:49 PM

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Board Rescinds Invitation to File Briefs in Loshaw Thermal Technology

12/14/2018 03:22 PM EST

WASHINGTON, D.C. — Today, the Board issued an order granting the Charging Party Union's request to withdraw the underlying charge in Loshaw Thermal Technology, LLC, 05-CA-158650 and rescinded its Notice and Invitation to File Briefs (NIFB) in the matter. The Board had invited briefs in this case to determine whether Section 9(a) bargaining relationships in the construction industry may be established by contract language alone.

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This email was sent to john.ring@nlrb gov using GovDelivery Communica ions Cloud on behalf of: National Labor Relations Board · 1015 Half Street SE · Washington, DC 20570 · 866-667-6572

From: (b) (6) [redacted]
To: Ring, John
Subject: boeing
Date: Monday, May 6, 2019 10:01:04 AM
Attachments: image026.png
image030.png

Dear NLRB

The American people are outraged at Boeing illegally firing and bullying its workers for unionizing https://www.theguardian.com/us-news/2019/may/03/boeing-union-workers-fired-south-carolina , we demand DoL, DoJ to punish this criminal company who just killed 346 innocents for violations of labor laws, civil rights, union busting, and other crime, and NLRB must rule against Boeing to protect workers NOW. Trump must order NLRB, DoL, DoJ actions against Boeing union busting NOW or he will lose the precious votes of workers, conservatives, gun owners, middle class, and unions who are his base. We blast the lazy, captured labor regulator for serving Boeing interest because the corrupt NLRB has failed to rule against Boeing since September 2018, and even after two crashes https://www.nlrb.gov/case/10-RC-215878. We stand with Richard Mester who worked for Boeing in South Carolina as a flight safety inspector for 5 years before being suddenly fired – along with two other employees – in November 2018 for allegedly failing to report a bird strike. Boeing must be prosecuted by DoJ, DoL because this came shortly after the company was told Mester had been elected a union steward. "I have 30 years' experience as an engine guy, so I was taken back by it because I don't miss bird strikes," Mester told the Guardian.

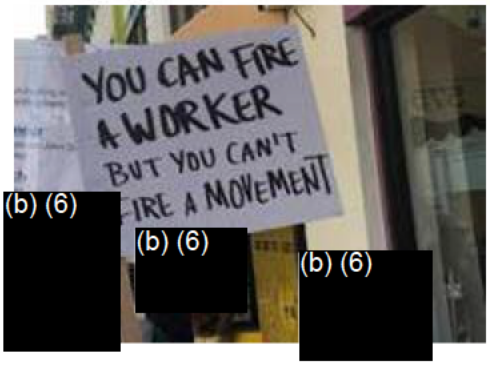
(b) (6) [redacted]

Trump must protect unions and not serve Big Corporations or he will lose in 2020 because America is strong because its workers are unionized and have pensions and benefits. An air force veteran, Mester had just bought a house and had (b) (6), (b) (7)(C) (b) (6), (b) (7) when he was terminated without cause. Mester and his colleagues have filed unfair labor practice charges with NLRB alleging there was no bird strike at all, but rather that this is an excuse to fire workers involved in unionization efforts, and NLRB must stop dragging its feet since September 2018 and rule for Mester and against Boeing NOW. "It was easy to see it was because we were union members," said Mester. "Boeing has no qualms about squashing any possibility of a union down here. Unfortunately we were the result of that." We all know that Mester and his colleagues believe their plight is intrinsically linked to Boeing's attempts to stifle unionization of the workforce in its important South Carolina operations – a workplace that has become an important battleground for both America's labor movement and the aircraft giant.

(b) (6)

[redacted]

WATCH: (b) (6) explains why (b) (6) voted YES in joining the Machinists Union at The Boeing Company South Carolina. #1u



Boeing's mere presence in South Carolina was already viewed as a union busting move when the company first opened an aircraft production plant there in 2011 rather than Washington, where Boeing had unionized operations. South Carolina has the lowest union membership rate in the United States at just 2.7% of workers. NLRB filed a federal complaint against Boeing for the move, accusing the company of violating federal labor law, before dropping it after the company came to an agreement with International Association of Machinists and Aerospace Workers (IAM). Since then, Boeing has fought to prevent unionization efforts of their workers in South Carolina and apparently NLRB has been bribed to delay or do nothing. In February 2017, union organizers came up short in attempting to unionize 3,000 Boeing workers. But organizers found success in May 2018, when over 60% of 200 Boeing flight line workers in North Charleston, South Carolina, voted to form a union, despite an aggressive anti-union campaign led by Boeing which included radio ad buys and attempts to delay and stop the election from occurring. **NLRB has lost the public trust and must affirm this legal union vote NOW, and stop serving Boeing lest it be charged by DoJ with public corruption and honest services fraud 18 USC 1346.**

(b) (6)

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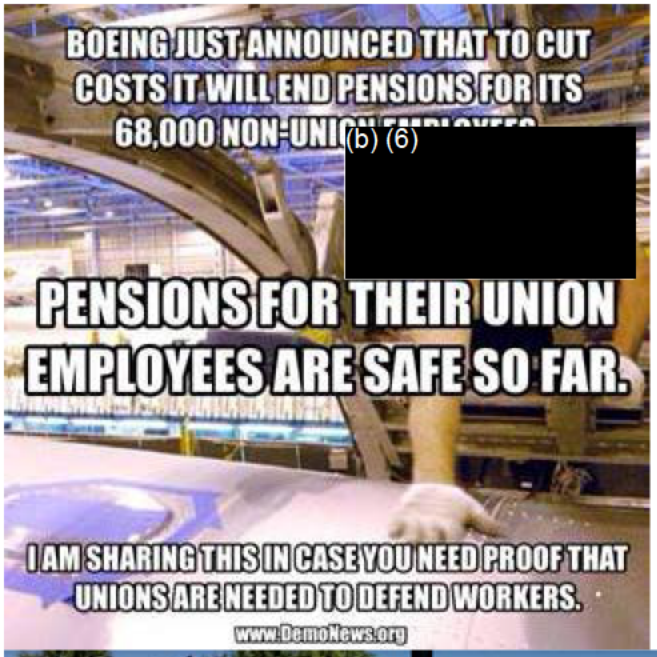
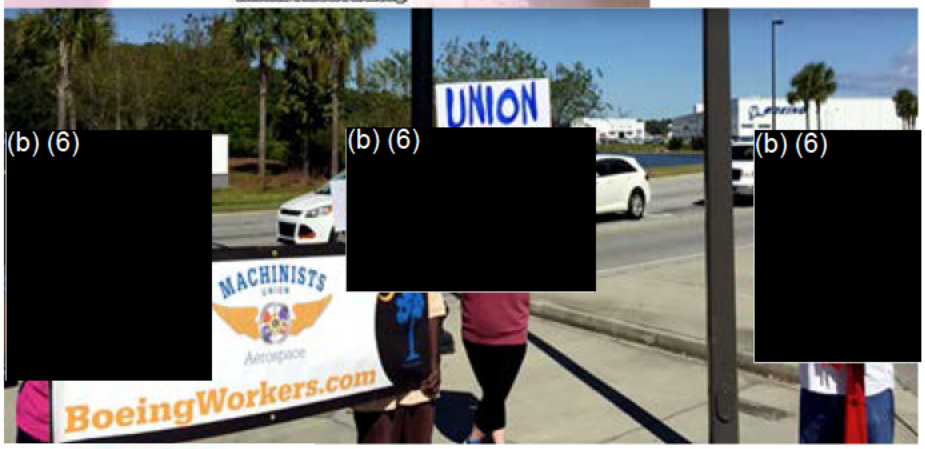
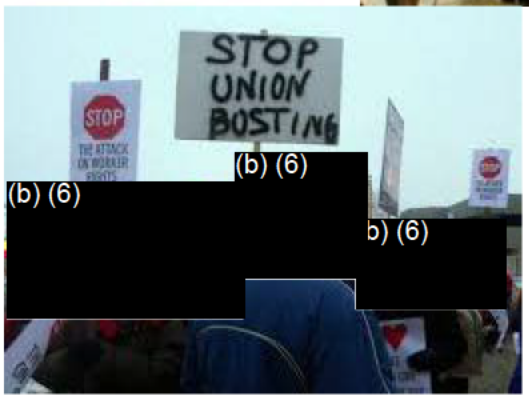
We remind NLRB they are public servants who must stop serving corporate interest and rule for workers against Boeing NOW because while the process slows down, what happens at the plant site is they start firing people knowing in a year or two they might have to pay them some wages for firing due to union activity, but it scares people and scares them enough to think maybe they did the wrong thing to vote for the union." As NLRB reviews the appeals where nothing was done since September, the union has accused Boeing of firing workers for supporting the union and spying on workers who voted in the election. "It's been 11 long months since the election," said Vinny Addeo, IAM organizing director. "They are imposing their power, strength and political allies to delay this proceeding as long as possible because they know doing this disenfranchises these workers and tries to break up any type of momentum we have going forward." The union's associate general counsel, Bill Haller, added: "They want to send the message that if you support the union you're going to get fired. They're not being subtle about it."





We demand NLRB to protect workers and their pensions, affirm the election results, and rule against Boeing union busting and unfair labor practices NOW because other workers in South Carolina are waiting before proceeding with their own unionization. DoL, DoJ must investigate and fine Boeing 10 figures NOW, and stop protecting this disgraced, criminal company to maintain its stock price. “They started writing people up for things that were the norm. They’ve targeted union supporters,” said a current Boeing employee who requested to remain anonymous due to fear of retaliation. The worker explained that after the union vote Boeing increased the workload of the group of workers who voted to form a union, reduced quality control and frequently sends the workers job openings in different locations. “I personally don’t believe Boeing knows how to treat hourly workers without a contract. We

need some type of an agreement. They don't even follow their own policies and procedures that are in writing," added the worker in regards to why a union is needed.



NLRB has lost public confidence, must stop stalling, rule for Mester and also against Boeing union busting NOW because those fired workers who supported the union are left to struggle with unemployment. Sixty-one-year-old Carlos Lugo, one of the two other union-supporting Boeing workers fired alongside Mester, is still looking for employment. He says he has been forced to sell some of his belongings to try to make ends meet. "Boeing never gave us the opportunity to write a statement on what we think happened with the airplane. They're accusing us of being irresponsible of a bird strike that they can't prove," said Lugo, who worked at Boeing for 10 years before his termination. "It's been very abusive what they've done to us." We say to Boeing salesman Trump, you've been to the Boeing plant in South Carolina, so stop protecting the company stock price and start protecting its workers and passengers worldwide by revoking 737 certification and terminating productions NOW, because they are the ones who vote for you, not Zionists or the 1%.

This message and any attached document is sent privately in the public interest and may contain candid, open, and truthful advice, recommendations, opinions, proposals, and information that is privileged, proprietary, non-public and exempt from disclosure, confidential or otherwise protected by law, and may be subject to executive, diplomatic, judicial, clerical, deliberative process or other privilege and is intended solely for the recipient and not for disclosure or distribution. If you are not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that you are prohibited from reviewing, retransmitting, printing, copying, scanning, disseminating, uploading or otherwise using in any manner this email or any attachments to it. Please notify the sender immediately by email if you have received this email by mistake and delete this email from your system. Email transmission cannot be guaranteed to be secure or error-free as information could be intercepted, modified, corrupted, lost, destroyed, manipulated, incomplete, arrive late or contain viruses. The sender therefore does not accept liability for any errors, revisions or omissions in the contents of this message which arise as a result of email transmission or unauthorized disclosure or distribution.

From: POLITICO"s Morning Shift
To: Ring, John
Subject: Cissna out, Cuccinelli in — Court blocks border wall funding — Epstein victims want Acosta on the stand
Date: Tuesday, May 28, 2019 10:03:24 AM

May 28, 2019 View in browser

2018 Newsletter Logo: Morning Shift

BY **IAN KULLGREN**

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— USCIS Director Francis Cissna is out, replaced by Ken Cuccinelli, a

controversial former attorney general in Virginia whom Mitch McConnell can't stand.

— A federal judge partially blocked Trump's plan to fund construction of a wall along the U.S.-Mexico border.

— Victims of billionaire pedophile Jeffrey Epstein want Labor Secretary Alexander Acosta to appear in court.

GOOD MORNING! It's Tuesday, May 28, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives, and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

Sick and tired of traffic? Relief may not be as far off as you think. POLITICO Magazine's "What Works" series looks at innovative ways that cities are trying to reduce traffic, from density-focused light rail to congestion pricing to an outright car ban on the busiest streets. If you could change anything to reduce congestion or improve transportation in your city, what would it be? Tell us here and we'll publish the most thoughtful responses.

DRIVING THE DAY

CISSNA OUT, CUCCINELLI IN: Cissna, who'd been hanging by a thread since early April, will depart this coming Saturday to make way for Cuccinelli II, the Washington Post's Nick Miroff, Josh Dawsey and Maria Sacchetti report.

Cissna took a fairly hard line at USCIS, but Stephen Miller, the de facto White House immigration czar, wanted Cissna out; Cissna may have signed his own death warrant when, "in a conference call during a debate over asylum laws in 2018, Cissna said 'Enough!' to Miller, who he believed was pressuring government officials to ignore immigration laws," according to Miroff, Dawsey and Sacchetti.

Cuccinelli, whose combative TV appearances endeared him to President

Donald Trump, arrives with a truckload of baggage. As Virginia attorney general, Cuccinelli waged culture war more or less nonstop, at one point trying to resurrect the Old Dominion's law against sodomy (years after the Supreme Court had ruled anti-sodomy laws unconstitutional). "Ken Cuccinelli is an outspoken immigration hawk," observes Vox's Dara Lind. (Example: He's suggested that states assert war powers to counter undocumented immigration.) "But he's not an immigration policy expert."

Cuccinelli faces long odds on confirmation, because in addition to being opposed by Senate Democrats he's "disliked by senior GOP figures, including Senate Majority Leader Mitch McConnell . McConnell has vowed to block Cuccinelli from getting confirmed for any position, blaming him for leading a 2014 effort defying McConnell that promoted insurgent candidates running against sitting Republican incumbents. And Cuccinelli signed a letter drafted by conservative activists two years ago calling on McConnell to step aside." More here from the Post and here from Vox.

From the archives: "The Man Behind Trump's 'Invisible Wall,'" by Ted Hesson for POLITICO Magazi ne

COURT BLOCKS BORDER WALL FUNDING: " A federal judge has partially blocked President Donald Trump's plan to fund construction of a wall along the U.S.-Mexico border," POLITICO'S Josh Gerstein reports. "The preliminary injunction issued Friday immediately halts a $1 billion transfer of Pentagon counterdrug funding to cover expansions and enhancement of border barriers."

"The court order also appears to jeopardize another $1.5 billion of the $8.1 billion the administration planned to use for border construction," Gerstein writes. "However, Oakland, Calif.-based U.S. District Court Judge Haywood Gilliam's order only limits construction in specific border areas in Texas and Arizona and does not prevent the administration from tapping other funding sources to advance those projects."

Trump sounded off on Twitter during his visit to Japan, saying his administration would seek an "expedited appeal." The president said the decision was made by an "activist Obama appointed judge" and that the decision favored "crime, drugs an d human trafficking." More here.

POLITICO LAUNCHES NEW GLOBAL PODCAST: Trade. Technology. The environment. The globe is beset by profound challenges that know no political bounds. But are our world leaders up to the task of solving them? POLITICO's newest podcast, "Global Translations" presented by Citi and launching on June 6, will go beyond the headlines, uncovering what's really at stake with the most pressing issues of our time, the political roadblocks for solving them and the ideas that might just propel us forward. Subscribe to receive the first episode at launch.

MOVERS AND SHAKERS

EPSTEIN VICTIMS WANT ACOSTA ON THE STAND: The victims of billionaire pedophile Epstein asked a federal judge to compel Acosta to appear before them in open court, the Miami Herald's Julie K. Brown reports.

"The request for a hearing is one of a litany of possible remedies proffered by the victims, who have been waging a decade-long legal battle to put Epstein in prison for his crimes and to hold prosecutors — mainly Acosta — accountable for violating their rights," Brown writes.

A federal judge ruled in February that Acosta violated the Crime Victims' Right Act in 2008, when he was U.S. attorney for Florida's southern district, by failing to disclose to Epstein's victims the terms of a plea deal that resulted in Epstein serving only 13 months of an 18-month sentence, with daily furloughs to go to his office. More here.

AROUND THE AGENCIES

DOL TO CLOSE 9 JOBS CORPS CENTERS: DOL agreed to shutter nine Job Corps Civilian Conservation Centers on Friday at the request of Agriculture Secretary Sonny Perdue, POLITICO's Catherine Boudreau reports. "Perdue, in a letter to Labor Secretary Alex Acosta, said the move will help the Forest Service prioritize its 'core natural resource mission to improve the condition and resilience of our nation's forests, and step away from activities and programs that are not essential to that core mission,'" Boudreau writes.

In a written statement, DOL said the remaining 16 Civilian Conservation Centers will be replaced by new contract operators or by a partnership overseen by DOL. (To be clear, Job Corps Civilian Conservation Centers are a subset of all Job Corps centers, which number 131 in total.) The announcement added that the "new operators will implement new policies and approaches that will offer students the skills they need to earn an independent living and succeed in meaningful in-demand jobs." More here.

SWAMP WATCH

BROWNING-FERRIS GOES TO BAT FOR EMANUEL: NLRB Member William Emanuel should be permitted to participate in a joint employer case on remand from the D.C. Circuit, one of the plaintiffs said last week, arguing it is unclear that his work for a former law firm poses an actual conflict of interest, Law360 reports.

"According to Browning-Ferris Industries of California Inc.," writes Law360, "Leadpoint Business Services Inc. — the party said to be represented by Emanuel's former firm Littler Mendelson PC — hadn't been part of its petition to review the NLRB's finding that it was a joint employer with Leadpoint. Littler didn't appear before the D.C. Circuit in the matter, and the firm's last filing on behalf of Leadpoint before the board in the case had been in November 2015, Browning-Ferris said Thursday." Emanuel has recused himself from a variety of NLRB cases to avoid conflicts of interest, including last week's high-profile decision barring a union vote at a Volkswagen plant in Chattanooga, Tenn.

But it isn't clear that Emanuel's participation or non-participation in the *Browning-Ferris* remand matters much anymore, because the NLRB is already at work on a regulatory repeal of *Browning-Ferris* that it proposed in September. More here.

AT THE BORDER

TRANSPORTING MIGRANTS: "The United States is for the first time sending illegal border-crossers to other cities for processing, transporting more than 3,000 each week from southern Texas and Arizona to other locations as the government struggles to deal with surging numbers of nearly 100,000 migrants a month crossing the southern border," POLITICO's Anita Kumar reports.

"The Trump administration is flying migrants to San Diego and Del Rio, Texas, and busing them to El Centro, Calif., and Laredo, Texas, according to a U.S. Customs and Border Protection official familiar with the plan," Kumar writes. "There, they are being processed — which includes photographs, health screenings, fingerprints and background checks — before they are often released and told to return for a court hearing at a later date." More here.

Related read: "Behind Trump's reversal of an explosive plan to move migrants to Florida," from POLITICO

THE WHITE HOUSE

TRUMP PROPERTIES FIRE UNDOCUMENTED WORKERS: Trump's eponymous golf clubs are beginning to get rid of more undocumented workers after adopting E-Verify this year, The Washington Post's Joshua Partlow and David A. Fahrenthold report. According to the Post, as many as 17 undocumented workers were recently let go at Trump's course in Colts Neck, N.J. (although the Post could not independently verify all of them).

"The dismissals ... show that the Trump Organization's adoption of E-Verify has led to further shedding of workers, after the company had already purged about 20 undocumented workers this year," Partlow and Fahrenthold write. "All 12 of Trump's U.S. golf courses are now enrolled in the program, according to the government's online database of E-Verify users; in December, only three were enrolled." More here.

Related read: "7 questions about Trump's use of undocumented workers at his golf courses," from The Washington Post

WHAT WE'RE READING

— "Portability Makes Some Paid Leave Programs Good for Gig Workers," from Bloomberg Law

— "'Generation Jobless' Looks Back on How Financial Crisis Shaped Careers," from The Wall Street Journal

— "A Million People Could Lose Their Pensions If Congress Doesn't Act," from HuffPost

— "America's 'best first jo b'? My story of sexual harassment at McDonald's," from Brittany Hoyos for the Guardian

— "Inside Trump's hunt to fill one of the worst jobs in Washington," from POLITICO

— "How to End the Child-Care Crisis," from The New York Times opinion page

THAT'S ALL FOR MORNING SHIFT!

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From:	Roberts, Tracey
To:	Ring, John; Lucy, Christine B.
Cc:	Witkin, Cynthia
Subject:	Congressional Update: Recap of House Subcommittee on Health, Employment, Labor and Pensions Hearing on "The Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Date:	Friday, May 10, 2019 5:38:45 PM

On Wednesday afternoon, the House Subcommittee on Health, Employment, Labor and Pensions held a hearing on "The Protecting the Right to Organize Act: Deterring Unfair Labor Practices."

According to the majority, the legislation would strengthen protections for workers' right to organize a union and bargain for higher wages, better benefits, and safer working conditions by:

- Establishing penalties on predatory corporations that violate workers' rights, and combat misclassification of workers as supervisors and independent contractors.
- Strengthening workers' right to strike for basic workplace improvements, including higher wages and better working conditions.
- Creating a mediation and arbitration process to ensure corporations and newly formed unions reach a first contract.
- Authorizing unions and employers to negotiate agreements that allow unions to collect fair-share fees that cover the costs of representation.
- Streamlining the National Labor Relation Board's (NLRB) procedures to secure worker freedoms and effectively prevent violations.
- Protecting the integrity of union elections against coercive captive audience meetings.

Richard Trumka (President of the AFL-CIO), Mr. Jim Straus (Former employee of UPMC), and Mr. Mark Pearce (Former NLRB Chairman), testified for the majority. Mr. Philip Miscimarra (Former NLRB Acting Chairman) testified for the minority.

Mr. Trumka testified that current laws are frustrating workers' growing desire to be represented by a union. He argued that the PRO Act would address many of these frustrations by ending captive audience meetings, providing for double back pay, permitting the award of civil penalties, and ordering employers of a newly certified unit to bargain.

Mr. Straus testified about his experience trying to organize a union at UPMC and losing his job at his employer as a result. He testified that the NLRB had ordered that he be reinstated and receive backpay, but that the case had been appealed to the federal courts. He testified that the PRO Act would help hold employers like UPMC accountable and make it easier for people like him to join a union.

Mr. Pearce testified that statutory change is needed to update the law. He stated that as a Board Member, he observed how cases could be tied up for years on appeal and how

vacancies on the Board could cause case processing delays. He argued that the PRO Act would address the Act's inadequate remedies for violations and prevent procedural obstacles for relief while strengthening protections during the bargaining process.

Mr. Miscimarra testified against the PRO Act, stating that the bill does not acknowledge how effective the Act and its enforcement has been. He stated that the PRO Act would change the balance of competing interests that have been carefully constructed by Congress over the years and that the bill would increase costs and conflict in our global economy, adversely affecting U.S. employees. Mr. Miscimarra's testimony referenced the current Board's strategic plan, and the goal for a four-year 20 percent reduction in caseprocessing time. When questioned by Congresswoman Shalala, he highlighted this endeavor, but said it did not go far enough. Mr. Miscimarra also fielded questions from Congressman Levin regarding his involvement in the Hybrand decision and the issues that arose as a result of that decision.

To watch the full hearing and view the testimony, click here:
https://edlabor.house.gov/hearings/the-protecting-the-right-to-organize-act-deterring-unfair-labor-practices

Tracey Roberts
Office of Congressional and Public Affairs
National Labor Relations Board
202-273-0187

From:	Burdick, Ruth E.
To:	Arbesfeld, Mark; Barham, Jeffrey; Bock, Richard; Carlton, Peter J.; Coleman, Jocelyn; Colwell, John F.; Cowen, William B.; Emanuel, William; Finkelstein, Marci J.; Free, Douglas; Giannasi, Robert (ALJ); Goldstein, Steven; Head, Brittani; Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kraus, Grant; Lambert, Malissa; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; ML-HQ-Advice; ML-HQ-Appellate and Supreme Court Litigation Brch; ML-HQ-Contempt, Compliance, and Special Lit Branch; ML-HQ-Solicitor"s Office; Murphy, James R.; Platt, Nancy; Qureshi, Farah Z.; Rappaport, Steve; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Walkowiak, Robert G; Watts, Elicia; Zick, Lara S.
Cc:	Hooks, Ronald K.; Kobe, James; Pomerantz, Anne; Sweeney, Brian; Eskenazi, Martin
Subject:	D.C. Circuit decision in Kitsap Tenant Support Services, Inc., Board Case 19-CA-074715 (reported at 366 NLRB No. 98)
Date:	Thursday, May 2, 2019 12:36:54 PM
Attachments:	18-1187 Kitsap Tenant Judgment fld.pdf Kitsap_18_1187___NLRB Brief.pdf.pdf

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In an unpublished judgment that issued Tuesday, April 30, 2019, the D.C. Circuit enforced the Board's order issued against this provider of residential living facilities to individuals with developmental disability for unfair labor practices committed before and after its care-giving employees voted 44 to 14 in a 2012 election to be represented by Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO. Dispensing with oral argument, the court upheld the Board's unfair-labor-practice findings, as well as the special remedies ordered for the violations committed during first-contract bargaining. The court also held that a challenge to the ratified complaint was jurisdictionally barred for review under Section 10(e) of the Act.

The Board (Chairman Ring and Members Pearce and McFerran) found that the employer, prior to the election, violated Section 8(a)(3) and (1) of the Act by discharging a key organizer, by placing two others on administrative leave and discharging them, by taking a series of adverse actions against and demoting a fourth organizer, and by enforcing work rules more strictly in response to union organizing. Further, the Board found that, after the election, the employer violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the union at reasonable times, by refusing to furnish or by delaying the provision of requested information, and by engaging in overall bad-faith bargaining for the entire first year of the parties' collective-bargaining relationship. Among the special remedies ordered, the Board required the employer to meet and bargain with the union within 15 days of a bargaining request, to bargain in good faith and at reasonable times, to meet for a minimum of 15 hours per week or on an alternative schedule to which the union agrees, and to submit written bargaining progress reports every 15 days to the regional office.

On review, the court held that the employer's challenges all lacked merit. Regarding application of the *Wright Line* standard, the court agreed with the Board that the employer had failed to carry its burden proving its affirmative defenses, or, with respect to one violation, that the employer's stated reasons were pretextual. Noting that the factual determination of whether a party has bargained in good or bad faith is a matter within the Board's special expertise, the court held that the record supported the Board's findings that,

among other actions, the employer's negotiator engaged in regressive bargaining tactics, repeatedly failed to respond to union scheduling requests, and canceled or cut short several meetings. On the remedial issues, the court summarily enforced the special bargaining remedies after determining that the employer failed to challenge them before the Board. Further, the court rejected the argument that restatement was inappropriate because the employees were discharged "for cause," noting the contention is contrary to the Board's settled interpretation Section 10(c) of the Act.

The court's unpublished judgment, and the Board's brief to the court, are attached.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1187 **September Term, 2018**

FILED ON: APRIL 30, 2019

KITSAP TENANT SUPPORT SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1217

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the NLRB's cross-application for enforcement be granted.

On May 31, 2018, the Board found that petitioner Kitsap Tenant Support Services had unlawfully disciplined four employees and violated its statutory duty to bargain during and after its caregiving employees' successful unionization campaign. The Board's remedy required Kitsap to bargain with the union for fifteen hours per week and to submit periodic progress reports, and to reinstate the disciplined employees with backpay. We conclude that all of Kitsap's challenges in its petition for review lack merit.

First, the Board correctly applied its *Wright Line* test to all four disciplined employees, and its findings are supported by substantial evidence.

(a) *Bonnie Minor*. The Board reasonably concluded that substantial evidence supports the prima facie case, relying on Minor's membership in the union's organizing committee, her extremely strong annual performance review just one week before her discharge, her lack of any previous discipline, her termination the same day she spoke at Kitsap's mandatory meeting regarding unionization, and Kitsap's other actions demonstrating anti-union animus. J.A. 117-19; *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). Kitsap failed to meet its burden in rebuttal because Program Manager Alan Frey never mentioned forthcoming discipline when reprimanding Minor for canceling a client Christmas party and engaging in "triangulation" with clients; Kitsap did not identify any other employee ever discharged for "counter-therapeutic" conduct; and the Board showed that Kitsap tolerated worse conduct by other employees. J.A. 119-20, S.A. 1-3.

(b) *Alicia Sale and Hannah Gates*. The General Counsel met his initial burden by showing that Kitsap knew Sale and Gates were members of the union-organizing committee, placed Sale and Gates on administrative leave two days after receiving notice that the union campaign had been successful enough to support an election petition, and disciplined Sale and Gates more harshly than other employees who intentionally harmed clients. J.A. 121, S.A. 1-3. Kitsap's argument in rebuttal, that it had a good-faith belief that Sale and Gates engaged in misconduct, fails because Kitsap did not "parcel[] out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred." *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (citation omitted).

(c) *Lisa Hennings*. Finally, the Board reasonably concluded that Hennings' demotion was unlawful because Kitsap was aware of Hennings' union membership and issued several pretextual letters of discipline against her, including for tardiness (though the General Counsel demonstrated that other tardy employees were not so disciplined), for scheduling beyond the scope of her role (though Frey admitted that such scheduling was routine), and for failing to complete client narratives (though Kitsap so disciplined no other employees in Hennings' house). *See* J.A. 124-27; S.A. 4-7; *Ozburn-Hessey*, 833 F.3d at 219-20.

Second, substantial evidence supports the Board's conclusion that Kitsap violated § 158(a)(3) of the Act by increasing its enforcement of disciplinary rules due to its employees' union support. Kitsap does not dispute that a deviation from prior practice coincided with the union election, and its purported concern about a potential state audit was pretextual. *See* J.A. 127-29; *Jennie-O Foods*, 301 N.L.R.B. 305, 311 (1991).

Third, we find that the Board adequately supported its conclusion that Kitsap did not "meet at reasonable times" and bargained in bad faith. 29 U.S.C. § 158(d); *see id.* § 158(a)(5) (recognizing "refus[al] to bargain collectively" as an unfair labor practice). Kitsap's negotiator repeatedly failed to respond to union scheduling requests and canceled or cut short several meetings. J.A. 109-12. Kitsap also engaged in regressive tactics by accepting and then rescinding an agreement to include heads of household in the bargaining unit. J.A. 115. Kitsap further violated its duty to bargain by failing to turn over information relevant to evaluating its proposal with respect to wages. *See KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Given that the "drawing of inferences

as to good or bad faith in the bargaining process is largely a matter for the Board's expertise," the Board has adequately supported its conclusion in this case. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted).

Fourth, we reject Kitsap's challenges to the Board's remedial order. We lack jurisdiction to consider Kitsap's challenge to the mandated bargaining schedule and status reports because Kitsap did not raise that argument in a motion for reconsideration before the Board. *See* 29 U.S.C. § 160(e). Kitsap also claims that the Board's remedy of reinstatement with backpay for the four employees is punitive. But this is the Board's conventional remedy, *see, e.g.*, *Precoat Metals*, 341 N.L.R.B. 1137, 1138 (2004); Kitsap's suggestion that the employees were disciplined "for cause" conflicts with the Board's settled interpretation of this term, 29 U.S.C. § 160(c); *see Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 647 (2007); and Kitsap's argument that these employees were "unfit" for reinstatement fails because Kitsap did not deem unfit other employees who engaged in considerably worse misconduct, *cf. NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 460 (9th Cir. 1978).

Finally, we lack jurisdiction to consider Kitsap's claim that the complaint was not properly ratified because that objection was not raised before the Board. *See* 29 U.S.C. § 160(e).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Oral argument not yet scheduled

Nos. 18-1187 & 18-1217

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-074715, et al.
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc. ("Kitsap") was the Respondent before the Board in the underlying proceeding (Board Case Nos. 19-CA-074715 et al.). The Board's General Counsel was a party before the Board. Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO, was the charging party before the Board.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against Kitsap on May 31, 2018, and reported at 366 NLRB No. 98.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 19th day of February 2019

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GLOSSARY

Act	The National Labor Relations Act (29 U.S.C. § 151, et seq.)
Board	The National Labor Relations Board
Br.	Opening brief of Petitioner/Cross-Respondent Kitsap Tenant Support Services, Inc.
FVRA	Federal Vacancies Reform Act (5 U.S.C. §§ 3345, et seq.)
JA	Joint Appendix
Kitsap	Kitsap Tenant Support Services, Inc.
SA	Supplemental Appendix
Union	Washington Federation of State Employees, American Federation of State, County and Municipal Employees, Council 28, AFL-CIO

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1187 & 18-1217

KITSAP TENANT SUPPORT SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Kitsap Tenant Support Services, Inc. to review, and the cross-application of the National Labor Relations

Board to enforce, a Board Decision and Order against Kitsap issued on May 31, 2018, and reported at 366 NLRB No. 98. (JA108-42.)[1]

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties.[2] This Court has jurisdiction and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit and the Board to cross-apply for enforcement.

Kitsap's petition for review and the Board's cross-application for enforcement were timely. The Act places no time limit on those filings.

ISSUE STATEMENT

1. Whether substantial evidence supports the Board's findings that Kitsap violated Section 8(a)(3) and (1) of the Act by retaliating against four pro-union employees and enforcing workplace rules more strictly because of union activity.

---

[1] Record references are to the Joint Appendix ("JA") and Supplemental Appendix ("SA"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Kitsap's opening brief.

[2] The Board severed and retained allegations involving Kitsap's employee handbook that are factually and legally distinct from the violations adjudicated in the Decision and Order. (JA127,132.) The Board's retention of the severed allegations does not affect the finality of its Order. *See, e.g.*, *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1249-50 (D.C. Cir. 2012). Kitsap acknowledges the Order's finality. (Br.1.)

2. Whether substantial evidence supports the Board's finding that Kitsap violated Section 8(a)(5) and (1) of the Act by failing to meet with the Union at reasonable times, refusing to provide or delaying information sought by the Union for collective bargaining, and engaging in overall bad-faith bargaining.

3. Whether Kitsap's challenge to the ratification of the underlying unfair-labor-practice complaint is properly before the Court.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on a consolidated complaint issued under Acting General Counsel Lafe Solomon's tenure on June 22, 2012. Before a hearing on the complaint allegations, Kitsap moved to dismiss, asserting that Solomon did not hold office consistent with the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) ("FVRA") when the complaint issued. An administrative law judge denied Kitsap's motion and, after a hearing, issued a decision and recommended order finding merit to some of the complaint allegations and dismissing others. The parties filed exceptions to his decision with the Board. (JA108&n.1,5-11;134-42.)

On March 21, 2017, while the case was pending before the Board, the Supreme Court issued *NLRB v. SW General, Inc.*, 137 S. Ct. 929, holding that, under FVRA, the Acting General Counsel could not have continued serving in his

position after President Obama nominated him to be General Counsel on January 5, 2011. On April 14, 2017, General Counsel Richard F. Griffin, Jr. issued a Notice ratifying the complaint and its continued prosecution. (JA108n.1.)

On May 31, 2018, the Board issued its Decision and Order finding that the ratified complaint allegations were properly before it, and rejecting as moot Kitsap's challenge to the validity of the complaint issued under Solomon. Addressing the merits, the Board affirmed the judge's findings of certain unfair labor practices, but found additional unfair labor practices based on the record discussed below. (JA108&n.1,109-29.)

II. THE BOARD'S FACT FINDINGS

A. The Union Campaign Begins; Kitsap Discharges Pro-Union Employee Minor When She Questions Kitsap's Labor Consultant

Kitsap provides residential living facilities and services to clients, individuals with varying degrees of developmental disability. In November 2011, the Union began a campaign to represent Kitsap's residential employees, including those designated as Heads of Household (HOH). (JA108;212,325,755-60,785-86,877.)

With the campaign, the Union conducted an organizing "blitz" in early December, visiting employee homes, soliciting signed authorization cards, and holding a December 4 meeting for interested employees. In response, Kitsap-

announced it would hold a mandatory employee meeting on December 7. (JA117;186-89,192,633.)

Early that day, employee Bonnie Minor, who had attended the union meeting, received a call from Kitsap General Manager Alan Frey at the home where she worked. He chastised her for cancelling a customary multi-residence Christmas party—a step she had taken based on client feedback about the difficulty of back-to-back parties during the holiday season. Frey instructed her to schedule the party, which she promptly did. He said nothing about possible discipline for this incident. (JA117;193,214-15,243-46,249-51,259,284-86,813-14,818-19.)

After the call, Minor vented to clients in the vicinity that Frey had yelled at her and had been mean. A co-worker reported Minor's comments to Frey, who summoned Minor to his office, where he stated, in the presence of Human Resource Representative Kathy Grice, that Minor's behavior constituted inappropriate "triangulation." Frey said nothing about potential discipline. (JA117-18;252-53,738-39,819-22,884.)

Later that day, Minor attended Kitsap's mandatory meeting, which was conducted by an outside consultant who discussed the disadvantages of unionization. During the meeting, Minor raised her hand and asked the consultant "how much money [Kitsap] was paying him." Later that day, Grice informed Minor that she was discharged for "insubordination." Kitsap's subsequent

termination letter cited other purported infractions, including not following protocol concerning the holiday party and maintaining professional boundaries, and misrepresenting information to clients. (JA117-18;232,253-57,263-67,273-74,276,287-88,634-36,737-38.)

B. Kitsap Monitors Employee Performance More Closely; It Places Union Supporters Sale and Gates on Administrative Leave, Then Discharges Them

On December 14, the Union distributed a flyer identifying employee members of its organizing committee, including Alicia Sale, Hannah Gates, and Lisa Hennings. The flyer found its way to General Manager Frey in mid-December. Around the same time, Hennings directly told Frey that she was "pro union." He said he "kind of figured that." (JA117,120,124;198-200,212-13,736-37,789-91,1596.)

As the union campaign gained momentum, managers began visiting client residences more frequently and inspecting them more closely. For instance, Frey and another Kitsap official responded in person when Sale and Gates reported on December 20 that a client under their care had a scratch and bruise on his leg. After personally investigating, Frey concluded that the injuries were caused by his wheelchair, and instructed Sale and Gates to repair it. On hearing from the client that he had asked to see a doctor about an unrelated stomach ailment, Frey also

arranged for him to see a doctor. (JA120,128;423,430-31,443,458,484,638-39,740-47,797-804.)

That afternoon, the Board notified Frey that the Union had filed a petition to represent a unit of Kitsap employees including direct caregivers and HOHs. The following day, Frey revisited the residence where Sale and Gates worked. He re-inspected the wheelchair, found it had not yet been repaired, and decided to fix it himself. Frey then placed Sale and Gates on administrative leave "pending further investigation" for not repairing the wheelchair sooner and not honoring the client's request for a doctor. Frey also referred the incident to the State of Washington for investigation. (JA120-21;492-93,725-26,805-06.)

Meanwhile, on January 4, the Board held a hearing on the Union's representation petition, which Gates attended as a union supporter. (JA120,126;481-82.)

On January 31, a state investigator contacted Frey for an initial interview regarding his allegations about Sale and Gates. The next day, before the State could complete its investigation and announce any findings, Frey discharged Sale and Gates, citing their failure to repair the wheelchair and tend to the client's request for a doctor. The State later closed its investigation, indicating "no violation was determined." (JA121;166-68,492,1343,1384,1390.)

C. Employees Vote for Union Representation; Kitsap Continues To Police Residential Conditions More Closely and Disciplines Hennings

The Board conducted a representation election among Kitsap's direct caregivers and HOHs in early 2012. After tallying the ballots on March 15 and announcing that a majority favored representation, the Board certified the Union as the employees' collective-bargaining representative. (JA124,134;200-02,218-19,506.)

As the Union took up its new role, Kitsap maintained its more frequent and closer inspections of facilities where its now-unionized employees worked. Kitsap also began documenting infractions as never before. On April 12, for example, Kitsap issued Hennings a formal written warning for being seven minutes late to work, even though it had previously tolerated more egregious instances of lateness and absence. On the date in question, Hennings came directly to work after a union meeting where she and several other employees were chosen as members of the Union's bargaining committee. (JA124-26,128;208,325-26,328-30,1345.)

D. The Union Attempts To Schedule Bargaining Sessions and Requests Information; Kitsap Stalls, Provides Only Limited Information, Reserves Sweeping Powers for Itself in Contract Proposals, and Pretermits Two Bargaining Sessions

On April 23, Union Chief Negotiator Sarah Clifthorne proposed a series of initial bargaining dates, but Kitsap's chief negotiator, Gary Lofland, said nothing

for nearly a month, despite her repeated emails and telephone calls. Lofland finally responded on May 21, saying he could meet on June 5 or 6, and asking the Union to bring its written contract proposal. The next day, Clifthorne told Lofland the Union was available on both dates and noted that it had selected five employees, including Hennings, to serve on its bargaining team. Clifthorne added that they would be trained on June 4, in time for the first meeting. (JA109;208,519,950-56.)

On June 1, the Union asked Kitsap to provide information about bargaining-unit employees and their terms and conditions of employment, to help inform upcoming negotiations. Lofland responded that Kitsap could not meet on June 5 or 6 after all. He blamed the Union for its one-day "delay in responding to the available dates," claiming they were not "realistic." He also alleged that the Union had failed to timely train its bargaining team, submit an information request, and develop a written proposal. (JA109;518-19,960-63.)

The Union trained its team on June 4, and the next day Clifthorne emailed Lofland again to schedule bargaining, proposing 26 possible dates between June and August. Lofland said he would schedule one date only, July 13. He refused to meet sooner. The Union accepted this date but continued to request additional ones. Lofland refused, but agreed to all-day bargaining sessions, from 9 a.m. to 5 p.m. (JA109-10&n.6;208,533,965-68.)

On June 11, Lofland partially responded to the Union's information request. Thereafter, the Union sent him its complete written proposal, per his request. (JA109-10;527-29.)

At the July 13 bargaining session, the Union explained its proposal. Kitsap asked no questions and made no proposals. Instead, it declared the parties "done for the day" well before noon and stayed only to schedule two additional bargaining sessions (August 6 and 15). (JA110;532-35,719-20,977-1049.)

A few days later, the Union made another information request seeking information about the HOH position, explaining that it needed the information because recent HOH job postings appeared to change the requirements for that position. (JA110;1051.)

At the next bargaining session on August 6, Kitsap discussed its contract proposal, which it had provided three days earlier. The proposal included a broad management-rights clause and a disciplinary procedure that gave management "sol[e]" discretion to determine "th[e] step to be utilized and the degree of discipline to be imposed." Regarding wages, Kitsap reserved the right to further reduce wage rates unilaterally, with 30-days' notice to the Union, based on changes to state-provided funding. Kitsap also proposed removing the HOH position from the bargaining unit entirely. (JA110&n8;220,536-43,547,1052-94.)

At noon, Kitsap prematurely called an end to negotiations. Before leaving, it agreed to one additional bargaining session (on September 17) beyond the upcoming August 15 session. (JA110;536-47.)

E. Kitsap Issues Hennings Two Letters of Direction and Abruptly Cancels the Parties' Third Bargaining Session

On August 10, a few days after the bargaining session where Hennings was on the union bargaining committee, Frey issued her a "letter of direction" based on observations he had made at the home where she worked. Frey's letter reprimanded her for purportedly writing down an assignment schedule, and "remind[ed]" her "that in sworn testimony" at the Board representation hearing HOHs "testified that they do not and have never scheduled staff." Frey did not cite any rule prohibiting HOHs from writing down a schedule, and at the representation hearing he testified that HOHs work "hand in hand" with Grice on scheduling. (JA125-26;333,915-17,1346.)

On August 13, Lofland said Kitsap could no longer meet for bargaining on August 15. He cited a state audit as his reason for the sudden cancellation. (JA110;220,1095.)

On August 15, Kitsap issued Hennings another letter of direction, this time for not completing monthly narratives about clients in her house, and not charting their medications. In the letter, Kitsap acknowledged that Hennings had completed three narratives that month but admonished her for not doing more. Kitsap also

asserted that the "trend" she set "seemed to…be followed by the rest of [her] Household as most of the narrative pages were empty for each of the clients." Kitsap additionally admonished Hennings for two instances in which she purportedly failed to record the reason for a medication error. (JA125;1347-48.)

Kitsap did not issue letters of direction or other discipline to the direct caregivers in the household, even though they had primary responsibility for administering and recording medications. Nor did Kitsap pursue those employees for their noted failure to complete client narratives. (JA125;340-44,361,930.)

F. Kitsap Curtails and Delays Scheduling More Bargaining Sessions; It Responds to Some Information Requests, But Refuses To Provide Other Information, Broadens Its Proposed Management-Rights Clause, and Continues To Issue More Discipline

At the parties' third bargaining session on September 17, the Union presented a modified proposal for discussion, but Kitsap refused to discuss certain items and again ended the session early, before noon. (JA110;548-50.)

Just before the parties' October 16 bargaining session, Kitsap partially responded to the Union's July information request regarding the HOH position. Kitsap also provided a modified contract proposal that included even more sweeping management-rights language that gave Kitsap unilateral control over changing employees' "compensation," including wages and benefits, based on

"fluctuations" in state funding levels. As under Kitsap's previous proposal, the Union would "only" receive 30-days' notice of changes. (JA111&n.11;1128-76.)

At the October 16 session, the parties discussed this and other aspects of Kitsap's proposal, as well as employee access to personnel records. When the Union suggested employees should be able to review their records, Frey responded: "[i]f people wanted more write-ups, they could have them, starting then." That day, Kitsap issued 10 written warnings to employees for failing to complete narratives. (JA111,128;551-54.)

Soon after, the Union tried to schedule additional sessions in November. Again, Lofland would not readily commit. On October 25, he told Clifthorne that he was "[d]ealing with a torn Achilles tendon" and would get back to her "soon." On October 29, having heard nothing, she again requested November bargaining dates. The Union also requested additional information for bargaining purposes, including an accounting of "total ISS dollars [i.e., payments from the State] paid to bargaining-unit members per month, including overtime." (JA111;1177-78.)

Nearly two weeks later, Kitsap said it could meet, but not until late-November. The parties ultimately agreed to meet on November 26 and December 18, although Kitsap flatly refused to provide information about payments from the State. (JA111-12;1179-81.)

At the November 26 session, Kitsap withdrew its proposal to remove HOHs from the bargaining unit. The parties signed a tentative agreement to include them in the unit. (JA111-12;564-65,1185.)

G. Kitsap Confronts Hennings About Union Activity; Lofland Cancels the Sole December Bargaining Session; Through Unresponsiveness and Unavailability, He Effectively Imposes a Three-Month Hiatus in Bargaining; Kitsap Places Hennings on Administrative Leave and Demotes Her

By mid-November, Kitsap had only met with the Union four times in the nearly eight months since its certification and cut three of those sessions short. To protest this foot-dragging, the Union organized a march to the home of Kitsap's owner in December. Although Hennings did not participate, Frey and Kitsap's owner confronted her about it. She denied involvement, but Frey said: "[y]ou're union, you're involved." (JA125,127;344-45,361.)

Lofland cancelled the December 18 bargaining session with one day's notice, saying he was "feeling ill." Although he promised to contact Clifthorne that week to reschedule, he never did so. On January 11, 2013, having heard nothing, Clifthorne told Lofland the Union was available for bargaining "every day" the last two weeks of January. Lofland responded—14 days later—that he could not meet until late February because of upcoming family surgeries and a Board hearing on unfair-labor-practice allegations against Kitsap. (JA112;1186-90.)

The Union agreed to meet in late February, as Lofland proposed, but also asked to meet sooner. Lofland refused, even after the unfair-labor-practice hearing was postponed. He also cancelled the planned late-February session, stating he "apparently [had] been summoned for jury duty during that period." Eventually, Lofland said he could commit to February 21 and March 11-12. (JA112;1293-98.)

Meanwhile, on February 4, Kitsap placed Hennings on administrative leave, citing the various disciplines issued to her in 2012. Two days later, Kitsap demoted her. (JA125,127;1349-53.)

The parties subsequently met on March 11-12 and April 4-5, 2013.[3] Although they reached tentative agreement on a number of issues, they remained far apart on significant issues, including compensation, benefits, leave, discipline, the grievance procedure, whether discharge would be at will or for cause, and the management-rights clause. Soon after the April 4 session, Kitsap reneged on its tentative agreement to include the HOH position in the unit, reverting to its proposal to eliminate the position. Kitsap offered to discuss the proposal all over again. (JA112;571,577-82,623,1300-41.)

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[3] Clifthorne cancelled the previously agreed-to February 21 session. (JA112;1299.)

The parties held additional bargaining sessions with a federal mediator. Nevertheless, by the end of 2013, they still had not reached a collective-bargaining agreement. (JA112;580-82,623.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Ring and Members Pearce and McFerran) found that Kitsap violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminatorily discharging Minor; placing Sale and Gates on administrative leave and discharging them; taking a series of adverse actions against Hennings, culminating in her demotion; and enforcing work rules more strictly in response to union organizing. The Board further found that Kitsap violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to meet and bargain with the Union at reasonable times; refusing to furnish or delaying the provision of requested information; and engaging in overall bad-faith bargaining for the entire first year of the parties' collective-bargaining relationship. (JA108-22,124-29.)

The Board's Order requires Kitsap to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires Kitsap to: offer Minor, Sale, Gates, and Hennings full reinstatement to their former jobs or

substantially equivalent positions; make them whole for any lost earnings and benefits resulting from the discrimination against them; rescind, in writing, its practice of enforcing disciplinary rules more strictly in response to employees' union activities; within 15 days of the Union's request, meet and bargain with the Union in good faith and at reasonable times; upon the Union's request, meet for a minimum of 15 hours per week, or on an alternative schedule to which the Union agrees; submit written bargaining progress reports every 15 days to the Board's Regional Office; and post a remedial notice.[4] (JA131-32.)

STANDARD OF REVIEW

This Court's review of Board decisions "is narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (internal quotation marks and citation omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). Accordingly, the

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[4] In light of Kitsap's bad-faith bargaining over the first year of the parties' relationship, the Board also granted a 12-month extension of the "certification year," in which the Union enjoys an irrebuttable presumption of continued majority support in the unit. (JA130&n.37.)

Court may not reject the Board's findings simply because other reasonable inferences may also be drawn. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1076 (D.C. Cir. 2016).

ARGUMENT SUMMARY

Substantial evidence supports the Board's findings that Kitsap discriminated against pro-union employees Minor, Sale, Gates, and Hennings. The suspicious timing of those actions, the lack of any consistently applied practice warranting such treatment, as well as Kitsap's disparately harsh treatment of pro-union employees, strongly support the Board's unlawful-motive finding. Moreover, Kitsap admittedly and unlawfully adopted a harsher overall approach to discipline—issuing many more disciplines than usual—in response to the union organizing campaign. The record therefore did not compel the Board to accept Kitsap's defenses that it would have taken the same actions against Minor, Sale, Gates, and Hennings regardless of their union activity.

Kitsap's attempt to escape its remedial obligation to those employees fails. Kitsap's actions cannot be deemed for-cause under the Act, given the Board's unassailable finding of Kitsap's unlawful motive and its failure to prove it would have taken the same actions regardless of union activity. Similarly, Kitsap cannot establish that the employees were unfit for service, given its retention of employees who engaged in worse conduct, including intentional client abuse.

Substantial evidence further supports the Board's findings that Kitsap failed to comply with its statutory obligation to meet with the Union and confer about a collective-bargaining agreement at reasonable times. Kitsap slowed bargaining by repeatedly withholding any response to the Union's meeting requests, claiming unavailability for long periods, and cutting scheduled sessions short. Meanwhile, it also hamstrung bargaining by refusing to provide or delaying information requested by the Union for bargaining purposes; indeed, Kitsap has waived any challenge to all but one of those violations. And it engaged in regressive tactics, such as tentatively agreeing to include HOHs in the bargaining unit, then reneging months later.

Based on this conduct, the Board reasonably found that Kitsap acted in overall bad faith, without a sincere purpose to achieve a collective-bargaining agreement. Kitsap's substantive proposals only bolster the finding of bad faith, as Kitsap sought unilateral control over all critical aspects of the employment relationship, effectively relegating the Union to a minor role and leaving employees worse off than if they had no contract at all.

Given this egregious bargaining conduct, the Board acted well within its discretion in ordering Kitsap to bargain for 15 hours per week and to provide periodic progress reports. The Court lacks jurisdiction to address its baseless challenges to those remedies because Kitsap failed to raise them below. The Court

also lacks jurisdiction to consider Kitsap's challenge to the General Counsel's ratification of the unfair-labor-practice complaint and its continued prosecution, given Kitsap's failure to raise its claim before the Board.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT KITSAP VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATING AGAINST FOUR PRO-UNION EMPLOYEES, AND BY MORE STRICTLY ENFORCING WORK RULES IN RESPONSE TO UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Retaliating Against Employees' Union Activity

Section 7 of the Act guarantees to employees "the right to self-organization, to form, join, or assist labor organizations," and to "bargain collectively through representatives of their own choosing…." 29 U.S.C. § 157. Section 8(a)(3) of the Act enforces these rights by making it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to…discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).[5] Thus, an employer violates Section 8(a)(3) "by taking an adverse

[5] A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employment action, such as issuing a disciplinary warning, in order to discourage union activity." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003) (emphasis omitted). Consistent with that test, if substantial evidence supports the Board's finding that protected activity was a "motivating factor" in the employer's adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct.[6] *Transp. Mgmt.*, 462 U.S. at 401-03; *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993).

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[6] Kitsap quibbles about the "element[s]" of the General Counsel's *Wright Line* burden before the Board, claiming he must specifically prove a "nexus" between protected activity and adverse action. (Br.20-21.) Kitsap's assertions have no bearing on the question before the Court, which is whether substantial evidence supports the Board's finding of unlawful motivation and its rejection of Kitsap's affirmative defense. Accordingly, the Court need not address Kitsap's claims. In any event, the General Counsel may meet his burden of proving unlawful motivation with circumstantial evidence, and *Wright Line* does not require him to "'demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action.'" (JA118&n.25, quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 n.10 (2014), *enforced sub nom. AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).)

"As direct evidence of employer motivation is generally scarce,…'circumstantial evidence alone may establish unlawful motivation.'" *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer's knowledge of and hostility toward protected activity, the timing of its action, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer" or its shifting reasons. *Southwest Merchandising*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)). Ultimately, because motive is a question of fact implicating the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

B. Bonnie Minor

1. Minor's union activity was a motivating factor in her sudden discharge

On December 7, 2011, Kitsap discharged Minor, a pro-union employee with no disciplinary record, just hours after she spoke up at an anti-union meeting conducted by Kitsap's labor consultant. Substantial evidence supports the Board's finding that her protected activity was a motivating factor in her sudden discharge.

Minor became active in the union campaign in early December. It is undisputed that during the mandatory meeting on December 7, she put the labor consultant on the spot by asking him how much Kitsap was paying him. Given

this undisputed evidence, the Board reasonably inferred that Kitsap would have known about Minor's pro-union stance before discharging her. (JA119;642.)

The highly suspicious timing of Minor's discharge also shows that her pro-union conduct at the mandatory meeting prompted Kitsap's swift reaction. *See Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015) ("[t]iming alone may suggest antiunion animus" (internal quotation marks and citation omitted)). Thus, Kitsap discharged Minor within hours after she attempted to undermine its labor consultant. At the time, Minor had no prior history of discipline. (JA264.) Indeed, just one week before, she had received a strongly positive performance evaluation awarding her the highest possible rating in seven out of ten categories. (JA117&n.24;1355.) The Board reasonably found that Kitsap's precipitous discharge decision, soon after Minor openly challenged an anti-union speaker, and despite her recent positive evaluation and lack of any disciplinary record, showed that Kitsap's motive was to retaliate against her for supporting the Union. (JA119.)

As the Board further noted, its conclusion that Kitsap acted out of hostility towards Minor's union activity is only bolstered by its other conduct in this case. (JA119.) As shown below pp. 26-59, Kitsap amply demonstrated its animus in the months after Minor's discharge, by discharging or taking repeated adverse actions against other union supporters and engaging in bad-faith and dilatory bargaining

tactics. Contrary to Kitsap's claims (Br.27), the Board properly considered the entire record, including Kitsap's slew of subsequent unfair labor practices, in drawing an inference that Minor's discharge was unlawfully motivated. *See Continental Radiator Corp.*, 283 NLRB 234, 238 (1987) ("it would be fatuous to ignore" subsequent violations in assessing employer's motivation for discharge).

2. The record did not compel the Board to accept Kitsap's defense that it would have discharged Minor absent her union activity

Faced with this strong evidence of unlawful motive, it was incumbent on Kitsap to prove it would have discharged Minor even absent her union activity. Kitsap claims (Br.24-26), as it did below, that it discharged Minor for complaining to clients on the morning of December 7 that General Manager Frey had yelled at her about canceling a holiday party. The Board, however, was not compelled to accept Kitsap's claim. As the Board noted, although Frey and Human Resource Representative Grice told Minor right away that her complaints amounted to improper "triangulation," they "did not indicate any discipline would be forthcoming" or that it "was even being considered." (JA118.) Instead, it was not until after Minor spoke up at the anti-union meeting later that day that Frey and Grice hastily announced her discharge for "insubordination." (JA118.) This sequence of events seriously undermines Kitsap's assertion that "triangulation" was the real reason for its decision to discharge Minor.

As the Board also found, Kitsap failed to show it had a practice of immediately discharging employees for "counter-therapeutic" conduct, and it could not identify any instances of termination for such conduct. (JA119.) To the contrary, the record shows Kitsap tolerated even outright physical harm to clients by other employees, see below p. 28, making its position that it "had to" immediately discharge Minor for "triangulation" even more untenable.[7] (JA119,121.) *See Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence that employer discharged other employees for similar conduct supported finding of unlawful discrimination).

At bottom, as the Board explained, Kitsap cannot escape a finding of unlawful discrimination by simply pointing to a possible non-discriminatory reason for its action. Rather, it had the burden of proving that it would have "discharged Minor for that reason even in the absence of [her] union activities." (JA120.) The Board reasonably found that Kitsap failed to meet that burden, given the undisputed fact that initially it did not even mention the prospect of discipline and

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[7] This disparate-treatment evidence also negates Kitsap's claim that it acted on a "good faith belief" that Minor's misconduct warranted discharge. (Br.26.) *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it "parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred").

only decided on discharge after Minor questioned its labor consultant, as well as its tolerance of outright physical abuse by other employees.

C. Alicia Sale and Hannah Gates

1. Their union activity was a motivating factor in Kitsap's placing them on administrative leave and discharging them

A few weeks after discharging Minor, and days after the Union petitioned to represent Kitsap's employees, Kitsap acted against two more prominent union supporters: Alicia Sale and Hannah Gates. Kitsap first placed them on administrative leave, allegedly for neglecting a client and failing to follow instructions. Kitsap soon discharged them, despite an ongoing state inquiry into whether they had in fact done anything wrong. Substantial evidence supports the Board's finding that these actions were motivated by their union activity.

Sale and Gates were members of the union organizing committee and specifically identified as such in a flyer that General Manager Frey admitted seeing in mid-December 2011. (JA120,789-92,848,1596.) Accordingly, contrary to Kitsap's claims (Br.31), there is no question that they were known union activists by the second half of December, when the events at issue unfolded.

Moreover, the swift and highly suspicious chain of events shows that Kitsap acted out of hostility towards their union activity. On December 20, after they reported a scratch and bruise on a client's leg, Frey personally appeared at their

facility to investigate. He believed that the client's wheelchair was the cause and directed Sale and Gates to repair it. He also determined the client had asked to see a doctor about an unrelated issue and arranged for a doctor's visit. That afternoon, Frey learned that the Union had filed its representation petition.

The following day, he reappeared at the house, noted the wheelchair was not yet repaired, and placed Sale and Gates on administrative leave on December 23, citing their failure to make immediate repairs and faulting them for not honoring the client's request for a doctor. (JA120.) As the Board aptly noted, Kitsap put them on administrative leave less than 2 weeks after they appeared on the union flyer, and just 2 days after Kitsap received notice that the Union had garnered enough support for an election petition. (JA121.)

On February 1, 2012, Kitsap discharged both employees, despite a still-open state investigation into their conduct. As the Board found, the timing of these discharges only lends further suspicion to Kitsap's already suspect actions. (JA121.) Kitsap had no pressing need to discharge them before the investigation concluded, while they were on administrative leave and no longer working with clients—unless it simply wanted to shed union activists as soon as possible. (JA121.) Had Kitsap waited, it would have learned that the State found no wrongdoing.

Kitsap also treated Sale and Gates more harshly than other employees who engaged in similar, if not more egregious, misconduct. In December 2011, for example, Kitsap learned that employee Jackie Cavanaugh had "yelled at a client, pulled the client by her arms, put her knee into the client's side, and pushed the client's chair" in an apparent effort to impose a "timeout." (JA121;SA1-2.) As he did with Sale and Gates, Frey referred the matter to the State for investigation. But far from placing Cavanaugh on administrative leave and removing her from client contact, Frey kept her working, even with the very client she had apparently abused. Frey also did not discharge her prematurely before the State concluded its investigation.

Similarly, in August 2011 Kitsap learned that employee Gerry Goodman had "purposely injured a client's ankle." (JA121;SA3.) Kitsap responded by simply prohibiting him from interacting with that client alone, without taking further action, such as placing him on administrative leave or discharging him.

Thus, based on Kitsap's own records, the Board reasonably concluded that it inexplicably "treated Sale and Gates more harshly than Cavanaugh and Goodman," who engaged in "intentional abuse, including physical abuse." (JA121.) This disparate treatment "strongly support[s] an inference of unlawful motivation." (JA121.) *Accord Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264 (D.C. Cir. 1993). Further, there is no merit to Kitsap's passing suggestion that

Cavanaugh and Goodman were not appropriate "comparators" because they cared for less vulnerable clients. (Br.34.) Kitsap has provided no support for its suggestion and, in any event, it is mistaken that a finding of disparate treatment requires an absolute identity of attributes among comparators and discriminatees. *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987); *accord NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 788 (8th Cir. 2013) (the "similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone") (internal quotation marks and citations omitted).

2. The Board was not compelled to accept Kitsap's defense that it would have discharged Sale and Gates absent their union activity

As the Board aptly found, Kitsap offered no explanation for its disparately harsh treatment of Sale and Gates. (JA122.) Accordingly, Kitsap plainly failed to establish that it would have taken the same action even if they had not engaged in union activity.

In a misdirected effort to provide some justification for its actions, Kitsap now alleges that it had a "good faith belief that Sale and Gates engaged in misconduct." (Br.32.) But the Board did not disbelieve Kitsap's evidence that they engaged in the "neglect" attributed to them. (JA120.) On the contrary, it accepted that evidence as credited. (JA120.) Accordingly, it is irrelevant whether Kitsap believed the neglect occurred. *See Fort Dearborn Co. v. NLRB*, 827 F.3d

1067 (D.C. Cir. 2016) (reasonable-belief defense fails if employer cannot prove it "parceled out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred"). In sum, Kitsap failed to meet its burden of proving that it would have placed Sale and Gates on administrative leave and discharged them absent their union activity, and the Board was not compelled to find otherwise.

D. Lisa Hennings

Undisputed evidence establishes that Hennings was a member of the union organizing committee and participated in collective bargaining on the Union's behalf. Almost from the outset, her union activities were known to Kitsap. (Br.39.) Thus, in December 2011, her name appeared on a pro-union flyer that Frey received, and she directly told Frey she was "pro union," to which he responded, "I kind of figured that." (JA124,126.) Hennings was also present at the meeting where Board agents announced the vote tally.

Following Hennings' open involvement with the Union and the Union's successful bid to represent Kitsap's employees, Kitsap took a series of disciplinary actions against her. Among other things, Kitsap gave her a written warning for being seven minutes late to work after a union meeting; issued her "letters of direction" for engaging in scheduling, and for not completing certain records; and

placed her on administrative leave and demoted her.[8] As explained below, substantial evidence supports the Board's findings that Kitsap took these actions against Hennings because of her union activity, and thus violated Section 8(a)(3) and (1) of the Act.

1. April 12 warning for lateness

Kitsap gave Hennings a written warning on April 12 for being seven minutes late to work. As the Board found, the timing of this warning in relation to her union activity supports a finding of unlawful motivation. Hennings received the warning the same day she attended the union meeting where nominations for its bargaining committee were considered. Indeed, the meeting was the reason for her being 7 minutes late.[9] (JA126.)

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[8] Kitsap errs in citing its managers' testimony that letters of direction "were not considered disciplinary." (Br.40.) As a matter of law, documents relied upon in issuing further progressive discipline—whether called "directions," "warnings" or "counselings"—constitute adverse employment actions, because they have the potential to affect the timing and severity of later discipline. *Altercare of Wadsworth Ctr. for Rehab. & Nursing Care, Inc.*, 355 NLRB 565, 565 (2010); *see also Bellagio, LLC v. NLRB*, 854 F.3d 703, 709 (D.C. Cir. 2017) (adverse actions "reduce a worker's prospects for…continued employment, or worsen some legally cognizable term…of employment"). Here, Kitsap listed the letters as a basis for her demotion. (JA1558-1662.)

[9] The Court lacks jurisdiction to consider Kitsap's baseless claim, which it failed to raise below, that Hennings lost the protection of the Act because she chose to "linger at [a union meeting] despite the obligation to report for work." (Br.41-42.) *See* below p. 55.

Kitsap's disparately harsh treatment of Hennings also supports the Board's finding of unlawful motive. Other employees escaped discipline despite multiple or serious instances of tardiness and worse. For example, Kitsap issued no discipline to Manuel Gipson, even though he did not appear for work or call in for 9 days in 2005, falsely claimed he had worked certain days, and "offered a false medical excuse." (JA126;SA6.) Likewise, Kitsap issued no discipline to HOH Shirley Gallauher, even though she was consistently late to work by 5-15 minutes, multiple days a week, in 2006; and issued no discipline to Janice Henry, even though she was late almost every day for two weeks in 2007. (JA126;SA4,7.) Nor did Kitsap discipline Andie Rood in 2008, when she abandoned her shift without notifying Kitsap or making alternative arrangements for client care. (JA126;SA5.)

Before the Board, "Kitsap offered no explanation for this disparate treatment or any other evidence to show that it would have issued the April 12 warning even in the absence of Hennings' union activities." (JA126.) The Board accordingly found that Kitsap violated the Act by warning her for being 7 minutes late. (JA126.)

On review, Kitsap makes no attempt to explain its disparate treatment of Hennings as compared to other employees who were tardy without consequence before the union campaign began. Instead, Kitsap argues that the disparate treatment should be disregarded because it is "too distant in time." (Br.42.) But

Kitsap does not explain why that matters, nor does it provide any justification for its apparent view that its previously lax treatment is irrelevant. Rather, Kitsap repeats its banal claim that comparators should be "similarly situated in all material aspects." (Br.42.) *See* above p. 29.

Kitsap does not undermine the strong evidence of disparate treatment by pointing to an incident where it warned a pro-union employee (Johnnie Driskell) who was late to work after a union meeting. (Br.42-43.) This after-the-fact event does not help Kitsap establish that, when it warned Hennings, its consistent practice was to issue a warning regardless of union affiliation. In any event, as Kitsap acknowledges (Br.42), Driskell's lateness caused Kitsap to incur overtime costs. By contrast, there is no evidence that Hennings' seven-minute delay resulted in overtime costs.

2. August 10 letter of direction for scheduling

Substantial evidence likewise supports the Board's finding that Kitsap unlawfully issued Hennings a letter of direction on August 10, 2012. Kitsap's knowledge of her union activism is undisputed: she openly discussed it with Frey in December 2011, and in May 2012, the Union announced her membership on its bargaining committee.

It is also undisputed that just weeks after the parties' first bargaining session in July 2012, Kitsap issued a letter of direction chastising her for engaging in

scheduling, even though Kitsap had no rule against it. Instead, the letter cited employees' representation hearing testimony as a basis for imposing discipline. Thus, on its face, the letter disciplined Hennings, not for violating rules, but for purportedly disregarding such testimony.

Below, Kitsap belatedly attempted to justify its letter of direction by asserting that it had a policy prohibiting HOHs from engaging in scheduling. (JA126.) However, the Board reasonably dismissed that assertion as false and therefore pretextual. *See Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016) (stated reasons are pretextual if false or not in fact relied upon). As the Board noted, "Frey admitted [] at the representation hearing…that HOHs work 'hand in hand' with Manager Grice regarding employee scheduling." (JA126.) Thus, its claim of a policy against HOH scheduling conflicts with Frey's own testimony. Given this contradiction, it was entirely reasonable for the Board to infer that Kitsap's true motive for issuing the letter of direction was her persistent union activity. (JA126.) *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947 (D.C. Cir. 1999) (employer's faulty justification was "pretextual and intended to conceal [its] true [discriminatory] motive").

3. August 15 letter of direction for not completing narratives and charting

Days after issuing the unlawful August 10 letter, Kitsap issued Hennings another letter, this time for failing to write narratives about clients in her house and

to chart notes about their medications. In so doing, Kitsap again engaged in blatant disparate treatment. As Kitsap acknowledged in its letter, other employees in Hennings' house were also guilty of not completing narratives and medical charts. Yet Kitsap admittedly did not take any action against them. Given this obvious disparate treatment, which Kitsap did not attempt to explain or defend, the Board reasonably inferred that Kitsap singled Hennings out for disciplinary action because of its amply demonstrated hostility towards her union activity.

4. February 2013 administrative leave and demotion

In early February 2013, Kitsap placed Hennings on administrative leave and then demoted her, citing concerns about her work and expressly relying on the unlawful discipline discussed above. Consistent with settled law, the Board found that because Kitsap relied on its prior unlawful discipline of Hennings in issuing further discipline, its February 2013 administrative-leave and demotion decisions were likewise unlawful. (JA127, citing *Hays Corp.*, 334 NLRB 48, 50 (2001).) *Accord NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013).

Kitsap gains no ground by arguing it would have placed Hennings on administrative leave and demoted her regardless of her protected activity because she had a history of "poor performance and lack of judgment." (Br.35-38,43-44.) That history includes the unlawful disciplinary actions discussed above, where Kitsap inexplicably treated Hennings more harshly than other employees, and

incidents that overtly manifested Kitsap's hostility to her union activity. For example, General Manager Frey accused Hennings of having some role in an employee demonstration outside the home of Kitsap's owner, telling her that because she was "union," she was "involved." (JA127.) In sum, considering Kitsap's history of unlawful conduct towards Hennings and other pro-union employees, the Board reasonably rejected Kitsap's claim that it would have placed her on administrative leave and demoted her even if she had not engaged in union activity.

E. Stricter Enforcement of Work Rules

As the Board found and Kitsap does not dispute (Br.55-56), Kitsap's monitoring of employees, and the sheer number of disciplines it issued to them, increased dramatically after they began organizing. Thus, several employees testified that managers began showing up at their worksites more frequently after the Union's December 2011 organizing blitz and started inspecting their work and worksite more closely. (JA128;638-39.) Before the Union campaign, inspections were conducted mainly by coworkers, and focused on safety issues such as functioning smoke detectors; after the campaign, managers took over, and began delving into details such as the contents of logbooks and kitchen cabinets, "pull[ing] out every can and inspect[ing] every expiration date." (JA128;638-39,643-44.)

Predictably, management's closer and more frequent scrutiny led to the discovery of more "infractions." Kitsap, moreover, adopted a practice of punishing infractions that were not previously subject to discipline. For example, Kitsap began issuing written warnings when employees failed to complete narratives about their clients. Indeed, on the very day Frey warned the Union that if employees "wanted more write-ups, they could have them, starting [now]," Kitsap issued 10 such warnings, fulfilling his threat. (JA128.) More generally, Kitsap showed an inclination toward discipline unlike anything seen before the union campaign. Thus, in the first eight months after the Union's election, Kitsap issued 40 written disciplines *in addition to* the unlawful disciplines discussed above—admittedly "a sharp break from prior practice." (JA128.)

On review, Kitsap does not question this compelling evidence, nor does it challenge the settled principle that where "'the pattern of discipline after the commencement of union activity deviate[s] from the [prior] pattern,'" a discriminatory motive is established. (JA128, quoting *Jennie-O Foods*, 301 NLRB 305, 311 (1991).) Accordingly, Kitsap waived any challenge to the Board's finding, based on the timing of Kitsap's tectonic shift in disciplinary approach, that it began "more strictly enforcing its disciplinary rules because its employees supported the Union and engaged in union activities." (JA128.) *See Corson &*

Gruman Co. v. NLRB, 899 F.2d 47, 50 (D.C. Cir. 1990) (arguments not raised in opening briefs are waived).

As the Board also found, Kitsap failed to establish any defense to this finding of discrimination. It never showed that "'its increased discipline was motivated by considerations unrelated to its employees' union activities.'" (JA128, quoting *Jennie-O Foods*, 301 NLRB at 311.) On the contrary, Kitsap *admitted* in briefing below that there was little evidence of discipline before the Union arrived, and Frey acknowledged that Kitsap began documenting discipline because of the Union. (JA128;361-62.)

Trying to negate this admission, Kitsap claims that its change in disciplinary approach was motivated by concerns over a "possible" state audit. (Br.55.) But Kitsap fails to explain the highly suspicious timing of this supposed audit, which appears to coincide exactly with the union campaign. (JA128.) Likewise, Kitsap says nothing about the origin of its sudden concern about an audit, or why it would require an entirely new disciplinary approach. Kitsap, thus, provides no reason to disturb the Board's well-supported finding that it adopted a harsher disciplinary approach in response to union organizing.

Contrary to Kitsap's claim, the Board is not asking Kitsap to "disregard the employees' failure to perform." (Br.55.) The Board's Order simply requires Kitsap to cease and desist from "[e]nforcing its disciplinary rules more strictly than

in the past in retaliation for its employees' union activities or support," and to "rescind, in writing, its policy or practice of enforcing its disciplinary rules more strictly in retaliation" for such activities. (JA132.) Plainly, these remedial provisions allow Kitsap to address failures to perform on a non-discriminatory basis, just as it did before the Union entered the scene.

F. The Board Properly Exercised Its Discretion in Ordering Kitsap To Reinstate the Discriminatees with Backpay

Intent on avoiding its remedial obligations to Minor, Sale, Gates, and Hennings, Kitsap misguidedly argues that it discharged or demoted them "for cause" under Section 10(c) of the Act, and that they should be denied reinstatement because they are "unfit" for further service. (Br.28-30,35,43-44.) Section 10(c) authorizes the Board to order "affirmative action" to remedy unfair labor practices, including "reinstatement of employees with…backpay." 29 U.S.C. § 160(c). This is the conventional remedy for loss of employment caused by an unfair labor practice. *See Precoat Metals*, 341 NLRB 1137, 1138 (2004) (citing *Sheller-Globe Corp.*, 296 NLRB 116 (1989)); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). The Board's award of that remedy here follows settled precedent. (JA131-32.)

The Court should reject Kitsap's argument that this standard remedy would run counter to a caveat in Section 10(c), that the Board may not award reinstatement or backpay to those who have been suspended or discharged "for

cause." 29 U.S.C. § 160(c). The argument disregards the Board's court-approved interpretation of the statutory term "for cause," which is entitled to judicial deference because the Board is interpreting an ambiguous provision of the statute it administers. *See Lechmere v. NLRB*, 502 U.S. 527, 536 (1992).

"[For] cause…effectively means the absence of a prohibited reason." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Malsters, Local Union No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). *See NLRB v. Local Union No. 1229, Int'l B'hd. Of Elec. Workers*, 346 U.S. 464, 474 (1953) (for-cause discharge is discharge for reasons "other…than [unlawful] intimidation and coercion"); *Taracorp*, 273 NLRB 221, 222 n.8 (1984) (employer may "discharge for good cause, bad cause, or no cause at all," subject to "one specific, definite qualification; it may not discharge when the real motivating purpose is to do that which [the Act] forbids") (internal quotation and citations omitted). Accordingly, Kitsap cannot evade its remedial obligations by citing "causes" for its adverse actions that the Board specifically rejected in finding those actions unlawfully motivated. *See also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ("There is no indication…that [Section 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.").

There is no more merit to Kitsap's claim that Minor, Sale, Gates, and Hennings should be denied reinstatement because they are "unfit" for service. (Br.30-31,34-35,43-44.) Kitsap's claim rings hollow, given the evidence that it allowed other employees to keep their jobs even after they had committed more serious offenses like intentionally inflicting physical harm on clients. *See* p. 28 above. Although Kitsap notes the importance of "competent" healthcare professionals, it simply has not shown that, in its organization, the discriminatees' conduct automatically makes them incompetent and unworthy of continued employment. (Br.30,34,43-44, citing *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 460-62 (9th Cir. 1978) (remanding to resolve conflicting evidence involving employee's basic competence to perform medical laboratory work).)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT KITSAP VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO MEET THE UNION AT REASONABLE TIMES, REFUSING TO PROVIDE AND DELAYING REQUESTED INFORMATION, AND BARGAINING IN OVERALL BAD FAITH

A. The Statutory Duty To Bargain Requires the Employer To Meet at Reasonable Times, Provide Relevant Information, and Engage in Negotiations With a Sincere Interest in Reaching Agreement

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to "bargain collectively" with the representatives of its employees.[10] 29 U.S.C. § 158(a)(5). In turn, Section 8(d) of the Act defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…." 29 U.S.C. § 158(d).

These provisions impose on the employer a "positive legal duty to meet and confer with the [u]nion at reasonable times and intervals." *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998) (internal quotation marks and citation omitted). An employer that shirks or neglects this duty violates Section 8(a)(5) and (1) of the Act. *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 182-83 (2d Cir. 1998); *see also Lancaster Nissan, Inc. v. NLRB*, 233 F. App'x 100, 102-05 (3d Cir.

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[10] A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1). *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

2007) (upholding Board finding of violation where employer limited bargaining sessions to once or twice per month in first year after union's certification).

The statutory duty to bargain also "includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Accordingly, an employer violates the Act by refusing to provide, or delaying providing, relevant information requested by its employees' union. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1251 (D.C. Cir. 2012).

At bottom, the statutory duty to bargain in good faith "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Ins. Agents' Union*, 361 U.S. 477, 485 (1960). Consequently, "the parties are obligated to do more than merely go through the formalities of negotiation." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 47-48 (2d Cir. 1974). They must "make a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). As a corollary, "[t]o conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would of course violate [Section] 8(a)(5) and amount to 'bad faith' bargaining." *Continental Ins.*, 495 F.2d at 48.

In assessing this issue, the Board considers "the totality of bargaining conduct." *Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 F. App'x 444 (D.C. Cir. 2002). That inquiry encompasses conduct "away from the bargaining table and at the table, including the substance of the proposals on which [the employer] has insisted." *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991). Ultimately, because "the drawing of inferences as to good or bad faith in the bargaining process is 'largely a matter for the Board's expertise' brought to bear on the particular facts before it," the Court is deferential in reviewing the Board's assessment. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 733-34 (D.C. Cir. 2015).

B. Kitsap Refused To Meet and Bargain at Reasonable Times

Substantial evidence supports the Board's finding that Kitsap breached its statutory bargaining obligation by failing "to meet at reasonable times" with its employees' chosen representative as Section 8(d) of the Act specifically requires. 29 U.S.C. § 158(d). To begin, although the Union proposed initial bargaining dates on April 23, 2012, Kitsap made no response for nearly one month, despite the Union's repeated emails and telephone calls. Moreover, when Kitsap's chief negotiator, Lofland, finally responded on May 21, he would only agree to meet on

one of the June dates proposed by the Union. He then rescinded his commitment just over a week later, for no legitimate reason.

Furthermore, as the Board found, Lofland sought to blame the Union for Kitsap's sudden cancelation, falsely claiming that the Union had "delay[ed] in responding to available dates." (JA112.) But plainly "[i]t was [Kitsap]—not the Union—that [had] waited almost one full month before agreeing to a date…which it then canceled." (JA112.) And although Lofland also tried to justify his cancelation by claiming the Union had not prepared its committee members for bargaining and had not submitted information requests and a complete written proposal, the Board reasonably found his assertions "baseless." As the Board explained, well before Lofland abruptly announced on June 1 that he was cancelling the June 5 session, the Union had confirmed that its bargaining committee would be trained beforehand. Moreover, contrary to Lofland's suggestion, the Union was not required to propound information requests and submit a complete written proposal before the first bargaining session.

Despite Kitsap's unreasonable refusal to meet as scheduled, the Union pressed on in its effort to schedule bargaining dates and acceded to Kitsap's demand for a proposal in advance of the first session. Although Kitsap eventually agreed to meet, it would not do so until July 13—almost three months from the Union's first scheduling request. Kitsap also rebuffed the Union's efforts to

schedule subsequent bargaining dates, rigidly adhering to its unreasonable refusal to schedule more than one date at a time.

Kitsap also hamstrung bargaining by repeatedly ending scheduled full-day sessions before noon and refusing to engage in substantive discussion of the Union's proposals. Indeed, at the very first bargaining session, Kitsap refused to discuss any aspect of the Union's proposal, even though the Union had provided it a week in advance, as Kitsap had requested.

Thanks to Kitsap's dilatory tactics, bargaining proceeded at a snail's pace through the fall of 2012, and consisted solely of once-a-month meetings, sometimes only for a half-day. In December 2012, Kitsap apparently tired of even this minimal routine and canceled its only scheduled bargaining session that month, with just one day's notice. And, as the Board found, "[a]lthough [Kitsap] promised that it would reach out to the Union to reschedule that session, it did not do so." (JA113.) "Only the Union made an effort to schedule additional sessions," but Kitsap successfully ignored its efforts until the end of January—"more than 5 weeks" after its last-minute cancelation of the December 18 session. Moreover, when Kitsap finally responded to the Union on January 25, it claimed inability to meet until February 21. Thus, "[b]ecause of [Kitsap's] continued dilatory conduct, almost 3 months elapsed between its proposed…session and the parties' previous meeting on November 26." (JA113.) In sum, given Kitsap's foot-dragging for

most of the first year after the Union's certification, the Board reasonably found that Kitsap failed to discharge its obligation to meet "at reasonable times" with the Union. 29 U.S.C.§ 158(d).

Kitsap attempts to excuse its delays by asserting that it had "legitimate reasons"—namely, Lofland's other commitments and physical injury. (Br.49.) However, as shown above, Lofland often gave no reason for his delays; he was simply unresponsive. Further, to the extent there were competing claims on his time, they provide "no defense" to the Section 8(a)(5) violation, as the Board found. (JA113n.14.) "[A]n employer's chosen negotiator is its agent for purposes of collective bargaining," and "if the negotiator causes delays in the negotiating process, the employer must bear the consequences." *Calex Corp. v. NLRB*, 144 F.3d 904, 910 (6th Cir. 1998).

C. The Court Should Summarily Enforce the Board's Uncontested Information-Request Violations; the Only Challenged Finding—that Kitsap Unlawfully Refused To Furnish Wage-Related Information—Is Supported by Substantial Evidence

In its opening brief, Kitsap does not contest the Board's finding (JA113-14) that it unlawfully delayed turning over certain information requested by the Union that was plainly relevant to fulfilling its duties as the employees' collective-bargaining representative. Specifically, the Board found, and Kitsap does not

dispute, that it waited three months or more before complying with the Union's request for:

- Employee schedules, house name, and shift information;
- Employee transfers, promotions, and movement in and out of the bargaining unit since December 11, 2011;
- Job descriptions and memos about job expectations;
- Memos or written materials on policies and procedures, rules, and guidelines for employees;
- History of wages and raises for employees for a five-year period;
- Training programs and requirements for staff, including all training records since December 1, 2011; and
- The job description for the HOH position.

Kitsap similarly does not question the Board's finding (JA114) that it entirely failed to provide copies of memos and job postings concerning the HOH position.

By failing to contest these Section 8(a)(5) violations in its opening brief, Kitsap has effectively waived any challenge to them on review. *See, e.g.*, *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990). Moreover, the Board is entitled to summary enforcement of the portions of its order corresponding to the uncontested violations. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

Turning to the single contested finding, the record and relevant precedent amply establish that Kitsap unlawfully refused to give the Union information about Kitsap's receipt of state funds for employee wages and overtime. As the Board found, Kitsap made such funding an issue by stating, in proposed clauses on management rights and compensation, that it reserved the right to modify compensation, including benefits, based on "fluctuations" in state reimbursement rates. Understandably, the Union sought some context for Kitsap's position, as well as concrete information about how state funding affects wages and benefits. The Union, thus, asked Kitsap to provide the monthly reimbursement rate for each employee beginning in March 2012.

The Board reasonably found that the requested information was relevant and therefore should have been produced. As the Board explained, "[w]here an employer adopts bargaining positions that make certain financial information relevant, the union is entitled to that information in order 'to evaluate and verify the [employer's] assertions and develop its own bargaining positions.'" (JA114, quoting *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).) Here, the requested information about state reimbursement rates would not only have given context to Kitsap's asserted need to reserve the right to change wages and benefits; it also would have informed discussions about what wage rates should be at the outset. As the Board noted, the parties' differences over wage rates made information

about state reimbursement particularly relevant because it "would have aided the Union in determining whether [Kitsap] had any room for potential movement on wage rates—a crucially important bargaining subject—based on current appropriations" and the recent pattern of appropriations.[11] (JA114.)

D. The Board Reasonably Found that Kitsap Bargained in Overall Bad Faith

The record amply supports the Board's finding that "the totality of [Kitsap's] conduct during negotiations demonstrates that it engaged in bad-faith bargaining." (JA114-15.) To begin, Kitsap "exhibited bad faith by engaging in dilatory tactics," which, as shown above, "began almost immediately after the Union's certification and persisted throughout negotiations." (JA115.) Kitsap further demonstrated bad faith by "outright refus[ing] to provide information concerning State payments." (JA115.) That refusal, in turn, undermined "the Union's ability to meaningfully bargain over wages and benefits, perhaps the most critical of all mandatory subjects of bargaining." (JA115.) Kitsap also hobbled negotiations, and again exhibited bad faith, by delaying provision of basic requested information "critical

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[11] The fact that Kitsap did not assert "inability to pay" does not relieve its obligation to produce financial information plainly relevant to informed discussion of its bargaining proposals. (Br.52-54.) *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Likewise, there is no merit to Kitsap's exaggerated claim that the Union's request for targeted information about Kitsap's use of state funding was tantamount to a request for a full financial audit. (Br.53-54.)

to the Union's ability to formulate proposals and engage in meaningful bargaining." (JA115.)

But Kitsap did not stop there. It also engaged in regressive bargaining that showed it "was not serious about coming to an agreement and would…walk back proposals so as to frustrate the Union and delay agreement." (JA115.) Specifically, after seeking removal of the HOH position from the bargaining unit, Kitsap tentatively agreed to keep it in, but then reversed course again without explanation, asserting that HOHs should be excluded. As the Board found, this whiplash of "unexplained conduct concerning an issue so critical to collective bargaining—the composition of the bargaining unit—is inconsistent with a sincere willingness to reach agreement." (JA115.) *See Valley Central Emergency Veterinary Hosp.*, 349 NLRB 1126, 1127 (2007).

Given this compelling evidence, the Board reasonably concluded that "without more, [it] warrants a finding of overall bad-faith bargaining." (JA115.) As the Board found, however, additional evidence demonstrates Kitsap's bad faith—namely, its scorched-earth bargaining proposals, which effectively "'exclude[ed] [the Union] from any participation in decisions affecting important conditions of employment,'" and thus would have severely undercut the Union's role as the employees' representative. (JA115-16, quoting *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (internal quotations omitted),

enforced, 732 F.2d 872 (11th Cir. 1984).) Indeed, these proposals would have left employees and their union "with substantially fewer rights and less protections than provided by law without a contract." (JA113, citing *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487-88 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003).)

Thus, in its October 2012 proposal, Kitsap reserved the right to unilaterally reduce "rates paid" to employees "if the [State]…reduces the benchmark rate, the Legislature reduces funding, or changes to health care laws and contributions occur." (JA116.) In its proposed management rights clause, Kitsap repeated this language and made clear that its reservation of rights extended to increases and decreases in wages and benefits. Under the proposal, moreover, the Union would only have been entitled to notice of the unilateral changes, not to bargaining. Kitsap, thus, sought to deprive the Union of any ongoing role in determining these crucial bargaining subjects.

Kitsap likewise sought to deprive the Union of any role in discipline and discharge. Thus, although Kitsap's final proposal included a progressive disciplinary schedule, this was illusory because the proposal also insisted that Kitsap was not obliged to follow the schedule. Instead, Kitsap sought unilateral control over the disciplinary "step to be utilized and the degree of discipline to be imposed," keeping that "solely within…[its] judgment and discretion." (JA116.)

Kitsap's final proposal also provided for "at will" employment, meaning there were "no limits on [its] right to discharge unit employees," other than those imposed by law. (JA116.) Its proposed management-rights clause sought to expand Kitsap's authority further, reserving for Kitsap the "sole[] and exclusive[]" right to "promote, demote, suspend, discipline, layoff, or discharge employees." (JA116.)

Intensifying the sting of these proposals were others that sought to exclude the Union from its role in bargaining over work rules, and to eliminate any possibility of grievances if Kitsap invoked its extensive rights under the management-rights clause. As the Board found, Kitsap's exclusion of so-called management rights from the grievance procedure was particularly indicative of bad faith, given the breadth of those stated rights. In effect, Kitsap left employees and the Union with "no avenue to challenge any of [its] decisions with regard to the nearly exhaustive list of rights reserved to [Kitsap]." (JA116.) *See, e.g.*, *Regency Service Carts*, 345 NLRB 671, 722 (2005) (finding bad faith where employer's "extremely broad" management-rights proposal exempted management rights from grievance and arbitration procedure).

On this record, the Board reasonably found that Kitsap's proposals "taken as a whole" sought near obliteration of the Union's representative role in the very areas where employees would normally seek its help—in regard to wages, benefits,

discipline, and discharge. (JA115.) As the Board explained, Kitap's proposals "'would have so damaged the Union's ability to function as the employees' bargaining representative,'" that Kitsap "'could not seriously have expected meaningful collective bargaining.'" (JA116, quoting *PSO*, 334 NLRB at 489.) In short, Kitsap's proposals collectively support the Board's finding that it bargained without any serious commitment to reaching agreement. (JA115,117.)

Contrary to Kitsap (Br.44-49), the Board fully recognized that its role is not to "evaluate whether particular proposals are acceptable or unacceptable." (JA115.) Instead, the Board considered the proposals to determine whether, in the aggregate, they showed that Kitsap was not bargaining in good faith. The Board can consider the substance of employer proposals for that purpose; in doing so, it is not making pronouncements on the acceptability of particular proposals. *See NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187-88 (D.C. Cir. 1981) ("[i]n determining whether the company fulfilled [its] obligation [to bargain in good faith], the terms of its bargaining proposals may be examined"). Kitsap's effort to defend its individual proposals misses the point: the question here is whether the proposals "in combination…evidence[d] an intent not to reach agreement." (JA116.) The Board reasonably answered this question in the affirmative.

In focusing on its individual proposals, Kitsap also forgets that the Board's finding of bad faith rests, not only on their combined effect, but also on Kitsap's

other unlawful bargaining conduct—its dilatory tactics and regressive proposal, its failure to provide and delay in furnishing information needed for the Union to perform its representative function. *Accord PSO*, 334 NLRB at 489. Thus, ample evidence supports the Board's finding that Kitsap violated the Act by refusing to bargain in good faith.

E. Kitsap's Meritless Challenges to the Board's Remedial Order Are Not Properly Before the Court

Kitsap contests the Board's Order where it requires Kitsap to bargain with the Union "for a minimum of 15 hours per week," or on an alternative schedule to which the Union agrees, and to submit written progress reports to the Board's Regional Office every 15 days. (Br.57,JA131.) Because Kitsap did not challenge these remedies in a motion for reconsideration below, it cannot obtain judicial review of them here. *See* 29 U.S.C. § 160(e)) ("No objection that has not been urged before the Board…shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (Section 10(e) "bar[red]" argument that could have been raised in motion for reconsideration); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same).

In any event, the Board acted well within its broad discretion in tailoring its remedies to Kitsap's bargaining violations. *See Sure-Tan, Inc. v. NLRB*, 467 U.S.

883, 898-99 (1984) (Section 10(c) of the Act "vest[s] in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review"). Thus, the Board ordered a regular schedule of bargaining and periodic progress reports because Kitsap failed to honor its statutory duty to meet with the Union at regular times and bargain in good faith. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("the relation of remedy to policy is peculiarly a matter for administrative competence"). Kitsap cannot and does not show that such reasonable remedies keyed to the violations in this case constitute a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

III. KITSAP'S CHALLENGE TO THE GENERAL COUNSEL'S RATIFICATION OF THE COMPLAINT IS NOT PROPERLY BEFORE THE COURT

In a final effort to avoid liability, Kitsap suggests that the underlying complaint was unauthorized and remains so despite its ratification by General Counsel Griffin. (Br.14-16.) By Kitsap's own account, the question it would have the Court consider is "whether Griffin's ratification was appropriate and cured" an acknowledged defect (*see* above pp. 3-4) in the underlying complaint. (Br.15.) But Kitsap never raised that question, as it should have, in a motion for reconsideration of the Board's decision accepting the ratification and finding

Kitsap's previous challenge to the complaint moot. *See* cases cited above p. 55. The Court accordingly cannot consider Kitsap's newfound argument. 29 U.S.C. § 160(e); *see Oncor Elec. Delivery Co. LLC v. NLRB*, 887 F.3d 488, 500-01 (D.C. Cir. 2017) (review of General Counsel Griffin's ratification of complaint "blocked" by untimeliness of employer's objection).

In any event, Kitsap's cursory claims do not provide a basis for setting the ratification aside. Under this Court's precedent, a ratification is valid where "a properly appointed official has the power to conduct an independent evaluation of the merits and does so." *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotation marks and citations omitted). That is precisely what happened here. Following the Supreme Court's decision in *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015), Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice stating that, "[a]fter appropriate review and consultation with [] staff," he had "decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." (JA108n.1.)[12]

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[12] This Court recognized in *SW General* that the Board's General Counsel is one of only several officers expressly exempted from the FVRA's "void-ab-initio" and "no-ratification" provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e), and

Kitsap claims but does not prove, as it must, that the General Counsel "'failed to make a detached and considered judgment,'" and that it "suffered…'continuing prejudice from th[at] violation.'" *Wilkes-Barre*, 857 F.3d at 372 (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 708-09 (D.C. Cir. 1996)). *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 770-71 (D.C. Cir. 2012) ("strong presumption of regularity" applies to General Counsel's action); *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App'x 129, 137 (3d Cir. 2017) ("clear evidence" of irregularity needed to overcome "presumption of regularity" that applies to public official's action).

Accordingly, the Court should "take [the] ratification 'at face value and treat it as an adequate remedy.'" *Wilkes-Barre*, 857 F.3d at 372 (quoting *Legi-Tech*, 75 F.3d at 709) (upholding Board ratification of the appointment of a regional director originally appointed when the Board lacked a quorum, finding that the ratification "remedied any defect arising from the quorum violation"). Indeed, taking that approach, the Third Circuit has rejected a similar challenge to General Counsel

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assuming that Sec. 3348(e) "renders the actions of an improperly serving Acting General Counsel *voidable*, not void") (original emphasis)). The Supreme Court acknowledged that proposition but did not address it because the issue was not presented, 137 S. Ct. at 938 n.2, and therefore it remains the law of this Circuit.

Griffin's ratification of a complaint issued initially by Acting General Counsel Solomon. *See 1621 Route 22*, 725 F. App'x at 137.[13]

[13] This Court is considering another complaint-ratification challenge in *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (argued Nov. 16, 2018).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Kitsap's petition for review and enforcing the Board's Order in full.

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February 2019

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	
Petitioner/Cross Respondent	)	Nos. 18-1187
	)	and 18-1217
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 12,784 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit

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Dated at Washington, DC
this 19th day of February 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	
Petitioner/Cross Respondent	)	Nos. 18-1187
	)	and 18-1217
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
David Habenstreit
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(202) 273-2960

Dated at Washington, DC
this 19th day of February 2019

ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES, INC.	)	
	)	Nos. 18-1187 & 18-1217
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-074715, et al.
	)	
Respondent/Cross-Petitioner	)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Section 7 (29 U.S.C. § 157) 2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 2
Section 8(a)(3) (29 U.S.C. § 158(a)(3)) 2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) 3
Section 8(d) (29 U.S.C. § 158(d) 3-4
Section 10(a) (29 U.S.C. § 160(a)) 5
Section 10(c) (29 U.S.C. § 160(c)) 5-6
Section 10(e) (29 U.S.C. § 160(e)) 6-7
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Federal Vacancies Reform Act, 5 U.S.C. §§ 3345, et. seq.

Section 3348 7-9

Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> ***
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the

same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

***

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been

suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

***

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the Federal Vacancies Reform Act
5 U.S.C. §§ 3345, et. seq.

Section 3348. (a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and
(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

From:	Burdick, Ruth E.
To:	Arbesfeld, Mark; Barham, Jeffrey; Bock, Richard; Boda, Dolores; Carlton, Peter J.; Coleman, Jocelyn; Colwell, John F.; Cowen, William B.; Emanuel, William; Finkelstein, Marci J.; Free, Douglas; Giannasi, Robert (ALJ); Goldstein, Steven; Head, Brittani; Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kraus, Grant; Lambert, Malissa; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; ML-HQ-Advice; ML-HQ-Appellate and Supreme Court Litigation Brch; ML-HQ-Contempt, Compliance, and Special Lit Branch; ML-HQ-Solicitor"s Office; Murphy, James R.; Platt, Nancy; Qureshi, Farah Z.; Rappaport, Steve; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Walkowiak, Robert G; Watts, Elicia; Zick, Lara S.
Cc:	Cowen, William B.; Seidman, Nathan M; Pate, William
Subject:	D.C. Circuit decision in Long Beach Memorial Medical Center Inc. d/b/a Long Beach Memorial Medical Center & Miller Children"s and Women"s Hospital Long Beach, Board Case 21-CA-157007 (reported at 366 NLRB No. 66)
Date:	Wednesday, May 15, 2019 1:28:24 PM
Attachments:	Long Beach 18-1125 DC Circ.pdf Long Beach Memorial Medical v NLRB_18_1125_Brief.pdf.pdf

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In an unpublished judgment that issued Friday, May 10, 2019, the D.C. Circuit enforced the Board's order issued against this independent, non-profit subsidiary of Memorial Health Services that operates two hospitals in Long Beach, California, where it employs 6000 employees, including 2100 registered nurses represented by the California Nurses Association/National Nurses United. In doing so, the court upheld findings by the Board (Members Pearce and McFerran, Member Emanuel dissenting in part) that the employer unlawfully maintained two overbroad rules prohibiting direct-care providers from wearing union-branded pins, badges, and badge reels in non-patient care areas in violation of Section 8(a)(1) of the Act.

On review, the court found no error in the Board's application of the settled presumption, applicable to healthcare settings, that a blanket restriction on wearing union insignia in areas not devoted to immediate patient care is presumptively invalid, unless the employer establishes that the prohibition is necessary to avoid disruption of health-care operations or disturbance of patients. The court noted that neither of the rules contained language restricting their application to patient-care areas. Moreover, the court held that the employer's contentions that the pin rule only applied to patient-care areas, and that safety concerns justified the badge-reel rule, were not supported by the text of the rules. Further, the court held that the employer's argument, first raised on appeal, that the case should have been governed by *Boeing Co.*, 365 NLRB No. 154 (2017), was jurisdictionally barred from review under Section 10(e) of the Act. The court noted that the employer could have raised the issue to the Board while the case was pending on exceptions, or in a motion for reconsideration, but had not done so.

The court's judgment, and the Board's brief to the court, are attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1125 **September Term, 2018**

FILED ON: MAY 10, 2019

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED,
INTERVENOR

Consolidated with 18-1143

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: WILKINS, *Circuit Judge*, and GINSBURG and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

This petition for review and cross-application for enforcement of a National Labor Relations Board order were presented to the court and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied, the Board's cross-application for enforcement be granted, and the petitioner's motion to supplement the record be denied.

The Board concluded that petitioner Long Beach Memorial Medical Center violated 29 U.S.C. § 158(a)(1) by maintaining two overly broad workplace insignia rules. *Long Beach Memorial Med. Ctr., Inc.*, 366 N.L.R.B. No. 66 (2018). The first rule, part of Long Beach's Dress Code and Grooming Standards, directs that "[o]nly [hospital] approved pins, badges, and

professional certifications may be worn." The second, part of the Appearance, Grooming and Infection Prevention Standards for Direct Care Providers, directs that identification "[b]adge reels may only be branded with [hospital] approved logos or text." The Board ordered Long Beach to rescind the rules or else revise them to conform with applicable law.

We may not consider Long Beach's central argument in this appeal: that the Board should have applied the framework set out in *Boeing Co.*, 365 N.L.R.B. No. 154 (2017). Under section 10(e) of the National Labor Relations Act, we lack jurisdiction over any "objection that has not been urged before the Board . . . unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The Board's decision in *Boeing* issued four months before its decision in this case. Long Beach therefore had time enough to raise *Boeing*'s applicability in supplemental briefing before the Board issued its decision here or in a motion to reconsider afterward. Long Beach did not raise the issue then, so it may not do so now. *Id.*; *accord HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016). Long Beach argues that a motion for reconsideration would have been futile because "the applicable law to this matter changed during the Board's review of the Judge's decision." Reply Br. 8.[1] Asking an adjudicator to apply newly decided law in a pending case is hardly futile: it is a routine practice in the federal courts of appeals, for example. *See* Fed. R. App. P. 28(j), 40(a)(2). Even if Long Beach would have faced "an uphill battle," a motion for reconsideration based on intervening law would not have been "clearly doomed." *Ga. State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889, 892 (D.C. Cir. 1999). The section 10(e) bar therefore applies to Long Beach's *Boeing* arguments.

The Board presumes that workplace rules prohibiting insignia are invalid absent special circumstances. *See, e.g.*, *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015). In the healthcare setting, there is an exception to this presumption for rules that apply only to "[i]mmediate patient care areas," such as "patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *Id.* at 1068 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 780 (1979)).[2] We see no error in the Board's application of the presumption in this case. Neither of the hospital's rules contains language restricting its application to patient care areas. Although the badge-reel rule applies only to direct-care providers, it contains no restriction about where in the hospital it applies.

[1] Long Beach offers *Robin American* as an example of another case in which "the applicable law . . . changed during the Board's review." Reply Br. 8 (citing *NLRB v. Robin Am. Corp.*, 667 F.2d 1170 (5th Cir. Unit B 1982)). As the Fifth Circuit's opinion makes clear, the law in that case changed during the appeal, not during the Board's review, so the petitioner could not possibly have raised the change before the Board. 667 F.2d at 1170.

[2] Because Long Beach failed to preserve the applicability of *Boeing*, we have no occasion to consider whether the Board's decision in that case unsettled the Board's earlier decisions establishing these presumptions in the healthcare context. *See* Memorandum GC 18-04 from Peter B. Robb, Gen. Counsel, NLRB, 2018 WL 2761555, at *1 & n.4 (June 6, 2018).

The Board determined that Long Beach failed to overcome the presumption of invalidity with respect to both of the challenged rules. Substantial evidence supported that determination.

As to the pin/badge rule, which directs that "[o]nly [hospital] approved pins, badges, and professional certifications may be worn," Long Beach explained that this was a security protocol to prevent employees from attaching unapproved pins and badges to their identification cards as opposed to, for example, their lapels or sleeves. There is no hint of this meaning in the text of the rule. The Board viewed the rule as a unqualified ban on unapproved pins and badges wherever they may be attached. Given the clarity of the rule's text, the Board did not have to accept the hospital's limiting gloss on the rule. Long Beach has not attempted to defend this blanket ban.

Similarly, as to the badge-reel rule, Long Beach relied solely on its interpretation of the rule as applying only in patient care areas. Whatever justifications might have supported the rules under Long Beach's unusual interpretations, they fail to support the rules as written. Ultimately, the Board ordered a modest remedy, allowing Long Beach to revise its broadly written rules to reflect the narrower policies the hospital now espouses. If Long Beach intended those narrower meanings all along as it now claims, we fail to see how the Board's order is objectionable.

Two other matters warrant brief discussion. Long Beach, in its reply brief, complains that the Administrative Law Judge excluded evidence concerning its business justifications for the rules. Long Beach failed to raise this argument in its opening brief and therefore forfeited it. *Rollins Envtl. Servs. (NJ) Inc. v. U.S. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991). Second, Long Beach moved to supplement the administrative record with three briefs it filed in support of its exceptions before the Board. Nothing in those proffered briefs affects our disposition of the petition, and we therefore deny the motion to supplement. *Nat. Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1231 n.6 (D.C. Cir. 1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or hearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Final Brief **Oral Argument Not Yet Scheduled**

Nos. 18-1125 & 18-1143

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach, was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. California Nurses Association/National Nurses United ("the Union"), was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66 (Apr. 20, 2018.)

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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GLOSSARY

A.	The parties' joint appendix
Br.	Long Beach's opening brief
Long Beach	Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Order	*Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66 (Apr. 20, 2018.)
The Union	California Nurses Association/National Nurses United

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1125 & 18-1143

LONG BEACH MEMORIAL MEDICAL CENTER,
D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER
& MEMORIALCARE MILLER CHILDREN'S AND
WOMEN'S HOSPITAL LONG BEACH

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED

Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach ("Long Beach") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against Long Beach on April 20, 2018, and reported at 366 NLRB No. 66. (A. 800-12.)[1] California Nurses Association/National Nurses United ("the Union"), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the preceding below under Section 10(a) of the National Labor Relations Act, as amended ("the Act"). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The Board's Order is final with respect to Long Beach. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

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[1] "A." references are to the joint appendix. "Br." references are to Long Beach's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining overbroad rules that prohibit employees from wearing union-branded pins, badges, and badge reels in non-patient care areas.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and Board regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Based on an unfair-labor-practice charge filed by the Union, the Board's General Counsel issued a complaint, subsequently amended, alleging that Long Beach violated Section 8(a)(1) of the Act by maintaining facially overbroad rules prohibiting employees from wearing union-branded pins, badges, and badge reels in non-patient care areas, and by disparately enforcing the badge reel rule. (A. 806, 809 n.12; A. 66-73, 439-43.) After a hearing, an administrative law judge found that Long Beach violated Section 8(a)(1) by maintaining the rule prohibiting union pins and badges in non-patient care areas; the judge found no other violations. (A. 806, 811.) On review, the Board affirmed the judge's rulings, findings and conclusions only to the extent consistent with its Decision and Order.

(A. 800.) Specifically, the Board agreed with the judge, for the reasons he stated, that Long Beach violated Section 8(a)(1) by maintaining the overly broad pin and badge rule, but unlike the judge, also found that Long Beach further violated the Act by maintaining the rule prohibiting union-branded badge reels in non-patient care areas. (A. 800-02 & n.7.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: Long Beach's Operations; Employee Uniforms and Identification Badges

Long Beach is an independent, non-profit subsidiary of Memorial Health Services ("MHS") that operates two hospitals in Long Beach, California. It employs approximately 6000 employees, including more than 2100 registered nurses represented by the Union. (A. 800, 806; A. 211-14, 233, 432.) Long Beach requires all direct care providers to wear standardized hospital uniforms color-coded by discipline, which it provides. (A. 800, 807; A. 473.) For example, registered nurses wear navy blue scrubs with their discipline and the MHS name and logo embroidered on the upper left side of the scrub top. (A. 800, 807; A. 474, 480, 486.)

Long Beach also issues identification badges to all employees, which must be visibly worn at all times while on hospital grounds. (A. 800, 806; A. 216, 225, 471, 479, 522-24.) Badges feature employees' photographs, names, job titles and, where appropriate, a color-coded strip indicating their professional discipline. (A.

800, 806; A. 226-27, 480, 485-86, 496.) They also contain electronic coding that permits employees to access authorized areas when the badge is swiped across a reader panel. (A. 800, 806; A. 76, 134-35, 225-26.)

Using a plastic sleeve or "badge holder" provided by Long Beach, direct care providers such as registered nurses affix their badges to a designated strip of cloth located at collar-level on the right side of their uniform. They may choose to affix their badges directly to the cloth, detaching the badge each time they need to present it. Alternatively, direct care providers may affix their badges via a hospital-provided "badge reel," an easily detachable device featuring a retractable string pulley. (A. 800, 807; A. 112, 228-30, 259, 322-23, 479, 480-81, 525.)

B. Long Beach's Policy Governing Pins and Badges

On its internal intranet under human resources, Long Beach maintains a "dress code and grooming standards" policy, formally known as Policy/Procedure # 318, which is promulgated by MHS for itself and its subsidiaries. (A. 800, 806, 807 n.3; A. 62-64, 467, 470.) Policy # 318 states that its provisions "apply to all those who work in any capacity" for Long Beach (as a subsidiary of MHS), specifically listing "employees [and] employees who work in uniforms." (A. 470.) The policy describes "examples of minimum requirements of dress and appearance," covering topics such as hygiene, hair style and length, and jewelry,

and at times distinguishes between clinical and administrative areas or personnel. (A. 470-71.)

Relevant here, Policy # 318 provides without qualification that "[o]nly MHS approved pins, badges, and professional certifications may be worn." (A. 800, 806; A. 471.) Union-branded pins and badges are not "approved" items. Moreover, the pin rule set forth in Policy # 318 applies hospital-wide, including in non-patient care areas, and to all employees, including those working in non-patient care areas or not engaged in immediate patient care. (A. 800, 807-08; A. 242-45, 276-77, 291-92, 297-99, 302-03, 471.)

In addition, under the pin rule, Long Beach only permits registered nurses to affix certain "approved" pins to the plastic sleeves holding their identification badges. For instance, they may affix pins issued by Long Beach indicating their years of service or their donations to the hospital, or by professional associations signifying certification in a specialty. (A. 806-07; A. 89-92, 151-56, 189-90, 235-37, 291-93, 480, 487, 493-94, 496, 525.) So long as the badge remains readable, Long Beach imposes no limit on the number of "approved" pins that may be worn. (A. 808; A. 293.)

There is no evidence that the prohibition against employees wearing union pins and badges in non-patient care areas is necessary to avoid disrupting

healthcare operations or disturbing patients, or that the prohibition is justified by hospital safety and security protocol. (A. 808; A. 237, 292-93, 470-79, 497-524.)

C. Long Beach's Policy Governing Badge Reels

Long Beach also maintains an "appearance, grooming and infection prevention standards" policy, formally known as PC-261.02, on its human resources intranet. (A. 800, 807; A. 64-65, 477.) PC-261.02 states that its provisions "apply to all those who work in any capacity in providing direct patient care," including "employees who work in uniforms." (A. 478.) In addition to establishing requirements for direct care providers' dress and appearance in areas such as hygiene, hair style and length, and jewelry, PC-261.02 provides that "[b]adge reels may only be branded with MemorialCare approved logos or text." (A. 800, 807; A. 479.)

Pursuant to this rule, if direct care providers elect to affix their identifications badge to their uniforms using a badge reel instead of attaching it directly to their uniform, then they must use the hospital-issued reel displaying the MHS logo. (A. 801, 807; A. 228-30, 259, 262-66, 282-83, 480-82, 525.) This requirement applies throughout the hospital, including in non-patient care areas. (A. 801; A. 479.) Thus, when direct care providers are present in public, non-patient care areas of the hospital during their workday, they must wear MHS-branded badge reels and cannot substitute reels bearing a union logo, even though

the reels are the same discrete size and shape and are readily detachable. (A. 800-02; A. 477-79, 481-84.)

There is no evidence that the prohibition against direct care providers wearing union-branded badge reels in non-care areas is necessary to avoid disrupting healthcare operations or disturbing patients, or that the prohibition is justified by the need to create a unique public image of quality patient care. (A. 801-02; A. 83.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Pearce and McFerran, Member Emanuel dissenting in part) found that Long Beach violated Section 8(a)(1) of the Act by maintaining overbroad rules prohibiting employees from wearing union-branded pins, badges, and badge reels in non-patient care areas. (A. 800, 802, 804 & n.2.) The Board's Order requires Long Beach to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A. 802-03.)

Affirmatively, the Order requires Long Beach to rescind the overbroad pin and badge reel rules, or to revise them to make clear that they do not prohibit employees in non-patient care areas from wearing pins, badges, or badge reels not approved by MHS and not branded with MemorialCare-approved logos or text.

The Order also requires Long Beach to notify employees that the overbroad rules have been rescinded or, if revised, to provide them a copy of the revised rules. Finally, Long Beach must post a remedial notice. (A. 803.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining its overbroad pin and badge reel rules. The pin rule prohibits all but hospital-approved pins and badges, and the badge reel rule permits only ones bearing hospital-approved logos or text. By their terms, both rules plainly restrict employees from exercising their Section 7 right to wear union-branded pins, badges, or badge reels at work, none of which are "approved." Moreover, in setting forth those blanket prohibitions, neither rule makes the legally significant distinction between immediate patient care areas, where a restriction on wearing union insignia is presumptively *valid*, and non-care areas, where a restriction is presumptively *invalid*. Although Long Beach asserts the badge reel rule applies only in immediate care areas, its claim is contrary to the rule's text. Consequently, both rules are presumptively invalid and Long Beach bore the burden of justifying them.

Substantial evidence supports the Board's further finding Long Beach failed to demonstrate that special circumstances justify prohibiting employees from wearing union-branded pins, badges, or badge reels while in non-patient care areas.

As to the pin rule, Long Beach's puzzling contention that it only prohibits pins *on* badges is contrary to the rule's plain language. Long Beach gains no more ground by asserting that the ban on wearing union pins in non-patient care areas is justified by hospital safety and security protocol. The pin rule is set forth in a policy governing dress code and personal grooming. It neither establishes safety and security measures, nor proscribes conduct that may jeopardize such measures. By contrast, Long Beach's actual safety and security policies do not address pins.

Regarding the badge reel rule, the Board found—and Long Beach does not appear to dispute—that there is no evidence the ban on union-branded reels in non-care areas is necessary to prevent disruption of care or disturbance of patients. And the Board reasonably rejected Long Beach's assertion that the ban is needed to maintain a uniform image of quality patient care. There is no evidence prohibiting union-branded badge reels in non-patient care areas is necessary to create a unique image. Likewise, Long Beach's interest in standardized uniforms does not constitute a special circumstance under established precedent. The badge reel rule, moreover, is not narrowly tailored to address Long Beach's ostensible public-image justification. Badge reels can be readily detached when direct care providers pass between immediate care and non-care areas, and easily replaced with hospital-approved ones. MHS-branded badge reels are also not required; direct care providers can simply attach their badges directly to their uniforms.

Finally, the Court lacks jurisdiction to consider Long Beach's *Boeing*-based challenges, which it failed to first raise before the Board. Those challenges are, in any event, without merit. The Court also need not address Long Beach's claims regarding exceptions briefs, which have no practical relevance here. In any event, exceptions briefs are properly excluded from the certified list.

STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). When supported by substantial evidence, the Board's findings of fact are "conclusive." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies that test to the Board's "application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Accordingly, "a decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted). Moreover, the question on review is not

"whether record evidence could support the [employer's] view of the issue, but whether it supports the [Board's] ultimate decision." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT LONG BEACH VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING OVERBROAD RULES PROHIBITING EMPLOYEES FROM WEARING UNION-BRANDED PINS, BADGES, AND BADGE REELS IN NON-PATIENT CARE AREAS

A. Healthcare Employers Cannot Ban the Wearing of Union Insignia in All Areas of Their Facilities, Absent Demonstrated Special Circumstances

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1).

The "central purpose of the Act" is to "protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991). As the Supreme Court recognized long ago, "the right of employees to self-organize and

bargain collectively [under Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). It is likewise well-established that the workplace is a "particularly appropriate" venue for employees to engage in such activity. *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1067 (D.C. Cir. 2015) (discussing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

At times, however, employees' exercise of Section 7 rights in the workplace may come into conflict with their employer's legitimate interests in controlling its property and operating its business. To aid its balancing of the conflicting interests in such cases, the Board, with Supreme Court approval, has developed certain legal presumptions, often adjusting them to account for the particularities of the industry and the activity at issue. *See Beth Israel*, 437 U.S. at 491-95 & n.10 (explaining the history of the Board's presumptions).

Of particular relevance here, it is firmly established that employees generally have a Section 7 right to wear union-related paraphernalia while at work as a form of "other concerted action," that is, to communicate about self-organization rights, or show support for their union. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803-04 (1945); *see also HealthBridge*, 798 F.3d at 1067 ("employees have the right to wear union insignia in the workplace"). In most employment contexts, the

governing presumptions are that such paraphernalia may be worn at any time and that a restriction of that right violates Section 8(a)(1) of the Act, unless the employer demonstrates "special circumstances" to justify it. *Republic Aviation*, 324 U.S. at 803-04; *see also Beth Israel*, 437 U.S. at 492-93; *HealthBridge*, 798 F.3d at 1067; *W San Diego*, 348 NLRB 372, 373 (2006).

Although the same principles hold true in the context of healthcare facilities, the Board, with Supreme Court approval, has further refined its presumptions "to avoid disruption of patient care and disturbance of patients." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 778 & n.8 (1979). As the Supreme Court has stated, in the healthcare setting the "'balancing of the conflicting legitimate interests . . . to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review.'" *Beth Israel*, 437 U.S. at 501 (citation omitted).

In *Beth Israel*, the Supreme Court expressly approved the Board's striking of that balance in a case involving union solicitation and distribution of union literature in a hospital setting. 437 U.S. at 507. The Board, with court approval, applies a similar analytical framework in other healthcare settings involving different types of Section 7 communications, including the wearing of union insignia. *See, e.g.*, *HealthBridge*, 798 F.3d at 1068; *Mt. Clemens Gen. Hosp.*, 335 NLRB 48, 50 (2001), *enforced*, 328 F.3d 837 (6th Cir. 2003); *Casa San Miguel*,

Inc., 320 NLRB 534, 540 (1995). Under that framework, a blanket restriction on wearing union insignia in areas not devoted to immediate patient care is presumptively *invalid*. *HealthBridge*, 798 F.3d at 1067-68; *Casa San Miguel*, 320 NLRB at 540. By contrast, a prohibition on wearing union insignia limited to direct or immediate patient care areas is presumptively *valid*.[2] *HealthBridge*, 798 F.3d at 1068; *Casa San Miguel*, 320 NLRB at 540.

To rebut the presumption that a restriction on wearing union insignia violates employees' Section 7 rights, an employer must establish "special circumstances." In the healthcare setting, the employer may justify a prohibition with evidence that it is "necessary to avoid disruption of health-care operations or disturbance of patients." *HealthBridge*, 798 F.3d at 1068 (quoting *Beth Israel*, 437 U.S. at 507); *see also Baptist Hosp.*, 442 U.S. at 779. To satisfy its burden, the employer must put forward specific evidence of the disruption or disturbance that the prohibition seeks to prevent, and in doing so it may not rely on mere speculation, unsubstantiated surmise, or subjective belief. *HealthBridge*, 798 F.3d at 1070-73; *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 847 (6th Cir. 2003); *Asociacion Hosp. del Maestro, Inc. v. NLRB*, 842 F.2d 575, 577 (1st Cir. 1988).

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[2] "Immediate patient care areas include patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *HealthBridge*, 798 F.3d at 1068 (quotation marks omitted).

In addition, outside of the healthcare setting, "[t]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may . . . unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atl.-Pa., Inc.*, 339 NLRB 1084, 1086 (2003), *enforced sub nom., Commc'ns Workers of Am., Local 13000 v. NLRB*, 99 F. App'x 233 (D.C. Cir. 2004). *See Guard Publishing Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) (special circumstances include "maintaining a certain employee image"). In evaluating the lawfulness of a public-image based rationale for restricting employees' right to display union insignia at work, the Board will examine the particular circumstances of each case, assessing the asserted business objective on the one hand, and the restriction's breadth or the affected insignia on the other. *See Bell-Atl.-Pa.*, 339 NLRB at 1086-87; *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982).

To establish special circumstances based on unreasonable interreference with an asserted public image, an employer must demonstrate both its deliberate cultivation of a particular image as part of its business plan, and that the limitations it has imposed are tailored to protect that image without overly impeding its employees' rights. *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 571 (1st Cir. 2016); *Guard Publishing*, 571 F.3d at 61-62; *Bell-Atl.-Pa.*, 339 NLRB at 1086; *W San Diego*, 348 NLRB at 373-74; *Nordstrom*, 264 NLRB at 701-02. Mere "customer

exposure to union insignia, standing alone," is not a special circumstance, *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *see also Guard Publishing*, 571 F.3d at 61; *Able Disposal*, 322 NLRB 244, 244 (1996); *Meijer, Inc.*, 318 NLRB 50, 50 (1995), *enforced*, 130 F.3d 1209 (6th Cir. 1997), and neither is a "requirement that employees wear a uniform," *AT&T*, 362 NLRB No. 105, 2015 WL 3492100, at *4 (June 2, 2015); *see also P.S.K. Supermarkets*, 349 NLRB at 35.

Other than the differing presumptions applied in the healthcare setting and a healthcare employer's ability to assert a special circumstance defense based on disruption of healthcare operations or disturbance of patients, the governing principles and Board analysis remain substantively similar whether an employer selectively banned specific union insignia due to its content, *see, e.g.*, *HealthBridge*, 798 F.3d at 1067-68, 1070-73; *Pathmark Stores, Inc.*, 342 NLRB 378, 378-80 (2004), applied an overbroad appearance or dress code to restrict the wearing of union insignia, *see, e.g.*, *Guard Publishing*, 571 F.3d at 61-62; *George J. London Mem'l Hosp.*, 238 NLRB 704, 706-09 (1978), or simply maintained a

provision amounting to a blanket ban on all potential union insignia, *see, e.g.*, *Boch Imports*, 826 F.3d at 570-77; *P.S.K. Supermarkets*, 349 NLRB at 34-35.[3]

B. The Pin and Badge Reel Rules Are Facially Overbroad and Presumptively Unlawful, and Long Beach Failed to Establish Special Circumstances

Substantial evidence supports the Board's finding that Long Beach violated Section 8(a)(1) of the Act by maintaining the overbroad pin and badge reel rules. (A. 800, 802.) As shown below, by prohibiting all but hospital-approved or provided pins, badges, and badge reels, both rules plainly restrict employees' right to wear union insignia while at work. (A. 800, 808.) Moreover, in setting forth that blanket prohibition, the rules fail to distinguish between immediate patient care areas and non-care areas. Thus, both rules are overbroad and presumptively invalid. (A. 800-02, 807-08.)

Substantial evidence also supports the Board's finding that Long Beach failed to meet its burden of demonstrating that its rules are justified by special circumstances. Long Beach did not show that its blanket bans are necessary to

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[3] Contrary to Long Beach's argument, the Board properly cited cases where an employer banned specific union insignia based on their content. (Br. 32-33.) Those cases apply the same general principles that make a blanket ban on union insignia unlawful. Long Beach also errs in relying on *Sacred Heart Medical Center*, 347 NLRB 531 (2006). (Br. 33 n.11.) It fails to note that the Ninth Circuit denied enforcement and remanded that case for the point cited. *See Wash. State Nurses Ass'n v. NLRB*, 526 F.3d 577 (9th Cir. 2008).

avoid disruption of healthcare operations or disturbance of patients, or to prevent unreasonable interference with its public image. (A. 800-02, 808-09.)

1. The pin rule

a. The rule is facially overbroad and presumptively invalid because it prohibits employees from wearing union pins or badges in non-patient care areas

As shown, the pin rule set forth in Policy # 318 unequivocally states that "[o]nly MHS approved pins, badges, and professional certifications may be worn." (A. 471.) Thus, as written, the rule prohibits employees from exercising their Section 7 right to wear union pins or badges at work because those insignia are not "approved" ones under the pin rule. (A. 807-08.) *See, e.g.*, *Boch Honda*, 362 NLRB No. 83, 2015 WL 1956199, at *2 (Apr. 30, 2015) (rule prohibiting employees from wearing pins, insignia, or message clothing not issued by employer restricted right to wear union paraphernalia), *enforced*, 826 F.3d 558 (1st Cir. 2016); *Albertsons, Inc.*, 351 NLRB 254, 256-57 (2007) (rule barring pins and badges other than name badges "[o]n its face" prohibited wearing of union pins or badges). The rule also fails to make the legally significant—and necessary—distinction between immediate patient care areas and non-care areas. (A. 807-08.) *See HealthBridge*, 798 F.3d at 1067-68; *Casa San Miguel*, 320 NLRB at 540.

Moreover, as the Board reasoned, the blanket prohibition set forth in Policy # 318 "applies to all employees, including non-direct patient care providers." (A.

807; A. 276-77, 291-92, 297-99, 302-03, 470.) As a result, not only are direct care providers subject to the pin rule when outside of immediate patient care areas, but "all those who work in any capacity" for Long Beach, regardless of their connection to immediate care areas, are prohibited from wearing union pins or badges. (A. 470.)

Before the Court, Long Beach does not challenge (Br. 28-34) the Board's finding that the pin rule applies in all areas and to all employees and "is not limited to direct patient care areas of the facility." (A. 808.) Accordingly, "the rule is presumptively invalid." (*Id.*)

b. Long Beach failed to meet its burden of demonstrating that special circumstances justify the overbroad pin rule

Given the pin rule's presumptive invalidity, the Board appropriately shifted the burden to Long Beach to demonstrate that its "restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients." (A. 808.) As it did before the Board, Long Beach presents just one justification for the pin rule. (*See id.*) Specifically, it repeats the curious claim that its rule merely prevents employees (in immediate patient care *and* non-care areas) from placing union pins directly *on* identification badges, and that it can impose this restriction because badges are part

of hospital safety and security protocol. (Br. 28-29, *see also* 6-8.) As shown below, the Board reasonably rejected both contentions.

As to the pin rule's scope, substantial evidence supports the Board's finding that "the rule on its face is not limited to wearing nonapproved pins on ID badges."[4] (A. 808.) As discussed, the pin rule provides, without qualification, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." (A. 471.) There is no limitation narrowing that broad prohibition only to placing union pins on identification badges, notwithstanding Long Beach's attempt to read that limitation into the pin rule's otherwise plain language.[5] (Br. 29-30.) Long Beach claims that such a limitation is evident when the pin rule is read in the "context" of Policy #318 as a whole and its other policies. (Br. 29-31, *see also* Br. 6-7.) However, as the record shows, Policy # 318, like others, contains no

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[4] In finding the rule unlawful as written, the Board specifically did not pass on whether the pin rule would be lawful if it were, in fact, limited to prohibiting employees from attaching union pins onto hospital-issued identification badges. (A. 800 n.2, 804 n.2.) Because, as shown, the rule is not so limited, the Board properly declined to pass on that question, contrarty to Long Beach's claim. (Br. 28.)

[5] According to Long Beach's reading, the pin rule provides that "only MHS approved pins, badges, and professional certifications may be worn on badges." (Br. 29-30.) This misreading of the rule must be rejected because it would lead to the bizarre result that the rule prohibits non-approved badges on badges.

language "narrow[ing] the otherwise broad restriction to only badge pins." (A. 808; A. 470-79, 497-524.)

Long Beach asserts uncontroverted evidence demonstrates that employees "understood" (Br. 29) and "knew" (Br. 30) the pin rule only prohibits pins on badges, but the employee testimony it apparently relies on does not support that claim (*see* Br. 6, 9 (citing A. 90-91, 151-52)), nor does the testimony of hospital officials (*see* A. 235, 340). In any event, several employees' subjective understanding of the rule's scope is not dispositive where, as here, the Board's established analysis entails reviewing the rule's plain text and finding that on its face, it restricts employees' right to wear union insignia at work. *See* cases *supra* p. 19; *cf. Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (in assessing whether rule explicitly restricts Section 7 activity, "the Board focuses on the text of the challenged rule").

The Board also reasonably rejected Long Beach's reliance on its safety and security protocol as a basis for prohibiting union pins in non-patient care areas. As the Board found and the record shows, there was a lack of evidence that "*pins* are part of" the security protocol. (A. 808 (emphasis in original).) After all, as the Board noted, the rule prohibiting union pins and badges "is set forth exclusively" within Policy # 318, a dress code and personal grooming policy. (A. 808; A. 470-72.) As that policy reveals, its raison d'etre is establishing appearance and

grooming standards because they "play an important role in conveying an image of high quality, professional health care." (A. 470.) Simply put, Policy # 318 does not establish safety and security measures or proscribe conduct that may jeopardize them. Conversely, the safety/security policies that Long Beach relies on (Br. 29, *see also* 6-7) do not address pins, let alone establish that affixing a union pin to a badge in non-patient care areas will adversely affect safety and security. (*See* A. 497-524, 527-29.)

Precedent supports this finding. For example, in a case where the Board rejected an employer's safety-based defense for a ban on pins, the Board similarly found it relevant that nothing in the employer's handbooks linked the ban—contained in a dress code provision—to safety considerations, including the section devoted to safety. *See Boch Honda*, 2015 WL 1956199, at *3 & n.7; *see also Boch Imports*, 826 F.3d at 576 n.14 (in rejecting rationale for ban, not unreasonable for Board to rely on fact pin ban located in dress code sections of handbook, not safety section).

As the Board further found, two additional factors undermine Long Beach's unsupported assertion that any union pin affixed to a badge, no matter its size, appearance, or message, negatively affects safety and security. First, the pin rule permits employees to place a variety of other pins directly on their badges, including "I Give" pins. (A. 808; A. 237, 292-93, 493.) There is no evidence that

such pins play a role in facilitating hospital safety and security when affixed to badges. As noted above, the pin rule's placement in the appearance and grooming policy, rather than in a policy governing safety and security, shows that nothing about pins inherently poses a safety problem. Second, Long Beach's professed concern that a union pin would create "distractions or obstructions" if placed directly on a badge (Br. 32, *see also* 8) is undermined by the admission of a hospital official that there is no limit to the number of approved pins an employee may wear directly on a badge, so long as the badge remains readable. (A. 808; A. 293.)

Thus, rather than target its ban to address a specific type, size or number of pins, or bar a specific, offensive message, Long Beach opted to implement a preemptive, blanket prohibition of *all* union pins, including in non-patient care areas. Even accepting Long Beach's claim that "I Give" and other "approved" pins assist patients in identifying caregivers when placed on badges, that justification does not warrant a blanket ban on union pins affixed to badges when employees are in non-care areas, not caring for patients. (Br. 8, 28-29.) Moreover, aside from proffering the unsubstantiated claim that it had safety reasons for banning union pins on badges, Long Beach offers no defense to the Board's finding that the pin rule imposes a blanket prohibition on all employees wearing

union pins not only on their badges but also elsewhere on their clothing, and in non-patient care areas.

Long Beach's remaining contentions are contrary to established Board law. It points out that employees may (or could) have displayed union insignia in other ways (Br. 30, *see also* 10), but the Board appropriately found that Long Beach's "burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned." (A. 808 (citing cases).) *See, e.g.*, *Albis Plastics*, 335 NLRB 923, 923-25 (2001) (requiring employer to justify rule banning union stickers on hardhats, even though employees free to display union insignia on clothing and elsewhere), *enforced mem.*, 67 F. App'x 253 (5th Cir. 2003). As discussed, Long Beach's burden was to justify a rule that is presumptively invalid because it prohibits employees from wearing union pins (or badges) while in non-patient care areas.

For similar reasons, Long Beach misses the mark in asserting that no employees were "restrained" by the pin rule. (Br. 30-31.) The Board based its finding on Long Beach's maintenance of a rule restricting Section 7 rights, not on its application of that rule to protected activity. Therefore, it is immaterial whether any employee was "actually prohibited" from wearing a union pin or badge. (A. 808.) *Cf. Guardsmark*, 475 F.3d at 374 (maintenance of rule explicitly restricting Section 7 activity is unfair labor practice, even absent evidence of enforcement).

In sum, substantial evidence supports the Board's finding that the pin rule is presumptively invalid, and that Long Beach failed to rebut the presumption with specific evidence that the ban on wearing union pins or badges in non-patient care areas was necessary to avoid disrupting its operations, disturbing patients, or creating safety and security problems.

2. The badge reel rule

a. The rule is facially overbroad and presumptively invalid because it prohibits employees from wearing union-branded badge reels in non-patient care areas

As shown, the badge reel rule unequivocally states that "[b]adge reels may only be branded with MemorialCare approved logos or text." (A. 801; A. 479.) Like the pin rule, the badge reel rule, as written, plainly prohibits employees from exercising their Section 7 right to wear union-branded badge reels at work (*i.e.* badge reels without MemorialCare-approved logos or text). (A. 800.) *See* cases *supra* p. 19. The prohibition on union-branded badge reels is similarly overbroad: "On its face," the Board found, "this requirement applies in all areas of the hospital, including non-patient care areas." (A. 801.) *See London Mem'l Hosp.*, 238 NLRB at 707-08 (policy prohibiting insignia other than "of a professional nature" overbroad where, on its face, ban on union insignia not restricted to patient care areas); *see also* cases *supra* p. 19.

As the Board reasoned, and the evidence shows, there are no provisions within PC-261.02, including the policy's stated purpose, limiting that otherwise blanket prohibition "to immediate patient care areas." (A. 801; A. 477-79.) By contrast, other provisions within PC-261.02 that do not govern badge reels "explicitly state they only apply in immediate patient care areas." (A. 801 & n.3; A. 477 ¶4, 478 ¶4.) Those provisions' "explicit limitation to patient care areas further suggests that the badge reel rule, which contains no similar language, is not so limited." (A. 801.) In any event, as the Board noted, because the scope of PC-261.02 is "[a]t the very least" ambiguous, the scope of its ban must be construed against Long Beach as the rule's drafter. (A. 801 (citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).)

The Board acknowledged that the badge reel rule (as part of PC-261.02) "may only apply to 'direct patient care *providers*,'" but reasonably found that fact "does not establish that it only applies in immediate patient care *areas*." (A. 801.) After all, as the Board aptly observed, direct care providers "necessarily move throughout the hospital and spend time in non-patient care areas." (*Id.*) Indeed, as the Board further noted, PC-261.02 itself recognizes that direct care providers are present at the hospital for reasons other than providing direct patient care, including for education and meetings. (A. 801; A. 478.) Thus, by its plain terms,

the badge reel rule also applies to direct care providers when they are present in the hospital but not engaged in immediate patient care.

Given the plain language of the badge reel rule and the absence of any limiting language in PC-261.02, Long Beach's assertion that the rule only applies to direct care providers "when performing patient care duties in patient care areas" is unpersuasive. (Br. 24, *see also* 28.) Contrary to its contention, nothing in the "companion" (Br. 13) policy PC-261.01 provides such a limitation. (Br. 12-14.) That policy is likewise broadly written, stating it applies "at all times" (A. 473 ¶1) and to those for whom "a standard uniform is required" (A. 474 ¶A). When the policy does mention patient care areas, it does so in connection with the "Bare below the elbows" approach to preventing hospital-acquired infections. (*See* A. 473 ¶4, 475 ¶5.) Long Beach gains no more ground by arguing—without citation to the record—that employees "understood" the badge reel rule applies only while working in patient care areas. (Br. 28, *see also* 24.) As discussed, their subjective understanding is not dispositive. *See* pp. 19, 22.

Because the badge reel rule facially applies in non-patient care areas, the Board reasonably found it presumptively invalid. (A. 801-02.) The Board therefore appropriately concluded that "[a]bsent special circumstances . . . the badge reel provision is unlawful." (A. 801.)

b. Long Beach failed to meet its burden of demonstrating that special circumstances justify the overbroad badge reel rule

Substantial evidence supports the Board's further finding that Long Beach failed to meet its burden of establishing special circumstances to justify its overbroad ban on union-branded badge reels. To begin, the Board found—and Long Beach does not appear to dispute (Br. 23-28)—that Long Beach "presented no evidence" that prohibiting direct care providers from wearing union-branded badge reels in non-patient care areas was necessary to prevent disruption of patient care or disturbance of patients. (A. 801-02; A. 83.) In this regard, the Board observed that the union-branded badge reels are similar to Long Beach's reels in size, shape, and appearance (bearing only a small, discrete logo). (A. 801-02; A. 481-84.) This fact undermines Long Beach's contention (Br. 27-28) that union-branded reels pose a problem in non-patient care areas. *See, e.g.*, *Nordstrom*, 264 NLRB at 701-02 (blanket ban on non-company buttons was unlawful, where banned steward button blended in with permitted jewelry).

The Board next found that Long Beach failed to establish a public-image based justification for prohibiting direct care providers from wearing union-branded badge reels in non-patient care areas. (A. 802.) Based on the evidence and relevant case law, the Board reasonably rejected Long Beach's contention (Br. 27-28) that the restriction was justified because it sought "a standardized, easily-

identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient[] care." (A. 802.) As the Board aptly noted, Long Beach presented "no evidence" that prohibiting union-branded badge reels in public, non-patient care areas was "necessary to create a unique experience distinct from its competitors." (*Id.*) *Compare W San Diego*, 348 NLRB at 372-73 (special circumstances justified blanket ban on adornments where hotel commissioned distinct uniforms for public-facing employees to foster unique "Wonderland" experience for its guests, distinct from other hotels), *with Boch Honda*, 2015 WL 1956199, at *2 & n.6 (special circumstances did not justify blanket ban on adornments where dealership provided standard Honda uniform with "Boch" added to some public-facing employees). In addition, although Long Beach requires direct care providers to wear a standardized uniform, the Board appropriately found that fact, standing alone, did not constitute a special circumstance justifying a ban on union-branded badge reels. Simply put, under established precedent "a uniform requirement alone is not a special circumstance." (A. 802 (citing *P.S.K. Supermarkets*, 349 NLRB at 35).)

Moreover, the Board found the badge reel rule was not "narrowly tailored" to address Long Beach's "purported concerns of providing a uniformed image of top-quality patient care." (A. 802.) As discussed, any rule curtailing employees' Section 7 right to wear union paraphernalia in the workplace must be narrowly

tailored to fit the particular circumstances. *See* p. 16. The badge reel rule is not so tailored because it fails to recognize that badge reels are "readily detachable," unlike other union paraphernalia that may be impractical to don and doff when passing between immediate care areas and non-patient care areas. (A. 802.) Thus, direct care providers can easily remove union-branded badge reels before entering immediate patient care areas, substituting the MemorialCare badge reel or simply affixing their identification badges directly to their uniform. (A. 802; A. 228-30, 259, 525.) *Compare Casa San Miguel*, 320 NLRB at 540 (special circumstances justified blanket ban on nursing assistant wearing union-branded smock in lieu of standard uniform where it was not "practical or possible" for employee to change clothes each time he entered patient care area), *with Enloe Med. Ctr.*, 345 NLRB 874, 874-76 (2005) (no special circumstances for blanket ban on employees wearing union badge where nothing prevented employees from simply removing badge when entering patient care areas).

Long Beach gains no more ground by asserting that badge reels bearing the MHS logo are an inseparable part of its uniform (Br. 14, 23, 28, 32). This claim is contradicted by the testimony of Judith Fix, its Senior Vice President of Patient Care Services and Chief Nurse Officer (A. 209), who was involved with creating the underlying policies (A. 246). Her testimony shows that so long as the *identification badge* is worn on the correct spot of direct care providers' uniforms,

it may be affixed directly using the hospital-provided plastic sleeve (*i.e.* badge holder) or with the MHS badge reel.[6] (A. 228-30, 259, 525.) Consequently, the MHS badge reel is not a required accoutrement for the uniform. In sum, the Board reasonably found that the badge reel rule, which restricts employees' right to wear union-branded badge reels in non-patient care areas, is presumptively invalid, and that Long Beach failed to establish special circumstances justifying the rule.

C. The Court Lacks Jurisdiction To Consider Long Beach's Remaining Challenges, Including Its Meritless Contention that the Board Should Have Analyzed This Case Under *Boeing*

On review, Long Beach pins its hopes almost entirely on an argument that it failed to raise below—namely, that the Board should have analyzed this case under *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). (Br. 24-34, *see also* 2-4, 15, 18-21.) *Boeing*, however, addresses a separate and distinct question under Board jurisprudence, whether certain facially neutral employer work rules are nonetheless unlawful because of their potential interference with

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[6] Long Beach does not advance its cause by citing (Br. 14) one employee's testimony that the MHS badge reel is required. (A. 186-87.) Her testimony conflicts with contrary testimony by Fix and a second employee. (*See* A. 74, 76, 103.) Long Beach gains no more ground by citing the testimony of a pediatric clinical operations director, which shows that if direct care providers wore a badge reel, then it had to be MHS-branded; her apparent belief the MHS reel is a required part of the uniform conflicts with Fix's testimony. (A. 316, 319-332.) Nor is Long Beach helped by citing certain documents pertaining to its new uniforms, bare-below-the elbows policy, and badge reels, which do not provide that the MHS badge reel is a required part of the uniform. (A. 549-55.)

Section 7 rights.[7] *See id.* at *4. Regardless, as noted, Long Beach failed to raise any of its *Boeing*-related challenges before the Board. It could have done so after *Boeing* issued on December 14, 2017, while this case was pending before the Board, or in a motion for reconsideration after the Board issued its Decision and Order on April 20, 2018. Long Beach did neither. (*See* A. 2-4.)

It is beyond cavil that a party must first raise a challenge before the Board in order to preserve it for subsequent consideration by a court of appeals. Under Section 10(e) of the Act, 29 U.S.C. § 160(e), "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court," absent extraordinary circumstances. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *HealthBridge*, 798 F.3d at 1069. The recognized statutory purpose underlying Section 10(e) is that a party must provide the Board with adequate notice of the basis of its objection, and thus the

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[7] Prior to *Boeing*, the Board used the analytical framework articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for analyzing certain employer work rules. *Boeing*, 2017 WL 6403495, at *8, *15-18. The Board first examined whether the rule explicitly restricted Section 7 activity; if it did, the rule was unlawful. *Lutheran Heritage*, 343 NLRB at 646. If it did not, then the Board considered whether "(1) employees would reasonably construe the [facially neutral rule's] language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. In *Boeing*, the Board expressly overruled *Lutheran Heritage*'s "reasonably construe" prong and announced a new balancing standard. 2017 WL 6403495, at *8, *15-*18. The Board left unchanged the remaining framework in *Lutheran Heritage*. *See id.* at *1-*17, *2 n.4.

opportunity to respond, before the party may pursue it in court. *See Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999).

Given Long Beach's failure to raise its *Boeing* challenges before the Board, and to present any extraordinary circumstances that would excuse its failure, the Court lacks jurisdiction to consider those challenges. *See HealthBridge*, 798 F.3d at 1068-70 (where party failed to raise issue prior to Board's decision, Section 10(e) bar applied because party subsequently could have raised issue to Board on motion for reconsideration).[8]

In any event, Long Beach's assertion that *Boeing* controls the outcome here rests on its incorrect premise that the Board relied on *Lutheran Heritage*'s

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[8] The Court likewise lacks jurisdiction to consider Long Beach's assertion the Board erred in relying on the established principle that an ambiguity in a rule may be construed against its drafter. (Br. 25-26.) In any event, *Boeing* merely clarifies that the Board would no longer rely on an ambiguity in a *facially neutral rule* to necessarily find that it interferes with Section 7 rights. *See Boeing*, 2017 WL 6403495, at *2, *8-10 & n.43. As shown, the badge reel rule is not facially neutral. Rather, on its face it plainly restricts employees' right to wear union insignia. *See* p. 26.

"reasonably construe" prong to find the violation here.[9] (*See, e.g.*, Br. 24-28, 30-32.) As shown, in finding the pin and badge reel rules unlawful, the Board appropriately relied on its established, court-approved precedent specifically governing employer restrictions on employees' right to wear union insignia at work—not on the inapposite reasonably construe analysis which, as noted (pp. 32-33 & n.7) addressed the distinct issue of the validity of certain facially neutral work rules.[10] *See* pp. 19-32. (*See* A. 800-02, 807-09.)

Long Beach likewise errs in asserting that the administrative law judge based his analysis of the pin rule on *Lutheran Heritage*. (Br. 31-32.) Although his recommended decision occasionally refers to reasonable interpretations, it does so

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[9] Long Beach does not advance its cause by citing General Counsel Memorandum 18-04 (Br. 25 n.9, 30-31), *available at* https://apps.nlrb.gov/link/document.aspx/09031d45827f38f1. General Counsel memoranda express only the General Counsel's views and "do not constitute precedential authority and are not binding on the Board." *Atelier Condo. & Cooper Square Realty*, 361 NLRB 966, 1002 (2014), *enforced*, 653 F. App'x 62 (2d Cir. 2016). In any event, contrary to Long Beach's representations, the General Counsel neither stated *Boeing* applies to the type of rules at issue here (*i.e.* apparel rules), nor "called-out" the Board for finding the present rules unlawful without relying on *Boeing*. (Br. 30-31.)

[10] It does not matter that the judge cited *Lutheran Heritage*'s reasonably construe prong in recommending dismissal of the complaint allegation involving the badge reel rule. (A. 809.) The Board did not adopt his finding or analysis. Instead, it expressly "reverse[d]" the judge on that issue and affirmed the judge's findings "only to the extent consistent with" its Decision and Order. (A. 800.) As the Decision and Order shows, the Board found the badge reel rule unlawful but did not rely on a reasonably construe analysis in doing so. (*See* A. 800-02.)

in the context of addressing (and rejecting) claims made by Long Beach in support of its asserted special circumstances defense; those references appear after the judge found the pin rule facially overbroad and presumptively unlawful under settled Board law. (*See* A. 807-09.) Furthermore, as the decision shows, the judge properly framed the pin rule analysis by citing apposite principles and cases such as *Healthbridge* and *Boch Honda*, including where he rejected Long Beach's claims. (*See* A. 807-08.) The Board adopted this analysis, which in no way relies on *Lutheran Heritage*. (A. 800.)

Contrary to Long Beach's further suggestion (*see, e.g.*, Br. 2, 25, 36), it is of no moment that the parties at times relied on a reasonable construction analysis in their answering or reply briefs, which was in addition to arguing their positions under settled precedent involving union insignia. (*See* A. 740-46, 748-62 and A. 682-735, 774-84.) As shown, the Board did not analyze this case under *Lutheran Heritage*. Instead, it applied the relevant Board precedent governing restrictions on wearing union insignia at work. Therefore, notwithstanding its suggestion of prejudice, Long Beach was able to defend—and defended—its rules prohibiting union insignia under the precedent relied on by the Board to find them unlawful.

Finally, Long Beach seemingly challenges the Board's findings on First Amendment grounds. (Br. 23, *see also* 15.) The Court lacks jurisdiction to consider that argument, however, because Long Beach likewise failed to raise it

before the Board.[11] (*See* A. 635-39, 682-736, 774-85.) Even absent this jurisdictional bar, Long Beach's passing mention of that argument in its opening brief fails to preserve the issue for appellate review. *See, e.g.*, *United States v. Miller*, 799 F.3d 1097, 1107-08 (D.C. Cir. 2015) (arguments not preserved by mere passing references or conclusory statements).

D. The Court Need Not Address Long Beach's Meritless Challenge to the Certified List

Echoing claims made in its motion to supplement the record, which the Board opposed, Long Beach argues that the certified list of the contents of the agency record filed by the Board should have included the parties' briefs in support of exceptions. (Br. 35-36.) The Court, however, need not rule on this issue because it has no practical consequences here. Long Beach mistakenly believes (Br. 36) that it needs the exceptions briefs to show that the parties mentioned *Lutheran Heritage* below, but that is evident from their answering and reply briefs (*see* A. 740-46, 748-62 and A. 682-735, 774-84), which are included on the certified list (A. 2-4). The Board does not dispute that the parties relied on *Lutheran Heritage* in their pleadings below. Instead, the Board argues that Long Beach failed to timely raise below its current argument that this case should have

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[11] Constitutional arguments may be forfeited under Section 10(e) of the Act. *See, e.g.*, *Ampersand Pub'g, Inc. v. NLRB*, 2017 WL 1314946, at *2 (D.C. Cir. Mar. 3, 2017) (holding First Amendment argument forfeited under Section 10(e)).

been analyzed under *Boeing*. *See* pp. 32-34. Thus, the briefs in support of exceptions are of no moment, and the Court can resolve this case without relying on them.

In any event, exceptions briefs are properly excluded from the certified list because they are not part of the "record" below as defined by the applicable Board rules. Specifically, Section 102.45(b) of the Board's Rules and Regulations, titled "Contents of record," enumerates the documents comprising the "agency record." The section makes it clear that exceptions briefs do not fall within the definition of that term. It provides:

> The charge upon which the complaint was issued and any amendments, the complaint and any amendments, Notice of Hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and *exceptions, and any cross-exceptions* or answering briefs as provided in section 102.46, constitutes the record in the case.

29 C.F.R. § 102.45(b) (emphasis added).[12]

Given this plain language, it is settled that briefs in support of exceptions are not part of the "record" before the Board as that term is defined by Section 102.45(b). Consequently, such briefs also are not part of the record on appeal (or

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[12] Contrary to Long Beach's bald assertion, Section 102.46—governing the content, formatting, and filing of documents, including exceptions briefs—does not make the parties' exceptions briefs part of the agency record. (Br. 35-36.)

the certified list).[13] *United Parcel Serv., Inc. v. NLRB*, 706 F.2d 972, 979 n.16 (3d Cir. 1983) ("brief filed in support of exceptions not included in record of case") (citing predecessor to Section 102.45(b)), *vacated on other grounds*, 464 U.S. 979 (1983); *A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969) (exceptions "brief is not made a part of the record on appeal"). Thus, where a party opts to file a separate brief in support of its exceptions (as permitted by Section 102.46(a)(1)(i)(D)), which all three parties did here, then consistent with Section 102.45(b) the exceptions document is part of the "agency record," but the separate brief in support is not.[14]

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[13] *HealthBridge*, 798 F.3d at 1069, and *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1264 (D.C. Cir. 1997), cited by Long Beach (Br. 35), do not compel the inclusion of exceptions briefs in the certified list. In *HealthBridge*, the exceptions brief was not part of the certified list. Rather, the employer simply cited it in its reply brief and provided a link to access it via the Board's public website. *See Healthbridge Mgmt., LLC v. NLRB*, Nos. 14-1101, 14-1116 (D.C. Cir.), ECF Nos. 1504296 (certified list), 1532509 (reply brief p. 8). As for *Diamond Walnut*, the decision does not reveal how the employer's exceptions brief came before the Court. The Board's longstanding practice would have excluded it from the certified list, and the case docket does not show that the Board was ordered to supplement the certified list with the exceptions brief. *See Diamond Walnut Growers, Inc. v. NLRB*, No. 95-1075 (D.C. Cir.). A party may have simply lodged the brief with the Court, a step Long Beach could have taken here and one that the Board would not have opposed.

[14] A party may be advantaged by deciding to file separate exceptions and supporting brief because any integrated document cannot exceed 50 pages. *See* 29 C.F.R. § 102.46(a)(1)(i)(D) (citing Section 102.46(h)).

Consistent with the foregoing, and as it has in the hundreds of cases filed in this circuit and others over the years, the Board therefore properly filed a certified list of the contents of the "agency record" listing the parties' exceptions documents but not their separate exceptions briefs.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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February 2019

STATUTORY AND REGULATORY ADDENDUM
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Relevant Provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69:

Sec. 7 [Sec. 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

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Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

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Sec. 10 [Sec. 160]

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United

States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant Provisions of the National Labor Relations Board's Rules and Regulations 29 C.F.R. §§ 101-103

§ 102.45. Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

***

(b) [Contents of record] The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

***

§ 102.46. Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

(a) [Exceptions and brief in support] Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section

10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section.

(1) [Exceptions]

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) [Brief in support of exceptions] Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) [Answering briefs to exceptions]

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) [Cross-exceptions and brief in support] Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) [Answering briefs to cross-exceptions] Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) [Reply briefs] Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further

briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

(f) [Failure to except] Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

(g) [Oral argument] A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(h) [Filing requirements] Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	**Nos. 18-1125, 18-1143**
Respondent/Cross-Petitioner	)	
and	)	
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,294 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
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Dated at Washington, DC
this 4th day of February 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	**Nos. 18-1125, 18-1143**
Respondent/Cross-Petitioner	)	
and	)	
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
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1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 4th day of February 2019

From:	Burdick, Ruth E.
To:	Arbesfeld, Mark; Barham, Jeffrey; Bock, Richard; Boda, Dolores; Carlton, Peter J.; Coleman, Jocelyn; Colwell, John F.; Cowen, William B.; Emanuel, William; Finkelstein, Marci J.; Free, Douglas; Giannasi, Robert (ALJ); Goldstein, Steven; Head, Brittani; Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kraus, Grant; Lambert, Malissa; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; ML-HQ-Advice; ML-HQ-Appellate and Supreme Court Litigation Brch; ML-HQ-Contempt, Compliance, and Special Lit Branch; ML-HQ-Solicitor"s Office; Murphy, James R.; Platt, Nancy; Qureshi, Farah Z.; Rappaport, Steve; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Walkowiak, Robert G; Watts, Elicia; Zick, Lara S.
Cc:	Walsh, Jack; Lewis, Nicholas H.
Subject:	D.C. Circuit decision in Michael Cetta, Inc. d/b/a Sparks Restaurant, Board Case 02-CA-142626 (reported at 366 NLRB No. 97)
Date:	Tuesday, May 28, 2019 5:37:56 PM
Attachments:	18-1165 Michael Cetta Per Curiam Judgment.pdf Michael Cetta v NLLRB_18_1165_Respondent brief fld.pdf.pdf

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In an unpublished judgment that issued Monday, May 20, 2019, the D.C. Circuit enforced the Board's order issued against this operator of a restaurant in New York, New York, for unfair labor practices committed after its waiters and bartenders voted in 2013 to be represented by United Food and Commercial Workers Local 342. In doing so, the court upheld the findings of the Board (Members Pearce, McFerran, and Emanuel) that the employer violated Section 8(a)(3) and (1) of the Act by refusing to reinstate striking employees after they unconditionally offered to return to work, and by discharging them, and summarily upheld the Board's additional findings.

In December 2014, after the parties had negotiated for 18 months to reach a first contract without success, 36 employees went on strike over the lack of progress in bargaining. In the coming days, the employer hired 34 employees to replace the strikers. Nine days into the strike, the employees made an unconditional offer to return to work. The employer refused to rehire them and banned them from the premises, claiming the strikers had engaged in picket-line violence and intimidation. After the employer could not provide the union with a single example of such misconduct, the employer then claimed its refusal to reinstate the strikers was justified because it had hired permanent replacements, and that it suffered a drop in business and no longer needed as much waitstaff. On review, the Board applied the settled principle that an employer must reinstate striking employees immediately once they unconditionally offer to return to work, unless the employer provides a legitimate and substantial business justification not to do so. The Board noted that it was undisputed that the strikers made an unconditional offer to return and that the employer had refused to rehire them. Regarding the employer's stated justifications, the Board determined that they were contrary to the record evidence. Among other findings, the Board concluded that the employer unlawfully discharged the employees for taking part in a strike.

The court held that the Board's discharge finding was amply supported by the employer's "repeated rejections of the employees' offer to return, its shifting explanations for those rejections, and its ban on the employees returning to the restaurant for any purpose." Further, the court noted that "the test is objective," and that "the Board's general counsel was under no obligation to call any employees to testify to their subjective belief that they

had been discharged." On the failure-to-reinstate finding, the court rejected the employer's justification that it had hired permanent employees and thus was relieved of the duty to reinstate. The court noted that, under settled law, the employer failed to show that it had a mutual understanding with the replacements that the nature of their employment relationship was permanent, and that the understanding was reached prior to the strikers' unconditional offer to return to work. Regarding the employer's stated justification that it no longer needed as much waitstaff due to a downturn in business, the court upheld the Board's determination that the downturn was merely seasonal after the December holiday rush, and did not explain the employer's refusal to reinstate the strikers. Accordingly, the court enforced the Board's order in full.

The court's judgment, and the Board's brief to the court, are attached.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1165 **September Term, 2018**

FILED ON: MAY 20, 2019

MICHAEL CETTA, INC., D/B/A SPARKS RESTAURANT,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1171

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: ROGERS, TATEL, and PILLARD, *Circuit Judges*.

JUDGMENT

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("NLRB" or "Board") and was briefed and argued by counsel. Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks") petitions for review of the Board's Decision and Order finding Sparks committed unfair labor practices in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons that follow, it is

ORDERED and **ADJUDGED** that the petition for review is denied, and the Board's cross-application for enforcement is granted.

In December 2014, Sparks and the union representing its waiters and bartenders had been unsuccessfully attempting to negotiate a contract for a year and a half. Following a brief, two-hour strike on December 5, a Sparks manager tried to convince an employee to leave the union. That effort failed, and no contract agreement resulted.

On December 10, thirty-six of Sparks's waiters and bartenders went on strike to protest the lack of progress in negotiations. After nine days, the strikers made a voluntary and unconditional offer to return to work. Sparks's management refused the offer, accusing the

strikers of having committed picket-line violence and intimidation. At a January negotiation session, Sparks's representatives again refused to allow the strikers to return to work, repeating their insinuation that the striking employees posed a threat. When union officials asked Sparks to identify a particular violent incident, the restaurant refused.

It later became clear that Sparks had hired workers to replace the strikers. And although several of those replacement employees left in early 2015, Sparks waited until August before it invited a single striking worker to return.

As relevant to this petition, the Board found that Sparks committed three unfair labor practices in violation of the National Labor Relations Act: (1) discharging striking workers; (2) failing to reinstate striking workers following a voluntary and unconditional offer to return to work; and (3) soliciting workers to withdraw their support from the union. Sparks's petition challenges the Board's findings with respect to discharge and failure to reinstate the strikers.

We begin with discharge. Sparks does not challenge the governing legal framework. For purposes of the Act, an employee is considered discharged "if the words or conduct of the employer would reasonably lead an employee to believe that he had been fired." *Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990). The test is an objective one: it "depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer." *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *as amended* (May 20, 1991) (emphasis omitted) (internal quotation marks omitted). Board precedent—uncontested by Sparks—supplements this rule by providing that "the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees" leading to "a climate of ambiguity and confusion" that would "reasonably cause[] strikers to believe . . . that their employment status was questionable because of their strike activity." *In re Kolkka*, 335 NLRB 844, 846 (2001) (internal quotation marks omitted).

Sparks challenges the Board's factual finding that the striking workers would reasonably have concluded that their employment status was ambiguous. But "we may not disturb the Board's findings of fact when those findings are supported by substantial evidence based upon the record taken as a whole." *Elastic Stop Nut*, 921 F.2d at 1279. "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks omitted).

Here, ample evidence supported the Board's discharge finding, including Sparks's repeated rejections of the employees' offer to return, its "shifting explanations" for those rejections, and its ban on the employees "returning to the restaurant for any purpose." *In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 14–16 (May 24, 2018). Contrary to Sparks's argument, the Board's general counsel was under no obligation to call any employees to testify to their subjective belief that they had been discharged; as Sparks concedes, the test is objective.

See Champ Corp., 933 F.2d at 692. Similarly, statements by union officials suggesting they believed the workers were "locked out" rather than discharged offer no basis to disturb the Board's finding. The test "depends on the reasonable inferences that the *employee* could draw," and characterizations by the union's officers are not dispositive of what the employees might have concluded. *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984). Nor did the Board unfairly punish Sparks for exercising the right to decline to disclose the existence of replacement workers. Assuming such a right exists, the Board is still entitled to consider how an employer exercises that right as evidence of a different unfair labor practice. *See New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006) (concluding that an employer's concealment of a replacement campaign might be evidence of "an independent unlawful purpose," such as "an illicit motive to break a union").

With respect to the failure-to-reinstate charge, Sparks again does not contest the controlling law. The National Labor Relations Act requires an employer to "reinstate strikers" following their voluntary and unconditional offer to return. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). An employer, however, may refuse reinstatement if "it can demonstrate that it acted to advance a legitimate and substantial business justification." *New England Health Care Employees Union*, 448 F.3d at 191 (internal quotation marks omitted). "The burden of proving justification is on the employer." *Fleetwood Trailer*, 389 U.S. at 378. Sparks offered two independent justifications to the Board.

First, Sparks claimed that it lawfully hired permanent replacements. *See Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995) ("That [the striker] was replaced by a permanent employee during the strike is [a legitimate and substantial business] justification . . . ."). Under unchallenged Board precedent, to succeed on that claim, Sparks had to prove "there was a mutual understanding between the [employer] and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373, 373 (1997), *enforced sub nom. Target Rock Corp. v. NLRB*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished per curiam decision). Crucially, Sparks had to demonstrate that the understanding was reached "before [the strikers] made unconditional offers to return to work." *Supervalu, Inc.*, 347 NLRB 404, 405 (2006).

Sparks argues that the general counsel conceded that Sparks timely hired replacements and therefore that the Board was not entitled to make a contrary finding. This argument misses the mark. Although the general counsel's attorney agreed that Sparks had hired replacements *at some point*, she never conceded *when* that happened. *See* Hearing Tr. 17, Joint Appendix 122 (general counsel's opening statement: "You will also learn that at the time the employees offered to return to work on December 19th, Sparks had not replaced all the strikers and that positions were available for the former striker[s] to return to work."). Thus, Sparks still had to present evidence establishing that it reached the necessary mutual understanding with the replacements before the December 19 offer to return to work.

The Board found that Sparks failed to meet that burden, and substantial evidence supports that finding. Although Sparks introduced offer letters for the replacements that it had issued on or before December 19, those letters did not indicate when the replacements signed them and the testimony of Sparks's human resources officer fell short of filling the gap. Sparks cites *Gibson Greetings* for the proposition that an employer's unilateral statements can establish the necessary mutual understanding. And so they may, depending on the context. 53 F.3d at 390–91. But this case is very different from *Gibson Greetings*, where the replacements had been working for several months and had received confirmation of their jobs' permanency more than a month before the strikers offered to return. *Id.* at 387–91. The rapidly evolving events and compressed timeline here make it more critical to establish exactly when the replacements reached a mutual understanding with Sparks.

Sparks now contends that certain tip records from the week of December 15–21 would have helped clarify this timing issue. But Sparks failed to introduce those records into evidence at the hearing. Based in part on that omission, the ALJ drew an adverse inference against Sparks, assuming that the records would not have supported its position. To be sure, the ALJ also thought (erroneously, as it turns out) that Sparks had failed to even produce those records during discovery. Even if that mistaken impression contributed to the ALJ's decision to draw the adverse inference, however, any error was harmless because admitting the tip records would not have affected the outcome. *See Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 582 (D.C. Cir. 2015) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule: [section] 706 of the Administrative Procedure Act instructs reviewing courts to take due account of the rule of prejudicial error." (alteration, citation, and internal quotation marks omitted)). At most, the missing records would have shown that some of the replacements started work before December 19. Such evidence would not have resolved the crucial evidentiary issue in this case: when the replacements understood their arrangement with Sparks to be permanent. *See In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 10 (records "would have established the precise dates that the newly hired employees *began working*," not when they understood their positions to be permanent (emphasis added)); *see also* Oral Arg. Rec. 13:18–14:54 (offering no explanation for how Sparks was prejudiced by the inference). Nor was the Board obligated to reopen the record for Sparks to introduce the tip sheets. Sparks's only excuse for failing to introduce them the first time around was the general counsel's supposed concession. Since that concession never happened, there was no reason to reopen the record.

Sparks argues that it had a second legitimate business reason for not reinstating its employees: a decline in business after December 2014. But the Board reasonably found based on five years' worth of sales records that Sparks's business suffered a downturn every year after the holiday rush. Despite this cyclical pattern, Sparks had never before reduced its staffing levels during off-peak periods. Thus, the Board found, the downturn in business failed to explain Sparks's failure to rehire the strikers. Sparks has given us no basis to upset that finding. *See Bally's Park Place*, 646 F.3d at 935 (Board accorded "a very high degree of deference" (internal quotation marks omitted)).

Finally, as Sparks chose not to challenge the unlawful solicitation finding in its petition for review, the Board is entitled to summary enforcement on that issue. *See CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (finding "summary enforcement is appropriate" when an issue is not raised in petitioner's "opening[] brief").

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Nos. 18-1165 & 18-1171

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT

Petitioner/Cross-Respondent

v.

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Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Michael Cetta, Inc., d/b/a Sparks Restaurant ("Sparks") is the Petitioner in case No. 18-1165, and the Cross-Respondent in case No. 18-1171. The Board is the Respondent in case No. 18-1165, and the Cross-Petitioner in case No. 18-1171. United Food and Commercial Workers Local 342 was the charging party before the Board.

B. Rulings under Review

The case under review is a Decision and Order issued by the Board against Sparks in Board Case Nos. 02-CA-142626 and 02-CA-144852, entitled *Michael*

Cetta, Inc., d/b/a Sparks Restaurant, and reported at 366 NLRB No. 97, 2018 WL 2387584 (May 24, 2018).

C. Related Cases

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

s/ David Habenstreit
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Dated at Washington, DC
this 11th day of March 2019

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GLOSSARY

A	Joint Appendix filed by Michael Cetta, Inc., d/b/a Sparks Restaurant
The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board	National Labor Relations Board
Br.	Opening brief of Michael Cetta, Inc., d/b/a Sparks Restaurant
The Complaint	Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued May 29, 2015.
The General Counsel	Counsel for the Board's General Counsel
SA	Supplemental Appendix filed by the Board
Sparks	Michael Cetta, Inc., d/b/a Sparks Restaurant
The Union	United Food and Commercial Workers Local 342

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1165 & 18-1171

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Michael Cetta, Inc., d/b/a Sparks Restaurant ("Sparks"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Board Decision and Order against Sparks, which is reported at 366 NLRB No. 97 (May 24, 2018). The Board's Decision and Order is final under Section 10(e) and (f) of the National

Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). Sparks's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, which allows the Board, in that circumstance, to cross-apply for enforcement. *Id.* § 160(f), (e).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's finding that Sparks violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate striking employees following their unconditional offer to return to work.
2. Whether substantial evidence supports the Board's finding that Sparks violated Section 8(a)(3) and (1) of the Act by discharging employees who engaged in a lawful economic strike.
3. Whether the Court should summarily enforce the Board's finding that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw their support from United Food and Commercial Workers Local 342.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

In July 2013, the Board certified United Food and Commercial Workers Local 342 ("the Union") as the exclusive collective-bargaining representative for Sparks's employees. But 18 months later, in December 2014, Sparks and the Union had yet to agree to a contract. Frustrated by what they perceived to be Sparks's foot dragging, most unit employees decided to go on strike. After about 10 days, the employees offered unconditionally to return to work, but Sparks refused to reinstate them and discharged them instead.

The Board found that Sparks violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by failing and refusing to reinstate employees engaged in an economic strike and by discharging them. The Board also found that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. The Board seeks enforcement of its Order in full.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. Background

Sparks operates a restaurant in New York, NY. (A4; SA46.)[1] Sparks's management consists of Michael and Steven Cetta, respectively president and vice president, office manager Shailesh Desai, and 5 managers referred to as Maître d's. (A4; SA1, 44-47.) Sparks also retains a human-resources consultant, Susan Edelstein. (A4; SA51.)

In July 2013, the Union was certified as the exclusive collective-bargaining representative of a unit consisting of Sparks's waiters and bartenders. (A4; A137-38.) Around that time, waiters Valjon Hajdini and Kristofer Fuller became shop stewards and members of the Union's bargaining committee. (A4; SA33.) The parties held several negotiating sessions over the next 18 months but were unable to reach a collective-bargaining agreement. (A4; A138.)

B. The December 5 Strike; Sparks Asks an Employee if the Union Could Be Voted Out

On December 5, 2014, unit employees went on strike in frustration over the lack of progress with bargaining. (A4; SA14.) After about 2 hours, the employees returned to work unconditionally. (A4; SA14.) The next day, Maître d' Valter

[1] Record abbreviations in this brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Kapovic told Hajdini that he was interested in buying the restaurant but was worried that additional strikes would "drag the business down" and cause outside investors to "back off." (A4; SA1, 6-7.) Hajdini replied that unit employees simply wanted a contract and that management could avert future strikes by making them an acceptable offer. Kapovic then asked, "If we buy the restaurant, . . . can we vote the Union out," to which Hajdini replied, "I don't see why the Union bothers you. All we want is a simple contract—that we get treated fairly." (A4; SA7.)

C. The December 10 Strike and its Aftermath

On December 10, 2014, upset at Sparks's refusal to bargain further before the holidays, 36 unit employees went on strike. (A4 & n.2; A37 at ¶ 6, SA2-3, 25-26.) In the ensuing days, Sparks hired 34 employees to replace the strikers.[2] (A4-5.)

On the afternoon of December 19, the Union and the striking employees decided to make an unconditional offer to return to work. (A5; SA3, 27-28.) Bartender Elvi Hoxhaj went to the restaurant with two union representatives, but they were stopped in the vestibule by Sparks's security guard. They informed the guard that they had come to speak with management about unconditionally

[2] Additional facts regarding the hiring of replacement employees are set forth in the argument portion of this brief, under section I.B.2.

returning to work, and he told them to wait while he relayed their message. After speaking to Kapovic, who was standing nearby, the guard returned and said, "[T]hey don't want you guys in here." They repeated that they were "just trying to get an unconditional offer to return to work," to which the guard responded, "I know, but they don't want you in here." (A5; SA28-30.) Later that afternoon, union representatives gathered employees and told them that Sparks had rejected their offer. (A5; SA3.)

That evening, the Union's Secretary Treasurer, Lisa O'Leary, e-mailed Sparks's attorney, Mark Zimmerman, stating that the offer remained valid despite Sparks's rejection. O'Leary also conveyed the Union's position that, unless and until Sparks accepted that offer, the employees were being locked out. (A5; A233.) On December 22, Zimmerman e-mailed Sparks's response to O'Leary, which included the following paragraph:

> Due to serious misconduct and unprotected activity by the union, its representatives and the striking employees during the two separate strikes at Sparks between December 5 and December 19, including without limitation, violence, threats and intimidation towards patrons and employees, destruction of property and trespass, be advised that Sparks must reject the union's offer to return the striking employees to work at this time. After much consideration, Sparks has determined this option best protects the safety and security of its patrons, employees and delivery people from the conduct described above, and reserves all legal rights in connection with the union's and Sparks' employees' conduct.

(A5; A231.) Later that day, O'Leary e-mailed a response expressing the Union's disagreement with Zimmerman's characterization of events and repeating its position that unit employees were being locked out. (A6; A231.)

In January 2015, two employees were notified that their health-insurance coverage had been terminated. (A15 n.23; SA10, 39.) One of them, Milazim Kukaj, received a letter from Discovery Benefits, Sparks's insurance provider, stating that his coverage ended because he experienced a qualifying event of "Termination." (A15 n.23; A219, SA39.) A month later, Discovery sent a second letter, which referred to the qualifying event as a "Reduction in Hours - Status Change." Kukaj testified that he never received the second letter. (A15 n.23; A421, SA40-41.)

On January 8, 2015, Sparks and the Union reconvened for further negotiations. (A6; A138.) At that session, Louis LoIacono, the Union's director of contracts, asked Zimmerman if he was going to respond to the unconditional offer and return employees to their jobs. Zimmerman replied that he could not do so because he was "protecting his client's property," and suggested that LoIacono "put it in writing." (A6; SA4, 15, 33-34.) LoIacono asked if Zimmerman had any evidence of damage caused to the restaurant by striking employees, and Zimmerman told him to submit a written information request. (A6; SA4, 34.) Afterwards, together with stewards Fuller and Hajdini, LoIacono told employees

that Sparks blamed them for damaging its property and would not let them return to work. (A6; SA5-6, 15-16, 34-35.)

The next day, January 9, the Union e-mailed Zimmerman a request for information on various topics, including the following:

> 7. Copy of any evidence and/or videos that the employer has pertaining as evidence to support the employer's representative's response to the Union's unconditional return to work. We were told in writing by the employer representative that the employees could not return to work due to the fact that the representative was protecting his client's property due to incidents that took place at Sparks which had nothing to do with the employees or the strike or the lockout.

(A6, 13; A206.) In an e-mailed response on February 5, Zimmerman objected that "[the request] facially seeks irrelevant information 'which had nothing to do with the employees or the strike or the lockout.'" (A6, 13; A203.) Sparks never provided any responsive information to that request. (A6, 13; SA42-43.) The parties met again on January 20 and February 25, but Sparks never mentioned having prepared a preferential rehire list or that it intended to return unit employees to work at any time. (A6; SA36-37.)

In May 2015, during a meeting to discuss the Union's charges, Sparks asserted for the first time that the striking employees had been permanently replaced. (A146.) On August 25, 2015, Sparks copied LoIacono on a letter offering full reinstatement to a former striker due to "the departure of a permanent replacement employee." (A6; A209, SA37.) That same day, LoIacono requested a

copy of the preferential rehire list and a list of replacement employees, which were eventually provided on September 11. (A6; A210-15.)

D. Procedural History

On unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint ("the Complaint") alleging that Sparks committed three violations of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). (A3-4; A27-32, 35-40.) Specifically, the Complaint alleged that Sparks: (1) failed and refused to reinstate the striking employees despite their unconditional offer to return to work; (2) denied employees their right to be placed on a preferential rehire list after they made their unconditional offer; and (3) discharged the employees for participating in a strike. The Complaint further alleged that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. (A36-38.)

On November 18, 2016, following a 6-day hearing, Administrative Law Judge Lauren Esposito issued a decision and recommended order finding that Sparks violated the Act as alleged. (A3-20.) The case was transferred to the Board, whereupon the General Counsel and Sparks filed exceptions to the judge's decision. Sparks also filed a motion to reopen the record, arguing that the judge

erred in finding that it failed to produce certain subpoenaed documents and drawing an adverse inference on that basis.[3]

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 24, 2018, the Board (Members Pearce, McFerran, and Emanuel) issued a Decision and Order affirming the judge's findings that Sparks violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate the striking employees and also by discharging them. The Board declined to pass on whether Sparks denied employees their right to be placed on a preferential rehire list, as such a finding would not materially affect the remedy.[4] The Board also affirmed the judge's finding that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. (A1 & n.3.) Finally, the Board denied Sparks's motion to reopen the record because the evidence Sparks sought to introduce was neither newly discovered nor previously unavailable. (A1 n.3.)

The Board's Order requires Sparks to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A1-2.) Affirmatively, the Board's Order requires

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[3] Additional facts regarding Sparks's motion to reopen the record are set forth in the argument portion of this brief, under section I.B.3.c.

[4] Accordingly, Sparks's argument on that issue is moot. (Br. 52-53.)

Sparks to offer the discharged employees full reinstatement, make them whole for any loss of earnings or benefits suffered as a result of their discharge, remove from its files any reference to the discharges and notify employees when this is done. The Order also requires Sparks to post paper copies of a remedial notice and to distribute that notice electronically to its employees, if Sparks customarily communicates with them by such means. (A2-3.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that Sparks violated the Act by failing to reinstate the striking employees after they offered to return unconditionally. Under Board law, an employer must reinstate striking employees immediately once they unconditionally offer to return to work, unless the employer provides a legitimate and substantial business justification not to do so. It is undisputed that the employees were not reinstated, so the issue turns on Sparks's two asserted justifications.

First, Sparks claims it hired permanent replacements before the strikers offered to return. The Board reasonably rejected that defense because Sparks failed to show that the replacements accepted its offers of employment before the strikers made their unconditional offer. The Court should deny Sparks's due-process and estoppel claims because the record shows the General Counsel never conceded that the replacements were permanently hired. Sparks's challenge to the

Board's adverse inference fails as well because Sparks cannot dispute that it failed to introduce documents that tended to substantiate when the replacements started work. Lastly, the Board was within its discretion to deny Sparks's motion to reopen the record because the materials in question were neither newly discovered nor previously unavailable.

Sparks's second asserted justification is that it suffered a drop in business that made it unnecessary to hire as much waitstaff as it had before the strike. However, Sparks does not dispute that the restaurant was still at the height of its busy holiday season when the strike ended and the employees offered to return. Moreover, even afterwards, Sparks's own business records show that the decline in business that occurred in January 2015 was the second smallest post-holiday drop of the previous 5 years, and that Sparks never previously laid off waitstaff after the holidays, or even during the summer, when business is the slowest. Thus, Sparks failed to show that its failure to reinstate the striking employees was due to a loss of business.

2. Even if Sparks could show that it permanently replaced the striking employees, substantial evidence supports the Board's independent finding that Sparks unlawfully discharged the employees for taking part in a strike. To determine whether Sparks discharged the striking employees, the Board analyzes the entire course of events from the employees' point of view, in particular

whether Sparks's statements or conduct would lead them reasonably to believe their employment had been terminated. The record reflects that Sparks denied employees access to its premises when they unconditionally offered to return to work. Two days later, Sparks's counsel, Zimmerman, rejected their offer again, accused them of various misconduct including violence, destruction of property, and trespass, and hinted at possible legal action against them. Nearly three weeks later, Zimmerman again rejected the employees' offer, still citing the need to protect Sparks's property. During this entire period, Sparks never expressed an intent to return the employees to work. Finally, Sparks waited until May 2015 to reveal that it had hired replacements on a permanent basis. On these facts, the Board reasonably concluded that Sparks's actions created an ambiguity that would lead reasonable employees to believe they were discharged.

Sparks's counter arguments do not pass muster. The Union's subjective belief that employees were locked out is irrelevant because the analysis is from the perspective of reasonable employees. Moreover, although Sparks had no obligation to disclose that it intended to hire permanent replacements, the Board reasonably found that concealing that fact over several months contributed to employees' uncertainty about their employment and belief that they had been discharged. Finally, Sparks failed to substantiate its claim that it concealed the fact that it had hired replacements out of fear of picket-line violence, and even if it

could, that still would not explain why Sparks continued to do so until May 2015, when the strike had ended in December.

3. Sparks's opening brief does not challenge the Board's finding that it violated the Act when Maître d' Kapovic asked waiter Hajdini if the employees could vote the Union out. Therefore, the Board is entitled to summary enforcement of that portion of its Order.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SPARKS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO REINSTATE EMPLOYEES DESPITE THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Standard of Review for Board Decisions

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court must treat the Board's factual findings as conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Wayneview*, 664 F.3d at 348. Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, "the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also Universal Camera*, 340 U.S. at 488 (reviewing court may not "displace

the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."). Finally, the Court must uphold the Board's application of the governing law to the facts of the case unless it is arbitrary or otherwise erroneous. *Oberthur Techs. of Am. Corp. v. NLRB*, 865 F.3d 719, 723-24 (D.C. Cir. 2017).

B. Striking Employees Who Offer to Return to Work Unconditionally Are Entitled to Immediate Reinstatement Unless their Employer Asserts a Legitimate Business Justification for its Refusal

The National Labor Relations Act guarantees employees the right to engage in a strike.[5] Among its safeguards, the Act provides that strikers do not forfeit their status as employees, or the protections that go with it.[6] *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Moreover, longstanding Board law dictates that economic strikers who offer to return to work without condition are entitled to immediate reinstatement, as failure to do so would discourage them

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[5] *See, e.g.*, 29 U.S.C. § 163 ("Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.").

[6] The Act defines the term "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." 29 U.S.C. § 152(3).

from exercising their statutory rights.[7] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263-64 (D.C. Cir. 1997).

An employer who fails or refuses to reinstate striking employees violates Section 8(a)(3) and (1) of the Act, unless it demonstrates a legitimate and substantial business justification for its refusal.[8] *Fleetwood*, 389 U.S. at 378. Absent such a justification, the strikers are entitled to immediate reinstatement; however, if the employer can prove that such a justification existed, they are entitled only to be reinstated into vacancies created by the replacements' departure. *Detroit Newspaper Agency*, 340 NLRB 1019, 1019 (2003); *Laidlaw Corp.*, 171 NLRB 1366, 1368-70 (1968).

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[7] Sparks does not dispute the economic nature of this strike. *See Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1136-37 (D.C. Cir. 2015) (discussing difference between economic and unfair-labor-practice strikes).

[8] Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, which includes the right to strike. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963); *see also* note 5, *supra*. Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1). Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization," 29 U.S.C. § 158(a)(3), which includes participating in concerted action like a strike, *Erie Resistor*, 373 U.S. at 233.

Sparks contends it had two legitimate and substantial business justifications for not reinstating the striking employees. First, Sparks claims it hired permanent replacements before the strikers unconditionally offered to return to work. Second, Sparks asserts that a decline in business prevented their reinstatement. As shown below, the Board reasonably rejected both purported justifications.

1. To permanently replace striking employees, the employer and the replacements must reach a mutual understanding about the permanent nature of their employment before the strikers unconditionally offer to return to work

An employer who fails to reinstate striking employees may assert, as a legitimate business justification, that it hired other employees to permanently replace the strikers as a means of continuing business operations. *Jones Plastic & Eng'g Co.*, 351 NLRB 61, 64 (2007) (citing *Mackay Radio*, 304 U.S. at 345-46). This being an affirmative defense, it is the employer's burden to show that the strikers were permanently replaced. *Jones Plastic*, 351 NLRB at 64; *accord Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 21 (D.C. Cir. 1982).

A critical aspect of the employer's burden is to show that the replacements were hired on a permanent basis before the strikers unconditionally offered to return to work. *Detroit Newspaper Agency*, 340 NLRB at 1019; *accord Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 361 (D.C. Cir. 2016). Mere evidence of the employer's *intent* to permanently employ the replacements is not enough. *Consol. Delivery & Logistics, Inc.*, 337 NLRB 524, 526 (2002), *enforced*,

63 F. App'x 520 (D.C. Cir. 2003) (per curiam). Rather, the employer must prove that it had "a mutual understanding [with] the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373, 373 (1997) (citation omitted), *enforced*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished table decision). For such a mutual understanding to occur, the replacements must accept the employer's offers of permanent employment before the strikers unconditionally offer to return to work. *Supervalu, Inc.*, 347 NLRB 404, 405 (2006); *Solar Turbines Inc.*, 302 NLRB 14, 14 (1991) ("[D]etermination of the replacement date turns on when a commitment to hire an employee for a permanent job was made and accepted." (footnote omitted)).

2. Sparks failed to show that the replacement employees accepted its offers of permanent employment before the strikers unconditionally offered to return to work

To prove its affirmative defense, Sparks had to show that the replacements were permanently hired before the strikers unconditionally offered to return to work on December 19, 2014. As explained below, the Board reasonably found that Sparks's failed to carry its burden because it did not show that the replacements accepted permanent offers of employment before the strikers made their unconditional offer. (A9-10.)

Prior to the strike, Sparks's waitstaff consisted of 46 individuals. (A8 & n.9; A238-65.) A total of 36 unit employees participated in the December 10-19 strike.

(A4 & n.2; A37 at ¶ 6, SA2, 25-26.) In the ensuing days, Sparks hired 34 replacements: 5 employees who had been hired for "seasonal" employment before the strike;[9] 6 kitchen employees who were hired as waiters;[10] and 23 entirely new employees.[11] (A8-9 & n.10; A437-70.)

To show that it hired permanent replacements before the strikers' December 19 unconditional offer to return, Sparks produced 34 letters, with typewritten dates ranging from December 11 to 19, 2014, offering permanent employment to the recipients. (A437-70.) Each letter is signed by Office Manager Desai and, with one exception (A438), by the employee to whom it is addressed. However, the employees' signatures are undated, making it impossible to know if they signed the letters before the strikers made their unconditional offer.[12] Adding to the confused state of Sparks's evidence of timing, the dates on several letters do not match the hiring dates of those replacements on the list Sparks provided to the Union.[13] (A10.) Finally, Sparks did not produce any replacement employee to testify about

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[9] (A433-36, 450-51, 454-55, 459.)

[10] (A449, 452-53, 456-58, SA48-50.)

[11] (A437-48, 460-70.)

[12] Sparks also provided 4 examples of offer letters signed by seasonal employees who were later offered permanent employment. (A433-36.) Three of those seasonal offer letters have handwritten dates next to the employee's signature; by contrast, the signatures on those same employees' permanent offer letters are undated. (*Compare* A433-34, 436, *with* A450, 454, 459.)

[13] (*Compare* A438-39, 441-43, 447-48, 460, 463, 465-69, *with* A217-18.)

the timing of their signatures or the hiring process in general. *See Consol. Delivery*, 337 NLRB at 526 (employer failed to prove mutual understanding where no replacement employee testified about hiring). Thus, the Board reasonably concluded that Sparks's offer letters did not establish whether or when it reached a mutual understanding with the replacements that they were being offered, and had accepted, permanent employment at the restaurant.

Sparks also provided testimonial evidence about the hiring process, which was either vague or inconclusive. Edelstein, the human-resources consultant, testified that she was responsible for finding, interviewing, and hiring suitable replacements, but she could not recall when any of them were hired. (A9; A180-81.) Edelstein testified that she prepared the offer letters with Desai and that she personally handed them to each applicant. (A9; A182-85, SA70-71.) However, she did not see a single replacement sign his or her letter, and she did not know the date any of the letters were signed or when they were returned to Sparks. (A9-10; A184-85, SA70-71.) Considering the vagueness of Edelstein's testimony, the Board reasonably declined to accept her surprisingly specific—but less-than-confident—blanket assertion that all letters were returned within 2 days of being

handed out, and on December 19 at the latest.[14] (A10; A186.) Vice-President Cetta's testimony that the 6 kitchen employees were hired as waiters "at some point after December 10, 2014" was equally unilluminating (A10 n.14; SA49-50), and Desai was not asked about offer letters, interviews, or the hiring process in general (A9 n.13). *See Consol. Delivery*, 337 NLRB at 526 (employer offered no testimony about hiring discussions with replacement employees).

Turning to Sparks's payroll records, the Board noted that they did not show with any specificity when the replacements started work, and thus did not clarify if they were permanently hired before the strikers unconditionally offered to return. (A10; SA52-53.) Finally, the Board drew an adverse inference from Sparks's failure to produce records showing who worked between December 15 and 19, because those documents could have at least helped determine when the replacements started work (albeit not when they were permanently hired). (A10-11.)

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[14] *Cf. SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012) (Court will uphold judge's credibility determinations adopted by the Board unless they are "hopelessly incredible, self-contradictory, or patently unsupportable").

Contrary to Sparks's claim (Br. 49-50), the Board did not find that all but 6 offer letters were returned prior to December 19, or even that they were likely returned before that date. Rather, the Board simply noted the contradictory and self-serving nature of Edelstein's testimony that all letters were returned within a day or two of being distributed, and then, barely a few sentences later, that letters distributed on the 19th were returned that same day. (A10.)

Having surveyed the record as a whole, the Board reasonably concluded that Sparks failed to show the replacements were hired on a permanent basis before the strikers unconditionally offered to return to work. (A10.) While Sparks disputes that conclusion, it does not challenge any of the Board's findings about the shortcomings of its evidence. For instance, Sparks insists that Edelstein's testimony was uncontroverted (Br. 49), but does not otherwise contest that she provided no concrete information about when the offer letters were signed or returned to Sparks, or even about her conversations with the replacements, even though she claimed to have interviewed every single one of them. Nor does Sparks dispute the Board's finding that its offer letters do not establish with certainty when any single replacement accepted its offer of employment. Not only are those challenges waived, but Sparks achieves nothing by doubling down on that same, deficient evidence to prove its point. (Br. 48-50.)

Sparks also accuses the Board of basing its mutual-understanding determination "solely" on when the signed offer letters were returned and argues that there are other means to establish mutual understanding of permanent employment. (Br. 50.) While Sparks is correct as to the latter point, in all the cases on which it relies, there was specific evidence that showed a mutual understanding between the employer and its replacements. For example, in *Gibson Greetings, Inc.*, an employer hired replacement employees during a strike without

promising them that their employment would be permanent. 310 NLRB 1286, 1291 n.23 (1993). Nearly two months later, but before the strikers unconditionally offered to return, the employer circulated a memorandum stating: "Every additional replacement hired means one less job for the strikers at the conclusion of the strike." *Id.* at 1290 n.19. On review, this Court held that although the memorandum was circulated months after the replacements started work, it showed the existence of a mutual understanding that the replacements were permanently hired before the strikers made their offer to return. *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 390 (D.C. Cir. 1995). In this case, however, Sparks never established conclusively that it reached a mutual understanding with the replacements before the strikers made their unconditional offer. This is because the evidence Sparks produced—Edelstein's testimony and the offer letters—did not show when the replacements accepted its offers of permanent employment.[15] Despite those flaws, however, Sparks still chose to rely on that evidence, and

[15] The other cases cited by Sparks are equally inapposite. *See Supervalu*, 347 NLRB at 416 (employer produced evidence that replacements signed offers of permanent employment before strikers' return-to-work offer); *H&F Binch Co.*, 188 NLRB 720, 723 (1971) (employer produced evidence that replacements orally accepted offers of permanent employment).

therefore it cannot blame the Board after the fact for its failure to build a record that carried its evidentiary burden.[16]

In sum, the record is devoid of evidence or testimony showing that before the strikers unconditionally offered to return to work, a mutual understanding existed that the replacements had been offered, and had accepted, permanent employment with Sparks.[17] Accordingly, the Board reasonably concluded, and substantial evidence supports, that Sparks failed to establish the hiring of permanent replacements as a legitimate a substantial business justification for its failure to reinstate the striking employees.

3. Sparks's procedural challenges are unavailing

Sparks contends the General Counsel was estopped from arguing that its replacements were not permanently hired before the employees' unconditional offer and that the Board violated its due-process rights by deciding the issue.

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[16] Sparks's baseless claim that it was somehow duped by the General Counsel into failing to introduce evidence of when the replacements started work is addressed in section I.B.3.a, below.

[17] Sparks wrongly claims that the unconditional offer was invalid because it was communicated to a security guard. (Br. 46 n.10.) The undisputed evidence shows that bartender Hoxhaj and two union representatives told the guard—whose agency was hired by Sparks—that they wanted to talk to management and the owners about an unconditional offer to return to work. They saw the guard talk to Maître d' Kapovic, an admitted supervisor and agent (SA1), who was standing a few feet away. The guard reported back "they don't want you in here." (A5; A164, SA28-30). Accordingly, the offer was properly conveyed to Sparks via its agents.

(Br. 34-44.) Sparks also claims the Board violated its due-process rights by drawing an adverse inference from its failure to enter into evidence the daily and weekly tip records for December 15 to 19, 2014, and that the Board erred in denying its motion to reopen the record. (Br. 44-48.) Each of these arguments fails.

a. Sparks's estoppel and due-process claims lack merit

According to Sparks, the General Counsel conceded several times before and during the hearing that replacement employees had been permanently hired, and only raised the issue for the first time in its post-hearing brief. Sparks contends that the General Counsel was estopped from arguing that Sparks failed to show it had reached a mutual understanding with the replacements regarding the permanence of their employment before the strikers made their unconditional offer. Sparks also claims that the judge erred in ruling on that point, and that the Board denied Sparks's due-process rights by affirming the judge's decision. (Br. 33-44.)

Sparks's estoppel claim requires proving that the General Counsel made a "definite representation" that the permanent status of Sparks's replacements was not in dispute, that Sparks reasonably "relied [on that representation] in such a manner as to change its position for the worse," and that the General Counsel "engaged in affirmative misconduct" by pursuing a legal theory it had previously abandoned. *Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 225 (D.C. Cir. 2017). As

to its procedural due-process claim, Sparks must show prejudice resulting from the assertedly erroneous ruling of the Board. *See Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 87 (D.C. Cir. 2018); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996). As shown below, both claims fail because the General Counsel never conceded that Sparks had hired permanent replacements before the employees made their unconditional offer, and in any event, Sparks was well aware of its burden of proof and fully litigated the issue.

Again, to prevail in its permanent-replacement defense, Sparks had to prove that it had reached a mutual understanding with the replacements about the permanence of their employment before the strikers offered to return. *Care One*, 832 F.3d at 361; *Detroit Newspaper Agency*, 340 NLRB at 1019. In other words, it was not enough to prove that the replacements were *hired*, a fact the General Counsel did not dispute. Rather, Sparks also had to show that, before the strikers made their offer, a shared understanding existed that the replacements had been offered, and had accepted, permanent employment with Sparks. *Consol. Delivery*, 337 NLRB at 526. It was that latter issue, which was in dispute. Indeed, the record reflects that Sparks was keenly aware a key element of its burden was to establish the permanence of its replacements. However, it is undisputed that Sparks never sought or secured a stipulation that the General Counsel conceded that issue. As a result, Sparks is left to argue that the Court should infer such a

concession from cherry-picked bits of testimony and some dubious parsing of the Complaint and the General Counsel's opposition to Sparks's petition to revoke a subpoena.

In and of itself, the length to which Sparks goes to prove its point should alert the Court to the weakness of its argument. For further evidence, the Court need only turn to the colloquy referred to at pages 37-38 of Sparks's brief. (A160-63.) As the transcript makes clear, the issue under discussion is not the replacements' permanent status or when a mutual understanding of that status was reached, but whether the General Counsel alleged that Sparks had an unlawful motive for hiring them. In addition, Sparks omits the most damning part of the discussion:

> [GC]: But that doesn't have to do with the hiring of Permanent Replacements. We're not disputing the hiring.
> [Sparks]: Okay, you're right.
> [GC]: Again, it's not my burden to put on permanency of replacements, which you said it was. It's not. So, I --
> [Sparks]: No, I understand.

(A163.) Sparks's response establishes that it was fully aware of its burden to prove the permanent status of its replacements.

Sparks also omits that the General Counsel elsewhere referred to the "alleged" permanent replacements and argued that Sparks unlawfully discharged the strikers "even assuming" they were permanently replaced. (A121-22.) Those

statements are further indication that the issue of the mutual understanding of the replacements' permanent status was in dispute. It also bears emphasizing that it was Sparks, not the General Counsel, who introduced the replacements' offer letters into evidence. Sparks was also the first to question Edelstein about the process of hiring replacements, including how they were recruited, when they were given offer letters and by whom, whether she witnessed the letters being signed, and when the letters were returned.[18] (A180-84.) That is not the conduct of a party who believes it has been released from its burden to show that it reached a mutual understanding with the replacements about the permanent nature of their employment before the strikers made their unconditional offer.

Sparks's reliance on the language of the Complaint (Br. 34) does not further its argument. The relevant Complaint allegation is that Sparks violated the Act by failing and refusing to reinstate the striking employees. (A38 at ¶ 7(b).) Where, here, it is undisputed that the strikers were not reinstated after they unconditionally offered to return, that allegation turned on whether Sparks had a legitimate and substantial business justification for refusing to reinstate them. And to prove that it did, Sparks had to show that it timely hired new employees to permanently replace

[18] The General Counsel was the first to call Edelstein as a witness, but only questioned her about Sparks's payroll records.

the strikers. Therefore, there was no basis for Sparks to believe that the replacements' permanence was not at issue, quite to the contrary.

Unsurprisingly, Sparks ignores that aspect of the Complaint. Instead, Sparks argues that an entirely separate and independent allegation that it denied striking employees their right to be placed on a preferential rehire list (A38 at ¶ 7(c)), is an "implicit" concession that the replacements were permanently hired. (Br. 34.) The assumption underlying that argument flies in the face of the well-established rule of litigation that "a party may state as many claims or defenses as it has, regardless of consistency." Fed. R. Civ. P. 8(d)(3). Whatever the General Counsel's rationale for including both allegations in the Complaint, the fact that one assumes the strikers were permanently replaced cannot be construed to relieve Sparks of its defensive burden under the other.

Sparks also misrepresents (Br. 34-35) the contents of the Amendment to the Complaint, which sought additional remedies of reinstatement and make-whole relief for the "discharged strikers . . . despite the fact that [Sparks] had hired permanent replacement workers before the date of discharge." (A47.) First, the Amendment plainly applies to the Remedy section of the Complaint, and thus it cannot alter the Complaint's substantive allegations. Second, the Amendment relates to the unlawful-discharge allegation (A38 at ¶ 7(d)), for which the status of replacement employees is not a factor. *See Kolkka Tables & Fin.-Am. Saunas*, 335

NLRB 844, 846 (2001) (unlawful discharge turns only on showing if employer's conduct would lead reasonably prudent employee to believe s/he was discharged); *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990) (same). The Amendment merely states the obvious, which is that unlawfully discharged employees are entitled to full relief even if their employer has hired permanent replacements.

Finally, Sparks's argument about the General Counsel's opposition to its petition to revoke a subpoena (Br. 35-36) is simply absurd. Sparks claims that because the General Counsel refers to its failure to "reinstate strikers to open positions" (A67), and to the fact that under Board law, striking employees who have been permanently replaced are "entitled to full replacement upon departure of the replacements" (A68), the General Counsel effectively conceded that Sparks's replacements were permanently hired. But when the subpoena issued it was still unknown whether Sparks would succeed in proving that the replacements were permanently hired. Therefore, a mere reference to that outcome does not somehow relieve Sparks of its evidentiary burden. Moreover, the Complaint also alleged that, regardless of the replacements' status, Sparks violated the Act by failing to keep a preferential rehire list and reinstate strikers as openings arose. (A38 at ¶ 7(c).) The Board did not pass on that allegation as it would not materially affect the remedy (A1 n.3, 13-14); nevertheless, it was still in play when the subpoena

issued. Therefore, Sparks's premise regarding the import of "open positions" is wrong. The reference to open positions does not concede the replacements' *permanence* as a defense to Sparks's failure to reinstate the strikers when they offered to return (as opposed to when later vacancies arose per the rehire-list allegation). In these circumstances, it defies common sense to argue, as Sparks does, that one would reasonably construe the General Counsel's opposition as conceding that the replacements were permanently hired and that the strikers were not entitled to immediate reinstatement after they offered to return.

In conclusion, the record reflects that the General Counsel never conceded the issue whether Sparks's replacements were hired with a mutual understanding about the permanence of their employment before the striking employees made their unconditional offer. Therefore, Sparks's estoppel claim must fail because it cannot show that the General Counsel made a definite representation on which it reasonably relied. (Br. 40-42.) Sparks likewise fails to show that the Board violated its due-process rights by finding that its replacements were not permanently hired. Indeed, the record shows that Sparks was not only aware of its burden to establish that it timely hired permanent replacements, but that it litigated that issue by providing testimony from its managers, payroll records, and offer letters for every single replacement. Therefore, Sparks fails to show any prejudice resulting from the Board's ruling on that issue. *See Tasty Baking Co. v. NLRB*, 254

F.3d 114, 122 (D.C. Cir. 2001) ("due process is satisfied when a complaint gives a respondent fair notice . . . and when the conduct implicated in the alleged violation has been fully and fairly litigated" (internal quotation marks and citation omitted)). Accordingly, the Court should reject Sparks's estoppel and due-process claims in full.

b. The Board reasonably drew an adverse inference from Sparks's failure to introduce daily and weekly tip records for December 15 to 19, 2014

The Court reviews the Board's drawing of an adverse inference for abuse of discretion. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972). Sparks challenges the Board's decision to draw an adverse inference from its failure to introduce daily and weekly tip records for the period from December 15 to 19, 2014.[19] (A10.) As shown below, the Board did not abuse its discretion and, even if it did, the error was harmless.

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*, 459 F.2d at 1336.

[19] The daily tip sheet is used to record which employees worked on any given day and their share of the tip pool. (A7; A471.) At the end of each week, the information from the daily tip sheets is compiled into a spreadsheet called the weekly tip record. (A7; A238.)

Here, the Board based its ruling on the fact that, although Sparks had the burden to prove that replacement employees were permanently hired before the strikers made their unconditional offer, it failed to introduce daily and weekly tip records that would "tend to substantiate" when they started work. (A11.) Sparks does not dispute that finding, or that it failed to enter those documents into the record. Therefore, the Board was well within is discretion to draw that adverse inference.

Sparks marshals several arguments against the Board's decision, none of which has merit. First, Sparks submits that adverse inferences are only appropriate when the party who controls the evidence believes it would harm its case. (Br. 45 n.9.) However, the rule does not consider a party's belief of whether the evidence is incriminating or exculpatory; rather, it is that party's failure to produce *relevant* evidence, which gives rise to an inference that the evidence is unfavorable to it. *Int'l Union*, 459 F.2d at 1336. Second, Sparks claims the Board erroneously concluded that it failed to produce the records in defiance of a subpoena. (Br. 16.) However, the Board clearly stated that the fact that a subpoena was served on Sparks was not necessary to establish the adverse inference, but merely strengthened it. (A10-11.) Finally, Sparks argues the adverse inference was unwarranted because the General Counsel had the documents at the hearing. (Br. 45.) Even if that is true, it still remained Sparks's burden to establish its

affirmative defense by placing them into the record. *Jones Plastic*, 351 NLRB at 64.

Finally, Sparks fails to show prejudice resulting from the Board's adverse inference. As an initial matter, and contrary to Sparks's claim (Br. 45 n.9), the Board drew only one adverse inference from its failure to produce the daily and weekly tip records.[20] And although the Board stated that those documents would "tend to substantiate" Sparks's argument (A11), it stopped far short of Sparks's assertion that they were "likely determinative" of whether the replacements were permanently hired before the offer to return. (Br. 46.) Indeed, even if the replacements started work on or before December 19, that would not per se establish that, prior to the strikers' unconditional offer to return to work, Sparks and the replacements had reached a mutual understanding about the permanent nature of their employment. *See Gibson Greetings*, 53 F.3d at 385 (finding that permanence of employment was not established until months after replacements started work).

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[20] The Board drew three adverse inferences: one based on Sparks's failure to introduce daily or weekly tip records, and two because it failed to call Manager Ricardo Cordero to testify about its practice of hiring of seasonal employees, and about the hiring of waiter Jonathan Sturms nearly 2 months after the strikers made their unconditional return-to-work offer. (A11-12.) To the extent Sparks would attempt to challenge the two latter adverse inferences in its reply brief, those arguments are now waived.

c. The Board was within its discretion to deny Sparks's motion to reopen the record, but even if the Court holds otherwise, the Board's error was harmless

Section 102.48(c) of the Board's rules and regulations allows a motion to reopen the record only in "extraordinary circumstances." 29 C.F.R. § 102.48(c). In relevant part, the rule provides that "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." *Id.* § 102.48(c)(1). The Board's denial of a motion to reopen the record is reviewed for abuse of discretion. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). The Court will not overturn the Board's ruling "unless it clearly appears that the new evidence would compel or persuade to a contrary result." *Id.* (internal quotation marks, brackets, and citation omitted).

After the judge issued her decision, Sparks moved for the Board to reopen the record to admit daily and weekly tip records for the period from December 15 to 21, 2014. The Board denied that motion on grounds that those materials were neither newly discovered nor previously unavailable. (A1 n.3.) Sparks does not contest either finding, nor could it, given that it insists it provided the documents to the General Counsel ahead of the hearing. (Br. 45-46.)

Instead, Sparks argues its motion should have been granted because it sought to admit evidence that "may have been taken at the hearing." (Br. 47 (quoting

29 C.F.R. § 102.48(c)(1)).) But Sparks ignores that the rule also requires a showing of extraordinary circumstances, which do not exist when the movant had the evidence on hand and failed to introduce it at the hearing. *See Circus Casinos, Inc.*, 366 NLRB No. 110, 2018 WL 3020212, at *1 (June 15, 2018) (denying motion where evidence was not newly discovered or previously unavailable, and employer failed to explain why it was not presented at the hearing), *review pet. filed*, Nos. 18-1201 & 18-1211 (D.C. Cir. July 31, 2018). Sparks's entire extraordinary-circumstances defense relies on its estoppel and due-process claims alleging that it was misled into thinking the permanence of its replacements was not in dispute. As shown at pp. 25-34 above, those claims are completely without merit.

C. Sparks Failed to Show that its Refusal to Rehire Striking Employees Was Due to an Unprecedented Drop in Business

As previously stated, once the striking employees unconditionally offered to return to work, Sparks was required to reinstate them to their former positions, unless it had a legitimate and substantial business justification not to do so.[21] Aside from arguing that the strikers were permanently replaced, Sparks claims it reduced its waitstaff after the strike due to a drop in business that was more significant than in previous years. (Br. 53-54.) Substantial evidence supports the

[21] *See* cases cited *supra* p. 16.

Board's finding that Sparks failed to show this was a legitimate and substantial business justification not to reinstate the strikers to their prior positions.

1. Factual background

Sparks's business follows a cyclical pattern. Busy season starts in late October and peaks in December. Business drops off in January, but recovers between February and March. Thereafter, things remain steady until June, before bottoming out in July and August. Despite the post-holiday slowdown, the beginning of the year is typically busier than the summer months. (A12; A510, SA8, 12-13, 17, 21-22, 31.)

As business fluctuates during the year, so do Sparks's staffing needs. Sparks typically hires additional waitstaff between October and December to handle increased holiday traffic. (A8; SA8, 17-18, 21, 31.) There is no evidence that "seasonal" employees—or any employees, for that matter—are discharged after the busy season.[22] (A6 n.11; A213, SA8-9, 18-19, 32, 64-68.) Instead, during slower periods Sparks allows employees to work fewer days or take longer vacations, and on days where the ratio of waitstaff to customers is higher,

[22] Sparks provided letters offering "seasonal employment" to 4 new employees between October and December 2014, but those letters did not define that term or limit the duration of their employment. (A9 n.11; A433-36.) Moreover, the record reflects that 13 employees were hired during the "seasonal" period between 2001 and 2013 and remained on staff consistently until the time of the strike. (A213, SA64-68.)

employees earn less money. (A8, 9 n.11; SA8-9, 18-19, 31-32.) When the holiday season returns, Sparks hires new staff to fill any openings that occurred during the year. (A8; SA9, 19-24, 32.)

2. Sparks's business-decline argument fails because business was still at its peak when the strike ended

Sparks argues it had a legitimate business justification for not reinstating the striking employees because it experienced "a significant drop in business in 2015 as compared to prior years." (Br. 53.) However, Sparks does not dispute the Board's finding that the strikers unconditionally offered to return to work on December 19, while the restaurant was still at the height of its busy season. (A12.) Indeed, Sparks's managers were very concerned about being short-staffed during the holidays.[23] (A12; SA69.) Therefore, the record does not support Sparks's claim that it did not have enough business to reinstate all the striking employees when they offered to return.

Sparks's claim that post-holiday business did not support maintaining pre-strike staffing levels is equally unsubstantiated. As an initial matter, even if that were true, it still would not excuse Sparks's failure to reinstate the former strikers when they offered to return in December, when business was at its highest.

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[23] Edelstein testified that Sparks's managers experienced "anxiety and stress about what was going on" when the strike began, and that they came to her saying, "[W]e need people, what do we do? What do we do?" (A12; SA69.)

Moreover, and in any event, Sparks's own business records belie its claim. First, the post-holiday decline in sales between December 2014 and January 2015 was actually the second smallest for that period since 2010. (A12; A510.) Second, the summer season is almost always slower than the period immediately after the holidays. (A12; A510.) Third, three witnesses testified that Sparks never laid off waitstaff after the holidays, or even during the slower summer season; instead, employees worked fewer days, took longer vacations, or worked for less money. (A12; A213, SA8-9, 18-19, 24, 31-32.) Fourth, those testimonies are borne out by business records, which show that Sparks's waitstaff always remained the same from one December to the following January, except between December 2014 and January 2015, after Sparks failed to reinstate the striking employees. (SA125-27.)[24] Equally significant, until December 2014, Sparks's waitstaff usually numbered between 43 and 46 and was never less than 41, even in the slowest summer months. (SA125-27.) And fifth, Sparks took no other step to address the

[24] This document, which is cited as "GC Appendix A" in the Board's decision (A12), is a chart summarizing Sparks's monthly sales and corresponding staffing numbers for each month between January 2010 and September 2015. The General Counsel prepared this summary based on Sparks's monthly sales numbers (A510) and one weekly tip record chosen at random for each of the corresponding months. (SA107 n.37.) The underlying documents were admitted into evidence at the hearing, but the summary itself was not. (SA54-56, 72.) However, the summary was attached to the General Counsel's answering brief to Sparks's exceptions, (SA73-127), which is part of the agency record. *See* 29 C.F.R. § 102.45(b) (agency record includes exceptions to the judge's decision "and any cross-exceptions or answering briefs as provided in [29 C.F.R.] § 102.46.").

alleged overstaffing caused by the decline in business, for instance by reducing its kitchen staff. (A12 n.17).

Tellingly, Sparks does not dispute *any* of these Board findings. Instead, Sparks claims that the ratio of tips per waiter better reflects the necessity to reduce waitstaff and argues that "those tips would have plummeted" if Sparks had kept the same complement of waiters after December 2014. (Br. 53-54.) Not only is there no evidence Sparks ever made hiring decisions based on waitstaff income, but the undisputed above-cited evidence conclusively shows otherwise.

II. SPARKS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES ENGAGED IN A LAWFUL ECONOMIC STRIKE

Even if Sparks could show that it permanently replaced the striking employees, the Board would still prevail on its finding that Sparks violated the Act by unlawfully discharging them. The Act provides that strike participants remain statutory employees, *see* 29 U.S.C. § 152(3), and makes it unlawful for an employer to discriminate "in regard to hire or tenure of employment" against employees for exercising their protected rights, including the right to strike, *id.* § 158(a)(3). One reason this is important is that employees who have been permanently replaced—but not discharged—are entitled to full reinstatement to fill openings created by the departure of permanent replacements. *See Laidlaw*, 171 NLRB at 1369-70. Accordingly, courts have long recognized that employers who

discharge striking employees violate Section 8(a)(3) and (1) of the Act by effectively discouraging the exercise of their statutory rights. *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52 (1972); *Fleetwood*, 389 U.S. at 378; *accord NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990) (citing cases).

A. Substantial Evidence Supports the Board's Finding that Sparks's Conduct Created an Ambiguity that Caused Employees Reasonably to Believe They Were Discharged

Sparks disputes the Board's finding that it discharged the striking employees. To determine whether a striking employee has been discharged, the Board considers whether the employer's statements or conduct "would logically lead a prudent person to believe his [her] tenure has been terminated." *Kolkka Tables*, 335 NLRB at 846 (internal quotation marks and citation omitted); *Elastic Stop*, 921 F.2d at 1282. The analysis is based on the perspective of reasonable employees and does not require "formal words of firing." *Kolkka Tables*, 335 NLRB at 846; *Elastic Stop*, 921 F.2d at 1282. Additionally, if the employer's acts or statements create "a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer." *Kolkka Tables*, 335 NLRB at 846 (internal quotation marks and citation omitted); *accord, e.g.*, *Champ*, 933 F.2d at 692; *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626,

629 (10th Cir. 1984). In other words, any uncertainty created by the employer's statements or actions will be construed against it. *Kolkka Tables*, 335 NLRB at 846.

The Board found that Sparks's conduct created an ambiguity that would lead reasonable employees to believe that they had been discharged for participating in the December 10 strike. Sparks's first act was to refuse to allow employees back into the restaurant on December 19, after they had unconditionally offered to return to work. (A5, 15.) This was followed, on December 22, by Zimmerman's e-mail informing the Union that Sparks was rejecting the return-to-work offer "[d]ue to serious misconduct and unprotected activity by . . . the striking employees . . . , including without limitation, violence, threats and intimidation towards patrons and employees, destruction of property and trespass." As conveyed by Zimmerman, Sparks not only believed the safety of its patrons and staff required barring the employees from its premises, but was also considering legal action against them. (A14-15; A231.) Then, at a meeting with the Union on January 8, 2015, Zimmerman again rebuffed the unit's return-to-work offer, assertedly to protect Sparks's property. (A16; SA4, 15, 33-34.) This continued in later meetings on January 20 and February 25, where Sparks showed no intent to return the employees to work at all. At the same time, however, Sparks never disclosed in those discussions that it hired permanent replacements, nor did it provide a

preferential rehire list to the Union, even though it would have clarified the employees' status. (A16; SA36-37.) Together, these undisputed facts constitute substantial evidence to support the Board's finding that reasonable employees confronted with Sparks's conduct would believe that their employment had been terminated.

Although Sparks challenges several aspects of the Board's analysis, it is worth noting what Sparks does *not* dispute. Specifically, Sparks does not contest that refusing to take employees back after they unconditionally offered to return to work—during the busiest time of the year, no less—and hiring security guards to prevent them entering the restaurant would cause employees reasonably to believe they were discharged. Nor does Sparks dispute that reasonable employees would draw the same conclusion after it rejected their offer anew on January 8, 2015, or when it showed no intent to reinstate them in subsequent negotiations with the Union.

B. Sparks's Many Challenges to the Board's Unlawful-Discharge Finding Are All Equally Meritless

Sparks claims the Board erred in finding that reasonable employees would construe Zimmerman's e-mail as discharging them because it included the qualifier "at this time," which left open "the possibility that, in the future, [Sparks] might change its position." (Br. 25.) Sparks would have this Court believe that reasonable employees who—during a strike, and after making an unconditional

offer to return to work—were told that their employer does not want them on its premises, blames them for a litany of crimes, and is weighing legal action against them, would reasonably believe they still have a job. Sparks goes even further, arguing that because Zimmerman included those three words, no reasonably prudent employee would even consider his e-mail to be ambiguous. (Br. 25.) To say that argument strains credulity is an understatement; by contrast, the Board's finding is eminently reasonable, and thus merits the Court's deference. *See Veritas*, 895 F.3d at 78 (Court defers to reasonable, fact-based inferences drawn by the Board). Moreover, even if employees would not construe Zimmerman's e-mail as a discharge, Sparks's hiring of security guards to bar employees from the premises, its continued rejection of their return-to-work offer, and its failure to hire a single employee back until August 2015 would lead a reasonable employee to believe they were discharged.

Sparks's argument that there is no evidence the Union shared Zimmerman's e-mail with the employees also fails. (Br. 26.) As the Board found (A16), the Union had been the employees' certified bargaining representative since July 2013. Moreover, waiters Fuller and Hajdini, who served as union stewards, participated in the January 8 meeting where Zimmerman said the employees could not return to work because Sparks believed they had damaged its property, and together with LoIacono, they conveyed Sparks's position to the other employees. (A6, 16; SA5-

6, 15-16, 34-35.) As the Board found, therefore, it defies the parties' legal status and common sense to think that employees were not fully apprised of Sparks's accusations. (A16.)

Sparks also claims that the Union's reference to the employees as "locked out"—in O'Leary's response to Zimmerman's e-mail, in Board charges, and in LoIacono's testimony—is conclusive proof that they were not discharged. (Br. 21-23.) Simply put, the Union's subjective view of the situation is irrelevant.[25] The discharge analysis is an *objective* one, which focuses on how a reasonably prudent employee would construe Sparks's statements and actions.[26] *See Elastic Stop*, 921 F.2d at 1283. The Board found in this case that, taken together, Zimmerman's e-mail, Sparks's continuing refusal to allow employees onto its premises after their unconditional offer, and its concealment of the fact that it was hiring replacements would reasonably lead employees to believe that Sparks had terminated their employment. (A15-16.) Sparks's argument that there is no evidence the employees themselves thought they were discharged fails for the same reason (Br. 24), just as its claim that the judge misapplied the reasonable-employee

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[25] That being said, the Union's confusion about the strikers' employment status is understandable given the vagueness of Sparks's explanations for refusing to return them to work after their unconditional offer.

[26] For this reason, the fact that the Union did not file a charge alleging that the employees had been discharged does nothing to help to Sparks's cause. (Br 28.)

standard (Br. 26-27). As the judge explained, the Board's analysis focuses on "the written and oral statements of employer representatives and not on the subjective responses of the employees in question." (A131.)

Sparks fares no better arguing that employees could not reasonably have believed they were discharged because it did not require them to clear out their lockers, but instead offered to "arrange" for them to retrieve their belongings. (Br. 27.) The Board reasonably declined to consider that fact, given that Sparks had explicitly barred employees from the premises, purportedly to protect its staff, property and clientele. (Br. 15.) Indeed, Hajdini testified that he did not know at the time if his belongings were still in his locker because he was not allowed into the restaurant. (A15 n.24; SA11.) Moreover, Sparks's offer to let the strikers retrieve their belongings from their lockers would only seem to reinforce a reasonable belief that they had been discharged.

Equally unavailing is Sparks's claim that employees knew from third parties that they had not been discharged. (Br. 28.) The Board reasonably found that employees should not be required to divine their employment status from the communications of health-insurance providers or retirement-savings-plan administrators. (A15 n.23.) Furthermore, this argument cuts against Sparks's overarching claim that its conduct was neither ambiguous nor confusing; indeed, if

that were true, Sparks's own employees would not have to turn to third parties to know if they still had a job.

Finally, there is no merit to Sparks's *Avery Heights* defense. *Avery Heights* (*Avery Heights I*), 343 NLRB 1301 (2004), *vacated and remanded sub nom. New England Health Care Emps. Union v. NLRB* (*Avery Heights II*), 448 F.3d 189 (2d Cir. 2006). The thrust of Sparks's argument is that Board law imposes no duty on employers to disclose the hiring of permanent replacements, and therefore the Board was precluded from finding that, by keeping its replacement campaign a secret and failing to provide a preferential rehire list, Sparks contributed to the ambiguity surrounding the employees' status. (Br. 30.)

In *Avery Heights I*, a judge found that the deliberate concealment of a replacement campaign for over 2 weeks was evidence that the employer had an unlawful motive for replacing its striking employees.[27] 343 NLRB at 1305-06. In reversing the judge's decision, the Board explained that hiring permanent replacements serves a lawful purpose of enhancing the employer's economic leverage, by allowing it to continue operating while pressuring strikers to return when they realize they are being replaced. The Board also noted that, while the

[27] Although Board law permits hiring permanent replacements for legitimate business reasons, an employer violates the Act if it is motivated by an independent unlawful purpose, such as retaliating against striking employees or trying to break a union. *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). There is no claim in this case that Sparks acted with unlawful intent in hiring the replacements.

right to hire permanent replacements is well established, an employer has no corresponding obligation to inform a union of its "intention" or "plan" to do so. *Id.* at 1306. Based on those observations, the Board concluded that the employer did not have an unlawful motive for concealing its replacement campaign. *Id.* at 1306-07.

On review, the Second Circuit accepted the premise that employers have no obligation to "inform striking workers *before* hiring permanent replacements." *Avery Heights II*, 448 F.3d at 195 (emphasis added). The court also assumed that there may be legitimate reasons for maintaining secrecy *during* a replacement campaign, like the fear of picket-line violence. *Id.* Absent such concerns, however, the court saw no logic in hiding the recruitment of permanent replacements, as that would only diminish the employer's leverage with the strikers and their union. *Id.* Therefore, the court concluded that an employer's unexplained failure to give notice of a replacement campaign could be evidence of unlawful motive. *Id.* at 195-96.

The Board's decision in this case is consistent with *Avery Heights I* and *II*. The Board recognized that Sparks was within its rights "not [to] disclose its *intent* to hire permanent replacement employees *prior* to doing so" (A16 (emphases added)), but also found that "this does not somehow remove from consideration the effect of [Sparks's] continued failure to provide this information to the striking

employees and the [U]nion." In other words, the Board found that Sparks's continued secrecy about the replacement campaign was probative of whether its behavior created an ambiguity that would lead reasonable employees to believe they had been discharged. Contrary to Sparks's assertion (Br. 30), the Board did not create an affirmative duty to disclose replacement campaigns or preferential rehire lists; it simply found that employers logically should bear the consequences of any ambiguity resulting from their (lawful) refusal to do so. This accords with the Second Circuit's holding that, simply because employers have the right to conceal replacement campaigns, the Board is not precluded from considering whether such concealment may support a different unfair-labor-practice finding.

Sparks also claims the Board should not have considered the fact that it kept its replacement campaign a secret because it had a legitimate reason for doing so, namely fear of picket-line violence. (Br. 31-32.) The problem for Sparks is that it did not produce any evidence to support such concerns. At the January 8 meeting, Sparks's counsel Zimmerman claimed the strikers had broken windows and that he could not allow them back on the premises of concern for Sparks's property. (A6; SA4, 34.) LoIacono asked to see evidence of damage caused by striking employees but Zimmerman demurred, telling him to submit a written information request. (A6; SA34.) When the Union complied, Zimmerman objected to the request as irrelevant. (A6, 13; A203, SA42-43.) Sparks never provided any

responsive information to the Union's request and did not otherwise produce any documentary evidence of striker misconduct.

Sparks's testimonial evidence was no more enlightening. Sparks called two security guards who testified generally that they observed picketers holding signs, blowing horns and whistles, and cursing at guards and staff.[28] (A174-75, SA57-58.) One guard gave hearsay testimony about a Sparks employee who claimed he was nearly injured by an unidentified individual on December 12, and the other testified about a scuffle that occurred in early December between an unidentified picketer and some customers leaving the restaurant. (A166, 172, SA59-63.) Thus, even assuming arguendo that Sparks established some picket-line misconduct occurred, Sparks produced no evidence to show that it was committed by a striking employee, as opposed to a picketer who was not employed by Sparks. In short, Sparks did not offer sufficient evidence to support a legitimate fear of picket-line violence.[29]

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[28] From the early days of the strike, and until mid-January 2015, Sparks hired a security agency to post guards outside the restaurant. (A164, 172-73.)

[29] Employees who engage in serious misconduct during a strike can lose the Act's protections and be lawfully discharged. *Nat'l Conference of Firemen & Oilers, SEIU v. NLRB*, 145 F.3d 380, 384 (D.C. Cir. 1998). Sparks, however, insists that "the hiring of permanent replacements ***always*** was the primary reason" for refusing the strikers' unconditional offer. (Br. 32.)

Finally, even if Sparks's evidence could justify concerns over picket-line violence, there is no evidence to suggest that those concerns remained valid by the time the strikers offered to return, much less into January 2015.[30] And yet, Sparks did not reveal that it had hired (assertedly permanent) replacement employees until at least May 2015. Sparks offers no basis for keeping the status of its replacements secret for so long. Therefore, it was entirely reasonable for the Board to find that, by concealing the fact that it had hired permanent replacements, Sparks contributed to the ambiguity over its employees' employment status, thereby supporting the belief that they were discharged.

[30] According to Sparks's own witnesses, the two alleged incidents occurred very soon after the strike began on Wednesday, December 10. The first one took place on or before the 12th (A172), and the second occurred on a "Saturday [in] early December" (SA59), likely December 13, which was the second Saturday of that month. Sparks's witnesses did not testify about any incident after the strike ended on December 19.

III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT SPARKS VIOLATED SECTION 8(a)(1) OF THE ACT BY SOLICITING EMPLOYEES TO WITHDRAW SUPPORT FROM THE UNION

Soliciting employees to decertify or otherwise withdraw support from a union restricts their Section 7 rights and thus violates Section 8(a)(1). *See, e.g.*, *Corr. Corp. of Am.*, 347 NLRB 632, 633 (2006) (employer may not solicit employees to decertify union); *Hialeah Hosp.*, 343 NLRB 391, 392 (2004) (employer may not solicit employees to dissuade coworkers from supporting union).

The Board found that Sparks violated Section 8(a)(1) of the Act when Maître d' Kapovic asked waiter Hajdini whether the Union could be voted out if Kapovic purchased the restaurant. (A16-17.) Sparks does not challenge that finding in its opening brief; therefore, the Court should deem the issue waived and summarily enforce the Board's Order on this point. *See* Fed. R. App. P. 28(a)(8)(A) (argument section of a brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *CC1 Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (Board is entitled to summary enforcement on issues not raised in opening brief).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Sparks's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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March 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL CETTA, INC.,	)	
d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its final brief contains 12,064 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ David Habenstreit
David Habenstreit
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Dated at Washington, DC
this 11th day of March 2019

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THE NATIONAL LABOR RELATIONS ACT

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

When used in this Act--

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> * * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

Section 13 of the Act (29 U.S.C. § 163):

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.45 Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case

* * *

(b) *Contents of record*. The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

29 C.F.R. § 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.

* * *

(b) *Answering briefs to exceptions*.

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

29 C.F.R. § 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

* * *

(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

* * *

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

* * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL CETTA, INC.,	)	
d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit
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Dated at Washington, DC
this 11th day of March 2019

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Cc:	Burdick, Ruth E.
Subject:	Decision - Tito Contractors 18-1107 DC Circ
Date:	Friday, May 24, 2019 10:57:22 AM
Attachments:	Tito Contractors 18-1107 DC Circ.pdf

Please see attached decision issued today by the DC Circuit.

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Cc:	Wilson, Nancy; Andrews, Kimberly; Marshall, Sean R.
Subject:	D.C. Circuit decision in Tito Contractors, Inc., Board Case 05-CA-119008 (reported at 366 NLRB No. 47)
Date:	Wednesday, May 29, 2019 2:10:15 PM
Attachments:	Tito Contractors 18-1107 DC Circ.pdf Tito Contractors_Inc._18_1107_Final Brief.pdf.pdf

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In an unpublished judgment that issued Friday, May 24, 2019, the D.C. Circuit enforced the Board's order issued against this provider of general contracting, construction, painting, and recycling services in the District of Columbia and nearby suburban Maryland. The Board (Members Pearce, McFerran, and Emanuel) found that the employer committed numerous violations of Section 8(a)(1) and (3) of the Act, including threats, interrogations, unlawful rule violations, and various levels of discipline and discharges imposed on the basis of the employees' protected activities.

Before the court, the employer contested only the Board's findings that it unlawfully discharged five employees, and that it issued a new overtime rule in response to union activity which it also discriminatorily applied to seven employees who were plaintiffs in a FLSA lawsuit. In upholding the Board's unlawful discharge findings, the court cited a manager's statements of hostility against the union and the employees' union activities that were made directly to three employees at the time of discharge, and noted that the employer's knowledge of the other two employees' union activities was uncontested. On the employer's asserted defenses, the court held that the employer's claims that it would have discharged the employees because of misconduct and low productivity despite their union activities were pretextual.

On the rule violations, the court cited managers' statements that the new overtime policy would apply only to those employees who had joined the FLSA lawsuit, and thus that the rule was created in response to protected activity. The court also agreed with the Board that the rule was discriminatorily applied only to those employees, as shown by payroll records and evidence of how overtime assignments were determined. Finally, the court rejected the employer's contention that the Board improperly left certain evidentiary questions on the scope of the remedy to the compliance phase of the case.

The court's judgment, and the Board's brief to the court, are attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1107 **September Term, 2018**

FILED ON: MAY 24, 2019

TITO CONTRACTORS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51,
INTERVENOR

Consolidated with 18-1119

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

JUDGMENT

The petition for review and the cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. The Court has given the issues full consideration and determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted.

Tito Contractors challenges the Board's finding that it engaged in unfair labor practices by firing five employees and by creating and enforcing a stricter overtime policy in response to union and other protected activities. Tito also argues that the Board improperly delayed consideration of backpay issues until compliance proceedings.

Section 8(a) of the National Labor Relations Act (NLRA) prohibits employers from engaging in unfair labor practices, which include interfering with protected union activities and discriminating against employees based on those activities. 29 U.S.C. § 158(a)(1), (3). In mixed-

motive cases, the Board's General Counsel may prove that the employer took an action motivated in part by improper animus, in which case the employer may avoid liability only by proving that it would have taken the same action regardless. *See Wright Line*, 251 N.L.R.B. 1083, 1089 (1980). The Supreme Court has approved this administrative interpretation of the NLRA, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), and Tito does not challenge it here.

Substantial evidence supports the Board's finding that the terminations in this case were motivated by improper animus. For example, Tomas Berganza, a Tito supervisor, "explicitly referenced [the first two employees'] union activities when terminating them," and he "made comments about the Union to [the third employee] at her termination meeting." *Tito Contractors, Inc.*, 366 N.L.R.B. No. 47, 2018 WL 1559885, at *5 n.18, *6 (Mar. 29, 2018). Further, Tito does not dispute that it knew of the final two employees' union activities.

Tito argues that it would have fired the employees in any event because of misconduct or low productivity. The Board reasonably rejected these justifications as pretextual, because Tito treated the fired employees worse than others similarly situated. *Tito Contractors*, 2018 WL 1559885, at *5. Tito challenges the credibility determinations of the administrative law judge on this point, but it fails to show that they were patently unsupportable.

The Board also had substantial evidence to find that Tito's creation of a policy requiring advance approval for overtime was an unfair labor practice. The Board noted statements by Tito's owner and several of its supervisors that the new overtime policy would apply only to employees who joined a lawsuit under the Fair Labor Standards Act (FLSA). *Tito Contractors*, 2018 WL 1559885, at *3. These statements provided adequate grounds both to find an impermissible motive and to reject Tito's argument that it would have created the new policy even absent that motive.

In addition, substantial evidence supports the Board's finding that Tito impermissibly discriminated against the FLSA plaintiffs in implementing the overtime policy. First, the Board cited payroll data showing that, "[d]uring the first full pay period after the filing of the overtime lawsuit, [Tito] assigned overtime to various employees, but none to the original seven, named plaintiffs." *Tito Contractors*, 2018 WL 1559885, at *4. This allocation of work "was in stark contrast" to the allocation in past pay periods "when the seven discriminatees were assigned an average of at least 10 hours of overtime pay per pay period, with a few working substantially more." *Id.* Second, the Board reasonably rejected Tito's arguments that it would have made the same overtime assignments for legitimate reasons; as the Board explained, Tito "did not lack overtime work." *Id.*

Tito further argues that the Board erred by "leav[ing] to compliance the determination of the extent to which [Tito] discriminated against the plaintiffs" beyond the first pay period after the lawsuit was filed. *Tito Contractors*, 2018 WL 1559885, at *4 n.15. The Board did not improperly delay this determination, for "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

The Board seeks summary enforcement of the rest of its order. Because Tito's opening brief does not challenge these parts of the order, we grant the Board's request.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Nos. 18-1107 & 18-1119

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TITO CONTRACTORS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Tito Contractors, Inc. was the respondent before the NLRB and is the petitioner/cross-respondent before the Court.

2. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

3. The labor union International Union of Painters and Allied Trades, AFL-CIO, District Council 51, was the charging party before the NLRB and has intervened on behalf of the NLRB.

B. Rulings Under Review: This case is before the Court on Tito's petition for review and the NLRB's cross-application for enforcement of a Decision and Order issued by the Board on March 29, 2018, and reported at 366 NLRB No. 47.

C. Related Cases: This case has not previously been before the Court.

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
This 1st day of March 2019

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FINAL BRIEF GLOSSARY

Documents Referred to in the Board's Brief	Designation
Joint appendix	JA
Organizations Referred to in the NLRB's Brief	
International Union of Painters and Allied Trades, AFL-CIO, District Council 51	The Union
Maryland Environmental Service	MES
National Labor Relations Board	The Board
Tito Contractors, Inc.	Tito

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1107, 18-1119

TITO CONTRACTORS, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This unfair-labor-practice case is before the Court on the petition of Tito Contractors, Inc., to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued on March 29, 2018, and reported

at 366 NLRB No. 47. (JA 7-32.)[1] The International Union of Painters and Allied Trades, AFL-CIO, District Council 51 ("the Union") has intervened on the Board's behalf.

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Tito's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of its uncontested findings that Tito violated the Act by discharging, suspending, laying off, disciplining, threatening, disparaging, and interrogating employees because of their union or other protected concerted activities; ordering an employee to return his company vehicle; equating protected concerted activity with disloyalty; creating

[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

the impression of surveillance; and soliciting grievances and promising to no longer disregard them if the employees voted against the Union?

2. Does substantial evidence on the record as a whole support the Board's findings that Tito violated the Act by promulgating and discriminatorily enforcing an overtime policy against construction employees because of their union or other protected concerted activities?

3. Does substantial evidence on the record as a whole support the Board's findings that Tito violated the Act by discharging five recycling center employees because of their union and other protected concerted activities?

RELEVANT STATUTORY AND REGULATORY ADDENDUM

Addendum A attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

The Union filed an unfair-labor-practice charge alleging that Tito's actions in response to its employees' overtime lawsuit and union organizing violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3). The Board's General Counsel issued an unfair-labor-practice complaint, and an administrative law judge conducted a hearing and issued a recommended decision, finding that Tito's conduct violated the Act. (JA 17-32.) After reviewing the parties'

exceptions, the Board adopted the judge's findings and recommended order as modified. (JA 7-17.)

II. THE BOARD'S FINDINGS OF FACT

A. Tito's Construction Employees Contact the Union and File an Overtime Lawsuit

Tito provides construction workers and laborers primarily to state and local governments, including production workers at state-run recycling facilities in Maryland. Maximo "Tito" Pierola owns the company and serves as its president. His son Alex is vice president, Kenneth Brown is general manager, and Davys Ramos is office manager. (JA 18.) On the construction side, Manuel Alarcon and Fermin Rodriguez are construction superintendents. (JA 18.)

Some of Tito's construction employees began meeting with union officials in September 2013 to discuss concerns, including Tito's failure to correctly pay them for overtime work. (JA 18.) The Union put the employees in contact with a law firm that agreed to represent them *pro bono*. (JA 18.) The firm notified Tito of its obligations to pay overtime on October 16. Two days later, it filed a collective and class action lawsuit on behalf of Tito's employees and seven named employees: Roberto Ayala, Mauricio Bautista, Geremias Berganza, Sabino Diaz, Hector Delgado, Jose Jimenez, and Domingo Zamora. (JA 10 n.13; 783-871.) Employees Jose Amaya, Jose Diaz, Luis Palacios, Hernan Latapy, and Nestor

Sanchez joined the lawsuit in November, and Norberto Araujo joined in February 2014. (JA 10 & n.14, 11.)

1. President Pierola threatens employees and equates union activity with disloyalty

President Pierola knew about the lawsuit by October 11, 2013, when he telephoned employees Amaya and Berganza to complain about it. Pierola told Amaya that he was "disappointed" by the legal action, which Amaya "shouldn't have taken." (JA 481-82.) Pierola also asked if Amaya had children and urged him to first "think about [his] family." (JA 7 n.1, 10 n.14, 19; 482.) In a call to Berganza, Pierola said "you guys are stabbing me in my back," and he did not "want [back]stabbers in the Company." Pierola warned Berganza that if he didn't like the company, "there's thousands of jobs outside." (JA 7; 432-33.)

2. Tito tells employees their hours will be cut because of their lawsuit and institutes a new overtime policy, saying it applies only to the plaintiffs

On October 25, just days after employees filed the overtime lawsuit, President Pierola held a mandatory employee meeting where he expressed surprise about the action and told employees he would now need to cut their hours. (JA 9; 449, 453.) Tito managers then distributed a new overtime policy requiring employees to obtain management approval in advance before working overtime. Prior to the lawsuit, advance approval was not required. (JA 9 & n.9; 449, 451, 469, 495-98, 598.)

After the meeting, Pierola told employee Araujo that his hours would not change because he had not joined the lawsuit. (JA 9; 454-55.) Araujo continued to work overtime without obtaining prior approval—until he joined the lawsuit. (JA 455-56, 463-64, 600, 923.)

Also on October 25, Project Superintendent Alarcon told employee Zamora, a named plaintiff, that the overtime policy memo "says that those of you that are in the lawsuit cannot work more than 40 hours a week." (JA 9; 450.) On separate occasions throughout October, Field Superintendent Rodriguez told Zamora, as well as Berganza, a named plaintiff, and Latapy, who joined the suit in November, that the new overtime policy applied only to those who joined the lawsuit. (JA 9, 19 & n.5; 428, 447, 468.)

3. The Union names its supporters and files a representation petition; Pierola disciplines Amaya, then suspends him for defending a coworker who testified at a Board hearing

On November 14, the Union sent Tito a letter identifying 35 employees who supported the Union, and the next day it filed a representation petition seeking to represent the construction and recycling employees. (JA 22; 593-94.) The Union's list of supporters included a number of construction employees who joined the lawsuit: Amaya, Ayala, Bautista, Berganza, Delgado, Sabino and Jose Diaz, Jimenez, Latapy, Palacios, Sanchez, and Zamora. The list also included five recycling employees who were later discharged by Tito. (JA 22; 594.)

A week later, Tito instituted a new requirement that all crew leaders email a job report to the office at the end of each day. On December 11, Amaya, a crew leader who was also a plaintiff, submitted his report somewhat late; President Pierola gave him a disciplinary warning.

At a December 24 meeting with several employees, Pierola distributed copies of testimony given by union supporter and named plaintiff Bautista at a Board hearing on the representation petition and told them not to trust him. Pierola became angry when Amaya defended Bautista. A few days later, Tito suspended Amaya for seven days for failing to submit daily job reports, even though Amaya had previously informed managers that his company cell phone, required for submitting the reports, was not working. Other employees who had failed to submit daily reports or submitted them late were not disciplined or suspended. (JA 24; 489, 491-94.)

4. Pierola disparages and threatens employees, and promises to resolve grievances if they vote against the Union

On February 27, 2014, President Pierola held a mandatory meeting of the construction employees where he encouraged them to vote against the Union. He described employees Bautista and Zamora (both union supporters and named plaintiffs) as “rotten apples” and told employees not to listen to them. He also said that if the Union kept bothering him, he could close the company, subcontract the work, or go bankrupt. Pierola then offered to resolve employee grievances,

including overtime claims, through private mediation. When employee Araujo noted that Tito had been promising to resolve their grievances for 25 years without result, Pierola assured him this would change. When employee Amaya asked whether a recycling employee had been discharged for supporting the Union, Pierola singled him out as a friend of Zamora and called him a faggot. (JA 8-9, 11, 24-25; 456-62, 471-73.)

5. Tito disciplines Araujo and other employees for working overtime without approval

As noted above, employee Araujo joined the lawsuit on February 10. The day after the February 27 meeting where he questioned President Pierola's promise to resolve grievances, Tito disciplined him for working overtime without prior approval. Tito also disciplined other employees for the same reason. (JA 11; 463-64, 568, 600.) On April 23, Vice President Alex Pierola ordered Araujo to return his company vehicle, which he had been assigned since 1992. (JA 25; 465.)

6. President Pierola threatens Berganza for raising pay issues with the Union

Also in February, union supporter and named plaintiff Berganza had been assigned to work at the home of Vice President Pierola, who paid him in cash without making any deductions. Berganza complained to Union Organizer Baiza

that he had not been paid properly. In April, President Pierola threatened Berganza with a defamation lawsuit and discharge. (JA 25; 436-38.)

7. Tito lays off Latapy and Sanchez, discharges Latapy, and threatens employees with discharge because of the lawsuit

In April, Tito removed employees Latapy and Sanchez from their painting assignments at the D.C. Convention Center. Both were union supporters who had joined the overtime lawsuit. The D.C. government site supervisor protested their removal, but Tito insisted on the action. Despite having plenty of work, Tito did not give them any further assignments. (JA 25; 443-45, 476-77.)

In May, Superintendent Rodriguez called Latapy and offered him employment as a subcontractor, not an employee. Rodriguez encouraged Latapy to take the offer, warning that after the lawsuit ended, President Pierola "would fire all those son-of-a-bitch[es]." (JA 25; 478-79.) In June 2014, Rodriguez told Sanchez there was plenty of work and he should "fix it with Tito or with the lawyers." (JA 25; 444.) On June 25, Tito discharged Latapy for failing to appear at a work site to which the company had never ordered him to report. (JA 25-26; 480.)

8. Tito discharges union supporter and named plaintiff Bautista

During his 10 years of employment with Tito, Bautista primarily worked at the Arlington County detention center and had never been disciplined. As noted above, however, after he became one of the original named plaintiffs in the

overtime lawsuit and was identified as a union supporter, Pierola called him a "rotten apple." (JA 7 n.1, 10 n.13, 24).

On July 24, Tito transferred him to an elementary school in Rockville. Although the jobsite superintendent had specifically requested a carpenter with experience installing continuous hinge doors, Bautista had never done that work, and Tito made no attempt to ascertain whether he possessed the requisite skills. On August 1, Tito discharged Bautista, saying it was because he couldn't do the work. (JA 26-27; 422, 587-88, 591-92.)

B. Tito Retaliates Against Recycling Employees After They Meet with the Union and Seek Representation

1. The Union identifies recycling employees among its supporters

In addition to its construction business, Tito has contracts with Maryland Environmental Service (MES) to provide laborers at the Derwood recycling center in Maryland. Tito's employees worked along a conveyor belt sorting recycling material and included five individuals who were identified by the Union as supporters in its November 14 letter: Maria Chavez, Yasmin Ramirez, Aracely Ramos, Maria Sanchez, and Reyna Sorto. (JA 20, 22; 131-32, 594.)

Tomas Berganza, Tito's on-site supervisor, oversaw those five employees and others who worked alongside them. Mark Wheeler was MES's on-site operations manager; he reported to David Wyatt, the MES field operations supervisor. (JA 20; 326-27, 335, 402, 405.) MES also employed two production

workers, Juana Rosales and Norma Garcia, to oversee the Tito employees on the sorting line. (JA 20; 146-47.)

2. Tito threatens to suspend Chavez for complaining about safety goggle problems; she and other recycling employees contact the Union

Tito does not allow its recycling employees to discuss issues or complaints directly with MES managers. (JA 23; 82, 286-87.) On September 25, 2013, after employees experienced headaches and other problems with their new safety goggles, Chavez and Ramos raised the issue with Supervisor Berganza. (JA 23; 959.) Five employees, including Ramirez, complained to him on another occasion. (JA 23; 254-55.) When their complaints went unresolved, Chavez told Berganza that she wanted to speak to Wheeler and Wyatt about the goggles. Although Berganza told her she was not permitted to complain directly to MES, he went ahead and called the MES representatives to his office, where Chavez explained the problem. Later that day, Tito's safety manager, Stedson Linkous, told Chavez she was prohibited from contacting MES directly, would be suspended for seven days unless she apologized to Berganza for going over his head. Linkous added that she would be discharged if it happened again. (JA 23; 286-93, 961.)

Meanwhile, Sorto reached out to Union Organizer Baiza to discuss employee concerns over vacation, holidays, and safety goggles. In early October,

Baiza met with Sorto and four other recycling employees (Chavez, Ramirez, Lemus, and Ramos) to discuss their concerns over treatment by Supervisor Berganza, as well as safety goggles, bathroom and water breaks, overtime, and the lack of holiday pay, vacation leave, and sick leave. (JA 39-42, 84-85.) After this meeting, employees received better safety goggles. (JA 86, 255.) About 10 recycling employees, including Sanchez, met with Baiza in mid-October, and they continued to meet with him in November. (JA 50-51, 66-68, 256-57, 311.)

3. After initially supporting the Union, Supervisor Berganza backs out and tries to identify its supporters

On October 18, 2013, Supervisor Berganza and construction employee Bautista met with Organizer Baiza. Initially, after signing a union authorization card, Berganza agreed to help organize the recycling employees. (JA 19; 35, 44-46.) A few days later, Baiza asked Berganza whether he had succeeded in getting certain employees to sign cards. Berganza replied that he had not, and asked whether Ramirez, Chavez, Ramos, Sorto, and Lemus had signed cards. (JA 19 & n.7; 46-48, 71-72.) Baiza refused to answer. Berganza explained that he wanted to know because these employees always complained about him. (JA 48.)

Later that day, another union organizer, James Coats, encouraged Berganza to continue helping the Union. Berganza said he would only if Coats gave him the names of employees who had already signed cards. Coats told him that “Maria” had signed but refused to give him any more information. (JA 19-20 n.7; 153-54,

156, 935.) A week later, Coats called again, seeking more help getting employees to sign cards, but Berganza no longer wanted to participate in the union drive and did not answer his calls. (JA 18; 158, 922.)

4. Supervisor Berganza tests employee productivity; Tito discharges Sanchez for union activity

Previously, in the summer of 2013, Wheeler and Wyatt learned that the facility's production of recyclable material had declined. In response, Supervisor Berganza devised a productivity test for Tito's employees, even though they were not required to meet production quotas. (JA 20; 363-67.) In the fall, MES tested the female workers' productivity to see how many bins (called hoppers) they could fill on two test days.[2] (JA 20; 163-64, 166, 872.) Results ranged from 5 to 13 hoppers. (JA 872.) Chavez filled the most hoppers; Sorto and Ramos were among the top performers. (JA 20; 872.) No action was taken against the poorer performers. (JA 20; 368.)

Sanchez began working at the recycling center in May 2013 after having previously worked for Tito as a construction helper. (JA 20; 307-08.) She filled eight hoppers on the first day of her productivity test and nine hoppers on the second. (JA 872.) Sanchez had never been disciplined or received any warnings

[2] Although Tito also employed male production workers, none participated in these tests. (JA 237-38.)

about her performance. (JA 21 & n.12; 170, 314, 317.) In mid-October she attended a union meeting and signed an authorization card, after learning about the organizing effort from employees Sorto and Chavez. (JA 310-11.)

On October 30, MES employee Rosales heard from another employee that Sanchez had called her a whore. Although Rosales complained to Supervisor Berganza, who told her to tell Operations Manager Wheeler, Rosales did not report the name-calling to Wheeler or Wyatt. Previously, Rosales had never had any problems with Sanchez. (JA 20-21; 555, 557-59.)

Later that day, Berganza called Sanchez into his office, saying that he had "bad news" for her, and that he had heard she "communicat[ed] with the Union." (JA 21 n.12; 313.) He then told her that she was discharged for not doing her job correctly. (JA 314.) A few days later, she received a termination letter stating that MES had requested her immediate removal for "unsatisfactory work behavior." (JA 21; 315, 873.)

5. Tito discharges Ramos for union activity

Ramos had worked at the recycling center for three years and was one of the top performers on the productivity test, filling 10 hoppers on each of the two days of testing. (JA 20-21; 872.) She attended four or five union meetings and signed a union authorization card. (JA 83, 85.)

On October 31, Supervisor Berganza emailed Tito's office manager, stating that Ramos had let material pass by her in order to bother coworkers and that Wyatt wanted her removed if it happened again. (JA 21; 874.) Less than two hours later, Berganza informed Tito's managers that MES Operations Supervisor Wyatt had requested Ramos's removal "because of her attitude problem." (JA 21; 875.) Although MES's contract with Tito allowed it to request that Tito remove an employee, Wyatt had never previously done so.[3] (JA 20 & n.8, 29; 408, 963.) In addition, Ramos had never previously received any complaints about her productivity, and Berganza had never spoken to her about letting material pass by her station. (JA 98.) Her sole disciplinary warning was in June 2013, for calling Berganza racist and unfair. (JA 21; 175, 876.)

Later that day, Berganza called Ramos to his office and discharged her for her "inappropriate attitude." (JA 92-93.) During this meeting, Berganza said he had noticed her speaking with the Union, and now that she was "with the Union," she should call Baiza "to find you a job." (JA 7, 11 n.18; 93-94.)

6. Tito discharges Sorto for union activity

Sorto worked for Tito at the recycling center for almost 11 years. In 2012, a piece of glass stuck in her hand while she was sorting materials. She returned to

[3] As for MES Manager Wheeler, in 11 years on the job he had made such a request only once. (JA 29; 359-62.)

work several months after surgery with medical limitations and continued to provide Supervisor Berganza with doctor's notes as she received care. (JA 112-13, 115, 119, 910-11, 913-20.) Initially, to accommodate her injury, Berganza assigned her to work at easier sorting stations. (JA 123-24.) Despite the injury, Sorto was one of the highest performers on the productivity test, filling 10 hoppers on the first day and 12 on the second. (JA 872.) She had received only one warning during her long tenure, for not wearing safety goggles in 2011. (JA 194, 881.)

In late September 2013, Sorto initiated the recycling employees' contact with the Union, after receiving Baiza's phone number from Ramirez. (JA 40, 105.) As noted above, in October and November she attended multiple union meetings, along with other recycling employees. (JA 106-08.)

On November 1, Berganza emailed Tito's office manager to say that he had been watching Sorto for a week, she was working very slowly, but he had not mentioned it to Wheeler. (JA 21; 877.) The same day, Berganza told Sorto for the first time that he had been watching her and she was working too slowly. Berganza had never previously counseled Sorto about her productivity. (JA 21; 109-10.) When Sorto explained that her injured hand was hurting, Berganza told her to get a doctor's note within two weeks. On November 8, Berganza asked Sorto if she had gone to the doctor. Sorto explained that she took the first available

appointment, on November 21. Berganza said he did not have light duty work for her. (JA 111-12, 126.)

On November 14, Berganza informed Tito's office manager that Wheeler and Wyatt had requested Sorto's removal because she did not meet MES production goals and bothered coworkers by telling them not to work hard. (JA 22; 879-80.) Berganza then called Sorto to his office and discharged her for "not producing enough." (JA 114.) He gave her a letter stating that Wyatt and Wheeler had requested her removal because she was "not achieving the goal" MES set for production and was bothering coworkers and telling them not to perform well. (JA 912.) He then told her to "go to the Union so they could help [her]." (JA 11 n.18; 113-14.)

7. Tito discharges Ramirez because of her union and other protected activity

Ramirez, whose husband was a named plaintiff in the overtime lawsuit, had worked for Tito for six years. (JA 20 n.9, 22, 30 n.34; 245-46.) Her only prior warning was for failing to wear safety goggles in 2011. (JA 22; 203-04, 884.) She had not previously been counseled for any issues related to her performance, and had an average performance on the productivity test, filling 8 hoppers the first day and 7 the second. (JA 262, 872.) Ramirez became involved with the union organizing effort, attended several union meetings in October and November, and was identified as a union supporter in the Union's November 14 letter. (JA 250,

256-57, 594.) She and other employees had complained to Berganza about their safety goggles before raising the issue with the Union. (JA 254-55.)

Previously, in October, coworker Martha Serpas had complained to Supervisor Berganza and Wheeler that Ramirez had teased her and called her old and stupid. After this, Wheeler told Berganza that he would begin monitoring Ramirez's work production. (JA 22; 196-97.) On November 27, Wheeler and Berganza met with Serpas, who again complained about the October incident. Berganza then emailed President Pierola and his son Alex, as well as Tito's office manager, about the episode. (JA 22; 882.) On December 2, Berganza notified Tito that Wheeler had requested Ramirez's removal for disrespecting her coworkers. No mention was made of her work performance. (JA 22-23; 883.) Berganza then telephoned Tito's office manager to ask if Ramirez could be transferred to the recycling center in Cockeysville, but the manager said Alex had rejected the idea. (JA 23; 200-01.)

After monitoring Ramirez's production in November, Wheeler requested her removal for poor performance. (JA 22; 389-90.) On December 6, Berganza called Ramirez into his office and told her MES wanted her removed because she "express[ed]" herself badly to her coworkers. He did not mention anything about her performance. (JA 261.) In her termination letter, Vice President Pierola wrote

that MES had requested her removal because of her "unsatisfactory work behavior." (JA 921.)

8. Tito discharges Chavez for union and other protected activity

Chavez had worked for Tito for approximately 10 years. She was one of the most productive employees, having received the highest score on MES's productivity test by filling 13 hoppers on the first day and 12 on the second. (JA 23; 391, 872.) As noted above, Chavez had repeatedly spoken to Berganza about problems with safety goggles, and she raised the issue directly to Wyatt and Wheeler, prompting Tito to threaten her with disciplinary action. (JA 23.) She attended union meetings throughout October and November and was identified as a union supporter on November 14. (JA 293-95, 594.)

On December 10, someone swept cold dirty water onto Chavez. She believed an employee named Iris was the culprit, but MES employee Rosales took the blame. (JA 23; 299-302.) Although Chavez and Rosales began arguing, Chavez did not touch Rosales, and Rosales was not afraid she would. (JA 23; 304, 306, 551.) Nevertheless, Rosales complained to Supervisor Berganza, who reported the incident to Wyatt. But Wyatt told Berganza that it was up to him whether to keep Chavez.

Although Wyatt and Wheeler never requested Chavez's removal, Berganza told Tito's managers on December 10 that Wheeler had said he did "not want to

have people with that kind of behavior in this work place." (JA 23 & n.19; 416-17, 885.) Berganza also obtained Chavez's personnel file, which included an October 10 memo criticizing her for complaining directly to MES about the goggles. (JA 23; 961.) On December 13, after reviewing the file, Berganza and Tito managers decided to discharge Chavez. (JA 23-24; 206.) Berganza handed Chavez a termination letter falsely stating that MES had requested her removal for "unsatisfactory work behavior." (JA 886.)

9. Berganza threatens employees with immigration consequences and discharge if they vote for the Union

On December 18, Supervisor Berganza called the remaining recycling employees into his office one-by-one to ask whether they had signed a union card and how they intended to vote. (JA 8; 76-78, 318-21.) That same day, he held a group meeting where he distributed and read to the employees part of construction employee Bautista's Board testimony averring that few Tito employees had "good" immigration papers. Berganza also told them that if the Union won the election, Tito would give their information to U.S. Immigration and Customs Enforcement, which would "get [employees] arrested." (JA 8; 80-81, 323, 890.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce, McFerran, and Emanuel) found that Tito violated Section 8(a)(1) and (3) of the Act by discharging, suspending, laying off, disciplining, threatening, coercing, disparaging, and interrogating employees; telling an employee to think about his family before engaging in protected concerted activity; telling an employee that those who joined the overtime lawsuit could not work overtime; telling employees that workplace issues could be resolved if they voted against the Union; calling pro-union employees "rotten apples"; telling employees it could close or subcontract work if the Union persisted; telling an employee that it would "fire all those son-of-a-bitch[es] after everything finishes with the [overtime] lawsuit"; ordering an employee to return his company vehicle; equating protected concerted activity with disloyalty; creating the impression of surveillance; soliciting grievances and promising to no longer disregard them; promulgating and discriminatorily enforcing an overtime policy; and encouraging MES to request removal of employees because of their participation in union and other protected concerted activity.

The Board's Order requires Tito to cease and desist from the unfair labor practices found and from, 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. (JA 14.) Affirmatively, the Board's Order directs Tito to reinstate the discharged and laid-off employees and make them whole; notify MES that it requests the recycling employees' reinstatement; make Amaya whole for his suspension; remove discharge, discipline, and suspension references from named employees' personnel files; make named employees whole for having overtime withheld; rescind the overtime policy; rescind the rule prohibiting employees from taking complaints about working conditions outside the chain of command; restore Araujo's use of a company vehicle; and in both Spanish and English, post the Board's remedial notice and read it aloud to employees. (JA 14-15.)

SUMMARY OF THE ARGUMENT

1. After employees exercised their Section 7 rights by contacting the Union and receiving help in protesting Tito's failure to pay overtime, Tito responded by committing a wide range of unlawful acts, including discharging, suspending, laying off, disciplining, threatening, disparaging, and interrogating employees; equating protected concerted activity with disloyalty; creating the impression of surveillance; and soliciting grievances and promising to no longer disregard them because of its employees' participation in union and other protected concerted activity. Before the Board and in its opening brief, Tito failed to challenge the Board's reasonable findings that it violated Section 8(a)(1) and (3) of

the Act by taking these actions. Accordingly, the Court should summarily enforce the portions of the Board's Order that correspond to the uncontested findings.

2. Substantial evidence supports the Board's further findings that Tito promulgated and discriminatorily applied an overtime policy in retaliation for employees' union and other protected concerted activity, causing them to lose overtime. Tito's owner and other managers told employees—explicitly and repeatedly—that its new policy requiring management approval for overtime applied only to employees who joined the overtime lawsuit against the company. True to its word, Tito discriminatorily enforced its policy. The Board reasonably inferred from Tito's admissions and uncontradicted testimony that Tito's actions were motivated by hostility to employees' protected activity, and found that Tito utterly failed to show it would have taken the same actions in the absence of that activity. Moreover, by leaving the determination of Tito's backpay obligations to subsequent compliance proceedings, the Board properly followed its standard procedure. Tito offers no reason to depart from that process here.

3. Finally, substantial evidence supports the Board's findings that Tito again violated the Act by encouraging MES to request the removal of recycling employees and then discharging them because of their union and protected concerted activity. Not only did Tito admit its anti-union motive for discharging Sanchez and Ramos, it proffered only pretextual explanations for the discharges of

Sorto, Ramirez, and Chavez. Given Tito's shifting explanations for their discharges and their disparately harsh treatment, the Board reasonably concluded that Tito would not have discharged them in the absence of their union and other protected activity.

STANDARD OF REVIEW

The Court "'accord[s] a very high degree of deference to administrative adjudications by the [Board]' and [will] reverse its findings 'only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (citation omitted). Under that deferential standard, the Court will uphold the Board's findings if they are supported by substantial evidence and will overturn them only if the Board "acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also* 29 U.S.C. § 160(e).

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives 'substantial deference to inferences the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (citation omitted). Thus, the Court's "review of the Board's conclusions as to

discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. Apr. 12, 2016) (reissued June 17, 2016) (internal quotation marks omitted).

The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted). The Court reviews Board remedial orders for abuse of discretion. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT TITO REPEATEDLY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT

Section 10(e) of the Act provides in relevant part that "no exception that has not been urged before the Board…shall be considered by the court," absent "extraordinary circumstances." 29 U.S.C. § 160(e). Before the Board, Tito failed to except to numerous Section 8(a)(1) and (3) findings made by the administrative law judge, which the Board accordingly adopted in the absence of exceptions. (JA 7 n.1.) Further, although the Board found additional violations based on exceptions to the judge's decision that were filed by the General Counsel (JA 7-9), Tito never moved for reconsideration of the Board's findings, as it was entitled to

do under 29 C.F.R. § 102.48(c)(1). Tito does not dispute its failure to challenge those findings below. Moreover, in its opening brief Tito fails to challenge any of those findings. *See, e.g.*, *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997) (issues not raised in opening brief are waived).

But even if Tito had contested those unfair labor practices in its opening brief, which it did not do, Section 10(e) of the Act would bar such a challenge. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002). Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to its uncontested findings. *Grondorf*, 107 F.3d at 885.

Specifically, the Court should summarily enforce the Board's findings that Tito violated Section 8(a)(1) of the Act by:

- Telling an employee to think about his family before engaging in protected concerted activity (JA 12);
- Equating employees' protected concerted activity with disloyalty by calling employees who joined the lawsuit backstabbers and telling them if they did not like the company, "there's thousands of jobs outside" (JA 12);
- Threatening employees that Tito would not permit employees participating in the overtime lawsuit to work overtime in the future (JA 12);

- Telling an employee that those who joined the overtime lawsuit could not work overtime (JA 12);
- Threatening to discipline employees who took complaints outside their "chain of command" (JA 12);
- Creating the impression of surveilling union activities (JA 12);
- Interrogating employees about their union activities (JA 12);
- Telling employees at a mandatory meeting that their workplace issues could be resolved if they voted against the Union, that prounion employees are "rotten apples," and that it could close or subcontract employees' work if the Union continued bothering it (JA 12);
- Threatening employees with immigration consequences and discharges for engaging in union activities (JA 12);
- Soliciting employees' grievances and promising to no longer disregard them (JA 12);
- Disparaging an employee during a meeting for his union support (JA 12):
- Disciplining employees for working overtime without advance management approval under the discriminatory overtime policy (JA 13);
- Threatening to sue an employee for defamation and discharge him for complaining to the Union about unpaid overtime wages (JA 13);

- Ordering an employee to return his company vehicle because he engaged in union or other protected concerted activities (JA 13);
- Telling an employee that it would "fire all those son-of-a-bitch[es] after everything finishes with the [overtime] lawsuit" (JA 13); and
- Telling an employee that he could get work if he "fix[ed] it" with Tito by withdrawing from the lawsuit (JA 13).

In addition, Tito failed to contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by:

- Disciplining and suspending Amaya for his participation in union and other protected concerted activities (JA 13); and
- Laying off Latapy and Sanchez, and discharging Latapy and Bautista because of their participation in protected concerted activities (JA 13).

Courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the contested issues are considered." *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (citation omitted). *Accord Torrington Extend-A-Care Employees Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991). As shown below, these numerous uncontested violations were part and parcel of Tito's

broader effort to coerce, threaten, discipline, and discharge employees for engaging in union and other protected concerted activities.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT TITO DISCRIMINATORILY PROMULGATED AND APPLIED AN OVERTIME POLICY AGAINST EMPLOYEES ENGAGED IN UNION AND OTHER PROTECTED CONCERTED ACTIVITY

A. The Act Protects Employees Engaged in Union and Other Concerted Activity

The employee rights guaranteed in Section 7 of the Act include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Because "[f]ew topics are of such immediate concern to employees as the level of their wages," employee discussions of pay "are protected under the 'mutual aid or protection' clause of § 7." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978). *Accord Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548 (D.C. Cir. 2016) (employee discussion of wages is a "core Section 7 right").

Section 8(a)(3) of the Act enforces the protections of Section 7 by prohibiting employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in

any labor organization." 29 U.S.C. § 158(a)(3).[4] Thus, an employer violates Section 8(a)(3) by discharging or taking other adverse employment actions against employees for engaging in union and other protected concerted activity.

When an employee has engaged in union and other concerted protected activity, and has been subject to an adverse employment action, the critical inquiry is the employer's motive for taking the adverse action. To make that determination, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983); *accord Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003). Courts will uphold the Board's finding of unlawful motive under *Wright Line* if substantial evidence establishes that protected activity was "a motivating factor" for the adverse action unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03; *accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). If

[4] A violation of Section 8(a)(3) of the Act produces a derivative violation of Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." 29 U.S.C. § 158(a)(1).

the employer's proffered reasons for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to establish its affirmative defense, and the inquiry is logically at an end. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998); *see also Wright Line*, 251 NLRB at 1084.

"As direct evidence of employer motivation is generally scarce, this [C]ourt has found that 'circumstantial evidence alone may establish unlawful motivation in a [Section] 8(a)(3) case.'" *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer's knowledge of and hostility toward protected activity, the timing of its action, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer" or its shifting reasons. *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB at 1088 n.12); *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001). Ultimately, because motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

Where, however, an employer admits that it took adverse employment action because of employees' union or other protected activities, further analysis of the employer's motive is unnecessary. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d

908, 916 (D.C. Cir. 2004); *accord L'Eggs Prod., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980).

B. Tito Promulgated and Discriminatorily Applied the New Overtime Policy To Retaliate Against Employees for Engaging in Union and Other Protected Concerted Activity

The record fully supports the Board's findings (JA 9-10) that Tito promulgated and then discriminatorily applied its new overtime policy to retaliate against employees because they sought help from the Union and filed an overtime lawsuit. As we now show, Tito admitted its intention to promulgate and apply the overtime policy to punish those who complained about not receiving overtime pay, and it failed to demonstrate it would have taken those actions absent the employees' union and other protected concerted activities.

1. Tito's own statements to employees establish that it promulgated and applied the policy for a discriminatory purpose

In finding that Tito's "underlying discriminatory purpose" in promulgating the new overtime policy was to "retaliate against those employees who participated in the lawsuit," (JA 9), the Board relied on explicit statements by Tito's owner and managers, including:

- President Pierola's statement to Araujo that his hours would not change because he had not joined the lawsuit (JA 9; 454-55);

- Superintendent Alarcon's statement to Zamora that Tito's overtime policy memo "says that those of you that are in the lawsuit cannot work more than 40 hours a week" (JA 9, 19 n.5; 450); and
- Superintendent Rodriguez's statement to Zamora, Berganza, and Latapy that the new overtime policy applied only to those who joined the lawsuit (JA 9, 19 & n.5; 428, 447, 468).

Tito concedes that Pierola, Alarcon, and Rodriguez made these admissions, which "eliminate any question" concerning Tito's unlawful motive. *L'Eggs*, 619 F.2d at 1343.

As the Board found, given these admissions, which provide direct evidence of Tito's explicitly unlawful purpose, a finding of unlawful motive is established without further analysis. (JA 10 n.11.) Nevertheless, on this record, the Board also reasonably concluded that its finding of unlawful motivation is further supported by circumstantial evidence. (JA 10 n.11.) Thus, as the Board explained, Tito's "own statements and actions reveal[ed]…that its overriding motivation was unlawful animus against Section 7 activity, not reducing its overtime exposure." (JA 10.) The timing of Tito's action also strongly supports the Board's finding of unlawful motive: just six days after employees filed the overtime lawsuit, Tito distributed the new policy memo requiring advance approval for overtime. (JA 9.) And, "true to its word," Tito discriminatorily applied its new policy to deny

overtime to those who engaged in protected activity by pursuing overtime with the Union's help via the lawsuit. (JA 10.) The Board also relied on "uncontradicted evidence" that Tito not only told employees it would discriminate against them, but "that it did so." (JA 28.)

Tito does not contest most of these findings, which conclusively establish its unlawful motive. Instead, Tito simply claims (Br. 52) that it approved all overtime requests by the plaintiffs, suggesting that the employees themselves were to blame for their lost overtime. But this argument ignores the uncontradicted testimony that Tito squarely and indisputably told employees—who previously had not been required to obtain management permission before working overtime—that its new policy applied only to those who joined the lawsuit. (JA 9; 427-28.) In sharp contrast with this new practice, Tito allowed employees who were not named in the lawsuit to continue working overtime without prior approval, including Araujo, who was not required to obtain approval until he joined the lawsuit in February. (JA 451, 454-55, 463-64, 600.) Admissions by Tito officials and undisputed employee testimony establish that it was not until employees began complaining about unpaid overtime that Tito instituted its new policy requiring them to obtain advance permission. (JA 26; 446, 451, 484, 495-98, 565-68.)

Given this evidence, Tito's argument that the rule is facially valid and "not meant to discourage protected concerted activity" (Br. 48), must fail. As an initial

matter, even a facially valid rule can be, as it was here, promulgated for a discriminatory purpose. Such a rule is unlawful. *See, e.g.*, *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 363 (D.C. Cir. 2016) (finding violation where employer instituted facially valid rule in response to employees' union activity); *Dillon Cos., Inc.*, 340 NLRB 1260 (2003) (same).

Tito gains no more ground in asserting (Br. 49-53) that it did not reduce the named plaintiffs' overtime hours. To the contrary, substantial evidence supports the Board's finding that Tito not only promulgated the new policy in response to employees' union and other protected concerted activity, it discriminatorily applied that policy. (JA 9-10 & n.14.) Thus, the seven original named plaintiffs worked, on average, at least 10 hours of overtime per pay period in the six pay periods immediately preceding the lawsuit, and some worked substantially more. (JA 10.) But in the first pay period after the lawsuit was filed on October 18, none of them received a single hour of overtime. (JA 10.)

By contrast, as shown in Addendum B at the end of this brief, in the first pay period after the lawsuit was filed, most of the employees who had not joined in the lawsuit worked more than 15 hours of overtime. In all, although Tito assigned 520 hours of overtime during those two weeks, none of it went to the original named plaintiffs. (JA 10; 602, 604, 608, 612, 617, 620, 623, 630, 633, 635-36, 638, 646-47, 650, 657, 662, 665, 670-71, 680, 688, 690, 693, 695, 701, 713, 726, 734.) In

addition, the payroll records clearly show that overtime increased for nonplaintiff employees.[5] Thus, Tito's statement that overtime decreased "for all of Tito's employees" (Br. 53), is simply not true.

Further, the Board reviewed Tito's payroll records and found that Tito "significantly reduced the overtime hours" of five employees who joined the lawsuit on November 13. (JA 10 n.14.) For example, over the six pay periods prior to the lawsuit, on average, Amaya worked 9.29 hours of overtime, and Latapy worked 26.92 hours. Over the six pay periods after the lawsuit was filed, however, Amaya worked 0 hours of overtime, and Latapy worked 1 hour. (JA 10 n.14; 602-05, 659-62, 736-37, 763.) Thus, substantial evidence supports the Board's findings that Tito promulgated a new overtime policy in response to employees' union and other protected concerted activity and then discriminatorily applied that policy.

[5] For example, Manuel Beza worked 80.25 hours overtime in the period ending October 19, but 115 hours in the November 2 period; Hector Cortez worked 85 hours in the period ending October 19, but 121 hours in the November 2 period. (JA 623, 635-36.)

2. The Board was not compelled to accept Tito's defense that it would have promulgated and discriminatorily implemented the overtime policy absent employees' union and other protected concerted activity

Faced with this compelling evidence of unlawful motivation, it was incumbent on Tito to show that it would have promulgated the policy and cut employees' overtime hours regardless of their protected activity. *See Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-28 (D.C. Cir. 2012) ("The emphasis is always on…the particular act that discouraged union activity"). This Tito did not do. It utterly failed to establish that it would have instituted the policy and made *the same* reduction in overtime hours even in the absence of employees' protected activity. *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016); *Cadbury Beverages*, 160 F.3d at 31.

Simply put, to establish its affirmative defense "the [employer's] rationale cannot only be a potential or partial reason for the [adverse action], it must be *the* justification." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotation marks and citation omitted). Moreover, the question on review is not "whether record evidence could support the [employer's] view of the issue, but whether it supports the [Board's] ultimate decision." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). The credited testimony, corroborating evidence, and reasonable inferences drawn from the record evidence, all support the Board's finding of a violation.

Tito asserts that it promulgated the new overtime policy simply to comply with federal wage and hour law, but its statements and actions contradict that claim. (Br. 46-47.) As shown above, it is undisputed that Tito's managers explicitly told employees that the new policy applied only to those who joined the overtime lawsuit—in other words, that it was discriminating against those employees who collectively sought their overtime pay by joining the lawsuit.

Tito gains no more ground in asserting that the Board's decision "effectively preclude[d]" it from "taking *any* corrective action in response to the lawsuit." (Br. 48.) As the Board noted, Tito could have simply paid its employees their correct overtime wages. (JA 29.) Instead, it chose to promulgate a new overtime policy in response to employees' protected activity and then apply the policy discriminatorily. Tito is, of course, free to monitor employee overtime and regulate costs. What it may not do, however, is take the actions it took here in adopting an overtime policy in response to protected concerted activity, telling employees that the new policy applied only to those engaged in such activity, and then restricting the overtime of employees because of that activity.

In his testimony, Vice President Pierola was utterly unable to explain why Tito "suddenly shifted the overtime hours of the plaintiffs in the lawsuit to other employees who had not joined the lawsuit." (JA 10, 26; 575-76.) Similarly, in its opening brief to the Court, Tito makes no attempt to show that the affected

employees would have suffered the same decrease in overtime hours even if they had not engaged in protected activity. Instead, Tito simply takes issue with the Board's analysis of its payroll records and asserts that overtime decreased seasonally and for all employees. (Br. 51-53.) Tito's argument (Br. 53) that the Board should have considered whether the plaintiffs worked more or fewer hours than other employees, not whether their own hours were reduced, ignores the record evidence that not all employees worked the same number of overtime hours. It further disregards the employees' uncontradicted testimony that, before they joined the lawsuit, they regularly worked overtime without first seeking management approval. (JA 439, 451, 469, 484.)

Further, as shown in Addendum B, Tito's own payroll records establish that overtime did not decrease across the board. Even if that were true, it would only partly account for the discrepancy in overtime between those who actively sought redress for unpaid overtime and those who did not. As for Tito's claim about the seasonality of its work (Br. 50-51), it not only ignores the 520 hours of overtime it assigned to nonplaintiffs in the first November pay period after the lawsuit was filed, it also turns a blind eye to uncontroverted employee testimony that before the lawsuit, named plaintiffs had regularly worked overtime, including in the winter. (JA 442, 466.) On this record, then, Tito failed to show it would have promulgated

the overtime policy or reduced employees' overtime hours in the absence of their protected activity, and the Board's findings should be affirmed.

C. The Board Acted Within Its Discretion by Deferring Backpay Calculations to Compliance

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006). Section 10(c) of the Act provides that the Board, upon finding that an unfair labor practice has been committed, shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act." 29 U.S.C. § 160(c). A backpay award is a make-whole remedy designed to restore "the economic status quo that [the discriminatee] would have obtained but for the…wrongful [act]." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969)). Indeed, a finding of discriminatory employment action "is presumptive proof that some back pay is owed." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972).

After finding that Tito discriminatorily promulgated and applied its new overtime policy, the Board ordered its standard remedy in such cases, namely that Tito make employees whole for any lost overtime. (JA 13.) Tito narrowly contests this remedy by arguing the Board should not have left the "details" of its

remedial Order to a subsequent compliance proceeding, and mistakenly asks the Court to remand the case to the Board now to determine the specifics of backpay owed in subsequent pay periods. (Br. 55.)

Tito fundamentally misunderstands the well-accepted, two-stage process long utilized by the Board in unfair-labor-practice cases, with judicial approval. In the initial stage, the Board determines—as it did here—whether violations occurred and issues a remedial order, which often provides for backpay. If a reviewing court upholds the Board's unfair-labor-practice findings and enforces its order, and a controversy subsequently arises over the terms of the remedy, the particulars can then be litigated in a subsequent compliance proceeding before the Board. 29 C.F.R. § 102.54-.59; *see also Sheet Metal Workers Int'l Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 500 (D.C. Cir. 2009) (describing the Board's compliance process).

As the Supreme Court explained long ago, "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any," to which employees are entitled. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). *Sure-Tan* approved the Board's longstanding practice of ordering its conventional backpay remedy, and "leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due." *Id.* *Sure-Tan*'s "if any" language makes clear that even

arguments that an employee is not eligible for any backpay belong in the compliance stage, rather than the merits stage, of the case. *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107 (D.C. Cir. 2003).

Therefore, during the Board's subsequent compliance proceeding, Tito "remains free to advance any appropriate arguments," and "the Board will undoubtedly come closer to approximating what would have occurred by attempting to estimate back pay, than by denying a back pay remedy altogether." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996). Whether backpay is due to individual employees for particular pay periods is exactly the type of determination the Board, with Court approval, leaves to a subsequent compliance proceeding. *See, e.g.*, *Ark Las Vegas*, 334 F.3d at 107 (leaving to compliance whether employee was entitled to any backpay); *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.3 (D.C. Cir. 1990) (leaving to compliance "the determination of the precise number of returning strikers eligible for payment"); *Akron Paint & Varnish Co*., 304 NLRB 1096, 1096-97 (1991) (estimating, during compliance proceeding, backpay owed for missed overtime), *enforced*, 985 F.2d 852 (6th Cir. 1992). Because the determination of the amounts owed in backpay is properly left to the compliance proceeding, the Court should enforce the Board's order and its standard backpay remedy and deny Tito's request for remand.

III. TITO VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ORCHESTRATING THE DISCHARGES OF FIVE RECYCLING EMPLOYEES BECAUSE OF THEIR UNION AND OTHER PROTECTED ACTIVITIES

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Discharging Employees for Engaging in Union and Other Protected Concerted Activities

As shown above in full, an employer violates the Act by taking adverse actions against employees because of their union and other protected concerted activity, and courts will uphold the Board's finding of unlawful motive if substantial evidence establishes that protected activity was "a motivating factor" for the adverse action, unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03, and cites cited at pp. 30-31. But where, as here, an employer admits that employees' union or other protected activities played a part in its decision, further analysis of motive is unnecessary because its admission serves to "eliminate any question" concerning its reason for the action. *L'Eggs*, 619 F.2d at 1343; *accord United Servs.*, 387 F.3d at 916.

Here, the Board found that Tito's motivation for orchestrating the discharge of recycling employees Sanchez, Ramos, Sorto, Ramirez, and Chavez was their participation in union and other protected activity. It further found that Tito admitted this motive in discharging Sanchez and Ramos and provided pretextual

explanations for the remaining discharges. As we now show, those findings are supported by substantial evidence and should be upheld.

B. Tito Explicitly Discharged Sanchez and Ramos for their Union Activities

1. Supervisor Berganza's statements to Sanchez and Ramos establish Tito's unlawful motive

Substantial evidence supports the Board's findings that Tito discharged Sanchez and Ramos because of their union activity. As an initial matter, it is uncontested that both Sanchez and Ramos engaged in union activity by signing union authorization cards and attending meetings.

Further, the Board found that its analysis under *Wright Line* was unnecessary with regard to the discharges of Sanchez and Ramos because the record contains direct evidence that Berganza, Tito's on-site supervisor at the recycling facility, "explicitly referenced their union activities when terminating them." (JA 11.) Thus, immediately before discharging Sanchez, Berganza told her that he had "bad news" for her, and that he heard she had "communication with the Union." (JA 11 & n.18; 313.) He then told Ramos that he noticed she had been speaking with the Union, and now that she was "with the Union," she should call Union Organizer Baiza "to find you a job." (JA 7, 11 n.18; 93-94.) Tito does not dispute that Berganza made these comments, nor does it dispute that his statement to Ramos independently violated Section 8(a)(1). (JA 12.)

Not only do these statements clearly establish Berganza's knowledge of their union activity, as the Board reasonably found, they "connect[] Sanchez' and Ramos' terminations to their union activity [and] are independently sufficient to demonstrate unlawful discrimination." (JA 11.) By themselves, these statements are "more than *Wright Line* requires," and constitute "affirmative evidence" that Sanchez's and Ramos's union activity was the "sole motive behind" Tito's decision to discharge them. *Quality Control Elec., Inc.*, 323 NLRB 238, 238 (1997). Indeed, Berganza's statements were "an outright confession of unlawful discrimination [that] eliminated any question concerning the intrinsic merits" of the discharges. *L'Eggs*, 619 F.2d at 1343 (internal quotation marks omitted); *accord United Servs.*, 387 F.3d at 916.

The Board also reasonably adopted the administrative law judge's decision to impute Berganza's knowledge of the employees' union activity to Tito, which had engaged in "obvious discrimination against several of its prounion employees." (JA 11 & n.18.) The judge determined, based in part on credibility determinations, that although Berganza had initially supported the Union, by October 30 he opposed it. (JA 18, 30.) To no avail, Tito cites (Br. 23-24) Berganza's testimony that he was a union supporter through late November or early December, when he learned that supervisors could not be part of the Union (JA 222). The Board, however, adopted the judge's explicit decision to discredit

that testimony, and to rely instead on Berganza's admission that he "no longer wanted to help" the Union and stopped answering organizers' phone calls. (JA 11 n.18, 18; 158.) This credibility determination should not be disturbed, given Tito's failure to show that it is "hopelessly incredible." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018).

Thus, Tito's contention that Berganza's knowledge should not be imputed to it because he supported the Union ignores Tito's admissions and the administrative law judge's credibility determinations appropriately adopted by the Board. (Br. 21-26.) The Board has long held that a supervisor's knowledge of employee union activity is imputed to the employer. *See, e.g.*, *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 312 (D.C. Cir. 1989); *Pellegrini Bros. Wines, Inc.*, 239 NLRB 1220, 1220 n.2 (1979). In entirely different circumstances, the Board has declined to impute the knowledge of a prounion supervisor. *See, e.g.*, *Music Express East, Inc.*, 340 NLRB 1063, 1064 (2003) ("ample affirmative evidence" that prounion supervisor did not inform manager of employee's union activity; no finding that prounion supervisor changed his sympathies). But that situation is inapplicable here. Simply put, Tito failed to undermine the Board's finding, based on its admissions and the credited testimony, that Berganza no longer supported the Union by October 30 when he discharged Sanchez. The Board therefore properly imputed Berganza's knowledge to Tito under well-settled principles.

2. The record did not compel the Board to accept Tito's affirmative defense that it would have discharged Sanchez and Ramos in the absence of their union activity

Given the suspect nature of Tito's asserted reasons for discharging Sanchez and Ramos, the Board was not compelled to accept its stated rationale at face value. Thus, Tito claims (Br. 35-36) that Wyatt requested Sanchez's removal because she performed poorly and called Rosales names, but the record shows otherwise. For instance, the Board found "no credible evidence" to support Wyatt's claim that Sanchez's performance was "very low." (JA 21.) Moreover, Sanchez had never been disciplined or warned about her performance before Tito summarily discharged her. (JA 21 & n.12; 170, 314, 317.) To the contrary, Sanchez, who had worked only a few months at the recycling center, filled eight hoppers on the first day of her productivity test and nine hoppers on the second. By contrast, workers who filled fewer hoppers were not discharged. (JA 20; 368, 872.) Meanwhile, Supervisor Berganza claimed that he first noticed problems with her performance "[a]fter she became friends with her coworkers" and the employees "start[ed] talking among themselves." (JA 172.) In effect, Berganza was acknowledging that her concerted activity prompted his scrutiny.

Nor did the Board find any credible evidence to support Wyatt's allegation of name-calling. The Board adopted the administrative law judge's decision to credit Sanchez's testimony that she never called Rosales a bad name. As for

Rosales, she testified only that someone told her Sanchez had called her a name, but she did not hear it herself. (JA 20-21; 555.) Rosales also admitted that other employees made fun of her "all the time." (JA 557.)

There is even more evidence of pretext. Notably, Supervisor Berganza, whom the judge found to be "not to be a credible witness generally," proffered inconsistent explanations for Sanchez's discharge. (JA 21 n.12.) Initially, in his Board affidavit, Berganza averred that Sanchez was removed for letting too much material pass her on the line. But at the hearing, Berganza changed course and claimed she was removed for calling Rosales a "son of a bitch," an accusation he did not bother to mention when he discharged her. (JA 167, 314.)

Similarly, although Tito claims (Br. 36) that Wyatt requested Ramos's removal because of low performance, the Board found "no credible evidence to support such a contention." (JA 21; 410.) To the contrary, the record shows that Ramos was one of the top performers on the productivity test, filling 10 hoppers on both days. (JA 20; 872.) And although Wyatt initially testified that Rosales and Garcia told him Ramos allowed material to bypass her on the line to bother her coworkers, Rosales did not corroborate that in her testimony and Garcia did not testify at all. (JA 21.) The Board therefore adopted the judge's determination to discredit Wyatt's testimony, finding it to be "false." (JA 21.) Similarly, the judge discredited Berganza's testimony that Ramos admitted to deliberately letting

material pass her to bother her coworkers—a claim that was controverted by Ramos's denial. (JA 21; 96.) As explained more fully below (pp. 54-56), Tito utterly fails to meet its heavy burden of showing that these credibility rulings were "patently insupportable." *PruittHealth*, 888 F.3d at 1294.

In sum, drawing conclusions from the credited testimony, the Board reasonably found that Wyatt based his decision to demand that Tito remove Sanchez and Ramos on information he received from Supervisor Berganza. And Berganza's statements to Wyatt were motivated by Tito's "desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert." (JA 21.) Given Tito's failure to show that the evidence is "so compelling that no reasonable factfinder could fail to find" in its favor, the Board's findings should be affirmed. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016).

C. Tito Discharged Sorto, Ramirez, and Chavez Because of Their Union Activity

1. Tito knew about and was hostile toward the employees' protected union activity

It is undisputed that Sorto, Ramirez, and Chavez were all involved in union activity. Sorto was the first recycling employee to contact the Union after Ramirez gave her Union Organizer Baiza's telephone number. All three employees attended union meetings and signed union cards. Additionally, Supervisor

Berganza questioned Baiza about these employees (as well as Sanchez and Ramos) by name, asking whether they had signed cards. When Baiza would not answer, Berganza asked Coats and learned that "Maria" had signed a card. (JA 19-20 & n.7; 40, 46-48, 153-54, 156.)

Not only were all three employees involved in union activity, but Tito knew about it. As Tito concedes, it knew of Ramirez and Chavez's involvement before discharging them. (Br. 21.) Moreover, the Board found that Tito's knowledge of Sorto's union activity was clearly established when Supervisor Berganza, in discharging her, said she should "go to the Union so they could help [her]." (JA 11 n.18; 113-14.)

Tito's overt hostility toward employees' union and other protected concerted activity is undisputed. Tito does not contest that, among other unlawful acts, it coerced, interrogated, and threatened construction employees because they joined together to seek their unpaid overtime. Nor does it contest the Board's findings that it created the impression of surveilling Ramos's union activity; prohibited recycling employees from raising common concerns directly to MES; threatened Chavez with discipline for discussing their concerns about ill-fitting safety goggles directly with MES; interrogated the recycling employees about their union activities and support; and threatened them with immigration-related consequences and discharge for engaging in union activities. Moreover, the Board

found a "correlation" between MES's decision to monitor Ramirez's performance and Tito's awareness of the overtime lawsuit in which her husband participated. (JA 30 n.34.) Tito's animus toward the employees who raised common concerns about wages and working conditions is, therefore, well established.

Tito's complaint that, in assessing its animus, the Board overlooked the bifurcated nature of its business (Br. 27), ignores the weight of the evidence. Tito's managers exhibited animus toward both the construction and recycling employees. Indeed, as Tito concedes, Supervisor Berganza created the impression of surveilling the recycling employees' union activities, interrogated them, and threatened them with immigration consequences and discharge. (JA 7-8.) Moreover, Berganza testified that he was in daily contact with Tito's office manager, Davys Ramos, and sought her guidance. (JA 138-39.) Additionally, Berganza lacked authority to discharge employees; he first had to seek permission from Ramos and Vice President Pierola. (JA 130-31.) In these circumstances, the Board appropriately determined that Tito harbored animus toward the union activities of its recycling employees.

2. The Board was not compelled to accept Tito's pretextual reasons for discharging Sorto, Ramirez, and Chavez

Substantial evidence supports the Board's finding that Tito's stated reasons for discharging Sorto, Ramirez, and Chavez were pretextual. (JA 11.) Tito contends that it discharged them because they were working slowly (Sorto) or

badly (Ramirez), or acting inappropriately (Chavez). (Br. 38, 40, 42.) But Tito cannot meet its burden on its affirmative defense simply by articulating nondiscriminatory reasons for getting rid of them. *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996); *Herman Bros, Inc. v. NLRB*, 658 F.2d 201, 208-09 (3d Cir. 1981). Rather, as shown above (pp. 30-31), once the evidence supports an inference of unlawful motive, Tito bore the burden of *demonstrating* that it would have taken the same action even in the absence of the employee's protected activity. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). Tito failed to meet this burden, and the Board was not compelled to find otherwise.

As an initial matter, although Tito claims (Br. 38) it discharged Sorto for working slowly, she received one of the highest scores on the productivity test, filling 10 hoppers on the first day and 12 on the second. (JA 20; 872.) Tito similarly claims (Br. 40) it discharged Ramirez for poor performance, but she had an average score, filling eight hoppers on the first day and seven on the second. (JA 872.) By contrast, Tito tellingly took no action against the lowest scorers on that test, including those who filled only five or six hoppers. (JA 20; 173-74.)

Tito discharged Chavez after someone swept cold, dirty water onto her, and she argued with Rosales about it. But the argument did not involve any hitting, pushing, or shoving, and MES's onsite officials—Wyatt and Wheeler—did not

request her removal. Instead, it was Berganza who made the decision to seek her discharge after reviewing her personnel file, which contained only one recent incident—namely, Berganza's own note complaining that Chavez had spoken directly to Wyatt and Wheeler about safety goggles. (JA 23 & n.19; 961.)

Tito's harsh treatment of Sorto, Ramirez, and Chavez stands in stark contrast to its more benign treatment of other employees, providing additional evidence that its true motive behind their discharges was hostility toward their union activity. For example, there is no evidence that Wyatt had ever requested an employee's removal, and Wheeler could remember doing so only once before the organizing drive. (JA 29.) In that instance, however, Wheeler documented the employee's performance problems over a three-to-four-month period before requesting her removal. (JA 29.)

The credited record evidence also shows that Tito routinely warned other employees before discharging them. For example, Tito warned Andrea Monroy three times for misconduct, including pushing coworkers; she was finally discharged not for that behavior, but for abandoning her job. (JA 29 n.32; 928.) Similarly, Berganza warned Anely Cavallini three times for working slowly and leaving the line to sleep before discharging her. (JA 225-27.) When Keila Diaz was found sleeping in her car during work time, Wheeler simply told Berganza her behavior would not be tolerated. He did not even request her removal. (JA 29;

966.) In contrast, after the union organizing drive began, MES requested the removal of four employees, and Tito discharged five, without first warning them about any performance deficiencies or misconduct issues. Tito provided no explanation for its disparately harsh treatment of these union supporters.

Faced with this powerful evidence that Sorto, Ramirez, and Chavez's union activities were a motivating factor in the adverse actions taken against them, Tito needed to show it would have taken the same actions even in the absence of their protected activity. But because Tito's reasons for discharging them were false and thus pretextual, Tito necessarily failed to make that showing, as the Board reasonably found. (JA 11.) *See Wright Line*, 251 NLRB at 1083-84, and cases cited at pp.30-31.

D. Tito's Remaining Challenges to the Board's Findings Must Fail

1. Tito has not shown that the Board's credibility determinations are hopelessly incredible

In challenging the Board's findings, Tito's primary complaint is that the Board erred in adopting the administrative law judge's decision to credit employee testimony and discredit Berganza, Wyatt, and Wheeler. (Br. 12-13, 15-16, 37.) But Tito has failed to show, as it must, that those credibility determinations are "hopelessly incredible." *PruittHealth*, 888 F.3d at 1294. Nor could it on this record. The judge found Berganza, Wyatt, and Wheeler not to be credible

witnesses, a reasonable conclusion given the record as a whole. (JA 21.) The judge based his credibility determinations on "the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences" drawn from the record. (JA 18.)

Specifically, the judge found Tito's witnesses not credible and their explanations contradictory or mysterious. Supervisor Berganza, for example, gave conflicting accounts of Sanchez's discharge in his Board affidavit and in his testimony at the hearing (see p. 48 above). His and Wheeler's accounts of monitoring Sorto's performance were also inconsistent and contradictory. (JA 21-22.) Further, Wheeler failed to explain why an employee's complaint that Ramirez called her "old and stupid" prompted him to monitor her work performance for a month. (JA 22.) For his part, Wyatt testified that he requested Ramirez's removal because she worked slowly and teased a coworker, but his Board affidavit provided earlier during the investigatory phase of the case mentioned nothing about her performance. These inconsistencies "provide[] more than a sufficient basis" for the judge's credibility determinations. *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996).

Contrary to Tito's claims (Br. 39, 41), the judge reasonably gave no weight to Wheeler's day-planner notes, which he had not recorded contemporaneously. (JA 20 n.11, 22 & n.13.) Wheeler was unable to explain his belated inclusion of

notes about Sanchez, Ramos, and Sorto in December 2013, after those employees had been discharged but coinciding with a note that he received a call from a Board agent "about the Tito ladies." (JA 376-77, 906.) Another note raised an entirely new accusation against Ramirez that was not mentioned at the hearing—that she worked faster when watched. Wheeler made the same accusation against Sorto, leading the judge to doubt whether either was true. (JA 22 n.13.)

Finally, the judge reasonably discredited Wyatt's testimony that he relied on statements by MES employees Rosales or Garcia in deciding to request the removal of Sanchez and Ramos. The judge noted that Rosales's testimony did not corroborate Wyatt, and Garcia did not testify at all. (JA 21.) Similarly, Berganza testified that he learned Sorto told employees to slow down on the production line from employee Alba Rauda. But Tito did not call Rauda to testify, and the judge concluded there was no credible evidence that the accusation was true. (JA 22.) Given these considerations, the judge appropriately credited the employees' accounts. *See Daikichi Corp.*, 335 NLRB 622, 623 (2001) (judge appropriately relied on employer's failure to offer available witness testimony to controvert employees' testimony in making credibility determinations), *enforced mem.*, 56 F. App'x 516 (D.C. Cir. 2003).

2. Tito orchestrated MES's removal requests

Tito further argues that MES requested the removal of four of the employees, and it was merely following MES's orders. (Br. 29.) As an initial matter, MES never even requested Chavez's removal from the facility. (JA 23.) Nor did MES request that the other employees be *discharged*; instead, it merely asked that they be removed from the facility. Tito itself decided to discharge them instead of transferring them to other recycling facilities or construction jobs where one of them had prior experience. In fact, Vice President Pierola specifically refused Supervisor Berganza's request that Ramirez be transferred. (JA 23; 166, 200-01, 307-08.)

As for Sanchez, Ramos, and Sorto, it was Berganza who provided the impetus for Wheeler and Wyatt to request their removal from the facility. Thus, as the judge reasonably found, Wyatt's negative information about Sanchez and Ramos came from Berganza, who "was motivated by [Tito's] desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert." (JA 21.) As for Sorto, Wheeler requested her removal after Berganza informed him she was telling employees to slow down on the production line, an accusation for which the judge found "no credible evidence." (JA 22.) The judge could find no reasonable explanation, except for the protected activity of

Ramirez and her husband, for Wheeler monitoring her work performance after an employee complained about teasing. (JA 22-23, 30 n.34.)

Thus, Tito's claim that it was simply following MES's orders is belied by the fact that it was the prime mover behind those requests, passing on negative information about the employees to prompt MES to seek their removal. The fact that Wyatt and Wheeler acceded does not absolve Tito of its responsibility for orchestrating their removal requests and thereby discriminating against prounion employees at the recycling facility. *See Meda-Care Ambulance, Inc.*, 266 NLRB 1208, 1213 (1983) (employer orchestrated complaints from customer, creating a pretext for discharge), *enforced*, 740 F.2d 971 (7th Cir. 1984). As the Board found, "the unprecedented nature and number of the MES removal requests during the organizing drive" warranted the conclusion that "none of these requests would have been made without the involvement of [Tito]." (JA 23 n.15.) On this record, substantial evidence supports the Board's finding that Tito failed to show it would have discharged Sanchez, Ramos, Sorto, Ramirez, and Chavez in the absence of their union and other protected activity.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Tito's petition for review and enforce the Board's Order in full.

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March 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TITO CONTRACTORS, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1107 &
	)	18-1119
Respondent/Cross-Petitioner	)	
and	)	
	)	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12951 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/David Habenstreit
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Dated at Washington, DC
this 1st day of March 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	)	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
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Dated at Washington, DC
this 1st day of March 2019

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that

membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall

state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

***

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

***

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.54-.59. Compliance Specifications

29 C.F.R. § 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to § 102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

29 C.F.R. § 102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

29 C.F.R. § 102.56 Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.
(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

29 C.F.R. § 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

29 C.F.R. § 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

29 C.F.R. § 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

ADDENDUM B

ADDENDUM B

Original 7 plaintiffs	Hours worked over 80 during pay period ending 11/02/13
1. Roberto Ayala	0
2. Mauricio Bautista	0
3. Geremias Berganza	0
4. Hector Delgado	0
5. Sabino Diaz	0
6. Jose Jimenez	0
7. Domingo Zamora	0
Other employees	
8. Angel Alvarado	17
9. Jose Amaya	0
10. Norberto Araujo	60
11. Jose Berganza	33
12. Jose Antonio Diaz Berganza	0
13. Vitalino Berganza	30
14. Manuel Beza	35
15. Edison Carrillo	20
16. Henry Castellon	34
17. Hector Cortez	41
18. Giovany Garza	51
19. Jose Granados	33
20. Enrique Guzman	47
21. Hernan Latapy	0
22. Manuel Medrano	52
23. Luis Palacios	21
24. Jorge Ramos	0
25. Cesar Bueco Rodriguez	0
26. Manuel Rodriguez	21
27. Leonel Rosales	25
28. Nestor Sanchez	0
Total overtime hours	520

Source: JA 602, 604, 608, 612, 617, 620, 623, 630, 633, 635-36, 638, 646-47, 650, 657, 662, 665, 670-71, 680, 688, 690, 693, 695, 701, 713, 726, 734.

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Highlights

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TOP STORIES

Tesla Worker Must Arbitrate Race Bias Claims: 9th Cir (1)

By Robert Iafolla and Patrick Dorrian

Tesla Inc. can require a black former production associate in California to arbitrate claims that he was harassed and denied promotion because of his race, a federal appeals court ruled May 17.

Settlement with Amazon IT Workers 'Laughable,' Judge Rules (1)

By Erin Mulvaney and Perry Cooper

A $62,000 settlement agreement between an Amazon.com subsidiary and a group of its IT workers, which would mean modest recovery for their overtime claims but steep attorneys' fees, was "nothing short of laughable," a Kansas federal judge ruled May 16.

Two Labor Department Insiders in Mix for Chief of Staff Role

By Ben Penn

Two Labor Department aides are considered the leading candidates to replace departing Chief of Staff Nicholas Geale as the secretary's top adviser, a source close to the secretary told Bloomberg Law.

House Passes LGBT Rights Bill, but Next Steps in Senate Unclear

By Jaclyn Diaz

The House today passed legislation that would ban LGBT discrimination at work and in a wide range of other situations, sending the measure to the Senate where it faces an uncertain fate.

DISCRIMINATION

Black Exotic Dancers to Collect $3.3M in EEOC Race Bias Win

By Patrick Dorrian

A Jackson, Miss., strip club must pay five black dancers a total of $3.3 million for race discrimination, a federal jury decided.

Dyslexic, Black, Older D.C. Water Worker Fails With Bias Claims

By Patrick Dorrian

A quick win for the District of Columbia Water and Sewer Authority in a former electrical equipment repairer's disability, race, and age discrimination case was proper, the D.C. Circuit ruled May 17.

Verizon Worker Missed 'High' Bar for Proving Harassment

By Patrick Dorrian

Verizon Wireless doesn't have to stand trial on a former customer service supervisor's harassment and age and sex discrimination claims, the Fourth Circuit ruled.

Riot Games to Keep Arbitration Clause Despite Employee Protest

By Josh Eidelson, Joshua Brustein and Christopher Palmeri

Riot Games, maker of the worldwide hit video game League of Legends, said Thursday that it would maintain its requirement that employees' sexual-harassment or discrimination complaints be handled via arbitration, rejecting

demands from workers who walked out over the issue last week.

WAGE & HOUR

$15 Minimum Wage Coming to Connecticut

By Aaron Nicodemus

Connecticut will become the seventh state to raise its minimum wage to $15 per hour.

New Perk for Fast-Food Workers: Finish a Shift, Get Cash to Go

By Leslie Patton

Workers at Church's Chicken, Pizza Hut and Checkers can now get expedited pay as U.S. restaurants grapple with a labor shortage that's not showing any signs of abating.

Oracle Ordered to Turn Over More Pay Data in DOL Bias Case (1)

By Paige Smith

Oracle Corp. must submit additional employee salary information in ongoing litigation involving the tech giant's pay practices, but it won't have to turn over all of the data requested by the Labor Department.

LABOR RELATIONS

Iowa Court Tosses Union Challenges to Collective Bargaining Law

By Michael J. Bologna

The Iowa Supreme Court shut down efforts to kill a 2017 law limiting the collective bargaining rights of public employees. It issued a pair of rulings May 17 tossing constitutional challenges by two of the state's largest unions.

IMMIGRATION

Trump's Termination of DACA Program Unlawful, 4th Cir. Rules (2)

By Laura D. Francis

The Trump administration's decision to end the Deferred Action for Childhood Arrivals program was illegal because it wasn't adequately explained, a split federal appeals court in Richmond, Va., ruled.

Trump H-1B Visa Policy Info May Be Revealed in Wake of Lawsuits

By Laura D. Francis

A legal challenge to a Trump administration immigration policy is setting the stage for a new approach to H-1B litigation that could open a window into the inner workings of U.S. Citizenship and Immigration Services.

DACA Recipient Accused of Gang Activity to File New Complaint

By Laura D. Francis

A Deferred Action for Childhood Arrivals recipient who said the government wrongly revoked his protections and work permit is now getting a chance to litigate over the denial of his DACA renewal application.

Army Can't Shed Immigrant Recruits' Discharge Challenge

By Perry Cooper

Sovereign immunity can't save the U.S. Army from a proposed class action by immigrant soldiers alleging unlawful discharge, a federal court said May 16.

BUSINESS OF LAW

Litigation Funder Pravati Hires Skadden Attorney

By Stephanie Russell-Kraft

Litigation finance firm Pravati Capital has hired Skadden litigator Adam C. Tubbs as director of business development for the company's New York City office.

LEGAL PROFESSION

Brown v. Board Turns 65, and Trump Picks Won't Say It's Right

By Patrick L. Gregory

Sixty-five years ago, the Supreme Court ruled unanimously that racial segregation in public schools was unconstitutional, in Brown v. Board of Education, which eventually led to the integration of schools.

PRACTITIONER INSIGHTS

INSIGHT: Defending Brown and the Rule of Law

Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund Inc., hails the 65th anniversary of Brown v. Board of Education as one of the most consequential decisions of the modern U.S. Supreme Court for its role in desegregating education—but also as bellwether for transforming the American legal system for breaking segregation in legal education and democratizing the image of the lawyers in our society.

LATEST CASES

Case: Discrimination/Discharge (N.D. Ill.)

The Union Pacific Railroad Company is entitled to summary judgment on a claim by a protected-age black female engineer alleging that her race, age, and/or sex motivated her discharge, rather than her violation of two critical safety rules within a one-year period. Although two co-workers outside her protected classes who were involved in the track switch alignment incident that led to the second violation weren't disciplined, they weren't similarly situated to her as neither of them had the opportunity to see the misaligned switch and stop the train, the court stated. The case is .

Case: Discrimination/Union Hiring (M.D. Pa.)

A female construction union member may proceed with her gender discrimination claim alleging that two male union members received preference over her for job placements. While the union contends that she wasn't selected

because she was an "apprentice" rather than a "journeyman," and that her union book was invalid, it provided placements to both of the male union members even though they were not journeymen and they obtained their union books in the same manner as the female member, the court said. The case is Bliss v. Laborers, 2019 BL 178137, M.D. Pa., 3:17cv1837, 5/16/19 .

Case: FMLA/Interference (S.D. Ohio)

An employee showed that a retail management operator in Ohio is liable for interfering with her rights under the Family and Medical Leave Act when it fired her for two consecutive no-call no-shows after she had informed it of her need for intermittent FMLA leave. The operator scheduled her to work on the days in question after it accepted her FMLA leave forms requesting an extension of her previously approved leave period, it didn't inform her of the scheduled shifts, and it fired her for the absences before inquiring about whether or not she needed continued FMLA leave for those days; additionally, the operator's assertion that its attendance policy, which places a higher duty on the employee to notify than the FMLA does, supersedes the Act isn't a legitimate reason for its actions. The case is Clark v. Cherryhill Mgmt., Inc., 2019 BL 179047, S.D. Ohio, No. 3:17-cv-074, 5/16/19.

Case: Disability Discrimination/Arbitration (E.D. Tex.)

A Hobby Lobby employee in Texas must arbitrate her claim that she was fired due to her disability, even though she says that she was 17 years old when she was told to "shut up and sign" an arbitration agreement to receive her paycheck. While she was hired at age 17, she was 29 years old when she signed a form acknowledging that she had received and read an employee handbook that included an agreement to arbitrate all employment-related disputes, and her working for another four years as an at-will employee shows that she accepted the agreement under state contract law, the court found. The case is McKinnon v. Hobby Lobby Stores, Inc., 2019 BL 178256, E.D. Tex., 2:18-CV-00179-JRG-RSP, 5/16/19.

Case: Wage & Hour/Collective Certification (N.D. Ind.)

Indiana truck drivers for a trucking company may not move forward with their class and collective actions for state and federal unpaid overtime and other

wage violations. They didn't show that the proposed class is sufficiently numerous, because they can only identify 16 potential members, and they didn't show that they would face any special difficulty in joining individual members. The case is Koch v. Jerry W. Bailey Trucking, Inc., 2019 BL 178819, N.D. Ind., 1:14-CV-72-HAB, 5/16/19.

Case: Labor Relations/Prehire Contract (N.L.R.B.)

Unfair labor practices committed by Raymond Interior Systems and a Carpenters local invalidated a prehire agreement that they executed after Raymond Interiors ended its bargaining relationship with a Painters union. The employer unlawfully assisted the Carpenters in obtaining authorization cards by threatening its drywall finishing employees that there would be no work for them if they failed to sign with the Carpenters "that day," its statement coerced employees into signing cards, and its unlawful conduct was an attempt to deprive the employees of their rights to decertify the Carpenters or replace them with another representative. The case is Raymond Interior Systems, 2019 BL 174189, N.L.R.B., 21-CB-014259, 5/14/19.

Case: Discrimination/Arbitration (9th Cir.)

A California federal district court didn't err in finding that a black production associate must arbitrate his 42 U.S.C. § 1981 racial discrimination and retaliation claims against Tesla pursuant to an arbitration provision in his employment contract. His § 1981 claims are subject to compulsory arbitration because the unambiguous language of § 118 of the Civil Rights Act of 1991, stating in part that "the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title," applies to § 1981 and and the statutory purpose of § 1981 doesn't reveal a preclusion of arbitrability. The case is Lambert v. Tesla, Inc., 2019 BL 179774, 9th Cir., 18-15203, 5/17/19.

Case: Discrimination/Discharge (D.D.C.)

A black female program manager may not proceed with her claim that the United States Department of Defense fired her because of her race and sex, rather than for repeated misconduct and failure to follow directions. She didn't show that she was treated less favorably than any non-black or male program

managers because her alleged comparators didn't engage in similar misconduct for a comparable amount of time, and the fact that her final performance evaluation recommended that she was "sustaining her current assignment" doesn't negate the Department's nondiscriminatory reasons for firing her. The case is Morse v. Mattis, 2019 BL 178421, D.D.C., No. 17-1881, 5/16/19.

Case: Disability Discrimination/'Disability' (E.D. Mo.)

A contract specialist, who had a heart attack three days after she started working at the National Geospatial Intelligence Agency, wasn't disabled for purposes of her Rehabilitation Act claim when she was later forced to retire in lieu of termination for poor performance, even though she has a surgically implanted defibrillator. She didn't show that her cardiac impairment substantially limited any of her major life activities, given that she didn't say how it affected her sleep and her other claimed limitations--the inability to run a marathon, lift over 40 pounds, or walk for miles--aren't activities that most people in the general population can do. The case is Gates v. Cardillo, 2019 BL 178817, E.D. Mo., 4:17-CV-02320-NCC, 5/16/19.

Case: Discrimination/Disparate Treatment (9th Cir.)

A non-Caucasian physician may not proceed with his claim that a hospital in California treated him less favorably than his co-workers because of his race when many of his surgical privileges were taken away and he was subjected to a review process following the death of one of his patients. He didn't show that he was similarly situated to his alleged Caucasian comparators, who weren't subjected to the same consequences following patients' deaths, because he provided no evidence that they performed comparable surgeries or made similar errors. The case is Bastidas v. Good Samaritan Hosp. LP, 2019 BL 178711, 9th Cir., 17-16432, unpublished 5/16/19.

Case: Wage & Hour/Settlement Agreements (D. Kan.)

Amazon.com and a group of its fulfillment-center IT support engineers must revise their proposed settlement of the engineers' collective action for unpaid overtime, because the claims-release provision isn't limited to the claims at issue in their complaint, and it requires the engineers to release claims against

shareholders, representatives, and others who aren't party to the lawsuit. The case is Christeson v. Amazon.com.ksdc, LLC, 2019 BL 178783, D. Kan., 18-2043-KHV, 5/16/19.

Case: Wage & Hour/Hours Worked (E.D. Va.)

Family service workers for the city of Richmond, Virginia, didn't show that their time spent on-call was compensable overtime work, because they were provided with an on-call cell phone, which allowed them to leave their house, and they were permitted to engage in personal activities as long as they could hear and respond to phone calls; however, they may move forward with their claim for unpaid overtime when they worked through lunch breaks and on nights and weekends. The case is White v. City of Richmond, 2019 BL 179022, E.D. Va., 3:18-CV-504-JAG, 5/16/19.

Case: Discrimination/Hostile Work Environment (4th Cir.)

A female former employee may not proceed with her claim that Verizon Wireless in South Carolina subjected her to a hostile work environment because of her sex and race. The alleged conduct, including her supervisor's investigation into a team member's dissatisfaction with her and his decision to place her on a performance improvement plan, wasn't severe or pervasive; additionally, Verizon promptly investigated any allegations of harassment that she notified it of. The case is Dortch v. Cellco P'ship, 2019 BL 178578, 4th Cir., 18-2108, unpublished 5/16/19.

Case: Discrimination/Disparate Treatment (5th Cir.)

A federal district court erred in determining that two Italian-born employees couldn't proceed with their claim that the University of Texas Medical Branch discriminated against them because of their national origin. The district court held them to too high of a pleading standard in order to survive a "Rule 12(b)(6) motion to dismiss for failure to state a claim," and when applying the appropriate standard their allegations, including that the chairman of surgery who made derogatory remarks about Italians reduced their salaries and restricted their work duties, could show that the university acted in a discriminatory manner. The case is Cicalese v. Univ. of Tex. Med. Branch, 2019 BL 178649, 5th Cir., No. 18-40408, 5/16/19.

Case: Labor Relations/Interference (N.L.R.B.)

A Longshoremen's Association local didn't unlawfully deny training opportunities to a casual worker because of her gender. The board's general counsel argued that the union's system of administering training was itself arbitrary, but his amended complaint wasn't so closely connected to that new theory to have put the union on notice that it should have defended itself against allegations involving its training system, and an administrative law judge found that the union offered the worker a training opportunity that she declined. The case is International Longshoremen's Association, Local 28 (Ceres Gulf Inc.), 2019 BL 176806, N.L.R.B., 16-CB-194603, 5/15/19.

Case: Individual Employment Rights/Defamation (Fla. 1st DCA)

Tallahassee Memorial Healthcare Inc. is entitled to judicial relief to quash an emergency room patient care assistant's motion for punitive damages in her defamation lawsuit against the hospital. The employee sought to add a punitive damages claim against TMH based on the conduct of the director of the emergency room. She failed to allege, in support of her damages motion, that management knowingly condoned, ratified or consented to the ER director's alleged misconduct, as required by Florida law, so her motion should have been denied, a court said. The case is Tallahassee Mem'l Healthcare, Inc. v. Dukes, 2019 BL 178297, Fla. Dist. Ct. App., 1st Dist., No. 1D18-2426, 5/16/19.

Case: Individual Employment Rights/Due Process (D.D.C.)

The U.S. Department of the Army can't avoid the due process claims of a putative class of Army soldiers who enlisted through Military Accessions Vital to the National Interest, a special program that enables certain non-citizens to enlist and serve in the U.S. Armed Forces, and were summarily discharged by the Army without notice or process. The Department of the Army argued that the MAVNI soldiers' complaint should be dismissed because the United States hadn't waived sovereignty with respect to their claims. The discharge orders that the non-citizen soldiers seek to challenge each represent a discrete, final agency action under the Administrative Procedure Act, rather than a broad programmatic attack, the court said. The case is Calixto v. Dep't of Army, 2019 BL 178822, D.D.C., No. 18-1551 (ESH), 5/16/19.

Case: Individual Employment Rights/Due Process (N.D. Miss.)

The University of Mississippi didn't deprive a part-time faculty member of his liberty interest in his reputation without due process when it interviewed a student after she filed a police report against him and allowed two other individuals to sit in on the interview. The teacher failed to allege that he requested a name-clearing hearing, or that his employer violated his constitutional rights by refusing to give him one. However, the teacher did state a claim that the university deprived him of his property interest in continued employment, by firing him without first giving him notice and an opportunity for a hearing. The case is Thomas v. Cohen, 2019 BL 179100, N.D. Miss., 3:18-CV-00062-GHD-RP, 5/16/19.

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TOP STORIES

Obese Workers Shielded From Bias? Seventh Circuit Will Hear Case

By Erin Mulvaney and Porter Wells

Chicago bus driver Mark Richardson weighed nearly 600 pounds when his employer of more than a decade decided it wasn't safe for him to perform his job. Now a federal appeals court is poised to consider whether allegedly using his obesity as a reason to fire him violated federal disability law.

Medical Resident to Get Bias Trial Over Neuropsychological Test

By Patrick Dorrian

A Michigan hospital may have violated the job rights of a medical resident when it allegedly ordered her to undergo a neuropsychological exam, a federal judge ruled.

Thyssenkrupp Elevator Mechanic Loses Gender Pay Bias Claim

By Patrick Dorrian

A female elevator mechanic who claims Thyssenkrupp paid her less than her male co-workers based on sex lacks proof, a federal judge ruled.

Tennessee Law Tips Worker Classification Scales for Employers

By Chris Marr

Tennessee employers will face an arguably lower hurdle to classifying workers as independent contractors rather than employees under a new law.

DISCRIMINATION

Carondelet's Leave Policy Unfair to Pregnant, Disabled: EEOC (1)

By Patrick Dorrian

Carondelet Health Network is accused in a new EEOC lawsuit of operating an inflexible 90-day maximum leave policy that discriminates against pregnant and disabled workers.

WAGE & HOUR

Foodliner Truckers Settle Per-Haul Unpaid Wage Dispute for $1.2M

By Porter Wells

A cargo-hauling company will pay $1.2 million to settle unpaid wage claims brought by a group of their trucker employees.

Steak 'n Shake Managers Get Overtime Verdict Doubled to $6M

By Porter Wells

A group of Steak 'n Shake managers who claimed to be owed overtime wages got some extra money tacked onto their $3.03 million jury verdict.

Comcast, Cable Techs Seek Approval for $7.5M Wage Settlement

By Porter Wells

Comcast Corp. and a group of cable technicians have asked a federal judge to take a second look at their $7.5 million settlement proposal.

HARASSMENT & RETALIATION

Florida School Board Beats Employment Retaliation Suit

By Brian Flood

A Florida school board is off the hook for claims it retaliated against one of its teachers because of his parents' political opposition to the school system's superintendant, a federal appeals court ruled May 10.

STATE & LOCAL LAWS

Equal Pay Measure Could Get Alabama House Vote

By Genevieve Douglas

Lawmakers in Alabama have until June 18 to take up legislation that would prohibit discriminatory pay practices based on sex or race, ending the state's distinction of being one of only two in the nation with no equal pay law on the books.

LABOR RELATIONS

Employer's Unionization Misstatements Didn't Spoil Vote: NLRB

By Robert Iafolla

The National Labor Relations Board wiped out a union's election victory to represent workers at a janitorial contractor in Virginia, ruling that the results of an earlier vote rejecting the union should have stood.

California Leads Challenge to New 'Anti-Union' Medicaid Rule

By Mary Anne Pazanowski

Five states are challenging a new federal rule prohibiting them from redirecting portions of Medicaid provider payments to third parties, including unions that represent home health-care workers.

SUPREME COURT

Supreme Court Doesn't Take Up Union Association Protections

By Erin Mulvaney

The U.S. Supreme Court declined to consider whether a public employee is protected from retaliation based on his union membership.

Justices Won't Take Up Challenge to Care Worker Union Power

By Robert Iafolla

The U.S. Supreme Court won't consider whether unions can represent government-subsidized home care workers who aren't union members.

LEGAL PROFESSION

Lawyers Are Uniquely Challenging Audience for Anti-Bias Training

By Stephanie Russell-Kraft

Cindy-Ann Thomas, co-chair of Littler Mendelson's employment and diversity practice, has been giving unconscious bias trainings to clients for nearly two decades. This year, she's training the firm's own lawyers, and she's preparing a little bit differently.

HEALTH CARE & BENEFITS

Clarify Small Business Health Plan Rules, Attorneys General Say

By Madison Alder

A dozen attorneys general aren't satisfied with the Labor Department's response to a judge's ruling that called the Trump administration's expansion of association health plans an "end-run" around the Affordable Care Act.

AssuredPartners Accused of Stealing Employees' Equity Interests

By Mike Leonard

AssuredPartners Inc. and its private equity backers have been hit with a

lawsuit accusing them of stealing back the ownership interests they gave two brothers when acquiring their insurance agency.

Despite Bipartisan Effort, Paid Family Leave Is Still Years Away

By Daniel Flatley

A consensus is growing among both Republicans and Democrats in Congress that something needs to be done about federal paid leave. The disagreement is in how to pay for it.

Placebo Effect Afflicts Wellness Programs That Feel, Sound Good

By Warren Rojas and Genevieve Douglas

As companies pour millions of dollars a year into hashtag-friendly employee wellness programs, two new studies find that the high from these spending sprees has all the staying power of a fad diet.

Pizza Chain Can't Escape Claims of Worthless Company Stock

By Jacklyn Wille

A California pizza franchise operator again failed to escape a lawsuit challenging how it managed its workers' employee stock ownership plan.

ALSO IN THE NEWS

Epstein Accusers, Justice Department Split on Next Steps

By Chris Opfer

The Justice Department and lawyers for women accusing Jeffrey Epstein of running a sex trafficking ring haven't been able to agree what happens next after a federal judge said Labor Secretary Alexander Acosta as a prosecutor broke the law in negotiating a controversial plea deal for the Miami hedge fund manager.

DOL Extends Comment Period for Joint Employer, Regular Rate

By Ben Penn

Members of the public now have 15 extra days to submit comments to the Labor Department on a pair of contentious wage-and-hour proposals.

Facebook to Raise Pay for Thousands of Contract Workers (1)

By Kurt Wagner

Facebook Inc. said it will give raises to most of its U.S. contract workers, a group of people who have critical roles but aren't paid or treated as full-time company employees.

PRACTITIONER INSIGHTS

INSIGHT: Discrimination in Athletics—Eligibility of Intersex Runner a Prime Example

Discrimination in athletics, based on a runner's sex, played a role in a recent decision by the Court of Arbitration for Sport to ban intersex athletes from competing in middle distance races, says Ronald S. Katz, sports attorney and author of the book Sport, Ethics, and Leadership. Katz was an expert witness in the case of South African runner Caster Semenya.

INSIGHT: The Fate of H-4 Spousal Employment Authorization

The Trump administration wants to rescind an Obama era rule that allows certain H-4 visa holders the right to work, and a federal lawsuit is challenging the rule. Fragomen's Andrew Greenfield examines the genesis of the H-4 spouse work authorization rule and the status of pending actions that imperil it.

LATEST CASES

Case: Labor Relations/Discrimination (N.L.R.B.)

In a 2-1 decision, the NLRB finds that Didlake, Inc. lawfully told employees that they would be discharged if a union "prevailed in the election and imposed a union security requirement on the bargaining unit." Although two managers misstated the law when they characterized union membership and the

payment of dues as a "condition of employment" if the union won the representation election, there are no allegations or evidence that Didlake acted in a deceptive manner, and one of the managers' comments were preceded by and implicitly based on Didlake's experience with the union at another nearby facility. The case is Didlake, Inc., N.L.R.B., 05-RC-179494, 5/10/19.

Case: Disability Discrimination/Retaliation (D. Neb.)

A Douglas County, Nebraska, mailroom clerk's claim that she was fired in retaliation for requesting accommodation for her job-related stress disorder fails, because she wasn't a qualified individual in view of her two at-work breakdowns that resulted in her discharge for insubordination and creating a disturbance that caused her co-workers to call security, and she didn't show that a vacant position was available for her requested accommodation of transfer to another department. The case is Iskandr v. Douglas County, D. Neb., No. 8:17CV306, 5/10/19.

Case: Disability Discrimination/Medical Examination (E.D. Mich.)

A medical resident can go to trial on her claim that a Michigan hospital asked her to undergo a neuropsychological exam in violation of the Americans with Disabilities Act, even though she walked out of the exam without consequence. The requested exam might have been a prohibited medical exam under the ADA given that it was conducted by a doctor and possibly was designed to diagnose mental illness, whether the resident was required to take the exam is disputed given that the hospital booked it for her after she delayed in making the appointment, and the hospital didn't show that the exam was a business necessity given its failure to explain how the stated reason for the exam--determining her "learning modes"--would improve her ability to do her job. The case is Azuh v. Providence-Providence Park Hosp., 2019 BL 170322, E.D. Mich., No. 17-10585, 5/10/19.

Case: Wage & Hour/Arbitration (Cal. Ct. App., 5th Dist.)

An employee of a California raisin company doesn't have to submit his claims for unpaid overtime, unpaid meal break premiums, and other state wage law violations to arbitration in accordance with a collective bargaining agreement with the company. The arbitration provision states that it covers any dispute

arising out of the agreement, which indicates that it only covers contractual disputes rather than statutory violations. The case is Mason v. Lion Raisins, Inc., 2019 BL 170045, Cal. Ct. App., 5th Dist., No. F076202, unpublished 5/10/19.

Case: Discrimination/Layoff (N.D. Ind.)

A director of student services may not proceed with her claim that a charter school in Indiana laid her off because of her age, rather than as part of an attempt to balance its budget while having the least effect on teaching. She admitted that she wasn't involved in day-to-day teaching activities, her duties were absorbed by two principals over the age of 45, and she didn't provide any valid evidence to support her assertion that the superintendent who selected her for layoff was engaged in a scheme to replace older employees with younger ones. The case is Fine v. Career Acad. of S. Bend, Inc., 2019 BL 170407, N.D. Ind., No. 3:17-CV-397 JD, 5/10/19.

Case: Discrimination/Arbitration (3d Cir.)

A federal district court didn't err in finding that a fired physician must arbitrate her Title VII and state-law retaliation claims against a Pennsylvania hospital pursuant to an employment agreement that she entered into with the hospital. Despite contention that her claims weren't subject to the agreement because it didn't contain language such as "any claim arising from" her employment, it specifically only mentions exclusions for specific performance and injunctive relief actions, and the court determined that the phrase “if a dispute or claim should arise” is functionally equivalent to language that would sweep any of her claims relating to her employment into the scope of the agreement. The case is Monfared v. St. Luke’S Univ. Health Network, 2019 BL 170038, 3d Cir., No. 18-2850, unpublished 5/10/19.

Case: Discrimination/Arbitration (E.D. Pa.)

A black former employee of Wells Fargo must arbitrate her discrimination claims alleging that she was placed into a lower-level mortgage processing position when she was hired while three white women with the same qualifications were hired at a higher level. The arbitration agreement was supported by adequate consideration because both she and the bank agreed

to arbitration, and while she suggests that the employee handbook may give Wells Fargo the right to amend the agreement without her consent, she didn't provide any evidence to support that suggestion, and the agreement itself makes it clear that the bank doesn't have the right to make unilateral changes, the court said. The case is .

Case: Individual Employment Rights/First Amendment (11th Cir.)

A former physical education teacher and football coach failed to show that his coaching contract was terminated and his teaching contract at a charter school wasn't renewed in retaliation for his parents' opposition to the county school board superintendent's campaign for reelection. Although the assistant principal of the school testified that the principal said the decision not to renew his contract came from "above" her, that comment can't be construed as reasonably referring to the superintendent or the school board, which didn't have authority over hiring decisions at the charter school, and the principal denied flatly that the superintendent was involved in the decision to fire him, either directly or indirectly. The case is Hale v. Husfelt, 2019 BL 169546, 11th Cir., No. 18-13738 Non-Argument Calendar, unpublished 5/10/19.

Case: Discrimination/Exhaustion of Remedies (7th Cir.)

A discharged baggage screener for Covenant Aviation Security and unsuccessful applicant for a position with the Transportation Security Administration was properly denied a trial on her employment discrimination claims under Title VII and the ADEA against Covenant, because she didn't name Covenant in her EEOC charge. She failed to exhaust administrative remedies, even though the EEOC's dismissal order refers to the fact that Covenant fired her, because her mention of Covenant was insufficient to give the EEOC reason to investigate a charge of discrimination against the company, the court said. The case is Eiler v. McAleenan, 2019 BL 169596, 7th Cir., 18-3451, unpublished 5/10/19 .

Case: FMLA/Retaliation (D. Conn.)

A Middletown, Connecticut, hospital employee didn't show that she was fired in retaliation for taking Family and Medical Leave Act leave for the treatment of depression, given that her insubordination and inappropriate interactions with

co-workers had been under review before she submitted her last FMLA certification eight months before she was fired, and she had taken approved leave multiple times for years without being subjected to any adverse action. The case is Lamitie v. Middlesex Hosp., D. Conn., No. 3:17-cv-753 (VAB), 5/10/19.

Case: Wage & Hour/Arbitration (N.D. Cal.)

A freight handler for a logistics company must submit his claims for various California wage law violations to arbitration, because he checked a box on his online employment documents stating that he acknowledged reading the arbitration agreement with the company, and he isn't exempt from federal arbitration law as he wasn't directly engaged in interstate delivery driving. The case is Furlough v. Capstone Logistics, LLC, 2019 BL 170978, N.D. Cal., 18-cv-02990-SVK, 5/10/19.

Case: Discrimination/Promotion (7th Cir.)

A white, Polish unemployment claims processor for the Illinois Department of Employment Security was properly denied a trial on her claims that she was discriminated against on the basis of race and national origin when she was orally counseled for mentioning the race of an unemployment claims applicant and when her probationary period in a position handling more complex claims was ended after a few weeks and she was returned to her prior job. The oral counseling wasn't an adverse employment action because it had no tangible consequences and a black probationary employee who allegedly was given a year to train for her new position wasn't a valid comparator because there was no evidence that they shared a common decisionmaker, the court stated. The case is Tomas v. Ill. Dep't of Emp't Sec., 2019 BL 169801, 7th Cir., 18-1888, unpublished 5/10/19.

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Highlights

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TOP STORIES

Marriott, Sheraton Effort to Force Worker to Arbitrate Fails

By Patrick Dorrian

A former engineering director at the Sheraton New Orleans doesn't have to face a lawsuit seeking to compel him to arbitrate his potential claims, the Fifth Circuit ruled.

Cleveland Officer Proves Retaliation for Filing EEOC Complaint

By Bernie Pazanowski

A Cleveland police officer sufficiently proved that he was retaliated against for filing a discrimination complaint with the Equal Employment Opportunity Commission, the Sixth Circuit said May 7.

In CNN Free Speech/Job Bias Case, Calif. Considers SLAPP's Reach

By Joyce E. Cutler

California Supreme Court justices appeared skeptical of CNN arguments that the state's anti-SLAPP statute, which protects free speech rights in matters of public interest, should defeat a black ex-producer's discrimination and retaliation lawsuit.

DISCRIMINATION

VW Bid to Nix Class Age-Bias Suit 'Premature,' Worker Says

By Patrick Dorrian

Volkswagen AG "jumped the gun" with its bid to strike class allegations from an employment lawsuit accusing it of nationwide age discrimination, a former logistics manager told a federal court.

Union Pacific Hit With Another Suit Over Worker Fitness Exam

By Patrick Dorrian

Union Pacific is accused in a new lawsuit of violating the federal rights of an employee in Kansas by not letting him return to work following leave for depression, despite his doctor's clearance.

U.S. Soccer Says Women’s Lesser Pay Due to Revenue, Not Sex (1)

By Patrick Dorrian

Any disparity in pay received by U.S. women's and men's soccer players is based on differences in the aggregate revenue their respective teams generate, not sex, the U.S. Soccer Federation says.

Two U.S. Solar Firms Have Now Been Accused of Workplace Racism

By Brian Eckhouse

Two residential solar companies have now been accused in separate lawsuits of discriminating against African American employees in warehouses.

Full 10th Cir. Weighs Proof Needed for ADA Accommodation Claim

By Patrick Dorrian

A county health inspector in Colorado will try again May 7 to convince a federal appeals court she was held to an unfair standard of proof at her disability bias trial.

WAGE & HOUR

Envoy Air $3.56 Million Wage Settlement Gets Final Approval (1)

By Julie Steinberg

A $3.56 million class settlement between Envoy Air Inc. and California workers resolving claims the airline didn't pay overtime or wage premiums got final approval from a federal judge.

STATE & LOCAL LAWS

Washington State Boosts Wage Protections on Public Works Jobs

By Paul Shukovsky

Construction workers on public works projects in Washington state will have increased protections with the enactment of a bill that gives them extra time to file complaints over failure to pay the correct wages.

LABOR RELATIONS

Unions at Work: Flint Auto Parts Workers, NYC Nurses OK Pacts

By Louis C. LaBrecque

Keep up-to-date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

Union Pay Increases Up Slightly Again, Led by Nonmanufacturing

By Louis C. LaBrecque

First-year wage increases for union-represented workers in the U.S. rose slightly, led by a strong 4% average increase in the nonmanufacturing sector, the latest biweekly update of Bloomberg Law's database of wage settlements shows.

LEGAL PROFESSION

Epstein Becker Green, Deloitte Form New 'Strategic Alliance' (2)

By Sam Skolnik

Epstein Becker Green and Deloitte have formed a new and unconventional alliance, as top law firms gird for increased competition with the Big Four accounting companies.

NLRB

NLRB Weekly Summary of Cases, Dated April 22-26, 2019

Summary of NLRB decisions for week of April 22-26, 2019.

IMMIGRATION

Social Security No-Match Letters Worry Immigrants, Bosses

By Laura D. Francis

The Social Security Administration has revived an old practice of notifying employers of mismatches between information on tax forms and the agency's records.

HEALTH CARE & BENEFITS

NFL Veteran Seeks Disability Benefits Following Brain Injuries

By Jacklyn Wille

Retired defensive end Darren Mickell wants the NFL retirement plan to pay him disability benefits, saying his traumatic brain injuries left him unable to maintain a job paying at least $30,000 per year.

SAFETY & HEALTH

Fatal Illinois Chemical Explosion's Cause Under Investigation

By Sam Pearson

An explosion at an Illinois specialty chemicals plant that killed three workers May 3 is prompting investigations by federal authorities.

ALSO IN THE NEWS

Pick to Lead Federal HR Office Faces Tough Questions in Senate

By Louis C. LaBrecque

President Donald Trump's pick to lead the federal government's chief HR office faced some tough questions from Senate Democrats during a May 7 hearing.

More Funding Sought for Gig Economy and Other BLS Studies

By Tyrone Richardson

House appropriators are seeking a nearly 10 percent increase in discretionary spending for the Labor Department's Bureau of Labor Statistics amid growing calls for more frequent data on workforce sectors like the gig economy.

Shale Driller Pioneer Asking Third of Senior Managers to Retire

By Kevin Crowley and Joe Carroll

Pioneer Natural Resources Co. is asking one-third of its senior managers to retire as the Texas shale oil driller shrinks spending, sells assets and raises dividends.

Nestle's U.S. Unit Will Slice 4,000 Jobs in Delivery Change (1)

By Deena Shanker

Nestle SA's U.S. unit will lay off about 4,000 workers as it stops delivering frozen pizza and ice cream directly to stores and instead transitions to a warehouse model that's becoming an industry standard for Big Food companies looking to trim costs.

U.S. Job Openings Increase by Most in a Year, Topping Estimates

By Katia Dmitrieva and Reade Pickert

U.S. job openings rebounded more than expected in the biggest gain in a year, indicating demand for workers remains healthy in a tight labor market.

Trump Country Winning on Job Growth Even as Pay Gap Persists

By Mike Dorning

Jobs are now growing at a faster rate in Trump country than they are in the Democratic-leaning urban and coastal areas that long had been a main driver of the U.S. economic expansion.

PRACTITIONER INSIGHTS

INSIGHT: Human Trafficking, Mass Torts, and Using Data to Support Civil Litigation

Human trafficking needs to take its place among mass tort litigation. Mark Eveland, CEO of litigation support services company Verus LLC, calls upon experienced class action lawyers to develop new legal theories to bring actions for injunctive and monetary damages on behalf of all victims rather than the slow drip, drip, drip of individual cases.

INSIGHT: The Dog Ate My Form 5500 Audit Report—Will My Penalty Be Reduced?

Filed a late audit report with the Form 5500 and want to try to reduce your penalties? Thompson Hine's Brian Lamb offers five tips and says file an acceptable amended audit report as soon as possible, even if it is late. This is by far the most significant driver of penalty reductions.

LATEST CASES

Case: Individual Employment Rights/First Amendment (D.R.I.)

The city of Newport, Rhode Island is entitled to partial summary judgment on the employment law claims of a retired police officer terminated from his part-time position as a sergeant with the Newport Retired Officer Corps, after he

allegedly interfered with a criminal investigation that had affected him personally, and he spoke to the state attorney general's office and the public at a press conference in his role as a fraud victim. The retired officer admitted his alleged protected conduct, a television interview and an interview with the attorney general's office, wasn't a motivating factor for his discharge. The case is Quinn v. City of Newport, 2019 BL 162263, D.R.I., C.A. No. 17·012·JJM-PAS, 5/6/19.

Case: Labor Relations/Arbitration (Cal. Ct. App., 4th Dist.)

A commercial construction contractor can't compel arbitration of an employee's claim for unpaid minimum wages, overtime pay, and meal and rest breaks. The contractor permitted two court-ordered deadlines, by which it was to have filed a motion to compel arbitration, to pass, it engaged in significant discovery and other litigation activities inconsistent with the right to arbitration, and the its delay in seeking to compel arbitration also caused the employee to expend resources on litigation activities inconsistent with arbitration. The case is Nunez v. Nevell Grp., Inc., 2019 BL 159114, Cal. Ct. App., 4th Dist., G056585, unpublished 5/2/19.

Case: Wage & Hour/Overtime Calculation (N.D. Tex.)

Dallas/Ft. Worth International Airport didn't establish that the higher rate it paid its civilian security officers for time they spent performing "off-duty" work for the airport's contractors in addition to their 40-hour workweek at the airport is incentive pay that it may credit towards its overtime obligations, because its guidelines on off-duty work don't state that employees are required to work overtime in order to receive the higher pay rate, and the fact that one employee said he typically worked 40 hours per week in addition to the off-duty work doesn't show that he was required to do so. The case is Frazier v. Dall./Fort Worth Int'l Airport Bd., 2019 BL 158829, N.D. Tex., No. 3:16-CV-2657-S, 5/2/19.

Case: Wage & Hour/Settlement Agreements (C.D. Cal.)

Envoy Air and a group of its airport agents and bus drivers may settle the employees' class-action claims for unpaid overtime compensation, meal and rest break premiums, and other California wage law violations. The $3.5 million

settlement is fair, reasonable, and adequte, because, among other factors, the employees concede that if they pursued litigation, they would risk a finding that federal airline laws preempt their meal- and rest-break claims, and the only objections to the settlement are by employees who were properly exempted from certain claims as motor carriers. The case is Schroeder v. Envoy Air, Inc., 2019 BL 162901, C.D. Cal., No. CV 16-4911-MWF (KSx), 5/6/19.

Case: Individual Employment Rights/Wrongful Discharge (Wash. Ct. App., Div. 1)

Two high-level managers in Microsoft's Online Services Division, separated as part of a reduction in force, can't proceed with their wrongful discharge and retaliation claims against Microsoft. The managers claimed they experienced retaliation after they complained about a well-connected subordinate's expense reports and alleged he was taking Microsoft clients to Korean "hostesss bars." The managers relied on the Foreign Corrupt Practices Act to demonstrate a clear public policy against falsifying corporate books or records, and bribery. They didn't assert anything related to bribery of foreign officials, instead they claimed to be discharged for reporting a subordinate's expense reports, which doesn't implicate the FCPA, a Washington court said. The case is Engstrom v. Microsoft Corp., 2019 BL 162623, Wash. Ct. App., Div. 1, No. 77538-3-I, 5/6/19.

Case: Individual Employment Rights/Arbitration (5th Cir.)

Sheraton, and its parent Marriott International, didn't have standing to pursue a declaration that any claims by a former employee of the Sheraton in New Orleans are subject to arbitration, and that an arbitration agreement also applies to an eight-year old state lawsuit arising out of his previous employment as director of engineering with the Ritz Carlton, another subsidiary. Marriott wanted to arbitrate the employee's pursuit of lost wages from the Ritz, under an arbitration agreement he signed with Sheraton three years later. Any damages that the Ritz Carlton owes him aren't an injury to Sheraton or Marriott, the court said. Because the plaintiffs failed to show that the underlying state action injures them, or that there is a strong possibility that they will be sued in a separate action, federal courts lack jurisdiction to issue declaratory relief, an appellate court said. The case is Marriott Int'l, Inc. v. Danna, 2019 BL 162749, 5th Cir., 18-31036, 5/6/19.

Case: Labor Relations/Public Employees (Pa. Commw. Ct.)

The Pennsylvania Labor Relations Board properly found that state law didn't prohibit a union representing public works employees of Lower Swatara Township from also representing all the township's full-time and regular part-time police officers. The township argued that the state Public Employe Relations Act prohibits any individual employed as a "guard" from being included in any unit with other public employees, but state courts and the PLRB have previously refused to classify police officers as guards under PERA's "guard exception," and PERA is clear that its definition of "employe" specifically excludes police officers. The case is Lower Swatara Twp. v. Pa. Labor Relations Bd., 2019 BL 158278, Pa. Commw. Ct., No. 1276 C.D. 2018, 5/2/19.

Case: Discrimination/Preliminary Injunction (N.D.N.Y.)

A female New York State Police Investigator who was fired three months after she filed an employment discrimination case isn't entitled to a preliminary injunction requiring her immediate reinstatement pending the conclusion of her lawsuit or the grant of a fair and impartial administrative hearing and arbitration that she claims she was denied. She failed to show that she would be subjected to irreparable harm by the injuries that she allegedly sustained---loss of reputation, loss of income, and difficulty in finding other employment---since reinstatement and money damages could make her whole, the court said. The case is Oliver v. N.Y. State Police, 2019 BL 163325, N.D.N.Y., 1:15-cv-00444 (BKS/DJS), 5/6/19 .

Case: Disability Discrimination/Benefits (S.D. Tex.)

An adhesive manufacturing company injured employee can't go ahead with his disability bias claim after his health insurance coverage ended because he had been receiving long-term disability benefits for at least 24 months and his employment ended. He wasn't a qualified individual for purposes of his claim given that chronic pain prevented him from working at all, so he couldn't establish a prima facie case for discrimination, the court found. The case is Nelson v. Covestro LLC, 2019 BL 160744, S.D. Tex., No. H-18-2899, 5/3/19.

Case: Disability Discrimination/Leave (D. Conn.)

A Connecticut YMCA former membership director's state-law disability bias claims after she was denied additional leave following the birth of triplets fail, because she didn't say that she had any specific pregnancy-related disability that required any accommodation beyond her 16-week leave of absence and she didn't know about the hematoma that allegedly impaired her ability to walk when she requested the extra leave . The case is Mosher v. YMCA of Metro. Hartford, D. Conn., 3:17-cv-1252 (SRU), 5/6/19.

Case: Discrimination/Rehiring (10th Cir.)

A protected-age naturalized U.S. citizen from India who was previously fired from the Los Alamos National Laboratories was properly denied a trial on his claims that he wasn't rehired for any of the 19 active positions that he applied for after his discharge because of his age and/or national origin. He failed to show that the explanations for not hiring him---his prior poor performance, lack of minimum qualifications, and the existence of better qualified applicants---were pretextual, as he didn't establish that the Lab lacked an honest belief in its explanations or that there was an “overwhelming disparity” between his qualifications and those of the successful candidates for each job that he sought, the court stated. The case is Laul v. Los Alamos Nat'l Labs., 2019 BL 162043, 10th Cir., 18-2084, unpublished 5/6/19 .

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TOP STORIES

Time Warner Subsidiary Worker's Age Bias Win Upheld on Appeal

By Patrick Dorrian

A Time Warner Cable subsidiary must pay a fired 60-year-old supervisor the $334,500 a jury awarded her for age bias, a divided Fourth Circuit ruled May 22.

Businesses Get Good News in Trump Administration Wage Plans

By Ben Penn

The Labor Department is quietly starting work on three previously unannounced regulations that are all designed to update wage laws—almost certainly to employers' advantage.

Labor Board Plans Rules on Worker Protests, Student Organizing

By Hassan A. Kanu and Robert Iafolla

The National Labor Relations Board is planning to undertake major new rulemakings in 2019 that could curb union power while continuing to work on a controversial regulation to limit companies' liability for collective bargaining and unfair labor practices.

NLRB Moves Quietly to Reverse Pro-Worker Arbitration Rule

By Hassan A. Kanu

The National Labor Relations Board has been working to make it easier for employers to steer certain workplace claims into arbitration, a private dispute resolution forum that tends to favor businesses.

DISCRIMINATION

Worker Gets New Chance to Prove RIF Was Cover for Leave Bias

By Patrick Dorrian

A former executive with a medical services provider in Ohio will get another chance to prove she was fired for taking medical leave, not because her job was cut, a state appeals court ruled May 22.

Black Tesla Worker Can Pursue Class Race Bias Claims in Court

By Patrick Dorrian

Tesla Inc. can't force a black man to arbitrate claims that he and other black workers faced race-based harassment and discrimination at the company's Fremont, Calif., factory, a state appeals court ruled.

AT&T Workers Accuse Company of Race Discrimination

By Patrick Dorrian

AT&T Mobility Services LLC is accused in a new lawsuit of standing by while a new manager pushed black employees out of a San Diego retail store.

Winston & Strawn Seeks High Court Review of Arbitration Limits

By Erin Mulvaney

Winston & Strawn wants the U.S. Supreme Court to upend a decades-old California arbitration standard. The law firm argues the state mandate wrongly moved a former partner's discrimination lawsuit to court instead of a private

arbitration process.

Disability Bias Suit Against LVMH Sent to Arbitration

By Porter Wells

A black, disabled Fresh Inc. employee must take her discrimination claims to arbitration despite the company's delayed payment of arbitration fees, a federal judge ruled May 21.

WAGE & HOUR

DOL Silent on Highly Anticipated Wage Rules Timing (2)

By Ben Penn and Paige Smith

The Labor Department isn't saying publicly when it expects to finalize three high-priority regulations that the White House and businesses want issued well before the 2020 election.

Belmont Horse Racing Trainer Settles Wage Case for $1.6 Million

By John Herzfeld

A horse racing trainer agreed to pay more than $1.6 million to settle Labor Department allegations that he knowingly underpaid seasonal workers at Belmont Park, Saratoga Race Course, and other popular tracks.

Cremation Sales Reps Get $1.65 Million to Settle Wage Dispute

By Porter Wells

Cremation provider SCI Direct Inc. will pay $1.65 million to settle allegations its sales representatives weren't provided adequate rest breaks and weren't paid proper minimum or overtime wages.

STATE & LOCAL LAWS

Illinois Poised to Enact Protections for Tipped Workers

By Michael J. Bologna

Businesses that pocket their employees' tipped wages would face penalties and damages for violations of Illinois' wage payment statute, under a bill headed to the desk of Gov. J.B. Pritzker.

Gender Pay Disparities Targeted in Colorado as Bill Signed

By Tripp Baltz

Colorado will be taking aim at disparities in pay between women and men under a bill signed by Gov. Jared Polis.

Oakland OKs Sanctuary Contracting Ban, State Measure in Limbo

By Joyce E. Cutler

Oakland, Calif., would be prohibited from contracting with businesses that help the federal government collect data and detain immigrants under a proposed law that's state counterpart is on hold.

LABOR RELATIONS

Volkswagen Union Petition Refiled Following Labor Board Setback

By Andrew Wallender

A representation vote on whether to unionize is back on track at Volkswagen's facility in Chattanooga, Tenn., after the United Auto Workers filed new paperwork for an election.

Bay Area SEIU Members Win Double-Digit Raises

By Joyce E. Cutler

Some 4,000 Alameda County employees would receive 10% wage increases under a three-year contract extension with Service Employees International Union Local 1021.

Large Contracts Drive Down Overall Union-Negotiated Pay Raises

By Andrew Wallender

Union contracts covering thousands of employees are failing to capture significant pay increases for workers in 2019, according to Bloomberg Law data.

IMMIGRATION

Greater Willingness to Boost Temporary Visas Shown by Lawmakers

By Laura D. Francis

Congress could be on a path to increasing seasonal guestworker visas after spending the last three years punting to the Homeland Security Department.

Employers to Pay Extra Fee for H-1B Preregistration Process

By Laura D. Francis

Employers seeking H-1B visas will have to pay an additional fee for a new process that will become part of next year's visa lottery.

HEALTH CARE & BENEFITS

Phoenix City Workers Lose Another Pension Calculation Suit

By Jacklyn Wille

City employees in Phoenix who cash out unused vacation leave at retirement can't use this payment to boost their pensions, a state appeals court ruled.

Worker Wellness Program Regulations Delayed Again by EEOC (1)

By Paige Smith

Companies wishing for additional guidance on what kind of corporate wellness plans they can offer employees will have to wait longer, once again, according to the Equal Employment Opportunity Commission's spring regulatory agenda.

HUMAN RESOURCES

Lawmakers Hammer Federal HR Office Director on Reorg Plan

By Louis C. LaBrecque

Republican and Democratic lawmakers and other witnesses May 21 criticized the Trump administration's plan to move the government's chief HR office to the General Services Administration while also creating a new federal workforce policy office at the White House.

SAFETY & HEALTH

McDonald's Workers Want OSHA to Investigate Pattern of Violence

By Josh Eidelson

Every 36 hours on average, American local news outlets deliver a new report on violence at a McDonald's. A group of employees in Chicago say workers bear the brunt of such incidents—enough to constitute a pattern of regular on-the-job violence they want the company to address across the U.S.

Amputation Job Injury Leads to $688,000 Fine for Builder

By John Herzfeld

A Pennsylvania modular home manufacturer faces proposed penalties of nearly $688,000 for alleged workplace safety violations uncovered in an inspection following a November accident.

Lands' End Uniforms Harm Delta Airlines Workers, Suit Says (1)

By Steven M. Sellers

Uniforms made by Lands' End Inc. are making Delta Airlines flight attendants and gate agents sick, a new class lawsuit alleges.

ALSO IN THE NEWS

Challenge to Trump Overtime Rule Mulled by Democratic State AGs

By Chris Opfer

The top attorneys in 15 states are considering going to court to challenge a Trump administration move to expand overtime pay requirements that they say doesn't go far enough.

Circle Cuts 10% of Staff, Cites Restrictive Crypto Regulations

By Julie Verhage

Circle Internet Financial Ltd., a closely held mobile-payments firm which acquired one of the largest cryptocurrency exchanges last year, is eliminating 30 positions, or 10% of its workforce, citing an increasingly restrictive regulatory environment for digital assets.

Lousy Metric for U.S. Workers May Be Less Worrisome Than Thought

By Rich Miller

The decline in U.S. labor's share of the economic pie since the turn of the century may be less worrisome for workers than the numbers suggest, according to consultants McKinsey & Co.

Conway to Replace Embattled Labor Department Chief of Staff

By Ben Penn

The Labor Department has promoted Molly Conway to chief of staff, where she will succeed Labor Secretary Alexander Acosta's controversial outgoing adviser.

New Work Suits: Dollar General Male Manager Alleges Gender Bias

By Cynthia Harasty

Dollar General Corp. was accused of gender bias by a store manager who alleges the district manager treated male employees less favorably than female employees, fired him because he's male, and replaced him with her ex-girlfriend.

Automakers' Job Cuts at 38,000 and Counting as Sales Woes

Deepen

By Chester Dawson and Cécile Daurat

As global auto sales slow after a decade of growth, carmakers are girding for a deeper downturn by slashing payrolls.

LEGAL PROFESSION

Majority of Legal Ops Directors Call Data Analytics 'Priority'

By Sam Skolnik

Data analytics is a high or medium priority for almost 60 percent of corporate counsel offices, according to a new survey of legal operations directors.

Ninth Circuit Nominee's California Ties Questioned (2)

By Patrick L. Gregory

Daniel Bress has insufficient ties to California to fill a top federal judicial vacancy there, Democrats said Wednesday in warning that confirmation "opens the door" to circuit court nominees elsewhere with weak or no local connections.

First-Year Law Firm Associates Earn Median $155K, Survey Says

By Elizabeth Olson

First-year salaries for law firm associates saw double-digit growth last year but many of them didn't match the much-publicized figure of $190,000 that some make at the biggest firms, new figures show.

Walmart Hires Former Federal Prosecutor for Ethics Job

By Elizabeth Olson

Walmart has hired former Justice Department prosecutor David Searle as its international ethics and compliance officer.

Former Knobbe Martens Lawyer Forms New IP Boutique Armond

Wilson

By Sam Skolnik

Former co-chair of Knobbe Martens' Patent Office Litigation practice group Michelle Armond has left the firm to open a new boutique along with Texas-based IP trial attorney Doug Wilson.

PRACTITIONER INSIGHTS

INSIGHT: Distressed Companies Should Prepare for Employee Rights Realities

Employees' legal rights are a paramount concern for companies in financial distress. Morrison Cohen attorneys say companies should be aware of key employee issues and have representation that specializes in these issues.

INSIGHT: Success Coaches on Rise for Lateral Partner Hires, Associates

Law firms have been hiring coaches for many years, mostly for helping associates into new roles, but now “Success Coaches” are also being hired to help partners elevate performance. Eva Wisnik, president and founder of Wisnik Career Enterprises, discusses the trends for this growing field.

LATEST CASES

Case: Labor Relations/Discrimination (D.C. Cir.)

The NLRB properly found that Sparks Restaurant unlawfully discharged and failed to reinstate striking waiters and bartenders following their voluntary and unconditional offer to return to work. Sparks argued that its decline in business after December 2014 was a legitimate business reason for not reinstating the workers, but the board reasonably found, based on five years of sales records, that the business suffered a downturn every year after the holiday rush, and Sparks had never before reduced its staffing levels during off-peak periods. The case is Michael Cetta, Inc. v. NLRB, 2019 BL 183292, D.C. Cir., No. 18-1165, unpublished 5/20/19.

Case: Discrimination/Exhaustion of Remedies (N.D. Tex.)

A protected-age female teacher for the Dallas Independent School District in Texas may only proceed with her claims that relate to her discharge, because she failed to exhaust administrative remedies for her other claims, including her class action claim and her hostile work environment claim. The only adverse employment action listed on the charge is her termination, and there is nothing in the narrative of her charge that suggests there were other adverse actions, or that her claims were collective in nature. The case is .

Case: Disability Discrimination/Qualified Individual (N.D. Ill.)

An injured "tote washer" for a food manufacturing company wasn't a qualified individual for purposes of his disability bias claim after he was fired when he was approved for long-term disability benefits, because his back injury and other medical conditions rendered him unable to do a job that requires heavy lifting, and he lacked the ability to read and write English needed for a sedentary job. He admitted that he didn't ask for an accommodation because there was no job he could perform, he didn't look for another job in the two years since taking medical leave, and he didn't show that he could perform essential job functions despite his receipt of Social Security disability benefits, the court found. The case is Najera v. Griffith Foods Int'l, Inc., 2019 BL 184439, N.D. Ill., No. 18-CV-292, 5/21/19.

Case: Disability Discrimination/Discharge (W.D. Va.)

A financial controller for a Virginia company can go ahead with his disability bias claim after he was fired following a diagnosis of pancreatic cancer, because he plausibly alleged that he was fired due to his disability given that he had never received negative feedback before his diagnosis but was criticized perhaps unfairly after, his supervisors expressed concern about his ability to work although he maintained a full-time work schedule during treatment, and he wasn't given an explanation for his termination. He also stated a failure-to-accommodate claim, even though he was granted leave for medical treatment, given that he was fired less than two months after beginning chemotherapy. The case is Donaldson v. Trae-Fuels, LLC, 2019 BL 184209, W.D. Va., 3:18CV00097, 5/21/19.

Case: Discrimination/Promotion (2d Cir.)

The grant of summary judgment to several high-level management employees of the New York State Insurance Fund on failure-to-promote claims by a black employee of Nigerian national origin is affirmed, albeit on different grounds than those advanced by the federal district court. While the trial court focused on the issue of whether the management employees were "personally involved" in the promotion decisions, the appellate court declined to address that issue, and held that the employee failed to show that the explanations for the decisions---one position was filled by a highly qualified individual and the other position remained vacant during the relevant time period because it was felt that the division was adequately supervised--- were pretexts for discrimination on the basis of race, national origin, or ancestry. The case is Emengo v. Stark, 2019 BL 185757, 2d Cir., 18-1942, unpublished 5/22/19 .

Case: Discrimination/Retaliation (N.D. Ill.)

A library director may proceed with her claim that a public library in Illinois subjected her to a hostile work environment, which forced her to resign, in retaliation for filing an EEOC charge of age discrimination. Her allegation that within two weeks of her charge the library began engaging in a series of harassing conduct, including placing her on administrative leave and changing her position's educational requirements, could show that it acted in a retaliatory manner. The case is Spratt v. Bellwood Pub. Library, 2019 BL 184398, N.D. Ill., No. 18-CV-6573, 5/21/19.

Case: Discrimination/Retaliation (E.D.N.Y.)

A Jewish education analyst may not proceed with his claim that the New York City Department of Education fired him in retaliation for requesting days off to observe a religious holiday, rather than for poor work performance. His supervisor had no adverse reaction to his request, he wasn't fired until three months after the request, and he didn't provide any evidence that the Department acted in a retaliatory manner. The case is Epstein v. N.Y. C. Dep't of Educ., 2019 BL 184719, E.D.N.Y., No. 18-CV-03686, 5/21/19.

Case: Discrimination/Discharge (S.D. Tex.)

A Pakistani-born Muslim engineer may not proceed with his claim that an oil

and gas company in Texas fired him because of his race, national origin, and religion, rather than for failing to meet the requirements of a performance improvement plan. He didn't show that he was treated less favorably than engineers outside of his protected classes because he failed to provide any evidence that he received different or any less training than his co-workers and he admitted that he didn't know any other engineers who weren't fired after they failed to meet the expectations of a performance improvement plan. The case is Ihsan v. Weatherford U.S., LP, 2019 BL 184553, S.D. Tex., No. H-17-2546, 5/21/19.

Case: Discrimination/Promotion (D.N.M.)

An Hispanic project manager for the City of Alamogordo, New Mexico, isn't entitled to a trial on his claim that his race was the reason why he wasn't selected for the newly-created position of engineering manager that a white contracts coordinator filled, despite his contention that the city violated its policies by not posting the position. There is no federal law that requires an employer to advertise a position, the failure to post isn't sufficient to establish pretext, and he didn't show that he was more qualified than the selected white contracts coordinator, who had many more years of supervisory experience than he did, the court said. The case is .

Case: Wage & Hour/Arbitration (D.Colo.)

Colorado call center employees for a healthcare company must individually submit their claims for federal and state wage law violations to arbitration. The arbitration agreement presented as part of their online training is valid, because the terms of the agreement were available via a hyperlink from the screen containing the button to accept the agreement, the company's records show that the employees clicked the acceptance button, and the employees' assertion that they don't recall signing the agreement isn't sufficient to overcome the records indicating that they did. The case is Beattie v. Ttec Healthcare Sols., Inc., 2019 BL 185009, D. Colo., 1:18-cv-01574-RM-SKC, 5/21/19.

Case: Wage & Hour/Hours Worked (Me.)

Therapists for a Maine mental health agency, who resided on-site for 10-day

shifts, may not recover overtime pay for their allotted sleep hours under state law, because, applying federal regulations on the compensability of sleep hours in the absence of relevant state law, the agency's policy of only compensating for sleep interruptions requiring direct client interaction reasonably provides pay for duty-call interruptions, and the therapists signed documentation acknowledging the policy. The case is TerMorshuizen v. Spurwink Servs., Inc., 2019 BL 185599, Me., CUM-18-288, 5/21/19.

Case: Individual Employment Rights/Emotional Distress (S.D. Ill.)

A long-serving tire assembler for Continental Tire the Americas LLC failed to show that CTA engaged in intentional infliction of distress under Illinois law, by firing her for filing a workers' compensation claim after suffering herniated discs in her neck from work-related incidents, and for taking leave from work because of her medical conditions. The employee claimed CTA knew she was susceptible to emotional distress because of her physical ailments. The company's conduct of wrongfully terminating her employment wasn't so extreme and outrageous as to support an actionable intentional infliction of emotional distress claim, a federal court said. The case is Wood v. Cont'l Tire the Americas, LLC, 2019 BL 185160, S.D. Ill., No. 3:18-CV-1434-NJR-RJD, 5/21/19.

Case: Individual Employment Rights/Due Process (N.D. Ohio)

Former police recruits failed to show that the city of Cleveland and Cleveland Police Academy officers violated their constitutional rights to due process by ending their employment after an alleged notebook plagiarism scheme. The police recruits didn't have a protected property interest in their employment because they were probationary employees with less than six months service. The police recruits claim that the defendants' conduct "shocks the conscience" because the CPA officers publicly charged them with shameful offenses, tarnishing their reputations, and ending their careers in law enforcement. Because the recruits haven't shown deprivation of a constitutionally protected property or liberty right, their substantive due process claim also fails, a court said. The case is Moore v. City of Cleveland, 2019 BL 185076, N.D. Ohio, No. 1:18-CV-1849, 5/21/19.

Case: Discrimination/Promotion (11th Cir.)

A white employee may not proceed with his claim that Lawson State Community College in Alabama, along with its president and one of its vice presidents, in their official and individual capacities, appointed a black employee to the position of "Associate Dean of the College of Career Technical Education" instead of him because of his race. The employee didn't show that the College's reasoning for appointing the black employee, including that he had already been performing that role at the time of appointment, was pretextual. The case is Lawrence v. Ward, 2019 BL 183872, 11th Cir., 18-11387 Non-Argument Calendar, unpublished 5/21/19.

Case: Discrimination/Hostile Work Environment (W.D. Tenn.)

A black baker may not proceed with his claim that Costco in Tennessee subjected him to a hostile work environment because of his age and race. He didn't show that the alleged harassment, including a second-hand derogatory comment about a co-worker's race and his supervisor's multiple statements that the baker was "too old" or "too slow," was sufficiently severe or pervasive to negatively alter the conditions of his employment. The case is Loggins v. Costco Wholesale Corp., 2019 BL 184078, W.D. Tenn., 2:17-cv-2688, 5/21/19.

Case: Individual Employment Rights/Negligence (Wash. Ct. App., Div. 1)

Equitable tolling prevents the statute of limitations from barring an injured railroad employee from pursuing his Federal Employer's Liability Act case in Washington, although he suffered injuries while working in Washington state and initially filed an action against BNSF Ry. in Oregon. The employee didn't sit on his rights when he first tried to litigate his case in Oregon, and he acted diligently by defending against BNSF's motion to dismiss on jurisdictional grounds. The absence of legal clarity over whether the Oregon court could exercise personal jurisdiction over his FELA action satisfies the extraordinary circumstances element for tolling, the court said. The case is Langlois v. BNSF Ry., 2019 BL 182244, Wash. Ct. App., Div. 1, No. 77752-1-I, 5/20/19.

Case: Labor Relations/Government Employment (Iowa)

Amendments to the Iowa Public Employment Relations Act, that ended payroll dues deductions and narrowed the scope of mandatory collective bargaining

topics for units with less than 30 percent "public safety employees," do not violate the state constitution's equal protection clause. Unions challenging the amendments concede that there is no constitutional right to public-sector collective bargaining or payroll deductions, the legislature could reasonably conclude that the classification was justified by the greater risks faced by emergency first responders and the goal of keeping labor peace with unions comprised of at least 30 percent public safety employees, and the legislative classifications are not so overinclusive or underinclusive as to be unconstitutional, the Iowa Supreme Court finds. The case is State, County, and Municipal Employees Iowa Council 61 v. State, Iowa, No. 17-1841, 5/17/19.

Case: Discrimination/Exhaustion of Remedies (E.D. Wis.)

Enterprise Rent-A-Car Company of Wisconsin is entitled to dismissal of a black maintenance technician's racially hostile work environment claim because he failed to exhaust administrative remedies. His EEOC charge only alleged racial discrimination with respect to his wages and internet access, so his hostile work environment claim falls outside of the scope of his charge. The case is .

Case: Discrimination/Arbitration (Cal. Ct. App., 1st Dist.)

A California state trial court properly found that a black temporary worker for Tesla doesn't have to arbitrate his putative class action complaint alleging racial discrimination claims under California state law, even though he was given an offer letter containing an arbitration agreement after he applied for a permanent position. There was no agreement to arbitrate because the offer was withdrawn after he failed to sign the offer letter, and the doctrine of equitable estoppel doesn't apply because his claims are based on California law and aren't founded on—or bound up with—the terms of the offer letter that he received after he began working at Tesla, the court stated. The case is Vaughn v. Tesla, Inc., 2019 BL 183841, Cal. Ct. App., 1st Dist., A154753, unpublished 5/21/19 .

Case: Labor Relations/Public Employees (Iowa)

A union that represents science and social services employees for the State of Iowa is entitled to enforcement of a new labor contract that its membership voted to ratify in February 2017. The state argued that no contract exists

because the state never voted to ratify the agreement as required by a state administrative rule, but the state failed to cite the rule in its motion for summary judgment, and it waived that defense to contract formation. The case is UE Local 893/IUP v. State, 2019 BL 181358, Iowa, No. 17-2093, 5/17/19.

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TOP STORIES

Amazon Takes Delivery Driver Arbitration Fight to 9th Circuit

By Porter Wells

Amazon.com Inc. wants the Ninth Circuit to weigh in on whether its delivery drivers must take their wage claims to individual arbitration proceedings, or if they can proceed as a massive nationwide class action.

GM Gets Appeal on China Retirement Law Issue in U.S. Bias Case

By Patrick Dorrian

General Motors may immediately ask the Sixth Circuit to review whether it would have violated China's mandatory retirement law by allowing a senior manager at its Shanghai facility to work past age 60, a federal judge ruled May 2.

Challenges to Union Fees Made Easier by Top NLRB Lawyer (1)

By Robert Iafolla

The National Labor Relations Board's top lawyer made it easier for workers represented by unions but aren't members to challenge the expenses they're required to pay for the costs of collective bargaining and other nonpolitical

activities.

Speak No Evil No More? Non-Disparagement Edicts Lose Favor

By Erin Mulvaney

The #MeToo movement and protests against large technology companies have drawn new attention to policies that discourage workers from speaking out against harassment and discrimination, forcing companies to balance the instinct to keep internal complaints quiet with increasingly persistent calls for transparency from workers.

DISCRIMINATION

Securitas Not Signing Pact Dooms Bid to Arbitrate Worker's Suit

By Patrick Dorrian

A former Securitas branch manager can pursue in court his claim that he was fired by the security services provider because of his age, a federal judge ruled.

Robinson Bradshaw Seeks Quick Win on Black Lawyer's Fraud Claims

By Patrick Dorrian

Robinson, Bradshaw & Hinson says a Charlotte-based lawyer who sued alleging the firm uses her and other minority attorneys as "diversity props" shouldn't be allowed to pursue her fraud claims.

WAGE & HOUR

Koppers Workers Must Redo Class Certification in OT Fight

By Porter Wells

Class certification for a group of Koppers Inc. workers who say they're due overtime wages is up in the air after the Arkansas Supreme Court overturned it May 2.

HARASSMENT & RETALIATION

Moody's Stress Tester Loses Medical Leave Retaliation Appeal

By Porter Wells

A former stress test analyst for Moody's Analytics Inc.'s sales team couldn't convince the Third Circuit May 3 that he was fired for taking medical leave.

Health-Care Worker Gets Second Shot at Fighting Abuse Ruling

By Mary Anne Pazanowski

A Texas health-care worker is getting a second chance to fight a state agency decision that barred licensed facilities from hiring her due to alleged misconduct.

STATE & LOCAL LAWS

Colorado Legislature OKs Bill Allowing Local Minimum Wage Laws

By Tripp Baltz

Colorado cities, counties, and other municipalities would be able to increase their minimum wage under a bill on its way to Gov. Jared Polis (D).

LABOR RELATIONS

Volkswagen Tennessee Union Bid on Hold in Big Defeat for UAW (1)

By Andrew Wallender and Chris Opfer

Volkswagen will escape a second unionization effort at its Chattanooga, Tenn., plant for the time being after the National Labor Relations Board sided with the company in a legal dispute with the United Auto Workers.

American Air Sends Contract Offer to Mechanics as Talks Bog Down

By Mary Schlangenstein

American Airlines Group Inc. has sent its full contract proposal directly to mechanics, baggage handlers and other airport ramp workers as talks with the union for those groups hit a standstill.

VA Proposes Dramatic Cut in Employee Time for Union Work

By Louis C. LaBrecque

The Department of Veterans Affairs is proposing dramatic reductions in the number of hours available for union representation activities. The change is part of a proposed collective bargaining agreement that would cover more than 250,000 VA employees.

NLRB

Shipping Terminal Company Used Wrong Union's Rules, NLRB Finds

By Robert Iafolla

A Southern California shipping terminal operator applied the wrong union's workplace rules to resolve allegations that one worker harassed another, the National Labor Relations Board ruled.

IMMIGRATION

Policy Targeting Student Visa Violators Blocked by Judge (1)

By Laura D. Francis

A policy that would penalize international students for overstaying or violating the terms of their visas has been blocked by a federal judge in North Carolina.

Kentucky Derby Teams Jockey for Worker Visas at Track and Beyond

By Genevieve Douglas

As horse racing enthusiasts gear up for the May 4 Kentucky Derby, employers in the racing industry worry that evolving immigration policy could hurt their ability to enter horses in future events.

BUSINESS OF LAW

Special Counsel Prosecutor Andres to Return to Davis Polk (1)

By Sam Skolnik

One of the senior prosecutors on Special Counsel Robert S. Mueller's team, Greg Andres, is returning to Davis Polk & Wardwell in New York, where he'll focus on white collar and regulatory investigations, as well as civil and criminal trial work.

HUMAN RESOURCES

DOD to Join Online Learning Program for Federal Workers

By Louis C. LaBrecque

The Department of Defense is looking to reduce redundancies in its training courses through a partnership with the government's chief HR office.

HR Buzz: Only Connect • Shake on It • Getting Mental Health

By Cathleen O'Connor Schoultz

In case you missed it on "Good Morning Britain," a new survey found that about two-thirds of U.K. workers are confused about how to greet co-workers and would appreciate some guidance from their employers.

HEALTH CARE & BENEFITS

Perks of Work: Employees Crave Respect More Than Yoga, Snacks

By Warren Rojas

Time for Perks of Work, our weekly recap of intriguing data, surveys, and trends about the 21st century workplace.

ALSO IN THE NEWS

U.S. Jobs Top Forecast at 263,000 Gain; Wages Miss Estimates (3)

By Jeff Kearns and Reade Pickert

U.S. hiring topped forecasts in April as the jobless rate dipped to a fresh 49-year low and wage gains were slightly cooler than projected, suggesting the still-healthy labor market can continue to support growth without fueling inflation.

U.S. Services Gauge Falls to Lowest Since 2017 as Jobs Cool (1)

By Jeff Kearns and Reade Pickert

A gauge of U.S. service industries unexpectedly dropped for a second month, slipping to the lowest level since August 2017 in the latest sign of weaker economic momentum at the start of the second quarter.

Appropriations Update for May 3: BGOV OnPoint

By Michael Smallberg and Danielle Parnass

House appropriators kicked off the fiscal 2020 appropriations process this week, with subcommittee approvals of three draft funding measures: Labor-HHS-Education, Legislative Branch, and Military Construction-VA.

PRACTITIONER INSIGHTS

INSIGHT: GCs Should Turn to AI to Save Time, Money, Manage Data

Virtually every process in today's legal department is automated by technology tools that generate large amounts of data. Haresh Bhungalia, CEO of Casepoint, says when that data is subjected to AI-powered analysis across functions and legal matters, it yields new insights that can help legal departments save time and money.

INSIGHT: A New Path to Law Firm Profitability—Contingency Fee Litigation

Law firms should stop shying away from contingency fee arrangements. Justin Barker, head of Validity Finance's Chicago office says a diverse portfolio of

carefully vetted contingency cases should result in a realization rate that far exceeds the 80 to 85 percent realization rates typical of most litigation practice groups in a law firm.

LATEST CASES

Case: Labor Relations/Fair Representation (N.D. Ill.)

A City of Chicago employee, who was held at knife-point while booting a vehicle and then laid off following a break in service for post-traumatic stress disorder, doesn't have a claim against his union for failing to represent him in a grievance against the city. The employee filed his claim in federal district court, and federal and Illinois state courts have been clear that the Illinois Labor Relations Authority has exclusive jurisdiction over state employees' unfair-labor-practice charges. The case is Flowers v. City of Chicago, 2019 BL 155894, N.D. Ill., No. 18 C 7003, 5/1/19.

Case: Discrimination/Arbitration (W.D. Mo.)

A former employee of Securitas Security Services USA, Inc. can't be compelled to arbitrate his age discrimination claim, even though he signed an arbitration-agreement acknowledgment form, because no one signed the form on behalf of the company. The absence of a signature on a signature line on the acknowledgment form entitled “Employer Representative Signature” means that the agreement to arbitrate was never completed due to lack of mutual assent, the court said. The case is Wilbur v. Securitas Sec. Servs. USA, Inc., 2019 BL 160268, W.D. Mo., 19-00176-CV-W-SRB, 5/3/19.

Case: Labor Relations/Arbitration (D. Or.)

A former crane operator, who didn't succeed in arbitrating his discharge grievance under a labor contract, can go ahead with his claim that his employer interfered with his rights under the Family Medical Leave Act when it fired him. A labor contract's arbitration provision must be "clear and unmistakable" to cover statutory claims, the contract's dispute resolution process applies to "any dispute" between the employer and the union or employees represented by it, and the contract's arbitration provision doesn't expressly reference the FMLA. The case is Munger v. Cascade Steel Rolling

Mills, Inc., 2019 BL 157006, D. Or., No. 3:18-cv-00970-SB, 5/1/19.

Case: Discrimination/Pay Equity (D. Or.)

A female Psychology Department professor at the University of Oregon who was paid less than four male professors in her department isn't entitled to a trial on her Equal Pay Act and analogous state law claims because she failed to show that she performed work of comparable character that requires comparable skills under the state law standard or work that was “substantially equal” under the federal law. The male professors had significant additional time-consuming responsibilities that included being the department head with both financial and supervisory duties, being the directors of various centers and clinical training programs, and conducting research funded by national grants, which requires the additional duties of managing the budget of the project, supervising the staff conducting the grant-funded work, and completing detailed reports of grant activities. The case is Freyd v. Univ. of Or., 2019 BL 158729, D. Or., 6:17-cv-00448-MC, 5/2/19 .

Case: Wage & Hour/Independent Contractors (9th Cir.)

The so-called "ABC" test for determining whether a worker is an employee or independent contractor, which analyzes workers' freedom of control over their work, relation of their work to a hiring entity's business, and their engagement in an independently established trade, must be applied to California janitorial cleaners' state-law claim against a commercial cleaning franchise company that they are owed unpaid minimum wages and overtime premiums due to their misclassification as independent contractors. A recent California Supreme Court opinion adopting the test applies retroactively to the cleaners' claim, because the Court denied a petition to make an exception to the general rule applying court opinions retroactively, other district courts have applied the test retroactively, and the opinion only clarified that the test adhered to California wage law, rather than announcing a new rule. The case is Vazquez v. Jan-Pro Franchising Int'l, Inc., 2019 BL 158198, 9th Cir., No. 17-16096, 5/2/19.

Case: Wage & Hour/Preemption (D. Idaho)

UPS established that a group of its Idaho drivers' state-law claims for unpaid wages is preempted by the federal law governing collective-bargaining

agreements. While their right to proper wage payment exists independently of their CBA, resolution of their claim requires interpretation of the agreement because it's based on the contention that UPS failed to consider their time spent as part-time drivers in determining their wage rate as full-time drivers, which hinges on the pay scale and eligibility laid out in the agreement. The case is Balderas v. United Parcel Serv., Inc., 2019 BL 158712, D. Idaho, 1:18-CV-00378-DCN, 5/1/19.

Case: Wage & Hour/Wage Deductions (D. Mass.)

Massachusetts truck drivers who performed services for a home delivery contracting company may move forward with their state-law claim for improper wage deductions to pay for insurance premiums, because the company can't avoid liability by having the deductions authorized through the drivers' employment contracts, and the drivers' payments for the mandated workplace injury and cargo insurance are still considered wage deductions even though they were direct, out-of-pocket payments; further, the drivers' state-law claims aren't preempted by the federal law governing motor carriers because the company didn't show that their recovery of the deductions would affect its prices or services. The case is Dasilva v. Border Transfer of MA, Inc., 2019 BL 158632, D. Mass., No. 16-11205-PBS, 5/1/19.

Case: Individual Employment Rights/Whistleblowing (D.N.J.)

A special education teacher failed to state a claim that the Camden City School District and a high school principal violated her rights under New Jersey's Conscientious Employee Protection Act. The teacher asserted that the principal abused his authority when he reassigned her to a less desirable teaching position that wasn't commensurate with her qualifications and experience, and refused to allow her to transfer to a different school. She didn't allege any facts to plausibly suggest that she believed the principal was committing a crime by not assigning her to a self-contained special education classroom of her preference, or that she reasonably believed the students weren't getting an appropriate education guaranteed by law. The case is Cuff v. Camden City Sch. Dist., 2019 BL 159124, D.N.J., No. 1:18-cv-13122-NLH-AMD, 5/2/19.

Case: Discrimination/Sexual Harassment (D. Or.)

The Washington County Sheriff's Office in Oregon isn't entitled to summary judgment on a claim by a female former deputy that she was exposed to a sexually hostile work environment when various co-workers allegedly engaged in conduct that included exposing themselves to her, discussing her private romantic relationship in crude terms, telling a jail inmate in her presence that she wears crotchless panties, asking her to show her breasts, propositioning her to have sex in her van, and one incident in which a co-worker choked her until she agreed to continue a sexual relationship with him. Although she didn't report most of the alleged harassment, it's possible that these incidents, along with other sexually offensive behavior allegedly directed towards other female employees, created an environment of harassment so pervasive that management must have known about it, and they could be liable for failing to take adequate steps to remedy it, the court said. The case is .

Case: Discrimination/Hostile Work Environment (E.D.N.Y.)

An employee may not proceed with his claim that an educational cooperative in New York subjected him to a hostile work environment because of his age. His complaints that the cooperative refused to investigate his "bullying" complaint, address his grievance, or place him back in a former position aren't enough to show that he was subjected to harsh and continuous treatment that altered the terms and conditions of his employment; however, he may proceed with his age discrimination claim surrounding an involuntary transfer. The case is Laface v. E. Suffolk BOCES, 2019 BL 159067, E.D.N.Y., No. 2:18-cv-01314 (ADS)(AKT), 5/2/19.

Case: Discrimination/Arbitration (C.D. Cal.)

A Muslim former shift supervisor in a California CVS Health Corporation pharmacy who immigrated from Bangladesh must arbitrate his race, religion, and national origin discrimination claims, despite his argument that the clause delegating the question of arbitrability to the arbitrator is unconscionable. He failed to opt out of the arbitration agreement that was presented to him in an electronic training course so he is bound by it, his arguments regarding substantive unconscionability are related to the attorneys' fees and costs provision, rather than the delegation clause, and his failure to show that the delegation clause itself is unconscionable means that he must arbitrate the arbitrability of his claims, the court said. The case is .

Case: Discrimination/Joint Employer (N.D. Tex.)

A discharged black employee for Kwik Kar auto repair shop in Dallas, Texas, can't proceed with his racial discrimination claim because Kwik Kar doesn't employ the required number of persons to be considered an "employer" under Title VII. He failed to show that an entity with the same owner as the shop, which was listed as paying his payroll taxes, can be considered a joint employer with Kwik Kar for purposes of meeting the 15-person numerosity requirement, the court said. The case is Shelby v. Kwik Kar, 2019 BL 158476, N.D. Tex., 3:18-CV-0532-B, 5/2/19.

Case: Discrimination/Discharge (7th Cir.)

A black driver for the City of Chicago Sanitation Department was properly denied a trial on his claim that he was subjected to race discrimination when he was fired after city officials discovered that he had been previously discharged from the City and designated as ineligible for rehire for knowingly being in possession of a stolen vehicle. His argument that he shouldn't have been placed on the ineligibility list because he never was convicted of the crime is beside the point, because he was found—after a full evidentiary administrative hearing during which he was represented by counsel—to have engaged in conduct prohibited by law that violated the City's personnel rules, the court said. The case is Austin v. City of Chicago, 7th Cir., 18-1905, unpublished 5/1/19.

Case: Individual Employment Rights/Free Speech (Tex. App.)

An employee's motion under the Texas Citizens Participation Act to dismiss Clearview Energy's legal action against her was properly denied. The employee asserted that Clearview's lawsuit was based on matters of public concern, and she argued that emails she wrote addressed the company's failure to pay vendors, which could violate regulations. Her emails contained complaints about the management of the company, objected to the way she was treated by her supervisor, and expressed her desire to be released from her noncompete agreement, a court said. She failed to show by a preponderance of evidence that her communications with management constituted an exercise of free speech under TCPA, an appellate court said. The case is Stroud v. Clearview Energy, 2019 BL 157348, Tex. App., 5th Dist.,

No. 05-18-00729-CV, 5/1/19.

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TOP STORIES

SCOTUS Won't Weigh Evidence Used for Class Status in Wage Case

By Perry Cooper

The U.S. Supreme Court won't get a chance to consider a circuit split over whether evidence used to support a bid for class certification must be admissible in court.

Full 5th Cir. Asked to Hear Sexual-Orientation Retaliation Case

By Patrick Dorrian

A heterosexual worker asked the full Fifth Circuit to decide if it was reasonable for her to believe she was complaining of sex bias when she reported her lesbian boss's alleged discriminatory reaction to a comment she posted on Facebook.

Ousting Unions May Get Easier as NLRB Weighs Options

By Robert Iafolla, Hassan A. Kanu and Andrew Wallender

School bus drivers in Rhode Island who want to force out their union hope the National Labor Relations Board can help. In the process their case might add to a broader effort to make it easier for workers across the U.S. to decertify

unions they want to eject.

Controversial EEOC Pay Data Collection Will Get Second Look (1)

By Paige Smith

A judge's revival of a controversial employer pay reporting requirement will be reviewed by a federal appeals court in Washington, D.C.

DISCRIMINATION

Macy's Worker Lacks Proof Slap of Boss's Butt Didn't Spur Firing

By Patrick Dorrian

Macy's doesn't have to face trial on a worker's claim that she was illegally fired because she was 68 years old, a federal judge in Texas ruled.

Morgan Stanley Worker Cites #MeToo Law in Opposing Arbitration

By Patrick Dorrian

A gay Muslim worker who accuses Morgan Stanley of sexual harassment and other bias says his case should remain in court because the firm's arbitration pact conflicts with New York law.

WAGE & HOUR

Southwest Airlines Looks to Kill Employee Biometrics Lawsuit

By Brian Flood

A lawsuit challenging Southwest Airlines's requirement that employees clock in and out of work using finger-scanning technology should be tossed, the airline told a federal court May 3.

IMMIGRATION

Additional 30,000 Seasonal Guestworker Visas Available May 8

By Laura D. Francis

An additional 30,000 seasonal guestworker visas will become available to employers starting May 8.

LEGAL PROFESSION

Trump Judge Pick Bianco to Get Vote Over Schumer Objection

By Patrick L. Gregory

Joseph Bianco, a federal judge and former organized crime and terrorism prosecutor, is one of two Donald Trump nominees set for likely confirmation this week to appeals court seats in New York.

Meet 'Fenni,' Fenwick & West's Digital Assistant

By Stephanie Russell-Kraft

When Big Law attorneys want to check a billing rate, book a conference room, or find out which partners have a relationship with a certain client, they might ask their administrative staff, or run a search of the firm's internal directory.

Jones Day, Quinn Emanuel Alums Get Trump Judicial Nods

By Jessie Kokrda Kamens

President Donald Trump nominated newly minted federal district Judge Peter Phipps to a slot on the U.S. Court of Appeals for the Third Circuit May 3 in his latest round of judicial nominations.

SAFETY & HEALTH

Deadly Superbug Fungus Could Pose Threat to Health-Care Workers

By Bruce Rolfsen

Hospitals and other health-care employers should be aware of an often-fatal fungus infection that could pose a safety threat to their employees.

ALSO IN THE NEWS

California Issues New Employee-Contractor Test Guidelines

By Hassan A. Kanu

A new test for determining when a worker is a legal employee, as opposed to an independent contractor, will be applied to more than just wage-and-hour claims, according to an opinion letter issued May 1 by California's labor commissioner.

Back-Loaded Supreme Court Enters 'Flood Season'

By Kimberly Strawbridge Robinson

Justice Ruth Bader Ginsburg has referred to it as “flood season.”

Trump's New Tariff Threat Comes Amid Signs Job Gains Peaking

By Shawn Donnan and Joe Deaux

President Donald Trump loves tariffs and hailing the jobs they create in protected industries, declaring last week that “tariffs are working” and again on May 5 that the taxes he imposed on Chinese imports “are partially responsible for our great economic results.”

Punching In: Heavy Is the Head that Wears the EEOC Crown

By Chris Opfer and Jaclyn Diaz

Monday morning musings for workplace watchers.

LATEST CASES

Case: Disability Discrimination/'Employer' (E.D.N.C.)

A former automobile collision repair shop technician in North Carolina can't pursue his disability discrimination claims against the shop's parent company, saying that he was forced to quit based on his cancer diagnosis, because his complaint didn't make any allegations to suggest that the parent company controlled the repair shop's employment decisions. The case is Miller v. Gerber

Collision Ne., Inc., 2019 BL 158903, E.D.N.C., 4:19-CV-18-D, 5/2/19.

Case: Discrimination/Failure to Exhaust (D. Ariz.)

A charge nurse may proceed with her claim that a nursing facility in Arizona refused to promote her to either the director of nursing or the assistant director of nursing positions because of her age. Despite the contention that she failed to include her failure to promote claims in her EEOC charge of discrimination, her EEOC intake notes, which indicate that she complained to an EEOC investigator about the facility promoting someone with less experience to the director of nursing position instead of her, could show that she properly raised the allegations in her charge. The case is Fellows v. Scottsdale OP CO LLC, 2019 BL 158752, D. Ariz., CV-18-03209-PHX-DLR, 5/1/19.

Case: Discrimination/Discharge (E.D. Ky.)

A non-Caucasian female teller may not proceed with her claim that PNC bank in Kentucky fired her because of her sex, age, and race, rather than for policy violations surrounding the falsification of records. She didn't show that she was treated less favorably than younger, Caucasian, or male tellers because her alleged comparator who was only given a written warning for similar violations didn't report to the same supervisor; additionally, she provided insufficient evidence that her discharge was a deviation from the bank's typical procedures and policies. The case is Howard v. PNC Bank, N.A., 2019 BL 159089, E.D. Ky., 5: 18-364-DCR, 5/2/19.

Case: Discrimination/Rehiring (N.D. Ill.)

The City of Chicago Board of Education isn't entitled to dismissal of a racial discrimination claim by a black former high school principal who alleged that she was discriminated against when she was designated as "do not hire" and subsequently denied rehiring following a biased investigation during which she was accused of falsifying attendance records at her school. The principal demonstrated that she would have accepted a position with the Board if it was offered by applying for another job despite the apparent futility of doing so, and her allegations that the investigation and the "do not hire" designation were discriminatory are not purely conclusory because she alleges that non-black principals at three other specific schools who engaged in the same attendance-record practices weren't subjected to any adverse employment

consequences, the court said. The case is Turner v. City of Chi. Bd. of Educ., 2019 BL 158965, N.D. Ill., 17 C 6507, 5/2/19 .

Case: Discrimination/Retaliation (S.D. Ohio)

A female department chair at Columbus State Community College in Ohio may proceed with her claim that she was fired in retaliation for voicing concerns and protesting actions due to her belief that the college was retaliating against a female co-worker for her sex discrimination complaints. Although she was fired for insubordination and threatening to hire an attorney, her protected activity could have constituted the insubordination because the dean partially based her firing decision around the chair's protests and behavior in the meetings that she voiced the retaliation concerns. The case is Raadschelders v. Columbus State Cmty. Coll., 2019 BL 158680, S.D. Ohio, No. 2:17-cv-450, 5/2/19.

Case: Discrimination/Retaliation (S.D.N.Y.)

A black female "Security Hospital Treatment Assistant" of West-Indian descent may proceed with her claim that a New York psychiatric center subjected her to a hostile work environment in retaliation for complaining about national origin and sex discrimination. Her allegation that a supervisor with knowledge of the complaints told her "we are watching you" days before ignoring the center's policies and assigning her to routinely monitor a highly sexualized male patient who repeatedly exposed himself and masturbated in front of her could show that the center acted in a retaliatory manner. The case is LaFontant v. Neale, 2019 BL 158391, S.D.N.Y., No. 18-CV-23 (KMK), 5/2/19.

Case: Wage & Hour/FMLA Retaliation (D.R.I.)

An ink technician at a Rhode Island packaging company can go ahead with his claim that he was fired in retaliation for taking 40 days of Family and Medical Leave Act leave due to his ulcerative colitis nearly a year before, despite the contention that he had a long history of disciplinary issues so that a disagreement with a co-worker was the "last straw" that resulted in his termination. A new manager's comment that he was there to get rid of "the old, the sick, the people taking a lot of time out from work" may allow the technician to establish a link between his FMLA leave and his discharge, and he may show that the company tolerated worse behavior for years, using the disputed

disagreement as a pretext to fire him only after he took protected leave, the court found. The case is Darosa v. Admiral Packaging, Inc., D.R.I., C.A. No. 16-485 WES, 5/2/19.

Case: Discrimination/Exhaustion of Remedies (D.N.J.)

Schindler Elevator Corporation is entitled to dismissal of a black former elevator mechanic's Title VII employment discrimination claims, because he didn't exhaust his administrative remedies when he failed to obtain a right-to-sue letter from the EEOC. While it is true that an employee lacking a right-to-sue letter who is otherwise entitled to one has exhausted administrative remedies, he forfeited his entitlement to the letter by voluntarily withdrawing his EEOC charge before receiving one, the court said. The case is .

Case: Discrimination/Jurisdiction (M.D. Ala.)

A federal district court lacks subject-matter jurisdiction over the Title VII race and gender claims asserted by a black female former employee of Alutiiq Education & Training, LLC, because the company is an Alaskan Native Corporation and Title VII is inapplicable to such corporations. The case is .

Case: Disability Discrimination/Harassment (D.R.I.)

Co-workers' comments about restroom odors and the frequency of an employee's restroom breaks aren't enough to support his disability-related hostile work environment claim after he returned from protected medical leave for ulcerative colitis, because he admits that those comments occurred only a handful of times so they weren't severe or pervasive. The case is Darosa v. Admiral Packaging, Inc., 2019 BL 160583, D.R.I., No. C.A. No. 16-485 WES, 5/2/19.

Case: Discrimination/Jurisdiction (S.D. Tex.)

An untimely motion to dismiss a Title VII retaliation claim against Performance Contracting Inc. in Texas will not be granted, despite the contention that a federal district court lacks jurisdiction because the employee failed to exhaust administrative remedies by not adequately alleging retaliation in her EEOC charge. The employer missed the deadline for filing dispositive motions and administrative exhaustion under Title VII isn't a jurisdictional defect, the court

said. The case is Ramos v. Performance Contracting Inc., 2019 BL 161625, S.D. Tex., CIVIL ACTION H-17-2852, 5/3/19 .

Case: Discrimination/Discharge (S.D. Ind.)

A team leader may not proceed with her claim that Indiana University Health fired her because of her age, rather than for violating the harassment policy. She didn't show that she was treated less favorably than younger employees under similar circumstances and her supervisor's stray remarks, such as making references to her retirement, were insufficient to show that her age was a factor in the firing decision. The case is Seneff v. Ind. Univ. Health, Inc., 2019 BL 160755, S.D. Ind., No. 1:17-cv-04126-JPH-MJD, 5/3/19.

Case: Discrimination/Discharge (N.D. Tex.)

An employee may not proceed with her claim that Macy's Retail in Texas fired her because of her age, rather than for an incident with her supervisor which involved inappropriate conduct. Her allegations, including that she had a perfect disciplinary record leading up to the incident and that there weren't any witness to the incident, didn't show that her age was a factor in the firing decision. The case is Moore v. Macy's Retail Holdings, Inc., 2019 BL 160708, N.D. Tex., No. 3:18-CV-1168-N, 5/3/19.

Case: Individual Employment Rights/Contracts (N.D. Ohio)

Hooberry & Associates Inc. must defend against a former director of nursing's breach of contract claim seeking six months severance pay that a nursing facility's administrator allegedly promised her, vesting upon the accrual of ten years of employment. The director was discharged with more than ten years of service, after a state inspection of the facility revealed problems with the quality of nursing and nursing supervision resulting from her poor performance. The company contended that the offer of severance pay wasn't definite enough to be enforced, and was only discussed in the context of retirement. The employee raised a genuine issue of fact as to the existence of an enforceable oral contract to preclude summary judgment, a court said. The case is Heib v. Hooberry & Assocs., 2019 BL 161127, N.D. Ohio, No. 4:17CV360, 5/3/19.

Case: Disability Discrimination/Hiring (W.D. Pa.)

A Pittsburgh police officer applicant with attention deficit hyperactivity disorder wasn't qualified to proceed with his disability bias claims after the city withdrew its job offer because he failed the state-mandated psychological exam, even though a Pennsylvania township later hired him as a police officer. State law makes the passage of a psychological interview a prerequisite for the hiring of law enforcement officers, so the city couldn't have legally hired him when it withdrew the offer, and he didn't show that the examining psychologists were biased in regard to ADHD, the court found. The case is Gibbs v. City of Pittsburgh, W.D. Pa., No. 18-1563, 5/3/19.

Case: Wage & Hour/Wage Payment (N.D. Miss.)

Employees of the city of Holly Springs, Mississippi, may not move forward with their claim for untimely wage payment, because they failed to make that claim in their complaint despite amending it twice, and even if they had, they didn't offer any evidence of the length of the payment delay to establish that it was unreasonable. The case is West v. City of Holly Springs, 2019 BL 160422, N.D. Miss., No. 3:16CV79-MPM-RP, 5/3/19.

Case: Disability Discrimination/Sovereign Immunity (E.D. La.)

A Nicholls State University fired employee can't sue the Board of Supervisors of the University of Louisiana System for failure to accommodate her knee injury under the Americans with Disabilities Act, because the board is an arm of the state entitled to 11th Amendment sovereign immunity, she didn't bring her claim against individual board members in their official capacity so as to establish a claim for non-monetary damages under the ADA's Title I employment discrimination provision, and the ADA's Title II provision abrogating immunity for public program claims doesn't apply to her employment claim. The case is Cancienne v. Bd. of Supervisors for Univ. of La. Sys., 2019 BL 161679, E.D. La., CIVIL ACTION CASE NO. 18-7934 SECTION: G, 5/3/19.

Case: Labor Relations/Worker Classification (E.D. Pa.)

Whether Fairfield Co. intentionally misclassified its union electricians, even though the Department of Labor declined to resolve the worker classification issue, which the company claims is central to a long-running False Claims Act

case, can now be decided by a federal court. Fairfield argues that a teamsters union's misclassification claims are nonjusticiable without the DOL determination, and that the court lacks subject matter jurisdiction. The primary jurisdiction doctrine, allowing a court to stay a matter in deference to agency expertise, doesn't divest federal courts of jurisdiction, and the union's delay in making a referral to the DOL isn't a basis to dismiss the action, a federal court said. The case is United States ex rel. Teamsters Local 98 v. The Farfield Co., 2019 BL 160255, E.D. Pa., No. 09-4230, 5/2/19.

Case: Discrimination/Adverse Employment Action (E.D. Mich.)

A white male United States Postal Service mail carrier in Southfield, Michigan, who was first suspended without pay and then issued a Notice of Removal can't pursue his race or sex discrimination claims, because he was paid for the suspension period, he voluntarily started the administrative retirement process on the same day he received the removal notice, and the notice was removed from his file. He never pursued a constructive discharge claim in his EEOC charge or in court and, even if he had, it would've been futile because he made no allegations that the USPS asked him to retire, encouraged him to retire, or engaged in any misconduct that affected his resignation decision, let alone compelled him to retire, the court said. The case is .

Case: Wage & Hour/Minimum Wage (E.D.N.C.)

The U.S. Department of Labor must give more information to make a claim for unpaid minimum wages against a North Caroline wine and beer company on behalf of its employees, because the complaint only stated that the company failed to pay the applicable minimum wage rate without specifying the length or frequency of the employees' unpaid work. The case is Acosta v. Ararat Imp. & Exp. Co., 2019 BL 160876, E.D.N.C., No. 5:18-CV-444-FL, 5/3/19.

Case: Disability Discrimination/Retaliation (S.D.N.Y.)

A disabled former administrative law judge for the New York City Department of Consumer Affairs, who was demoted to staff attorney, can go ahead with her disability bias claim under the city anti-discrimination law and her retaliation claims under city, state, and federal laws, even though her federal and state disability bias claims failed because she didn't show that her demotion was due

to her disability. Her allegation that her supervisor needlessly increased her workload and berated her about her disability in front of others allows her to establish a disability bias claim under the broader city law, and her allegation that her supervisor took those actions shortly after the attorney filed an EEOC charge allows her retaliation claims to survive a motion to dismiss, the court ruled. The case is Viruet v. City of New York, 2019 BL 160769, S.D.N.Y., No. 16-cv-8327 (JGK), 5/3/19.

Case: Discrimination/Hiring (6th Cir.)

A candidate may not proceed with her claim that Hudson City School District in Ohio failed to hire her as a teacher on multiple occasions because of her age. The District felt that she performed poorly in her interviews, including by giving vague answers and discussing her plans to use the wrong curricula to teach math and reading, and she didn't show that she clearly was the superior candidate or that her age was a factor in the hiring decision. The case is Romano v. Hudson City Sch. Dist., 2019 BL 161914, 6th Cir., 18-3969, unpublished 5/6/19.

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TOP STORIES

Mulvaney Tightens Grip on Labor Chief After Trump Allies Grumble

By Ben Penn

President Donald Trump's acting chief of staff, Mick Mulvaney, has seized power over the Labor Department's rulemaking process out of frustration with the pace of deregulation under Labor Secretary Alexander Acosta, according to current and former department officials and other people who communicate with the administration.

Arbitration Provision Keeps Sheet Metal Firm at Bargaining Table

By Porter Wells

An Oregon company didn't have the right to renounce a collective bargaining agreement with a sheet metal worker's union, the Ninth Circuit ruled.

Chipotle Supervisor to Get Trial on Race-Based Retaliation Claim

By Patrick Dorrian

A former supervisor at a Chipotle Mexican Grill Inc. in Ohio may have been fired for telling her boss he was discriminating against a black crew member, the Sixth Circuit ruled May 28.

Hyundai Faces Trial Over Accommodations for Worker's Diabetes

By Patrick Dorrian

Hyundai Motor Manufacturing of Alabama LLC may have failed to accommodate a warranty claims reviewer's need for food breaks for his diabetes, a federal judge ruled.

DISCRIMINATION

National Oilwell Varco Manager's Text, Email May Prove Bias

By Patrick Dorrian

Two men fired from their jobs performing contract work for National Oilwell Varco Inc.'s Tuboscope division may be able to prove disability bias, a federal judge ruled.

Sterling Jewelers Worker Must Arbitrate Job Bias Claims

By Patrick Dorrian

Sterling Jewelers Inc. can require an employee in Oregon to arbitrate his employment discrimination claims, a federal appeals court ruled.

Fired Fifth Third Bank Workers Lose Sex-Based Bias Claims

By Patrick Dorrian

Two Kentucky women who claim Fifth Third Bank Inc. treated them differently than male colleagues for violating its cash-vault entry procedures failed to show sex bias, a federal appeals court ruled.

WAGE & HOUR

Amazon Narrows Overtime Claims in Station Manager Class Action

By Porter Wells

Amazon.com LLC successfully shook off claims it violated federal

requirements to pay overtime to delivery station managers, leaving only California state law claims on the table.

STATE & LOCAL LAWS

Connecticut $15 Minimum Wage Bill Signed Into Law

By Aaron Nicodemus

Connecticut has joined the $15-minimum wage club, which now counts seven states as members.

WHISTLEBLOWERS

Lewis Brisbois Investigated Bias Claim So Can't Defend College

By Peter Hayes

Lewis Brisbois Bisgaard & Smith LLP's takeover of a sex discrimination investigation from the director of human resources at Newman University bars the firm from defending the school against her whistleblower claims.

LABOR RELATIONS

Unions at Work: Illinois Grad Students on Verge of Labor Rights

By Louis C. LaBrecque

Keep up to date with a weekly roundup of union initiatives, bargaining developments, leadership changes, and other labor news.

NLRB

NLRB Weekly Summary of Cases, Dated May 13-17, 2019

Summary of NLRB Decisions for Week of May 13 - 17, 2019

HEALTH CARE & BENEFITS

Challenges to Trump's Religious Protection for Health Workers Grow (1)

By Mary Anne Pazanowski and Madison Alder

LGBTQ advocacy groups, Santa Clara County, Calif., and health-care providers are asking a federal court to stop the federal government from enforcing a rule to protect health workers with moral objections set to take effect in July.

Chevron Workers' 401(k) Fee Challenge Won't Get SCOTUS Review

By Jacklyn Wille

Chevron Corp. workers challenging the fees and investment options tied to their $19 billion 401(k) plan couldn't convince the U.S. Supreme Court to take their case.

Dead Man Not Liable for Former Company's Pension Debt

By Jacklyn Wille

A multi-employer pension fund lost a round in its lawsuit seeking $1.4 million in withdrawal liability from the estate of a man who owned an electrical contracting company in Orange County, Calif.

Pension Lawsuit Puts Court Choice Test Back Before High Court

By Lydia Wheeler

Theodore Rapp lives and works in California, but the legal fight to recoup his pension benefits is playing out in a courtroom across the country in Connecticut.

SAFETY & HEALTH

Refinery Responsible for Predecessor's Safety Violations: DOL

By Fatima Hussein

The Labor Department is taking its view to a federal appeals court that it

showed that an Oklahoma oil refining company where a worker died in a 2012 explosion should face more serious penalties.

Railroad Agency Scraps Train Crew Staffing Regulation Proposal

By Louis C. LaBrecque

Two-person train crews aren't necessary for rail safety, the Federal Railroad Administration said in withdrawing a proposed rule that would have regulated staffing.

ALSO IN THE NEWS

Domino's Loses Bid to Get Antitrust No-Poach Case Dismissed

By Mike Leonard

Domino's Pizza Inc. and its franchising affiliates must face an antitrust challenge to a "no poach" agreement barring the chain's stores from recruiting or hiring one another's workers.

Fortune 500 Attorney Takes Reins From EEOC's Bipartisan Leader

By Paige Smith

A new leader could bring change to the Equal Employment Opportunity Commission at a time when the agency is navigating disputes within the Trump administration and with business groups.

Punching In: The Trump Medical, Family Leave Reform Blueprint

By Chris Opfer, Ben Penn and Jaclyn Diaz

Monday morning musings for workplace watchers

LEGAL PROFESSION

Former U.S. Attorney General Loretta Lynch Heads to Paul Weiss

By Meghan Tribe

Loretta Lynch, the first black woman to serve as U.S. attorney general, is joining Paul, Weiss, Rifkind, Wharton & Garrison as a partner in its litigation department.

Opportunity Zones Give Big Law 'Pop-Up' Teams Plenty of Work

By Melissa Heelan Stanzione

The 2017 tax law created tax incentives for investors in certain economically distressed communities in the U.S., and it's keeping more than just tax lawyers busy.

Taking on Culture Change at Ninth Circuit Post Kozinski

By Patrick L. Gregory

Yohance Edwards had his work cut out for him when he became the first director of workplace relations at the California-based federal judicial circuit grappling with addressing harassment concerns in the #MeToo era.

LATEST CASES

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

Anheuser-Busch, LLC lawfully sought to compel arbitration of the race discrimination and retaliation claims of a discharged employee who had been covered by a labor contract. Although this was the first time the employer suggested that its arbitration policy might apply to a former unit employee, and the employer never gave the union notice or an opportunity to bargain over the potential application of the policy to the employee, the employer's arbitration policy is not alleged to be facially unlawful, the general counsel cites no case in which the NLRB has found that a court filing has an "illegal objective" solely because the filing itself amounted to a unilateral change, and the employer's motion to compel arbitration was an exercise of its First Amendment right to petition, the NLRB finds in a 2-1 decision. The case is Anheuser-Busch, LLC, 2019 BL 186329, N.L.R.B., 5/22/19.

Case: Individual Employment Rights/Public Employees (Ill. App. Ct.,

4th Dist.)

The Illinois Civil Service Commission's decision to impose a suspension in lieu of discharge on a child welfare specialist who falsified some of his case notes about visits with families and children in foster care wasn't arbitrary and unrelated to the terms of his service with the Illinois Department of Children and Family Services. DCFS contends that his falsification of contact notes was a serious violation of its rules, which made it difficult for department employees to determine the best course of action in child welfare cases. The commission largely adopted an ALJ's proposed decision, however, it determined that a suspension was the appropriate level of discipline, because the employee had a good performance record, no prior discipline, and a long period of service. The case is Ill. Dep't of Children & Family Servs. v. Leeds, 2019 BL 191098, Ill. App. Ct., 4th Dist., No. 4-18-0480, 5/24/19.

Case: Wage & Hour/Overtime Exemptions (N.D. Cal.)

Amazon.com didn't establish that a California delivery station shift manager was an executive employee exempt from state overtime law. Although certain elements of his job met the criteria for the exemption, such as the independent judgment he exercised in assigning work and troubleshooting operations issues, there is a dispute as to whether he was primarily engaged in those duties because he testified that he spent most of his work day on non-exempt tasks such as unloading trucks and breaking down packages in order to meet his managers' expectations. However, the manager was properly classified as overtime-exempt under federal law, because his job description, resume, role as the sole manager at the delivery station, and relative freedom from supervision reflect that management was his primary duty. The case is Ortiz v. Amazon.com LLC, 2019 BL 191510, N.D. Cal., No. 17-cv-03820-JSW, 5/24/19.

Case: Individual Employment Rights/Whistle-blowers (Idaho)

An Idaho police officer will get a partial new trial to address only the question of damages related to his whistle-blower retaliation lawsuit, after an Idaho district court incorrectly applied the Idaho Tort Claims Act and its damages caps to the officer's retaliation and negligence claims, improperly reducing a jury's $1.5 million damages award for negligent infliction of emotional distress. The Idaho Protection of Public Employees Act supplants the state tort law, and the

whistle-blower act doesn't bar non-economic damage awards, the Idaho Supreme Court held. The officer had alleged that the Idaho State Police retaliated against him for testifying against another officer at a hearing about a fatal crash, and for objecting to a new policy requiring crash investigators to destroy draft and peer review reports. The case is Eller v. Idaho State Police, 2019 BL 191826, Idaho, No. 45699, 5/24/19.

Case: Discrimination/Sexual Harassment (D. Mass.)

A female employee of a Boston-based facility services company may proceed with her sexual harassment claim based on her allegations that her manager subjected her to inappropriate sexual innuendos, questions, advances, touching, jokes, gossip, conduct, comments, and leering. The alleged conduct is sufficient to support a sexually hostile work environment claim, and her complaint plausibly alleges that her employer didn't take reasonable measures to prevent the harassment and that the female employee took reasonable steps to avoid the harassment, such as reporting her manager's behavior to Human Resources and requesting a transfer to get away from him. The case is .

Case: Discrimination/Constructive Discharge (W.D. Mich.)

A black law enforcement officer may not proceed with his claim that the city of Lansing, Michigan, forced him to resign because of his race. Although an attorney told him that he was facing termination before a pre-determination hearing about an investigation into his alleged multiple policy violations, the attorney was from his union, no one at the city had recommended any sanctions or disciplinary actions at the time of his resignation, and a mere investigation into alleged policy violations isn't enough to constitute intolerable working conditions. The case is Funk v. City of Lansing, 2019 BL 191040, W.D. Mich., No. 1:17-CV-514, 5/24/19.

Case: FMLA/Interference (3d Cir.)

A training director may not proceed with her claim that a medical services company in Pennsylvania interfered with her rights under the Family and Medical Leave Act when she was fired while on leave for failing to timely respond to the company's inquiry about potential non-compete agreement

violations. She didn't show that the firing decision was related to the exercise of her FMLA rights and her allegation that the company placed unreasonable expectations on her to timely respond to the inquiry while on FMLA leave doesn't constitute interference under the Act because the one-time inquiry wasn't related to her FMLA rights and "there is no right in the FMLA to be 'left alone.'" The case is Reagan v. Ctr. LifeLink Emergency Med. Servs., Inc., 2019 BL 191857, 3d Cir., No. 17-3056, unpublished 5/24/19.

Case: Disability Discrimination/Qualified Individual (N.D. Ill.)

A former senior manager at Discover wasn't a qualified individual for purposes of her disability bias claims after the credit-card company fired her while she was on protected medical leave for the treatment of anxiety and depression, because her leave expired and she says that she remains unable to work due to those and other medical conditions, including hypothyroidism and morbid obesity. The case is Jahnke v. Discover Prods., Inc., 2019 BL 190968, N.D. Ill., No. 18 C 5259, 5/24/19.

Case: Discrimination/Discharge (6th Cir.)

Fifth Third Bank, Inc. in Newport, Kentucky, was properly granted summary judgment on a claim by two female employees that they were subjected to sex discrimination because they were discharged for violating the bank's policy regarding access to the vault while three male employees who allegedly also committed the same infraction were just counseled and retained. The female employees admitted to the violation and were seen on video committing it, while two of the male employees denied the accusation and weren't seen on videotape, and the third male claimed that he was bullied into violating the policy by a supervisor, he complained about being forced to do it, and he refused to do it again when asked by one of the fired females, who was not his superior and described him as a "by-the-book guy," the court said. The case is McLaughlin v. Fifth Third Bank, Inc., 2019 BL 190450, 6th Cir., No. 18-5712, unpublished 5/24/19.

Case: Discrimination/Equal Pay Act (W.D. Va.)

A female former "scale house supervisor" may proceed with her claim that Rockydale Quarries in Virginia violated the Equal Pay Act by failing to provide

her with the same benefits that it provided to her male predecessor. Her allegation that the quarry provided her predecessor with a company vehicle for commuting purposes but refused to give her the same benefit could show that it violated the Act. The case is Perdue v. Rockydale Quarries Corp., 2019 BL 187047, W.D. Va., 7:18CV00416 1964, 5/22/19.

Case: Discrimination/Discharge (N.D. Tex.)

A male senior manager may not proceed with his claim that Xerox Corporation in Texas fired him for failing to conform to traditional gender stereotypes, such as by engaging in sexual relationships with males and displaying "gay mannerism," rather than for misusing his corporate credit card. He only presented evidence that he was allegedly discriminated against because of his sexual orientation, instead of his failure to conform to traditional gender stereotypes, and the district court followed the Fifth Circuit's precedent that "Title VII does not prohibit discrimination on the basis of sexual orientation." The case is Berghorn v. Xerox Corp., 2019 BL 188899, N.D. Tex., No. 3:17-CV-01345-S, 5/23/19.

Case: Discrimination/Joint Employer (D.N.M.)

A female pipelayer for C3 Pipeline Construction Inc. can't sue Alpha Crude Connector, LLC and its successors in interest for sexual harassment allegedly committed by her supervisors at C3 Pipeline because she failed to show that Alpha Crude was a joint employer with C3 Pipeline, even though Alpha Crude supervised limited aspects of the work and provided instruction on particular tasks. Alpha Crude hired C3 Pipeline as a subcontractor for a pipeline project and the female pipelayer didn't demonstrate that Alpha Crude exerted sufficient control over the essential terms and conditions of her employment---including the authority to terminate, pay, supervise, and discipline her---to be considered her joint employer, the court found. The case is .

Case: Labor Relations/Contracts (W.D. Wash.)

A senior missile craftsman who was jailed on a charge of assault, for firing a gun at an acquaintance of his daughter who had broken into their house, can't show that Lockheed Martin Corp. breached a labor contract when it fired him for failing to report to work for five scheduled work days without a valid

justification. His daughter contacted Lockheed to inform them that he was in jail, and he argued that her "report" should have been sufficient under the contract, but he doesn't cite an integration clause or other basis for the court to conclude that the contract prohibits Lockheed from implementing policies not explicitly contained within the contract's text. The case is Badkin v. Lockheed Martin Corp., 2019 BL 187007, W.D. Wash., C17-5910 BHS, 5/22/19.

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TOP STORIES

In Worker Center Battle, Business Seeks Ally in Labor Board

By Andrew Wallender

The country's largest business lobby is turning to the National Labor Relations Board as a potential new ally in its long-term efforts to get the government to treat nonprofit, community-based worker centers no differently than unions.

Change to Indiana Law Flips Outcome in Wage Deduction Case

By Porter Wells

A recent change to Indiana law allowing employers to deduct wages for employee uniforms means an automobile manufacturing plant is off the hook for a damages award to a class of its workers, the Seventh Circuit said May 29.

Black Nanny Can Pursue Race Bias Claims Against White Couple

By Patrick Dorrian

A text message a wife meant to send to her husband supports a nanny's claims that she was immediately fired when the couple learned she is black, a federal judge ruled.

'Hiring Robots' Restrictions Passed by Illinois Legislature

By Michael J. Bologna

Illinois employers using artificial intelligence platforms during their hiring and recruitment processes would have to seek the consent of job applicants under legislation headed to the desk of Gov. J.B. Pritzker.

DISCRIMINATION

New York Hyatt Settles EEOC Disability Bias Lawsuit for $100K

By Patrick Dorrian

A federal court approved Hyatt Corp.'s settlement of a U.S. government lawsuit accusing it of discriminating against a front desk agent in New York with a spine impairment, the agency announced May 30.

JPMorgan Agrees to Biggest-Ever Settlement in Anti-Dad Bias Case

By Josh Eidelson

JPMorgan Chase & Co. has agreed to pay $5 million to resolve a discrimination claim filed by a male employee who alleged the bank's parental leave policy was biased against dads.

Black Nurse Lacks Proof Race Drove Firing After Patient Dispute

By Patrick Dorrian

A Maryland hospital doesn't have to face trial on a black nurse's race discrimination claim that she was fired after a patient's white family member threatened her, a federal judge ruled.

WAGE & HOUR

Florida Contractor Debarred Over Refusal to Pay Back Wages

By Jennifer Kay

A Florida construction company can't bid on federally funded projects for three years after refusing to pay back wages allegedly due to nearly a dozen workers.

Builder Fined in Wage Case, General Contractor Also Liable

By David McAfee

A Southern California construction company was fined nearly $600,000 for allegedly failing to pay workers, and for the first time under a 2017 state law, a general contractor has been fined for a subcontractor's wage violations.

HARASSMENT & RETALIATION

Ex-Arizona Coach Must Face Suit Alleging Sex Assaults Downplayed

By Steven M. Sellers

A woman allegedly attacked by a former University of Arizona football player can proceed with civil rights claims against the team's former coach, a federal court in Arizona ruled.

Professor Gets Job Back as He Fights Sex Harassment Allegations

By Peter Hayes

A University of Louisville biology professor fired over alleged sexual harassment claims is entitled to reinstatement while his suit challenging his termination proceeds, the Western District of Kentucky said.

STATE & LOCAL LAWS

Chicago Predictive Scheduling Bill Revived With Mayor's Support

By Andrew Wallender

Chicago lawmakers reintroduced a bill that would penalize employers for making last-minute changes to workers' schedules. The legislation has been revamped with a number of concessions to the business community and has backing from Mayor Lori Lightfoot.

Alabama Pay Equity Bill, Passed by Legislature, Goes to Governor

By Chris Marr

Alabama would bar pay discrimination and protect job applicants who don't disclose their salary history, under legislation headed to Gov. Kay Ivey.

California Assembly Passes Dynamex Bill Favoring Employee Status (1)

By Joyce E. Cutler

A hotly debated labor-backed bill codifying a California Supreme Court decision that makes it harder for employers to classify workers as independent contractors passed the state Assembly.

Paid Time Off Mandate for Employers Passes Nevada Legislature

By Brenna Goth

Providing employees with paid time off could soon be a requirement for Nevada companies with at least 50 employees.

States of Work: Nevada Limits Nondisclosure Agreements

By Chris Marr

This week's "States of Work" looks at Nevada legislation to block nondisclosure agreements from settlements involving sexual offenses or discrimination, plus Minnesota and Illinois efforts to tackle wage theft.

IMMIGRATION

Prosecution of Employers for Hiring Unauthorized Workers Rare

By Laura D. Francis

Prosecutions of employers for knowingly hiring undocumented workers appear to be minuscule in comparison to prosecutions of other immigration-related crimes.

HEALTH CARE & BENEFITS

Georgetown Workers Miss Deadline to Revive Retirement Plan Suit

By Jacklyn Wille

Georgetown University workers can't revive their retirement plan lawsuit because they missed a filing deadline by two days, a federal judge ruled.

ALSO IN THE NEWS

Top Labor Department Enforcement Official Stepping Down (1)

By Paige Smith

Another Obama-era top official at the Labor Department is departing, multiple sources familiar with the situation told Bloomberg Law.

Trump Religious Shield for Health Workers Puts Employers in Bind

By Erin Mulvaney and Madison Alder

Religious protections bolstered under a new Trump administration rule create a pathway to deny health care treatment to LGBT individuals, restrict abortion rights, and avoid providing vaccinations, prompting concern that employers in the health care industry are now in an untenable and risky position.

Uber Lowers Barrier to Drive for Those With Little Cash (1)

By Gabrielle Coppola

Uber Technologies Inc. is going nationwide with a program that helps those without a car—or the financial means to get one—drive for the ride-hailing giant.

HSBC Plans Hundreds of Investment Bank Job Cuts in Cost Push (1)

By Harry Wilson and Stefania Spezzati

HSBC Holdings Plc is considering eliminating hundreds of investment banking

jobs as Chief Executive Officer John Flint pressures the lender's top managers to cut costs, according to people familiar with the plan.

PRACTITIONER INSIGHTS

INSIGHT: Law Firms on Sidelines of Structural Change While New Players Take Field

BigLaw continues making money and tinkering with changes, but other players in the legal market are actually driving structural change. Seyfarth Shaw's J. Stephen Poor says the so-called "law companies," alternative service providers, technology companies, and the Big Four continue to position themselves to take market share from BigLaw.

LEGAL PROFESSION

Winston Strawn, Latham Led the Pack on NFL Union Legal Fees

By Roy Strom

The NFL Players Association paid Big Law firms more than $4.75 million in legal fees last year, according to a new regulatory filing.

Dorsey & Whitney Partner Gets Trump Nod for Judgeship in Utah

By Jordan S. Rubin

President Donald Trump plans to nominate a Dorsey & Whitney partner to a district court judgeship in Utah.

LATEST CASES

Case: Labor Relations/Interference (N.L.R.B.)

Quality Dining, Inc. didn't violate federal labor law by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The U.S. Supreme Court held in 2018 that agreements that stipulate that employment

disputes are to be resolved by individualized arbitration do not violate the National Labor Relations Act and must be enforced as written under the Federal Arbitration Act, and the unfair-labor-practice complaint must be dismissed in light of that ruling. The case is Quality Dining, Inc., 2019 BL 195932, N.L.R.B., 04-CA-175450, 5/29/19.

Case: Labor Relations/Racketeering (N.D. Ill.)

A company that leased Chicago office space from Jones Lang LaSalle Americas (Illinois), LP can go forward a suit alleging that JLL unlawfully conspired with three unions to bar nonunion labor from the building and induce tenants to purchase union labor at inflated prices. JLL argued that wage payments the company made to union contractors were lawful under federal labor law as "the sale or purchase of an article or commodity at the prevailing market price in the regular course of business," but the complaint alleges that JLL's actions drove the price of union labor above "the prevailing market rate," and that the wages the company paid were the result of an unlawful hot cargo agreement and extortion under the Hobbs Act. The case is Wacker Drive Exec. Suites, LLC v. Jones Lang LaSalle Ams. (Ill.), LP, 2019 BL 193242, N.D. Ill., 18-CV-5492, 5/28/19.

Case: Disability Discrimination/Essential Functions (2d Cir.)

A federal district court properly denied a post-verdict motion for judgment as a matter of law by the Board of Education for the Town of Greenwich, Connecticut, after a jury found the Board liable for its failure to accommodate a school paraprofessional's disability in violation of the Americans with Disabilities Act. While the Board argued that she hadn't shown that she could perform the essential functions of her job with or without a reasonable accommodation, sufficient evidence supported the jury's findings that lifting and toileting students weren't essential functions of the paraprofessional's job, given that the paraprofessional and her former supervisor testified that she and other paraprofessionals with injuries or disabilities were previously allowed to work with students who didn't require lifting or being pushed in a wheelchair. The case is .

Case: Discrimination/Jurisdiction (D.N.M.)

A federal district court lacks subject matter jurisdiction over Title VII claims

brought by a discharged employee of Shiprock Associated Schools, Inc., which is a non-profit corporation in New Mexico that is registered to conduct the business of operating schools within the Navajo Nation, because the company qualifies as an "Indian tribe" that is exempt from Title VII claims. The company isn't a covered entity under Title VII because it fits the definition of an “Indian tribe,” given that over 98% of the company's students are enrolled in federally recognized tribes, its board members are enrolled members of the Navajo Nation, and the Navajo Nation Board of Education authorizes the company to operate Navajo community schools, classifies the company as a tribal organization, requires it to comply with Navajo Nation rules and regulations, and may step in and assume control if the company fails to comply. The case is Jim v. Shiprock Associated Sch., Inc., 2019 BL 196753, D.N.M., CIV 17-1114 RB/JHR, 5/29/19.

Case: Wage & Hour/Overtime Calculations (6th Cir.)

A federal district court erred in calculating the amount of overtime employees of a timber-harvesting company in Michigan worked by determining that ordinary commuting time and bona fide meal periods count as compensable hours which are subject to overtime requirements under the Fair Labor Standards Act. Although the district court held that the company had a custom of paying for certain non-compensable hours such as meal and travel periods, the FLSA only requires an employer to compensate overtime for "actual work or employment," and the employer's mere custom of paying for the travel time and meal periods doesn't make them "actual work" under the Act. The case is Sec'y of Labor v. Timberline South LLC, 2019 BL 195940, 6th Cir., No. 18-1763, 5/29/19.

Case: Wage & Hour/FLSA Retaliation (W.D. Wis.)

A former jail officer may proceed with his claim that the County of Barron, Wisconsin, demoted him from a jail sergeant position in retaliation for questioning if the County was violating the Fair Labor Standards Act by failing to pay jail staff for time spent in pre-shift briefings. Although the County offered multiple reasons for the demotion such as communication and performance issues, the officer's allegations, including that his performance evaluations never mentioned concerns about communication issues and that the County may have enhanced his disciplinary record to justify the demotion, could show