

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

MILUM TEXTILE SERVICES, CO.

and

UNITE HERE!

**28-CA-20898
28-CA-20906
28-CA-20973
28-CA-21050
28-CA-21203**

John Giannopoulos, Atty., Counsel for the General Counsel,
Region 28, Phoenix, Arizona.

Laurie A. Laws, Atty., Farley, Robinson & Larsen,
Counsel for Respondent, Phoenix, Arizona

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. Judge Joseph Gontram heard this case in Phoenix, Arizona, on March 5 through March 9, March 20 and 21, April 2 through April 5, April 9 and 10, 2007.¹ The hearing closed on April 11, 2007, and the parties submitted their briefs on June 15, 2007.² Judge Gontram died on July 18, 2007, prior to issuance of his decision in this case. Thereafter, all parties agreed that a trial de novo was unnecessary and that the case could be transferred to another administrative law judge to write the decision based on the record created before Judge Gontram without the need for demeanor credibility findings. On August 7, 2007, the case was transferred to the undersigned for decision.

This matter was tried upon a Third Consolidated Complaint (the Complaint) issued February 23, 2007 by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by the UNITE HERE! (the Union). After issuance of the Complaint, the Regional Director amended the Complaint on February 27, March 16, and April 9, 2007. The Complaint, as amended, alleges Milum Textile Services, Co. (the Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent essentially denied all allegations of unlawful conduct.

II. Issues

1. Did Respondent violate Section 8(a)(1) of the Act by the following conduct:
soliciting employee grievances, promising and granting benefits, interrogating employees, implying employee organizing efforts were futile, filing and maintaining a lawsuit against the Union, promulgating a rule prohibiting employees from wearing union buttons at work, seeking the arrest of union supporters, creating the

¹ All dates herein are 2006 unless otherwise specified.

² Counsel for the General Counsel's unopposed post hearing motion to correct the transcript is granted. The motion and the corrections are received as ALJ exhibit 1.

impression of surveillance and engaging in surveillance of employees' union activities, threatening employees with reduced wages, and violating employees' *Johnnies Poultry*³ rights.⁴

2. Did Respondent violate Section 8(a)(3) of the Act by discharging Denise Knox and Soe Moe Min on July 8?
3. Did Respondent violate Section 8(a)(3) of the Act by suspending and placing on probation Maria Minjarez on October 19?
4. Did Respondent violate Section 8(a)(3) of the Act by suspending Evangelina Guzman on July 4 and disciplining her on December 26 and January 20, 2007?
5. Is a bargaining order pursuant to *NLRB v. Gissel Packing Co.*⁵ an appropriate remedy?

III. Jurisdiction

At all times relevant, the Respondent, an Arizona corporation with a facility and place of business located in Phoenix, Arizona (the facility) has been engaged in the business of providing commercial laundry services.⁶ During the 12-month period ending July 6, the Respondent, in conducting its business operations purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Arizona. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. The Facts

A. The Respondent's Business Operation

The Respondent commercially launders restaurant and healthcare linens at its laundry in Phoenix, Arizona, which occupies a block between Sixth and Seventh Avenues and provides pickup and delivery services to customers in the area, including hospitals and restaurants.

During the relevant period, the following individuals served as supervisors and agents of the Respondent in the indicated positions:

Craig Milum (Mr. Milum)	---	President
Angela Kayonnie (Ms. Kayonnie)	---	Production Manager
Jaime Chavez (Mr. Chavez)	---	Production Supervisor
Rafael Parra (Mr. Parra)	---	Chief Engineer
Jason Myer (Mr. Myer)	---	IT Director

The Respondent's production department, which includes finishing, washing, and sorting employees, numbering approximately 70, operates Monday through Saturday in two basic shifts: 6:00 a.m. – 2:00 p.m. and 2:00 p.m. until the work is completed for the day. The washing and sorting employees generally start a few hours before the finishing employees. Employees

³ 146 NLRB 770 (1964).

⁴ In his post-hearing brief, Counsel for the General Counsel withdrew complaint allegation 5(b)(2), which alleged the Respondent unlawfully prohibiting employees from wearing union tee shirts at work.

⁵ 395 U.S. 575 (1969).

⁶ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

“clock” in and out of work using a computer system into which individual employees type their respective employee numbers. Company policy requires employees to notify and to obtain authorization from supervisors for absences or to leave work.

5 Both the Respondent and Counsel for the General Counsel introduced into evidence copies of written disciplinary notices given to employees since 2003. Review of the notices reveals that at all relevant times the Respondent exercised significant discretion as to the scope and number of oral or written warnings given for infractions of company rules. The majority of the disciplinary notices deal with such time and attendance issues as unexcused absences, 10 tardiness, and leaving work without permission or before work is finished. Other notices warn against misuse of work time, e.g., smoking, slowness, and talking. The notices show that occasionally employees are placed on probation in connection with warnings, including first warnings. Frequently, the disciplinary notices include warnings that additional infractions will result in suspension or termination.

15 I find that at all times relevant, the Respondent’s disciplinary practices have followed no clearly discernible pattern. The evidence does not show clear-cut disciplinary progression from warnings to suspension or termination. However, except in extraordinary circumstances, it appears that the Respondent has generally given employees one or more oral and/or written warnings before imposing suspension or 20 termination. After one or more warnings, the Respondent has both suspended and failed to suspend employees for time and attendance problems. In the year preceding the union campaign, various employees left work without permission and received warnings with the threat of subsequent suspension or discharge upon repeated offense.

25 B. The Union Organization Drive

The Union distributed union literature to production employees at the facility beginning February 27. Thereafter, employees supporting the Union passed out union flyers at work and placed stacks of flyers in the employee lunchroom. By letter dated March 3, Kurt Edelman, laundry director of the Union, asked Mr. Milum to discuss participating in a neutral-party 30 examination of written employee union authorizations to determine whether a majority of the Respondent’s employees wished to be represented by the Union, which the Respondent declined.

35 On March 4, at about 3 p.m., all scheduled production employees (about 40) stopped working and asked to speak to Mr. Milum. Mr. Milum joined the employees in the production area, and an employee presented him with a multipage document (the Petition), saying that the workers wanted the Union to represent them. The Petition was in Spanish and English, the fore page of which read, “For Respect and Dignity [and] Safer Working Conditions.” Succeeding pages bore the following heading and the seriatim names, addresses, telephone numbers, and 40 dated signatures of 42 individuals:

WE DEMAND TO JOIN WITH UNITED HERE AND 40,000 UNION
LAUNDRY WORKERS ACROSS THE COUNTRY!

I hereby accept membership in UNITE HERE, the international laundry workers union, and authorize UNITE HERE to represent me in negotiations with my 45 employer about wages, hours and all other conditions of employment.

On March 7, the Union distributed to employees entering work adhesive name tags on which union representatives had written “Unite Here!” Receptive employees wrote their names on the tags and affixed them to their clothing without comment or objection from any supervisor.

5 During the Union's organizational efforts, the Union held biweekly employee meetings and recruited employees to distribute union literature and paraphernalia at the facility.⁷ Many employees wore the union-distributed items at work, including approximately three-inch diameter adhesive paper emblems that bore the words "QUEREMOS UNION YA~WE WANT UNION NOW" around the circumference and UNITE HERE! in the center. The Union provided employees with a nine by four foot banner that employees displayed in the employee lunchroom, which read, as translated from Spanish, "THE COMMUNITY SUPPORTS YOU! UNITE." The Union also presented employees with a microwave oven for the lunchroom on which employees affixed multiple stickers bearing the following messages (in English and Spanish): UNITE HERE! IT'S TIME FOR A UNION! UNION ORGANIZE! WE WANT A UNION! After their placement in the employee break room, both the microwave oven and the banner remained there at least until the date of the hearing. No evidence was adduced that any supervisor objected to or commented on the union paraphernalia worn or displayed at the facility except for metal union buttons, as related below.

15 Beginning March 10, the Union, assertedly relying on the findings of governmental regulatory agencies and employee reports, wrote to some of the Respondent's restaurant customers and leafleted their patrons, asserting that the Respondent disregarded established health and safety practices. The Union also created a website entitled "milumexposed," on which safety and employee issues were discussed. Sometime in April a television newscast featured an interview with employee Denise Knox (Ms. Knox) as a union supporter. On April 24, the Union issued a press release repeating its criticism of the Respondent's health and safety record. On April 28, *The Arizona Republic* published an article bearing the headline, "Laundry service targeted by Valley union officials," which dealt with the same issues. In June, union representatives and employee supporters, accompanied by a television news crew, filmed a news segment at the facility.⁸ On July 6, the Union sponsored a community forum in Tucson, Arizona. A news segment of the event in which some of the Respondent's employees appeared was televised.⁹ The Respondent has referred to the Union's appeal to the Respondent's customers and to the community as the "corporate campaign," distinguishing it from the Union's organizational campaign among employees. The Respondent's post-hearing brief describes the so-called corporate campaign as "a form of economic warfare," which the Respondent had assertedly been defending since 2005.

35 Over the course of the union organizational campaign, Ms. Kayonnie reported to Mr. Milum which union organizers were at the facility and which employees were talking to them. By April, Mr. Milum believed that several production employees were "strong" union supporters, including Evangelina Guzman (Ms. Guzman), Maria Minjarez (Ms. Minjarez), Ms. Knox, and Brandy Ibarra (Ms. Ibarra).¹⁰

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⁷ Employees handed out union flyers, shirts, wrist-bands, stickers, and buttons.

⁸ The employee supporters included Ms. Knox, Brandy Ibarra, and Zulema Ruiz

45 ⁹ Mr. Milum went to Tucson in anticipation of being interviewed, but the interview did not take place.

¹⁰ In a February 9 email to the manager of the Respondent's customer, Fox Restaurant, Mr. Milum identified Ms. Guzman as the "number one union supporter" at the company.

C. Alleged 8(a)(1) Violations

1. The March 4 Meeting

On March 4, after the Respondent's employees presented Mr. Milum with the Petition, Mr. Milum spoke with them for about 45-60 minutes (the March 4 Meeting) with Mr. Chavez translating. Witnesses to the March 4 meeting gave essentially corroborative accounts. The following is an amalgam of credible testimony. Upon presentation of the Petition, Mr. Milum asked the congregated employees why they wanted a union. Some employees complained that Ms. Kayonnie did not treat them with respect and dignity and that she clapped her hands or poked them instead of using their names. Mr. Milum said he could not tell the employees anything for or against the Union, but the process of getting a union could be a long one; there could be a lot of problems because employees could strike, and they might have to go to court to obtain a union election. He said there was no need for the Union, as he could resolve the problems at the plant, and he would speak to Ms. Kayonnie. Employees suggested Mr. Milum change supervision, but he refused, telling them Ms. Kayonnie was a very good supervisor. Ms. Minjarez recommended Mr. Milum provide employees with nametags, to which Mr. Milum agreed. In response to an employee's description of union persistence in urging a relative to sign an authorization card, Mr. Milum told employees they should report such conduct.¹¹

About a week after the meeting, Mr. Milum disseminated to employees 3 by 1 ¼ inch plastic nametags on which were printed employee first names. The nametags were secured to clothing by a 1 ¼ inch horizontal metal pin on the back of the nametag that could be secured by a rotating closure. Employees wore the nametags, some of which fell off and were lost.

2. The Respondent's Lawsuit against the Union

By letters dated March 10, the Union wrote to some of the Respondent's restaurant customers warning that they "should be concerned about the risk of contaminated linens" processed by the Respondent, as the company "mixed hospital linens with restaurant linens in the washers." For authority, the Union cited 2002 investigative reports by the Arizona Department of Environmental Quality and Arizona OSHA.¹² On April 3, the Respondent filed an unfair labor practice charge with the Region alleging that the Union violated Section 8(b)(4)(ii)(B) of the Act by transmitting the letters and requesting injunctive relief.¹³ On April 28, the Region, citing *NLRB v. Servette*, 377 U.S. 46 (1964), dismissed the charge, noting that unions are not prohibited from making "non-coercive entreaties" to secondary employers to cease doing business with primary employers.¹⁴

¹¹ Ms. Guzman testified that Mr. Milum asked employees in favor of the Union to so indicate by a show of hands or by moving to one side. No other witness testified of this incident, which would reasonably have been expected to excite recall, and I give the testimony no weight.

¹² On May 4, Arizona OSHA issued another report citing the Respondent for five "serious" violations relating to blood or other potential infectious material contamination. At the hearing, the Union admitted its only basis for believing the Respondent mixed hospital and restaurant linens was employee reports.

¹³ Case 21-CC-1008.

¹⁴ By letter dated June 7, the NLRB Office of Appeals upheld the Region's dismissal of charges.

On April 26, the Respondent filed a verified complaint for injunction and damages (Respondent's Complaint) and a motion for temporary restraining order (Respondent's Motion) in Arizona Federal District Court. Respondent's Complaint set forth five causes of action: illegal secondary boycott, intentional interference with economic relationships, intentional interference with prospective economic advantage, libel, and common law fraud. The Respondent contended the Union sought to induce the Respondent's customers to cease doing business with the Respondent by mailing and faxing letters to them that contained false and misleading material, and to damage the Respondent's reputation by making statements the Union knew were false or without reasonable grounds for belief of truthfulness. The Respondent sought damages and prohibition against the Union's contacting its customers.

On April 27, the District Court denied the Respondent's request for injunction on grounds the issues were preempted by federal law. The Respondent continued to maintain and prosecute its lawsuit until May 26 when it obtained voluntary dismissal of the action without prejudice. The Union incurred legal expenses consequent to the lawsuit.¹⁵

3. The Respondent's Alleged Prohibition on Distributing and Wearing Union Buttons at Work

On June 27, Zulema Ruiz (Ms. Ruiz), order assembler, appeared at work wearing a round metal button on which the message UNITE HERE! was enscripted (Union Button) and gave a similar button to a coworker. The attachment device on the Union Button consisted of an approximately one-inch pointed horizontal shaft with a crookneck safety latch to hold the shaft in place after insertion in fabric. Mr. Milum asked Ms. Ruiz if she were handing out union buttons during work hours, which Ms. Ruiz denied doing.¹⁶ Mr. Milum told Ms. Ruiz she could not wear the union button while working because the attachment pin posed a danger to employees when holding piles of linens close to the body and a danger to equipment if it fell into the machinery.¹⁷ Ms. Ruiz asked why the Respondent permitted name badges. Mr. Milum explained he had ensured the badges had a rotating locking mechanism to enhance safety, but since it was impractical to inspect every pin an employee might wear, the company had a rule not to wear pins in production. Ms. Ruiz protested she did not work around equipment. Mr. Milum said order assemblers worked near equipment, were sometimes assigned to work on equipment, and it was not practical to remind employees to remove pins during reassignments.

On July 4, Ms. Guzman appeared at work wearing a Union Button. Mr. Milum told her she could not work unless she removed the button because it created a safety problem. He said he did not care what the button said, but it could fall into and scratch the ironer or hurt her. Ms. Guzman protested, and Mr. Milum told her she could not work while wearing the button and if she left she would lose the July 4 holiday pay. Ms. Guzman left work rather than remove the button; she did not thereafter wear it at work.¹⁸

¹⁵ Counsel for the General Counsel sets the amount of expenses at \$2,000; the Union sets them at \$3,000.

¹⁶ Ms. Ruiz testified, "He told me if I was handing buttons over to employees during work hours." In his post-hearing brief, Counsel for the General Counsel characterizes Mr. Milum's words as a declarative statement. However, it is clear that Ms. Ruiz understood Mr. Milum to be asking a question.

¹⁷ Mr. Milum had not examined the union button, but he assumed it had a sharp pin on the back, as he saw no other type of fastening.

¹⁸ The General Counsel alleges this incident as a independent violation of 8(a)(1) as well as a suspension of Ms. Guzman in violation of Section 8(a)(3).

Although a warning notice on the feeding machine cautioned employees: Tie hair back, no loose clothes, Remove all jewelry,” employees commonly wore watches, earrings, chains and necklaces while working.¹⁹ Demonstrations conducted at the hearing showed the nametags readily separated from material upon abrupt movement, and several employees testified that the nametags fell off as they worked. After conducting tests, expert witness, Dr. Gary Bakken, industrial engineer and college professor at the University of Arizona, concluded the nametags furnished by the Respondent were more likely to become unlatched during work activities than the Union Button.

4. Soliciting Third Parties to Contact Law Enforcement Agencies and Attempting to Instigate the Arrest of Union Handbillers

After the Union commenced its publicity campaign directed toward the Respondent’s customers, the Respondent regularly contacted the Phoenix Police Department seeking police response to and intervention in the hand billing the Union conducted at customer facilities. Mr. Milum emailed some customers with suggestions on how to effectuate arrests of handbillers for trespassing, urging them to warn handbillers of criminal liability and to contact the police. He occasionally referred to the Union as cockroaches and monsters. Mr. Milum also urged customers to file unfair labor practice charges with the Board against the Union.²⁰ One of Respondent’s customers reported to the Respondent that the police had caused union hand billers to leave its private property. In an interview given to a local newspaper in February, 2007, Mr. Milum compared the union organizational campaign to “an organized-crime shakedown.”

5. Alleged Unlawful Surveillance/Creating Impression of Surveillance

While eating lunch in her husband’s truck parked on 6th Avenue outside the facility, Ms. Kayonnie saw various employees meeting with union agents and reported her observations to Mr. Milum the first time she saw them.²¹

When the union campaign commenced in early 2006, the Respondent’s security system included seven to eight video cameras mounted at various locations, only a few of which were functional. In January the Respondent’s information technology director, Mr. Meyers inquired if Mr. Milum wanted to replace its three year old security camera system with a new one. Mr. Milum initially declined but at the end of 2006, when Mr. Meyers again

¹⁹ Ms. Kayonnie testified she told employees to remove long necklaces and loose bracelets at work, but in an affidavit given to the Board, she denied telling employees to remove jewelry. I accept employee testimony that employees regularly wore jewelry without supervisory objection.

²⁰ In consequence, one customer and the Respondent on behalf of another customer filed unfair labor practice charges alleging illegal secondary boycotts by the Union, which the Region later dismissed.

²¹ Counsel for the General Counsel urges that Ms. Kayonnie’s testimony of a long history of eating lunch in her husband’s truck be discredited. It is true that Ms. Kayonnie appeared to equivocate on this point, but Ms. Kayonnie’s primary language is Navajo, and the transcript shows she did not always clearly understand questions put to her. Although employee Maria Velasquez testified it was “really rare” that Ms. Kayonnie would eat lunch in her husband’s truck on 6th Avenue, she also testified that she had never been on 6th Avenue when Ms. Kayonnie was there. I accept Ms. Kayonnie’s testimony that her choice of a lunch spot preceded the Union’s organizational campaign.

proposed a camera revamp, authorized the change, saying business was good and in might be a good time to do it. In late January 2007, the Respondent installed approximately 15 cameras in the production, laundry, storage, office, and some perimeter areas of the facility. Mr. Milum vetoed placement of a camera on the 6th Avenue perimeter because employees regularly met with the Union there but approved one in the lunchroom where no camera had before been placed.

During the installation, Ms. Guzman asked Mr. Parra why cameras were being installed. Mr. Parra laughingly replied they were to keep her "in check" and that while all other images would be in color, she would appear in black and white.

6. The Computer Video Presentation to Employees

In December, the Respondent individually showed employees a company-created computer video. At that time, the Respondent paid new employees between \$8.00 and \$9.25 and experienced employees between \$8.00 and \$9.25 per hour. In pertinent part, the video pointed out that the Respondent paid its employees higher wages than its Arizona competitors, including several unionized companies, and stated:

If the Union was representing employees and bargaining for wages, wages would be open to serious bargaining between the Company and the Union and the result of the bargaining could be wages of \$6.75 per hour or higher.

7. Pre-hearing Employee Interviews

In preparation for the hearing, the Respondent's attorney, Ms. Laws, in company with Mr. Milum interviewed a number of employees at the facility. The following employees testified as to what the interviews entailed: Maria Zambrano (Ms. Zambrano), Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts (the latter four employees were interviewed at a group). Although each employee described a slightly different notification by Mr. Milum or Ms. Kayonnie that the Respondent wanted to interview them, all employees denied that they had been informed their participation in the interview was voluntary or that they had been assured no reprisals would be taken.²² At the interview itself, neither Ms. Laws nor any representative of the Respondent assured any employee that the meeting was voluntary and/or that the employee need not fear reprisal.

²² Pat Goebel testified that Mr. Milum asked her to meet with the company lawyer, "If you want to." Maria Teresa Velasquez testified that Mr. Milum asked her if she wanted to help him in supporting him; he told her he was not demanding anything of her. I do not find Mr. Milum's statements assured either employee that the prospective interview was voluntary.

D. Alleged 8(a)(3) Violations

1. The Discharges of Denise Knox and Soe Moe Min

5 Prior to their discharges on July 8, Ms. Knox and Soe Moe Min (Mr. Min) worked for Respondent as soiled laundry sorters. Because she openly championed the Union, Mr. Milum believed Ms. Knox to be a strong union supporter. Mr. Min, a Burmese-speaking employee, also openly supported the Union, wearing tee shirts enscribed "UNITE HERE" to work almost daily.

10 On Thursday, July 6, Ms. Knox appeared on a Tucson television newscast as a union supporter. On Friday, July 7, Ms. Zambrano, lead person for the Respondent's early shift soil sort department, told Ms. Kayonnie and Mr. Chavez that after clocking in Ms. Knox and Mr. Min sat in the lunch room instead of working.²³ Ms. Kayonnie relayed the complaint to Mr. Milum, who knew of Ms. Knox's July 6 Tuscon television appearance.²⁴

15 On Saturday, July 8, Ms. Knox and Mr. Min, who were scheduled to start work at 4:00 a.m. in the soil sort department, clocked in at 3:53 a.m.²⁵ With the object of verifying Ms. Zambrano's report, Mr. Milum arrived at the facility before 4:00 a.m. and covertly reconnoitered the lunchroom, waiting outside it until 4:08 a.m., at which time he entered.²⁶ According to Mr. Milum, he saw Ms. Knox and Mr. Min, the former sitting and the latter talking with a janitor. Mr. Milum asked Ms. Knox if she had punched in. When she said she had, he asked her if it was normal for her to punch in and then go sit down. She said it was not. Mr. Milum asked why she was doing it that day, and she said she was waking up. Mr. Milum

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²³ Counsel for the General Counsel argues that Ms. Zambrano gave inconsistent testimony as to whether she had told Ms. Kayonnie that Ms. Knox and Mr. Min delayed starting work. It is true that Ms. Zambrano's testimony given during the Respondent's case was fragmented and sometimes ambiguous. However, her testimony engendered a number of objections, counsel colloquy, and procedural discussions among the judge and the parties, and I cannot blame her resultant confusion on lack of credibility. In spite of some imprecise and nearly incoherent testimony, Ms. Zambrano consistently maintained that she had told Ms. Kayonnie the two employees "would be talking in the dining room and then would go to work...it was already work time and we were already working."

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²⁴ Regarding his knowledge of Ms. Knox's July 6 Tuscon television appearance, Mr. Milum initially testified that on July 8 he was aware firing Ms. Knox was "a pretty explosive situation with Denise being on television Thursday in Tucson and promoting the union against Milum Textile Services and here we are less than two days later and I'm firing her." He almost immediately corrected his testimony, stating that although he knew of Ms. Knox's April television appearance, he did not know she had been on television in Tucson until after he fired her. Given Mr. Milum's spontaneous and specific initial testimony, I do not credit his later denial. I find that at the time Mr. Milum heard of Ms. Zambrano's complaint, he knew of Ms. Knox's July 6 television appearance.

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²⁵ Mr. Min initially testified that he arrived at work at 4:10 a.m. The Respondent's time records show he clocked in 17 minutes earlier. The inconsistency is probably due to translation error, as Mr. Min also testified that he arrived before 4:00 a.m.

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²⁶ Mr. Milum waited until after 4:07 a.m. to satisfy the vagaries of the Respondent's time clock, which reverts to the quarter hour if activated on or before seven minutes after the quarter hour.

told her it was wrong to punch in and sit in the lunchroom rather than start work and that stealing time was stealing money. Mr. Milum directed her to punch out and go home. Ms. Knox replied that everyone, including Ms. Zambrano, went to the lunchroom after clocking in.²⁷ Ms. Knox clocked out at 4:11 a.m.

Ms. Knox did not testify. According to Mr. Min, after clocking in on July 8, he worked at assigned tasks for about five or ten minutes,²⁸ after which he repaired to the lunchroom to get a drink from the vending machine. In the lunchroom, Mr. Min saw Mr. Milum talking to Ms. Knox. He obtained a soda, drank some of it, and returned with the soda to his station, the round trip taking about three to five minutes. Mr. Min worked for about ten more minutes, after which Mr. Milum approached and spoke to him, gesturing at the time clock. Although Mr. Min did not speak English, he understood Mr. Milum to be accusing him of wasting time and not working. Mr. Milum left for six to seven minutes and returned with Arafat, a Burmese-speaking janitor, who told Mr. Min he was fired. Mr. Min clocked out at 4:17 a.m.²⁹ Two days after the terminations, Mr. Milum and Mr. Chavez asked Ms. Zambrano if Ms. Knox and Mr. Min often stayed in the lunchroom after clocking in.

Before he fired Ms. Knox and Mr. Min, Mr. Milum did not discuss the disciplinary action with supervisors, to whom he generally referred disciplinary issues; he did not review the two employees' personnel files, which were devoid of any prior warnings, and he did not, apparently, consider Ms. Knox's assertion that early morning lunchroom loitering was a common employee practice. Although there is no evidence any employee had committed an identical infraction in the past, the evidence shows the lunchroom was a draw for many employees who stopped work early, delayed work, extended a break, or detoured from a restroom trip to pause there. Mr. Milum's practice was to give new employees engaging in such work evasions a "stern discussion," and before Ms. Knox and Mr. Min's discharges, no such employee had been disciplined beyond a written warning. In January, Ms. Kayonnie issued a written warning to an employee who, among other work violations, left his work station to visit the restroom every 15 minutes after reporting to work. Two months prior to the discharges, an employee who twice left work for smoking breaks was issued a written warning. Mr. Milum estimated that in the five years prior to July 8, he had terminated without prior notice about 10 employees for severe misbehavior. However, Mr. Milum detailed far fewer terminations for that period, citing terminations that spanned a period of more than 25 years and involved significant property theft: 1983 and late 1980's, office employees fired for depositing checks in separate accounts; 1989, production employee fired for stealing linens; 1994, supervisor fired for fraudulently claiming gasoline expense; 2003, engineer fired for theft of a tool; 2003-2004 security janitor fired because of missing hand tools.

2. Maria Minjarez

²⁷ In an affidavit given to the Board on September 1, Ms. Zambrano admitted that all soil sort department workers went to the lunchroom after clocking in, including herself, remaining there the several moments between clocking in and actual start time plus "several minutes after the exact hour."

²⁸ Mr. Min initially testified he worked for ten minutes, then said for five minutes.

²⁹ I cannot fully credit Mr. Min's testimony. Although Mr. Min insisted the time clock was off by a few minutes, there is no evidence of that; I accept that Mr. Min clocked in at 3:53 a.m. and clocked out at 4:17 a.m. Mr. Min's testimony appeared calculated to fit the established time period rather than to present a straightforward account. Accordingly, I give weight to Mr. Milum's testimony.

The Respondent hired Ms. Minjarez as a production worker in January. Without notice, Ms. Minjarez voluntarily terminated her employment on May 10 by not showing up for work. In July the Respondent rehired Ms. Minjarez on condition she would notify the company every time she had to be off.

Beginning in October, Ms. Minjarez actively participated in union organizing: distributing union fliers to employees at the facility and collecting signatures on a petition asking for set work schedules. At all relevant times, Mr. Milum knew Ms. Minjarez to be a firm union supporter.

On October 16, while at work Ms. Minjarez felt ill and left work without permission because she did not think the company would authorize her absence.³⁰ Ms. Minjarez had her mother notify Mr. Chavez on the following day that she would not be at work. When Ms. Minjarez returned to work on October 18, Ms. Kayonnie sent her home, telling her she had quit.³¹ Ms. Minjarez returned to the facility that afternoon and spoke to Mr. Chavez. Mr. Chavez told her Ms. Kayonnie had said she had quit and that she was “very problematic.” Ms. Minjarez waited several hours to speak to Mr. Milum who told her that Ms. Kayonnie had reported she was a “troublemaker.” Mr. Milum also told Ms. Minjarez she was slow and not at the level of the rest of the workers. According to Ms. Minjarez, a few weeks earlier Mr. Milum had told her she could not receive a requested transfer from her department because she was a very good worker. Ms. Minjarez had no prior record of discipline.

On October 19, the Respondent suspended Ms. Minjarez for three days and placed her on probation for 90 days. The accompanying Employee Warning Notice, signed by Mr. Chavez, read, in pertinent part:

On Monday, October 16, early evening you left your position without seeking approval or notifying your supervisor. You later indicated that you were feeling too ill to work and that you were afraid that I would not approve of your leaving before the work was done.

Since you...were re-hired in July after you quit without notice in May at which time you committed to not again leaving the company's employment without notice, 1) you have been missed days of work and 2) you have been late days.

³⁰ Ms. Minjarez' testimony on this score was somewhat equivocal. She testified that she did not ask anyone for permission because “they had just switched the person that used to work with me, I didn't think they were going to replace that person and I didn't—couldn't find the supervisor and I went home.” When questioned further, Ms. Minjarez testified that she did not know how long she looked for Mr. Chavez and that she did not think about notifying Mr. Milum. She then agreed that the statement in her Employee Warning Notice was accurate: “You later indicated that you were feeling too ill to work and that you were afraid that I would not approve of your leaving before the work was done.” I infer from her testimony that she did not seek permission to leave because she thought it might be denied.

³¹ In its post-hearing brief, the Respondent states that Ms. Minjarez missed a second day of work on October 18 without notice to the company. Although Ms. Minjarez testified under cross examination that she did not report a prospective absence for October 18, it is clear from her credible testimony that she did not voluntarily miss work on October 18, rather the Respondent refused to let her work.

You also have also 3) worked at a slower pace than is considered a good and acceptable on a long term basis.³²

3. Evangelina Guzman

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Ms. Guzman worked for the Respondent during three separate periods (in 2005, in 2006 until September 28, and commencing again in early October), beginning each period as a new employee. During her second period of employment, a photograph of Ms. Guzman and the Regional Manager of the Union appeared in an April 28 news article in *The Arizona Republic*. The caption read: "Unite Here workers protest conditions at Milum Textile Services. Unite Here Regional Manager Christina Vasquez (center) interprets for Evangelina Guzman, who tells of an injury she suffered on the job." On July 4, also during Ms. Guzman's second period of employment, as detailed above, the Respondent refused to permit Ms. Guzman to work unless she removed the union button she wore. Ms. Guzman terminated her second period of employment on September 28 when her work permit expired. When Ms. Guzman presented the Respondent with a renewed work permit on October 10, the Respondent rehired her.

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On December 25, during Ms. Guzman's third period of employment, Ms. Guzman worked until 5:43 p.m. and then told Ms. Kayonnie she was leaving because she had finished her work and her ride had arrived. Ms. Kayonnie told her she had to stay until the entire production was finished and if she left she would not have a job. Ms. Guzman said, "Okay" and left. When Ms. Guzman reported to work the following day, December 26, Ms. Kayonnie signaled to her that there was no work. Ms. Guzman left but returned sometime later and spoke to Mr. Milum with Ms. Kayonnie present. Ms. Kayonnie denied she had fired Ms. Guzman, telling Mr. Milum that on the preceding day, contrary to specific instructions, Ms. Guzman had left work before her assigned tasks were completed. Later that afternoon, Ms. Kayonnie gave Ms. Guzman an Employee Warning Notice that imposed a three-day suspension and 90-day probation, and which stated in pertinent part:

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On Monday, December 25, you left your position without securing [my] approval...In the future, you may not leave your work position until directed by the supervisor on duty. Yesterday, we had an unusually bad day. It was Christmas and we were all in a hurry to finish the production...When you left without the rest of us being finished, this was a serious failure to perform your duty and will not be tolerated in the future.

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On January 20, Ms. Guzman was scheduled to work. According to Mr. Chavez, she requested the day off but was refused. According to Ms. Guzman, she intended to report to work, but while in transit, her car malfunctioned. Ms. Guzman called the Respondent and left a message when no one answered. On January 22, Ms. Guzman reported to work and tried to give Ms. Kayonnie an invoice from Gorditos Emission Repair to show her car had been repaired the preceding Saturday. Ms. Kayonnie told her to show it to Mr. Garcia. Because she believed Mr. Garcia had gotten the message she left on January 20, Ms. Guzman did not show him the invoice, which read in pertinent part: "Car Needs Mass Air Flow Sensor, Oz sensor & Fuel Pressure Regulator Fix To Continue \$537.00."

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³² Ms. Minjarez agreed that she had missed work because of her child's bouts with asthma and that she sometimes clocked in late but denied working slowly.

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On January 23, 2007, Mr. Chavez told Ms. Guzman he was going to give her a warning for her absence on the preceding Saturday. Ms. Guzman told him she had been absent because her car had broken down and that Ms. Kayonnie had refused to look at the mechanic invoice. She asked if he had gotten the message she left on the answering machine.
 5 Mr. Chavez said he had not and that the warning he was going to issue her would be her third, as the company was counting a warning Ms. Guzman had received in September.³³ Ms. Guzman protested that as the company had hired her as a new employee in October, her warnings from the past should not count. Mr. Chavez told Ms. Guzman to speak to Ms. Kayonnie about that.

10 In Spanish, Mr. Chavez read to Ms. Guzman an Employee Warning Notice bearing his signature, which stated in pertinent part:

15 Last week, you asked me if you could not work Saturday, the 20th, and instead work on the following Thursday which is your normal day off. I responded that we could not do that and that you needed to be here on Saturday, your regular work day.

20 You failed to come to work on Saturday. You indicated today when questioned about your unexcused absence that you went to look for a car to purchase on Saturday. Looking for a new car is not sufficient reason for an unexcused absence.

25 This is the third time in less than six months where you have either left work early against direct instructions...or have failed to come to work on a [scheduled] day...This is the third and final warning. If you again fail to timely report to work or leave early without authorization before the end of your shift, you will be subject to immediate dismissal. This status will be in effect through July 23, 2007.

30 Ms. Guzman protested that she had not gone to buy a car but that her car had broken down. Mr. Chavez said it was the same thing.³⁴

E. Majority Authorization of the Union and Later Dissipation of Union Support

35 As of March 4, the Respondent employed 70 production workers at its facility. As evidenced by the signatures of production employees on the March 4 Petition, 43 of the production employees had authorized the union to represent them.³⁵

33 The Respondent had issued Ms. Guzman an Employee Warning Notice dated September 26, stating, "Warning for absent on 9/23/06 & 9/25/06 which is your workday. (No call in)."

34 I do not find Ms. Guzman's account credible. The proffered mechanic's invoice does not support her testimony of car trouble. The invoice evidences no malfunction; rather it shows only that the vehicle needed emission control procedures performed. Under cross-examination, Ms. Guzman testified that her car broke down after she left "emissions" at 12:30 p.m. and while she was on her way to work. Under cross examination, Ms. Guzman said she left the emissions facility at 10:30. Although she was scheduled to report for work at 1:00 p.m., by her account Ms. Guzman did not telephone the company and leave a message until 3:00 p.m. The inconsistencies prevent my crediting her account, and I find that she deliberately failed to report for work on January 20 after being denied leave.

Prior to Ms. Guzman's suspension and Ms. Knox and Mr. Min's discharges, the Union held biweekly meetings of the Respondent's employees with an average attendance of 10-15 employees. Following the suspension/discharges, employee attendance at union meetings decreased, and the Union's two August meetings were attended by only one and two employees, respectively. Before the suspension/discharges, employee volunteers distributed union flyers to other employees inside the plant; afterwards, they declined to do so. Employees also declined to accept union buttons. Employee Salvador _____ told union representatives he no longer wanted to wear the union sticker because he was afraid he would be fired. Mr. Milum estimated that by February 2007, of the 40 employees participating in the March 4 work stoppage, only Ms. Guzman still wanted the Union.

V. Discussion

A. Alleged 8(a)(1) Violations

1. Alleged Interrogation, Promise and Grant of Benefits, Threat of Futility

The Complaint alleges that in the course of Mr. Milum's March 4 meeting with employees, he engaged in the following conduct: (1) interrogated employees about their Union membership, activities, and sympathies; (2) solicited employee complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if employees refrained from selecting the Union as their bargaining representative.

When the Respondent's employees presented Mr. Milum with the Petition, Mr. Milum asked them why they wanted a union. Counsel for the General Counsel contends this question constituted unlawful interrogation in violation of Section 8(a)(1) of the Act, but an employer's questioning of employees about their union sentiments does not necessarily violate Section 8(a)(1) of the Act, particularly where the employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985) (questioning of open and active union supporter about pronoun mailgram he sent to employer was not coercive). Here the employees, having engaged in a work stoppage for the purpose of presenting a signed union authorization petition to their employer, could scarcely have more openly or actively demonstrated their union support. Mr. Milum's subsequent question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce or interfere with the employees' statutory rights. I shall, therefore, dismiss this allegation of the Complaint.

Counsel for the General Counsel also argues that Mr. Milum unlawfully interrogated employees by asking pronoun employees to raise their hands or to separate themselves from other employees. I have not credited testimony to that effect and therefore find no violation of the Act with regard to it.³⁶

³⁵ I discount the testimony of three employees who variously claimed they did not read the Petition, did not understand the Petition, or signed in reliance on Union promises as inconsistent with their testimonies as a whole and at odds with the clear meaning of the Petition language.

³⁶ In light of the disposition of this allegation of the complaint, I find it unnecessary to consider the Respondent's arguments that the allegation is outside the 10(b) period.

After listening to employees' complaints—primarily about an unpopular supervisor—Mr. Milum told them there was no need for the Union, as he could resolve the problems at the plant, and he would speak to the supervisor. He rejected employee suggestions that he get rid of the supervisor but agreed with an employee recommendation that he provide nametags. Counsel for the General Counsel argues that Mr. Milum thereby solicited grievances and promised improved terms and conditions of employment. The Board has held that a solicitation of grievances by an employer during a union campaign is not itself unlawful but merely raises a rebuttable inference that the employer is promising to remedy the grievances, which implicit promise violates Section 8(a)(1) of the Act. *Southern Monterey County Hospital d/b/a George L. Mee*, 348 NLRB No. 15, sl. op. 3 (2006). Here Mr. Milum made no express promises to employees. Indeed, he specifically rejected a proposal that he remove an offending supervisor. However, his agreement with and later provision of individual nametags to assist supervisors in addressing employees was a grant of benefit in response to employee grievances and violated Section 8(a)(1) of the Act.

In his post-hearing brief, Counsel for the General Counsel argues that other March 4 statements also violated the Act: (1) Mr. Milum's statement that unionization could take years and could lead to strikes and lawsuits conveyed to employees that their support for the Union was futile, and (2) his direction to employees to report to him if they were being harassed or pressured into signing with the Union violated Section 8(a)(1) of the Act. Although the Complaint sets forth the first allegation, it places its occurrence in mid-March and clearly contemplates statements separate from those made on March 4. The Complaint fails to allege the second statement as a violation of the Act. Neither the complaint allegations nor the General Counsel's presentation of evidence put the Respondent on notice that these statements were at issue. Accordingly, I do not address them. See *Sara Lee d/b/a International Baking Company*, 348 NLRB No. 76 (2006); *Dilling Mechanical Contractors, Inc.*, 348 NLRB No. 6, slip op. 9-10 (2006).

The Complaint alleges that in mid-March Mr. Milum informed employees that it would be futile for them to select the Union as their collective-bargaining representative. No evidence was presented in support of this allegation. I shall, therefore, dismiss it.³⁷

The General Counsel argues that on June 27 Mr. Milum unlawfully interrogated Ms. Ruiz when he accused her of passing out union buttons. I have found that Mr. Milum did not accuse Ms. Ruiz of anything but merely asked her whether her open distribution of a union button in the workplace occurred on work time. For a finding of unlawful interrogation, a supervisor's words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, supra at 1177-1178. Here Mr. Milum apparently accepted Ms. Ruiz' denial that she had given out the button on work time and, although he told her she could not wear the button while working because of safety considerations, he said nothing to dissuade her from distributing buttons. His question could not reasonably have tended to restrain, coerce or interfere with Ms. Ruiz' statutory rights. I shall, therefore, dismiss the complaint allegation that the Respondent unlawfully interrogated employees on June 27.

2. The Respondent's Lawsuit Against the Union

³⁷ In light of the disposition of this allegation of the complaint, I find it unnecessary to consider the Respondent's arguments that the allegation is outside the 10(b) period.

The General Counsel argues that by filing a lawsuit and motion for a temporary restraining order against the Union, the Respondent violated Section 8(a)(1) of the Act, asserting the lawsuit lacked a reasonable basis in law or fact and was retaliatory.

5 Drawing on the principles enunciated in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) and *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Board in *Manufacturers Woodworking Association Of Greater New York Incorporated*, 345 NLRB No. 36, sl. op. 4 (2005) notes:

10 [A]s a general rule a lawsuit enjoys special protection and can be condemned as an unfair labor practice only if it is filed with a retaliatory motive, i.e., motivated by a desire to retaliate against the exercise of a Section 7 right, and if it has no reasonable basis in fact or law. However, a lawsuit that is aimed at achieving an
15 "unlawful objective" (or is preempted) "enjoys no special protection" under *Bill Johnson's* and may be enjoined... "In determining whether an employer's [conduct] violates Section 8(a)(1), the Board considers the 'totality of the relevant circumstances.'" *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

The General Counsel bears the burden of proving that the Respondent's motive in filing the lawsuit was a desire to retaliate against the exercise of a Section 7 right and that the lawsuit had no reasonable basis in fact or law. As the General Counsel argues, to the extent the Respondent sought a temporary injunction for the Union's alleged illegal secondary boycott and interference with economic relationships, its lawsuit was preempted by federal law,³⁸ and the district court so found. The Respondent's attempt to obtain injunctive relief under those theories had, therefore, no reasonable basis in law and was unlawful under Section 8(a)(1) of the Act.

25 As to the remaining causes of action alleged in the Respondent's lawsuit—fraud, slander, and libel—I accept, arguendo, that the lawsuit embodied the Respondent's desire to retaliate against the Union's appeal to the Respondent's customers to cease doing business with the Respondent, an activity normally protected by Section 7 of the Act. *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964); *DeBartolo Corp. v. Florida Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988); *Victory Markets, Inc. d/b/a Great American*, 322 NLRB 17 (1996). However, the existence or nonexistence of a reasonable basis for those allegations is not clear. While the question of whether a lawsuit has a reasonable basis in fact or law may be answered by its outcome in court, here the Respondent obtained voluntary dismissal of its
35 lawsuit before an outcome was reached. Consequently, other evidence must provide the key.

Both the General Counsel and the Charging Party argue that the Respondent's failure to provide evidence that the Union made false statements with actual malice (i.e. with knowledge of falsity or in reckless disregard of the truth) proves absence of reasonable basis. But the General Counsel and the Charging Party's argument subverts the burden of proof. The General
40 Counsel must show the lawsuit had no reasonable basis in fact or law; it is not the Respondent's burden to show the contrary. While relevant, the voluntary dismissal of the remaining allegations of the lawsuit does not establish that the Respondent subjectively believed its lawsuit had no merit when it was filed and prosecuted or that it acted in bad faith in doing so. Accordingly, I find the Respondent did not violate Section 8(a)(1) of the Act by
45 continuing to prosecute the undismissed allegations of its lawsuit.

³⁸ See *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260-61 (1964); *Burlington Northern RR. V. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

3. The Union Button Prohibition

5 The Complaint alleges that on June 27 and again on July 4 the Respondent promulgated and thereafter maintained an overly broad and discriminatory rule prohibiting employees from distributing and wearing union buttons at work. In his post-hearing brief, Counsel for the General Counsel does not argue that Mr. Milum's June 27 button discussion with Ms. Ruiz, in which he asked her if she were handing out union buttons during work hours, constituted an unlawful prohibition of button distribution, and there is no evidence that the Respondent otherwise curtailed or interfered with button distribution. Accordingly, I will dismiss the complaint allegations relating to unlawful prohibition of union button distribution.

15 The General Counsel contends the Respondent's prohibition against wearing union buttons—announced to Ms. Ruiz on June 27 and to Ms. Guzman on July 4—violated Section 8(a)(1) of the Act. Employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. The General Counsel need not show that Respondent's insignia prohibition was unlawfully motivated; "rather, the test is whether an employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act." *St. Luke's Hospital*, 314 NLRB 434, FN. 4 (1994). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E&L Transport Co.*, 331 NLRB 640, fn. 3 (2000). However, "[t]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety [or] damage machinery or products..." *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)." *The Smithfield Packing Company, Inc.*, 344 NLRB No. 1, FN 20 (2004); *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1086 (2003).

30 The Respondent defends its prohibition of union buttons on safety grounds, asserting that the union button attachment device created a danger to workers and machinery alike. However, the evidence is clear that the nametags distributed by the Respondent were no less hazardous to employees and equipment than the union buttons, and the employees did not need the expert testimony of Dr. Bakken to tell them so. Employees could see for themselves that some nametags fell off as they worked, and they must have been able to see the Respondent's inconsistency in banning union buttons while permitting the wearing of nametags and jewelry. The Respondent's prohibition may not have been unlawfully motivated. Indeed, since the Respondent permitted the employees to wear prounion stickers and to decorate the lunchroom with prounion paraphernalia, evidence suggests it was not. However, motivation is not the test; the test is whether the Respondent's conduct reasonably tended to interfere with its employees' free exercise of their guaranteed rights. By prohibiting the wearing of prounion paraphernalia without apparent justification, the Respondent interfered with its employees' Section 7 right to wear and display union insignia while at work and violated Section 8(a)(1) of the Act.

45 4. Soliciting Third Parties to Contact Law Enforcement Agencies and Attempting to Instigate the Arrest of Union Hand billers

The General Counsel alleges that Mr. Milum unlawfully "contrived a plan to have union hand billers arrested and charged with trespassing when they were engaged in union activities at his customers' businesses" with the object of interfering with the Union's lawful activities. In

furtherance of the plan, Mr. Milum obtained information from the Phoenix police department and emailed to affected customers instructions for obtaining trespassing arrests, urging customers to contact the police when hand billing occurred and to request the police to warn the hand billers of potential arrest. One of Respondent's customers reported to the Respondent that the police had caused union hand billers to leave its private property on one occasion. In the General Counsel's view, Mr. Milum's machinations interfered with employees' Section 7 rights.

The General Counsel cites no authority for the proposition that discussing possible police intervention with law enforcement agencies and/or customers threatens, interferes with, or coerces employees in the exercise of their protected rights. The cases cited by the General Counsel³⁹ relate to actual police action or threat of such action directed toward individuals engaged in protected activity. Here, there is no evidence that protected rights were impacted by Mr. Milum's behind-the-scenes maneuvers.⁴⁰ Inasmuch as the General Counsel has failed to prove interference with or coercion of employees in these circumstances, I shall dismiss this allegation of the Complaint.

5. Alleged Unlawful Surveillance/Creating Impression of Surveillance

The Complaint alleges that the Respondent engaged in surveillance of its employees union activities beginning in March through Ms. Kayonnie and since January 2007 through use of video surveillance cameras. The Complaint further alleges that the Respondent created an impression of surveillance since January 2007 by installing and maintaining said video surveillance cameras and in January 2007 through Mr. Parra.

As to Ms. Kayonnie's alleged surveillance of employees' union activity at work, I have credited her testimony that she regularly ate lunch while parked on a street adjacent to the facility where she observed employees engaging in pronoun activities. Mere supervisory observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance." *Town & Country Supermarkets*, 340 NLRB 1410 (2004); *Fred'k Wallace & Son*, 331 NLRB 914 (2000). Ms. Kayonnie's observation and report of open union activity in the course of her normal routine cannot be deemed surveillance. Accordingly, I shall dismiss this allegation of the Complaint.

The Complaint alleges that by installing video surveillance cameras at the facility in January 2007, the Respondent engaged in and created an impression of surveillance of its employees protected activities. "[P]ictorial recordkeeping tends to create fear among employees of future reprisals." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), *enfd.* 156 F3d 1268 (D.C. Cir. 1998). Therefore, "although employers have the right to maintain security measures necessary to the furtherance of their legitimate business interests during union activity, an employer engaged in photographing and videotaping such activity has the burden to demonstrate that it had a reasonable basis to anticipate misconduct by employees." *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). The "inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances." *National Steel & Shipbuilding Co.*, at 499.

³⁹ *Indio Grocery Outlet*, 323 NLRB 1138 (1997); *Bristol Farms, Inc.*, 311 NLRB 437 (1993), etc.

⁴⁰ In one instance the police directed hand billers to remove from a customer's private property, but there is no evidence the action was legally unjustified.

The following circumstances are relevant to the question of whether the Respondent's 2007 replacement of and addition to its security camera system violated the Act: the replacement security cameras were not installed for a full year after union organizational efforts commenced; during that time, employees openly met with union representatives outside the facility, engaged in a work stoppage, presented a union authorization petition to the Respondent, wore prounion stickers, distributed prounion literature to other workers, displayed a prounion banner and decorated a lunchroom microwave with prounion stickers, all without comment or objection from the Respondent. I find a reasonable employee would not view the replacement and/or addition of security cameras in production, office, and perimeter areas other than 6th Avenue as being directed at employee protected activities. The installation of the lunchroom camera, however, merits additional scrutiny.

Prior to January 2007, no video camera existed in the Respondent's lunchroom where employee contact frequently occurred. The Respondent asserts that prior vandalism of lunchroom vending machines, employee complaints of stolen lunches, and the use of the lunchroom to pass out paychecks justified enhanced security there. As pointed out by Counsel for the General Counsel, the Respondent did not articulate its assertedly legitimate reasons for placing a security camera in the lunchroom until preparation for the hearing and never communicated the reasons to employees. The unprecedented and unexplained placement of a security camera in the lunchroom where employee interaction, including union activity, regularly took place, would reasonably give rise to an assumption among employees that their non-work activities, including protected activities, had been placed under surveillance. Although there is no evidence that the Respondent actually surveyed the union activities of its employees, since the Respondent has failed to show that it installed the lunchroom surveillance camera because of legitimate security concerns, I find the Respondent thereby violated Section 8(a)(1) of the Act by creating the impression of surveillance. See *Trailmobile Trailer, LLC*, supra.

The General Counsel contends that Mr. Parra created an impression of surveillance when, in response to Ms. Guzman's inquiry about installation of surveillance cameras at the facility, he told her they were being installed to keep her "in check" and would thereafter record her appearances in black and white rather than color. The General Counsel has the burden of establishing, by a preponderance of the evidence, that an employer unlawfully created an impression of surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB No. 52, sl. op. 2 (2007). Whether an employer's statement has created an unlawful impression of surveillance is based on the objective test of "whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance," based on the perspective of a reasonable employee. *Flexsteel Industries*, 311 NLRB 257 (1993). In response to Ms. Guzman's inquiry, Mr. Parra laughingly made the patently absurd rejoinder that the cameras were being installed to keep her in check and that she alone would be recorded in black and white. Mr. Parra said nothing about Ms. Guzman's union activities. Indeed, the General Counsel adduced no evidence that Mr. Parra had ever said anything to Ms. Guzman about her union activities or that he even knew she engaged in any. The General Counsel has not shown why a reasonable employee would assume from Mr. Parra's jocular statements that the Respondent intended to scrutinize her union activities. See *Sunshine Piping, Inc.*, 350 NLRB No. 91 (2007). Accordingly, I dismiss this allegation of the Complaint.

6. The Computer Video Presentation to Employees

The Complaint alleges that in the course of the Respondent's December computer video presentation to employees, the Respondent threatened to reduce employees' wages if they selected the Union as their bargaining representative. At the time of the presentation, the Respondent paid new employees between \$8.00 and \$9.25 and experienced employees

between \$8.00 and \$9.25 per hour. The statement the General Counsel labels a threat followed the Respondent's declaration that it paid its employees higher wages than its Arizona competitors, including several unionized companies, and asserted:

5 If the Union was representing employees and bargaining for wages, wages would be open to serious bargaining between the Company and the Union and the result of the bargaining could be wages of \$6.75 per hour or higher.

10 An employer may communicate views about unionism, "so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *Gissel Packing Co.*, at 618, citing Section 8(c) of the Act. Predictions concerning the precise effects of unionization, however, "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Id.* The Court cautioned that if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement loses protection of the First Amendment. Neither the subjective reactions of employees nor the intent of the speaker are determinative in finding 8(a)(1) violations. *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999); *Swift Textiles*, 242 NLRB 691 FN 2 (1979). Rather, "the issue is whether objectively ... remarks reasonably tended to interfere with the employee's right to engage in [a] protected act." *Southdown Care Center*, 308 NLRB 225, 227 (1992).⁴¹ Here, the Respondent discussed wage reduction as something that "could" result from future bargaining with the Union, and the Respondent argues that the statement is a simple recognition of the fact that in the collective-bargaining process, wages are negotiated. However, in the absence of any explication by the Respondent of bargaining eventualities or economic conditions that might lead to wage reduction, the statement reasonably communicated to employees that selection of the Union threatened current wages. See *President Riverboat Casinos of Missouri, Inc.*, *supra*. Accordingly, I find the statement violated Section 8(a)(1) of the Act.

7. Pre-hearing Employee Interviews

30 Pursuant to Board's decision in *Johnnie's Poultry*, *supra*, an employer, when interviewing employees in preparation for trial, must communicate to them the reason for the questioning, explicitly assure them that no reprisals will occur, and obtain voluntary participation. The Board has "generally taken a bright-line approach in enforcing the requirements established in *Johnnie's Poultry*."⁴² The testimony of Ms. Zambrano, Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts is consistent with a finding that neither Ms. Laws, Mr. Milum, nor any other company representative clearly communicated to any of the witnesses that the Respondent's pre-hearing questioning was voluntary or what the purpose of the questioning was. Further, the evidence shows that neither Ms. Laws nor Mr. Milum gave any witness assurances that no reprisals would take place for refusing to answer or for the substance of any answer. As the Respondent did not follow the requirements of *Johnnie's Poultry* in its interviews of the named employees, I find the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating them.

45 ⁴¹ Consequently, the Respondent's argument that no evidence demonstrated that any employee perceived the statement to be a threat is immaterial.

⁴² *Midwest Television, Inc., d/b/a KFMB Stations*, 349 NLRB No. 38 (2007), citing *Freeman Decorating Co.*, 336 NLRB 1 (2001) *enf. denied* on other grounds, 334 F.3d 27 (D.C. Cir. 2003).

B. Alleged 8(a)(3) Violations

1. The Discharges of Denise Knox and Soe Moe Min

5 The question of whether Respondent violated the Act in discharging Ms. Knox and Mr. Min rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in the *Wright Line* case.⁴³ To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; *United Rentals, Inc.*, 350 NLRB No. 76 (2007); *Donaldson Bros, Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

15 The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon and Its Subsidiary Telesector Resources*, 350 NLRB No. 53, 2007; *Group Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the elements are clearly met as to Ms. Knox, who openly championed the union cause among employees and assisted the Union with what the Respondent terms the Union's "corporate" or community publicity campaign by appearing on television in the role of vocal employee supporter. Mr. Milum knew of Ms. Knox's public pronoun appearances and admittedly believed her to be a strong union supporter. 20 Moreover, Mr. Milum exhibited unquestionable hostility toward the Union's publicity campaign. In his communications to other companies, Mr. Milum urged his customers to seek criminal sanctions against the Union for promoting its organizational drive at their premises, referring to the Union as a "monster," its representatives as "cockroaches," and its organizing tactics as an "organized crime shakedown." Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Ms. Knox's protected activity was a motivating factor in the Respondent's decision to discharge her. See *Wright Line*, supra at 1089.

30 The circumstances involving Mr. Min's discharge require a different though correlative analysis. As did Ms. Knox, Mr. Min openly supported the Union, wearing union tee shirts to work almost daily, and the Respondent must have been aware he was pronoun. However, Mr. Min's union adherence was no more pronounced than that of many other employees against whom the Respondent exhibited no animosity, and there is no reason to suppose the Respondent focused on his union activity at all. Nevertheless, if an employer, in a retaliatory strike against one pronoun employee, entangles an unintended victim, the employer is culpable for both adverse actions. Ms. Knox and Mr. Min engaged in identical workplace misconduct at the same time and in the same location; if the Respondent seized upon that misconduct in order to rid itself of Ms. Knox because of her union activity, any collateral victim of the scheme is in the same posture as the discriminatee. I therefore focus this analysis on Ms. Knox's discharge; if her discharge was unlawfully motivated, it follows that Mr. Min's was also. Consequently, the burden shifts to Respondent to demonstrate that it would have discharged both Ms. Knox and Mr. Min even in the absence of Ms. Knox's protected activities.

45 The Respondent argues that Mr. Milum fired Ms. Knox and Mr. Min because they dallied in the lunchroom after clocking in instead of going directly to work. I have found that on July 8, the two employees did, in fact, delay starting work. The question of whether they were

⁴³ 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

subsequently discharged because of that delay or because of antiunion considerations depends on the Respondent's motivation. There is no overt evidence of union animus directed specifically toward either Ms. Knox or Mr. Min, but direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corporation of America*, 337 NLRB 99 (2001); *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,⁴⁴ abruptness of the adverse action,⁴⁵ suspicious timing,⁴⁶ disparate treatment,⁴⁷ and/or departure from past practice.⁴⁸

Mr. Milum bore particular animosity toward the Union's corporate campaign, as evidenced by his rancorous descriptions of the Union as monstrous, pestilent, and mafia-like. On Thursday, July 6, Ms. Knox appeared on a Tucson television newscast as a union supporter, a circumstance of which Mr. Milum was aware. On Friday, July 7, Ms. Zambrano reported to Ms. Kayonnie and Mr. Chavez that after clocking in Ms. Knox and Mr. Min remained in the lunchroom rather than reporting to work. When Ms. Kayonnie relayed the complaint to Mr. Milum, he acted upon it with notable promptness, undertaking to catch the two employees in dereliction of duty early the following morning and promptly firing them. Timing is a significant factor in ascertaining motive. See, e.g. *LB&B Associates, Inc.*, 346 NLRB No. 92 slip op. 2 (2005); *Desert Toyota*, 346 NLRB No. 3, slip op. 2-3 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000). Only one day passed between Ms. Knox's newscast appearance and her discharge. During that intervening day, Mr. Milum learned Ms. Knox and Mr. Min were violating company rules by failing to start work on time, and he contrived to catch them at it and to fire them in one swift transaction. Although Mr. Milum assertedly considered Ms. Knox and Mr. Min's infractions to be momentous enough for immediate discharge, he did not, apparently, care that other employees might be breaking the same work rule. Ms. Knox told Mr. Milum that early morning lunchroom loitering was a common employee practice, but there is no evidence Mr. Milum took any steps to alert supervisors to watch for and control similar misconduct or that he conducted any post-discharge investigation beyond an after-the-fact inquiry of Ms. Zambrano as to how often Ms. Knox and Mr. Min remained in the lunchroom after clocking in. Mr. Milum's belated inquiry into Ms. Knox and Mr. Min's past conduct underscores the precipiteness of the discharges, and his indifference to other possible malefactors strongly suggests the alleged offense was not his primary concern. It is reasonable to infer from these circumstances that Ms. Knox and Mr. Min's abrupt discharges were related to Ms. Knox's well-publicized support of the Union's corporate campaign.

The most compelling evidence of the Respondent's unlawful motive in discharging Ms. Knox and Mr. Min rests in its deviation from past practice and its disparity of treatment.⁴⁹ Mr. Milum did confer with any supervisor about the discharges, and he did not take into account Ms. Knox and Mr. Min's lack of any prior warnings. The Respondent's disciplinary notices show the Respondent followed at least a semblance of a progressive disciplinary system. Before Ms. Knox and Mr. Min's discharges, no employee had been disciplined beyond a written warning for stopping work early, delaying work, taking extended breaks, or detouring from a

⁴⁴ *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

⁴⁵ *Dynabil Industries, Inc.*, 330 NLRB 360 (1999).

⁴⁶ *McClendon Electrical Services, Inc.*, 340 NLRB 613, FN 6 (2003); *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 (2000).

⁴⁷ *California Gas Transport, Inc.*, *supra*; *In re NACCO*, 331 NLRB 1245 (2000).

⁴⁸ *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

⁴⁹ See *Grant Prideco, L.P. d/b/a Tubular Corporation of America*, 337 NLRB 99 (2001).

restroom trip to pause at the lunchroom. Even Mr. Milum took no action against shirkers beyond sternly cautioning them. In the months before the discharges, the Respondent issued written warnings to, but did not discharge, employees for misconduct similar to that of Ms. Knox and Mr. Min, i.e., twice leaving work for smoking breaks and leaving the work station to visit the restroom every 15 minutes.⁵⁰ Finally, prior to the July 8 discharges, the Respondent had rarely terminated employees and had terminated none for conduct approximating that of Ms. Knox and Mr. Min. The Respondent has not justified its digression from prior practice or its disparity in the treatment accorded Ms. Knox and Mr. Min, and it is reasonable to find, as I do, that the only rational explanation is that the Respondent was motivated by a desire to retaliate against Ms. Knox for her unabashedly public display of union support, and that Mr. Min was an unfortunate casualty of that unlawful motivation. In these circumstances, I find that the Respondent violated Section 8(a)(3) and (1) of the Act on July 8 by terminating Ms. Knox and Mr. Min.

2. Maria Minjarez

Counsel for the General Counsel argues that the Respondent pretextually suspended and placed on 90-day probation union supporter Ms. Minjarez. The *Wright Line* analysis described above applies, and the General Counsel has the burden to persuade, by a preponderance of the evidence, that Ms. Minjarez's protected conduct was a motivating factor in disciplining her. Only if the General Counsel makes such a showing, will the burden of persuasion shift to the Respondent to demonstrate it would have taken the same action in the absence of Ms. Minjarez' protected conduct." *Wright Line*, supra at 1089; *United Rentals, Inc.*, supra; *Donaldson Bros, Ready Mix, Inc.*, supra.

The General Counsel has met the elements of discriminatory motivation: union activity, employer knowledge, and employer animus. *Verizon And Its Subsidiary Telesector Resources*, supra; *Group Farmer Bros. Co.*, supra. Ms. Minjarez engaged in extensive union activities, and Mr. Milum knew her to be a firm union supporter. As detailed above, the Respondent revealed significant animus toward the Union's "corporate" organizational activities, and the Respondent's supervisors described Ms. Minjarez as "problematic" and a "troublemaker," which suggests, in the absence of other explanation, antipathy toward her individually for supporting the Union. Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Ms. Minjarez's protected activity was a motivating factor in the Respondent's decision to suspend her and to place her on probation, and the burden of persuasion shifts to the Respondent "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The Respondent argues that the evidence shows no disparate treatment between Ms. Minjarez and any other similarly situated employee and that it would have taken the disciplinary action it did regardless of her union activity. The evidence supports the Respondent's position.

When the Respondent rehired Ms. Minjarez in July, it did so on condition she notify the company every time she had to be off, which she had failed to do during her prior period of employment. Ms. Minjarez did not abide by her commitment, leaving work without permission on October 16. Consequently, the Respondent suspended her for three days and placed her on probation for 90 days.

⁵⁰ The Respondent unsuccessfully tries to distinguish Ms. Knox and Mr. Min's conduct by calling it time "theft". I see no significant difference between the work avoidance of employees who received only written warnings and that of the two discharged employees.

Counsel for the General Counsel does not contend that leaving work without permission is not a disciplinary offense, but he asserts the discipline imposed on Ms. Minjarez was disparate to that given other employees. While the evidence of employee discipline shows that the Respondent's supervisors exercised considerable discretion in determining when and what discipline should be imposed, it is clear that the Respondent has, after one or more warnings, both suspended employees and placed them on probation for time and attendance infractions. Here the Respondent rehired Ms. Minjarez after her earlier voluntary no-show termination and required her to commit to giving prior notification of absences. On October 16, Ms. Minjarez breached her agreement. Ms. Minjarez's unexcused departure from work differed from other employees' leave infractions as it involved flagrant abrogation of her commitment to the Respondent. In those circumstances, the Respondent's discipline was neither unreasonable nor demonstrably disparate. The employer's arguable satisfaction in disciplining Ms. Minjarez because she was a "troublemaker" is not relevant. If an employee provides an employer with sufficient cause for discipline, the fact the employer welcomes the opportunity does not render the discipline unlawful. *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). An employer can meet its *Wright Line* burden by showing that it has a rule and that the rule has been applied to employees in the past. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). Counsel for the General Counsel argues that Ms. Minjarez's personnel file showed no disciplinary notices, but his argument overlooks the fact that Ms. Minjarez had admittedly, in the not-too-distant past, voluntarily terminated her employment by not showing up for work. It also overlooks Ms. Minjarez's admission that she sometimes missed work because of her child's illness and sometimes clocked in late. In disciplining Ms. Minjarez on October 19, the Respondent could reasonably take into account Ms. Minjarez's past attendance problems and her breached commitment not to repeat them, even though neither had been preceded by written warnings. The Board will not "substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 FN6 (2000), and cases cited therein. Here the Respondent had attendance rules and enforced them with various forms of discipline, including suspension and probation. When Ms. Minjarez violated those rules, she became subject to discipline that the Respondent has shown was neither unprecedented nor unjustified. The Respondent has successfully borne its burden of showing that it would have disciplined Ms. Minjarez in the circumstances regardless of her union activities. Accordingly, I dismiss this allegation of the Complaint.

3. Evangelina Guzman

On July 4, the Respondent unlawfully refused to permit Ms. Guzman to work unless she removed the union button she wore. The General Counsel alleges the refusal to permit Ms. Guzman to work was a suspension in violation of Section 8(a)(3). An employer may not suspend an employee for refusing to comply with an unlawful order prohibiting protected activity. *Kolkka Tables and Finnish-American Saunas*, 335 NLRB 844, 850 (2001); *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994). A refusal to comply with an unlawful order does not constitute "insubordination upon which a sustainable [adverse action can] be based." *Kolkka*, supra, citing *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977). Since, as detailed above, I have found the Respondent unlawfully demanded that Ms. Guzman discard her Union Button as a condition of working, I find the Respondent suspended Ms. Guzman for the day she refused to work sans button, and thereby violated Section 8(a)(3) of the Act.

Counsel for the General Counsel argues that the Respondent pretextually suspended Ms. Guzman on December 26 and disciplined her on January 23. The General Counsel has the burden to persuade, under *Wright Line*, that Ms. Guzman's protected conduct was a motivating factor in disciplining her. Only if the General Counsel makes such a showing, will the burden of

persuasion shift to the Respondent to demonstrate it would have taken the same action in the absence of Ms. Guzman's protected conduct." *Wright Line*, supra at 1089; *United Rentals, Inc.*, supra; *Donaldson Bros, Ready Mix, Inc.*, supra.

5 The General Counsel has met the elements of discriminatory motivation: union activity, employer knowledge, and employer animus. *Verizon And Its Subsidiary Telesector Resources*, supra; *Group Farmer Bros. Co.*, supra. Ms. Guzman engaged in extensive union activities, and Mr. Milum knew her to be involved in the Union's "corporate" organizational activities to which the Respondent bore specific animosity. Accordingly, I find the General Counsel has met his
10 initial burden by "making a showing sufficient to support the inference" that Ms. Guzman's protected activity was a motivating factor in the Respondent's decisions to discipline her, and the burden of persuasion shifts to the Respondent "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The Respondent argues that the evidence shows no disparate treatment between Ms. Guzman and any other similarly situated employee and that it would have taken the disciplinary action
15 regardless of her union activity.

There is no dispute that on December 25, Ms. Guzman disobeyed Ms. Kayonnie's direct order to stay until the production was finished under penalty of termination. Although the Respondent did not terminate Ms. Guzman, it did impose a three-day suspension and a 90-day
20 probation. On January 20, when Ms. Guzman ignored a denial of leave for that day and failed to report to work as scheduled, the Respondent refused to accept her proffered excuse and issued her a written warning along with a six-month probation. Counsel for the General Counsel argues that the disparity of treatment afforded other employees with similar infraction histories demonstrates the pretextual nature of the discipline applied to Ms. Guzman.

25 The Respondent's history of discipline shows no clear cut pattern, although, as Counsel for the General Counsel points out, a six-month probation period is unprecedented. However, the Respondent has meted out suspensions and probations, either separately or combined, for time and attendance infractions, and the evidence provides no predictability as to whether the Respondent is likely to be longsuffering or intolerant of any particular misconduct. In these
30 circumstances, the Respondent's disciplinary record cannot provide evidence of disparate treatment.

It is not for the Board to decide "whether a nondiscriminatory reason for discharging an employee is wise or well supported,"⁵¹ and it is well established the Board "cannot substitute its
35 judgment for that of the employer and decide what constitutes appropriate discipline."⁵² Here, Ms. Guzman's deliberate flouting of her supervisor's December 25 order and her unexcused absence of January 20 constitute legitimate bases for discipline. See *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006). Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. *Ibid.* In determining Respondent's actual motivation for twice disciplining Ms. Guzman in a one-month period, I have considered
40 the Respondent's animus toward her support of the Union's corporate campaign. However, I find that animus outweighed by the circumstances of Ms. Guzman's reemployment on October 10. On September 28, some months after Ms. Guzman had engaged in public support of the Union, she was obliged to terminate her employment with the Respondent because her work permit had expired. When Ms. Guzman presented a renewed work permit on October 10,

45 ⁵¹ *West Limited Corp.*, 330 NLRB 527, FN 5 (2000).

⁵² *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171, FN 6 (2000) and cases cited therein.

the Respondent rehired her. The Respondent's willingness to rehire Ms. Guzman in spite of her past union activity effectively vitiates the significance its animosity toward her union support might otherwise have. In these circumstances, I find the Respondent has met its burden of proof, and I shall dismiss the allegations that the Respondent's December 26 and January 20, 2007 discipline of Ms. Guzman violated the Act.

C. Appropriateness of Bargaining Order

Accepting that the Union obtained bargaining authorization from a majority of the Respondent's employees in March and that its majority support was dissipated, at least in part, by the unfair labor practices found herein, it nonetheless remains to determine whether a bargaining order under *Gissel*, supra, is appropriate herein.

The question to be answered in determining the appropriate remedy for the Respondent's unfair labor practices is whether the conduct so tainted the workplace atmosphere that traditional remedies will not erase the coercive effects, rendering a fair representational election impossible. In *Gissel Packing Co.*, supra, the Supreme Court identified two categories of cases in which a bargaining order is appropriate: Category I cases are exceptional situations involving outrageous and pervasive unfair labor practices that traditional remedies cannot resolve and which make a fair election impossible. Category II cases involve unfair labor practices that are less extraordinary but that nonetheless have a tendency to undermine majority support and impede the election process. As such unfair labor practices render the possibility of a fair election slight, "employee sentiment once expressed through cards would...be better protected by a bargaining order." *Id.*, at 614-615. This case falls into the latter category.

The Board considers a *Gissel* bargaining order to be an extraordinary remedy and prefers to order traditional remedies for unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Cast-Matic Corporation, d/b/a Intermet Stevensville*, 350 NLRB No. 94 slip op. 14 (2007). I examine, as the Board directs, the "seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *Id.*

I have found that the Respondent engaged in the following unlawful conduct: granted employees the benefit of nametags, filed a preempted lawsuit, prohibited the wearing of union buttons, created the impression of surveillance of union activities, implicitly threatened decreased wages if the Union were selected, engaged in *Johnnies Poultry* violations, and discriminated against three prounion employees, firing two of them. Those are serious violations, particularly the discriminations. In tempering their ineradicable effect on employees, I have noted that throughout the Union's organization campaign, the Respondent has not discouraged employees from openly meeting with union representatives outside the facility, wearing prounion stickers, distributing prounion literature, displaying a prounion banner and setting up in the lunchroom a union-donated microwave decorated with prounion stickers. While the Respondent's partial respect for employees' Section 7 rights in no way excuses or remedies its unlawful conduct, it does suggest that the coercive effects of the Respondent's conduct can be adequately remedied by the Board's traditional remedies. The lingering effects of the Respondent's unlawful interference with Section 7 rights can be addressed by detailed notice postings, and the lingering effects of the discriminatory discharges of Ms. Knox and Mr. Min and the discriminatory suspension of Ms. Guzman can be remedied by reinstatement and backpay. In the circumstances of this case, the traditional remedies are likely to assure employees that

interference with their Section 7 rights will not be tolerated. *Abramson, LLC*, 345 NLRB No. 8, slip op. 8-9 (2005). See also, *The Guard Publishing Company*, 344 NLRB No. 150 (2005); *Hialeah Hospital*, 343 NLRB No. 52 (2004); *Jewish Home for the Elderly*, 343 NLRB No. 117 (2004). Accordingly, I decline to recommend a *Gissel* bargaining order as a remedy herein.

5

Conclusions of Law

1. The Respondent, Milum Textile Services, Co., is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 10 2. The Union, Unite Here!, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act on July 4, 2006 by suspending employee Evangelina Guzman because she refused to take off a union button.
4. The Respondent violated Section 8(a)(3) and (1) of the Act on July 8, 2006 by discharging employees Denise Knox and Soe Moe Min because of their support of and protected activities on behalf of the Union.
- 15 5. The Respondent violated Section 8(a)(1) of the Act in mid March 2006 by granting the benefit of providing nametags in order to discourage employees from engaging in union activity.
6. The Respondent violated Section 8(a)(1) of the Act on April 26, 2006 by filing and pursuing a lawsuit against the Union that was preempted by federal law.
- 20 7. The Respondent violated Section 8(a)(1) of the Act on June 27 and on July 4, 2006 by promulgating and thereafter maintaining a rule prohibiting employees from wearing union buttons while working.
8. The Respondent violated Section 8(a)(1) of the Act in January 2007 by creating the impression of surveillance by operating a security video camera in its lunchroom.
- 25 9. The Respondent violated Section 8(a)(1) of the Act in December 2006 by impliedly threatening to reduce employees' wages if they selected the Union as their bargaining representative.
10. In the course of preparing for hearing herein, the Respondent violated Section 8(a)(1) of the Act at various time since February 6, 2007 by interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.
- 30 11. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

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

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The Respondent having discriminatorily suspended employee Evangelina Guzman on July 4 and discriminatorily discharged employees Denise Knox and Soe Moe Min on July 8, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

45

50

The Respondent having unlawfully instituted and pursued a lawsuit against the Union that was preempted by federal law must reimburse the Union for costs associated with the lawsuit.⁵³

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁴

ORDER

10 The Respondent, Milum Textile Services, Co., its officers, agents, successors, and assigns, shall

1. Cease and desist from

- 15 (a) Suspending any employee for engaging in union or other concerted protected activities.
- (b) Discharging any employee for engaging in union or other concerted protected activities.
- (c) Promising and/or granting benefits in order to discourage employees from engaging in union activity.
- 20 (d) Instituting and pursuing any lawsuit against the Union that is preempted by federal law.
- (e) Promulgating and thereafter maintaining an overly broad rule prohibiting employees from wearing union buttons while working.
- (f) Creating the impression of surveillance by operating a security video camera in the employees' lunchroom.
- 25 (g) Threatening to reduce employees' wages or other benefits if they select the Union as their bargaining representative.
- (h) Unlawfully interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.
- 30 (i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

- 35 (a) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Evangelina Guzman, Denise Knox, and Soe Moe Min to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- 40 (b) Make Evangelina Guzman, Denise Knox, and Soe Moe Min whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

⁵³ The question of the costs associated with the institution and pursuit of the unlawful lawsuit is left to the compliance stage of these proceedings.

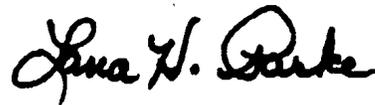
45 ⁵⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) Expunge from its files any reference to the unlawful suspension of Evangelina Guzman and discharges of Denise Knox, and Soe Moe Min and thereafter notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.
- 5 (d) Compensate the Union for costs incurred by the institution and pursuit of its lawsuit against the Union that was preempted by federal law.
- (e) Rescind the rule prohibiting employees from wearing union buttons while working and inform employees that it has been rescinded.
- 10 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 15 (g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona copies of the attached notice marked "Appendix."⁵⁵ Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.⁵⁶ Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 4, 2006.
- 20 (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.
- 25

30 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: October 5, 2007.

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Lana H. Parke
Administrative Law Judge

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45 ⁵⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

⁵⁶ The notices are to be posted in the following languages: English, Spanish, Burmese, Karen, Arabic, Somali, and Russian.

50

APPENDIX
NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT suspend or discharge any of you for supporting Unite Here! (the Union) or any other union.

WE WILL NOT promise and/or give you any benefits in order to discourage you from supporting the Union.

WE WILL NOT file any lawsuit against the Union with the unlawful purpose of retaliating against the Union.

WE WILL NOT issue or enforce any unlawful rule preventing employees from wearing union buttons while working.

WE WILL NOT make our employees think we are watching them engage in union or protected activities by operating a security video camera in the lunchroom.

WE WILL NOT threaten to cut employees' wages or other benefits if they select the Union to represent them.

WE WILL NOT unlawfully ask employees about their union membership, activities, and sympathies and/or the union membership, activities, and sympathies of other employees.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer full reinstatement to Evangelina Guzman, Denise Knox, and Soe Moe Min to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, insofar as we have not already done so, make whole Evangelina Guzman, Denise Knox, and Soe Moe Min for any loss of earnings and other benefits resulting from their suspension or discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Evangelina Guzman and discharges Denise Knox and Soe Moe Min, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.

Milum Textile Services, Co.

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.