

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

**COPPER CRAFT PLUMBING, INC.,  
AND KANSAS CITY PLUMBING, INC.,  
a Single Employer and Their Alter Egos  
KC COMMERCIAL PLUMBING, INC.  
AND STUDIO 36 LLC**

and

**CASE 17–CA–24227**

**DONOVAN SHAFER, and Individual**

and

**CASE 17–CA–24291**

**STEVEN R. COX, an Individual**

*Mary G. Taves, Esq.*, for the General Counsel.  
*Walter R. Roher, Esq.*, for the Respondent.

**DECISION**

**Statement of the Case**

**MARGARET G. BRAKEBUSCH, Administrative Law Judge.** This case was tried in Overland Park, Kansas, on January 13 and 14, 2009. The charge in Case 17-CA-24227 was filed by Donovan Shafer (Shafer) on July 14, 2008,<sup>1</sup> and amended on November 24, 2008. The charge in 17-CA-24291 was filed by Steven R. Cox (Cox) on September 11, 2008, and amended on November 21, 2008.

On November 26, 2008, the Regional Director for Region 17 of the National Labor Relations Board (Board) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing based upon the allegations contained in Cases 17-CA-24227 and 17-CA-24291. The consolidated complaint alleges that Copper Craft Plumbing, Inc. (Copper Craft) and Kansas City Plumbing, Inc. (Kansas City Plumbing) constitute a single-integrated business enterprise and a single employer within the meaning of the Act. The consolidated complaint further alleges that on or about August 22, 2008, and August 25, 2008, Studio 36

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<sup>1</sup> All dates are in 2008 unless otherwise indicated.

5 LLC (Studio 36) and KC Commercial Plumbing, Inc. (KC Commercial) were established by Copper Craft and Kansas City Plumbing as a disguised continuation of Copper Craft and Kansas City Plumbing for the purpose of evading responsibilities under the National Labor Relations Act (Act). The consolidated complaint additionally alleges that Copper Craft, Kansas City Plumbing, KC Commercial, and Studio 36 are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

10 The consolidated complaint further alleges that the four Respondent entities described above, and collectively referred to herein as Respondent; terminated Shafer on July 8, 2008, because of his protected concerted activities. The consolidated complaint also alleges that Respondent laid-off Cox and 9 other employees on or about September 17, 2008, because Shafer and Cox filed charges with the Board and because of their activities in support of the Union. The consolidated complaint additionally alleges that on or about September 1, 2008, Respondent required Cox and seven other employees to begin parking work vans at the Respondent's facilities rather than permitting them to drive the vans home at the end of the workday. Finally, the consolidated complaint alleges that in or about mid-July 2008, Respondent, acting through Tim Nettekoven, threatened employees with unspecified reprisals because they engaged in union or other protected activities. Respondent filed a timely answer, denying the allegations of violative conduct. Respondent admits, however, that 20 Copper Craft and Kansas City Plumbing have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for, and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single-integrated business enterprise. Respondent admits that Copper Craft and Kansas City Plumbing constitute a single-integrated 25 business enterprise and a single employer within the meaning of the Act. In its answer, Respondent admits that Copper Craft, Kansas City Plumbing, KC Commercial, and Studio 36 have had substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership. Respondent denies, however, that Studio 30 36 is engaged in the business of plumbing and asserts that it was created solely to own a building that serves as a residence and a warehouse for Copper Craft, Kansas City Plumbing, and KC Commercial.

35 On the entire record, including my observations of the demeanor of the witness, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

**Findings of Fact**

40 **I. Jurisdiction**

45 Respondent, a corporation, with an office and place of business in Kansas City, Missouri, has been engaged in the business of residential and commercial plumbing. During the past 12 months, Respondent performed services valued in excess of \$50,000 directly for customers located outside the State of Missouri. 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. I also find<sup>2</sup> that Local 8 for the Plumbers and Gasfitters (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

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**II. Alleged Unfair Labor Practices**

**A. Background**

**1. Origin of the Business Enterprise**

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Respondent’s business operation in residential plumbing began in 1995. On September 23, 2004, Copper Craft and Kansas City Plumbing were incorporated in the State of Missouri by Timothy Nettekoven and Christian M. Ismert to own, manage, and operate as a commercial and residential plumbing contractor in the greater Kansas City geographical area. In 2007, Timothy J. Nettekoven (Nettekoven) and his wife Cami L. Nettekoven purchased Christian M. Ismert’s ownership interest in Copper Craft Plumbing and Kansas City Plumbing and became the sole shareholders of both entities. Prior to October 2008, both Copper Craft and Kansas City Plumbing maintained a place of business at 2930 Cherry, Kansas, City, Missouri. In October 2008, Copper Craft and Kansas City Plumbing relocated to 3600 Troost Avenue, in Kansas City, Missouri.

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**2. Interrelationship between Copper Craft and Kansas City Plumbing**

The parties stipulate that Copper Craft and Kansas City Plumbing maintain combined business and accounting records, and while maintaining separate bank accounts use such accounts in the combined operation of both businesses. In the operation of their business, Copper Craft and Kansas City Plumbing utilized the same equipment, tools, office supplies, vehicles, and employees. The bulk of the equipment used by both companies was owned by Copper Craft and the employees’ salaries were paid by Copper Craft. Copper Craft and Kansas City Plumbing have also maintained the same insurance carriers and policies to cover their business operations. In the operation of their businesses, Copper Craft and Kansas City Plumbing performed services for the same customers and used the same plumbing suppliers. Beginning in mid-2006, most of the bids for new business were made under Kansas City Plumbing. It was Nettekoven’s intention that Kansas City Plumbing would eventually take over all the work of Copper Craft. Based upon undisputed evidence and the stipulations of the parties, I find that Copper Craft and Kansas City Plumbing constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

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**3. Respondent’s Work Force**

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In the summer of 2008, Respondent employed approximately 11 field employees,

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<sup>2</sup> Section 102.20 of the Board’s Rules and Regulations provides that any allegation not specifically denied or explained in an answer filed shall be deemed to be admitted to be true unless good cause to the contrary is shown or the respondent states that he is without knowledge. Finding neither exception to apply, the complaint allegation concerning the status of Local 8, Plumbers and Gasfitters (the Union) is deemed to be admitted.

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including plumbers and plumbers’ helpers. Donovan Shafer was employed as a lead plumber and had worked for Respondent since October 2006. He had been a licensed plumber since 1991 and had experience in commercial, residential, and underground plumbing. Steve Cox and Jeff Raley also worked for Respondent as lead plumbers. The parties stipulated that Shafer, Raley, and Cox were not supervisors within the meaning of Section 2(11) of the Act.

**4. Respondent’s Supervisors and Agents**

Nettekoven is President for both Copper Craft and Kansas City Plumbing. Cami Nettekoven is Secretary, a member of the Board of Directors, and Office Manager for both Cooper Craft and Kansas City Plumbing. Cami Nettekoven is also President, Secretary, and a member of the Board of Directors for KC Commercial. The parties stipulated that Nettekoven and Cami Nettekoven continued to manage and supervise the business of KC Commercial just as they managed the business of Copper Craft and Kansas City Plumbing. Brian Lee served as Manager of Operations for Respondent and is an admitted supervisor. James Newstrom held the position as master plumber and is an admitted agent of Respondent. Respondent continued to utilize Newstrom as a plumber after the September 17, 2008 layoff. There is no record evidence and no assertions by any party that there were any other supervisors other than Lee and the Nettekoven’s.

**B. Discharge of Donovan Shafer**

The consolidated complaint alleges that Respondent terminated Donovan Shafer on July 8, 2008, because he and others engaged in protected concerted activity as well as activities on behalf of the Union. Respondent submits that Shafer was not engaged in any protected activities and that his termination was for reasons other than any protected activity.

**1. Employees’ Lunch with the Union Representative**

On May 12, 2008, Shafer and Cox were working on the same job site when they were visited by Jim Stout; an organizer with Local 8 of the Plumbers and Gasfitters Union (Union). Cox knew Stout from his work with a previous company. As Stout arrived at the job site shortly before their lunch break, Shafer and Cox joined Stout for lunch. When they returned to the job site in Stout’s vehicle, Nettekoven was present on the job site delivering materials. Although Shafer and Cox immediately returned to work, Stout remained to talk with Nettekoven. It is undisputed that Stout told Nettekoven that he had taken Shafer and Cox to lunch and that he knew them because they were previously in the Union. Stout additionally asked Nettekoven if there would be a time when he would be interested in becoming a union contractor. Nettekoven recalled that his only response to Stout was to say “maybe.” Nettekoven testified however, that at the time of his conversation with Stout, he did not believe that there was any good reason for his company to become part of the Union.

Following the lunch meeting with Stout, Shafer spoke with fellow employee Javier Mendoza about the potential for the employees becoming unionized. Shafer recalled that he may have given Mendoza some paperwork showing the Union’s first year apprentice scale and the Union’s benefit package that he had received from Stout during their lunch meeting. Shafer testified that he shared this information with Mendoza in order that Mendoza could

convey it to the Spanish-speaking employees working for Respondent.

5 Shafer recalled that within the next day or two after his lunch with Stout, he again spoke with Stout. During the conversation, Stout explained that when he asked Nettekoven about becoming a union contractor, Nettekoven stated that he didn't think that he had any plumbers that were worth union scale. Shafer checked with Cox and discovered that Stout also repeated this same comment by Nettekoven to Cox as well. Shafer and Cox discussed this comment and agreed that they were worth more than they were currently being paid. Shafer and Cox discussed this concern and other concerns with fellow employee Jeff Raley. 10 During these conversations, they discussed their concerns about their inability to get the necessary materials and blueprints for their jobs in a timely fashion and their frustration with the length of the commute time to get to their respective work sites. They also discussed vacation and holiday pay, as well as Cox's need for the use of a company van. Shafer, Cox, and Raley decided that they needed to meet with Nettekoven to discuss these various concerns. Raley set up a meeting for the three of them with Nettekoven. In setting up the meeting, Raley assured Nettekoven that the meeting was not going to be all about wages; however, he expected wages to be a part of the discussion. 15

## 20 **2. The Employees' Meeting with Nettekoven**

Toward the end of May 2008, Nettekoven met with Shafer, Cox, and Raley at a restaurant near one of the work sites. Supervisor Bryan Lee (Lee) also attended the meeting. The plumbers brought a list of the issues that they wanted to discuss with Nettekoven and Cox took notes during the meeting. The employees told Nettekoven and Lee that they believed 25 that the lead plumbers should all be paid the same wages. The employees further explained that since they were "running" their respective jobs, their wages should be \$31 to \$32 an hour. In response to their comments about wages, Lee discussed with them his understanding of the existing union scale for wages. The employees also voiced their desire to have more holidays and paid vacation. Although Nettekoven and Lee made no promise to increase employee wages, they discussed the possibility of a profit sharing plan for the employees. Lee recalled 30 that during the meeting he told the employees that the cash flow had been somewhat better and that the company had been able to pay off some of its debt.

The employees additionally explained to Nettekoven and Lee their frustration with 35 working without access to a full set of prints for their respective projects. Nettekoven and Lee voiced their understanding of this issue and assured the employees that they would have access to the full set of blueprints. Cox testified that the employees also mentioned their concerns about existing language barriers for crews composed of both Spanish-speaking and English-speaking employees. When the employees voiced concerns about the distances they 40 were driving to the job sites, Nettekoven stated that he would try to assign them work closer to their homes.

In his testimony, Lee confirmed that during the meeting, the employees talked about 45 difficulties in getting materials as well as the unavailability of blueprints that hindered their ability to make work decisions. He recalled that they talked about the use of vans and about their wages. Lee acknowledged in his testimony that he raised union scale with the employees while discussing wages. He recalled that Cox had mentioned that the Union had

just negotiated new contract wages. Lee testified that about a week after he and Nettekoven met with the employees, he and Nettekoven discussed their suspicion that the impetus for the meeting may have been the employees’ lunch with the Union organizer.

5 Cox testified that approximately 10 days after the meeting, Nettekoven told him that he would get the use of a van to drive to the work sites and that he would get a \$2.00 an hour raise. Raley contacted Nettekoven twice after the meeting to ask whether he was going to receive an increase in his wages. On one occasion, Nettekoven told him that he would have to wait until his anniversary date and on another occasion; he told Raley that he had not had an opportunity to discuss the matter with his wife. During a later conversation with Nettekoven, 10 Shafer asked Nettekoven if he had spoken with his wife about the raises. Nettekoven told him that none of the employees were going to get wage increases; however, he would implement a profit sharing plan. Although Nettekoven told both Shafer and Cox that employees would receive profit sharing, the plan was never implemented.

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### 3. The Events of July 7, 2008

Shafer testified that although Nettekoven had told him that he would be assigned to jobs closer to his home, he never received<sup>3</sup> those assignments. The commute to his assigned 20 jobs required his driving as much as an hour and twenty minutes each way. Shafer’s normal starting time for work was 7:00 a.m. Because the cellular telephones used by the employees have a GPS tracking component, the employees were able to clock in when they reached their job site by using their telephones. Shafer left for his assigned job on July 7, 2008 at approximately 6:00 a.m. After approximately 45 minutes into his drive, he received a 25 telephone call from Nettekoven. During the telephone conversation, Nettekoven discussed what he wanted accomplished on the job that day and the manpower that he was sending to the job to assist Shafer. The conversation lasted for approximately 10 to 15 minutes. Although Shafer was still approximately 15 minutes away from the jobsite, he clocked in at 7:00 a.m. Nettekoven did not dispute Shafer’s testimony about the telephone call or about the 30 length of time that they spoke during Shafer’s drive to the work site.

On the same day, Cox reported to the Sam’s Club car wash job site and clocked in when he arrived at the site. After arriving at the site, however, he learned from Nettekoven that he was to report to the Valvoline site. Later that same day, Cox received a telephone call 35 from a new office employee whose first name was identified as Lisa. She told him that he had clocked in early and that she was going to dock his pay. During the same day, Shafer also received a telephone call from Lisa. She told him that because he had clocked in 19 minutes before he actually arrived at the worksite, the time would be deducted from his pay.

40 When Shafer and Cox spoke with each other during the day, they discovered that they had both been told that their pay would be deducted because of the time that they clocked in. Shafer and Cox agreed that they needed to meet with Nettekoven to discuss the deduction in pay. When Shafer spoke with Nettekoven on July 7 to request a meeting, Nettekoven initially

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<sup>3</sup> Cox confirmed that following the meeting with Nettekoven, he continued to commute to his job site for over an hour without any compensation.

told Shafer that he was too busy. Shafer responded by asking if they could meet within the next 24 hours. Shafer testified that he did so because Nettekoven had proven “pretty good about putting meetings off.” Although Shafer detected some frustration or exasperation in Nettekoven’s voice, Nettekoven agreed to meet with Shafer within 24 hours. Nettekoven admits that he was aware that both Shafer and Cox wanted to meet with him over the clocking in issue and their pay being docked.

#### 4. The Events of July 8, 2008

When Cox completed the work he was doing on the Valvoline job on July 7, Nettekoven told him to report to the Noodles and Company job site. Nettekoven told him to continue to work there until either he (Nettekoven) or the general contractor on the car wash site called him to return to work on the car wash. On July 8, 2008, Cox returned to the Noodles and Company site; the site where Shafer was also working. During the morning of July 8, Shafer received a telephone call from Nettekoven. When Nettekoven asked Shafer where Cox was working, Shafer confirmed that Cox was present at his same jobsite. Shafer then took the opportunity to inquire of Nettekoven what time of the day that he wanted to meet with Shafer and Cox. Shafer testified that Nettekoven replied: “I can’t deal with that now. I need Steve at that fucking carwash now.” Shafer did not recall that he had heard Nettekoven use profanity with him previously. Because Nettekoven and Shafer were speaking on a two-way phone, Cox confirmed Nettekoven’s profanity and his directive to Shafer for him (Cox) to return to the car wash immediately. When Shafer again asked Nettekoven if he were going to come to the work site for the scheduled meeting, Nettekoven replied that he had 24 hours until he had to meet with the employees. Cox described Nettekoven’s tone of voice with Shafer as agitated.

Nettekoven testified that on July 8, 2008, he believed that Shafer had ordered Cox to come to the Noodles and Company job site. Although Nettekoven admitted that he had no independent knowledge that Shafer was responsible for Cox being at the Noodles and Company job site, he asserted that there would have been no other reason for Cox to have been there. Shafer testified that he did not have the authority to direct where employees worked and he denied that he had ordered Cox to be at his same jobsite. Cox also testified that he reported to the Noodles and Company job site because of his previous day’s instruction and not because Shafer told him to work in that site.

Cox waited until 7:00 a.m. on July 8, 2008, and then telephoned Nettekoven. Cox described Nettekoven as “nice” to him and noted that Nettekoven’s tone of voice had changed dramatically from the earlier tone used with Shafer. Nettekoven simply explained the circumstances that necessitated his going back to the car wash earlier than had been expected. Cox also explained to Nettekoven that he had reported to the Noodles and Company work site because he had been told to work there until notice from either Nettekoven or the general contractor. During his testimony, Nettekoven did not rebut Cox’s testimony that he (Cox) had been told to work at Noodles and Company until notified to return to the car wash site.

Later in the morning, Nettekoven came to Shafer’s jobsite to deliver a trailer. Nettekoven acknowledged, however, that an additional reason for his going to the Noodles and Company job site was to meet with Shafer. When Shafer saw Nettekoven, he approached

Nettekoven and asked if they were going to have the meeting about the disputed time. Nettekoven replied that he did not have time to do so. Shafer asked: "When are we going to have the meeting?" Nettekoven only responded that the meeting would be when he returned and then he left the jobsite.

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Nettekoven testified that when Shafer approached him, his manner was "belligerent" and "pushy." Nettekoven acknowledged, however, that Shafer did not curse him. Nettekoven further admitted that when he told Shafer that he didn't have time to meet with him, Shafer went back to work without further comment. Shafer recalled that while he had been frustrated when speaking with Nettekoven, he had not yelled or threatened Nettekoven. He denied that he approached Nettekoven in a threatening manner or that he ever pointed his finger at Nettekoven during the conversation. Nettekoven testified that he had wanted to fire Shafer for about a year, however, he "didn't have the pieces in place to make it happen" until the July 8, 2008, conversation.

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Justin Beauchamp was working at the Noodles and Company job site on July 8, 2008, and was aware of the conversation between Nettekoven and Shafer. Beauchamp asserted that while he did not hear what Shafer said to Nettekoven, he recalled Shafer's tone as "rude." Beauchamp went on to explain that by "rude," he meant that Shafer's tone of voice was elevated, although not screaming. Beauchamp further explained that he was actually working on a trailer and he did not physically observe Nettekoven and Shafer when they spoke. He estimated, however, that they were approximately four to five feet away from each other and about four to five feet away from him when they spoke. In describing Nettekoven's response, Beauchamp testified: "I just heard him say that he can't deal with this right now and he has to go." Beauchamp described Nettekoven's tone of voice as normal. At that point, Beauchamp returned to work inside the building.

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Javier Mendoza was also working at the Noodles and Company job site on July 8. He recalled that Shafer approached Nettekoven and told him that they needed to talk. Nettekoven told him that he didn't have time and that he would talk with Shafer when he returned from dumping some rock with Mendoza. Mendoza recalled that Shafer had simply said "Okay," and walked back into the building. Mendoza recalled that while Shafer appeared frustrated and upset, he did not scream or curse Nettekoven.

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Shafer and an apprentice were working on a bathroom group across from the front door of the building being constructed when Nettekoven later returned to the jobsite that afternoon. Nettekoven walked over to Shafer and stated: "We can have that meeting now. This isn't going to take long." Then Nettekoven asked Shafer for his keys to the company van, his company phone, and for his company gas credit card. Realizing that he had been fired, Shafer told Nettekoven that he would need to retrieve his tools. He then went to the two apprentices with whom he was working and told them that it had been nice to work with them. Nettekoven directed him to also take his personal tools from the company van. Because Shafer no longer had access to drive the company van, Nettekoven ultimately decided that he would drive Shafer home. Shafer recalled that there was very little conversation between them during the 80-minute drive home.

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## 5. Conclusions Concerning Shafer’s Discharge

Section 7 of the Act protects the right of employees to engage in concerted activities for their mutual aid or protection and Section 8(a)(1) of the Act prohibits employers from interfering, restraining, or coercing employees in the exercise of that right.<sup>4</sup> In its decision in *Meyers Industries*, 268 NLRB 493 (1984), the Board found that employee activity is concerted when it is “engaged in, with, or on the authority of other employees.” The employer is found to violate the Act if, having knowledge of an employee’s concerted activity, it takes adverse employment action that is “motivated by the employee’s protected concerted activity.” *Id* at 497. In a later decision, the Board additionally clarified that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries II*, 281 NLRB 882 (1986).

In its brief, Respondent asserts that on July 8, 2008, Shafer “confronted his supervisor, Tim Nettekoven, at a work site during work hours and demanded an immediate meeting to discuss the fact that he was not going to be paid for clocking in early that morning<sup>5</sup> – approximately 19 minutes prior to arriving at his designated job site.” Respondent submits that in that instance, Shafer pursued his individual complaint action on his own behalf. Respondent further argues that “the fact that two individual employees decided to try to speak with Nettekoven about their individual issues at a common time should not be construed as concerted activity.” Despite Respondent’s argument that Shafer and Cox were simultaneously pursuing individual interests, it is apparent that Shafer’s activities were protected inasmuch as his request to talk with Nettekoven involved issues that directly effected terms and conditions of employment for both he and Cox. See *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100, fn. 18 (2000).

Respondent also argues that even if the activity of Cox and Shafer on July 8, 2008, could be classified as concerted, the argument for protection fails because Counsel for the General Counsel has failed to show that Nettekoven was aware that Shafer and Cox were engaged in concerted activity. Counsel for the General Counsel submits, however, that in the three months prior to his termination, Shafer engaged in a number of activities that constituted protected concerted activity and the record supports her assertion. There is no dispute that Nettekoven knew about Shafer’s lunch with the Union representative in mid-May. Lee even admitted that he and Nettekoven had discussed the possibility that the meeting with the Union representative had been the impetus for the May meeting requested by the employees. Lee admitted that there had been a discussion of Union wages and the most recent Union contract during the meeting with the employees. Respondent does not deny that during the meeting, the employees discussed their concerns about their wages, benefits, and working conditions. The employees specifically voiced their concerns about not having the necessary materials and blue prints to do their jobs adequately. They also complained about the time required for them to commute to their respective work sites. Thus, as of July 2008, Nettekoven was not only aware of Shafer’s link to the Union, but also of Shafer’s interest in improving wages,

<sup>4</sup> 29 U.S.C. § 157-158.

<sup>5</sup> The record actually reflects, however, that Shafer’s clocking in early occurred the previous day.

benefits, and working conditions for Respondent’s employees. Nettekoven admitted that Shafer told him on July 7, 2008, that both he and Cox wanted to meet with him and Nettekoven further admitted that he knew that the purpose of the meeting was to discuss the clocking in issue. Accordingly, Nettekoven was aware that Shafer wanted to speak with him about an issue affecting wages for both he and Cox.

Thus, the record evidence establishes that Shafer was engaged in concerted protected activity and that Respondent was aware of his protected activity. As the Board pointed out in its decision in *Noble Metal Processing, Inc.*, 346 NLRB 795, 795 and fn. 2 (2006), the analysis for determining whether an employer has unlawfully disciplined an employee for conduct that is part of the *res gestae* of protected concerted activity is contrary to a *Wright Line*<sup>6</sup> analysis.

Quoting from its earlier decision in *Sanford Hotel*, 344 NLRB 558 (2005), the Board in *Noble Metal Processing*, explained that “when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.” *Noble Metal Processing* at 795. Thus, an employer violates the Act by discharging an employee engaged in the protected concerted activity of voicing a complaint about his or her employment terms, unless, in the course of that protest, the employee engages in opprobrious conduct, costing him the Act’s protection. *Atlantic Steel*, 245 NLRB 814, 816-17 (1979). In assessing the conduct, the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practices. *Id* at 816.

There is no dispute that the conversation between Nettekoven and Shafer occurred at the Noodles and Company work site and in the presence of two other employees. Neither employee testified that Shafer screamed, yelled, used threatening gestures, or threatened Nettekoven in any way. Javier Mendoza confirmed that when Nettekoven declined to talk with Shafer, Shafer simply responded “okay,” and returned to work. Beauchamp only overheard Nettekoven’s comments and did not hear what Shafer said in the conversation. The evidence indicates that the exchange between Shafer and Nettekoven was extremely short and resulted in no disruption of the work process for any employee.

Respondent argues that despite the company rule requiring employees to clock in upon their arrival at their job site, Shafer “unilaterally determined that his pay should begin at an earlier time of day.” Respondent further argues that there is no evidence that Shafer was pursuing the issue of whether one may clock in early if engaged in a phone conversation with

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<sup>6</sup> *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup>. Cir. 1981), cert. denied 455 U.S. 989 (1982) is based on the legal principle that an employer’s unlawful motivation must be established as a precondition to finding a violation of 8(a)(3) of the Act. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). The *Wright Line* analysis requires General Counsel to make an initial showing sufficient to support the inference that the employee’s protected activity was a motivating factor in the employer’s decision to discipline an employee. Once General Counsel has made that showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity. *Id* at 645.

5 a supervisor on behalf of any fellow employees.” While it is apparent that Shafer did not  
have the opportunity to detail his concerns to Nettekoven when he initially requested the  
meeting, Nettekoven admits that he was aware that Cox and Shafer wanted to talk with him  
about an issue involving their clocking in on July 7, 2008. The reasonableness of Shafer’s  
10 belief about the docking of pay for his early clock-in and the validity of the complaint are  
irrelevant in this circumstance. Additionally, there is no dispute that Shafer, Cox, and Raley  
specifically discussed with Nettekoven and Lee their concerns about their long commutes to  
their work sites. It is sufficient that Shafer and Cox believed that they had a grievance and  
wanted to speak with Nettekoven and it is reasonable that their requested meeting was also a  
15 continuation of their protected concerted activity that began in May, 2008. See *Dayton  
Typographical Service, Inc.*, 778 F.2d 1188, 1191-1192 (6<sup>th</sup> Cir. 1985).

20 The third step in the *Atlantic Steel* analysis considers whether Shafer’s actions  
removed him from the protections of the Act. The Board has long recognized that the  
protections afforded by Section 7 of the Act would be meaningless without taking into  
account the realities of industrial life and the recognition that disputes over wages, hours, and  
working conditions are “among the disputes that most likely engender ill feelings and strong  
responses.” *United Parcel Service, Inc.*, 353 NLRB No. 39, slip op. at 16, (2008); *Consumers  
Power Co.*, 282 NLRB 130, 132 (1986). In assessing whether employees lose the protection  
25 of the act, the Board draws a line between cases where employees engaging in concerted  
activities “exceed the bounds of lawful conduct in a moment of animal exuberance or in a  
manner not motivated by improper motives and those flagrant cases in which the conduct is so  
violent or of such character as to render the employee unfit for further service.” *Allied  
Aviation Fueling of Dallas*, 347 NLRB No. 22, slip op. at 9 (2006), enfd. 490 F.3d 374 (5<sup>th</sup>  
30 Cir. 2007); *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973). It has been noted  
that employee complaints are sometimes made under conditions that can best be described as  
“the heat of battle.” See *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 207 (7<sup>th</sup> Cir. 1971).

35 Nettekoven described Shafer’s manner as belligerent and abusive. Nettekoven  
asserted that Shafer told him: “I want to meet with you now!” and did so “right in front of all  
my guys.” Nettekoven went on to testify: “And - - no one talks to me like that, and he has  
talked to me like that in the past.” Nettekoven did not assert that Shafer yelled, threatened, or  
even used any profanity during the brief exchange. Nettekoven simply testified that he  
terminated Shafer because Shafer was an “asshole” and the incident on July 8, 2008, was the  
40 straw that broke the camel’s back. When asked to identify Shafer’s other improper conduct,  
Nettekovon initially responded that one of the factors that he considered was Shafer’s moving  
Cox to the Noodles and Company job site. He acknowledged, however, that he had no  
independent knowledge that Shafer had anything to do with Cox being at the Noodles and  
Company job site on July 8, 2008. Nettekoven also asserted that Shafer had been a problem  
45 employee for the last year of his employment. When asked to explain, he maintained that  
Shafer was arrogant to the office staff when he called in about purchase orders and he had  
been rude to Nettekoven’s wife about his gas card. Nettekoven acknowledged, however, that  
he had never disciplined Shafer for any behavior. Nettekoven identified the conduct  
triggering Shafer’s discharge as the manner or tone in which Shafer made his request, rather  
than any accompanying threat, profanity, or gesture.

I take note of the fact that much more offensive and disruptive behavior by an

employee has failed to lose the protection of the Act. In *NLRB v. Thor Power Co.*, 351 F.2d 584, 587 (7<sup>th</sup> Cir. 1965), the Court affirmed the Board’s finding that an employee did not lose the protection of the Act, despite the employee’s calling the employer a “horse’s ass,” during a grievance meeting. I also note that in a 2005 decision, the Board dealt with the circumstance of an employee’s calling the employer a “f-ing son of a bitch” while angrily pointing his finger at the employer. While the Board noted that it did not condone such insubordination, it also found that the employee did not lose the protection of the Act because of the overall circumstances of the case. *Stanford New York*, 344 NLRB 558, 559 (2005).

In contrast to the cases described above, Shafer’s comments were relatively mild. The circumstances of the instant case might be compared to those considered by the Board in its recent decision in *Dickens Inc.*, 352 NLRB No. 84, slip op. at 11 (May 2008). In *Dickens*, the alleged misconduct which so angered the employer was the employee’s questioning the employer about bonus rates for other employees and questioning the employer’s veracity about the rates. The employer deemed such conduct insulting when the employee questioned the employer’s veracity in front of other employees. Affirmed by the Board, the judge concluded that such comments “did not come close to meeting the stringent standard of egregious conduct” to remove the employee from the protection of the Act. *Id.* at 11.

Counsel for the General Counsel acknowledges that Shafer’s request to meet with Nettekoven on July 8, 2008, and his statements made during that request to meet, were not prompted by any unfair labor practice on the part of the Respondent. She argues, however, that despite the absence of any provocation by an unfair labor practice, a weighing of all the *Atlantic Steel* factors supports a finding that Shafer did not lose the protection of the Act.

There is no real dispute in this case that Nettekoven discharged Shafer because of his manner and behavior during their conversation on the morning of July 8, 2008. Inasmuch as Shafer was engaged in protected concerted activity when he approached Nettekoven on July 8, 2008, the only remaining question is whether Shafer’s conduct was so egregious that it lost the protection of the Act. Having considered all of the analysis factors set forth by the Board in *Atlantic Steel*, I do not find that Shafer’s conduct took him outside the protection of the Act.

The Board has clearly found that where the conduct for which an employer claims to have discharged an employee is protected activity, the *Wright Line*<sup>7</sup> analysis is not appropriate. *Felix Industries, Inc.*, 331 NLRB 144,146 (2000); *Neff Perkins Co.*, 315 NLRB 1229 fn. 2 (1994). I note, however, that even if the *Wright Line* standard were applicable, the evidence supports a finding of unlawful discharge. The General Counsel has met its initial burden of establishing the prerequisites of a *prima facie* case. The record reflects that within the two months prior to his discharge, Shafer met with Union organizer Jim Stout, and Nettekoven was aware of their meeting. Within a short period of time, Shafer and two other employees requested a meeting with Nettekoven to discuss concerns about wages and other terms and conditions of employment. Lee testified that he and Nettekoven had not expected to discuss wages in the meeting and had been blindsided by the employees’ introduction of

<sup>7</sup> 251 NLRB 1083, (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. (1982).

the topic. Lee also admitted that it became apparent after the meeting that the employees' meeting with the Union had been the impetus for their requested meeting.

In order to make out a *prima facie* case under *Wright Line*, General Counsel must also demonstrate that Shafer's protected activity was a motivating factor for his discharge. This factor can be proven through direct evidence or can be inferred from circumstantial evidence based upon the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). While there was no direct evidence of animus toward Shafer for his protected activity, the overall record would support such a finding. Nettekoven's stated reason for his discharge of Shafer was his opinion that Shafer was an "asshole" and he (Nettekoven) had simply had enough of Shafer's temperament. It is established that an employer's pretextual nature of stated reasons for an employee's discharge will support an inference of the employer's animus toward the employee's protected activity. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd.* 97 F.3d 1448 (4<sup>th</sup> Cir. 1996). Based upon Lee's testimony, it is apparent that Respondent was aware that the previous employee meeting was prompted by the employees' meeting with the Union. In less than two months, Nettekoven was confronted with yet another meeting requested by employees to discuss wage concerns. The Board has held that where adverse actions occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). I find that such an inference may be drawn in this case. Accordingly, the record supports a finding that if a *Wright Line* analysis were the appropriate standard, the General Counsel has met the burden for establishing a *prima facie* case.

Under *Wright Line*, once the General Counsel has established the *prima facie* case, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. *Metro Transportation Services*, 351 NLRB No. 43, slip op. at 4 (2007); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). In its brief, Respondent asserts that Shafer was a chronic problematic employee who "provided plenty of motivating reasons for his termination unrelated to any alleged concerted activity." Respondent relies upon Nettekoven's testimony that he fired Shafer because he was an "asshole," and submits that the evidence supports Nettekoven's assessment. In his testimony, Nettekoven recited a number of examples of what he viewed as Shafer's previous misconduct. Nettekoven contended that not only had Shafer been rude to the office staff, other plumbers, suppliers, and even to Cami Nettekoven, he had also told inappropriate jokes. Nettekoven acknowledged, however, that he had never disciplined Shafer for any of the examples that he cited. In acknowledging that he had not done so, he testified: "He's a grown man, it's his personality, you know? He's not a guy you're going to change." Nettekoven also admitted that Shafer was not only a very good plumber, but that he knew more than any of the other plumbers and was his best plumber. Nettekoven described him as his best "all around plumber." Lee testified that Shafer was an excellent plumber.

Interestingly, after Nettekoven fired Shafer, he never met with Cox about the clocking in issue. Nettekoven said that the planned meeting "just kind of got lost in the shuffle," and Cox did nothing to initiate it. Thus, the overall record supports a finding that Respondent would not have terminated Shafer on July 8, 2008, in the absence of his protected activity. Cox did not pursue the meeting and he continued to be employed until he was laid off with all of Respondent's other employees in September. While Respondent asserts that Shafer had

repeatedly engaged in rude conduct, he was never disciplined until his protected activity. Clearly, Shafer was Nettekoven’s best plumber and any previous rudeness or abruptness was tolerated until he engaged in protected activity. Accordingly, even under a *Wright Line* analysis, the overall record supports a finding that Respondent unlawfully terminated Shafer on July 8, 2008.

### C. Shafer’s Charge

On July 10, 2008, Shafer signed a charge alleging that he had been unlawfully terminated on July 8, 2008. The charge was received by the Board’s Regional Office on July 14, 2008. On the same day, a letter was mailed to Nettekoven, notifying him of the charge, and requesting that he submit evidence in response to the charge. Thus, within approximately one week of Shafer’s discharge, Respondent learned of Shafer’s charge. The parties stipulated that on August 26, 2008, the Regional Office faxed a proposed settlement agreement to Nettekoven. Nettekoven also admitted that a few days prior to August 26, 2008, he spoke with the investigating Board agent and learned of the Region’s decision in the case.

### D. Alleged Threat

Jeff Raley testified that after Shafer’s discharge, he had occasion to talk with Nettekoven about Shafer and he asked Nettekoven why he terminated Shafer. Nettekoven replied: “Donovan was an asshole and I didn’t like his attitude, so he’s gone.” Raley also recalled that during this same time period, he asked Nettekoven if Cox could fill in for him on a particular job. Raley recalled that during the conversation, Nettekoven stated that Cox was “skating on thin ice” and that Cox needed “to pick his friends better.” When Raley asked what he meant by the statement, Nettekoven replied: “Like Donovan [Shafer].”

It is well settled “that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.” *Daikichi Corp.*, 335 NLRB 622 (200), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003). Although Nettekoven remained in the courtroom throughout the hearing, he did not rebut Raley’s testimony. While Nettekoven is not alleged to have directly threatened Raley or Cox, his comments are nonetheless coercive. His assertion that Cox was skating on thin ice and that Cox should pick friends better than Shafer is especially potent when such comments are made shortly after Nettekoven’s abrupt termination of Shafer. Of the three employees who initially brought their concerns to Nettekoven in May, only Raley and Cox remained. The clear implication was that Raley and Cox should disassociate from Shafer and not engage in any more protected activity. While the record is not sufficiently clear as to the exact date of this conversation, there is the likelihood that it occurred after Shafer filed his charge with the Board. Certainly, such statement would also be viewed as an implied threat to these employees that they should not seek the assistance of the Board. Overall, I find Nettekoven’s remarks were coercive in nature and constituted an implied threat in violation of Section 8(a)(1) of the Act as alleged in complaint paragraph six. See *Arnold Junion Fenton Co.*, 240 NLRB 202, 202 (1979).

## E. Respondent's Change in Employees' Use of their Vans

### 1. Evidence Concerning the Change in Van Use

5 Prior to September 1, 2008, several of Respondent's employees were allowed to drive company vans for their personal transportation to work. Unless they needed to pick up materials or supplies at the shop, they could drive directly to and from the job site from their residence. They were not compensated, however, for their commuting time to their job sites. The employees who were allowed to use the company vans to commute to work were Jeff  
10 Raley, Javier Mendoza, and Gerardo Valenzuela. Additionally, Donovan Shafer was given the use of a company van before his discharge in July 2008, and Steve Cox was allowed to use a van after the employees met with Nettekoven in May 2008.

15 On August 22, 2008, employees were notified that they would no longer be permitted to drive company vehicles home at the end of the work day. In a memorandum dated August 22, 2008, Respondent informed employees that beginning on September 1, 2008, all company vehicles would remain either at the corporate office or at a location designated by Respondent when not in use.

20 The memorandum gave the following reasons as the basis for the change:

1. Fuel costs are high and vehicles are depreciating too quickly due to excess mileage.
- 25 2. Management needs contact with employees each morning during the work week to maintain a good working relationship with employees.
3. The flow of new projects is slowing and some vehicles may not need to be used everyday. Access to these vans may be needed for company tools and materials.

30 Cox testified that when he learned of this change in the use of the vans, he spoke with Nettekoven and asked him why he was taking their vans. Nettekoven simply replied that he wanted to see everybody at the shop. During the conversation, Cox reminded Nettekoven that issues relating to commuting to the work site had been discussed in the May 2008 meeting. Despite the fact that Cox reminded Nettekoven that it was going to cost Respondent more in  
35 the long run for the employees to come to the office and then drive to the work site each morning, Nettekoven simply replied that he wanted to see everyone in the morning.

### 2. Conclusions Concerning the Change in Van Use

40 General Counsel argues that Respondent's actions were motivated by animus toward employees' Union and protected concerted activities, and because Shafer filed his charge on July 14, 2008. Neither Nettekoven nor any other Respondent witness testified concerning the reason for the change in van use. Nettekoven told Cox that he wanted to see all the employees at the shop and the memorandum asserts that management needed the daily contact  
45 with employees in order to maintain a good working relationship with employees. Respondent's written rationale and the unrebutted verbal rationale given to Cox curiously reflects a concern about the daily activities of its employees that had not been demonstrated

previously. Such a new-found attentiveness to the daily activities of its employees is significant in light of the status of Shafer’s charge. Nettekoven acknowledged that within a “few” days before August 26, 2008, he was aware that the Region had found merit to the charges and was proceeding to either settlement or trial. I take administrative notice of the fact that August 26, 2008, occurred on a Tuesday. The memorandum restricting employees’ use of the vans issued on Friday, August 22, 2008 and within two work days of the Board’s fax confirming that the Board was seeking a remedy to Shafer’s unfair labor practice charge. Accordingly, the Respondent was not only aware of Shafer’s unfair labor practice charge on August 22, 2008, but was most likely also aware that the Region intended to take the matter to hearing. It is reasonable that Respondent wanted daily contact with its employees in order to monitor employee activities and to ascertain whether any other employees were likely to engage in protected conduct, rather than the asserted new interest in maintaining a “good working relationship with employees.”

Certainly, denying the use of the company vans to commute from their homes to work adversely affected the employees. Additionally, there is no dispute that Respondent was aware that its employees had engaged in protected and union activity. As Counsel for the General Counsel points out in her brief, August 22, 2008, is also the date upon which Respondent, acting through Cami Nettekoven, created Studio 36 as a limited liability company and five days before KC Commercial was incorporated as a new company to perform residential and commercial plumbing. While the change in the use of vans would not necessarily support a finding of unlawful motivation standing alone, the change in conjunction with Respondent’s other actions, supports a finding of unlawful motivation. Timing has been found to be a significant factor in assessing discriminatory motivation for an employer’s adverse actions toward employees. *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006), enfd. 232 Fed. Appx. 270 (4<sup>th</sup> Cir. 2007).

Based upon the overall record, and especially in light of the timing of the action, it is apparent that General Counsel has met its burden of showing that Respondent’s change in the employees’ use of company vans was motivated, at least in part, by employees’ union and protected activities. Thus, Counsel for the General Counsel has met her burden of proving that employees’ protected activities were at least a partial motivating factor in Respondent’s adverse change in working conditions. *Wright Line, Inc.* 251 NLRB 1083; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As discussed above, Respondent presented no additional evidence to show the basis for the August 22, 2008 memo. Although all of the factors listed in the memorandum are plausible reasons for the change, Respondent has not demonstrated by a preponderance of the evidence that it would have withdrawn employees’ use of the vans to commute to work in the absence of protected conduct. *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). Accordingly, I find merit to complaint paragraph 7(d).

### 3. Cox’s Charge against Respondent

Cox testified that he spoke with Nettekoven in August about upcoming work projects. He recalled that Nettekoven told him about a Buffalo Wild Wings project in Kansas City. Nettekoven also mentioned a job in Harrisonville with Harris Construction as the general contractor. Cox recalled that Nettekoven stated that it “was pretty much a done deal” that

Respondent would get the job and asked Cox how far that would be from where he lived. In early September, however, Nettekoven called Cox with different information. Nettekoven told Cox that he should put out feelers to find a new job. Nettekoven told Cox that the employees' insurance had been terminated and that the van he was using had to be returned. Nettekoven went on to explain that Cox would be laid off after he finished the job at the Valvoline work site and the job was estimated to end on approximately October 27. Raley testified that within a month prior to his layoff on September 17, 2008, Nettekoven told him that when he completed the job on which he was working that he would no longer be needed and he would be laid off.

On September 11, 2008, Cox filed a charge against Respondent alleging that on or about August 31, 2008, Respondent told Cox and Raley that they were going to be laid off and further alleged that the layoff was in retaliation for Shafer having filed a charge against Respondent. In the charge, Cox also alleged that on or about August 31, 2008, Respondent unlawfully changed its policy of allowing employees to drive their vans home and unlawfully terminated employees' health insurance. Cox alleged that these actions were taken in retaliation for Shafer's charge against the Respondent and in retaliation for employees' protected concerted activity and Union activity.

## **F. Respondent's Creation of New Companies and the Layoff of Employees**

### **1. Creation of the New Companies**

On August 22, 2008, Cami Nettekoven filed for the incorporation of Studio 36 LLC, a limited liability company organized to conduct real estate investment. Both Tim Nettekoven and Cami Nettekoven are managing partners of the corporation. Studio 36 thereafter purchased a building located at 3600 Troost Avenue in Kansas City, Missouri. The upstairs of the building became the personal residence for Tim Nettekoven, Cami Nettekoven, and their children in October 2008. Respondent also stipulates that KC Commercial was incorporated in the State of Missouri on August 27, 2008, by Cami L. Nettekoven to own, manage, and operate as a commercial and residential plumbing contractor in the greater Kansas City geographic area. Cami Nettekoven is not only the registered agent for the corporation, but also the President and Secretary of the business. The downstairs of the building located at 3600 Troost Avenue is used by Copper Craft, Kansas City Plumbing, and KC Commercial as a shared facility.

### **2. Nettekoven's Conversation with Javier Mendoza**

About a month prior to the layoff, Nettekoven spoke with Javier Mendoza at Respondent's facility after everyone left for the day. Nettekoven told Mendoza that the matter involving Shafer was "just getting crazy." Nettekoven stated that he had not been doing so well with Kansas City Plumbing and the matter with Shafer's discharge was "the last straw." Nettekoven shared that he was thinking about closing down the company. When Mendoza questioned him, Nettekoven assured Mendoza not to worry because he was starting a new company and there would be a job for Mendoza. Nettekoven told Mendoza that he would be laid off with all the other employees and then would be called back to work again. Nettekoven cautioned Mendoza not to tell anyone about the new company or about the layoff.

5 Mendoza further testified that approximately a week before the layoff, he was notified to come to the office. When he arrived at the office, Cami Nettekoven gave him an envelope containing a job application. Attached to the application was a note with the words: “Javier, I’ve started a new company and I’d like you to apply. Cami.” Mendoza testified that Cami Nettekoven told him to fill out the application, come in, and she would interview him.

10 On September 16, 2008, Mendoza was working with Jim Newstrom at the Petsmart job site. As noted earlier in this decision, Newstrom was a master plumber and an admitted agent of Respondent within the meaning of Section 2(13) of the Act. Newstrom made the comment that they should try to accomplish as much as possible on the job that day because they might not come back to the job. Newstrom went on to add that they might not come back to any of the jobs. Later in the day, Mendoza again spoke with Newstrom while they were driving from the job site to Respondent’s facility. Mendoza testified that Newstrom began talking about Respondent’s new company and assured Mendoza that he didn’t have to worry. Newstrom explained to Mendoza that the new company would be in Cami Nettekoven’s name and would operate by using Newstrom’s master plumber’s license. Newstrom asserted that jobs were already lined up for the new company and he commented that things were looking really good for the new company. During the conversation  
20 Newstrom and Mendoza spoke about the expected length of time before Nettekoven would bring Mendoza back to work for the new company. Mendoza told Newstrom that he would not mind being off work until October 1, 2008 in order to have some vacation time.

### 25 3. The Layoff

30 During the course of the day on September 16, 2008, employees were told that they were to attend a meeting at the office the following day and to bring their fuel and store credit cards with them. When he met with the employees, Nettekoven told them that he was “tired of running ragged” and he was going to close the doors and “finish up what was left.” Mendoza recalled that Nettekoven told employees that the company had not been doing well and he was not able to get more jobs. In addition to Cami Nettekoven and Tim Nettekoven, there was another unidentified woman present at the meeting who told the employees about how they could apply for, or train for other jobs. When Cami Nettekoven spoke briefly at the meeting, she explained that because her husband had not been spending enough time at home  
35 with his children, the decision was made to change operations.

40 Mendoza testified that within 30 minutes of Nettekoven’s meeting with employees, Nettekoven telephoned him. Nettekoven stated that he had heard from Newstrom that Mendoza would not mind being off work until October 1, 2008, and Mendoza confirmed what he told Newstrom. Mendoza testified that Nettekoven ended the conversation by saying that Mendoza should make sure to have his work clothes ready on the 1<sup>st</sup>. Nettekoven also added that while he couldn’t pay him for doing so, he could use Mendoza’s help in moving to the new facility. Mendoza explained that he would not be able to do that without compensation because of the expense required for not only gas, but also baby-sitting costs for his two little  
45 girls. Nettekoven ended the conversation by confirming that employees would meet on October 1 at his house.

When Mendoza had not heard anything further about returning to work for Nettekoven by September 28, he began trying to reach Nettekoven. Although he telephoned Nettekoven daily, he was not able to speak with him until October 1. During the telephone conversation, Nettekoven talked about the extent of the Board agent’s investigation<sup>8</sup> of the pending charges and made the comment that “it’s going way out of proportion.” Nettekoven added: “I would hate to bring you on to something like this.” Mendoza testified that Nettekoven then added: “But it’s okay, though, right? Because I mean, you’re already on unemployment.” Mendoza asked Nettekoven why he would be on unemployment when Nettekoven had told him not to look for a job. Mendoza did not pursue the inquiry further, however, and simply wished Nettekoven good luck. He testified that he heard nothing further from Nettekoven.

**4. Respondent’s Evidence Concerning Reason for Layoff**

The only witness called by Respondent to testify concerning the basis for the September 2008, layoff was Lee, who worked for Respondent from September 2007 until mid-May 2008. Prior to working for Respondent, Lee owned a construction company for five years. He first met Nettekoven when he hired Nettekoven’s company as a subcontractor to do residential plumbing work. As a result of working together, Lee and Nettekoven became friends and have remained friends. In September 2007, Lee began working for Respondent. Lee testified that just prior to his accepting the job with Respondent, Nettekoven contacted him and asked for his help. Nettekoven told him that an employee who had worked as an estimator and project manager had embezzled money from the company and he asked Lee to work for him and to handle estimates for jobs that the company was bidding. Lee testified that another of his responsibilities was to assess the health of the company. He testified that organizationally the company was in a state of disarray and that the company carried a disproportionate amount of debt in relation to income. Lee testified that there was an \$80,000 debt owed to IRS and also \$80,000 owed for the purchase of a backhoe. He also asserted that there was a line of credit due to a bank for \$120,000. Lee also claimed that the usual credit balance for one of Respondent’s vendors ranged from \$90,000 to \$120,000. Although Lee recited the series of debts and financial obligations, he produced no supporting documents.

Lee described the company when he left in mid-May 2008, and opined: “it was looking like we were coming in for a real hard patch.” Lee maintained that beginning in January 2008, he began to recommend monthly to Nettekoven that he should close down the company. Lee testified that he left the company in May 2008, because he felt that he could no longer do any good in his job.

**5. Conclusions Concerning the Layoff**

Counsel for the General Counsel does not contend that Respondent deliberately chose certain employees for layoff because of their particular union, or protected concerted activity, but rather that the mass layoff was ordered to discourage employees’ activities that are protected by the Act. Counsel for the General Counsel also asserts that Respondent engaged in “a course of action in which they abandoned and subsequently created corporations in

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<sup>8</sup> The transcript erroneously identifies the Board agent as “Mary Tate” rather than “Mary Taves.”

retaliation for employees engaging in Union and protected, activity, as well as to evade their statutory obligation to remedy the unfair labor practices they committed.” Because of the timing and the circumstances of the two events, it is apparent that Respondent’s layoff of its employees on September 17, 2008, must be viewed in relation to Respondent’s creation of KC Commercial and Studio 36.

Respondent argues in brief that the company acted consistent with a company facing a downward financial spiral. Based upon the testimony of Lee, as well as the testimony of employee witnesses, it is apparent that whether recognized as Copper Craft or Kansas City Plumbing, Respondent’s business could not have been characterized as thriving. Lee testified, without contradiction, about a number of expenses and debts that plagued Respondent’s financial situation. Respondent argues that General Counsel produced no evidence to rebut Lee’s assessment that Respondent’s financial condition warranted its closing as early as January 2008. Although Lee’s testimony was unrebutted in this regard, his assessment also supports a finding of Respondent’s discriminatory motive. If Lee is to be credited, I must conclude that Nettekoven had a legitimate and economic basis for closing his business as early as January 2008. Despite recommendations from Lee, however, Nettekoven continued the business for approximately seven more months before he rid himself of his employees and created a new business. Although Respondent’s economic situation may not have improved in the interim, the significant intervening event was Shafer’s unfair labor practice charge; which included the potential for both a financial remedy, as well as, Shafer’s reinstatement. By the time of the September 17, layoff, Respondent was aware that not only had the Region found merit to Shafer’s charge, but the Region was additionally investigating the charge filed by Cox. Respondent’s reaction to Shafer’s charge is seen most vividly in Nettekoven’s comments to Mendoza in August 2008. Mendoza’s unrebutted testimony reflects that Nettekoven told him that the matter involving Shafer was “just getting crazy.” Nettekoven added that he had not been doing so well with Kansas City Plumbing and that the matter with Shafer’s charge was the “last straw.” Nettekoven went on to share his plan to layoff the employees and to start a new company. Nettekoven’s statements reflect that the Region’s investigation and Shafer’s charge played a distinct role in his decision to close the company and to create a new company. Nettekoven’s discriminatory motivation in doing so is evident by the fact that he cautioned Mendoza not to tell anyone about the new company or the layoff.

Mendoza produced not only a written application form, but also a written note from Cami Nettekoven confirming that she was starting a new company and that she wanted him to apply. Mendoza also testified that admitted agent Jim Newstrom told him that Respondent was starting a new company in Cami Nettekoven’s name and that the company would operate under Newstrom’s plumber’s license. I find it significant that Nettekoven did not rebut Mendoza’s testimony and neither Cami Nettekoven nor Newstrom were presented to rebut or contradict Mendoza’s testimony. Overall, I found Mendoza to be a credible witness. His description of his conversations with Nettekoven and Newstrom were straight-forward with no apparent attempt to embellish or exaggerate. His testimony reflected no perceptible personal anger or resentment for Cami Nettekoven or Tim Nettekoven. His lack of animus or sentiment toward Nettekoven is apparent in his description of his conversation with Nettekoven when Nettekoven asked for Mendoza’s assistance in moving to the new facility. Mendoza testified that when he told Nettekoven that he could not help him move without compensation for gas or baby-sitting, Nettekoven responded that he would call his “real

friends.” Mendoza quickly added in his testimony that he didn’t think that Nettekoven said this to offend him and that it “just came out that way.”

5 Mendoza’s testimony is further enhanced by the testimony of admitted supervisor Lee. Although Lee was no longer employed by Respondent at the time of the layoff, he assisted Nettekoven in moving some inventory to the new facility and spoke with him about his business. Lee testified that Nettekoven told him that he was going to start a new plumbing business under a different name. This testimony is consistent with Mendoza’s testimony concerning the information received from both Cami Nettekoven and Jim Newstrom. Based  
10 upon Mendoza’s un rebutted and credible testimony, it is apparent that Respondent intended to hire only specific employees for the new plumbing business. It is reasonable that Mendoza would have been a desirable employee to rehire because he had no union activity, no involvement with Shafer, Cox, or Raley in protesting terms and conditions of employment, and he had filed no charges with the Board.  
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In *Midwest Precision Heating & Cooling*, 341 NLRB 435, 439 (2004), the Board affirmed the judge in concluding that the only reasonable explanation for an employer’s going through the legal process of creating a new company and terminating old ones was ultimately to avoid the obligation under the collective-bargaining agreement. While there is no union  
20 contract in this case, Respondent was, nevertheless, facing the potential remedy of reinstating Shafer and the financial obligation of paying backpay. A number of factors support General Counsel’s *prima facie* case. The Board has found timing to be a significant element in finding a *prima facie* case of an unlawful layoff. See *Equitable Resources Energy Co.*, 307 NLRB 730, 731 (1992). In this case, Respondent implemented the layoff of all of its employees after  
25 its creation of the two new companies and after learning that the Region had found merit to Shafer’s charge. Respondent’s unlawful motive for the layoff is seen in the un rebutted testimony of Mendoza. Additionally, Respondent’s unlawful motive is not negated by the fact that most of the employees laid off had not engaged in protected activity. The Board has found that unlawful motivation may be shown even when an employer takes adverse action  
30 against a group of employees regardless of their individual protected activities if the action was ordered to discourage protected activity or if it was in retaliation for the protected activity of some employees. *ACTIV Industries*, 277 NLRB 356, (1985).

Respondent argues that the September layoffs were not discriminatory because the  
35 employees were not engaged in concerted protected activity. Specifically, Respondent asserts that there was no union organization occurring and there had been a four-month gap between the May meetings and the September layoff. Respondent is correct that there is no evidence that employees were engaged in union organizing and there had been a four-month interval since Shafer, Cox, and Raley met with Nettekoven and Lee. Respondent’s argument is  
40 nevertheless flawed because the record contains clear evidence of protected activity after May. Section 8(a)(4) of the Act provides, and the Board has found, that an employer commits an unfair labor practice when it discriminates against an employee who files charges or gives testimony under the Act. See *McKesson Drug Co.*, 337 NLRB 935 (2002); *Freightway Corp.*, 299 NLRB 531, 532 (1990). Thus, it is axiomatic that an employee’s filing a charge  
45 with the Board is also protected activity. In mid-July, Respondent employed approximately twelve employees. By September 17, 2008, two of those employees had filed charges with the Board.

General Counsel is not required to show a relationship between each employee's union or protected activity and his layoff. General Counsel need only show that the mass layoff was ordered to discourage protected activity or in retaliation for the protected activity of some of its employees. *J.T. Slocomb Co.*, 314 NLRB 231, 241 (1994). As the court noted in *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1180 (6<sup>th</sup> Cir. 1985), general retaliation by an employer against the workforce can discourage the exercise of Section 7 rights just as effectively as adverse action taken against employees who have engaged in protected activities. Accordingly, I conclude that General Counsel has made a *prima facie* showing sufficient to support the inference that employees' protected conduct was a "motivating factor" in Respondent's decision to lay off its work force on September 17, 2008. *Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Upon such a showing, the burden shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The Respondent cannot carry this burden merely by showing that it had a legitimate reason for its layoff. Respondent must demonstrate by a preponderance of the evidence that the layoff would have taken place absent protected conduct by its employees. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). As I have discussed above, the timing of the layoff, the creation of the new companies, and Mendoza's credible testimony concerning the revealing statements of Cami Nettekoven, Timothy Nettekoven, and Jim Newstrom are all factors that weigh in favor of my finding that General Counsel has demonstrated that employees' protected activity was a substantial or motivating factor in Respondent's layoff of its employees on September 17, 2008. In such instances in which the General Counsel has made out a strong *prima facie* case under *Wright Line*, the burden on the respondent is substantial to overcome a finding of discrimination. *Vemco, Inc.*, 304 NLRB 911, 912 (1991); *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). Thus, while Respondent's financial circumstances may have constituted a legitimate reason for its layoff, Respondent has not shown by a preponderance of the evidence that the layoff would have occurred when it did in the absence of employees' protected activities. Cox testified, in fact, that at the time of his layoff, there were still approximately three to four weeks of work remaining. While Lee testified that Respondent was experiencing financial problems in January 2008, neither Nettekoven or any other representative of Respondent explained the basis for the creation of the new companies in August 2008 and the layoff of its employees in September 2008. Lee, however, testified that Nettekoven told him that he was going to open the same business under a different name. As Counsel for the General Counsel points out in her brief, it is not reasonable for Respondent to lay off its employees and then to "turn around and immediately open an identical business." Thus, Respondent has not met its burden of demonstrating that it would have taken the same actions in the absence of employees' protected activity. I find that the overall evidence supports finding the September layoff in violation of Sections 8(a)(1), (3), and (4) of the Act.

### G. Respondent's Continuing Liability

As described above, Mendoza testified that when he last spoke with Nettekoven, Nettekoven talked about the Board agent's investigation of his new business; including not

only photographs but also visits to the job sites. Counsel for the General Counsel argues that it was only Nettekoven’s belief that the Board was monitoring his new business that kept Respondent’s business from rising to the level it was before the creation of the new companies. Counsel for the General Counsel acknowledges that while there was some  
 5 evidence at the hearing that Copper Craft, Kansas City Plumbing, and KC Commercial may no longer be in business, there is nothing that extinguishes Respondent’s reinstatement obligations to all of the discriminatees or to toll the discriminatees’ backpay.

### 1. KC Commercial as an Alter Ego

10 In *Diverse Steel*, 349 NLRB 946, (2007), the Board observed that it would generally find alter ego status where two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. The Board went on to explain that not all of these indicia need to be present and no one of them is a prerequisite  
 15 to finding an alter ego. Respondent stipulated that Tim Nettekoven and Cami Nettekoven continued to manage and supervise the business of KC Commercial, just as they managed the business of Copper Craft and Kansas City Plumbing. Respondent also stipulated that KC Commercial used the equipment, tools, office furniture, vehicles, and office supplies of  
 20 Copper Craft and Kansas City Plumbing. Respondent further stipulates that KC Commercial performed work for the same type of customers as those that had historically been serviced by Copper Craft and Kansas City Plumbing. There is no dispute that Copper Craft, Kansas City Plumbing, and KC Commercial all operated out of a shared facility that was owned by Studio  
 25 36. No rent was charged to Copper Craft, Kansas City Plumbing, or KC Commercial for the use of the shared facility. Copper Craft and Kansas City Plumbing were owned by Timothy Nettekoven and Cami Nettekoven. Cami Nettekoven is shown to be the owner of KC Commercial in the incorporation of the company on August 27, 2008.

Thus, the record establishes that Copper Craft, Kansas City Plumbing, and KC  
 30 Commercial have substantially identical management, business purposes, operations, equipment, customers and supervision. While only Cami Nettekoven is shown to be the owner of KC Commercial, I also note that the Board has found that where other alter ego factors exist, ownership of two companies by members of the same immediate family is deemed to be “substantially identical” ownership. *Kenmore Contracting Co.*, 289 NLRB 336,  
 35 337 (1988), enfd. 888 F.2d. 125 (2<sup>nd</sup> Cir. 1989). Although unlawful motivation is not a necessary element in finding an alter ego, the Board also considers whether the purpose behind the creation of the alleged alter ego was to evade responsibilities under the Act. *Diverse Steel* at 946. Despite the fact that Respondent laid off all its employees on September  
 40 17, 2008, Respondent undertook the expense and time to create an entirely new company on August 24, 2008, that would conduct the same business for the same group of customers under the same supervision and management. There is no other logical explanation for Respondent’s doing so other than an attempt to avoid the legal obligations of Copper Craft  
 45 and Kansas City Plumbing. See *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 439 (2004). The record evidence therefore demonstrates that KC Commercial was established in retaliation for employees’ protected concerted activities and to avoid Respondent’s liability under the Act. Accordingly, I must conclude that KC Commercial is an alter ego of Copper Craft and Kansas City Plumbing and was created as a disguised continuance of Copper Craft and Kansas City Plumbing. Accordingly, KC Commercial shares the same responsibilities

and obligations under the Act.

## 2. Studio 36’s Liability under the Act

5 Respondent asserts that Studio 36 was a corporation that was created solely to  
purchase and to own the building that served as the personal residence of Timothy and Cami  
Nettekoven, and to serve as a warehouse for Copper Craft, Kansas City Plumbing, and KC  
Commercial. There is no evidence that Studio 36 has ever engaged in the business of  
10 plumbing. Nettekoven admitted that although Copper Craft, Kansas City Plumbing, and KC  
Commercial lease space from Studio 36, no rent is paid to Studio 36. When he was asked  
whether the other corporations paid rent to Studio 36, Nettekoven responded: “No, because I  
have enough creditors banging on my door. We did not charge any rent to anyone because I’d  
rather pay my creditors than - - I mean, it doesn’t make sense.” Nettekoven testified that he  
15 moved all of the vehicles, inventory, and plumbing equipment belonging to Copper Craft and  
Kansas City Plumbing to the facility owned by Studio 36. He further explained that it had  
been his intention to then operate KC Commercial on the first floor of the Studio 36 facility;  
while he and his family resided on the second floor. Nettekoven confirmed that while his  
wife established Studio 36 as a corporation, he was also a managing member of that limited  
liability company.

20 Counsel for the General Counsel confirms that she is not seeking personal liability for  
the Nettekoven’s. She does, however, seek liability for Studio 36 to remedy the unfair labor  
practices discussed above. In *White Oak Coal*, 318 NLRB 732 (1995), the Board set out a  
two-part analysis for assessing personal liability for the shareholders of corporations  
25 committing unfair labor practices. Under *White Oak Coal*, the corporate veil may be pierced  
when (1) there is such unity of interest, and lack of respect given to the separate identity of the  
corporation by its shareholders, that the personalities and assets of the corporation and the  
individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud,  
promote injustice, or lead to an evasion of legal obligations. Using this same analysis,  
30 Counsel for the General Counsel submits that Studio 36 should be held liable as an alter ego  
and single employer with Copper Craft, Kansas City Plumbing, and KC Commercial.

35 In determining whether the personalities and assets of a corporation and its  
shareholders have become indistinct are the degree to which corporate formalities have been  
maintained and the extent to which individual and corporate funds, assets, and affairs have  
been commingled, the Board in *White Oak Coal* considered the following factors:

40 (1) whether the corporation is operated as a separate entity; (2) the commingling of  
funds and other assets; (3) the failure to maintain adequate corporate records; (4) the  
nature of the corporation’s ownership and control; (5) the availability and use of  
corporate assets, the absence of same, or undercapitalization; (6) the use of the  
corporate form as a mere shell, instrumentality or conduit of an individual or another  
corporation; (7) disregard of corporate legal formalities and the failure to maintain an  
45 arm’s length relationship among related entities; (8) diversion of the corporate funds  
or assets to noncorporate purposes; and, in addition, (9) transfer or disposal of  
corporate assets without fair consideration.

The record does not contain specific information that would address each of these factors. Counsel for the General Counsel submits, however, that several of the factors are present. She asserts: “The overarching evidence of corporate misuse is, of course, the testimony concerning the establishment of corporate identities under Cami Nettekoven’s name in an effort to hide Tim Nettekoven’s involvement in the business.” Counsel for General Counsel argues that Tim Nettekoven used both KC Commercial and Studio 36 as shells of Copper Craft and Kansas City Plumbing “so that he could continue in the plumbing business without the worries of unfair labor practice liability.”

Although there is no evidence that Studio 36 engaged in the business of plumbing, the overall record reflects a blending of identities of the four corporations and their principals. Studio 36 provided not only the residence for Timothy and Cami Nettekoven, but also the operating and warehousing facility for the other three corporations. Not only was there no compensation paid to Studio 36, there was an absence of any other arm’s length transactions between Studio 36 and the other corporations. The overall evidence reflects not only that Studio 36 has a sufficient unity of interest with the other three corporations, but also a lack of respect for the separate identity of Studio 36 from the other three corporations. See *A.J. Mechanical, Inc.*, 352 NLRB No. 108, slip op. at 1 (2008). The record fully supports the conclusion that the personalities and assets of the four corporations are indistinct.

In *White Oak Coal*, the Board also indicated that the second prong of the test must have some causal relationship to the first prong of the test. Stated in another way, the fraud, injustice, or evasion of legal obligations must flow from the misuse of the corporate form. Counsel for the General Counsel submits that the second prong is met because “the fundamental purpose of the Nettekoven’s establishment of KC Commercial and Studio 36 was to promote a method to conceal his ownership and control of each corporation and thereby evade his labor law obligations.” The record as a whole indicates that KC Commercial and Studio 36 were formed in an attempt to evade the Respondent’s responsibilities under the Act. Additionally, it is apparent that while Studio 36 did not function as a commercially viable plumbing business, it was nevertheless created as a shell, instrumentality, or conduit to insulate Nettekoven’s plan to continue his plumbing business as KC Commercial without the legal obligations engendered by Copper Craft and Kansas City Plumbing. See *Diverse Steele*, 349 NLRB 946, 946 (2007). Accordingly, I find that Studio 36 is an alter ego of Copper Craft, Kansas City Plumbing, and KC Commercial and was created as a disguised continuance of Copper Craft and Kansas City Plumbing.

**Conclusions of Law**

1. Respondents Copper Craft Plumbing, Inc. and Respondent Kansas City Plumbing, Inc. constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

2. Respondents KC Commercial Plumbing, Inc. and Studio 36 LLC were established by Copper Craft Plumbing, Inc. and Respondent Kansas City Plumbing, Inc. as a disguised continuance of Copper Craft Plumbing, Inc. and Respondent Kansas City Plumbing, Inc.

3. Respondents Copper Craft Plumbing, Inc., Kansas City Plumbing, Inc., KC Commercial Plumbing, Inc., and Studio 36 LLC have been at all material times, alter egos and a single employer within the meaning of the Act.

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4. As a single employer and alter egos, Respondents Copper Craft Plumbing, Inc., Kansas City Plumbing, Inc., KC Commercial Plumbing, Inc., and Studio 36 LLC, herein collectively identified as Respondent, is an employer within the meaning of Section 2(2) of the Act.

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5. Local 8, Plumbers and Gasfitters is a labor organization within the meaning of Section 2(5) of the Act.

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6. By threatening employees with unspecified reprisals because they engaged in union or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

7. By discharging Donovan Shafer because of his protected concerted activity, Respondent violated Section 8(a) (1) of the Act.

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8. Denying employees the opportunity to drive work vans home at the end of the work day in order to discourage employees in the exercise of their Section 7 rights, Respondent violated Section 8(a)(3), (4) and (1) of the Act.

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9. By laying off employees Steve Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Ismael Castillo, Gerardo Valenzuela, Sr., Gerardo Valenzuela, Roberto Becerra, and Justin Beauchamp on September 17, 2008, in order to discourage employees in the exercise of their Section 7 rights, Respondent violated Section 8(a)(3), (4) and (1) of the Act.

30

### 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.

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The Respondent having discriminatorily discharged Donovan Shafer, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of 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).

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The Respondent having discriminatorily laid off Steven Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Justin Beauchamp, Gerardo Valenzuela, Gerardo Valenzuela, Sr., Roberto Becerra, and Ismael Castillo, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of 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

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*New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Counsel for the General Counsel urges that the current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest. Counsel for the General Counsel attached an Appendix to her written brief outlining the basis for her recommendation. In its decision in *National Fabco Manufacturing, Inc.*, 352 NLRB No. 37, slip op. at fn. 4 (March 17, 2008), the Board addressed a similar request by the General Counsel. Referencing a previous decision in *Rogers Corp.*, 344 NLRB 504 (2005), the Board explained: “Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.” Accordingly, I deny Counsel for the General Counsel’s request for an order requiring compound interest.

Inasmuch as I have found KC Commercial Plumbing, Inc. and Studio 36 LLC as alter egos and a disguised continuance of Copper Craft Plumbing, Inc., and Kansas City Plumbing, Inc., I find that all four entities are jointly and separately liable for Respondent’s unfair labor practices and the remedy thereof.

Counsel for the General Counsel asserts that because of Respondent’s discriminatory discharge of Shafer and its discriminatory layoff of other employees, General Counsel seeks the traditional remedy of reinstatement and backpay for the discriminatees. General Counsel also acknowledges that there was some record evidence that Copper Craft, Kansas City Plumbing, and KC Commercial may no longer be in business. General Counsel argues, however, that because Respondent has used the corporate entities in a shell game to avoid its obligations under the Act, a full restoration remedy including both backpay and reinstatement for all discriminatees is appropriate. I agree that inasmuch as Respondent has unlawfully terminated Shafer and unlawfully laid-off other employees, a full restoration remedy including both reinstatement and backpay is not only appropriate, but required. I also realize, however, that in the event that Respondent’s business operation has ceased in its entirety, the potential extinguishment of reinstatement obligations and the appropriate period for the backpay obligation may have to be fully determined through the compliance phase of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>9</sup>

**ORDER**

Respondents Copper Craft Plumbing, Inc., Kansas City Plumbing, Inc., KC Commercial Plumbing, Inc., and Studio 36 LLC, as alter egos and a single employer, in Kansas City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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<sup>9</sup> 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) Threatening employees with unspecified reprisals because they engaged in union and other protected concerted activities.

5 (b) Denying employees the opportunity to drive company vehicles to their homes in order to discourage employees in the exercise of their Section 7 rights.

(c) Terminating employees for engaging in protected concerted activities.

10 (d) Laying off employees in order to discourage employees in the exercise of their Section 7 rights.

(e) 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.

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

(a) Within 14 days from the date of the Board's Order, make whole Donovan Shafer, with interest, for any loss of wages and benefits that he suffered as a result of Respondent's unlawfully discharging him on July 8, 3008.

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(b) Within 14 days from the date of the Board's Order, make whole, with interest, Steven Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Ismael Castillo, Gerardo Valenzuela, Gerardo Valenzuela, Sr., Roberto Becerra, Justin Beauchamp, and any other employees included in the September 17, 2008 layoff for any loss of wages and benefits that they suffered as a result of Respondent's unlawful layoff.

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(c) Within 14 days from the date of the Board's Order, offer Donovan Shafer, Steven Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Ismael Castillo, Gerardo Valenzuela, Gerardo Valenzuela, Sr., Roberto Becerra, Justin Beauchamp, and any other employees included in the September 17, 2008, layoff reinstatement to their former jobs, or if those jobs no longer exists to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

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(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Donovan Shafer, and, within 3 days thereafter, notify Donovan Shafer in writing that this has been done and that the discharge will not be used against him in any way.

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(e) Within 14 days from the date of the Board's Order, rescind the notice to employees of August 22, 2008, denying our employees the opportunity to drive company vehicles to employees' homes.

45

(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.

5                   (g)     Within 14 days after service by the Region, post at its Kansas City, Missouri, facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 17 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  
10 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.

                  (h)     Within 14 days after service by the Region, mail copies of the attached notice marked "Appendix." Respondent shall duplicate and mail at its own expense, a copy  
15 of the notice to all employees employed by the Respondent at any time since July 8, 2008.

                  (i)     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.  
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Dated, Washington, D.C., April 30, 2009.

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**Margaret G. Brakebusch**  
**Administrative Law Judge**

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45 <sup>10</sup> 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."

APPENDIX

NOTICE TO EMPLOYEES

5

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

10 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 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

20 **WE WILL NOT** discharge or otherwise discriminate against any of you for engaging in concerted protected activity.

**WE WILL NOT** threaten you with unspecified reprisals because you engage in union or other protected concerted activities.

25 **WE WILL NOT** deny you the opportunity to drive company vehicles to your homes in order to discourage you from engaging in activities that are protected by Section 7 of the National Labor Relations Act.

30 **WE WILL NOT** layoff our employees in order to discourage them from engaging in activities that are protected by Section 7 of the National Labor Relations Act.

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

35 **WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Donovan Shafer, 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 anyway.

40 **WE WILL**, within 14 days from the date of the Board's Order, offer Donovan Shafer, Steven Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Ismael Castillo, Gerardo Valenzuela, Gerardo Valenzuela, Sr., Roberto Becerra, Justin Beauchamp, and any other employees included in the September 17, 2008, layoff, reinstatement to their former jobs, or, if those jobs no longer exists, to substantially equivalent jobs, without prejudice, to their  
45 seniority or any other rights or privileges previously enjoyed.

**WE WILL**, within 14 days from the date of the Board's Order, make whole Donovan Shafer

for any lost wages because of his discriminatory discharge on July 8, 2008.

5 **WE WILL**, within 14 days from the date of the Board’s Order, rescind our notice to employees of August 22, 2008, denying you the opportunity to drive company vehicles to your homes.

10 **WE WILL**, within 14 days from the date of the Board’s Order, make whole Steven Cox, Jeff Raley, Charles Simms, Javier Mendoza, James Newstrom, Ismael Castillo, Gerardo Valenzuela, Gerardo Valenzuela, Sr., Roberto Becerra, Justin Beauchamp, and any other employees included in the September 17, 2008 layoff for any lost wages because of their discriminatory layoff.

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**COPPER CRAFT PLUMBING, INC., AND  
KANSAS CITY PLUMBING, INC., A Single  
Employer and Their Alter Egos KC  
COMMERCIAL PLUMBING, INC. AND  
STUDIO 36 LLC**

20

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

25

30 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 an agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: [www.nlr.gov](http://www.nlr.gov)

35

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677  
(913) 967-3000, Hours: 9:15 a.m. to 5:45 p.m.

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

45 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. (913) 967-3005.