

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**HYUNDAI AMERICA SHIPPING AGENCY, INC.**

**and**

**Case 28-CA-22892**

**SANDRA I. McCULLOUGH, an Individual**

**BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**I. INTRODUCTION**

“If you are so unhappy about this office and company, then you should consider to leave and go somewhere else.” (GC 41) Such was Respondent’s directive to employees in its Phoenix customer service center who had engaged in protected concerted activity. But when Sandra McCullough (McCullough) persisted in bringing concerns to management’s attention in order to effectuate change in the workplace, Respondent went to great lengths to concoct reasons to get rid of her and, in the end, fired her without regard to and in retaliation for her exercise of Section 7 rights. Counsel for the Acting General Counsel (CAGC) files this brief in support of its Exceptions to those portions of the Decision of Administrative Law Judge Gregory Z. Meyerson (the ALJ), [JD(SF) 41-10] (October 18, 2010) (the ALJD), in which the ALJ, while finding that numerous written and oral rules of Respondent independently violated Section 8(a)(1) of the Act, failed to find that Hyundai America Shipping Agency, Inc. (the Respondent) discharged McCullough in violation of the Act.

More specifically, it was no secret that McCullough and others were unhappy with the way management in Respondent’s Phoenix facility did things. McCullough found herself in the position of being the “voice” for Phoenix employees, airing grievances to management on

their behalf. There is no dispute that McCullough complained loudly, and frequently, to anyone who would listen. First she brought employees' complaints to local management, and then went to Human Resources (HR). When HR failed to address employees' concerns, she sent a lengthy letter to Respondent's Assistant Vice President, outlining employees' problems with local management. What McCullough wanted was to see the Phoenix facility become a better working environment for everyone, including herself and her coworkers. The ALJ, though finding that Respondent discharged her, in part, for violating a rule that he found to be independently violative of the Act, did not conclude that the discharge was violative of the Act. CAGC excepts to the ALJ's failure to so find, and also excepts to the ALJ's failure to find that McCullough's discharge was also violative under a *Wright Line* analysis.<sup>1</sup> Finally, CAGC also takes exception to the ALJ's failure to find, as a result of his reliance on the Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), that Respondent's maintenance of an overly broad electronics communications policy was an independent violation of Section 8(a)(1) of the Act and its application to McCullough's protected concerted activity, which was among the reasons for her discharge, was yet another example of Respondent applying an unlawful rule in discharging McCullough.

## **II. PROCEDURAL HISTORY**

The hearing on the Complaint alleging that Respondent violated Section 8(a)(1) of the Act was conducted before the ALJ from June 29 to July 1, 2010. (ALJD at 1)<sup>2</sup> In the ALJD,

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<sup>1</sup> *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 US 989 (1982).

<sup>2</sup> References to the ALJD are designated as "ALJD" followed by the applicable page number and, as appropriate, followed by a colon and line numbers. References to CAGC and Respondent Exhibits are designated as "GC," and "R," respectively, followed by the applicable exhibit number and, as appropriate, the relevant page number(s). References to the transcript of the proceedings are designated as "Tr." with the appropriate page citations and, where appropriate, followed by a colon and line numbers.

the ALJ properly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining numerous unlawful written and oral rules, including:

- An overly-broad and discriminatory rule prohibiting employees from discussing matters under investigation by Respondent (ALJD at 17-19);
- An overly-broad and discriminatory rule threatening employees with discipline for violating its unlawful rule prohibiting employees from discussing matters under investigation by Respondent (ALJD at 17-19);
- An Employee Handbook provision (i.e., the last sentence of Respondent’s Electronic Communications and Information Systems policy) prohibiting employees from disclosing any information or messages from Respondent’s electronic communications and information systems to anyone other than authorized persons (ALJD at 12-13);
- An Employee Handbook provision prohibiting unauthorized disclosure of information from an employee’s personnel file (ALJD at 13-14);
- An Employee Handbook provision directing employees to complain directly to supervisors and Human Resources and not to coworkers (ALJD at 14-15);
- An Employee Handbook provision prohibiting employees from engaging in “harmful gossip” (ALJD at 15-16);
- An Employee Handbook provision prohibiting employees from performing activities other than work during working hours (ALJD at 16-17); and
- An Employee Handbook provision prohibiting employees from exhibiting a negative attitude towards work assignments (ALJD at 17).

The ALJ found that traditional Board remedies were sufficient to remedy Respondent’s conduct and, therefore, refused to order that Respondent post an appropriate notice via electronic means, as requested by the CAGC. (ALJD at 28)<sup>3</sup>

The ALJ dismissed the other Complaint allegations, including that Respondent violated Section 8(a)(1) by unlawfully discharging McCullough because she engaged in

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<sup>3</sup> The ALJD issued prior to the issuance of the Board’s recent decision in *J. Picini Flooring*, 356 NLRB 9 (October 22, 2010), in which the Board announced its electronic notice posting policy. Inasmuch as the Board stated in *J. Picini Flooring* that its electronic posting policy will be applied retroactively to all cases at whatever stage (*J. Picini Flooring*, supra, slip op. at 5), CAGC does not except to the ALJ’s failure to order electronic notice posting inasmuch as that aspect of the ALJD is now moot.

protected concerted activities and because she violated Respondent's unlawful rules, including its rule prohibiting employees from discussing matters under investigation. (ALJD at 23:42-51, fn. 14; 26-27) CAGC's exceptions focus on the ALJ's failure to find that Respondent's discharge of McCullough was violative of the Act and that Respondent's maintenance and application of its electronic communications policy are independently violative of the Act.

### **III. BACKGROUND**

#### **A. Respondent's Business**

Respondent is an international shipping company engaged in the business of transporting cargo from all over the world to end destinations around the world, including to and from the United States. (ALJD at 3; Tr. 546) To facilitate its operations, Respondent has three regional customer service centers, including one in Phoenix, Arizona. (ALJD at 3; Tr. 33) Respondent's Phoenix facility is responsible for Respondent's entire west coast operations, including customer service, export bookings, export documentation, export traffic, rebilling and collections, freight cashiering, accounting, inbound documentation, inbound customer service, and inbound cargo release. (ALJD at 3; Tr. 419)

Dianne Gunn (Gunn) is Respondent's Assistant Vice President of National Logistics and works out of Respondent's headquarters in Irving, Texas. (ALJD at 3; Tr. 28, 33) Gunn is responsible for the operation of Respondent's three regional customer service centers, including the Phoenix facility, as well as setting policy with regard to the movement of cargo. (ALJD at 3; Tr. 33) Brandi Andrews (Andrews) is Respondent's Assistant Human Resources Manager and also works primarily at Respondent's headquarters. (ALJD at 3; Tr. 97) Andrews is responsible for employee relations and consultations, including with regard to the

Phoenix facility. (ALJD at 3; Tr. 436-37) Andrews reports directly to Charles Sartorius (Sartorius), Human Resources Manager. (ALJD at 3; Tr. 436) The General Manager of Respondent's Phoenix facility is Larry Marvin (Marvin), who is responsible for overseeing the entire operation of the Phoenix facility including its approximately 63 employees. (ALJD at 3; Tr. 418)

## **B. McCullough's Employment**

McCullough began her employment at Respondent's Phoenix facility on or about June 1, 2004, in its documentation department. (ALJD at 3; Tr. 176) After two years, McCullough transferred to customer service in the import department, where she worked until she was terminated on August 5, 2009.<sup>4</sup> (ALJD at 3; Tr. 176-77) As a customer service representative, McCullough's primary job duties were to answer calls from customers and assist customers in getting their cargo released. (ALJD at 3; Tr. 176)

### **1. McCullough's Concerted Activity and Respondent's Knowledge of Such Activity**

The ALJ found that through July, McCullough engaged in *significant* concerted activity with numerous fellow employees and by direct contacts with management on behalf of herself and her co-workers. (ALJD at 21:13-22) The ALJ went on to conclude that "the evidence of concerted activity and the Respondent's knowledge of that activity is ... obvious." (ALJD at 21)

More specifically, in approximately February, McCullough and fellow employees met after work to discuss what they felt was the unfair discharge of a coworker, Marianne Culpepper. (ALJD at 4; Tr. 180) Thereafter, McCullough engaged in continuing discussions with her coworkers about their concerns with management, including how

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<sup>4</sup> All dates cited in this brief, unless otherwise specified, took place in 2009.

employees were treated by managers. (ALJD at 4; Tr. 181-82) In mid-May, McCullough called HR manager Sartorius and said that she wanted to make a complaint about the working atmosphere in Phoenix being extremely hostile, intimidating, and uncooperative, and management exhibiting favoritism among employees. (ALJD at 4; Tr. 183-85) McCullough also told Sartorius that she feared retaliation and, therefore, wanted to remain anonymous. (ALJD at 4; Tr. 184) McCullough declined to make a formal complaint at that time because of her fear of retaliation, and, therefore, no investigation was launched by Respondent. (ALJD at 4; Tr. 184)

Thereafter, McCullough continued to have frequent communications with her coworkers about the workplace hostility they were experiencing. (Tr. 186) On June 12, McCullough and several coworkers, including Deborah Ruscher (Ruscher), Brian Coberly (Coberly), Kristen Cortelyou (Cortelyou), Kaitlin Hamilton (Hamilton), and Brianne Flake (Flake), met at a restaurant to discuss their concerns with management. (ALJD at 4; Tr. 190) One of the matters discussed was Hamilton's allegation that she was being sexually harassed by Justin Bozarth (Bozarth), Respondent's supervisor in the cargo release department, with whom she was romantically involved. (ALJD at 4) On June 15, McCullough spoke to assistant HR manager Andrews about these issues, specifically the workplace hostility, offensive instant messages in the workplace, and the effect of Hamilton and Bozarth's relationship on the workplace. (ALJD at 4; Tr. 188) McCullough sent Andrews some documentation of her complaints on June 17, and McCullough discussed these same issues with Andrews again on June 22. (ALJD at 4; Tr. 201-02) By then, however, McCullough had been reprimanded by local management in Phoenix for seeking clarification of

Respondent's electronic communications policy, and she feared retaliation was beginning. (ALJD at 5; Tr. 204)

Because McCullough did not feel that HR was doing enough to investigate the complaints she had raised, she prepared and sent a letter to Gunn, dated June 29.<sup>5</sup> (ALJD at 5; Tr. 206) In that letter, McCullough raised a host of issues including employees having issues with demurrage, hostility and negativity by managers, male employees being favored, employees abusing Respondent's policy on e-mails and instant messages, verbal abuse of employees, firing employees for complaining about offensive instant messages, high turnover of temporary employees, and the generally hostile environment that existed in Phoenix. (ALJD at 5; Tr. 206-07; GC 6)

In addition to the foregoing, the record evidence established, and the ALJ found, that McCullough blind copied her coworkers on e-mails regarding work-related issues, including investigations that Respondent considered confidential. (ALJD at 8, 23; Tr. 72-75, 225-31) Such actions are also concerted activity under the Act, and, as discussed further below, the ALJ erred in failing to so find.

The ALJ also concluded that CAGC established a *prima facie* showing that McCullough's protected concerted activity was a motivating factor in Respondent's decision to terminate her. (ALJD at 21:46-23:27) In fact, the ALJ concluded that CAGC had, by a preponderance of credible record evidence, established that McCullough engaged in protected concerted activity; that Respondent had knowledge of such protected conduct; that McCullough suffered an adverse employment action, i.e., her discharge; and that there was a nexus between such adverse employment action and her protected conduct. (ALJD 21:46-

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<sup>5</sup> The June 29 letter followed an earlier draft sent to Gunn by McCullough. (ALJD at 5; Tr. 206)

22:8) The ALJ specifically found that McCullough's protected concerted activity was a motivating factor in Respondent's decision to discharge her. (ALJD 22:39-42)

Moreover, the ALJ also found that Respondent's unlawful rules, including Respondent's application of such rules to McCullough's protected conduct, establish the "animus by Respondent's managers" toward employees who would engage in protected concerted activity, (ALJD at 23:5-21), and that such animus was specifically directed toward McCullough by Respondent because she was engaged in protected concerted activities, including, but not limited to, "blind copying" certain fellow employees with e-mails sent to Respondent's managers regarding work-related investigations. (ALJD 23:36) In fact, the ALJ went so far as to conclude that, though not necessary, CAGC had established "a direct link or nexus between the protected concerted activities engaged in by McCullough and her discharge." (ALJD 23:33-36)

Despite such specific factual findings and conclusions, the ALJ nonetheless specifically rejected CAGC's assertion that Respondent, by discharging McCullough because she violated Respondent's written and oral rules, violated the Act. The ALJ explained that because both theories (the application of an unlawful rule theory and a *Wright Line* theory) are based on the same set of facts, it was unnecessary to address CAGC's "alternate" theory. (ALJD at 23 fn. 14) It is respectfully submitted, as shown below, that the ALJ erred by refusing to consider both theories and by failing to find that Respondent violated the Act by discharging McCullough because she violated an independently unlawful rule.

In any event, having rejected, out of hand, consideration of one of the two principal bases for alleging that McCullough's discharge was violative of the Act, the ALJ went on to find that Respondent met its *Wright Line* burden. While the ALJ's findings and conclusions

regarding Respondent's *Wright Line* burden are discussed more fully below, specific attention to the ALJ's failure to find that Respondent's "investigation" into McCullough's concerted claims was actually a "witch hunt" designed to generate a basis to discharge her for her protected conduct is warranted. The record shows that such an investigation was simply another step on the same trail that started with other unlawful retaliation, interrogation, and reprimands just outside the Section 10(b) period.

## **2. Retaliation Against and Investigation into McCullough**

As to the Respondent's investigation into McCullough's concerted complaints, the ALJ found that because the investigation resulted in "legitimate complaints" against McCullough, such an investigation could not be considered as evidence of unlawful motivation. (ALJD 26:31-44) It is respectfully submitted that the ALJ's findings and conclusions in this regard are in error, and that the record establishes that the investigation itself was an act of retaliation against McCullough and her protected conduct designed to ferret out some basis, albeit pretextual, to fire her.

More specifically, the record shows that immediately after reporting to HR's Andrews on June 15 issues regarding the affair between Bozarth and Hamilton, as well as other complaints concerning Phoenix management, McCullough began experiencing retaliation. (Tr. 193) It started with "evil eyes" from Bozarth, a supervisor, as well as a "cold shoulder" from Bonin, the assistant manager. (Tr. 193-94) Other coworkers, including Cortelyou and Hamilton, stopped talking to her. (ALJD at 7; Tr. 194) On June 22, McCullough and the rest of the import department began receiving warnings – three in a period of 12 business hours – about Respondent's media policy, including abuse of instant messages. (ALJD at 4; Tr. 195) When McCullough questioned Director Dan Fetters about the policy, she was disciplined for

insubordination (outside the Section 10(b) period). (ALJD at 4; Tr. 195-200; GC 16) During the meeting with Fetters where McCullough was disciplined for insubordination, with other managers, J.J. Lee (Lee) and Marvin, present as well, Respondent interrogated McCullough about the complaints she had made to HR and about other employees who had also complained.<sup>6</sup> (ALJD at 4; Tr. 198-99; GC 16) Respondent also reprimanded McCullough for not following the chain of command with regard to reporting her complaints. (Tr. 203; GC 16) McCullough called Andrews after the meeting to tell Andrews about the reprimand (ALJD at 5; Tr. 201), and sent Andrews an e-mail the following day (a) stating that she feared that retaliation was starting, and (b) reporting that she had been interrogated about her complaints to HR and her discussions with others who had similar complaints. (ALJD at 5; Tr. 204, 122-24; GC 18) McCullough also informed Andrews that, for these reasons, she could no longer submit documentation that she had been compiling to support her complaints from January through June. (ALJD at 5; GC 18) When McCullough later attempted to offer documentation to Andrews in support of her concerted complaints, Andrews told her she could not accept the information because it had not been submitted in a timely fashion and the complaint was closed. (Tr. 124)

After McCullough sent Gunn her lengthy complaint letter on June 26 – and soon after McCullough had been reprimanded and interrogated locally – Gunn traveled to Phoenix on July 2 to meet with McCullough. (ALJD at 6; Tr. 86) Although Respondent has asserted that the purpose of Gunn’s trip was to investigate the issues raised by McCullough, Gunn testified that her travel on July 2 was *not* solely for the purpose of investigating McCullough’s concerns and, in fact, that she did not speak with anyone other than McCullough about the

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<sup>6</sup> Again, although this occurred outside the Section 10(b) period, such retaliation, reprimands, and interrogation are further evidence of the animus harbored by Respondent.

issues raised in McCullough's letter. (Tr. 86) In fact, Gunn spent only an hour speaking with McCullough about the complaints raised in McCullough's lengthy, single-spaced letter.

(ALJD at 6; GC 6) By the time Gunn later returned to Phoenix – with Andrews – on July 22 and 23, any pretense of investigating McCullough's complaints had been jettisoned and the sole focus of Respondent's efforts was the investigation of McCullough. (ALJD at 8; Tr. 77, 90-91)

### **3. McCullough's Termination**

On August 5, Gunn called McCullough into a meeting just before the lunch hour with Pamela Rosales, a manager in the export department, and Andrews, who participated via telephone. (ALJD at 11; Tr. 266) Gunn informed McCullough that she was being terminated. (ALJD at 11; Tr. 266) Respondent verbally gave McCullough the following six reasons for terminating her:

- 1) Violation of Respondent's employee conduct and dishonesty policies by issuance of a personal check to pay a customer's demurrage fees;
- 2) Violation of Respondent's employee conduct policy by blind copying third parties on confidential emails concerning investigations;
- 3) Violation of Respondent's employee conduct policy regarding harmful gossip by sending an email to a coworker commenting on that coworker's absence;
- 4) Violation of Respondent's employee conduct policy by creating a hostile work environment by encouraging employees to go to Human Resources with their complaints;
- 5) Violation of Respondent's employee conduct policy and sexual harassment policy by making a comment to a coworker about the appearance of part of her body; and
- 6) Violation of Respondent's alcohol and drug abuse policy by reports of substance abuse during work hours.

(ALJD at 10-11; GC 2) Gunn and Andrews also summarized these reasons in written communications. (ALJD at 10-11; GC 2; R 14)

Gunn testified that each of these six reasons played a factor in her recommendation to terminate McCullough, and that there were no other reasons that contributed to her recommendation to terminate McCullough. (ALJD at 11; Tr. 29)

Moreover, Gunn herself actually performed any semblance of actual investigation into McCullough's actions only with regard to the one stated reason involving demurrage payment; Gunn was not involved in the investigations of the other matters upon which she relied to recommend McCullough's termination, relying upon Andrews of HR. (Tr. 567-78) Andrews was not involved with the recommendation to terminate McCullough or the final decision to terminate McCullough. (Tr. 57; 100)

After the termination meeting, which lasted approximately ten minutes, Gunn escorted McCullough to her desk, where two boxes were waiting for her and where her coworkers watched as she collected her belongings and was escorted by Gunn out of the back door of the building. (Tr. 268)

As set forth below, based on the ALJ's factual findings, the credible record evidence, and the reasonable connections and conclusions drawn there from, it is respectfully submitted that the ALJ erred in failing to find that Respondent violated the Act by discharging McCullough for violating its unlawful written and oral rules; by finding and concluding that Respondent met its *Wright Line* burden with regard to the discharge of McCullough; and by finding that Respondent did not maintain an unlawful electronic communications policy.

#### IV. ANALYSIS

##### A. **The ALJ Erred in Refusing to Find That McCullough’s Discharge for Violating Respondent’s Unlawful Rule Prohibiting Employees From Discussing Matters Under Investigation and Other Rules Maintained by Respondent in Its Employee Conduct Policies Violated the Act (Exceptions 1, 2, 5, and 12)**

The ALJ found that Respondent’s oral and written rules prohibiting employees from discussing matters under investigation violate the Act. (ALJD at 13, 17-19) The ALJ further found, based upon the record evidence, that McCullough violated those unlawful rules by “blind copying” coworkers on work-related investigations, that Respondent had direct knowledge that McCullough violated its unlawful rules on numerous occasions, and that Respondent’s “unhappiness with McCullough’s disregard for its written and oral rules was . . . at least a ‘motivating factor’ in Gunn’s decision to terminate her.” (ALJD at 23) The ALJ noted that it was “undisputed that one of the reasons leading to McCullough’s termination was the use of ‘blind copy’ e-mails to alert coworkers to communication between McCullough and management regarding matters under investigation by the Respondent.” (ALJD at 17; GC 2)

The ALJ concluded, however, that McCullough’s discharge, which was at least motivated in part by her violation of Respondent’s unlawful rules, did not violate the Act. (ALJD at 23) The ALJ explicitly declined to address more fully CAGC’s argument that by discharging McCullough because she violated the unlawful rules set forth in Respondent’s Employee Conduct policy, such a discharge also violates the Act. Instead, the ALJ simply found that because the factual underpinnings of both theories rely on the same facts, it was unnecessary to address the CAGC’s “alternate theory.” (ALJD at 23, fn. 14) In so doing, the ALJ failed to consider and apply the Board’s long-standing approach in such situations, and

instead focused exclusively on a *Wright Line* analysis. Under extant Board law, the ALJ's application of *Wright Line* to the analysis of McCullough's discharge due to her violation of unlawful employer rules was in error.

More specifically, the Board has held that an employee's discipline or discharge for violation of an unlawful employer rule is itself a violation of the Act without consideration of *Wright Line*'s dual-motivation analysis. *Northeastern Land Services, Ltd.*, 352 NLRB 744, 745-46 (2008); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n. 3 (2004); *Saia Motor Freight Line, Inc.*, 333 NLRB 784, 785 (2001). In *Saia Motor Freight Line*, the Board affirmed the administrative law judge's finding that the employer violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad no-solicitation/no-distribution rule. 333 NLRB at 784-85. The Board further held that the employer's discipline of an employee for violation of that overly-broad rule was a violation of the Act without consideration of *Wright Line*'s dual-motivation analysis, stating that "[a]ny disciplinary action taken pursuant to an unlawful no-solicitation rule is likely unlawful, analogous to the 'fruit-of-the-poisonous-tree' metaphor often used in criminal law." *Id.* at 785. The Board concluded that "[b]ecause [the employee] was disciplined for violating the Respondent's unlawful overly broad no-solicitation/no-distribution rule, that discipline itself constitutes a violation of Section 8(a)(3) and (1), without consideration of *Wright Line*'s dual-motivation analysis." *Id.* The Board went on to say that in circumstances "where the conduct for which the Respondent claims to have [disciplined the employee] was protected activity, the *Wright Line* analysis is not appropriate." *Id.*

The Board has consistently held that an employee's discipline or discharge for violation of an unlawful rule is a *per se* violation of the Act. See *Northeastern Land Services*,

352 NLRB at 745-46 (stating that “[u]nder extant Board precedent, an employer’s imposition of discipline pursuant to an unlawfully overbroad policy or rule constitutes a violation of the Act”); *Double Eagle Hotel & Casino*, 341 NLRB at 112 n. 3 (finding that “where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule”).

Accordingly, it is respectfully submitted that the Board should find that McCullough’s discharge – which the ALJ properly concluded was motivated by McCullough’s violation of rules which were elsewhere in his decision found to be unlawful – was itself unlawful as a matter of law, without the need to apply or consider a *Wright Line* analysis. In discharging McCullough, Respondent relied specifically on rules that the ALJ found to be unlawful, i.e., the written and oral rules prohibiting the divulging of confidential information to unrelated parties, which the Respondent knew McCullough violated by (a) blind copying employees on e-mails dealing with work-related complaints and concerns and (b) her protected concerted communications with other employees “on numerous recent occasions.” (ALJD 23:28-32<sup>7</sup>) In fact, at least two of the six specific reasons proffered by Respondent as grounds upon which it discharged McCullough involved her protected concerted activities, which ran afoul of rules found by the ALJ to be unlawful, i.e., “(2) Violation of Respondent’s employee conduct policy by blind copying third parties on confidential emails concerning investigations;” and “(4) Violation of Respondent’s employee conduct policy by creating a hostile work environment by encouraging employees to go to Human Resources with their

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<sup>7</sup> Other rules, found by the ALJ to be violative of Section 8(a)(1) of the Act, and of which McCullough’s protected conduct ran afoul, include: the prohibitions on the use of Respondent’s electronic communications system, discussed immediately below; written and oral overly-broad rules prohibiting the disclosure of information contained in employees’ personnel files; rules prohibiting complaints to other employees; the rule threatening discipline and discharge for engaging in “harmful gossip” and “negative conversations” with other employees; rules against “exhibiting a negative attitude;” and the myriad oral rules prohibiting employees from discussing matters under investigation. (ALJD 11-19)

complaints,” while a third (Item 3 on Respondent’s list) involves the application to McCullough of the unlawful prohibition against “harmful gossip.” (GC 2)

As a result, it is respectfully submitted that the ALJ erred in dismissing CAGC’s allegation that McCullough’s discharge, which was explicitly tied to her protected conduct which dishonored Respondent’s unlawful rules, violated Section 8(a)(1) of the Act as a matter of law.<sup>8</sup>

**B. The ALJ Erred in Failing to Find that Respondent Violated the Act by Its Maintenance of its Electronic Communications and Information Systems Policy and by Discharging McCullough for Violating That Policy (Exceptions 2 and 12)**

The Complaint, at paragraph 4(d), alleges that Respondent violated Section 8(a)(1) by maintaining the following policy, and, at paragraph 4(j), by discharging McCullough because, inter alia, she violated the following policy:

**ELECTRONIC COMMUNICATIONS AND INFORMATION SYSTEMS**

Hyundai’s electronic communication and information systems including, but not limited to, electronic mail (“e-mail”), voicemail and computer system are Company property and should be used for Company purposes only. Nothing should be entered into these systems without good reason. You must be aware that Hyundai reserves the right to: 1) Monitor and retrieve information from these systems to assure that its property is being used for appropriate business purposes only; and 2) disclose or use any information found in these systems. Employees do not have a personal privacy right in any matter created, received, sent or stored in these systems. Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons.

The ALJ found that the final sentence of the rule (“Finally, employees should only disclose information or messages from theses [sic] systems to authorized persons.”)

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<sup>8</sup> Moreover, inasmuch as Respondent’s reliance on McCullough’s blind copying of e-mails occurs in the framework in which Respondent maintains a rule prohibiting employees from using Respondent’s e-mail system for anything other than work communications, that rule, alleged at paragraph 4(d) of the Complaint as unlawful on its face, also prohibits employees from disclosing information or messages on Respondent’s electronic communications system to anyone other than “authorized persons.” (GC 4 at p. 6)

independently violated the Act. (ALJD at 12-13) However, the ALJ declined to find that the maintenance of the rule as a whole violated the Act, basing his conclusion on the Board's holding in *Register-Guard*, 351 NLRB 1110 (2007).

Though the ALJ, when describing McCullough's protected concerted conduct, describes McCullough's blind copying in a manner that shows that he considered it to be protected concerted activity – and to be protected conduct that ran afoul of Respondent's unlawful rules – his focus is more on the fact that it (the blind copying) was violative of Respondent's rules prohibiting employees from discussing confidential information or ongoing investigations. (ALJD at 22, 23) Such conduct, however, also certainly violates the part of Respondent's electronic communications policy found by the ALJ to be violative of the Act (the last sentence of the policy, as excerpted above).

The ALJ elected not to go further and specifically find that the mere maintenance of the electronics communications policy interfered with and restrained employees' exercise of Section 7 rights, including, but not limited to, McCullough's protected conduct – blind copying her coworkers on e-mails to and management of common concern. In so doing, it is respectfully submitted that the ALJ erred. Moreover, it is respectfully submitted that the Board should grant CAGC's exception to the ALJ's failure to find that Respondent's maintenance of the electronic communications policy was violative of the Act and that Respondent's discharge of McCullough for blind copying employees with e-mails (an act of McCullough's that the ALJ found prompted her discharge) warrants a finding that her discharge was unlawful on the additional basis that it resulted from the application of Respondent's maintenance of its (unlawful) electronic communications policy.

The record evidence establishes, and the ALJ found, that McCullough used Respondent's computers, which Respondent limited use of to business-related purposes only, to blind copy her coworkers on e-mails regarding work-related issues, including investigations that Respondent considered confidential. (ALJD at 8, 23) Inasmuch as such conduct is protected by Section 7, the maintenance of a policy that would likely tend to chill such conduct should be found to be unlawful.

As the dissent in *Register-Guard* pointed out, e-mail usage, including usage in the workplace, has all but replaced face-to-face communications, particularly here where the record evidence established Respondent's significant use of instant messages in the workplace among employees to create real-time conversations. For that reason, employer rules restricting employee e-mail usage must be evaluated under the framework of *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945), which requires the Board to balance employees' Section 7 rights to communicate with an employer's right to protect its business interests. Here, and in other workplaces, where employees routinely – and perhaps nearly exclusively – communicate with one another electronically, whether by e-mail or by real-time instant messaging, a broad ban on employee e-mail usage must be considered presumptively unlawful, and employees' electronic communications with one another discussing working conditions must be protected under Section 7 of the Act. Failing to protect such activity undermines the purpose and intent of the Act at its core and ignores the Board's obligation to adapt the Act to the modern workplace. See *NLRB v. J. Weingarten*, 420 US 251, 266 (1975) (“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.”).

In this case, the ALJ found that McCullough had used Respondent's electronic communications system to blind copy coworkers on matters that involved work-related issues, including work-related investigations that Respondent considered confidential. Such conduct, as well as myriad other conduct protected under Section 7 of the Act, is prohibited by the maintenance of Respondent's electronic communications policy. Accordingly, it is respectfully submitted that the Board should find that by maintaining such a policy, Respondent violated Section 8(a)(1) of the Act.

**C. The ALJ Erred in Failing to Find That McCullough Engaged in Protected Concerted Activity When she Paid Demurrage Fees on Behalf of a Customer and That Such Conduct did not Warrant Termination (Exceptions 3 and 4)**

The ALJ erred in failing to find that McCullough engaged in protected concerted activity when she paid demurrage fees on behalf of a customer to protest what she viewed as management's lack of service to customers. This exception should be granted because the record evidence plainly establishes that McCullough's act was one of defiance in protest of working conditions, which is protected Section 7 activity.

The ALJ concluded, contrary to the record evidence, that it was McCullough's attempts to conceal her payment of demurrage, and not her act of paying demurrage itself, that was the reason for her termination. (ALJD at 25) Although the ALJ correctly concluded that McCullough never told management that the refund she sought was for the customer on whose behalf she paid the demurrage fee, the ALJ did find that McCullough's failure to inform management that she was seeking the refund on behalf of herself was "deceptive." (ALJD at 25)

Even accepting the ALJ's factual findings, the ALJ's decision fails to recognize that McCullough's act of paying demurrage on behalf of a customer – and her subsequent attempts

to conceal that fact from management<sup>9</sup> – were itself protected concerted activity. The ALJ credited the testimony of Gunn, who stated that when she confronted McCullough about the demurrage and asked why McCullough had paid the demurrage on behalf of a customer, McCullough’s response was, “To prove a point.” (ALJD at 9, 25) The ALJ found this statement to be “highly cryptic” and further acknowledged that Respondent’s managers were “puzzled” by McCullough’s actions. (ALJD at 25)

The ALJ’s decision that McCullough engaged in what he characterized as a “highly cryptic” and “puzzling” act that justified her termination is not supported by the evidence and ignores the fact that the act itself was protected concerted activity on McCullough’s part. The record evidence establishes, without dispute, that McCullough had numerous communications with Respondent’s managers about her concerns with how demurrage was handled.

McCullough raised those concerns in her letter to Gunn (GC 2), and she also discussed them with different levels of management when she first disagreed that the customer – on whose behalf she ultimately paid demurrage fee – should have been charged demurrage fees for a mistake made by Respondent. (Tr. 212-24) When McCullough presented her personal check for payment of a customer’s demurrage fee to Respondent’s billings and collections supervisor, Derek Vincent Moore, she explained that she was paying the fee on the customer’s behalf because of “management.” (Tr. 215) Consistent with her position, McCullough later told Gunn, according to the ALJ’s finding, that she paid the fee “to prove a point.” (ALJD at 9, 25)

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<sup>9</sup> Although the ALJ found that McCullough attempted to conceal her payment of demurrage from management, the record evidence does not support that conclusion. It is undisputed that Derrick Vincent Moore, a supervisor in Respondent’s billing and collections department, told McCullough that she could pay demurrage, and Moore accepted McCullough’s personal check for payment of demurrage fees on behalf of Respondent’s customer. (Tr. 215-16, 483-84; R 2)

There is nothing cryptic or puzzling about that statement or her payment, given McCullough's prior complaints about demurrage issues. McCullough's act was a clear protest against the manner in which Respondent handled demurrage issues on behalf of customers, and the ALJ's decision fails to even address the fact that McCullough's actions regarding demurrage, for which she was terminated, were themselves protected activities. The ALJ's decision further fails to acknowledge that McCullough's attempts to conceal her actions are evidence that she feared reprisal from Respondent. See *Bourne v. NLRB*, 332 F.2d 47, 48 (1964) (finding that one factor to consider in determining if an employer's interrogation of an employee is an unfair labor practice is the truthfulness of the reply; where replies are truthful, there is no evidence that the interrogation actually inspired fear). Accordingly, CAGC takes exception to the ALJ's finding that McCullough's attempts to conceal her actions with regard to the demurrage payment were a sufficient basis to terminate her employment.

**D. The ALJ Erred in Refusing to Find That McCullough's Discharge for Engaging in Protected Concerted Activities Violated the Act (Exceptions 5 through 11)**

The record evidence established, and the ALJ recognized, that McCullough was employed by Respondent for approximately five years, and that Respondent only contends that McCullough's performance was unsatisfactory in the last two months of her employment. (ALJD at 21) The ALJ also properly found that McCullough engaged in significant protected concerted activity beginning in May, less than three months prior to her termination on August 5. (ALJD at 21) The timing is not a coincidence, but the ALJ erred in failing to find that the reasons proffered by Respondent for McCullough's discharge were a pretext for violation of McCullough's Section 7 rights.

The ALJ, in his application of *Wright Line* to the allegation that McCullough was discharged for engaging in protected concerted activities, first properly concluded that the CAGC met the burden to establish a *prima facie* case that McCullough's protected concerted activity was a motivating factor in Respondent's decision to terminate her. (ALJD at 21-23) The ALJ erred, however, in concluding that Respondent would have terminated McCullough even in the absence of the protected conduct based on "[t]he combination of McCullough's work related conflicts with employees Kersey, Cassidy, Hamilton, and Cortelyou, her deceptive conduct regarding the demurrage refund, and her alleged drug use at work." (ALJD at 26) In so erroneously concluding, the ALJ ignored the overwhelming record evidence that established that the proffered reasons were simply pretext.

Factors relevant to determining if an employer's motive is unlawful include the employer's knowledge of the activity, the coincidence in timing between the protected concerted activity and the adverse action, manifestations of animus toward the employee's protected concerted activities, departure from past practice, and disparate treatment. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Based on consideration of the entire record, the only proper conclusion to be reached is that Respondent took unlawful retaliatory measures against McCullough because of her protected concerted activities.

**1. McCullough's Alleged Drug use at Work, Which was not Investigated by Respondent, was a Pretext to Terminate McCullough for her Protected Concerted Activity (Exceptions 9 through 11)**

The ALJ erroneously concluded that "[w]hether McCullough ever actually used marijuana at work or not[] is really not relevant." (ALJD at 26) To the contrary, the issue of whether McCullough used marijuana at work, when cited as the basis for her termination, is entirely relevant to the analysis of pretext. Even the ALJ recognized and acknowledged that

one of the alleged eyewitness reports of McCullough's use of drugs at work came from Kaitlin Hamilton on July 10, who claimed that she had seen McCullough smoking marijuana at work on June 16, and that by the time of Hamilton's report to management on July 10, "Hamilton and McCullough were embroiled in their dispute over the apartment lease." (ALJD at 10) Certainly, a reasonable employer would cast suspicion on such a report, coming a month after the alleged drug use took place, and only after Hamilton had been told she needed to move out of the apartment where she was living. Had Respondent conducted any type of investigation – including having McCullough submit to a drug test, which Respondent's policy calls for and for which McCullough volunteered – it would have reasonably concluded that Hamilton's stale report of alleged drug use was motivated by revenge over a personal dispute.

But rather than conduct any real investigation into the allegation, including by drug testing McCullough, Respondent relied on a belated, suspect report from one employee with whom McCullough was engaged in a bitter personal dispute, and concluded that there was justification to fire McCullough for drug use at work. The ALJ, however, found that what was relevant to the decision to terminate McCullough was that the allegation of drug use "seemed credible." (ALJD at 26) That finding ignores the entire concept of pretext. Where an employer displays animus towards an employee who has engaged in significant protected concerted activity, as the ALJ found existed in this case, it would be easy and convenient for an employer to take any complaint or allegation against that employee which "seemed credible," whether true or not, and cite that as a justification for termination. That is essentially what the ALJ's decision permits. Board law, however, recognizes that an employer's failure to fully and fairly investigate an employee's alleged misconduct before

disciplining or terminating that employee, or to provide the employee an opportunity to rebut the accusation, suggests the presence of discriminatory motivation. *Traction Wholesale Cr.*, 328 NLRB 1058, 1072 (1999). Furthermore, Respondent departed from its own written policy calling for drug testing in cases of reasonable suspicion by failing and refusing to drug test McCullough, even after she volunteered to submit to a drug test. (ALJD at 10; Tr. 50, 153, 241; GC 4) Accordingly, the ALJ erred in finding that a single suspect complaint of McCullough's alleged drug use, with no investigation by Respondent into the truth of that allegation, was sufficient to justify McCullough's termination.

**2. McCullough's Conflicts with Coworkers did not Warrant or Justify Termination (Exceptions 5 through 8, 11)**

The ALJ erred in finding that McCullough's conflicts with her coworkers, particularly Julie Kersey (Kersey), Hamilton, and Cortelyou, and a comment made to supervisor Joanne Cassidy (Cassidy), were a sufficient basis upon which to terminate McCullough even in the absence of her concerted activity. The ALJ described the incident involving Kersey and acknowledged McCullough's testimony that the e-mail she sent to Kersey and other employees on July 22, in which McCullough claimed that Kersey was partying in Las Vegas and not at home sick, was intended as a "friendly joke." (ALJD at 6) It is undisputed that McCullough's "conflicts" with Kersey were limited to this single, discrete incident. Similarly, the incident involving Cassidy was a single, discrete incident in which McCullough made a comment to Cassidy about the size of her breasts. (ALJD at 7) The ALJ acknowledged McCullough's testimony that she intended the comment as a compliment and apologized to Cassidy shortly thereafter. (ALJD at 7)

Despite these isolated incidents, neither of which were made with any malicious intent on the part of McCullough, the ALJ found these “caustic” comments to warrant termination. (ALJD at 6) That conclusion ignores Respondent’s departure from past practices and disparate treatment of McCullough as compared to other employees, considerations that, in light of McCullough’s significant concerted activity, overwhelmingly indicate pretext. The record evidence, which was simply ignored by the ALJ, established that other employees found by Respondent to have engaged in much more egregious violations of the company’s policies regarding harassment and discrimination were not terminated.

For example, Andrews confirmed that Julie Miller was disciplined for making derogatory comments about people based on their ethnicity, but Miller remains employed by Respondent. (Tr. 49-50) Respondent investigated another employee, Laura Borek, for making derogatory comments about people based on their ethnicity, and Borek remains employed. (Tr. 150-51) Most telling, however, was the sexual harassment complaint submitted against Bozarth, a supervisor, who was rumored to be having a romantic relationship with a subordinate employee, Hamilton. Bozarth was accused of sending graphic instant messages and engaging in inappropriate touching, yet Bozarth is still employed by Respondent as a supervisor, even after admitting to making inappropriate comments. (Tr. 48-49, 110-12, 444) In fact, the only discipline Bozarth received for engaging in sexual harassment of a subordinate employee was a written warning and a requirement to undergo additional training. (Tr. 444) Even employees who made derogatory comments about employees’ ethnicity were merely disciplined. But McCullough, for making a single joke about an employee partying in Las Vegas and a single comment – intended to be complimentary – about a supervisor’s “boobs,” was fired. The evidence is overwhelming that

Respondent's reliance on these isolated incidents as grounds for McCullough's termination was pretextual.

Furthermore, with regard to McCullough's conflicts with Hamilton and Cortelyou, the ALJ found that McCullough's failure to "confine[] her actions to after work hours" transformed the matter from a personal issue among former friends to a "work related issue" which "adversely affected the work performance of Cortelyou and Hamilton." (ALJD at 25) The ALJ, however, ignored in his analysis the fact that the record established that it was Cortelyou and Hamilton – not McCullough – who brought the matter into the workplace and allowed it to affect their job performance. The ALJ acknowledged that it was Cortelyou and Hamilton who informed their manager, Marvin, of the dispute between them and McCullough over an apartment lease issue and asked to leave work to address the issue with McCullough.<sup>10</sup> (ALJD at 25) Furthermore, the purportedly "harassing" voicemails Cortelyou claimed that McCullough left for her were made to Cortelyou's personal cell phone. (ALJD at 7-8; Tr. 301) Again, Cortelyou was the one who brought this personal issue into the workplace by reporting the calls to management, not McCullough. (ALJD at 25; R 7)

At the same time, McCullough's efforts to inform management that Cortelyou and Hamilton were retaliating against her were simply ignored. (ALJD at 26, fn. 15; GC 27) Notwithstanding that the ALJ found, based on the record evidence, that Hamilton and Cortelyou brought these personal issues into the workplace, the ALJ nevertheless concluded

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<sup>10</sup> By way of background, the record evidence established, and the ALJ found, that at one time, McCullough was friends with Cortelyou and Hamilton. (ALJD at 7; Tr. 279-80, 373, 397-98) As a favor to Cortelyou, who was left without a roommate to share responsibility for the lease of her apartment, McCullough cosigned on Cortelyou's lease. (ALJD at 7; Tr. 282-83, 398) Both Cortelyou and McCullough understood that McCullough's act of cosigning the apartment lease made McCullough legally responsible for the apartment. (ALJD at 7; Tr. 334, 386, 411) It is undisputed that Cortelyou allowed Hamilton to move into the apartment, and that Hamilton was not on the lease. (ALJD at 7; Tr. 333, 386, 411) McCullough ceased to be friends with Cortelyou and Hamilton in June, although why they ceased to be friends is not particularly clear nor is it relevant. (ALJD at 7; Tr. 378, 400)

that Respondent had sufficient justification for terminating McCullough based on her conflicts with Hamilton and Cortelyou, despite his finding that Respondent failed to act on a formal complaint filed by McCullough against Hamilton and Cortelyou. Although the ALJ explains this failure on the part of Respondent as “rather obvious” based on the fact that Respondent had already decided to terminate McCullough by the time it received her complaint, when viewed in the totality of the circumstances along with the other record evidence in this matter, Respondent’s failure to act on McCullough’s complaint of retaliation from Hamilton and Cortelyou, while at the same time relying on complaints by Hamilton and Cortelyou against McCullough to justify termination, is simply additional evidence of pretext.

As further evidence of pretext, one only need examine the manner in which Respondent conducted its investigations – both into complaints raised *by* McCullough and those raised *about* her. The disparate treatment by Respondent reveals its true motivation, which was to ignore and dismiss McCullough’s complaints and to seize upon each and every complaint about McCullough as an opportunity to get rid of an employee Respondent viewed as toxic.

More specifically, Respondent ignored or brushed off many of McCullough’s concerted complaints, yet dug with a vengeance into any complaints about McCullough. McCullough complained to Sartorius in May (ALJD at 4) and was told that she needed to talk to Andrews instead. (Tr. 183-84) She was also told that she needed to get others to complain as well. (Tr. 184) When she did just that, she was fired for “encouraging them to go to HR with all complaints.” (GC 2) When McCullough told Andrews that six managers in Phoenix – Daryl Bonin, Won Keh, Marvin, Fetters, Bozarth, and Chian Ma – were abusive, discriminatory, and displayed favoritism, Andrews failed to conduct a full investigation

because she did not have enough information. (Tr. 105-09) In fact, all she did was speak to those managers, who obviously denied that they engaged in abuse, discrimination, or favoritism. (Tr. 108) Andrews did nothing more, despite similar complaints from employees Ruscher and Bobbi Lewison. (Tr. 340-47, 351-57) It would have been easy for Andrews to call any number of employees who reported to Keh, Bozarth, Ma, or Bonin, or who had interactions with Marvin and Fetters, to see if McCullough's allegations could be corroborated. Instead, Andrews did nothing, claiming she had nothing to go on as a basis for an investigation. Andrews separately was able to conduct an investigation into an anonymous complaint that had been raised by an employee (Tr. 162), but a complaint of discrimination and abuse by six managers working in a facility of approximately 60 employees was summarily dismissed. Furthermore, when McCullough did attempt to bring Andrews documentation showing some of the examples of abuse and discrimination she observed, Andrews responded that the information was "untimely" and the complaint was already closed. (Tr. 124)

When McCullough complained to Gunn, in a lengthy letter outlining the issues she tried to raise with HR, Gunn flew out to Phoenix to meet with McCullough. (ALJD at 5-6; Tr. 86) Respondent attempted to paint a picture of an assistant vice president being so concerned about McCullough's complaints that she flew out to Phoenix from Dallas to address them in person. But admittedly, Gunn met with no one but McCullough on her trip, and for only one hour. (ALJD at 6; Tr. 86) She made no effort to speak to any other employee mentioned in McCullough's lengthy letter – there were numerous employees mentioned – nor did she speak to any of the managers about whom McCullough complained. The ALJ acknowledged that Gunn did not address any of McCullough's complaints. (ALJD

at 6) Respondent has also suggested that the complaints McCullough raised were of such import to Gunn that she flew out again in July to meet with McCullough; however, Gunn – and Andrews – admitted that by then, the investigation was no longer focused on McCullough’s complaints. Rather, Respondent had shifted the focus to investigating McCullough, as the ALJ recognized, stating that McCullough’s complaints to Gunn were “subsumed” by subsequent events. (ALJD at 6; Tr. 77, 90-91) Similarly, Respondent offered evidence of a “job reshuffling” in Phoenix, suggesting that management took McCullough’s complaints to heart and made efforts to change the structure of the Phoenix operations. (ALJD at 6; R 19; Tr. 550) But when questioned, Gunn admitted that only one person was involved in the restructuring, and that was Cassidy, not one of the managers about whom McCullough complained. (Tr. 562)

McCullough’s multiple efforts to inform HR that she believed she was being retaliated against fell on deaf ears. That was true not only of her complaint of retaliation to Andrews after she was disciplined by Marvin, Fetters, and Lee on June 22, but it was also true of her attempts to complain about retaliation by Cortelyou and Hamilton in July. Andrews first told McCullough that coworkers could not retaliate against one another. (Tr. 236) Later, Andrews retracted that statement, but when McCullough submitted an e-mail to Andrews on July 24 entitled “Retaliation,” Andrews refused to treat the e-mail as a complaint, responding instead that it was “not a formal complaint [but] is for documentation only.” (GC 22; R 18) It is worthwhile to note that Andrews’s response to McCullough’s “Retaliation” e-mail was sent on the morning of August 5, while Gunn was on her way to Phoenix to fire McCullough. (R 18) McCullough’s last attempt to be heard was an August 4 e-mail she sent to Andrews entitled “Formal Complaint.” (GC 27) Andrews did not respond. Obviously by then,

although unbeknownst to McCullough, the decision had already been made to fire McCullough the next day.

To contrast, investigations into complaints *about* McCullough were handled much differently. When McCullough brought up the demurrage issue as being a complaint about how management in Phoenix handled the issue from a customer service standpoint, Gunn instead focused on McCullough's "wrongdoing" in the matter and contacted the customer as well as Fetters to find out what McCullough had done. (Tr. 64) She then spoke with Brian Black, Respondent's Senior Vice President, as well as Marvin, Fetters, and Lee. (Tr. 65-66) McCullough's complaints about six managers led Gunn to speak with one person: McCullough. But in turn, in the course of investigating McCullough's demurrage actions, Gunn spoke to the customer and at least four managers before meeting with McCullough.

Similarly, Andrews's "investigations" into issues involving McCullough were handled in a much different manner than Andrews handled McCullough's concerted complaints. Andrews received a report from Alice Moore that an employee, Colleen Bender, was being blind copied on e-mails from McCullough. (Tr. 451-52) Andrews spoke to Moore, Bender, Gunn, Lee, and Respondent's information technology personnel. (Tr. 519-23) But when McCullough tried to offer documentation to Respondent to support her complaint about abusive management in Phoenix, she was told it was too late. (Tr. 124)

It is apparent from the evidence that what started as protected concerted activities by McCullough was quickly turned on its head by Respondent into a witch hunt against her. The ALJ's suggestion that "witch hunt" is inapplicable because the term "denote[s] an investigation devoid of any finding of actual wrong doing" ignores the heart of CAGC's argument, which is that Respondent's investigations were conducted only because

McCullough had engaged in significant protected concerted activity, and were used as a basis to justify her termination.

Respondent collected any and every alleged infraction it could find – no matter how minor, no matter how unreliable, and with no regard to the fact that others had done the same or worse without consequence – to justify firing McCullough. Marvin’s warning to employees was clear: “If you are so unhappy about this office and company, then you should consider to leave and go somewhere else.” McCullough’s mistake was that she failed to heed Marvin’s warning. Instead, she brought her complaints about the company to management, thinking and hoping Respondent was interested in making the company a better place to work. It was not, and because McCullough dared to complain on behalf of her coworkers, rather than simply go find another place to work, Respondent made sure McCullough saw the door. Respondent compiled a slew of reasons to fire McCullough, but it is clear from the evidence that these reasons were nothing more than pretext to terminate McCullough because she had complained.

The record in this case, as well as the factual findings made by the ALJ, establish that the evidence of pretext is overwhelming. Rather than be critical of Respondent’s claims, as he should have been in light of the significant concerted activity in which he had already found McCullough to have engaged, the ALJ simply accepted Respondent’s proffered reasons as legitimate reasons for McCullough’s termination, without regard to any of a number of factors that suggest pretext, including Respondent’s knowledge of McCullough’s activity; the coincidence in timing between the protected concerted activity and the adverse action, particularly in light of McCullough’s satisfactory five-year employment history; manifestations of animus toward McCullough’s protected concerted activities, including

Respondent's clear attempts to chill McCullough's and other employees' rights to engage in concerted activities such as discussing matters under investigation through the promulgation and enforcement of unlawful rules; Respondent's departure from past practice and from its own written policies, such as with regard to drug testing; and Respondent's disparate treatment of McCullough as compared to other employees, who were shown to have engaged in more egregious conduct, including sexual harassment of subordinate employees. Had the ALJ properly analyzed the record evidence in this case, the only conclusion he could have reached would be to find that Respondent unlawfully discharged McCullough because she violated Respondent's unlawful rules and because she engaged in protected concerted activities, and that the reasons it cited for her termination were merely a pretext for its unlawful retaliation under the Act.

## **V. CONCLUSION**

Based on the foregoing, CAGC respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) as delineated herein and order that any appropriate Notice to Employees regarding such violations be posted by Respondent via electronic means.

Dated at Phoenix, Arizona, this 15<sup>th</sup> day of November 2010.

Respectfully submitted,

/s/ Eva Shih Herrera

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in HYUNDAI AMERICA SHIPPING AGENCY, INC., Case 28-CA-22892, was served via E-Gov, E-Filing, E-Mail and overnight delivery via United Parcel Service, on this 15<sup>th</sup> day of November 2010, on the following:

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