

SPE Utility Contractors, LLC and Linda M. Leuch.
Case 7–CA–50767

March 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On December 17, 2008, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,² findings,³ and conclusions⁴ and to adopt the recommended Order.⁵

¹ 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.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent states that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

³ There were no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by discharging Linda Leuch because of her union activity.

The Respondent contests the propriety of the judge's 8(a)(4) finding absent specific precedent holding that an employer violates the Act when discharging an employee to curtail her potential backpay award in another unfair labor practice proceeding. Regardless whether there is precedent on all fours, we agree with the judge that the Respondent's discrimination against Linda Leuch, for pursuing her claim before the Board, is the essence of an 8(a)(4) violation. See *General Services, Inc.*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

In his August 16, 2007 telephone conversation with Leuch, the Respondent's owner, David Postill, referred to his July 23 and August 7, 2007 letters to her. The judge inadvertently stated that Postill referenced his July 23 and August 2 letters to Leuch. We correct this error, and note that it does not affect our findings.

⁴ In determining that the Respondent violated Sec. 8(a)(4), the judge found that the General Counsel established that Leuch's participation in another unfair labor practice proceeding was a motivating factor in the Respondent's discharge of her, as shown by: (1) Leuch's participation as an alleged discriminatee and witness in this other proceeding; (2) the Respondent's knowledge of this; (3) the Respondent's animus against Leuch's status as a potential discriminatee; and (4) a causal connection between that animus and Leuch's discharge. Although Board cases

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, SPE Utility Contractors, LLC, Port Huron, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dynn Nick, Esq., for the General Counsel.

Kenneth M. Gonko, Esq. (The Danielson Group, PC), of Chesterfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The complaint, issued on January 31, 2008, stems from unfair labor practice (ULP) charges that Linda M. Leuch, an individual, filed against SPE Utility Contractors, LLC (Respondent or SPE), and alleges that Respondent violated Section 8(a)(3), (4), and (1) of the National Labor Relations Act (the Act) by discharging her on August 7, 2007.¹ The 8(a)(4) allegation relates to previous charges filed against Respondent by Local 339, International Brotherhood of Teamsters (the Union), Leuch's bargaining representative. One of the allegations in the ensuing complaint was that her December 20, 2006 layoff violated Section 8(a)(5) of the Act. Leuch testified at the trial that Judge Arthur J. Amchan conducted on August 8 and 9.²

Pursuant to notice, I conducted a trial in Detroit, Michigan, on April 30–May 1, and October 23, 2008, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.³ Respondent and the General Counsel filed helpful posthearing brief that I have duly considered.

Issue

Was Respondent's August 7 discharge of Leuch for not meeting with Respondent on July 30 and August 6, to provide information concerning her billing and performance of other

typically do not include (4) as an independent element (see, e.g., *Newcor Bay City Division of Newcor*, 351 NLRB 1034 fn. 4 (2007)), because *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is a causation analysis, Member Schaumber agrees with its addition when analyzing both 8(a)(3) and (4) allegations. See, e.g., *St. George Warehouse, Inc.*, 349 NLRB 870, 878 fn. 28 (2007).

⁵ We reject the Respondent's contention that the judge improperly ordered, as part of the expunction remedy, that Leuch's discharge not be used against her in any way. This is part of the traditional remedy for unlawful discharges. See, e.g., *All Pro Vending*, 350 NLRB 503 (2007).

¹ All dates are in 2007, unless otherwise indicated.

² In JD–67–02, issued on October 2, he found that her layoff violated Sec. 8(a)(5), on a different basis than that alleged in the complaint (Jt. Exh. 1). The Board later reversed this determination, in 352 NLRB 787 (2008) (Jt. Exh. 3).

³ The trial was postponed indefinitely on May 1, 2008, when the parties entered into a non-Board settlement agreement. The settlement failed of achievement, and the hearing was resumed and concluded on October 23, 2008.

duties, based on lawful considerations, or because of union activities and/or her status as a potential recipient of backpay under the Act and as a witness at an NLRB trial?

At the outset, I note that Respondent's sole proffered basis for the discharge was her failure to meet and provide information, not her conduct in any of the matters it wished to discuss with her.⁴

Witnesses and Credibility

On April 30, the General Counsel called David Postill, Respondent's chief executive officer (CEO) and majority stock holder, as an adverse witness under Section 611(c); Kurt Satryb, Respondent's former vice president in charge of Florida operations; and Leuch.

On October 23, Respondent called Michael Moriarty, president, and Postill, whose testimony was limited to what was said in his telephone conversation with Leuch in mid-August. I note here that at the time I scheduled the resumed hearing for October 23, 2008, Postill had plans to be out of town. In the interest of timely concluding the trial, I allowed him to testify telephonically on October 23, 2008, over the General Counsel's objections. I determined that this would cause no prejudice to either the General Counsel or the Charging Party, inasmuch as he had testified at length as a 611(c) witness on April 30, and I therefore previously had ample opportunity to observe his demeanor.

Leuch appeared sincere and to answer questions readily and without hesitation, taking into account that much of her testimony involved events that occurred in 2005 during and after Hurricanes Katrina and Rita (the hurricanes). She candidly conceded during portions of her testimony that, in hindsight, she might have handled some of her communications with SPE more tactfully.

Satryb also struck me as candid and as not making efforts to slant his testimony in favor of one party or the other. Although he has contacted an attorney concerning possible legal action against SPE for terminating him on July 31, allegedly for violating the no-competition clause in his employment contract, he has continued to perform work for SPE under his own business. Thus, he might naturally have countervailing reasons to testify for or against Respondent. Reflecting his lack of bias in favor of Leuch was his testimony that he had recommended she be discharged prior to her December 2006 layoff, based on what Postill reported to him about her conduct, but that Postill decided to lay her off instead.

Moriarty admittedly had limited knowledge of Leuch's performance; he testified that prior to February, when he became president, Postill was always her direct supervisor. On one matter, I find his testimony implausible, to wit, that at the time he issued Leuch the July 23 letter (and, ergo, the August 2 letter), he did not know the specific date of the scheduled NLRB trial (August 8) but merely knew that it was coming up.

Postill demonstrated notable defensiveness and unease during his testimony on April 30, and he also displayed defensiveness during his telephonic testimony on October 23. He was often evasive, vague, and/or nonresponsive in his answers; he

sometimes contradicted himself; and portions of his testimony were not plausible. Following are examples of these deficiencies in his testimony. Others will be addressed in the "Facts" section.

Postill was evasive and inconsistent on who made the decision to terminate Leuch. Thus, he first testified that, "I played a role in that with my team," then narrowed "management" to Moriarty, and later testified, "I'm the CEO of the Company; ultimately I don't care what [Moriarty]—what decision [Moriarty] made. I agreed with it and supported it."⁵

To give context to what follows, four subjects were cited in the discharge letter: (1) Leuch billed Florida Power and Light (FPL) for her labor during a week she was off work and paid by SPE; (2) while reconciling FPL records, she paid both office staff and temporary services for 16-hour shifts, although she had no authority to do so; (3) she continued to use Vonage service paid by SPE; and (4) in reconciling FPL and Entergy accounts, it appeared that she made significant payments to subcontractors beyond the pay-when-due clause of their contracts. Significantly, all of the cited FPL issues and the Vonage service matter arose in 2005 from posthurricane work that SPE performed for FPL in southern States.

Postill's testimony about SPE's attempts to resolve its billing disputes with FPL stemming from hurricane-related work in 2005 was evasive to the point where it was practically incomprehensible.⁶ His explanation of why he did not request more information from Leuch until July was wholly unbelievable. Thus, when asked if he was aware of all of the specific billing issues with FPL in May (which amounted to millions of dollars), he replied, "Some were mentioned to me. I don't know if I had the documentation because at that point I was just rolling up my hand and getting involved in it."⁷ Yet, he also testified that Leuch worked on reconciling the billing differences with FPL prior to her layoff in December 2006. I cannot find plausible that, as CEO and majority owner of a small company, he was still so unknowledgeable about such a major problem with a large customer.

To best illustrate why I have found Postill an unreliable witness, I will use his testimony regarding Leuch's allegedly paying office staff and temporary service workers for 16-hour shifts, without authorization. He testified this occurred probably as far back as 2004. He asserted that he did not ask Leuch for more information until July, because, "I did research based on a rumor I heard prior to [seeing documents in 2007], and I looked at it and it was confirmed. Once it was confirmed, I wanted to bring her in and ask her and see what the reasoning was."⁸

Aside from vagueness, such testimony is at odds with his admission that he knew she was paying herself and his mother (then the only other office employee) for 16-hour shifts at the time of occurrence. He also stated in his affidavit that "[w]hen I talked to Leuch about this issue, she acknowledged that she paid the employees outside of the rate," even though he had not

⁴ See Tr. 33, 279.

⁵ Tr. 49, 51.

⁶ See Tr. 80, et seq.

⁷ Tr. 92.

⁸ Tr. 65.

authorized it, and it was his decision to make.”⁹ Moreover, he averred in the affidavit that he had talked to her about paying temporaries and office staff with the same overtime provisions as provided to union members, and that she acknowledged doing this. Finally, an e-mail dated June 24, 2005, from Postill to FPL¹⁰ shows his knowledge of the issue at that time.

I also find incredulous his testimony that despite his knowledge of Leuch’s alleged malfeasance in 2004 and 2005, she continued “running” his office until her layoff in December 2006.¹¹

Postill’s telephonic testimony, in which he was asked solely about a telephone conversation with Leuch in mid-August was also unconvincing (Leuch had testified, in sum, that he called her on August 16 and said he was sorry about her termination, but SPE lawyers had instructed him to terminate her to limit liability). Vague and evasive, he professed absolutely no recollection of anything specific that she said, although he testified that the conversation occurred after her mother’s funeral (and, therefore, after her termination). I find this totally unbelievable, especially when he repeated over and over again that when he called her to express condolences, she “went off” on matters unrelated to her mother’s death. The following, during his cross-examination, reflects both the defects in his testimony concerning the phone call and his marked defensiveness:

When she picked up the phone, immediately she started going off. Was she going off because she’s mad at me, she’s mad at the company? I don’t know. I didn’t put a lot of faith in it, even listen to it much because that wasn’t the nature of my call. And we’re talking about Linda. She could have been going off because she lost the Lotto. I don’t know. I don’t remember.¹²

I highly doubt that she would have vented anger against him or SPE because she lost the Lotto or because he called to offer condolences. The only plausible explanation is that she expressed wrath at her termination, which had occurred a little over a week earlier.

In this regard, as amply reflected by Leuch’s testimony and that of other witnesses (including Postill), documents of record, and my observations of Leuch during her testimony, Leuch is a forceful individual who does not mince words. I find it wholly implausible that, even if he did not raise the subject of her very recent discharge, she would not have done so *sua sponte*.

For the above reasons, I credit Leuch and Satryb where their testimony diverged from that of Postill and Moriarty.

Facts

Based on the entire record, including witness testimony, documents, stipulations, and uncontested findings of fact in Judge Amchan’s previous decision, I find the following facts.

Respondent, a Michigan corporation with a permanent office and facility in Port Huron, Michigan (the office), is engaged in the construction, maintenance, and repair of high-voltage electrical lines for utility companies and some commercial custom-

ers. Jurisdiction has been admitted, and I so find. SPE performs work nationally and obtains its field employees from International Brotherhood of Electrical Workers hiring halls. During hurricane or storm work, there may be 400–500 such employees; at other times, the number averages 80–120.

I take administrative notice that Hurricane Katrina made landfall in southeast Louisiana on August 29, 2005, and that Hurricane Rita made landfall near the Louisiana–Texas border on September 24, 2005.

SPE began operations in 2001 under four partners, including Postill and Satryb. Later, Satryb sold his ownership interest to Postill, who at some point became the majority owner.

Satryb hired Leuch as office manager in September 2003. From the start, she handled accounts receivable and prepared billings for different power companies for which Respondent performed work, and she continued doing so throughout her employment and until her layoff on December 20, 2006. Leuch was technically “demoted” in mid-October 2005 from office manager to accounts receivable, as a result of her out-of-State work following Hurricane Katrina. However, her duties in the office did not change, and she continued to perform them with the same degree of independence.

Following the 2005 hurricanes, SPE performed extensive work for FPL, in the repair of overhead power lines to restore power to residential customers. Leuch spent a total of about 8 weeks in SPE’s temporary office locations in Florida; Jackson, Mississippi; and New Orleans. During this period, SPE employed up to 450 employees in southern States, and Satryb supervised all of the general foremen, linemen, groundmen, truckdrivers, and a temporary secretary. This work ended in late 2006.

On August 14, 2006, the Union was certified as the collective-bargaining representative of Respondent’s clerical employees. A series of negotiations was held from October 2006 through March, but no agreement was reached.

Leuch was the alternate steward until December 20, 2006, when she and two other unit employees were laid off. Between August 7, 2006, and April 27, the Union filed the charges and amended charges that culminated in the hearing on August 8 and 9. As noted, one of the allegations in the complaint was that her layoff violated Section 8(a)(5) of the Act. It was not alleged as an 8(a)(3) violation.

By letter of January 4, Leuch requested a copy of her personnel file, pursuant to state law and, after an exchange of correspondence, she met in late January with Thomas D’Luge, SPE’s attorney, and reviewed documents that Respondent advised her were available.¹³

In May, representatives of SPE, including Postill and Satryb, met with FPL executives at FPL’s offices in West Palm Beach, Florida, to try to work out their billing disagreements. At the

¹³ GC Exhs. 2–7. Such conduct does not come under the parameters of protected concerted activity. See *Tradewaste Incineration*, 336 NLRB 902, 906 fn. 8 (2001).

⁹ See Tr. 67.

¹⁰ GC Exh. 15.

¹¹ Tr. 95–96.

¹² Tr. 382.

time this occurred, reconciliation efforts between the two companies had already gone on for a full year, or since mid-2006.¹⁴

On June 27, Regional Director Stephen Glasser issued an order rescheduling the trial from June 27 to August 8.¹⁵

I credit Satryb's un rebutted testimony as follows. In July, he had a conversation with Postill in the parking lot. When they were discussing the office employees' effort to decertify the Union, Postill brought up Leuch and stated that, as directed by SPE's lawyers, "[H]e probably would have to fire her because it would stop the backpay."¹⁶

Moriarty, by certified letter of July 23 to Leuch, stated:¹⁷

Since your layoff in December 2006, SPE has been working on reconciling its accounting records

In conjunction with these reconciliations, we have become aware of certain acts or omissions not in conformity with SPE's practices.

We are seeking any input that you may have regarding these inconsistencies and request that you appear at SPE's office this Monday, July 30, 3007 at 9 Am [sic]

This meeting is time sensitive as we are in the process of negotiating settlement with FPL and Afton Power. If you are unable to assist SPE in these matters, we shall proceed to finalize these matters without your input.

Moriarty testified that at the time he prepared and sent the letter, he had no intention of discharging Leuch; rather, his purpose was to get further information from her.

Leuch telefaxed a response on July 30, stating that the letter had arrived when she was attending to the needs of her mother's death and subsequent funeral, and that she could not appear on Monday morning "due to a previous appointment regarding the upcoming trial."¹⁸

In a letter to Leuch of August 2,¹⁹ Moriarty essentially repeated verbatim what he had stated in his July 23 letter, and he requested that she appear for the same purpose on August 6 at 12:30 p.m. Again, Moriarty asserted that at the time he prepared and sent the letter, he had no intention of discharging her.

Leuch responded by a telefax of August 6,²⁰ wherein she raised issues concerning whether SPE had properly paid benefits and compensation to her and other employees. As to the requested meeting on August 6, she replied, "I will be unable to appear at SPE's office due to a previous appointment regarding the upcoming trial."

The following day, August 7, Moriarty sent her, by certified mail, a discharge letter.²¹ He reiterated that SPE had sought her input to "matters that arose after your layoff," generally relating to FPL work. He set out and discussed four areas of her alleged

misconduct (specifically addressed in the next section). He concluded by stating that SPE considered these allegations substantiated because she had not provided a sufficient reason for her actions.

Leuch appeared and testified at the NLRB trial on August 8 and 9. By faxed letter of August 14, she denied, in rather colorful language, Moriarty's allegations against her.²²

On the evening of August 16, Postill called Leuch at home. He quoted portions of her August 14 letter and said he was sorry but that his lawyers made him write the July 23 and August 2 letters because of the August 8 trial.²³

Respondent's Position

I reiterate that Respondent's sole basis for discharging Leuch was her failure to come in and discuss the issues raised in Moriarty's July 23 and August 2 letters, not the underlying alleged acts of misconduct. Therefore, I will focus primarily on when they occurred and when Postill first had knowledge.

Leuch billed FPL for her labor during a week she was off and paid by SPE.

Postill testified that FPL representatives complained in 2007 that Leuch had improperly billed FPL for office work she performed at the temporary office(s).

However, Postill also testified that he had knowledge of this issue as far back as 2005 and that Leuch was working on the matter prior to her layoff, but that he waited until "we had all our ducks in a row" before making the request that she meet to discuss it.²⁴ He offered no explanation of why this took 2 years.

I credit Leuch's testimony that Postill knew and approved all of her billing of her hours to FPL.

2. Leuch paid both office staff and temporary services for 16-hour shifts, without authorization.

Because, as described earlier, Postill's testimony on this was unreliable, I credit Leuch's testimony that she never authorized employees to work without his approval.

3. Leuch set up a Vonage account that provided free Internet use at her residence and continued to use it after her layoff, at SPE expense.

When SPE had a temporary office (in a trailer) in Jackson, Mississippi, it ordered Vonage phone service. Leuch used a company credit card, which Postill had her cancel in November 2005, when the temporary office was closed. She received a new company credit card, which was canceled around the time of her layoff in December 2006.

Respondent's contends that Vonage has continued to bill it for the services and offered Respondent's Exhibit 7 as evidence. In part, it shows items billed to Postill's credit card in January, including a charge for Vonage. Both the documents and Postill's testimony reflect that one of the problems in stopping service was that Leuch's password was needed, but Respondent offered no evidence that Postill or anyone else from SPE ever asked her for it. Moreover, the temporary office was

¹⁴ Credited testimony of Satryb, which was not necessarily contradicted by Postill, who was very vague and evasive about the reconciliation process.

¹⁵ GC Exh. 8.

¹⁶ Tr. 116; see also Tr. 118.

¹⁷ GC Exh. 9.

¹⁸ GC Exh. 12.

¹⁹ GC Exh. 13.

²⁰ GC Exh.14. She inadvertently referred to his August 2 letter as "August 4."

²¹ GC Exh. 15.

²² GC Exh. 17.

²³ Tr. 341; see also Tr. 340.

²⁴ Tr. 60.

closed back in 2005. I cannot, therefore, find credible Postill's assertion that he needed to meet with her to talk on the matter in July.

I credit Leuch's testimony that she did not take the Vonage equipment with her and has never used it for free Internet service.

4. Leuch made significant payments to subcontractors beyond the pay-when-paid clauses in their contracts with SPE.

Postill testified that during the reconciliation process with FPL—on the dates of which he was conveniently vague—he became aware that she prepaid subcontractors ahead of what they were due under the pay-when-paid clause of their contracts; i.e., before SPE was itself paid for the job. He testified that such instances were raised to him in 2005 and 2006 but that he was not aware of the scope of the problem (millions of dollars) “until I actually rolled my hands up and got involved.”²⁵ He also testified that there were issues with “every subcontractor” she paid.²⁶ I note Satryb's testimony that when representatives of FPL and SPE met in May to reconcile their billing differences, reconciliation attempts had already gone on for a full year (or back to mid-2006).

I credit Leuch's testimony that she made payments to subcontractors under Postill's direction.

In sum, I discredit Postill's highly implausible claims of ignorance of the scope of Leuch's alleged malfeasance until months after her December 2006 layoff, as well as his testimony that she continued to “run” his office after he already knew of major defects in her performance.

Analysis

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Leuch was an alternate union steward, certainly protected activity. However, apart from her testimony as a witness at the August 8 and 9 trial, conduct that comes under Section 8(a)(4), the record is devoid of evidence of what she did in that role, or otherwise in the way of union activities. There is no direct evidence of animus against her because she served as an alternate steward, nor can such be implied. Thus, Satryb recommended that Leuch be discharged in December 2006, but Postill instead lawfully laid her off, along with other office employees. Credited testimony of Satryb and Leuch reflects that the discharge was directly connected to her involvement in NLRB proceedings, not to any severable union activities. I therefore conclude that the General Counsel has not established

a prima facie case of unlawful termination under Section 8(a)(3).

A *Wright Line* approach is also used for analyzing alleged violations of Section 8(a)(4) of the Act, and the remedy is the same. *Newcor Bay City Division*, 351 NLRB 1034 *fn.* 4 (2007); *All Pro Vending, Inc.*, 350 NLRB 503, 515 (2007).

Section 8(a)(4) prohibits adverse action against an employee “who has filed charges or given testimony.” The provision is broadly construed in order “to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.” *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mutual Life Insurance v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951). See also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001).

Thus, its protection extends to employees such as Leuch on whose behalf charges were filed (*Climatrol, Inc.*, 329 NLRB 946 (1999)), and to employees who plan to testify at NLRB trials. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). In any event, Leuch's activity of providing information to NLRB investigators of ULP's was conduct that brought her under the provision's coverage. See *Operating Engineers Local 39*, 346 NLRB 336 (2006); *Metro Networks*, above at 63.

The element of knowledge is easily met. Leuch was named in the earlier complaint and alleged therein to have been laid off in violation of Section 8(a)(5). Further, she specifically mentioned her upcoming role as a witness at the NLRB trial in her July 30 and August 6 telefaxes. Animus is demonstrated by Satryb's testimony that in late July, Postill stated that he probably would have to discharge Leuch to stop backpay, and Leuch's testimony that on August 16, Postill stated that SPE's attorneys had directed that Leuch be terminated because of the August 8 (NLRB) trial.²⁷ Respondent discharged her by letter of August 7. Therefore, I conclude that the General Counsel has satisfied all of the elements necessary to establish a prima facie case of unlawful termination under Section 8(a)(4).

Under *Wright Line*, if the General Counsel establishes a prima facie case of unlawful conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in the absence of such activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *SFO Good-Nite Inn, LLC*, 352 NLRB 268, 269 (2008); *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

If the employer's proffered defenses are found a pretext, i.e., the reasons given for the employer's actions are either false or not in fact relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. *SFO Good-Nite Inn, LLC*, *supra*. On the other hand,

²⁷ The discharge of an employee to curtail her backpay remedy in the event that her layoff is found unlawful by the Board constitutes a form of retaliation that punishes her for pursuing her right to seek redress under the Act, and clearly violates Sec. 8(a)(4).

²⁵ Tr. 74.

²⁶ *Id.*

further analysis is required if the defense is one of “dual motivation,” i.e., the employer defends that, even if an invalid reason might have played some part in the employer’s motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

I conclude that Respondent’s defense was a pretext, based on the following. Statements that Postill made to Leuch and Stryb demonstrate that the real reason for her discharge related to her being a subject of charges that were to be litigated at an upcoming NLRB trial, more specifically, to limit her backpay in the event that her layoff was found unlawful under the Act. The timing of her discharge was also very suspicious. In this regard, almost all of the major issues that Respondent contends required further information from Leuch occurred during the 2005 hurricanes or before, management admittedly had knowledge of the existence of at least most of them by 2006 and before Leuch was laid off in December 2006, and Postill even discussed at least some of them with her prior to her layoff. Respondent offered no good explanation of why, suddenly right before the scheduled NLRB hearing, it was so urgent to have Leuch come in to provide information and/or explanations. Nor did Respondent explain why it offered her no alternative dates and times but, in each of its requests, presented her with only one specific meeting time. In both of her replies, Leuch stated that she could not make the proposed date and time because of trial preparation for the August 8 hearing.

Accordingly, I conclude that Respondent violated Section 8(a)(4) and (1) by discharging Leuch on August 7, 2007, because of her status as a potential recipient of backpay under the Act and as a witness in support of charges that the Union had filed against it.

Postill’s statement to Leuch about her being discharged to limit her financial remedy under the Act constituted an independent 8(a)(1) violation, in my view, but it was not alleged in the complaint and, in any event, is essentially encompassed in the subject of the discharge itself.

REMEDY

Because I have found that 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.

Since the Board determined that Leuch’s prior layoff was not unlawful, reinstatement and backpay remedies are not germane.

ORDER

The Respondent, SPE Utility Contractors, LLC, Port Huron, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because they are potential recipients of backpay under the Act and/or are witnesses scheduled to testify in unfair labor practice trials, or because they otherwise participate in National Labor Relations Board proceedings.

(b) 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 from the date of the Board’s Order, remove from its files any references to the August 7, 2007 discharge of Linda Leuch and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used in any way against her in the event of a recall.

(b) Within 14 days after service by the Region, post at its facility at Port Huron, Michigan, copies of the attached notice marked “Appendix A.”²⁸ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 7, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- 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 discharge or otherwise discipline you because you are potential recipients of backpay under the Act and/or are witnesses scheduled to testify in unfair labor practice trials, or

²⁸ 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.”

otherwise participate in National Labor Relations Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL remove from our files any reference to the unlawful discharge of Linda Leuch, and WE WILL, within 3 days thereof-

ter notify her in writing that this has been done and that the discharge will not be used against her in any way in the event of a recall.

SPE UTILITY CONTRACTORS, LLC