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**Brighton Retail, Inc. and Ronda Sadowsky.** Case 28–CA–20323

July 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On June 7, 2006, Administrative Law Judge Jay R. Pollack issued a decision in this case, and on May 30, 2008, the National Labor Relations Board issued a Decision and Order remanding the case to the judge for further findings, analysis, and conclusions consistent with the Board's remand. On June 19, 2008, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The Board<sup>1</sup> has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> as modified below,<sup>4</sup> and to adopt the recommended Order.

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

<sup>2</sup> There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an overbroad no-solicitation/no-distribution rule and a rule prohibiting employees from discussing salaries.

<sup>3</sup> The Respondent does not except to the judge's finding that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), of proving that animus against protected concerted activity was a motivating factor in the Respondent's decision to discharge sales partners Wanda Hill and Ronda Sadowsky and to issue a final warning to Brenda Reed. However, we affirm the judge's finding that the Respondent met its *Wright Line* rebuttal burden of proving that it would have discharged Hill and Sadowsky and disciplined Reed even in the absence of their protected concerted activity based on a reasonable belief that they had engaged in unprotected hostile and disruptive be-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Brighton Retail, Inc., Scottsdale, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

havior towards coworkers, in contravention of the Respondent's written teamwork policies.

<sup>4</sup> We reject Respondent's argument in cross-exceptions that Sec. 10(b) bars litigation of the allegation that the Respondent's District Manager Nikki Wride violated Sec. 8(a)(1) by asking Hill if she was aware of a lawsuit being brought against the Respondent and asking Sadowsky if she was planning on suing the Respondent. This allegation was closely related to a timely filed charge that the Respondent unlawfully discharged Hill and Sadowsky for engaging in protected concerted activity. See generally *Redd-I, Inc.*, 290 NLRB 1115 (1988).

On the merits, we affirm the judge's finding of unlawful interrogation. Wride, a senior management official, asked questions about a potential lawsuit during one-on-one interviews with Hill and Sadowsky in Wride's hotel room. Wride heard from Assistant Manager Lori Westerkamp that some sales partners had discussed hiring an attorney to sue the Respondent if it continued to employ Crossland. Her questions to Hill and Sadowsky were intended by her and reasonably viewed by them as an attempt to elicit information about protected concerted activity, i.e., whether they or any other employees planned to file a lawsuit as a means of protesting Crossland's impact on their working conditions. As such, these questions constituted unlawful interrogation. Cf. *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1254 (2005) (respondent's official Johnson violated Sec. 8(a)(1) by individually asking employees about who had prepared a petition protesting working conditions and who had discussed a possible work stoppage); *Westchester Iron Works Corp.*, 333 NLRB 859, 866 (2001), citing *Frances House, Inc.*, 322 NLRB 516, 522–523 (1996) (interrogation of employees concerning letters of complaint to a Government agency violates Sec. 8(a)(1)); *Delta Gas, Inc.*, 282 NLRB 1315, 1315 fn. 1 (1987) (employer's repeated questioning of employees about the purpose of their meeting with an attorney was unlawful coercive interrogation). Because we find that Wride's questions about a lawsuit violated Sec. 8(a)(1), we find no need to pass on whether she also unlawfully interrogated Hill and Sadowsky about a possible dinner celebration because Crossland was in trouble.

In the absence of a majority to reverse the judge's recommended finding of an interrogation violation, Member Schaumber, for institutional reasons, joins his colleague in adopting that violation.

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain rules prohibiting employees from discussing their salaries and compensation; promulgate or maintain rules limiting employee discussions concerning terms and conditions of employment; or maintain an overly-broad no-solicitation/no-distribution rule.

WE WILL NOT coercively interrogate employees about their protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights set forth above.

BRIGHTON RETAIL, INC.

*Christopher J. Doyle, Esq.*, for the General Counsel.  
*Jeffrey A. Berman, Esq. (Sidley, Austin, Brown & Wood, LLP)*, of Los Angeles, California, and *Gary A. Freedman, Esq.*, of Santa Monica, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I issued my original decision in this case on June 7, 2006, finding that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining rules prohibiting employees from discussing their salaries and compensation; promulgating and maintaining rules limiting employee discussions concerning terms and conditions of employment; and maintaining an overly broad no-solicitation/no-distribution rule. I further found that Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their protected concerted activities. Finally, I found that Respondent violated Section 8(a)(1) of the Act by discharging employees Ronda Sadowsky and Wanda Hill and by issuing a written warning to employee Brenda Reed because of their protected concerted activities. On May 30, 2008, the Board remanded the case to me to prepare a supplemental decision.

I heard this case in trial at Phoenix, Arizona, on February 21–23 and March 22–23, 2006. On June 9, 2005, Ronda Sadowsky (Sadowsky) filed the charge alleging that Brighton Retail, Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations

Act (the Act). Sadowsky filed an amended charge on July 19, 2005. The Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing on July 28, 2005, against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. The complaint was amended on August 18 and 25, 2005. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,<sup>1</sup> and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, operates Brighton Collectibles retail stores nationwide, which sells women's fashion merchandise. Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$5000 from outside the State of Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Respondent operates Brighton Collectibles retail stores nationwide, which sells women's fashion merchandise. Ronda Sadowsky, Wanda Hill, and Brenda Reed were employed as part-time sales persons at Respondent's Kierland Commons Mall store in Scottsdale, Arizona. The General Counsel contends that Sadowsky, Hill, and Reed were engaged in protected concerted activities in complaining about Amanda Crossland, the store manager of the Kierland Commons store. The General Counsel alleges that Sadowsky and Hill were discharged and that Reed was issued a warning because these employees engaged in protected concerted activities. Further, the General Counsel alleges that Respondent independently violated Section 8(a)(1) of the Act by interrogating employees about their protected concerted activities, and by threatening employees with discharge if they discussed working conditions with other employees.

Respondent denies the commission of any unfair labor practices. Further, Respondent contends that Sadowsky, Hill, and Reed were disciplined because they "treated their coworkers with disrespect, creating a disruptive and hostile working environment." Respondent contends that the same disciplinary

<sup>1</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

action would have occurred regardless of any alleged protected activity.

### B. Facts

Sadowsky worked as a sales partner (a part-time sales person) at the Kierland Commons store from November 2002, until January 2005. In the summer of 2003, several of Respondent's sales partners including Sadowsky, Hill, and Reed began discussing their complaints about the store manager, Amanda Crossland.<sup>2</sup> The employees complained that Crossland favored certain employees in the allocation of hours; did not post the work schedule in a timely fashion; did not properly enforce the dress code; was insensitive and used inappropriate language and showed a lack of concern for the theft of employee property.

On January 14, 2004, Sadowsky, Hill, Reed, and three other sales partners met at a restaurant and discussed their complaints about Crossland. The employees decided to write a letter to Jerry Kohl, Respondent's owner. On January 15, Sadowsky wrote a letter to Kohl complaining about Crossland. The letter did not indicate that Sadowsky was acting on behalf of the other employees. Sadowsky stated:

I'm writing this letter for two reasons. The first is quite honestly to give me the opportunity to vent some of the anger and frustration I find myself dealing with. The second, also quite honestly, is because I believe that as a Brighton employee I have a responsibility to bring these issues to your attention.

Sadowsky then proceeded to discuss complaints about Amanda Crossland not following the open door policy; showing favoritism in scheduling; not posting the schedule in a timely manner; using inappropriate language; not taking care to protect employees' private property; and not following security measures regarding bank deposits.

Upon receipt of this letter, Kohl asked Robin Boyd, director of retail operations,<sup>3</sup> to look into the matter. Boyd called Sadowsky and on January 20, they discussed the letter paragraph by paragraph. Boyd stated that she would discuss these matters with Crossland.<sup>4</sup> Boyd also told Sadowsky that if the other sales partners wanted to discuss these matters they should e-mail her as she would be out of town. Sadowsky later informed her fellow employees of her conversation with Boyd.

Boyd testified that she discussed the issues raised by Sadowsky with Crossland. Boyd told Crossland that she had to conduct herself in a calm and professional manner. Boyd discussed all the topics raised by Sadowsky but did not mention the letter to Kohl or show the letter to Crossland. Boyd instructed Crossland to purchase locks for the employee lockers. Boyd also told Crossland that it was wrong for Crossland to have sent Sadowsky to make bank deposits unaccompanied by another employee.

<sup>2</sup> Crossland's title was store managing partner. Crossland and the two assistant store managing partners were full-time employees. The sales partners were all part-time employees.

<sup>3</sup> Boyd is responsible for the overall operation of Respondent's retail stores nationwide.

<sup>4</sup> It should be noted that on January 14, Crossland warned Sadowsky for alleged insubordination.

Notwithstanding Boyd's conversation with Crossland, Sadowsky and her fellow employees continued to complain to each other about Crossland. In the winter of 2004, Sadowsky, Hill, and three other employees met at a coffee shop and discussed their work complaints. They even discussed a possible class action based on age discrimination. The sales partners continued to complain about Crossland throughout the year.

In December, Nikki Wride, Respondent's district manager, visited the Kierland Commons store. Assistant Store Managers Lori Westerkamp and Kim Shaffer, complained about Crossland. On December 8, 2004, Crossland told Wride that she was "threatened and scared for her job" because she feared that Sadowsky and Hill would "write another letter to Jerry Kohl or have her job."<sup>5</sup> On December 28, Hill sent an e-mail to Wride, stating that she wanted to discuss "some concerns that I and others have regarding the store." In an attempt "to get to the bottom" of the problem, Wride decided to interview all of the store employees separately during the second week of January 2005, and to take detailed notes of what she was told.

On January 13, 2005, Wride met with the employees individually at her hotel room. Wride told Sadowsky that their meeting was confidential. Wride asked questions about what Sadowsky liked and disliked about working at the store. Wride asked if Sadowsky planned on suing Respondent. Sadowsky said she did not but that former employee Connie Robinson had discussed a lawsuit. Wride asked if Sadowsky would be celebrating that evening because Crossland was in trouble. Sadowsky answered that she was going out to dinner that evening with her husband. According to Wride, Sadowsky stated several times that "Amanda [Crossland] will not mess with her" or "Amanda knows not to tussle with me."

On January 13, Wride also met with Hill. Wride told Hill that the meeting was confidential and then asked Hill what she liked and disliked about working at the store. Hill told Wride that morale was better when Crossland was not present at the store. Hill said that she hoped Crossland would improve her people skills with employees and with customers. Wride asked about a potential lawsuit and Hill said she had heard something but thought the matter had been dropped because the employee had left the store. Wride asked if there was a dinner planned that night to celebrate Crossland's termination. Hill said that she was not aware of such a thing and that she did not want to see anyone get fired.

Reed also met with Wride that same day. Reed complained about Crossland. Reed stated that Crossland lacked management skills and needed training. She also stated that Sadowsky and Hill were stirring up problems. Reed explained that Sadowsky and Hill discussed their complaints about Crossland with other employees. Wride asked about Reed's friendship with Sadowsky and Hill. Reed answered that she was friendly with them at the store but did not socialize with them outside of work. Wride said that there would be changes at the store but did not say what the changes would be.

Wride also interviewed six other sales partners, the two assistant store managing partners and Crossland. Wride's notes

<sup>5</sup> The record does not reveal how Crossland obtained knowledge about the January 2004 letter to Kohl.

of these interviews show that several employees and the assistant managers complained about Crossland's management style. The notes also show that employees indicated that Sadowsky and Hill did the most complaining about Crossland. An assistant store manager told Wride that Sadowsky was the "ringleader" and that Hill and Reed were followers. Wride was also told that Sadowsky, Hill, and Reed were engaging in intimidating behavior towards other sales partners.

On January 14, Wride met with Crossland. Crossland complained that Sadowsky and Hill were damaging her career. Wride asked why the personnel files of Sadowsky and Hill did not reflect Crossland's problem's with these two employees. Crossland stated that she feared the employees would write a letter to get her fired. Wride stated that Crossland had the responsibility of managing these employees. Wride said that Crossland had lost control of the employees. Crossland said that if she were fired, Sadowsky and Hill would have won. Wride ended the meeting by saying that she would discuss the matter with Respondent's management and that changes would be made.

On January 20, Boyd and Wride met with Sadowsky to give Sadowsky her letter of termination. Boyd read the following letter to Sadowsky:

You have engaged in insubordinate behavior in your dealings with your Store Manager, which violates Brighton's Standards of Business Conduct.

Brighton Collectibles is committed to providing all employees with a work environment that is free of hostility. You have created a hostile working environment by undermining both management and fellow sales partners. Your attitude in your dealings with other employees has been confrontational, negative and threatening, and has been disruptive of store operations.

You have been counseled regarding these matters, beginning in January 2004, yet the conduct has continued.<sup>6</sup>

Boyd read the letter but gave no further explanation for Sadowsky's termination. Wride observed but said nothing at the termination interview. Later that same date Boyd and Wride discharged Hill. Except for the name, Hill's termination letter was the same as Sadowsky's. Boyd read the letter and Wride observed. Hill had not received a warning in January 2004.

Wride and Boyd then met with Reed. Wride told Reed that she had fired Sadowsky and Hill, and then gave Reed a written warning. Wride assured Reed that things would be better because Sadowsky and Hill were no longer working at the store. Hill was placed under a performance action plan which stated:

I expect you as a Sales Partner to:

Not participate in any gossip, negative talk, backbiting or conversation that could be disruptive to the team or management.

<sup>6</sup> Sadowsky had received a warning for insubordination in January 2004. In her letter to Kohl, Sadowsky contended that she was not insubordinate and that Crossland claimed insubordination whenever an employee questioned her.

Maintain a level of professionalism with all Partners that is free from hostility, disruption or antagonism.

Foster a sense of community and cooperation in the workplace.

Reed signed the performance action plan and wrote, "Disagree with the antagonistic remark. Feel there is a difference in being aggressive/assertive sales. Not intended to be cruel."

On the evening of January 20, Wride held a meeting with sales partners at her hotel. Wride told the employees that Sadowsky and Hill had been discharged and that the attitude at the store had to change. Wride told the employees that any negative talk, backbiting, gossip, or conversation that could be misconstrued or disruptive would not be tolerated and would be grounds for termination. Wride also stated that the employees were not to discuss any working matters with anybody, and if they did, that would be considered grounds for termination.

On January 21, Wride issued a "final written warning" to Crossland, "because she had not effectively managed the partners in her store." Crossland was warned that she would be terminated if her performance issues did not improve.

Respondent's "partner guide" issued to all employees, in effect in 2005, contained the following rule: "No one may solicit, distribute, or receive non-company documents, materials or products during their work time or on company premise." Respondent's partner guide in effect in 2005, also contained the rule "salaries are confidential." In January 2006, Respondent revised its partner guide. The current partner guide does not contain either of the rules set forth above. There is no evidence that any employee was disciplined for violating the no-solicitation rule or the confidentiality rule.

### C. Respondent's Defense

Respondent's "partner guide" issued to all employees states that the Employer's mission is "to create an unexpected, warm, and wonderful shopping experience with unique Brighton Accessories and happy helpful sales partners to exceed our customer's expectations and inspire them to come back often." In support of this mission, Respondent has a set of "Brighton Values." These values emphasize the importance of "respect for all individuals" and "teamwork." Respondent contends that Sadowsky, Hill, and Reed were disciplined because they "treated their colleagues with disrespect, creating a disruptive and hostile working environment" at the Kierland Commons store.

Secondly, Respondent contends that it had no knowledge of any protected activity and that it was unaware that any other employee was involved in Sadowsky's January 2004 letter to Kohl.<sup>7</sup> Respondent argues that the January 2004 letter had nothing to do with the discipline which took place 1 year later. Third, Respondent argues that even if the employees engaged in concerted activity it would have taken the same action because of lack of respect for fellow employees and lack of teamwork at the Kierland Commons store.

<sup>7</sup> In its exceptions to the Board Respondent conceded that Sadowsky, Hill, and Reed engaged in protected concerted activities and that Respondent knew of that activity at least by December 2004.

*D. The Discipline of Sadowsky, Hill, and Reed*

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

In this case, the critical issue is whether Sadowsky and Hill were engaged in protected concerted activities when they discussed their dissatisfaction concerning Crossland's supervisory methods with other employees. Where employees seek to protest the selection or termination of a supervisor or other management officials, an analysis of whether the employees' activities are protected under the Act is fact-based and depends on whether "such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees own job interests and on their performance of the work they are hired to do." *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963). See also *Hoytuck Corp.*, 285 NLRB 904, 907 (1987). In the instant case, the employees were complaining about Crossland's management of the store but the facts do not support a finding that they were seeking her termination.

In January 2004, the six part-time sales employees decided that Sadowsky would write Kohl complaining about Crossland. Their complaints went beyond Crossland's personality and concerned working conditions. Sadowsky raised issues of retaliation for using the open door policy, posting schedules in a timely fashion, favoritism in scheduling, inappropriate language, security concerns and an allegedly unfair warning. However, the letter and Sadowsky's subsequent conversation with Boyd failed to alert Respondent that Sadowsky was acting in concert with other employees.

However, in December 2004, and January 2005, Respondent was aware of employee complaints about Crossland. Crossland indicated to Wride a fear that Sadowsky and Hill would attempt to have her terminated. Wride conducted interviews with employees and discovered that employees had complaints about Crossland's management of the store including their perceived favoritism in scheduling, lack of timeliness in scheduling, and conflicting or inconsistent information. Wride also learned that Sadowsky and Hill, and Reed to a lesser extent, were the ring-leaders. Wride learned that the complaints about Crossland created a tension in the store. In its exceptions to the Board, Respondent conceded that it had knowledge of the protected concerted activities at least by December 2004.

The employee complaints and discussions occurred in an effort to protest and change the working conditions of employees working for and with Crossland. The Respondent's subjective evaluation of the merits of the complaints is not controlling. The complaints do not have to be "earth shattering" in order to be protected by the Act so long as they arise from the employees' conditions of employment. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984). The employees complained that

Crossland had a bad attitude and gave instructions which interfered with their productivity on the job. Those complaints reveal their "concerns over their working conditions." *Avalon-Carver Community Center*, 255 NLRB 1064 fn. 2 (1981). Here, I find that Sadowsky, Hill, Reed, and other employees were engaged in protected concerted activities in complaining about Crossland's treatment of employees and customers. The protection of the protected activity does not depend upon the merit or lack of merit of the grievance. *Skril Die Casting, Inc.*, 222 NLRB 85, 89 (1976).

Respondent argues that the employees were not discharged for criticizing or complaining about Crossland. Rather, Respondent contends that the employees were disciplined because of their conduct towards their fellow employees. I found the hostility and animosity which Respondent found offensive to be inextricably intertwined with Sadowsky's and Hill's protected activities. These employees engaged in protected concerted activities which, may indeed, have created a negative atmosphere at the store which was in conflict with Respondent's mission statement and values. However, those activities were protected by Section 7 of the Act. I found that the law is well established that when it is once made to appear from the primary facts that an employer has engaged in conduct which operates to interfere with an employee's statutorily protected right, it is immaterial that the employer was not motivated by antiunion bias or ill intentions." *Fabric Services*, 190 NLRB 540, 543 (1971). See also *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), and *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96 (7th Cir. 1959). The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Continental Chemical Co.*, 232 NLRB 705 (1977), and *American Lumber Sales*, 229 NLRB 414 (1977). The Board in its remand decision rejected this finding as inconsistent with an analysis under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent contends that it would have disciplined these employees even in the absence of their concerted activities. The Board found that *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) applies. Under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. The General Counsel meets this initial burden by demonstrating that the employee engaged in protected activity, the employer knew of that activity, and the employer harbored animus against the protected activity. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action in the absence of the protected activity. *United Rentals*, 350 NLRB 951, 951 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). The employer's burden on rebuttal is not met by a showing merely that it had a legitimate reason for its action. Rather, the employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

The Board ordered that I must consider whether the General Counsel has met his initial burden by showing that the Respondent's animus against the employees' protected acts was a motivating factor in the decision to discipline and discharge them. For the following reasons, I find that the General Counsel has made a prima facie showing that Respondent was motivated by unlawful considerations in disciplining Sadowsky, Hill and Reed. First, the employees were engaged in protected concerted activities. Second, Respondent was clearly aware of such activities, at least by December 2004. Respondent disciplined these employees to stop the tension in the store, at least in part, caused by the protected concerted activities. The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected concerted activities. In my original decision I found that the "hostility and animosity" Sadowsky and Hill allegedly created in the workplace were "inextricably intertwined" with their protected activities. The Board rejected that finding. The Board stated that I must consider whether the respondent proved, by a preponderance of the evidence, that it would have discharged Sadowsky and Hill and disciplined even in the absence of their protected activity.

Respondent's "partner guide" issued to all employees states that the Employer's mission is "to create an unexpected, warm, and wonderful shopping experience with unique Brighton Accessories and happy helpful sales partners to exceed our customer's expectations and inspire them to come back often." In support of this mission, Respondent has a set of "Brighton Values." These values emphasize the importance of "respect for all individuals" and "teamwork."

In December, Wride visited the Kierland Commons store. Assistant Store Managers Lori Westerkamp and Kim Shaffer complained about Crossland. On December 8, 2004, Crossland told Wride that she was "threatened and scared for her job" because she feared that Sadowsky and Hill would "write another letter to Jerry Kohl or have her job." On December 28, Hill sent an e-mail to Wride, stating that she wanted to discuss "some concerns that I and others have regarding the store." In an attempt "to get to the bottom" of the problem, Wride decided to interview all of the store employees separately during the second week of January 2005, and to take detailed notes of what she was told. On January 13, 2005, Wride met with the employees individually at her hotel room.

Wride interviewed nine sales partners, the two assistant store managing partners and Crossland. Wride's notes of these interviews show that several employees and the assistant managers complained about Crossland's management style. The notes also show that employees indicated that Sadowsky and Hill did the most complaining about Crossland. An assistant store manager told Wride that Sadowsky was the "ringleader" and that Hill and Reed were followers. Wride was also told that Sadowsky, Hill, and Reed were engaging in intimidating behavior towards other sales partners.

On January 14, Wride met with Crossland. Crossland complained that Sadowsky and Hill were damaging her career. Wride asked why the personnel files of Sadowsky and Hill did not reflect Crossland's problem's with these two employees. Crossland stated that she feared the employees would write a

letter to get her fired. Wride stated that Crossland had the responsibility of managing these employees. Wride said that Crossland had lost control of the employees. Crossland said that if she were fired, Sadowsky and Hill would have won. Wride ended the meeting by saying that she would discuss the matter with Respondent's management and that changes would be made.

On January 20, Boyd and Wride met with Sadowsky to give Sadowsky her letter of termination. Boyd read the following letter to Sadowsky:

You have engaged in insubordinate behavior in your dealings with your Store Manager, which violates Brighton's Standards of Business Conduct.

Brighton Collectibles is committed to providing all employees with a work environment that is free of hostility. You have created a hostile working environment by undermining both management and fellow sales partners. Your attitude in your dealings with other employees has been confrontational, negative and threatening, and has been disruptive of store operations.

You have been counseled regarding these matters, beginning in January 2004, yet the conduct has continued.

Boyd read the letter but gave no further explanation for Sadowsky's termination. Wride observed but said nothing at the termination interview. Later that same date Boyd and Wride discharged Hill. Except for the name, Hill's termination letter was the same as Sadowsky's. Boyd read the letter and Wride observed.

Wride and Boyd then met with Reed. Wride told Reed that she had fired Sadowsky and Hill, and then gave Reed a written warning. Wride assured Reed that things would be better because Sadowsky and Hill were no longer working at the store. Hill was placed under a performance action plan which stated:

I expect you as a Sales Partner to:

Brighton Collectibles is committed to providing all employees with a work environment that is free of hostility. You have created a hostile working environment by undermining both management and fellow sales partners. Your attitude in your dealings with other employees has been confrontational, negative and threatening, and has been disruptive of store operations.

Reed signed the performance action plan and wrote, "Disagree with the antagonistic remark. Feel there is a difference in being aggressive/assertive sales. Not intended to be cruel."

On the evening of January 20, Wride held a meeting with sales partners at her hotel. Wride told the employees that Sadowsky and Hill had been discharged and that the attitude at the store had to change. Wride told the employees that any negative talk, backbiting, gossip, or conversation that could be misconstrued or disruptive would not be tolerated and would be grounds for termination. Wride also stated that the employees were not to discuss any working matters with anybody, and if they did, that would be considered grounds for termination.

On January 21, Wride issued a "final written warning" to Crossland, "because she had not effectively managed the part-

ners in her store.” Crossland was warned that she would be terminated if her performance issues did not improve.

Respondent contends that the decision to discipline the employees was solely because of their conduct towards their fellow employees. Based on the Board’s remand, I find that Respondent was motivated by its desire to end the “negative talk, back-biting, gossip or conversation that could be misconstrued or disruptive.” Respondent said that the Employer’s mission is “to create an unexpected, warm, and wonderful shopping experience with unique Brighton Accessories and happy helpful sales partners to exceed our customer’s expectations and inspire them to come back often.” In support of this mission, Respondent has a set of “Brighton Values.” These values emphasize the importance of “respect for all individuals” and “teamwork.” I find that Wride was motivated by a desire to end the tension in the store. She believed that Sadowsky and Hill were the ringleaders. The termination letters make reference a work environment that is free of hostility. They further state “You have created a hostile working environment by undermining both management and fellow sales partners.” Finally they state “Your attitude in your dealings with other employees has been confrontational, negative and threatening, and has been disruptive of store operations.” The warning letter to Reed states the Employer “is committed to providing all employees with a work environment that is free of hostility.” “You have created a hostile working environment by undermining both management and fellow sales partners. Your attitude in your dealings with other employees has been confrontational, negative and threatening, and has been disruptive of store operations.”

Based on the Board’s remand, I find that Respondent has sustained its burden of showing that Sadowsky, Hill, and Reed would have been disciplined even in the absence of their protected activity.

#### 1. Independent 8(a)(1) allegations: rules restricting protected concerted activity

As set forth above, Respondent’s “partner guide” issued to all employees, in effect in 2005, not only prohibited the discussion of salaries but also contained the following rule: “No one may solicit, distribute, or receive non-company documents, materials or products during their work time or on company premise.” There is no evidence that any employee was disciplined for violating the no-solicitation rule or the confidentiality rule.

It is well settled that restrictions on union solicitation in non-working areas during nonworking time are presumptively invalid. It is equally well settled that in the case of retail establishments an employer may prohibit solicitation in the selling areas of a retail store even when employees are on their own time. *J.C. Penney Co.*, 266 NLRB (1983). Thus, since Respondent operates a retail store, it lawfully could have restricted all solicitation on the selling floor. Respondent’s rule, however, prohibits solicitation “on company premise” and therefore is not specifically limited to the selling floor. Thus, I find that Respondent’s former no-solicitation/no-distribution rule violated Section 8(a)(1) of the Act.

The Respondent’s partner guide in effect in 2005, also contained the rule “salaries are confidential.” The Board has held

that discussion of wages is part of organizational activity and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid. *Mediaone of Greater Florida*, 340 NLRB 277 (2003); citing *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *Waco, Inc.*, 273 NLRB 746, 747-748 (1984); and *International Business Machines*, 265 NLRB 638 (1982). Thus, when an employer prohibits its employees from inquiring as to the wages paid fellow employees, the employer unlawfully inhibits its employees from exercising their Section 7 rights. Accordingly, I find that Respondent’s former rule prohibiting employees from discussing salaries violated Section 8(a)(1) of the Act.

On January 20, Wride issued a warning to Reed which instructed Reed, “not to participate in any gossip, negative talk, back-biting or conversation that could be disruptive of the team or management.” Wride further stated, “If you ever again engage in conduct that could be construed as disruptive or antagonistic to a co-worker you will be terminated immediately.” When Wride met with the store employees in the evening on January 20, Wride told the employees that any negative talk, backbiting, gossip, or conversation that could be misconstrued or disruptive would not be tolerated and would be grounds for termination. Wride also stated that the employees were not to discuss any working matters with anybody, and if they did, that would be considered grounds for termination.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d (D.C. Cir. 1999). A rule that prohibits, inter alia, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). As the Board stated therein, in determining whether a challenged work rule is unlawful, the rule must be given a reasonable reading, phrases should not be read in isolation, and improper interference with employees’ rights is not to be presumed. *Lutheran Heritage Village-Livonia*, supra at 646.

Here the issue, is whether an employee would reasonably read the rule as covering protected activity—in this case complaints and grievances against Crossland. I find that an employee simply cannot be sure what conduct the employer might consider “disruptive.” The ambiguity of this admonition gives the employer great discretion in defining it and in deciding when to impose discipline—enough discretion to invalidate the rule under established law. See, e.g., *Advance Transportation Co.*, 310 NLRB 920, 925 (1993). Indeed, it is well-established that any ambiguity in a rule should be construed against the employer. See, e.g., *Lafayette Park Hotel*, supra at 828, citing *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

In the context of this case, it would appear to employees that Wride’s admonition about conversations that would be disruptive reasonably interfered with Section 7 activity, were promulgated in response to employees complaining about Crossland and were applied to halt such activity. Accordingly, I find Respondent violated Section 8(a)(1) of the Act.

## 2. Alleged interrogation

During her conversations with employees on January 14, Wride asked Sadowsky whether the employee intended to sue Respondent. Sadowsky answered that she did not but that a former employee had mentioned a suit. However, since that employee no longer worked for the Respondent, Sadowsky did not know whether the matter would be pursued. Wride also asked whether Sadowsky planned to celebrate Crossland's termination that evening and Sadowsky answered that she was having dinner with her husband.

Similarly, Wride asked Hill about a potential lawsuit and Hill said she had heard something but thought the matter had been dropped because the employee had left the store. Wride asked if there was a dinner planned that night to celebrate Crossland's termination. Hill said that she was not aware of such a thing and that she did not want to see anyone get fired.

The General Counsel contends that by such action, Respondent coercively interrogated the employees about their protected concerted activities. The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), *enfd.* in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985).

The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that questioning was coercive. See, e.g., *Stoody*, *supra*. The Board generally does not consider whether an interrogation actually coerced employees in the exercise of their rights under the Act, but whether the interrogation would reasonably tend to have that effect. See *Williamhouse of California*, 317 NLRB 699, 713 (1995); *El Rancho Market*, 235 NLRB 468, 471 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979); *American Freightways Co.*, 124 NLRB 146, 147 (1959). See also *Delta Gas*, 282 NLRB 1315 (1987) (Board affirmed the administrative law judge's finding that the respondent violated the Act by interrogating employees about the purpose of their meeting at an attorney's office). Wride was a high level supervisor. In addition, the individuals being questioned were part-time employees who did not report directly to Wride. Employee participation was mandatory. Although the subject matter of the interviews was working conditions at the store, the questions about the lawsuit and the alleged employee celebration went beyond that subject matter. For these reasons, I conclude that the Respondent violated Section 8(a)(1) on January 14, by coercively interrogating employees about protected concerted activities.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining rules prohibiting employees from discussing their salaries and compensation; promulgating and maintaining rules limiting employee discussions concerning terms and conditions of employment; and maintaining an overly broad no-solicitation/no-distribution rule.

3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their protected concerted activities.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not otherwise violate the Act.

## REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

## ORDER

Respondent, Brighton Retail, Inc., Scottsdale, Arizona, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining rules prohibiting employees from discussing their salaries and compensation; promulgating and maintaining rules limiting employee discussions concerning terms and conditions of employment; and maintaining an overly broad no-solicitation/no-distribution rule.

(b) Coercively interrogating employees about their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its Kierland Commons store in Scottsdale, Arizona, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these pro-

<sup>8</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.

<sup>9</sup> If this Order is enforced by a judgment of a 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."

ceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since January 2005.

(b) 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 Respondent has taken to comply.

Dated, Washington, D.C. June 19, 2008

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain rules prohibiting employees from discussing their salaries and compensation; promulgate or maintain and maintain rules limiting employee discussions concerning terms and conditions of employment; or maintain in an overly broad no-solicitation/no-distribution rule.

WE WILL NOT coercively interrogate employees about their protected concerted activities.

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

BRIGHTON RETAIL, INC.