

**Cadence Innovation, LLC and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.** Cases 9–CA–43672, 9–CA–43673, and 9–CA–43674

January 16, 2009

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 17, 2008, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering brief and limited cross exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.<sup>3</sup>

<sup>1</sup> There are no exceptions to the judge’s recommended dismissal of allegations that the Respondent unlawfully discharged employee Shonttaye Thomas or unlawfully threatened employees with discharge because of their union activities.

The Respondent has implicitly 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his cross-exception and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any make-whole relief awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Goya Foods of Florida*, 352 NLRB 884 at fn. 2 (2008).

<sup>2</sup> The judge, applying *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), found that the Respondent unlawfully discharged employee Tawana Merriewether. To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007); *Desert Springs Hospital Center*, 352 NLRB 112 (2008). Chairman Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel’s initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer’s Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Chairman Schaumber agrees with this addition to the formulation. In this case, he finds a causal nexus between the Respondent’s union animus and Merriewether’s discharge.

In adopting the finding that the General Counsel established anti-union animus, Chairman Schaumber does not rely on the judge’s finding that the Respondent opposed unionization and hired an outside

ORDER

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

*Naima R. Clarke, Esq.*, for the General Counsel.  
*Craig M. Stanley, Esq. (Butzel Long, P.C.)*, of Detroit, Michigan, for the Respondent.

*Ava Barbour, Esq.*, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated cases in Detroit, Michigan, on March 25, 26, 27, and 28, 2008. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) filed the initial charge on March 16, 2007, the second charge on April 27, 2007, and the third charge on May 4, 2007. The Union filed amended charges in all three cases on May 25, 2007.<sup>1</sup> The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the order consolidating cases and the consolidated complaint on November 21, 2007. The complaint alleges that Cadence Innovation, LLC (the Respondent) discriminated in violation of Section 8(a)(3) and (1) of the Act by discharging employee Tawana Merriewether and disciplining, suspending, and discharging employee Shonttaye Thomas because of their union support and protected activities. The complaint also alleges that the Respondent violated Section 8(a)(1) by threatening to discharge employees because of their union activities. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

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

consultant to disseminate antiunion information to employees. See *Basic Industries*, 348 NLRB 1267 fn. 5 (2006)

<sup>3</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 Schaumber and Member Liebman 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.

<sup>1</sup> The charge numbers for the three cases were changed prior to the issuance of the consolidated complaint and notice of hearing: Case 9–CA–43672 had originally been designated Case 7–CA–50215; Case 9–CA–43673 had originally been designated Case 7–CA–50320; and Case 9–CA–43674 had originally been designated Case 7–CA–50338.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, a corporation, with its headquarters in Troy, Michigan, and offices and places of business throughout the State of Michigan, manufactures and sells automotive parts. In conducting these operations during the 12-month period preceding issuance of the complaint, the Respondent purchased and received at its Michigan facilities goods valued in excess of \$50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

The Respondent manufactures automotive parts at facilities in Michigan, including one known as the Masonic plant and another known as the Groesbeck plant.<sup>2</sup> In early 2007, the Union initiated an effort to become the collective-bargaining representative of employees at a number of the Respondent's facilities, including the Masonic and Groesbeck plants. The discharges of Merriewether and Thomas took place at the Masonic facility and the Respondent's alleged threat is purported to have been made at the Groesbeck facility.

The Masonic plant has between 300 and 600 hourly employees.<sup>3</sup> Those employees are organized into approximately six departments, including the IP line (where dashboards and door panels are assembled) and molding (where components are made for use by the IP line). Merriewether worked as a production operator on the IP line and Thomas as a hi-lo driver<sup>4</sup> in the molding department.

Jennifer Mort, the plant manager for the Masonic facility, testified that the Respondent opposed the union effort. Shortly after the Union began its campaign, the Respondent retained a labor consulting firm—Russ Brown and Associates—to help the company defeat the Union. In February 2007, Loren Clyburn, an employee of Russ Brown and Associates, began to campaign against the Union at the Masonic plant. He was present at the Masonic plant 5 days a week and would walk around

the facility's work areas talking to employees. He also held a series of group meetings during which he showed videotapes to employees. His objective was to disseminate negative information about unionization.

## B. Merriewether

## 1. Employment and union activities

Merriewether began working as a production operator at the Masonic plant's IP line on May 3, 2006, and was terminated 10 months later on March 15, 2007. She started as a temporary employee and during her period of temporary employment received a 45-day review rating of "above average," and a 90-day review rating that fell between "above average" and the highest possible rating of "excellent." In early November, the Respondent offered Merriewether the production operator position on a permanent basis, something it did for temporary employees who had performed well. Merriewether accepted and became a permanent employee on November 6, 2006. At the time the Respondent made her employment permanent, the Respondent said nothing to Merriewether indicating that, despite having already worked at the Masonic facility for 6 months, Merriewether would be considered a probationary employee. Merriewether was informed that she would receive a pay raise upon the successful completion of 90 days as a permanent employee. On February 5, 2007—90-calendar days after her employment became permanent—Merriewether received the raise.

Merriewether did not work every day between the time she became a permanent employee and the time she received the 90-day pay raise. During one period the Respondent suspended operations at the Masonic facility and temporarily laid off all the employees there, including Merriewether. Merriewether's layoff lasted from January 8 to 26, 2007. During her first 90 days of permanent employment, Merriewether was also out sick for 2 days, absent for personal reasons for 1 day, and late for work four times. The Respondent's attendance records also indicate that Merriewether was not scheduled to work on week-ends. Subsequent to receiving the 90-day raise, Merriewether was laid off for an additional 5 days, out sick for 2 days, and absent for personal reasons for 1 day. During that period she arrived late or left early on six occasions.

At about the same time that she received her 90-day raise, Merriewether found out about the Union's organizational campaign at Cadence and became an active and open union supporter. Merriewether collected union authorization cards from employees, distributed union buttons, and spoke to coworkers about the Union during breaks and outside of work. She also showed her union support by openly wearing a large number of pronoun buttons—as many as 20 at a time—at work each day. Although many Masonic employees wore pronoun buttons during the campaign, only a few IP line workers wore as many as Merriewether. Cindy Hollis, one of Merriewether's supervisors, was present when Merriewether engaged in some of her activity in support of the Union, including wearing buttons, distributing buttons, and talking about the Union in the break room. After Hollis saw Merriewether engaged in these activities, her behavior towards Merriewether changed dramatically.

<sup>2</sup> The Respondent acquired the Masonic plant, as well as other facilities, from Venture Industries in May 2005. The Respondent initially operated the former Venture facilities under the name "New Venture Industries," but in November 2005 the Respondent changed the name of the enterprise to Cadence Innovation.

<sup>3</sup> In an NLRB decision regarding the Union's representation petition, the number of hourly employees at Masonic was reported to be about 324. Decision of April 3, 2007, in Case 7-RC-23080. One of the witnesses at the hearing in the instant case estimated the number of employees at Masonic to be "400 plus" and another estimated that number at 600. Tr. 230, 782. There was no testimony about the number of hourly employees at the Groesbeck plant, but the April 3, 2007 decision set the number at 245, and also stated that the total number of Cadence employees that the Union was seeking to represent was approximately 1270.

<sup>4</sup> Hi-lo drivers are also sometimes referred to in the record as "material handlers."

Previously, Hollis had never stopped to watch Merriewether work. After becoming aware of Merriewether's union activities, Hollis began to stand and watch Merriewether for lengthy periods of time. At trial, the Respondent stipulated that it knew about Merriewether's union activities. (Tr. 205–206.)

Merriewether was subpoenaed by the Union to appear as a witness at a Board hearing regarding the representation petition. Merriewether was concerned that compliance with the subpoena would prevent her from arriving on time for her work shift, which started at 3:30 p.m. Therefore, she provided the subpoena to Hollis prior to the hearing. Merriewether attended the hearing on March 6 and 7. Ann Lipsitz, the human resources manager at the Masonic facility, also attended the hearing and observed that Merriewether was present and appeared ill during the session on March 6. After the March 6 session adjourned at 5:16 p.m., Merriewether continued to feel unwell, but came to the Masonic plant anyway. Upon arriving, Merriewether talked to Hollis and another supervisor about obtaining medical attention at the clinic the Respondent made available to employees. The supervisors told Merriewether to go home for the day and said nothing about charging her with an attendance "occurrence" for doing so. The next morning, March 7, Merriewether obtained treatment, and then continued to the Board hearing where she remained until she was released from her subpoena at about 5:05 p.m. Then, Merriewether drove a coworker home, continued to her own home to change into work clothes, and drove both herself and the coworker to the Masonic plant. Timecard records show that Merriewether reported for work that day at 7:31 pm.

## 2. Merriewether discharged

When she arrived at the Masonic facility following the March 7 hearing, Merriewether gave her supervisor documentation regarding the treatment she had obtained that morning.

Later the same day, Hollis issued a written attendance warning to Merriewether. The warning stated:

### ATTENDANCE COMMUNICATION RECORD

#### WRITTEN WARNING<sup>5</sup>

According to our records you have accumulated six occurrences of absence. Your attendance record is considered unacceptable and is resulting in a written warning. Any further absenteeism, in accordance to the attendance policy will result in progressive discipline.

Hollis asked Merriewether to sign the written warning, but Merriewether refused, stating that she had not incurred six occurrences under the attendance policy.

On March 15, Lipsitz told Merriewether that she was being terminated for accumulating a total of seven-and-one-third attendance occurrences. How this new, higher, total was arrived at is somewhat unclear since the Respondent's own attendance records show that Merriewether did not miss any time

<sup>5</sup> This is how the printed heading read when the document was presented to Merriewether. However, the version that was produced at trial from the Respondent's records had the printed word "Written" scratched out, and the handwritten word "Final" inserted in its place. GC Exh. 6.

subsequent to receiving the March 7 warning. When Merriewether disputed Lipsitz' explanation for the termination decision, Lipsitz responded that her "hands were tied" because Merriewether was still within her 90-day probationary period. Merriewether told Lipsitz that she was not within the 90-day probationary period because she had already received the 90-day pay raise. Lipsitz repeated that her hands were tied. Lipsitz showed Merriewether a document that stated Merriewether had "accumulated 7 1/3 occurrences of absence . . . resulting in termination of employment." Merriewether refused to sign the document. Merriewether's termination date was 317 days after the date when she started working as a production operator at the Masonic facility and 130 days after the date when the Respondent made her a permanent employee in that position.

## 3. Attendance policy

The Respondent has a written attendance policy that was in effect at the time Merriewether was discharged. (See GC Exh. 2.) Under that policy, employees are not discharged for absenteeism until they reach eight occurrences within a 12-month period. The policy states that excessive absenteeism will be subject to the following steps of progressive discipline: a verbal warning for five occurrences of absence; a written warning for six occurrences of absence; a final written warning for seven occurrences of absence; and termination for eight occurrences of absence. A full occurrence is incurred for any absence of 1 day in duration, except that only one occurrence will be incurred when an employee is absent for consecutive days due to an illness or injury. Employees incur one-third of an occurrence when they arrive late to work or leave work early. The policy provides that employees will not incur an occurrence for absences due to certain reasons, including compliance with subpoenas and "any other approved leave of absence." The attendance policy does not make any reference to probationary or newer employees being subject to a different attendance standard, nor does it mention terminating employees for less than eight occurrences during their initial period of employment.<sup>6</sup>

<sup>6</sup> I reviewed Merriewether's attendance record, GC Exh. 8, under the standards set forth in the written attendance policy. Based on this review, I find that Merriewether had, at most, seven legitimate "occurrences" and possibly as few as five at the time she was discharged. Merriewether was charged with a one-third occurrence for tardiness on March 7, but on that day she could not report to work at the start of her shift because she was at a Board hearing pursuant to subpoena. The record does not show that Merriewether unnecessarily delayed reporting to work once she was released to leave the hearing. Indeed, the coworker who Merriewether drove to work after the hearing, and who was assigned to the same shift as Merriewether, was not charged with being tardy. The Respondent's imposition of that one-third occurrence was plainly improper.

The Respondent also charged Merriewether with a full attendance occurrence on March 6, a day when she arrived late due to her compelled attendance at the Board hearing, and then left due to illness after supervisors told her to do so. In addition, the Respondent charged Merriewether with two occurrences for a period of illness that caused absences on 4 workdays that straddled a weekend. Under the Respondent's attendance policy only one occurrence is charged for consecutive days of absence due to illness. Since Merriewether did not work weekdays, I would expect her absence of 4 consecutive workdays to be

#### 4. Purported policy regarding probationary employees and attendance

In its brief, the Respondent contends that even though the Company's written policy is not to discharge an employee for poor attendance unless that employee accumulates eight occurrences, it legitimately discharged Merriewether for less than eight occurrences because she was a probationary employee. Not only is this purported policy on probationary employees unwritten, but the Respondent's records are free of the types of references one reasonably would expect to find if such a policy existed. For example, the Respondent's records do not designate whether an employee is probationary or not and do not generally memorialize the change in status from probationary to nonprobationary. The Respondent's written attendance policy makes no reference at all to a probationary period or to different attendance rules applying during such a period. The Respondent has a 14-page manual of employee guidelines, but that manual also makes no reference to the existence of a probationary period. (GC Exh. 22.) (Cadence Innovation Employee Guidelines, Revised 4/1/04). The Respondent does not notify employees when they have completed the purported probationary period. The Respondent did not show that newly hired permanent employees were told that they were probationary. To the contrary, the record shows that at least some employees, including Merriewether, were not told that they were probationary at the time they became permanent employees.

Even more telling is the fact that the Respondent's officials were unable to provide a clear or consistent description of the purported probation/attendance policy that supposedly justifies Merriewether's termination. Lipsitz initially testified that the probationary period ended after 90 days of employment. (Tr. 27.) Later she modified her testimony, stating that the probationary period ended after 90 workdays—by which she meant that weekends, holidays, and layoffs would not be counted towards completion of probation. (Tr. 59–60, 63–64.)<sup>7</sup> A completely different description of how the probationary period worked was offered by Jane Grewe, a senior human resources generalist with the Respondent. Grewe directly contradicted Lipsitz' testimony that the probationary period ended after 90

treated as a single occurrence, but the Respondent charged her with two occurrences for that period.

<sup>7</sup> Based on her demeanor and testimony, I found Lipsitz a less than credible witness regarding most disputed matters. She appeared unusually nervous while testifying and on more than one occasion I observed her looking around the hearing room in what appeared to be a search for assistance answering questions. This behavior was commented upon by counsel for the General Counsel. Tr. 88, 139–140. In one instance, counsel for the General Counsel stated on the record that an individual attending the hearing had prompted Lipsitz, something that I did not observe, but which neither Lipsitz nor counsel for the Respondent denied. Tr. 88. I also had the impression that Lipsitz was overly anxious to deny facts favorable to the General Counsel. For example, when asked whether she had seen Merriewether at the Board hearing on March 6 and 7, she responded: "I was relatively new at the company. I did not know all the employees by name at that point so I just can't tell you." Tr. 46–47. Later, however, Lipsitz stated that she knew who Merriewether was at the time of the March hearing and even recalled noticing that Merriewether was sitting behind her and was sick. (Tr. 151.)

workdays. According to Grewe, there was no official number of days after which the probationary period ended. (Tr. 707.) She testified that the Respondent's determination of whether an employee had completed the probationary period was made on a far more subjective basis than the one described by Lipsitz. Grewe said the determination takes into account "days worked, number of occurrences, input from the supervisor, days employed, workforce needs." She stated that there was no precise policy regarding how these factors were to be considered or requiring that the factors be applied in a uniform way. In fact, Grewe conceded that she "ha[d] no idea" how the Respondent's various supervisors and human resources staffers applied the factors. (Tr. 708.) At any rate, since Grewe had stopped working at the Masonic location in December 2006, she was not present at the time Merriewether was terminated in March 2007 and admitted that she did not know on what basis Masonic's human resources staff had designated Merriewether as a probationary employee. (Tr. 738.) In light of the evidence, I am astonished by the Respondent's attempt to characterize its probationary policy as "unwritten, but universally known and consistently enforced," Brief of Respondent at page 8, and I reject that characterization. I note moreover, that the Respondent failed to present the testimony of the human resources staffer—identified in the record as "Kristyn"—who made the decision to designate Merriewether as a probationary employee at the time of the discharge.<sup>8</sup> The Respondent did not explain why Kristyn was not called.

As stated above, the Respondent did not generally designate the probationary or nonprobationary status of employees in its records. To the extent that there is documentary evidence regarding this, that evidence suggests that any probationary period ended 90-calendar days after an employee was hired. The Respondent's records for attendance-based terminations include a space to enter the employee's "Probation Date." In the overwhelming majority of examples in the record, the Respondent left that space blank, but four such documents state a probation date. In three cases the stated probation date is 90-calendar days after the individual was hired and in the fourth case the probation date is a few days short of 90-calendar days.<sup>9</sup> Grewe was directly questioned about this and could not explain how the "probation date" notation could be squared with her testimony that probation did not end after 90-calendar days or any other fixed period of time. (Tr. 735–737.)

The evidence regarding the treatment of other employees does not substantiate the Respondent's contention that Merriewether was still a probationary employee when she was terminated on March 15. The Respondent did not identify a single employee, other than Merriewether, who it had employed for more than 90-calendar days and yet discharged in 2007 for being a probationary employee with fewer than eight occurrences. Nor did it identify a single such employee who it discharged in 2006 under such circumstances. In order to identify

<sup>8</sup> Lipsitz testified that Kristyn was the one who informed her that Merriewether was probationary. Lipsitz stated that she deferred to Kristyn's determination regarding this. Tr. 52.

<sup>9</sup> GC Exh. 31 (termination reports for W. Crosby, R. Lewis, K. May Jr., and A. Ruffin).

any employees who were discharged for poor attendance based on fewer than eight occurrences after more than 90-calendar days of employment, the Respondent has to reach back all the way to January 2005—a time when Venture Industries, not the Respondent, was operating the Masonic facility. See fn. 2, *supra*. Moreover, Lipsitz, who terminated Merriewether, did not begin working at the Masonic facility until almost 2 years after those terminations, and she was not shown to have ever terminated anyone other than Merriewether for fewer than eight occurrences. Even in the temporally remote cases identified by the Respondent, none of the employees terminated had been working for the Respondent as long as Merriewether when terminated.

The record also showed that during the period it was operating the Masonic facility the Respondent permitted other employees to continue working despite having accumulated more occurrences than Merriewether. Indeed, during 2006 and 2007, the Respondent gave written warnings, not termination notices, to 16 employees who had each accumulated more than eight occurrences. (GC Exhs. 35 to 50.) Also during that period, the Respondent waited to terminate nine employees until they accumulated more than eight occurrences. (GC Exh. 9.) One of those individuals was permitted to keep working until she reached 15-1/3 occurrences over twice the number of occurrences the Respondent permitted Merriewether before firing her.

The Respondent contends that it calculates an employee's total number of occurrences once monthly and at that time decides on discipline. (R. Br. at 7; Tr. 723–724.) According to the Respondent, this explains why so many employees were not terminated until after they had accumulated not only more than the seven-and-one-half occurrences it says Merriewether had, but in excess of the eight occurrences that should result in termination under the attendance policy. At best this contention is speculative and at worst it provides evidence of discrimination against Merriewether. It is speculative because the Respondent did not introduce attendance records or testimony showing that any of the comparator employees had, in fact, accumulated the excess occurrences during the same month that they reached the eight-occurrence benchmark. It suggests discrimination because the record shows that, in Merriewether's case, the Respondent departed from its practice of calculating an employee's occurrence total for purposes of attendance-based discipline on a monthly basis. On March 7, the Respondent issued a warning to Merriewether for accumulating six occurrences, and then it terminated her on March 15 based on the additional occurrences it says she incurred. The Respondent does not explain why it calculated Merriewether's occurrence on two occasions in March, barely a week apart, given its practice of performing such calculations for other employees on a monthly basis.

### C. Thomas

#### 1. Employment and union activities

Thomas began working at the Masonic facility in May or June 2004 and from November 2004 until his termination on May 2, 2007, his position was hi-lo driver. The hi-lo is a type of forklift used to transport parts and materials around the Ma-

sonic plant. Although Thomas was assigned to the Masonic plant's molding department, his duties as a hi-lo driver required him to move material to and from other departments at the plant.

Thomas was an active and open supporter of the Union. He passed out union authorization cards to employees and collected completed cards from them. He wore union buttons, hats, and shirts, and passed out union pamphlets. Lipsitz testified that she knew Thomas was an active union supporter. Thomas' supervisors, Ernie Haddix and Steve Las, both made comments to Thomas recognizing his prouion stance. Shortly after her March 21 start date, Mort began receiving complaints from Las, Haddix, and Rob Paquin (operational manager at Masonic facility), that Thomas was not keeping up with his work duties because of the excessive amount of time he spent out of his work area, talking to other employees.

#### 2. Friction between Thomas and Clyburn

##### a. Thomas and Clyburn introduced

As discussed above, the Respondent hired an outside consultant to help campaign against the Union. Clyburn, one of the consultant's employees, came to the Masonic facility on a daily basis, and would speak with employees informally and also hold group meetings at which he discussed negative aspects of unionization and played antiunion video presentations. The record indicates that friction began to develop between Thomas and Clyburn. At some point Thomas approached Mort and told her that he wanted to leave the facility because he did not know what Clyburn was doing there and had concerns that Clyburn was involved with a bomb threat received several months earlier. Mort had previously introduced Clyburn to employees at a meeting attended by Thomas. Nevertheless, Mort responded to Thomas' concerns by walking him over to Clyburn and introducing the two men on an individual basis.

In March or early April 2007, Clyburn was at the Masonic plant talking with a hi-lo driver named Thaddeus Fielder. Thomas attempted to intervene in the conversation and he and Clyburn traded insults. Clyburn stated that the conversation was only for "tall" me—a reference to the fact that Clyburn is considerably taller than Thomas. Thomas responded by commenting that Clyburn's clothes and hairstyle made him look "gay."

Clyburn and Thomas also had an exchange during an April 10 meeting that Clyburn held with a group of approximately 20 to 25 employees. At that meeting, Clyburn warned employees that if they decided to unionize the Union might initiate a strike. Thomas countered that there would only be a strike if the employees themselves voted to authorize it. Clyburn stated that if employees went on strike, the Respondent would hire people to do their jobs until the strike ended. Thomas then asked, loudly enough for the other employees in attendance to hear, "Mr. Clyburn, isn't it a fact that people that try to cross picket lines in [an] environment like this get their heads cracked?"<sup>10</sup>

<sup>10</sup> At trial, Thomas admitted that he said this. Tr. 313. Witnesses Clyburn and Karayan Crigler also testified that Thomas said something along these lines. (Tr. 259, 761–762.)

*b. Thomas counseled after interrupting his own work to tell other employees not to talk to Clyburn*

On April 11, Clyburn was talking with two employees in the IP line department. Thomas drove up to them on his hi-lo. As Thomas approached, Clyburn walked away. Thomas spoke with the two employees for 2 or 3 minutes. Thomas told the employees that when Clyburn tried to talk to them the best thing to do was to ignore Clyburn and talk among themselves. Thomas said that “[i]f you all talk to each other and don’t respond to him, he can’t do nothing but leave,” because “nobody’s going to talk to their self.” Thomas conceded that he was not engaged in any work activities during the time he was dispensing this advice. The two coworkers continued working while Thomas spoke to them. The conversation was cut short by Thomas’ supervisors—Las and Haddix—who told Thomas that he had to leave the area and should take care of his own business on his own time.

Later that day, Thomas was called to a meeting with Las and Kal Marogi (supervisor, IP line department). Marogi stated that “we don’t want you over [at the IP line], talking to them anymore, because we don’t want the line to stop.” Thomas responded that in the past he had “stood at the IP line” and talked to employees there “for hours and hours,” and “no one has ever said anything.” Marogi said: “Well, now we’re getting tight. We don’t want you over there.” Marogi presented Thomas with a document about the incident, which he described to Thomas as an oral writeup.

The record establishes that the Respondent permits employees to talk with one another while all the employees involved continue to work. However, the record also shows that the Respondent has an established rule prohibiting employees who are not engaged in work activities from remaining on the work floor to talk to other employees who are working. When employees are taking a break from work, they are required to go to a break area. Since at least April 1, 2004, the Respondent’s written employee guidelines have stated that “loitering” and “wasting time” were unacceptable conduct. (GC Exh. 22.) Two hi-lo drivers—Fielder and Shawn Schmidt—testified that the Respondent did not permit hi-lo drivers who were taking a break from work to remain in work areas talking to employees who were working. (Tr. 194–195, 276–278, 282–283.)<sup>11</sup> Thomas conceded that the Respondent had a rule against employees stopping work to talk to other employees who were working, but he asserted that this rule applied to other hi-lo drivers, not to him. (Tr. 353–354.) The evidence showed that the Respondent had disciplined employees for engaging in nonwork related conversations in work areas of the facility. One employee was given a warning in November 2006 after she left her work station without permission to attend to nonwork matters. (GC Exh. 52.) Two other employees received warnings in 2006 for talking on their cell phones while in work areas. (GC Exhs. 51 and 53.)

*c. Alleged threats of April 13*

On April 13, Thomas interrupted Clyburn’s conversations

<sup>11</sup> Fielder and Schmidt were both witnesses for the General Counsel, and Fielder described himself and Thomas as good friend. (Tr. 268.)

with employees on three more occasions. In the first instance, Thomas saw Clyburn talking to an employee named Veronica near the Masonic facility’s break area. Thomas walked up and told Veronica to ask Clyburn “how much is the company paying them to be here.”

On the second occasion, Clyburn was in the molding department talking to a hi-lo driver named Shawn Schmidt. Thomas drove up on a hi-lo, stopped about 2 feet from Clyburn, and began waving a document with information about Clyburn’s employer. Thomas urged Schmidt to ask Clyburn how much money he was making. Schmidt indicated to Thomas that he did not care how much Clyburn was making. Thomas said, “Ask him, Shawn. Ask him, Shawn.” Schmidt asked, and Clyburn responded that he “made a lot.” Then Clyburn and Thomas began talking back and forth. A couple of minutes after Thomas had interrupted the conversation, Schmidt drove away while Thomas and Clyburn continued talking to each other. As Thomas started to leave, he told Clyburn that he would crack his head.

Later on April 13, within minutes of the encounter discussed directly above, Clyburn and another consultant, Jason Schaeffer, were talking to Cynthia Baker—a production worker in the molding department. At the time Baker was working at a press. Thomas drove up on a hi-lo and told Clyburn and Schaeffer, “Leave her alone, she’s busy.” Thomas also told them, “She has a mind of her own.” In addition, Thomas spoke to Baker, warning that if she “sent out any bad parts” because she was distracted by her conversation with Clyburn, she would be terminated. At some point, Schaeffer left and Baker turned back to her own work. Clyburn and Thomas remained to continue their conversation. Baker testified that this conversation was a “little intense,” but that after she turned away the noise from the press prevented her from hearing what was being said.<sup>12</sup> It was not long after Baker resumed her work that Thomas started to drive away. Clyburn, who was on foot, offered to pause in order to allow Thomas to drive past. Thomas responded: “No, go ahead.” “I’ll get you outside. I’m not going to hit you now. I’ll wait till you get outside.”<sup>13</sup> Clyburn walked away without responding.

Within minutes of the April 13 incident in the molding department, Clyburn contacted the police and reported that Thomas had threatened him. Clyburn testified that he decided to

<sup>12</sup> A supervisor referred to in the record only by the name “Vermal,” was in the general area at the time of this exchange between Thomas and Clyburn. However, Vermal was not at the specific press where Baker, Thomas, and Clyburn were, and was not as close to the speakers as Baker was.

<sup>13</sup> I credit Clyburn’s account that Thomas threatened to “crack” his “head” and “get” him “outside.” Thomas denied the threats. In fact, contrary to the testimonies of Schmidt and Baker, as well as Clyburn, Thomas claimed that he had not said anything to Clyburn that day. Based on their respective demeanors and testimonies, and the record as a whole, I consider Clyburn far more reliable than Thomas. My credibility determinations regarding Clyburn and Thomas are discussed more fully later in this decision. In reaching the decision to credit Clyburn, I took into account that neither Schmidt nor Baker heard the threats he reported. However, this is of limited significance since both Schmidt and Baker testified that they had not heard everything that was said between Thomas and Clyburn during the exchanges in question.

make the report so that there would be a record in the event that he and Thomas crossed paths outside of work and “something happened to me or if I had to defend myself.” Police officers came to the Masonic facility and interviewed Thomas about the incident. The officers searched Thomas’ jacket. They asked Thomas whether he had threatened Clyburn and he answered, “[N]o.” The police told Thomas not to talk to Clyburn. They also told Thomas that they would advise the Respondent not to permit Clyburn to talk to Thomas.

### 3. The Respondent’s investigation

Lipsitz was the company official responsible for conducting the investigation of Clyburn’s allegation that Thomas had threatened him. She found out about the allegation directly from Clyburn, who came to her office and stated that he had called police officers to the facility in order to report threats made by Thomas. She testified that Clyburn appeared distressed. Lipsitz asked Clyburn to send her an e-mail describing what had happened.

On April 13, Lipsitz, Mort, Rob Paquin (operational manager, Masonic plant), and Glenn Tosta (molding department supervisor) met with Thomas immediately after the police finished interviewing him. Lipsitz told Thomas that there was an allegation that he had made a threat against another employee. Thomas said that he already knew Clyburn was the one making the allegation. Lipsitz informed Thomas that he was suspended with pay pending an investigation and asked whether he had anything to say regarding Clyburn’s allegations. Thomas’ response was that he had not said a word to Clyburn that day. At trial he confirmed that this had been his response, and again stated that he had not said a word to Clyburn on April 13. (Tr. 372.)

Mort and Lipsitz also met with Clyburn on April 13. Clyburn told them that Thomas threatened to physically harm him. Clyburn stated that Thomas had said something about splitting a head open and getting him outside of work. Mort met with Clyburn formally about the alleged threat once more and also discussed the matter with him informally during multiple meetings around the plant. Clyburn’s account of the incident remained generally consistent through these meetings. Clyburn also set forth his account of what happened on April 13 in an e-mail to Lipsitz. Clyburn wrote that he was having a conversation with Schmidt when Thomas interfered. Then, “[w]hile [Thomas] backed away on his hi-lo he told me that he would ‘crack my head.’” Clyburn said that the incident near Baker’s press took place about 10 minutes later. He stated that he was having a conversation with Baker, when Thomas interrupted and eventually stepped between them. Regarding the alleged threat, Clyburn wrote: “Thomas hop[p]ed back on his hi-lo, I started to walk behind Mr. Thomas but told him to go ahead. Mr. Thomas replied ‘naw you go, don’t worry about me hitting you in here imma wait till we get outside.’”

Lipsitz also interviewed Schmidt and Baker. Both of these witnesses contradicted Thomas’ claim that he had not even talked with Clyburn that day. According to Schmidt and Baker, Thomas and Clyburn did exchange words. Schmidt did not hear Thomas make any threats, but he was not present for the entire exchange and it is not clear that he could hear everything that

was said even while he was present. Similarly, Baker did not hear Thomas make any threats, but she also did not hear everything that was said between Thomas and Clyburn during the conversation at issue. Lipsitz did not interview Schaeffer, who was present at the start of one of the incidents on April 13. Nor did she interview Vermal who was in the general vicinity when the exchange involving Baker took place, but was not actually at the press where the incident occurred. Baker had been in closer proximity to the speakers than was Vermal.

As part of the investigation, Lipsitz also interviewed two employees regarding the April 10 group meeting at which Thomas asked Clyburn whether it was true that people who crossed picket lines would have their “heads cracked.” The two employees both told Lipsitz that they had heard Thomas say something along those lines, although each remembered Thomas threatening to commit the violence himself.

On April 16—3 days after Thomas was suspended pending an investigation of the allegations that he had threatened Clyburn—Thomas called an employee telephone hotline service and asserted that Clyburn had threatened him. According to the report generated by the third party that operated the hotline service, Thomas stated that on April 6 he was being harassed by Clyburn and did not know who Clyburn was. Thomas stated that he complained about this to Mort, but that she did “nothing.” According to the hotline report, Thomas also stated that on April 10, Clyburn had said that he could “take him on” and that if they met outside of work Thomas would “probably never return.” Thomas’ hotline call was the only complaint that Mort received from an employee about Clyburn’s behavior during the entire union campaign.

On April 17, Lipsitz and Mort had a second interview with Thomas regarding Clyburn’s allegations. Before coming in for the interview, Thomas stopped outside the plant and distributed flyers to employees who were entering. The flyer stated, *inter alia*, that Thomas had been “terminated” based on “a false accusation by a [Russ Brown Associates] employee.”<sup>14</sup>

Later that day, at the April 17 interview, Lipsitz and Mort asked Thomas about the alleged threats of April 13. They also asked him about his comment/question at the April 10 group meeting regarding people getting their heads cracked, as well as about the flyer he had been distributing and his hotline report.<sup>15</sup> Regarding the events of April 13, Thomas vacillated between saying that he had not talked to Clyburn at all and saying that they had not only spoken, but engaged in a loud argument. Regarding the April 10 group meeting, Thomas denied making the comment/question about people getting their heads cracked for crossing picket lines. When asked about distributing the

<sup>14</sup> I credit Lipsitz’ testimony that she observed Thomas distributing this flyer. Thomas denied that he passed out these flyers, but his account was shifting. At various times he stated both that he had been distributing a different flyer that day, and that he had not distributed any flyer at all. Moreover, for reasons discussed below I consider Thomas a particularly unreliable witness. Thus, although I found Lipsitz less than fully credible, see fn. 7, *supra*, I consider her testimony generally more credible than that of Thomas and reliable on this subject.

<sup>15</sup> My account of this meeting is based largely on the testimony of Mort, who I considered a very credible witness based on her demeanor and testimony, and the record as a whole.

flyer earlier that day—something Lipsitz had witnessed him doing—Thomas denied that he had distributed a flyer. Either Mort or Lipsitz told Thomas that the statement in the flyer that he was terminated was false since he was suspended with pay pending the outcome of the investigation. Then Thomas said that it was true that he had been distributing a flyer, but that it was not the one stating that he had been discharged. Lipsitz and Mort also asked Thomas about his hotline report, and in particular his statement that Mort had done “nothing” about his complaint. As discussed above, when Thomas told Mort that he was uncomfortable because he did not know Clyburn, Mort had led Thomas over to Clyburn and introduced the two. When confronted regarding the statement that Mort had done “nothing,” Thomas replied that the operator taking his report misquoted him. Mort testified that, based on the interviews with Thomas, she concluded that he was not being truthful and that, after completing the April 17 interview, she was leaning heavily towards crediting Clyburn regarding the events of April 13.

At the recommendation of legal counsel, the Respondent requested a criminal background check for Thomas as part of the investigation of Clyburn’s allegation. Mort credibly testified that this was done to determine if there was anything in Thomas’ background suggesting that he had a propensity for violence consistent with the threat Clyburn had reported. She stated that by the time she requested the background check, the Respondent “felt strongly” that “termination was justified,” but because of the ongoing union campaign, and the likelihood of an unfair labor practices charge, the Respondent wanted to have “all our i’s dotted and our t’s crossed.” The background check revealed that Thomas had been charged with aggravated assault and that, under the terms of a plea agreement, convicted of misdemeanor assault in 2001. The Respondent also reviewed Thomas’ applications, and discovered that on both his 2004 application and his 2005 application, Thomas falsely stated that he had never been convicted of a misdemeanor.<sup>16</sup>

#### 4. Respondent terminates Thomas

The Respondent terminated Thomas’ employment effective May 2, 2007. Mort was the official who made the termination decision. The reason Mort gave for her decision was that Thomas made a threat of violence in the workplace and had falsified his application. According to Mort, she credited Clyburn’s allegations over Thomas’ denials primarily because Clyburn’s account was consistent over multiple interviews while Thomas’ account was inconsistent. Indeed, Mort testified that she was “alarmed” at the way Thomas “twisted” things between interviews and even within a single interview. Although Mort herself did not interview other witnesses to the alleged threat, her understanding was that Lipsitz had interviewed the witnesses and that their accounts were more consistent with Clyburn’s than with Thomas’. Mort had not received a single complaint about Clyburn’s conduct in the plant aside from the one made

by Thomas.

Mort and Lipsitz each testified that Thomas’ union activity was not a factor in the decision to terminate him, but that they felt that, in light of such activity, the Respondent had to be particularly cautious before disciplining Thomas. Before finalizing the decision to terminate Thomas, Mort consulted with the Respondent’s senior vice president of human resources (Ronda Coogan), the Respondent’s senior vice president of operations (Eric White), and legal counsel (Craig Stanley), as well as with Lipsitz. None of those individuals disagreed with Mort’s decision to terminate Thomas.

The record shows that the Respondent has written policies prohibiting employees from threatening coworkers and from falsifying applications. The Respondent’s safety handbook states that it has a “zero-tolerance policy towards workplace violence,” and that “[a]ny such act or threat may lead to discipline, up to and including termination.” The Respondent’s employee guidelines state that “falsifying records” is “unacceptable and will not be tolerated by the company.” In addition, both applications completed by Thomas state that “any misrepresentation or concealment of information, regardless of when it is discovered, will be sufficient grounds for dismissal from employment.”

The record shows that in 2006 and 2007 the Respondent terminated a number of employees other than Thomas for making threats or engaging in disruptive arguments. In August 2006, the Respondent terminated an employee for threatening a coworker. (Emp. Exh. 16.) The Respondent terminated an employee in March 2007, for “threatening another employee.” (Emp. Exh. 15.) In May 2007, the Respondent discharged an employee for engaging in a disruptive argument with another employee in violation of the Respondent’s prohibition on “discrimination, harassment, intimidation, teasing, fighting, or use of profanity and/or ‘fighting words.’” (GC Exh. 21.) This employee had previously been suspended for “fighting” with another employee, but the record does not reveal the details of the prior fight, including whether it was physical or verbal in nature. In another instance the Respondent suspended, but did not terminate, two employees who had an argument that did not include any threats of violence. (GC Exh. 19, GC Exh. 20; Tr. 149.)

The record also showed that the Respondent had terminated other employees for including false information on their applications. In 2006, the Respondent terminated approximately 20 employees at another facility after background checks revealed that they had lied about their criminal backgrounds when completing their applications. (Tr. 601–602.) The Respondent has also terminated three employees at the Masonic facility because they made false statements on their applications. (Emp. Exhs. 10, 11, and 13; Tr. 741.) Coogan, the Respondent’s vice president of human resources gave uncontradicted testimony that the Respondent disqualifies all applicants who have been convicted of misdemeanors involving violence.

#### 5. Credibility of Clyburn and Thomas

Neither Clyburn nor Thomas was an excellent witness at trial, but I found Clyburn by far the more credible of the two. In general, Clyburn appeared to be a forthcoming witness try-

<sup>16</sup> The record contains two employment applications completed by Thomas. The first one, dated May 26, 2004, was submitted by Thomas at the time the Respondent acquired the Masonic facility from Venture. Among the questions that both applications ask is, “Have you ever been convicted of a criminal misdemeanor or felony?” On both applications Thomas answered this question “no.”

ing his best to accurately recount events of a year earlier. I did not have the impression that he was attempting to slant or exaggerate his testimony to favor the Respondent. Although Clyburn's memory regarding details failed him at times, he demonstrated a willingness to admit such failures instead of becoming defensive or evasive. In some instances, the Respondent's counsel attempted to suggest answers when Clyburn could not remember something, but Clyburn generally resisted having words put in his mouth. (See, e.g., Tr. 757.) I also note that it is uncontroverted that during a group meeting Thomas had commented to Clyburn that people who cross picket lines get their "heads cracked." Although this was a different incident than the one in which Thomas threatened to "crack" Clyburn's "head," the similarity of the formulations lends minimal additional credence to Clyburn's account of the threat. In addition, the evidence showed that Clyburn had been involved as a consultant in approximately 30 union campaigns, but never made a police report or accusation about any employee other than Thomas. This undercuts any suggestion that making such accusations was simply one of Clyburn's standard tactics in fighting unions. Moreover, no witness, other than Thomas, claimed that Clyburn had behaved in anything other than an appropriate manner. Indeed Baker, an employee who testified for the General Counsel, stated that Clyburn conducted himself in a professional manner.

Thomas' testimony, on the other hand, was among the most internally inconsistent and evasive—indeed dizzying—I have ever had presented to me. The inconsistencies and reversals are too numerous to recount, but I discuss a portion to give the flavor of the testimony. In both his sworn testimony and during the Respondent's investigation, Thomas denied that he had said a word to Clyburn on the day that he was alleged to have made the threats. After even Schmidt and Baker—witnesses for the General Counsel—testified that Thomas and Clyburn had been talking back and forth that day, Thomas returned to the stand and stated that not saying "a word" did not mean not saying anything, but rather that he had not made a threat. (Tr. 789.) Elsewhere he claimed that he and Clyburn had not had a conversation on April 13. This, too, was contrary to the testimony of all the other witnesses who testified about the incident in question. At one point Thomas admitted that he and Clyburn spoke to each other, but claimed that it was not a "conversation" because, while Clyburn was talking to him, he had only responded, "yeah," "uh-huh," or "whatever." (Tr. 373.) Thomas also testified that this exchange of words did not constitute "talking to" Clyburn. *Id.*

When asked why he stated on his 2004 application that he had never been convicted of a misdemeanor, Thomas answered that he was "quite sure" the application had only asked about felony convictions. (Tr. 345–346.) When confronted with his completed 2004 application, which explicitly asked about misdemeanor convictions, he tried another explanation, stating that he had not been convicted of a misdemeanor because he had not been to prison and someone was not convicted unless they had been incarcerated. (Tr. 348, 351–352.)

His testimony was also shifting regarding the question of the hotline complaint he made after being suspended. First he affirmed that the written hotline report was an accurate statement.

(Tr. 333–334.) As discussed above, in the hotline complaint he stated that Mort had done nothing when he told her that he felt threatened and harassed by Clyburn. When asked about that portion of his hotline complaint, Thomas reversed field and stated that he had not reported the threats and harassment to Mort at all, but rather to Las and Haddix. (Tr. 366–367.) When asked about the portion of his hotline report in which he stated that Clyburn had accused him of threatening to use a gun, Thomas stated that the portion of the written report misrepresented what he had said. (Tr. 392–393.) In the hotline report, Thomas stated that Clyburn had warned that if they met outside of work, Thomas would never return. When Thomas was asked why he waited until after his own suspension to make the hotline report regarding Clyburn's supposed threat, Thomas answered that Clyburn had not made a threat "so it was nothing for me to report." (Tr. 388–389.) This contention is contrary not only to his hotline report, in which Thomas both stated that Clyburn made threats and reported plainly threatening statements by Clyburn, but also to his own testimony that Clyburn had threatened him. (Tr. 390.)

Thomas' testimony was also shifting on the subject of the Respondent's tolerance for him talking to other employees while he was not working. Thomas acknowledged that the Respondent had a rule prohibiting other employees who were not working from talking to other employees who were working. At first Thomas claimed that this rule applied to other employees, but not to him. (Tr. 353–354.) He recounted telling a supervisor that he had "stood" at the IP line and talked to employees for "hours and hours" and that no one had said anything to him about it. (Tr. 338.) Then he denied that he ever "stood around for numerous amount of time just talking to an employee while they were working." (Tr. 355.) When asked whether it was his "habit" to talk to other employees when he himself was not working, he first answered "I wouldn't call it a habit if it's something that the company allows you to do." (Tr. 356.) Then he denied that it was a habit because "A habit is something . . . you can't break." *Id.* Then he asserted that every employee at the Masonic facility shared the habit of stopping work to talk to other employees who were working (Tr. 356–357), thus undercutting his initial assertion that the rule prohibiting such behavior applied to other employees.

Thomas also conveyed an unnervingly grandiose view of his role at the Masonic facility. He stated that he had "a lot of say so in Cadence's plant," "[m]ore say so than probably [the Respondent's] own management did." (Tr. 383–384.) He repeatedly referred to himself in the third person. (See, e.g., Tr. 357) (No official "ever said anything to Shonttaye about conversating with anyone throughout that whole plant.") (Tr. 343.) ("Here is Shonttaye.") (Tr. 358) ("[o]ther employees would see Shonttaye"). Thomas' self-serving testimony that he was so important as to be completely above work rules that applied to other employees was not corroborated, was contradicted to some extent by his own testimony, and based on my review of the record as whole, was not credible.

#### *D. Alleged Threat by Dmytryszyn to DeGrandchamp*

The complaint also alleges a violation at the Respondent's Groesbeck plant. According to the complaint, on about Febru-

ary 12, 2007, Donald Dmytryszyn—general manager of the Groesbeck plant—threatened to terminate employees because of their union activities. Dmytryszyn has been the general manager of the Groesbeck plant since approximately 2003. Dmytryszyn testified that although he had been a member of the Union years ago, he opposed the union campaign at the Groesbeck plant.

To support the allegation that Dmytryszyn made an unlawful threat, the General Counsel relies on the testimony of employee Beverly DeGrandchamp. DeGrandchamp has worked at the Groesbeck plant since April 2001, and at the time of the events in question held the position of operator/floor support. Dmytryszyn and DeGrandchamp know one another not only from the Groesbeck plant, but also from having worked together at another company approximately 18 years earlier. DeGrandchamp was an open supporter of the Union who attended union meetings and wore pronoun buttons at work during the campaign. Dmytryszyn testified that he knew that DeGrandchamp supported the Union.

DeGrandchamp testified that during the campaign, Dmytryszyn “harassed” her “every day” about wearing union buttons. Regarding the one unlawful statement alleged in the complaint, DeGrandchamp stated that it occurred on February 12, 2007,<sup>17</sup> when she was at a press operated by an employee named Mary Vanidour. DeGrandchamp testified that she had come there to inform Vanidour that certain components were unavailable. While DeGrandchamp was at Vanidour’s press, Terry Robertson,<sup>18</sup> an employee from another department, passed by and DeGrandchamp asked him about the weather. Robertson stopped to answer. At that moment, Dmytryszyn saw the three employees. According to DeGrandchamp, Dmytryszyn “threw his hands up in the air,” then approached and asked “[A]re you talking about union business.” DeGrandchamp testified that she answered, “no,” and said that she was informing Vanidour about the lack of components. Then Robertson started off in one direction, and DeGrandchamp and Dmytryszyn started in another direction. According to DeGrandchamp as they began to walk away, Dmytryszyn said, “Well who can I get rid of, you, him, or her?” DeGrandchamp testified that she just kept walking away without answering Dmytryszyn. DeGrandchamp stated that Robertson asked her, “Did he just say what I thought he said?” and DeGrandchamp answered, “Yes, he did.”

DeGrandchamp also testified about a second threat by Dmytryszyn. This threat is not alleged in the complaint and DeGrandchamp could not say when it occurred. At any rate, DeGrandchamp stated that she was walking in the plant when Dmytryszyn said, “I’m going to get rid of you.” According to DeGrandchamp she said, “Go ahead and fire me,” and Dmytryszyn responded, “No I’m not going to fire you; I’m going to send you down to Chesterfield and you can be union steward

down there.”<sup>19</sup> DeGrandchamp stated that in the years she had worked with him, she had never known Dmytryszyn to discipline anyone for union activity, but she stated that it would not surprise her if he did so.

The Respondent called Dmytryszyn as a witness. He denied that he had threatened to terminate any employees based on their support for a union. He stated that he had never disciplined anyone because of their union support and that during the course of the union campaign he did not discharge any employees who happened to be union supporters. He also denied that he ever criticized DeGrandchamp for wearing a union button; asked employees if they were talking about the Union or union business; threatened to get rid of any known union supporters; or threatened to transfer any employee to Chesterfield so that they could be union steward there. According to Dmytryszyn, he not only did not comment about DeGrandchamp’s buttons every day, but did not even see her on a daily basis. He stated that he did not know anything about the accusation regarding the February 12 threat until he received the unfair labor practices charge in May 2007.

As presented, the factual issue here comes down to a credibility determination between DeGrandchamp and Dmytryszyn. It would have been helpful to have the testimony of Vanidour and Robertson regarding the threat that DeGrandchamp says those coworkers witnessed on February 12, but no party chose to call those individuals as witnesses or explain the failure to do so. After considering the respective demeanors and testimonies of DeGrandchamp and Dmytryszyn, and the record as a whole, I find that Dmytryszyn’s denials are at least as credible as DeGrandchamp’s allegations. It is true that DeGrandchamp’s testimony had the virtue of being more detailed than Dmytryszyn’s, but then again Dmytryszyn could not be expected to give specifics about a conversation that he says did not occur. Moreover, I considered some elements of DeGrandchamp’s testimony implausible. She stated that Dmytryszyn harassed her every day about wearing union buttons. It is somewhat implausible that the manager of a plant with over 200 employees would target a particular employee for daily harassment simply because that employee was wearing a union button, something that many of the Respondent’s other employees were also doing. Moreover, if Dmytryszyn’s harassment of DeGrandchamp was so unrelenting, I would expect that the relevant charge, which was filed towards the end of the union campaign, would have alleged more than a single unlawful statement by Dmytryszyn. However, the portion of the charge relating to Dmytryszyn mentions only a single, 3-month-old, allegation. In addition, neither DeGrandchamp nor the Union explains why the charge allegation regarding the February 12 threat was not made until May 24.

For the reasons discussed above, I conclude that the General Counsel has failed to carry its burden of showing that Dmytryszyn more likely than not made the February 12 statement alleged to be an unlawful threat.

#### *E. Complaint Allegations*

The complaint alleges that the Respondent violated Section

<sup>17</sup> According to DeGrandchamp, this was before the Union filed its representation petition, but after the start of the union campaign and her own display of pronoun sentiment

<sup>18</sup> DeGrandchamp testified that she believes this individual’s last name was “Richardson,” but Dmytryszyn stated with more confidence that the last name “Robertson.”

<sup>19</sup> Chesterfield is a unionized facility operated by the Respondent

8(a)(3) and (1) of the Act by discriminating against employees because of their union and concerted activities: on about March 15, 2007, when it discharged Merriewether; on about April 11, 2007, when it issued a written counseling warning to Thomas; on about April 13, 2007, when it suspended Thomas; and, on about May 2, 2007, when it discharged Thomas. The complaint also alleges that the Respondent violated Section 8(a)(1) on about February 12, 2007, when Dmytryszyn threatened employees with discharge because of their union activities.

### III. ANALYSIS AND DISCUSSION

#### A. Section 8(a)(3) and (1)

##### 1. Merriewether

The General Counsel argues that the Respondent unlawfully discharged Merriewether on March 15, 2007, because she was an open and active union supporter. The Respondent counters that it terminated Merriewether because of poor attendance. In *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or other protected activity in violation of Section 8(a)(3) and (1). Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by anti-union considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or union activity. *Intermet Stevensville*, 350 NLRB 1273 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Intermet Stevensville*, *supra*; *Senior Citizens*, *supra*.

The General Counsel has met its initial burden with respect to Merriewether. The evidence shows that Merriewether engaged in an array of prounion activities. These included wearing union buttons, distributing union buttons to other employees, collecting union authorization cards, and discussing the Union with other employees during breaks. As discussed above, the Respondent stipulates, and the record shows, that the Company had knowledge of Merriewether's union support and activities. The evidence also establishes that the Respondent harbored antiunion animus. Mort testified that the Respondent opposed unionization at the Masonic facility, and the record shows that it hired an outside consultant to disseminate anti-union information to employees.

The Respondent's officials began treating Merriewether differently when they discovered that she was engaged in activities on behalf of the Union. After Hollis saw Merriewether engaged in prounion activities, she began to stand for long periods of time watching Merriewether work. Prior to that time Hollis had spent almost no time at all observing Merriewether. In addition, the Respondent departed from its practice of calcu-

lating attendance occurrences (and deciding on attendance-based discipline) on a monthly basis, by calculating Merriewether's occurrences on March 7 and again on March 15, and disciplining her on both occasions. The Respondent does not explain why in Merriewether's case it reviewed attendance on a weekly basis, rather than a monthly basis as with other employees. See *Metropolitan Transportation Services*, 351 NLRB 657, 661 (2007) (departure from past practice may support an inference of unlawful motivation); *Intermet Stevensville*, 350 NLRB at 1327 (same); *Exelon Generation Co.*, 347 NLRB 815 *fn.* 3 (2006) (same).

The timing of Merriewether's discharge further supports finding a connection between that discharge and antiunion animus. During the months prior to the union campaign, the Respondent gave Merriewether two favorable performance reviews. On February 5, the Respondent granted Merriewether a pay raise, which marked successful completion of 90 days as a permanent employee. Then just a month later, after becoming aware of Merriewether's union activities, the Respondent issued a written warning to Merriewether for attendance, even though most of the absences were accumulated before Merriewether's recent raise. The warning was issued on the very day that Merriewether attended a Board hearing as a potential witness for the Union. Eight days after it issued the warning, the Respondent dismissed Merriewether. The reason given for the discharge was poor attendance, even though Merriewether's attendance had been perfect since she received the March 7 warning. Such timing is an important factor in assessing discriminatory motivation and in this case shows a link between Merriewether's termination and the employer's effort to defeat the Union. See *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), *enfd.* 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), *enfd.* sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed. Appx. 236 (4th Cir. 2001).

Since the General Counsel has met its initial burden, the burden shifts to the Respondent to prove that it would have terminated Merriewether even in the absence of her union support and activities. The Respondent has not met that burden. The Respondent's written and established policy on progressive discipline for attendance calls for the Company to wait until an employee has accumulated eight occurrences before terminating the employee for attendance. Merriewether had, at most, seven-and-one-third occurrences, and arguably as few as five occurrences, see, *supra*, footnote 6, when the Respondent discharged her for attendance. The Respondent asserts that contrary to its written policy it legitimately discharged Merriewether for fewer than eight occurrences based on its policy regarding probationary employees. As discussed above, not only is this purported probation policy unwritten, but is not even alluded to by the Respondent's written attendance policy or its employee guidelines manual. Such unwritten policies are ready tools for discrimination and are suspect. *Planned Building Services*, 347 NLRB 670, 715 (2007) (the fact that a putative policy is unwritten lends support to a finding that it is pretextual); *Kentucky General, Inc.* 334 NLRB 154, 161 (2001) (policy on which union applicants were rejected is pretextual where, *inter alia*, policy was unwritten); *Sioux City Foundry*,

241 NLRB 481, 484 (1979) (alleged policy relied on to reject applicants who were strikers from other employers “is a mere pretext” where, inter alia, “this ‘policy’ was not written down anywhere”); see also *Dunning v. National Industries*, 720 F.Supp. 924, 931 (M.D. Ala. 1989) (“Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination.”). If the Respondent had a policy of requiring employees to complete a probationary period, it seemed inexplicably determined to keep that policy a secret not only from employees but from itself. The Respondent did not notify employees when they completed the supposed probationary period and its personnel records did not generally state an employee’s probationary/nonprobationary status. Furthermore, in its brief, the Respondent argues for the highly subjective and indeterminate probationary period policy that Grewe testified about and ignores the testimony of Lipsitz that probation ended after 90 days or workdays. The danger that an unwritten policy will become a ready tool for discrimination is exacerbated where that policy is described in terms that are as uncertain and subjective as those the Respondent offers here. See *Kentucky General, Inc.*, 334 NLRB at 161 (policy found to be pretext for discrimination where, inter alia, it is unwritten and conveniently vague).

My doubts about the legitimacy of the Respondent’s claim that Merriewether was discharged pursuant to an unwritten policy regarding probationary employees is heightened by the fact that the Respondent is a rather large employer that has reduced many of its other policies to writing. The Respondent not only has a detailed written policy on discipline for attendance, but also maintains a handbook of employee guidelines, and a handbook on safety practices. Why would the Respondent reduce so many of its policies to writing, but not include, or even reference, the purported policy on probation? Such a probationary policy would be extremely important to the Respondent’s operations—controlling discharge decisions and nullifying the Respondent’s written attendance policy for a significant number of employees. Yet the Respondent urges me to believe that it had such a probationary policy and failed to put the policy in writing, inform employees when they completed probation, or record the completion of probation in employees’ personnel files.

The testimony of current and former company officials regarding the purported probationary policy did not help the Respondent to meet its burden. As discussed above, those officials did not describe the supposed probationary policy with enough consistency or clarity to permit a conclusion that such a policy applied to Merriewether. According to their testimony, either the probationary period lasted for 90 days (in which case Merriewether had completed probation), or for 90 days of actual work (in which case Merriewether still had completed probation, unless one discounts her 6 months of temporary employment), or for an indeterminate period of time based on multiple, sometimes subjective, factors that officials were not required to apply consistently (in which case, who knows?). Moreover, the Respondent failed to present the testimony of the company official—“Kristyn”—who supposedly made the decision to designate Merriewether as probationary. Instead, it presented the testimony of Grewe, and asks me conclude that nondis-

crimatory application of the highly subjective and indeterminate probationary policy that Grewe described was the reason for Merriewether’s discharge. The Respondent’s reliance on Grewe’s testimony is even more unpersuasive given that Grewe had no involvement in Merriewether’s termination, was not working at the Masonic facility at the time, and conceded that she did not know how other company officials applied the probationary policy factors.

To the extent that the Respondent’s argument has any facial appeal, it attaches because an employer could reasonably choose to treat probationary employees more strictly regarding attendance. But even assuming for the sake of argument that the Respondent had such a probationary/attendance policy, the Respondent would still not have met its burden in this case because the evidence does not show that Merriewether was a probationary employee. The Respondent did not introduce evidence showing how the purported policy on probation was applied in Merriewether’s case; nor did it produce records documenting Merriewether’s supposed probationary status. To the extent that the record indicates the Respondent applied a probationary period in some instances, it would be the 90-calendar-day period. This is supported by the Respondent’s own attendance-based termination reports that state a “probation date” approximately 90-calendar days subsequent to an employee’s hire date. This alternative is also lent credence by the Respondent’s policy of giving employees a pay raise to mark successful completion of 90-calendar days as a permanent employee. This evidence does not establish that the Respondent actually had a general practice of applying a probationary period of any kind to individuals who, like Merriewether, were made permanent employees after an extended period of temporary employment, but only suggests that if such a policy existed it most likely used a 90-calendar-day probation period. There is no dispute that Merriewether was terminated more than 90 calendar days after her date of hire.

Lastly, even assuming that the probationary policy described by Grewe was being applied by the Respondent, the Respondent has failed to show that Merriewether would have been considered probationary under that policy. Merriewether had been working as a production operator at the Masonic facility for approximately 10 months—130 days of that time as a permanent employee. The Respondent identifies employees who it claims it considered probationary for purposes of attendance-based discipline, but not a single one of those employees had worked for the Company for more than 90-calendar days, much less for as long as Merriewether. The Respondent does identify a small number of employees who were terminated in January 2004 for accumulating fewer than eight occurrences over a period of more than 90-calendar days, but those employees were all terminated by the Respondent’s predecessor Venture, not by the Respondent. Even in those cases, none of the employees involved had been employed for as long as Merriewether. On the other hand, the evidence establishes 25 instances in 2006 and 2007 when the Respondent permitted employees to continue working despite the fact that they had more occurrences than Merriewether. For these reasons, I conclude that the Respondent has failed to meet its burden of showing that it would have terminated Merriewether if not for her union

support and activities.

I find that the Respondent discriminated against Merriewether in violation of Section 8(a)(3) and (1) by discharging her because she supported the Union and engaged in protected activities.

## 2. Thomas

*Written Counseling:* The General Counsel alleges that the Respondent singled out Thomas in violation of Section 8(a)(3) and (1), when, on April 11, 2007, it issued written counseling to him for talking to employees in the IP line department. The Respondent counters that it counseled Thomas pursuant to its policy of prohibiting employees who are not working from remaining in work areas of the plant to talk to coworkers.

The General Counsel has met its initial *Wright Line* burden with respect to this allegation. The evidence showed that Thomas was an open union supporter who passed out and accepted authorization cards for the Union, distributed pronoun pamphlets, and wore pronoun buttons, hats, and shirts to work. Thomas also repeatedly intervened in the conversations that Clyburn, the Respondent's antiunion consultant, was having with employees. There is no dispute that the Respondent was aware of Thomas' pronoun stance and activities. Lipsitz testified that she knew he was an active union supporter. Clyburn, and Supervisors Haddix and Las, all made comments to Thomas that recognized his support for the Union. As I found in the discussion of the discrimination against Merriewether, the evidence shows that the Respondent harbored animosity toward the Union and union activity. In addition, the evidence shows that supervisors made comments to Thomas disparaging unions.

I conclude, however, that the Respondent satisfied its responsive burden by showing that it would have issued written counseling to Thomas even absent his union support and other protected activities. The evidence showed that, on April 11, Thomas stopped working and went to talk to employees in another department while those employees were working. Thomas admits that he engaged in this conduct and that the conduct was observed by his supervisors. Thomas' conduct was contrary to the Respondent's established policies. Since at least April 2004, the Respondent's written employee guidelines expressly prohibited employees' from "loitering" and "wasting time." Two witnesses for the General Counsel testified that the Respondent did not permit an employee who had stopped working to remain in work areas talking to employees who were working. The Respondent showed that in 2006, before the Union's petition, it had issued warnings to other employees who were talking in work areas of the facility. The General Counsel did not produce any credible evidence that the Respondent knowingly permitted employees who were not working to remain in work areas talking to employees who were working.

As discussed above, I do not credit Thomas' claim that the Respondent's rule against wasting time applied to other employees but not to him. On the face of it, that is a rather astonishing claim and the evidence presented by the General Counsel does not overcome its facial implausibility. Thomas was not a credible witness and, as discussed above, his testimony on this

point was shifting and without meaningful corroboration. Certainly, Thomas' testimony was less reliable on the subject than that of Fielder and Schmidt, two hi-lo drivers who testified for the General Counsel and stated that such behavior was not permissible at the Masonic facility. Indeed, in the days before Thomas received the written warning, Haddix, Las, and Paquin had complained that Thomas was not keeping up with his work because of the amount of time he was spending in conversations with other employees. Aside from Thomas' testimony, there was no evidence showing that officials of the Respondent had ever knowingly permitted Thomas to waste time by interrupting his own work in order to go talk to other employees who were on the plant floor engaged in work activities. See *Meijer, Inc.*, 318 NLRB 50, 56 (1995) (fact that employees previously violated employer policy does not establish that subsequent enforcement is discriminatory absent evidence that the prior conduct was observed by management), *enfd.* 130 F.3d 1209 (6th Cir. 1997).

For the above reasons, I find that the General Counsel has not proven that the Respondent violated Section 8(a)(3) and (1) when it issued written counseling to Thomas on April 11, 2007. That allegation should be dismissed.

*Suspension and Termination:* The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Thomas on April 13, 2007, and then discharging him on May 2, 2007, because of his union support and activities. The Respondent contends that it discharged Thomas not because of anything having to do with the Union, but rather because Thomas threatened Clyburn and lied about his criminal history on his application for employment.

The General Counsel has satisfied its initial burden with respect to these claims. As discussed above, the evidence shows that Thomas engaged in pronoun activities, the Respondent was aware of such activities, and the Respondent harbored animosity towards the Union and union activity. However, I conclude that the Respondent has met its responsive burden by showing that it would have suspended and terminated Thomas for legitimate reasons even absent its antiunion motivation.

As discussed above, Thomas threatened Clyburn with violence twice on April 13. Moreover, the way Clyburn reacted to those threats, i.e., by not only informing the Respondent, but also calling the police—suggested that Clyburn felt in real danger. The Respondent has a written "zero-tolerance policy towards workplace violence" under which "[a]ny such act or threat may lead to discipline, up to and including termination." Under the circumstances, I conclude that the Respondent would reasonably believe that permitting Thomas to remain on the job during the investigation created a risk to workplace safety. The fact that the Respondent suspended Thomas with pay, supports the view that the purpose of the suspension was not to punish Thomas, but rather to address the safety issue that had been presented to the Respondent. In *Sodexo Marriott Services*, 335 NLRB 538, 554 (2001), an employer did not violate the Act by suspending a pronoun employee pending an investigation into allegations that he had made a threat of violence at work. Although, in that case, the General Counsel made out a prima facie case under *Wright Line*, the employer met its rebuttal burden where, as here, the employee's denial that he had

made the threat was not credible, the recipient of the threat was concerned enough to file a police report, and the Respondent had a “zero tolerance policy” regarding threats of violence in the workplace. Under the similar facts presented here, I conclude that the Respondent would have suspended Thomas even if he had not been involved in union activities, and that the suspension did not violate the Act.

I also conclude that the Respondent lawfully terminated Thomas on May 2, 2007. I find not only that Thomas threatened Clyburn with violence, but also that the Respondent had a good faith belief, based on its investigation, that Thomas had done so. As discussed above, Thomas was an unusually inconsistent and evasive witness at trial, and the record shows that Thomas exhibited the same shortcomings during the Respondent’s internal investigation. I am not surprised that Mort and Lipsitz found him less credible than Clyburn, who generally appeared forthcoming and straightforward when discussing the relevant facts. In addition, Thomas’ assertion during the investigation that he had not even spoken to Clyburn on the day in question was directly contradicted not only by Clyburn, but also by the statements that Schmidt and Baker gave to the employer. Thomas’ answers to the Respondent’s questions regarding the April 10 group meeting and his April 16 hotline report were similarly inconsistent and/or contrary to credible information possessed by the Respondent. The evidence showed that the Respondent applied its “zero-tolerance” towards threats of violence not just to Thomas, but also to terminate other employees who made threats at work in 2006 and 2007.

In its brief, the Union argues that the Respondent’s investigation was so “grossly inadequate” as to demonstrate that the reasons for discharging Thomas were pretextual. It is true that a more complete investigation would have included interviews with Schaeffer and Vermal, both of whom were in a position to witness at least some portion of the interactions that Clyburn had with Thomas on April 13. However, the Respondent’s failure to interview those individuals was not so serious as to call into question the basic legitimacy of its investigation. Neither Schaeffer (an antiunion consultant) nor Vermal was shown to be present during the exchange between Thomas and Clyburn that began in Schmidt’s presence and ended with Thomas threatening to “crack” Clyburn’s head. Schaeffer was present at the beginning of the subsequent exchange that took place at Baker’s press, but not for that entire exchange and not at the time the threat was made. Although Vermal was somewhere in the vicinity during the exchange that took place at Baker’s press, he was not as near to it as was Baker. Since, given the factory noise, even Baker missed significant portions of what was said between Thomas and Clyburn, it is doubtful that Vermal would have been able to shed additional light on the conversation. Because Clyburn was much more consistent and credible than Thomas, and given that the other witnesses directly contradicted Thomas’ claim that he had not said anything to Clyburn on April 13, it is not surprising that the Respondent concluded it was not necessary to interview Schaeffer and Vermal. Neither the General Counsel nor the Union called Schaeffer or Vermal as witnesses to explore what they knew about the relevant events and the record does not provide any

basis for believing that such testimony would have added to an understanding of those events.

Given the record as a whole, I conclude that Mort would have decided to terminate Thomas for making threats of violence to Clyburn even if the investigation had not also revealed that Thomas lied about his criminal background when completing his applications. The record shows that prior to requesting the background check, Mort “felt strongly” that “termination was justified,” based on the investigation the Respondent had already performed regarding Thomas’ threats. She took the additional step of checking whether Thomas had a criminal history consistent with the alleged threats of violence in order to make sure “we had all our i’s dotted and our t’s crossed” in light of the ongoing union campaign and the likelihood that Thomas’ termination would result in a charge.

In light of my conclusion that the Respondent would have terminated Thomas based on the threats of violence he made to Clyburn, even absent Thomas’ union support and protected conduct, I need not reach the question of whether Thomas’ false application statements constitute an additional nondiscriminatory justification for the Respondent’s action. Under the circumstances presented here, that is a difficult question and the parties have not cited any authority squarely addressing it.<sup>20</sup>

<sup>20</sup> Mort’s testimony indicated that the Respondent discovered the application falsifications as the result of a background check that it would not have conducted absent its concern that, given the union campaign, Thomas’ termination was likely to result in an unfair labor practices charge. The purpose of that background check was to see if Thomas had a history of violence that was consistent with Clyburn’s allegation that Thomas had threatened him, and which might further support the discharge decision that the Respondent expected to make. As the General Counsel notes, the Board has held that employee misconduct discovered during an investigation undertaken because of the employee’s protected activity does not render a discharge lawful. Brief of General Counsel at p. 32; see also *FedEx Freight East, Inc.*, 344 NLRB 205, 212 (2005), *enfd.* 431 F.3d 1019 (7th Cir. 2005); *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003); *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121–122 (1979). On the other hand, in *Inland Steel Co.*, 263 NLRB 1091 (1982), the Board held that an employer did not necessarily violate the Act by terminating a prounion employee based on application falsifications discovered as a result of an investigation initiated when the employee’s union activities brought her name to the employer’s attention. In *Inland Steel*, the Board stated that the question turned on motivation, and that the circumstances permitted, but did not compel, an inference that the employer initiated the investigation for the purpose of discovering a reason to terminate the union supporter. Based on the record in the instant case, I conclude that the Respondent checked Thomas’ background as an outgrowth of a legitimate investigation into allegations that he threatened Clyburn. When the Employer’s investigation indicated that Thomas would likely have to be terminated, the Respondent took extra investigatory steps out of concern that, given the union campaign and Thomas’ union activity, the termination decision would need to withstand the scrutiny brought by an unfair labor practices charge. That is a different motivation than would exist if the Respondent had initiated the background check in order to find a way of disguising that the true reason for Thomas’ discharge was protected activity. Nevertheless, it is not at all clear that the Respondent can use Thomas’ application falsifications to defend the discharge decision since the Respondent would not have undertaken the background check that revealed those falsifications absent Thomas’ union activity and the union campaign.

Since an answer to that question will not affect the outcome here, I do not reach it.

For the reasons discussed above, I conclude that the General Counsel has not shown that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it suspended and terminated Thomas.

#### B. Section 8(a)(1)

The General Counsel argues that, on February 12, 2007, Dmytryszyn threatened employees DeGrandchamp, Robertson, and Vanidour with discharge for union activities in violation of Section 8(a)(1). As discussed in the factual findings above, the record does not show that Dmytryszyn made the statements alleged to be unlawful. Therefore, the complaint allegation based on those statements should be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent discriminated against Merriewether in violation of Section 8(a)(3) and (1) of the Act by discharging her on March 15, 2007, because she supported the Union and engaged in protected activities.

#### 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. In particular, I recommend that the Respondent be required to offer Merriewether reinstatement and make her whole for any loss of earnings and other benefits she suffered as a result of her discharge, computed on a quarterly basis, 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).

The General Counsel urges that the Board's "current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest." (GC Br. At 33.) The Board has considered, and rejected, this argument for a change in its practice. See *Rogers Corp.*, 344 NLRB 504 (2005), citing *Commercial Erectors, Inc.*, 342 NLRB 940 fn. 1 (2004), and *Accurate Wire Harness*, 335 NLRB 1096 fn. 1 (2001), *enfd.* 86 Fed. Appx. 815 (6th Cir. 2003). If the General Counsel's argument in favor of compounding interest has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), *enfd.* 736 F.2d 507 (9th Cir. 1984), *cert. denied* 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended<sup>21</sup>

#### ORDER

The Respondent, Cadence Innovation, LLC, Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or any other union.

(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, offer Tawana Merriewether full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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

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

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Masonic facility copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, 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

<sup>21</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>22</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."

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 March 15, 2007.

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

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

#### 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 discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Tawana Merriewether full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tawana Merriewether whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Tawana Merriewether, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CADENCE INNOVATION, LLC