

Hewlett Packard Company¹ and United Steel Workers of America, AFL–CIO, CLC. Case 25–CA–28591

March 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On November 5, 2003, Administrative Law Judge Joseph Gontram issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hewlett Packard Company, Palo Alto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ Pursuant to the General Counsel's motion, the administrative law judge amended the case caption to substitute "Hewlett Packard Company" for "HP/Compaq Direct" as the Respondent. The Respondent excepted, arguing that "Compaq Computer Corporation," which Hewlett Packard had acquired in a merger, should be the respondent in this case. In finding no merit in the Respondent's exceptions, we rely on evidence that Hewlett Packard defended the case at trial, its managers represented it at the facility at the time of the discharge and participated in the discharge, and it has admitted liability for any remedies that might result from this discharge. Accordingly, we agree that the judge acted properly in amending the caption.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent's failure to conduct a full and fair investigation into Snead's alleged misconduct, under the circumstances of this case, constituted evidence of discriminatory intent. We do not rely on the judge's implication that a failure to investigate will always constitute evidence of such intent.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by discharging employee Snead, Chairman Battista agrees with the judge and his colleagues that the General Counsel has met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), by showing that the Respondent disparately enforced its "remain in your work area" rule, and that the Respondent failed to establish that it would have discharged Snead even absent his union activities. Chairman Battista finds it unnecessary to rely on the judge's additional reasons for finding the violation.

Kimberly R. Sorg-Graves, Esq., for the General Counsel.
Paul E. Bateman, Esq. (Littler Mendelson), of Chicago, Illinois,
for the Respondent.

Anthony Alfano, Esq., of Gary, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on July 10 and 11, 2003. The charge was filed February 21, 2003, and the complaint was issued April 29, 2003. The complaint alleges that Hewlett Packard Company¹ (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging its employee, David Snead, because Snead assisted the United Steel Workers of America, AFL–CIO, CLC (Union) and had engaged in concerted activities. The issue is whether Snead's actions in assisting the Union and the Union's organizing campaign were a motivating factor in the Respondent's decision to discharge him, and if so, whether the Respondent would have taken the same action without regard to such activities.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures and customizes computers at its facility in Indianapolis, Indiana, where, during the past 12 months, a representative period, it sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Indiana, and purchased and received goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ The General Counsel submitted a motion at the conclusion of the hearing to amend the name of this case to substitute Hewlett Packard Company for HP/Compaq Direct, the party originally named as the Respondent. Hewlett Packard Company, in whose name the complaint was defended, is the successor to Compaq Computer Corporation (Compaq) pursuant to a merger between the companies in May 2002. Compaq was a wholly owned subsidiary of Hewlett Packard and was the employer of all employees involved in this case until December 31, 2002, at which time Hewlett Packard became the employer. Compaq Direct was a name used by Compaq to describe the services of a wholly owned subsidiary of Compaq. Hewlett Packard represents that it is the successor under Board law to the employer at the time of the alleged unfair labor practices. Hewlett Packard has stipulated that it is liable for any remedies that could result from these proceedings, including postings, backpay, reinstatement, and any other remedy found appropriate. Accordingly, I have granted the General Counsel's motion to amend the caption of the case.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Management and the Plant

In April 2002,² Keith Heinrich was named the director of the Respondent's Indianapolis facility,³ the highest management position at that facility. In May 2002, Stan Smith was transferred from the Respondent's Ontario, California plant, and was named the production manager, the second highest management position at the Indianapolis facility. Since at least May 2002, and at all relevant times to this proceeding, the following persons held the following positions: Pamela Elliott, human relations manager; Jonathon Hughes, shift supervisor; Kyle Degonia, shift supervisor; Jason Shryock, shift supervisor; Rob Haverly, quality assurance supervisor; and Mark Hancock, team leader. Shift supervisors have the authority to recommend that an employee be disciplined, up to and including discharge. Team leaders do not have the authority to impose or recommend discipline.

The Indianapolis facility is approximately 400,000 square feet. The manufacturing or CAMS room, where computers are customized, is 50,000 square feet, or about 1 acre. Other areas in the facility include a bulk storage area, small parts storage area, raw and process area, receiving dock and offices, inbound area, high-density storage area, assembly areas, shipping area, the out of box audit (OBA) area, and miscellaneous offices and other areas. In August 2002, there were approximately 1500 workers employed at the Indianapolis facility, including part-time employees.

B. David Snead and the Commencement of the Organizing Campaign

David Snead began working for the Respondent in 1998.⁴ In approximately 2000, he was promoted to technician II or senior technician. In this position, he worked with and assisted six junior technicians in locating and assembling servers, parts, and hardware in order to construct and configure computers. The Respondent had four shifts for its employees. In August 2002,

Snead was working the first shift of the week consisting of three successive 12-hour shifts from 7 p.m. to 7 a.m., Sunday night to Wednesday morning, plus every other Saturday. However, for religious reasons, Snead did not work on Sundays, so his Sunday shift began on Monday at 12 a.m.

In approximately February 2002, Snead had discussions with several coworkers about the possibility of being represented by a union. Snead then contacted the Union and a meeting was arranged for March 4 between these workers and the Union. Soon after the meeting, the organizational campaign began. Snead attended the initial meeting with the Union as well as all subsequent organizational meetings, which numbered about 10.

² All dates are in 2002 unless otherwise indicated.

³ The parties and witnesses also referred to this facility as the Georgetown Road facility.

⁴ Snead began working for Van Star Company or Inacom Corporation, predecessor corporations to Compaq Computer Corporation. There have been several mergers/takeovers involving the Respondent in this case. See also fn 1. In light of the stipulations of the parties and the representations of the Respondent, I will refer to the Employer and any successor entity as the Respondent.

The employees who met with the Union formed an organizing committee, and Snead was a member of the committee. The Union considered Snead to be its lead organizer at the Respondent.

In early May, Snead became an open, visible advocate for the Union. He made himself available to coworkers to discuss the advantages of organizing. He talked to employees about the Union. He distributed union pamphlets at work. He regularly wore a shirt to work that advocated the Union in large letters, and was wearing this shirt on the day he was discharged. He made stickers for his car that advocated the Union and displayed those stickers in the car's rear window. He regularly drove his car to work and parked in the plant's parking lot. No other employee was as open or visible as Snead was in his support for the Union.

The Respondent was well aware of Snead's active support for the Union. As noted, he openly displayed his support on a shirt he wore to work. On one occasion, Snead observed Hughes with other employees standing behind Snead's car in the parking lot while Hughes was pointing at the union signs on Snead's car. Hughes and this group quickly disbanded when Snead approached them. On one occasion, Hughes was following Snead as Snead was walking within the plant. Hughes asked Snead to stop and he then stared at the back of Snead's shirt which contained the following note: "United Steelworkers of America District 7 UNION YES /." ⁵ Thus, the Respondent's managers not only knew of Snead's support for the Union, but they also made a point to let Snead know that they knew. Hughes did not deny or explain this implicitly threatening behavior regarding Snead's open support for the Union.

Although Hughes admitted that Snead made his union sympathies obvious, Smith was reluctant to admit that he knew of Snead's union organizing activities. For example, Smith several times attempted to downplay or discredit his knowledge by saying in a disparaging manner that he had only received anecdotal reports of Snead's union activities. If Smith truly doubted the reliability of anecdotal reports, such doubts should have applied equally to discredit the alleged basis for Smith's discharge of Snead, which was the single anecdotal report of a team leader.⁶ Nevertheless, the anecdotal reports of Snead's union activities were reports received from other managers, precisely the type and source of information upon which managers often rely in making decisions. In spite of how Smith would characterize the source of his knowledge of Snead's union activities, Smith accepted the accuracy of these reports that Snead was actively supporting the Union at the Respondent's Indianapolis plant.

On August 13, the employee organizing committee decided to start soliciting employees to sign union authorization cards. On August 18, Jason Shryock notified Pamela Elliott, as well as other managers, that Snead had been advocating the Union with other employees in front of the plant. Elliott, in turn, sent this information directly to Heinrich and Smith in an e-mail designated as "high" importance, the highest such designation for e-mail transmissions at the Respondent. Elliott also sent a copy of

⁵ GC Exh. 20.

⁶ See GC Exh. 6.

this e-mail to her supervisor in California. The Respondent makes no claim that Snead was doing anything wrong in conducting organizing activities in front of its plant. Nevertheless, it is significant that lawfully protected activities should receive such immediate and high-level attention by the Respondent.

These e-mails between the Respondent's managers, including the two highest managers in the plant, confirm that the Respondent knew of Snead's support for the Union. The e-mails also show that as of August 18 or 19, about 1 week before Snead was discharged, Snead's active solicitation for the Union was brought to the attention of and was circulated among the Respondent's highest managers. Adding to the conclusion that the Respondent was aware of and was concerned about Snead's organizing activities is the fact that the e-mail regarding Snead's union activities was copied to the two highest ranking executives at the Indianapolis plant, six shift supervisors, only one of whom supervised Snead, and a corporate officer in California.

C. Discipline on May 30, 2002⁷

On May 30, approximately 1 month after Snead began to openly support the Union, Snead received the first discipline he had ever received in 4 years of employment at the Respondent. According to Hughes, he observed Snead on May 23 making copies of documents in a suspicious manner.⁸ The copier machine was in the cubicle area where managers had their offices. Hughes claimed that he observed Snead put the original of the document he copied between the other pages he had in his hand. This, according to Hughes, was suspicious.

Hughes' demeanor on the witness stand, including tone of voice and eye contact, demonstrated, and was consistent with, a person who does not like unions and does not like persons who are members of unions. Moreover, he showed little regard for the oath he took as a witness. For example, Hughes testified that he had no knowledge of the reason Snead was discharged. (Tr. 79.)⁹ However, prior to the present hearing, Hughes had been selected by the Respondent to testify at the State hearing on Snead's claim for unemployment compensation benefits. At that hearing, Hughes testified under oath that the reason Snead was discharged was because he had been out of his work area on August 25. Hughes attempted to explain the inconsistency between these two, sworn statements by stating that his testimony at the unemployment compensation hearing was only based on his review of the file that the Respondent had given to him. However, Hughes never explained why he would have testified, and did testify, at the present hearing that he had no knowledge as to why Snead was discharged. This statement was simply not true, and Hughes must have known that it was

⁷ Time-barred conduct may be considered to evaluate events that occurred within the statutory period. *Property Markets Group*, 339 NLRB No. 31 fn. 2 (2003). Moreover, Snead's discipline on May 30 was the first he received at the Respondent and it was the only other discipline that Heinrich relied on when he ordered that Snead be discharged. Accordingly, the circumstances and propriety of the May 30 discipline may and should be considered in evaluating the lawfulness of Snead's discharge.

⁸ GC Exh. 7.

⁹ Tr. refers to the transcript of the hearing in this case.

not true. And Hughes' credibility is not enhanced by his attempt to impeach his own testimony at the State unemployment compensation hearing.

The document that Hughes observed Snead copying on May 23 was work instructions that Snead was copying to give to one of his six junior technicians. After Snead made the copy (he had only made one copy at the copier), Hughes approached him and asked to see what he had made. Snead showed him and held out all six copies of the instructions for Hughes to see or take if he wished. Hughes did neither. He simply asked Snead again and again to show him what Snead had copied. On every occasion, Snead complied with Hughes' request. Hughes was still not satisfied, possibly because he hoped to find nonwork-related materials in the documents, and there were none.

The Respondent has no policy regarding employee use of its copier machines. Heinrich testified that he expected the copiers would only be used for company business. However, there is no evidence that this expectation was communicated to the Respondent's employees or that any other rules were ever imposed on or communicated to the employees. Troy Robson, a configuration technician, confirmed that he is not aware of any rule regarding use of the copier. Also, there was no evidence that any employee had ever been stopped by a manager to inspect something the employee had just copied. Yet, on May 30, less than 1 month after Snead began openly supporting the Union, he became the first and only employee, insofar as the evidence in this case discloses, who was ever stopped by a manager to inspect what the worker had copied.

Since the Respondent has no rules regarding employee use of the copiers, it is unlikely that Hughes would have been so closely observing Snead as to see him placing the document that he copied at the machine into the middle of the documents he held in his other hand. There was no reason for Hughes' to be observing Snead at all, let alone this closely. On the other hand, if Hughes' had been watching Snead this closely, which I do not accept, the possible, if not likely, reason that springs to mind is Snead's recent and open support for the Union and Hughes' demonstrated hostility towards Snead's union activities.

I reject Hughes' claim that Snead acted suspiciously. I do not credit Hughes' description of the incident, and I do credit Snead's description of the incident. The evidence shows that Snead did not act suspiciously. Moreover, there was no legitimate reason for Hughes to stop Snead and ask to see the document he had just copied. The only plausible reason, a reason consistent with Hughes' demeanor on the witness stand and with Hughes' threatening actions in staring at Snead's prounion shirt and pointing to the prounion placard on Snead's car, is that Snead had recently begun openly supporting the Union, and Hughes was hoping to find that Snead had copied nonwork-related documents so that Hughes would have a supposedly proper reason to discipline Snead. Hughes was not even Snead's supervisor at this time. Hughes wanted to discipline Snead because of Snead's open support for the Union. However, there were no such documents, so Hughes decided to construct another reason to discipline him— Snead's alleged insubordination in refusing to show Hughes what he had just copied. But Snead did show the document to Hughes. More-

over, Snead several times offered all the documents in his hand to Hughes, but Hughes refused to take them.

Hughes notified the top three management officials at the Respondent concerning his alleged encounter with Snead on May 23. Hughes and Smith decided to discipline Snead by suspending him for 3 days, placing him on probation for 1 year, and issuing a final warning to him. Even if one were to credit the insubordination claim put forward by the Respondent at the hearing, which I do not, this discipline seems unduly harsh for the alleged offense. Moreover, Snead curiously was issued a "final" warning, despite the fact that it was also his first disciplinary warning.

The discipline of Snead is somewhat unique in the Respondent's facility of approximately 1500 employees. The Respondent represented at the hearing that from January 1, 2002, to the present it had records reflecting the discipline of only four employees in the entire facility that had received discipline for any of the reasons for which Snead was discharged.¹⁰ The infractions were for unauthorized absences from work, leaving the work area without approval, and failing to pay attention to work. There were no infractions dealing with the use of the copier machine. Indeed, there is no evidence that the Respondent has ever disciplined any employee for any actions involving the copier machine. This absence of discipline is also consistent with the Respondent's failure to have or communicate any rules regarding the use of the copier machine.

D. Termination on August 27, 2002

As noted above, on August 13, the employee organizing committee decided to start soliciting employees to sign union authorization cards. Snead signed a card on that date and started soliciting other employees to sign cards. On August 18 and 19, Snead's organizing efforts were noted by management and were communicated via e-mail to shift supervisors, to the highest management officials at the plant, and to corporate personnel in California. Indeed, Snead's organizing activities were of such interest to the Respondent's management that Shryock, who had observed Snead soliciting employees for the Union, sent his e-mail to Elliott and other managers on Sunday at 6:18 a.m., just before he left for vacation.

On August 27, Smith, after receiving instructions from Heinrich, terminated Snead's employment. The events that precipitated the termination occurred on Sunday evening, August 25, just prior to the start of Snead's shift. Mark Hancock reported in an e-mail of August 27 to his supervisor, Rob Haverly, that Snead had been seen talking to two employees in the OBA area on the previous Sunday night, and that he had been talking to these two employees about signing a union authorization card. Hancock's e-mail did not disclose how he learned of or heard about this allegation. Haverly forwarded Hancock's e-mail to Elliott. Elliott, in turn, forwarded the e-mail to Heinrich and Smith. After receiving the e-mail, Heinrich notified Smith to discharge Snead for failure to follow instructions.

This entire process was handled with great dispatch. Hancock sent his e-mail at 6:36 a.m. and by 8:54 a.m. Heinrich had

ordered Smith to terminate Snead. Moreover, within 6 minutes of the time that Heinrich received the e-mail from Elliott, he sent an e-mail to Smith directing him to terminate Snead. Heinrich conducted no investigation of the allegations in Hancock's e-mail. Indeed, conducting an investigation of the allegations was apparently so unimportant to Heinrich that he could not remember whether he talked to Smith and Elliott before or after he ordered Smith to discharge Snead.

If Heinrich had conducted an investigation, he would have discovered that Snead was in the OBA area before the start of his shift, not while he was working. Heinrich would also have found out that Snead had a proper reason for being in the OBA area because he was looking for his supervisor. Snead wanted to talk to his supervisor before starting work because many employees had already been sent home,¹¹ and Snead wanted to find out if he should report for work that day. Snead did find his supervisor during his search, and his supervisor told him that there was no work and there was no need for Snead to clock in.

Although Snead did briefly talk to two employees while he was in the OBA area, conversations like this between and among employees as well as managers were common. Snead was also careful to not disrupt a worker who was busy, and the two employees he talked to while he was in the OBA area were not busy. The fact that these workers were not busy is also consistent with the Respondent's acknowledgment that it had sent many employees home during that shift because it was not busy at this time.

The Respondent has no rule prohibiting employees from talking amongst themselves or with other employees as they walk through the plant. It was a common practice in the Indianapolis plant for employees to talk to other employees while they moved about the plant. And such conversations typically involved subjects having nothing to do with work. In particular, employees would often talk to other employees about their families and, especially, sports as they walked through the plant. Managers did the same, including Shryock and Smith. The conversations would generally last several minutes, sometimes lasting as long as 15 or 20 minutes. Employees frequently stopped by Snead's work area and talked to him. Smith himself had engaged an employee in a personal, nonwork-related conversation in the employee's work area, lasting approximately 45 minutes just a few days before the hearing in this case.

Many employees, including technicians, are required to leave their work area and walk to other areas of the plant in order to do their job. Snead was a technician, and in order for him to perform his job of assembling computers and servers, it was necessary for him to go to other areas of the plant to obtain the hardware he needed to make the proper assembly. Many of the Respondent's employees, including Snead, simply could not do their jobs without leaving their work areas and going into other work areas. It was common for any number of employees to walk, and be required to walk, to various other areas of the plant throughout the typical workday.

¹¹ Occasionally, employees or entire shifts would be sent home if there was not sufficient work at the plant.

¹⁰ See GC Exhs. 12-15.

While Snead was working on August 27, his supervisor told him to report to Smith's office. When Snead arrived, Smith told him he was being terminated for being out of his work area on Sunday night, and the matter was not open for discussion. Smith handed Snead a termination memorandum. (GC Exh. 8.) The memorandum confirmed, in part, what Smith had just told Snead as to why he was being terminated. The memorandum stated: "On Sunday, August 25, you were again observed out of your assigned work area conducting personal business." Snead attempted to explain to Smith that he could not have been out of his work area on Sunday night because he was not even working that night, but Smith refused to discuss the matter or even to listen to Snead. Smith and Snead's supervisor then escorted Snead out of the building.

Smith claimed at the hearing in this case that the offense for which Snead was discharged had actually occurred on August 26. (Tr. 49.) This shifting explanation is not credible. The initial e-mail that reported Snead's presence in the OBA area stated that this had occurred on Sunday night, which was August 25. This date was repeated in the termination memorandum. Smith refused to even consider Snead's explanation on August 27 that he was not working on August 25. However, by the time of the hearing, the Respondent was aware that Snead had not worked that night and must have appreciated the significance of this fact, viz., that Snead was terminated for doing something he could not have done. Accordingly, Smith testified that Snead's actions occurred on August 26. This testimony is not credible and is rejected.

The Respondent claims that it advised its workers, in meetings held by lower level supervisors, that employees were not permitted to walk around the plant. However, none of the Respondent's employees, except managers who testified at the hearing, were aware of such a rule. The Respondent admits that this "rule" was not in writing. The credible evidence shows that there was no such rule at the Indianapolis plant. Moreover, even if there were such a rule, there was no enforcement of such a rule because the workers continued to walk throughout the plant as they had done in the past and as they were required to do in order to perform their jobs.

This finding is corroborated by the lack of records showing enforcement of any such rule. For the period from January 1, 2002, to the time of the hearing, the Respondent disciplined only one worker, Josh Sears, for being out of his work area. Moreover, this single discipline also confirms the relative unimportance of the offense because Sears, who had been repeatedly told to return to his work area, only received a letter of concern for his conduct.

On the other hand, it is reasonable to assume that workers were not free to leave their work areas and roam the plant at will. It is also reasonable to assume that workers were expected to be in their work areas unless they had a work-related reason to be elsewhere. Indeed, both Smith and Hughes identified these limitations on the rule. However, Heinrich, who claimed to have instituted the rule when he took over command of the plant in April 2002, did not identify any limitations on the rule. Because the rule articulated by Heinrich defies common sense, because such a rule would prevent many of the Respondent's employees from performing their jobs, and because the Re-

spondent's workers continued to leave their work areas for work-related reasons, Heinrich's testimony regarding the rule is not credible.

Nevertheless, accepting the existence of a rule prohibiting workers from being in other areas of the plant for nonwork-related reasons, the discipline for violating such a rule can only be speculated because of the Respondent's failure to consistently or commonly enforce such a rule. Moreover, given the widespread practice of employees walking throughout the plant, as well as the slight "discipline" administered to Sears who had been repeatedly out of his work area, any discipline for violating such an unwritten rule would likely not include termination, except possibly in the most extreme and egregious case.

The termination memorandum given to Snead also charged him with conducting personal business. However, the Respondent has no rule prohibiting employees from soliciting or conducting personal business. In fact, employees frequently and openly solicit for various purposes in the workplace. Employee solicitations have involved such diverse purposes as local schools, the Girl Scouts, help for families of employees, anniversaries, and personal solicitations when employees have items for sale. Solicitations are made during working hours, in the plant, and in the presence of managers. Indeed, managers also participate in these solicitations. Thus, Snead was charged with doing something that had been an accepted practice and was commonly and openly done by employees and managers.

The termination memorandum describes the reason for Snead's termination as follows: "You are hereby terminated for knowingly violating established procedures and failure to follow work rules and instructions from your supervisor." As noted above, the credible evidence fails to show that the Respondent had any established procedure prohibiting a worker from being out of his work area or from conducting personal business. In fact, the evidence shows just the opposite. The established procedure in the plant was that employees were permitted to walk throughout the plant on work-related matters and were permitted to conduct personal business.

On April 18, Hughes verbally counseled Snead for leaving his work area. In accordance with standard policy, Hughes made a memorandum of that counseling. (Tr. 312; R Exh. 3.) In addition, Smith claims that he counseled Snead on June 27 about e-mails Snead had sent to Elliott, and there is evidence that, during that counseling, Smith covered items in the May 30 discipline, including that Snead should not be out of his work area. (GC Exh. 10.) Detracting from this evidence is the fact that Snead's May 30 discipline did not concern him being out of his work area. Thus, if Smith counseled Snead on June 27 about the matters covered in the May 30 discipline, then he did not counsel Snead on being out of his work area. Moreover, Smith did not testify that he counseled Snead about being out of his work area. Accordingly, I find that Smith did not counsel Snead on June 27 about being out of his work area.

Smith claims that other supervisors counseled Snead about being out of his work area. However, none of these alleged counseling sessions were documented, in spite of the Respondent's standard policy of documenting such sessions. Accordingly, Smith's claim that other supervisors, besides Hughes,

counseled Snead on being out of his work area is not credible since it is contradicted by company policy and is disputed by Snead.

Hughes also claims that he counseled other workers for being out of their work areas, but that he did not document these occasions. (Tr. 320.) It is significant, then, that Hughes did document the only time he allegedly counseled Snead for being out of his work area. This disparate treatment of employees indicates that Hughes had an ulterior, unexplained purpose for treating Snead differently from other workers.

Also, the mere fact that Hughes counseled Snead on April 18 for being out of his work area should have no impact on Smith's evaluation of Snead's actions on August 25, unless Snead had no work-related reason for being out of his work area and this was known by Smith.¹² But neither of these conditions is met in this case. First, Snead did have a work-related reason for being in another area of the plant on August 25 because he was properly looking for his supervisor to find out if he should report for work. (And, as it turned out, his supervisor told him that he should not report because there was not sufficient work at the plant.) More important, Snead was not even working when he was seen in the OBA area. Second, Smith did not know if Snead had a work-related reason for being in the OBA area or if Snead was even working at that time because Smith refused to investigate the charge and refused to even listen to Snead when he discharged Snead.

In any event, whether Snead was counseled by Hughes or Smith or by anyone else is irrelevant to Heinrich's decision to terminate Snead because Heinrich admitted that he did not know whether he was aware of such warnings when he issued the order to fire Snead. Heinrich's decision was based, according to him, on Snead's May 30 discipline and the e-mail of August 27, not on any other alleged warnings to or actions by Snead.

E. Comparable Employees

As noted above, the Respondent's records show that only four employees were disciplined between January 1, 2002 and July 2003 for any of the reasons for which Snead was discharged. Only two of these occurred before Snead was terminated. None of the four disciplines involved a termination.

The four disciplines produced by the Respondent are as follows. Kristi Benberry was suspended for 1 day because of insubordination and leaving the work floor to talk on the telephone. Jason Bybee received a written warning for excessive absenteeism and failure to complete his work. Josh Sears received a letter of concern for talking with others after being repeatedly told to return to his work area. Christopher Wheatley, who was disciplined after the charges in the present case were filed, was excluded from certain benefits because of taking an unscheduled smoking break. Significantly, Benberry and Sears, whose actions most closely resemble what the Respondent claims Snead had done on August 25, were both given warnings to return to their work areas before discipline was imposed. Snead was given no such warning on August 25.

¹² This is because the Respondent, at least, had no rule prohibiting a worker from being out of his work area for work-related reasons.

The dearth of comparable situations shows that the Respondent either had no rule prohibiting what Snead was accused of doing on August 25 or, if there were such a rule, even a rule prohibiting employees from walking around the plant for non-work-related reasons, the Respondent elected not to enforce it. The experience of technician Troy Robson, an open union supporter, is instructive.

In approximately January 2003, Robson's supervisor instructed him to remain in his work area. However, Robson, like Snead, was required to get parts from other locations in the plant in order to perform his work. After about 1 week, Robson met with his and two other supervisors. He told them he could not do his job under this new rule that was applicable only to him. He called his supervisor an idiot, he told his supervisor to leave him alone and to stay the hell away from him. Robson then told the supervisors that they could write him up for insubordination, he did not "give a shit. Better yet, you can fire me so I could give a shit less." (Tr. 218.) The supervisors did not say anything. Robson returned to his work area and resumed working as he had in the past, that is, he resumed his previous practice, and the practice of all other technicians, of leaving his work area whenever it was work-related, and of talking to other employees when he was in other areas of the plant. Robson was not cited for insubordination nor given any discipline for this outburst. Indeed, management never mentioned his outburst to him.

F. Analysis

Under the test set forth in *Wright Line*, when the Respondent is alleged to have violated Section 8(a)(1) and (3) in the discharge of an employee, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. To meet this burden, the General Counsel must offer credible evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). Once unlawful motivation is shown, the burden shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If the employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The evidence demonstrates that the Respondent had knowledge of Snead's union activities. Moreover, the e-mail sent by Hancock that reported Snead's presence in the OBA area on August 25, and which was the basis for Heinrich's decision to discharge Snead, states that Snead had solicited two employees to sign union cards. Of course, if the Respondent did not allow personal business or soliciting to occur in the workplace, then the purpose of Snead's actions would be irrelevant. But the purpose was important to the Respondent or there would have been no need for Hancock to mention union activity. Hancock

also added the apparently gratuitous comment in his e-mail that “there appears to be a big push now toward the Union since new folks have been hired.”¹³ Such a comment is and should be irrelevant to whether Snead had engaged in any misconduct. However, the comment was not irrelevant to how Smith and Heinrich would deal with the matter. Indeed, the comment was part and parcel of Smith’s and Heinrich’s motive in the quick decision after Hancock’s e-mail to discharge Snead.

The Respondent contends that there is no evidence of anti-union animus.

However, motive and union animus may be, and often are, proven through indirect and circumstantial evidence. *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987). All of the circumstances in the case should be considered in making this determination. Among the individual factors that the Board has found to support an inference of animus are (1) suspicious timing, (2) the abruptness of the termination, (3) failure to adequately investigate the alleged misconduct, (4) disparate treatment of the discharged employee, (5) shifting or inconsistent explanations, and (6) false or pretextual reasons given to explain the Respondent’s action. *Medic One, Inc.*, 331 NLRB 464, 475 (2000); *Dynabil Industries*, 330 NLRB 360 (1999); *Lampi LLC*, 327 NLRB 222 (1998); and *Master Security Services*, 270 NLRB 543, 552 (1984).

Suspicious timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision. *Schaeff Inc.*, 321 NLRB 202, 217 (1996); *NLRB v. Rain Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). The timing of the Respondent’s actions against Snead strongly and singularly supports an inference of animus. The first time Snead received any discipline during his 4 years of employment at the Respondent occurred within 1 month of his initial and open support for the Union. Snead’s next discipline was his last, and this occurred within 2 weeks after the Respondent’s two highest managers at the plant, the very managers who decided and carried out Snead’s termination, became aware that Snead had begun soliciting employee signatures for union authorization cards. Such timing between protected activity and termination is a highly significant indication of an unlawful, discriminatory motive for the termination.

The abruptness of a discharge is persuasive evidence of motivation. *Schaeff Inc.*, supra; *NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971). The Respondent acted beyond abruptly in terminating Snead. Six minutes after Heinrich learned that Snead had been out of his work area, or at least this is what Heinrich thought he had learned, Heinrich directed Smith to discharge Snead. And the lack of any investigation into the alleged reasons for Snead’s discharge necessarily flows from this extreme abruptness.

The Board has consistently held that a respondent’s failure to conduct a full and fair investigation of an employee’s alleged misconduct is evidence of discriminatory intent. *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). Here, not only was no investigation conducted, but Heinrich was so unconcerned with making an investigation that he could not even remember whether he had talked to any of his subordinate managers before direct-

ing that Snead be terminated. The timing and the manner in which Snead was discharged compels the conclusion that Snead was terminated because of his union activity, and the Respondent simply did not seem to care whether or not the discharge was supportable. In fact, it was not.

The Respondent’s failure to investigate whether Snead had been out of his work area, and if so, why, is proof that it was not concerned with what such an investigation would disclose. In turn, this proves that the Respondent’s reason for the discharge, however that reason is characterized, was not the true reason for the discharge.

The Respondent treated Snead differently from other employees. There is no evidence that any of the Respondent’s managers ever stopped any other employee to inspect what that employee had copied at the copier. The Respondent treated Snead differently from other employees who had left their work areas for nonwork-related reasons. Indeed, if the Respondent had any applicable rule, it was a rule that required working employees to have a work-related reason before going to other areas of the plant. On August 25, Snead was not even working; moreover, he did have a work-related reason for going to another area of the plant. In addition, the Respondent has no rules prohibiting solicitations, and employees and managers commonly participated in solicitations. However, when Snead did this on August 25, briefly and at a time when most of the Respondent’s workers had already been sent home, he was terminated. The only difference between what Snead did on August 25 and what other employees and managers commonly did was that Snead was soliciting signatures for the Union.

The e-mail that reported Snead had been out of his work area stated that this occurred on Sunday night. The e-mail is dated Tuesday, August 27. (GC Exh. 6.) August 25 was a Sunday. In the memorandum reflecting Snead’s discharge, the date of Sunday, August 25, is repeated. When Smith handed this memorandum to Snead, Snead attempted to refute the charge by explaining he was not working on August 25. Snead would not listen to him or allow him to explain. At the hearing, Smith, now realizing that Snead had not worked on August 25, and therefore could not have been out of his work area on August 25, testified that the event for which Snead was terminated actually occurred on August 26. This inconsistent, incredible testimony and the shifting explanation further weaken Smith’s credibility, and provide persuasive, independent evidence of an unlawful, discriminatory motive for the termination.

The reason given by the Respondent for its discharge of Snead was false, both because Snead had not committed the misconduct with which he was charged and because the Respondent did not believe or care whether he had. The Respondent knew it had no rule prohibiting solicitations, but it discharged Snead, at least in part, because he solicited for the Union. The Respondent knew that its workers could leave their work areas for work-related reasons, but it did not investigate whether Snead was even working, let alone whether he had a work-related reason for being in another area. It did not investigate because it had already decided to terminate Snead because of his support for the Union.

My determination that the reasons advanced by the Respondent for its discharge of Snead are false and a pretext for its

¹³ GC Exh. 6.

actual motive in taking that action necessarily means that the asserted reasons were not relied on. Accordingly, there is no need to further address these reasons because a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Alternatively, because the Respondent's reasons for discharging Snead are unsupported under the standards it normally applies to its other employees, I conclude that the Respondent has not proven that it would have taken the same action in the absence of Snead's protected activity. *Hospital San Pablo*, 327 NLRB 300 (1998).

For all the foregoing reasons, I conclude that the Respondent discriminated against David Snead and violated Section 8(a)(3) and (1) of the Act when it discharged Snead because of his protected activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) and (3) by discharging employee David Snead.

REMEDY

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

Having found that the Respondent unlawfully discharged David Snead, I shall order that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Hewlett Packard Company, Palo, Alto, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against any employee for supporting the United Steel Workers of America, AFL-CIO, CLC, or any other union.
 - (b) In any like or related manner interfering with, restraining, or coercing its 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.

¹⁴ 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.

- (a) Within 14 days from the date of this Order, offer David Snead full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

- (b) Make David Snead whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of David Snead, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

- (d) 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.

- (e) Within 14 days after service by the Region, post at its facility at Georgetown Road, Indianapolis, Indiana, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 2002.

- (f) 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 the Respondent has taken to comply.

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

¹⁵ 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."

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Steel Workers of America, AFL-CIO, CLC, or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer David Snead full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Snead whole for any loss of earnings and other benefits resulting from his discharge, 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 discharge of David Snead, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

HEWLETT PACKARD COMPANY