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Random Acquisitions, LLC and Sherrie Cvetnich.
Case 7–CA–52473

August 2, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On March 21, 2011, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions, and the Acting General Counsel filed an answering brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Random Acquisitions, LLC, Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its Battle Creek, Michigan facility copies of the attached notice marked “Appendix.”⁸⁷ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent custom-

¹ The Respondent also filed a motion for leave to amend its answer to deny allegations, previously admitted, that alleged discriminatees Sherrie Cvetnich, Eric Cvetnich, and Teresa Burge were (1) statutory employees; and (2) discharged on October 16, 2009. The Acting General Counsel filed an opposition to the motion. The Board denied the Respondent's motion on July 12, 2011.

² We shall modify the judge's recommended Order to require electronic distribution of the notice “if the Respondent customarily communicates with its employees by such means,” in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall also modify the recommended Order to include the Board's standard certification-of-compliance provision.

arily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 2009.”

2. Add the following as paragraph 2(f).

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

Dated, Washington, D.C. August 2, 2011

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph D. Canfield, Esq., for the General Counsel.
James R. Durant, Esq., of Portage, Michigan, for the Respondent.

DECISION

MARK D. RUBIN, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on September 30 and October 1, 2010, based on a charge filed on October 26, 2009, by Sherrie Cvetnich (Charging Party) against Random Acquisitions, LLC (Respondent). The Regional Director's complaint, dated June 30, 2010, alleges that the Respondent violated Section 8(a)(1) of the Act by discharging its employees Eric Cvetnich, Teresa Burge, and Sherrie Cvetnich on October 16, 2009.¹ The Respondent, by its answer to the complaint submitted two days before the opening of the hearing herein, admitted discharging its said employees on October 16, but denied that it did such for reasons prohibited by Section 8(a)(1).

The General Counsel's theory of violation is that the three employees named in the complaint were discharged on October 16 because, on that same date, Sherrie Cvetnich concertedly protested the Respondent's failure to pay them earned wages due for work already performed.² The Respondent, despite

¹ Unless otherwise specified, all dates herein refer to 2009.

² The complaint alleges that Sherrie Cvetnich's assertedly protected concerted activity occurred in the presence of Teresa Burge and Eric Cvetnich. I find, *infra*, that the activity did not take place in Eric Cvetnich's presence.

admissions contained in its answer, contends that, in fact, the named individuals were either not employees, or were discharged on a date earlier than October 16. The Respondent also maintains that Sherrie Cvetnich misbehaved while complaining to the Respondent about its failure to provide them with their wages.

At trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file briefs.

Based on the entire record, including my observation of witness demeanor,³ and after carefully considering the posthearing briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties, at hearing, stipulated to the factual jurisdictional allegations contained in the complaint. Based on such, I find that at all material times the Respondent, a corporation with an office and place of business in Battle Creek, Michigan, has been engaged in the management and rental of an office building located in Battle Creek, Michigan, known as the Heritage Towers (Heritage), the only facility involved in this proceeding. During the calendar year 2009, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000, of which in excess of \$25,000 was derived from Securitas, Inc. (Securitas) and Midwest Communication Services, Inc. (Midwest).

Securitas is engaged in the business of providing security services, and leases an office in Heritage. During the calendar year 2009, Securitas performed security services valued in excess of \$50,000 in states other than the State of Michigan. Midwest is engaged in the business of radio broadcasting, and leases space in Heritage. During the calendar year 2009, Midwest received gross revenues in excess of \$100,000, held membership in and is a stockholder of Broadcast Music International (BMI), and advertised various nationally sold products including the vehicles of General Motors Corporation, Ford Motor Company, and Toyota Motor Company, music concert tickets, and prepared food products sold by McDonalds Corporation and Subway restaurants. Based on these stipulated facts, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent owns and operates Heritage Towers, a high-rise office building and banquet facility in Battle Creek, Michigan.⁴ Linda Tessin (Tessin) was hired as the operating manager of Heritage in 1994, a time when the building was owned by

³ In the absence of a more detailed discussion as to a particular issue of fact, and in general, my findings as to disputed facts include a consideration of the demeanor of a witness during testimony.

⁴ The building is referred to on the record sometimes as "Heritage Towers" and other times as "Heritage Tower." Throughout the decision, the building is referred to as either "Heritage Towers" (the name utilized in the complaint) or just "Heritage."

Art Dore. Tessin's son, Eric Cvetnich, was also hired by Art Dore, to perform building maintenance work. In 1995, Tessin hired her daughter, Sherrie Cvetnich, to clean the common areas of Heritage and the office suites, and to work at banquets, setting up and "tearing down" the banquet room for functions, working in the kitchen, and bussing tables during parties.

Also in 1995, Tessin hired Teresa Burge⁵ to work at banquets on weekends. Burge testified that her work consisted of "setting up and tearing down the parties. . . ." Tessin hired Burge as a full-time employee in October 2008. Burge, in addition to working banquets, began to clean the building's lobby and main floor. Tessin scheduled employees for work, hired bartenders for banquets, and chose contractors to perform work in the building.

In August 2008, Art Dore sold Heritage to the Respondent, a real estate holding company, of which 50 percent is owned by Timothy Hogan.⁶ Hogan testified that he first did a "walk-through" of Heritage in 2007, before the Respondent purchased the property from Dore. But he later testified that the walk-through occurred about "two months before the acquisition," which would have put the walk through in June 2008. The Respondent's counsel asked Hogan if he did the walk-through alone or with somebody. Hogan first answered "alone." Then Hogan testified, "Actually, I was escorted by someone that worked for Art Dore, and I believe it was his son-in-law." Still again, Hogan testified that Tessin was "with me for part of the time, just not the entire time."

Hogan's testimony as to his initial walk-through of Heritage centered on his appreciation for a bank vault that he discovered, and its condition. In short, Hogan testified that he was awestruck by the "beauty" of the bank vault, that Tessin, who accompanied him to the vault, told him that they had "started taking some of the brass out," "because Art Dore was a guy who wouldn't give them any money to work on stuff." Hogan testified that he told Tessin, "Please, I'm buying this building. Whatever you do, don't hurt this any more."⁷ I love this."⁸

⁵ Burge is not a relative of Tessin.

⁶ Hogan testified that he "believes" the purchase took place in August 2008.

⁷ Tessin testified that, in fact, she did have a conversation with Hogan, in which Hogan told her not to remove additional metal from the bank vault, but that it was before Hogan actually purchased the building, and that she couldn't remember whether or not he ever also told her this after becoming owner of Heritage.

⁸ The Respondent's counsel simply asked Hogan "what condition was the vault in?" Hogan's answer took up almost an entire page of transcript, and included the following: "It was in about 75 percent internally. The external, if I might give an explanation—as you walk up to it, it's a gigantic bank vault with a 30,000-pound door and there's a gated door that has to be opened once you open the 30,000-pound door that lets you into a safety deposit box room, I would call it, which is—there's probably thousands of—there's probably a thousand safety deposit boxes, if I were to guess, with very beautiful, ornate brass doors. And I went in and I was—I remarked at just how unbelievably cool and beautiful this was. It was just a work of art. It was beautiful. It was put in before they put the rest of the building around it. And I did notice that, as I started walking through, there was a room in the back corner that was just a concrete room. And I asked what this was, and they said, 'well, it was another vault room, but, you know, we

Hogan testified that he again visited Heritage with Ben Bates “either before or after I acquired the building. . . .” According to Hogan, Bates “also fell in love with the bank vault.” Hogan further testified that he observed the bank vault was in substantially similar condition to his earlier visit.

Initially after the sale, the Respondent utilized Mean Ben Syndicate LLC (Mean Ben), owned by Ben Bates, to manage the building, but retained Tessin as the building manager. Tessin showed Bates around the property and introduced him to Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich, telling Bates that Sherrie Cvetnich and Burge were banquet staff, and Eric Cvetnich the maintenance supervisor.⁹ Tessin managed Heritage on a day-to-day basis, including signing and issuing paychecks and checks for expenses on a checking account maintained by Mean Ben. Tessin continued with her other duties including scheduling employees, and arranging for bartenders to work banquets.

In June 2009 the Respondent, in the person of Hogan, replaced Mean Ben in the management of Heritage. Hogan¹⁰ visited Heritage in June. He and Tessin went to a local bank, and opened a checking account for the Respondent.¹¹ Tessin, following Hogan’s instructions, used this account to pay building expenses and issue payroll checks,¹² instead of the prior checks which bore the Mean Ben account information. Tessin’s duties did not change under the Respondent’s stewardship. On a later visit to Heritage, about September 19, Tessin introduced Sherrie Cvetnich and Burge to Hogan, telling him they were employees.¹³ Hogan testified that during this visit he noticed that the vault “was significantly—I’ll use the word ‘destroyed’.” Hogan testified that most of the brass was missing, and that he again asked Tessin to stop removing the brass.¹⁴

started taking some of the brass out of here’ because Art Dore was a guy who wouldn’t give them any money to work on stuff. And I said, ‘Please.’ I said, ‘I’m buying this building. Whatever you do, don’t hurt this any more. I love this.’”

⁹ Testimony of Tessin. Apparently Tessin believed that Eric Cvetnich’s title was maintenance supervisor, although Eric Cvetnich did not testify as to such. In any case, as discussed infra, there is no evidence that Eric Cvetnich ever supervised another employee.

¹⁰ Hogan lived in Florida and did not regularly appear at Heritage.

¹¹ Hogan became an additional signer on the account in September.

¹² In response to questions asked by the Respondent’s counsel on cross-examination, Sherrie Cvetnich, Burge, and Tessin testified that they did not receive IRS W-2 forms for 2009 from the Respondent.

¹³ Sherrie Cvetnich testified that Tessin introduced her and Burge to Hogan “as employees,” but didn’t mention what work they performed. Burge testified that Tessin introduced her and Cvetnich to Hogan, but didn’t mention their employment status. Hogan testified that Tessin introduced Burge and Sherrie Cvetnich to him, telling him that they worked the banquet hall on weekends, and that Sherrie Cvetnich “had a cleaning company and they clean for tenants. . . .” Hogan also testified he became aware that Sherrie Cvetnich was working at Heritage during the conversation. Thus, by these accounts, Hogan became aware of their status as employees at least by this conversation in September.

¹⁴ Hogan’s answers to his counsel’s questions as to this trip ranged far beyond the questions and became a moving narrative of his thoughts on various subjects, detracting from his credibility as a witness. For example, the Respondent’s counsel simply asked Hogan whether he observed the vault on this visit to Heritage. Hogan’s answer, verbatim,

Subsequently, Hogan asked his long-time friend Hogarth Joseph¹⁵ to accompany him on a visit to Heritage to look over the property. According to Joseph, Hogan told him that he had purchased a “20-story skyscraper,” and Joseph replied, “you got to be kidding me.” Joseph testified that the two of them had been trying to get together for a number of years, and Hogan said, “Could you come: You want to meet me in Detroit? You know, take a look at the building and tell me what you think.” Hogan and Joseph traveled to Heritage on September 25. Hogan returned to Florida on October 1, and Joseph remained until October 3. Upon their arrival at Heritage, Hogan introduced Joseph to Tessin, telling her that Joseph “was there to help us get a handle on things.”

According to Tessin, Joseph walked around the building during his stay, and asked a lot of questions about it. Tessin described the questions as “How the HVAC worked, how the boiler system worked, those kind of questions.” As to some of these questions, Tessin directed Joseph to Eric Cvetnich, and heard Joseph and Eric Cvetnich talking about “general maintenance, repairs of the building.” According to Tessin, Joseph told Tessin, during his visit, that she did banquets well, but as to all other responsibilities, she had to “go through him.” Tessin testified that, nevertheless, her duties did not change.

According to Hogan, during his visit to Heritage, he became concerned over the state of the building. He testified as to the upper floors of the building: “complete utter neglect, tiles down, mold on the ceilings . . . water leaks, frozen pipes, never mitigated.” Hogan asked Tessin about the state of the upper floors, and she replied, “We don’t have the money to do anything up here and we don’t have the manpower to work on this stuff.”¹⁶

Tessin testified that in early October, Joseph called an employee meeting in an office that he was temporarily occupying in the building. Present for the meeting besides Tessin and Joseph were Sherrie Cvetnich, Burge, Eric Cvetnich, and Zach

is as follows: “I believe the next time I visited the vault—I’m not exactly sure when the next time I visited the building was. I know that my wife and I traveled to Battle Creek in September, in late September of ’09. She and I were in New York. We decided to fly to Battle Creek together. She had never seen the building and I wanted to show her the building. I got in on a Friday, I believe, midday. One of things I had to do was I was not yet a signer on the Random Acquisitions account that was opened. It was opened up remotely. I faxed a driver’s license and our corporation paperwork in June, I believe, and Linda had gone over and opened the account. She was our registered agent in Michigan. And I became a signer on the account that Friday.” Hogan’s long response to his counsel’s question, never reached the subject matter of the question.

¹⁵ Joseph testified that he and Hogan have been friends for over 20 years, attended college together, and have had various types of business relationships over the years. Tessin testified that Joseph eventually maintained an office in the building, and instructed her that as to any business other than banquets, “she needed to go through him.” Hogan testified that he instructed Joseph to carry out management decisions such as the asserted decisions to lay off employees. Joseph testified that he called an employee meeting at Heritage, and questioned employees as to their jobs. Clearly, Hogan designated Joseph as a 2(11) and a 2(12) agent of the Respondent, and I so find that he occupied said status. No party contended to the contrary.

¹⁶ Credited, uncontroverted testimony of Hogan.

Cvetnich,¹⁷ at times. Tessin testified that during the part of the meeting she attended, Joseph told the employees that the Respondent had no money, that the hours of Sherrie Cvetnich and Burge needed to be cut, and that employees needed to make the most of the limited resources,¹⁸ suggesting that employees make sure that the trash containers are full when trash collection was scheduled. Tessin testified that after the meeting she gave Joseph written job descriptions for each employee, including Sherrie Cvetnich, Burge, Eric Cvetnich, Zach Cvetnich, and Tessin.

Burge and Sherrie Cvetnich also testified as to the October employee meeting with Joseph. Counsel for the acting General Counsel asked Burge what she remembered Joseph saying at the meeting, and she testified that he said he was there to make sure “everything was running smoothly,” that “everybody was doing their job,” and to make sure the dumpsters were full on “garbage day.” She was not specifically asked, and did not testify, as to whether he said anything about the hours of Sherrie Cvetnich and Burge being cut, as testified to by Tessin.

Eric Cvetnich testified that he also attended the employee meeting. According to Cvetnich, Joseph asked the employees for their job descriptions, and each employee told Joseph what their work consisted of. Eric Cvetnich told Joseph that he performed maintenance work, and described his maintenance duties. Sherrie Cvetnich and Burge told Joseph that they worked parties and banquets and also mopped floors, cleaned, and painted.¹⁹ Eric Cvetnich testified that subsequent to the meeting, he received work assignments from both Tessin and Joseph, and that Joseph instructed him to inspect a leak in a chimney flue.

Sherrie Cvetnich testified that at the meeting, Joseph said that she and Burge should continue with their duties, that the dumpster had to be full of trash for the scheduled pickup, and that even though the Respondent had no money, that if they absolutely needed some, “it would just take one phone call and a check would be here.”²⁰ Sherrie Cvetnich was not specifically asked, and did not testify, as to whether Joseph said anything about employee hours being cut, as testified to by Tessin.²¹ Joseph testified that he did hold an employee meeting in late September, but was not asked any questions about what was said during the meeting, and offered no testimony as to any details.

¹⁷ Tessin testified that Eric Cvetnich’s son, Zach Cvetnich, was a temporary employee, that he was hired in early October 2009, and that he would have, but didn’t, receive his first payroll check on October 14.

¹⁸ Only Tessin testified that Hogarth talked about cutting employee hours.

¹⁹ Credited testimony of Eric Cvetnich. Cvetnich’s testimonial demeanor was impressive, including his generally direct and non-argumentative answers to questions of all counsel.

²⁰ Hogan testified that in the fall of 2009, the financial condition of Random Acquisitions was “dire, at best,” that there was not enough income “to cover the debt service,” and he intended to cut costs.

²¹ Respondent’s counsel, in his brief, asserts that Sherrie Cvetnich and Teresa Burge both testified that Joseph said nothing at the meeting about their hours being cut. In fact, while neither testified that Joseph said anything about hours being cut at the meeting when asked what was said at the meeting, neither testified that he didn’t talk about hours being cut and, indeed, neither was asked that specific question.

Joseph ended his stay at Heritage on October 3, and flew to Pensacola, Florida. Joseph testified that he traveled to Pensacola, where Hogan was located, because, first, he wanted to look at some computer equipment he had stored in a warehouse owned by Hogan’s father and, second, because he wanted to talk to Hogan about “events going on in the building.” Joseph took several documents that concerned him from Tessin’s files at Heritage to show to Hogan, including a check issued to another of Tessin’s sons, Michael Cvetnich, for work at Heritage performed by C.J. Jones Construction (Jones), a credit application that Tessin had filed with Kendall Electric (Kendall) that contained Hogan’s social security number and apparent signature, an application for credit with United States Lumber dated June 4, and an Internal Revenue Service document assigning an Employer Identification Number to “Random Acquisitions LLC,” which listed Tessin as a “Sole MBR.”

Joseph and Hogan both testified that they discussed the problems they perceived at Heritage and the status of Tessin and the employees. According to Hogan, the primary conversation between the two occurred about October 3, when Hogan picked up Joseph at the Pensacola, Florida airport.²² According to Hogan and Joseph, Joseph told Hogan that there were serious problems at Heritage including problems with employees, problems with potential fraud, and liability issues related to building maintenance. Joseph showed Hogan the documents he had taken from Heritage, and discussed each with him.

Some of the documents involved a check Hogan had issued to Consumer’s Energy for about \$6000 in response to a power shutoff notice the utility had sent to Heritage, but which was returned by the bank for insufficient funds, and a check on the Respondent’s account issued about the same time to another son of Tessin, Mike Cvetnich, for \$3419 for work done in respect to a damaged canopy at Heritage. Hogan testified that Tessin had not informed the Respondent of the check written to Mike Cvetnich, and this caused the check issued to Consumer’s Energy to be returned by the bank.²³ Joseph testified that he became further concerned about the check issued to Mike Cvetnich, because Tessin had originally issued a check for the canopy work to Mike Cvetnich’s employer, C.R. Jones, Construction, because Tessin’s home phone number appeared on the C.R. Jones invoice, and because another contractor, “CSE”, had submitted a slightly higher, but competitive, bid²⁴ to Tessin for the work, but which included repair of the canopy, while C.R. Jones’ bid simply provided for the hauling away of the damaged canopy, but not repairing it.

²² When asked the Respondent’s counsel when his conversation with Hogarth occurred, Hogan answered, “I know for a fact Mr. Joseph arrived on the 3rd to (sic) Pensacola.”

²³ Hogan testified that that when the check was written to Consumers Energy, he had personally instructed Tessin to deliver the check before 4:00 p.m., to avoid the power being shut off, and she had promised to do so. Hogan further testified that when he learned that a second check for a large amount had cleared the bank, thus leaving insufficient funds for the Consumers Energy check, he called Tessin and asked for an explanation, and that Tessin replied that she didn’t “know anything about that.”

²⁴ CSE’s bid for repair of the canopy was \$3,556. The bid from C.R. Jones was \$3,419.

Tessin testified that she had accepted the bid of C.R. Jones even though CSE had told her that they could fix the canopy and “make it look right,” because her son Michael Cvetnich’s employer, C.R. Jones, told her that in “their opinion [the canopy] could not be attached back to the building.”²⁵ As to the duplicate checks,²⁶ Tessin testified that she originally cut the check to C. R. Jones, but that Michael Cvetnich asked her to make out the check to him because Jones was unavailable and Cvetnich’s crew “needed to be paid.” Tessin testified that her home phone number appeared on the invoice from C. R. Jones because her son, Michael Cvetnich, lives at her residence.

Joseph also showed Hogan a credit application that Tessin had filed with Kendall Electric on June 4.²⁷ Hogan’s apparent signature appeared on the document as “Guarantor,” and the apparent signatures of Sherrie Cvetnich and Burge appeared as witnesses. Hogan told Joseph that the signature on the document was not his. Tessin testified that she, in fact, “put Tim’s name down on there” because Kendall required the paperwork in their file in order to grant Heritage wholesale prices for supplies for the building, that she had done the same with other suppliers, and that she had also engaged in that practice when Art Dore owned the building.

Sherrie Cvetnich testified that she did, in fact, sign the document as a witness. Burge testified that the signature on the credit application was not hers.

Finally, among the documents that Joseph brought with him to show Hogan, was an IRS form assigning an Employer Identification Number (EIN) to a business listed as follows: “Random Acquisitions LLC Linda Tessin Sole MBR.” Tessin testified, as to this IRS document that it was for a business she was setting up, called “Silks by Design,” to make and sell centerpieces for the banquet center. She testified that she had discussed her idea of the business with Hogan “as a good way of income for the building,” and he had agreed to it.

During direct examination, the Respondent’s counsel asked Hogan whether, in their conversations in Florida during early October, Hogan said “anything to Mr. Joseph about terminating employees?” I sustained counsel for the Acting General Counsel’s objection to the leading question. Counsel for the Respondent then, without objection, asked Hogan just to testify as to what he and Joseph said during the conversation. Hogan began a lengthy answer to the question as follows, verbatim:

“I said, based on my trip with him to Battle Creek where I saw that the building was improperly being run, the way that—I mean, if I may, when I was there, the check that was payable to Consumers Electric (sic), it was issued when I was there on the trip with Mr. Joseph prior to me leaving to go to

Florida. There was a disconnect notice that came while I was there. That disconnect notice said that if 6,000 and some odd dollars was not received the next day, that it did not post—no, it had to post that day at Consumers Electric (sic). And I can remember at that point that I had Hogie’s wife, Darci, now that I was. . . .”

I then sustained counsel for the Acting General Counsel’s objection, as it appeared that Hogan was simply relating a stream of consciousness rather than making a serious attempt to answer the question.

The Respondent’s counsel then approached the question for a third time, asking Hogan, “What did you say to Mr. Joseph in that conversation in October of 2009 about what you observed at the building upon your visit?” Hogan answered, “I said to him that I was embarrassed. I was disappointed that I was an absentee landlord. I said that the folks—that I made a huge mistake by trusting Linda Tessin. When I first met her, she seemed like a sweet lady. And that she actually asked me when I bought the building. . . .” I then, again, sustained an objection by counsel for the Acting General Counsel. The Respondent’s counsel tried again, and asked Hogan, “What else did you say?” Hogan answered, “I told him that we need to fire these people. That’s what I told him. I said, We need to fire these people. . . . My asset is getting destroyed. . . . My company’s being fleeced.”

Counsel for the Acting General Counsel then, on cross-examination of Hogan, revisited the subject of the Heritage employees’ job status, and asked Hogan, “These employees were terminated on October 16th; isn’t that correct?” Hogan responded that it was not correct. Counsel for the Acting General Counsel asked, “When were they terminated?” Hogan answered, “Sherrie [Cvetnich] and Teresa [Burge] were terminated a week or so prior at my instruction to Mr. Joseph.” In response to a later question, Hogan answered, “Two employees were terminated, Sherrie [Cvetnich] and Teresa [Burge] were terminated the 5th or 6th of October.” In response to a subsequent question of counsel for the Acting General Counsel, Hogan testified that the discharge decision was made because the Respondent couldn’t afford them and because of fraud, but mainly the fraud. Hogan cited Tessin’s actions, and testified, “. . . Linda [Tessin] was involved with forging checks, opening up what I thought was a separate Random Acquisitions, LLC, her as sole managing member. Fleecing the company by transferring funds to every family member she had, lying to me about that. . . .”

Joseph was explicitly asked by the Respondent’s counsel, as to a conversation between Joseph and Hogan in Pensacola shortly before October 5, what was said between the two of them as to the employment status of the employees at Heritage. Joseph answered, “The employment status is that he did not want Sherrie [Cvetnich] and Teresa [Burge] working there anymore. Eric [Cvetnich] was uncertain at that point.” Joseph was then reminded that the question called for his testimony as to what actually was said, and instructed, by the undersigned, “If you have a firm recollection of what he said, I don’t care if you remember every vowel and every period and every comma, but if you have a firm recollection of what he said, so testify.”

²⁵ Presumably, the C.R. Jones representative who told her the canopy could not be repaired was her son, Michael Cvetnich, although Tessin did not testify as to a name. Tessin testified, “when C.R. Jones came, got up on the canopy, their opinion was it could not be attached to the building.”

²⁶ Only the check made out to Michael Cvetnich was cashed.

²⁷ Joseph also showed Hogan a similar credit application for U.S. Lumber. Tessin testified that she “made out” this document. Tessin signed this application with her own name, as general manager of Heritage, but she also signed Hogan’s name as “principal/proprietor/guarantor” in the credit report authorization section of the application.

Joseph responded, "I do not have a firm recollection exactly what was said. No sir."

Nevertheless, Joseph testified that following his conversation with Hogan about employee job status at Heritage, he had a conversation with Tessin on October 5²⁸ about the status of Sherrie Cvetnich and Burge. Joseph testified that he told Tessin that "this was the last week for Teresa and Sherrie." According to Joseph, Tessin only responded "Okay," and did not ask for reasons for the decision.

As to Joseph's phone call, Tessin testified²⁹ that about October 5 or 6; she received a telephone call from Joseph, in which he informed her that Hogan didn't feel that Sherrie Cvetnich and Burge were needed and that "we could let them go."³⁰ According to Tessin, she responded that the two employees didn't need to clean in the building, but she needed them for banquets, and that Joseph replied that "we had to cut their hours to 20 per week," and they were to work banquets only. Tessin testified that about a day or two later she informed Sherrie Cvetnich and Burge that their hours were cut to 20 and they would only work banquets. Sherrie Cvetnich testified³¹ that Tessin told her that her hours were reduced, and she would only be working banquets. Burge also testified³² that Tessin informed her that her hours would be cut to 20 per week.

Also on October 5, Joseph's wife, Darci Joseph, acting in a secretarial capacity for him, sent an email to Tessin asking for information as to the Heritage internet website, including the name of the internet company which was hosting the Heritage website and the passwords. About three hours later, Tessin emailed the following response to Darci:³³ "To my knowledge we are paying no one to host the website. It was set up about 12 years ago. Looked for a file after all my staff was laid off. But it's empty. Sorry I can't be of more help with this."³⁴

The Respondent's counsel, on cross-examination asked Tessin about this email response, which appeared to acknowledge the layoff of employees. In answer, Tessin testified that she didn't recall sending the email and that the "from" email address on the message was not hers. Then, after so testifying that the email address was not hers, Tessin changed her testimony to "It may be—this is my email address, but anybody could send that off my computer." Later in the cross-examination, Tessin finally admitted, "I'd say I've seen [the email message] before."

On re-direct examination by the counsel for the Acting General Counsel, when asked about the email message, Tessin testi-

fied that the layoffs she was referring to in the email occurred 12 years earlier, when prior Heritage owner Art Dore laid off her staff. Tessin testified that she had looked for a file as to the website at the time Dore laid off her staff and couldn't find it, and that the staff she referred to in the email as being laid off was the staff from 12 years ago, not the current employees. Tessin offered no further explanation as to why she would mention, in her email, the asserted layoff from 12 years earlier.

On October 7, Darci Joseph, acting in a secretarial role for Joseph, sent Tessin an email informing her that Joseph would return to Florida, that no further information was then needed as to "employees, etc. that work there," and that Joseph had told her (Darci) that he will return to Battle Creek by that Friday "and will immediately address those issues upon his return." The Respondent also introduced what appears to be Tessin's email response to Darci's message, sent about two and a half hours later as follows (verbatim): "If my employees are being dismissed it needs to be done for I work a 20 hour day and they work 16 hr days. I would like an answer."

When questioned by the counsel for the Acting General Counsel as to what she meant by her email reply to Darci Joseph, Tessin testified, "I was upset when I got [Darci Joseph's] email. That [my reply] makes no sense at all." When asked why she was upset, Tessin testified, "To think they were going to take all my help away from the banquet floor." Then, counsel for the Acting General Counsel asked, "Well, when did they say they would do that?" Tessin answered, "I think when I had—when I had a conversation with Mr. Joseph on cutting their hours, I said I could cut their hours, but I could not, not have them at all." Tessin was not asked, and did not explain, why she would have still been upset on October 7 that "they were going to take all my help away. . .", inasmuch as she had earlier testified that on October 5 or 6 Joseph had acceded to her request to keep Burge and Sherri Cvetnich at work 20 hours a week for banquets.

Joseph returned to Heritage from Pensacola on Sunday, October 11. A few days later, on October 15, Joseph noticed a deputy sheriff for Calhoun County Michigan,³⁵ walking around the Heritage premises. According to Joseph, a few minutes later Tessin told him that she was in "big trouble." Joseph approached the deputy, who was sitting in one of the offices to inquire as to his presence. The deputy told Joseph he was there to seize assets of the Respondent, pursuant to a garnishment order of the court, and showed Joseph the order. The case title in the order was styled Chase Bank vs. Random Acquisitions, and the balance due Chase, on the order, was \$11,155.50. Tessin told Joseph that the debt was her personal debt, and she would pay it. Tessin further testified that the debt was as to her credit card,³⁶ that she had received a garnishment as to her wages, but had never given the garnishment to Hogan.

While the deputy was present at Heritage, Hogan, in Pensacola, called Tessin and asked her "why there was a sheriff in our building seizing Random Acquisitions' assets?" Tessin

²⁸ Joseph eventually testified that the conversation with Tessin was later on the same day as his conversation with Hogan as to employee job status.

²⁹ On rebuttal, called by counsel for the Acting General Counsel.

³⁰ Yet, Tessin had earlier testified, "there was never any talk of anyone being laid off that I remember."

³¹ On rebuttal, called by counsel for the Acting General Counsel.

³² On rebuttal, called by counsel for the Acting General Counsel.

³³ Tessin's email appears to be a direct response to Darci's earlier message. Thus, it follows Darci's by about 3 and a half hours, and the subject line shows as "RE" the same subject line as Darci's.

³⁴ In this email, and others in the record sent by Tessin, for whatever reason, the punctuation used at the end of sentences appears as ".?" rather than ".".

³⁵ Heritage is located in Battle Creek. Battle Creek is located in Calhoun County, Michigan.

³⁶ She asserted, in her testimony, that there was some type of credit card fraud involved in the debt.

replied that it was a mistake and she was going to get it taken care of. Hogan responded that “this is a huge problem. This is not our debt. You have to take care of this . . . we cannot afford to lose the assets that are in our building because it sounds like this guy’s just going to start loading his truck.” Hogan asked Tessin “if she was going to get the money together to satisfy the judgment in time to prevent the officer from removing [the Respondent’s] property.” Tessin replied that she was “going to be on the phone, calling people, trying to get money together.”

Eventually that day, Tessin gave the deputy \$2,000 towards the debt and the deputy left the premises. The deputy’s court receipt however, signed by both the deputy and Tessin, and contains the following, apparently in the deputy’s handwriting: “To pay \$2,000 today. To pay \$7,000 on 10/16/09 to keep assets in the building.” But, in answer to a question on cross-examination, Tessin testified that she did not tell the deputy on October 15, that she was going to pay the balance owed on the judgment the next day.

The following morning, October 16, Joseph called Hogan and told him that Tessin wasn’t going to pay the deputy the balance owing on the garnishment.³⁷ Hogan then called Tessin and asked her if she told Joseph that she was refusing to pay the deputy the balance owing. Tessin replied that it was true, that her attorney told her that it was not her debt, and she didn’t have to pay it. The deputy returned to Heritage on October 16 to collect the balance owing on the debt, but left around mid-day. There is no evidence that he took any of the Respondent’s property or collected the balance due on the garnishment order.

The Respondent failed to pay the Heritage employees on Wednesday, October 14, which was the scheduled payday.³⁸ Tessin testified that she had also held the checks for the previous two paydays, and that she spoke to Joseph on October 15 about the situation. Joseph told her to figure the checks, figure the payroll, and print out the checks. Tessin testified that after completing those tasks, “I went to his [Joseph’s] office and we did some calculating to see if there was money in the account to pay payroll,” and there was sufficient money.³⁹ According to Tessin, Joseph then told her that she would have to hold the October 14 paychecks as it would make the Respondent “really close on money,” but that employees could cash the earlier paychecks. Tessin testified that she, thus, “held” the employees’ paychecks that had been scheduled for October 14.

On October 16, Tessin received telephone calls from Sherrie Cvetnich and Burge asking about their paychecks. Tessin told them they would have to speak to Joseph. Sherrie Cvetnich called Burge, told her she was going to Heritage to see if their paychecks were ready and asked if she wanted to go. Burge told Tessin she would meet her there. Burge and Sherrie Cvetnich then met in Tessin’s office. Also present were Tessin, and

Eric Cvetnich.⁴⁰ Sherrie Cvetnich asked Tessin where their paychecks were. Tessin replied that she didn’t know.

Sherrie Cvetnich and Burge then walked into Joseph’s office and asked him about their checks. According to Burge, Sherrie Cvetnich told Joseph that they had families and bills, and needed their checks, and Joseph replied that he didn’t have their checks. Sherrie Cvetnich told Joseph if they didn’t get paid, she would “call Channel 3 News, the Labor Board, and Michigan Hour and Wage.”⁴¹

According to Burge, Sherrie Cvetnich also told Joseph that if they didn’t get paid then “we’re going to tear down the job that we already did.”⁴² Sherrie Cvetnich testified that she told Joseph, “if I wasn’t going to get my paycheck, that I would go up to the second floor, which is the banquet facility, and tear it down.”⁴³ Cvetnich testified that she meant she was going to “undo” the work they had already performed to set up for a banquet, including taking off the linens, tablecloths, napkins, and place settings.

Joseph testified that Sherrie Cvetnich said she wanted her paycheck, and he replied, “We’re working on it.”⁴⁴ Asked a second time by the Respondent’s counsel as to what Sherrie Cvetnich said to him, Joseph testified (verbatim), “She said she wanted her f***ing paycheck⁴⁵ or she was going to go upstairs

⁴⁰ Tessin’s husband, Robert Tessin, was also present. Robert Tessin was not a witness at the hearing.

⁴¹ Sherrie Cvetnich was questioned about this conversation a number of times, and her answers were not exactly the same each time. The first time she answered a question as to the conversation, she testified that she “asked him if we were getting our paychecks today, and he stated no. And I told him that I needed my paycheck because I have bills due, shut-off notices and stuff, and he said he wasn’t authorized to sign paychecks. I stated to him that Linda Tessin was. And he hesitated, and I told him that if I wasn’t going to get my paycheck today, that I would call OSHA, the health department, anybody I could think of because of the working conditions I have worked in.” Then, when asked who else she remembered saying she was going to call, Sherrie Cvetnich answered, “Channel 3 News, Battle Creek Enquirer, Labor Board.”

⁴² Burge testified that “tear down” is a phrase used in the banquet business to refer to the work performed after a banquet to clean-up and put away the various items used during the banquet. In this case, Burge testified that she understood Sherrie Cvetnich’s usage of “tear down” to mean undoing the work they had already completed for scheduled banquet, including putting back the napkins, glasses, silverware, linens, and chairs. In other words, undoing the work that they had already performed, but were not being paid for.

⁴³ She initially testified that she made the “tear down” comment a few minutes later, after returning to Tessin’s office. Later in her testimony, she said she may have also used this expression to Joseph, in Joseph’s office.

⁴⁴ Joseph was asked by the Respondent’s counsel, “What was the substance of the conversation you had with Sherrie Cvetnich.” Joseph answered, “Sherrie came in. She said she wanted her paycheck. She said she wanted—she goes, ‘I want to get paid,’ is what she said. Something to that effect.”

⁴⁵ Inasmuch as Sherrie Cvetnich eventually testified she did not remember whether she used the “f” word, and Joseph testified that she, in fact, had used the word, I credit Joseph as to his testimony that Sherrie Cvetnich used the “f” word in talking to Joseph. I note that when first asked by the counsel for the Acting General Counsel whether she used “obscene words or profanity, Sherrie Cvetnich asked if this meant

³⁷ Joseph testified that Tessin told him this on October 16. Tessin testified that she didn’t remember said conversation with Joseph on October 16.

³⁸ The Respondent paid its Heritage employees every other Wednesday.

³⁹ Tessin testified that her calculations were based on paychecks for herself, Burge, Sherrie Cvetnich, Eric Cvetnich, and Zach Cvetnich.

and trash the dome,⁴⁶ the tables.⁴⁷ She was going to tear them—turn them over.⁴⁸ She was going to trash the dome, is what she said. She was with her little boy. I shouldn't say that. Sorry.⁴⁹ Joseph testified that Cvetnich was speaking in an angry tone, and that he considered what Sherrie Cvetnich said to be a threat against the building. According to Joseph, Sherrie Cvetnich told him she wanted paychecks for everybody.

Joseph testified that after listening to Cvetnich, he called Hogan. Burge testified that she heard Joseph tell Hogan, on the phone, that she and Sherrie [Cvetnich] “were in there demanding our paychecks . . .”, and that after speaking to Hogan, Joseph hung up the phone and told Burge and Sherrie Cvetnich that “we didn't have no money and we weren't getting our money for a long time.” According to Burge, she and Sherrie Cvetnich then walked back to Tessin's office.

According to Sherrie Cvetnich's testimony, Joseph called Hogan immediately after Cvetnich threatened to call the media and government agencies, but that all she recalled Joseph telling Hogan in the phone conversation was that Cvetnich was in his office demanding her paycheck, and threatening to call “Channel 3, OSHA, health department, Battle Creek Enquirer.” Sherrie Cvetnich also testified that she didn't remember if Joseph said anything to Hogan about Burge being in his office.

Joseph testified, upon being asked as to his conversation with Hogan on direct-examination by the Respondent's counsel that he told Hogan that “Sherrie is here. She is screaming, yelling and swearing, and what do you want me to do? She's threatening to damage the building. What do you want me to

“cussing and stuff,” and denied that she had, but then testified that she didn't remember whether she had used the “f-word.”

⁴⁶ Area of Heritage where the banquets take place.

⁴⁷ On cross-examination, the counsel for the Acting General Counsel asked Joseph whether it wasn't possible that instead of saying “trash the dome,” Sherrie Cvetnich said, “tear down the dome?” Joseph replied, “She said, “trash the dome.”

⁴⁸ Here, I credit Sherrie Cvetnich and Burge to the effect that she threatened Joseph that she would “tear down” the job they had already set up in the banquet facility, and that this simply meant they would undo the work that had already performed, but had not been paid for. In addition to my conclusions that Burge and Sherrie Cvetnich were generally reliable witnesses, and Joseph, generally, less so, here Joseph actually begins to use the word “tear,” in describing what Sherrie Cvetnich threatened, before abruptly changing in mid-sentence to “turn.” Further, from the testimony of Burge and Sherrie Cvetnich, it is clear that in the context of their work, “tear down” means the process of removing the banquet trappings and setups. In the context of banquet work, the usage of “tear down” would have been natural and expected.

⁴⁹ At this point I asked Joseph whether he was testifying as to the exact words used by Sherrie Cvetnich, or his best recollections, which may or may not be the exact words she used. Joseph replied, “The exact—pretty—the exact words.” I asked if his usage of “pretty” meant “pretty much?” Joseph replied, “Yes, sir.” I asked, then, which it was, exact or pretty much, and whether he was confident that he remembered the exact words she used. Joseph replied, “The exact keywords. Yes sir.” Joseph was then asked whether Sherrie Cvetnich said the same or similar things again in the conversation, and replied that it was said a second time. I asked whether she used the exact same words the second time. Joseph replied that he couldn't testify they were “exact.” I asked whether he remembered the exact words the second time. Joseph replied, “I couldn't testify exactly. No, sir.”

do?” Joseph further testified that Hogan replied, “I'm calling the cops.” On cross-examination by the counsel for the Acting General Counsel, when asked if he (Joseph) told Hogan what Sherrie Cvetnich said, Joseph testified that he didn't know the exact words he used. He also testified, on cross-examination, that he told Hogan “that Sherrie was in the office and they want their paychecks now.”

According to Hogan, Joseph actually called him twice. The first time, Joseph told him that “things are getting crazy down here,” and that he would call him back. A few minutes later, Hogan received a second call from Joseph. Hogan testified that he could hear screaming and shouting in the background, and somebody using the “f-word,” that he asked Joseph if everything was “okay,” that Joseph replied that “Sherrie's in here screaming, threatening to trash the place,” and that Hogan replied that he was going to call the police.⁵⁰ Hogan testified that he subsequently called the police. On cross-examination, Hogan testified that in one of the phone calls, Joseph told him that he had asked “them” to leave, but that “they” were demanding their paychecks.

Sherrie Cvetnich and Burge then returned to Tessin's office, where Tessin and Eric Cvetnich were already present.⁵¹ Each of the witnesses told different versions of what happened once Sherrie and Cvetnich and Burge returned to Tessin's office after leaving Joseph. Tessin testified that Sherrie Cvetnich spoke, and said that Joseph told them he wasn't authorized to issue paychecks and they wouldn't be receiving them. Tessin left her office, met Joseph in the hallway, and asked him why the employees weren't getting their checks. According to Tessin, Joseph responded that “they're not going to receive paychecks.”

Tessin continued, that after her brief conversation with Joseph, she returned to her office. A few minutes later, Joseph, accompanied by a number of police officers, entered Tessin's office. According to Tessin, Joseph told the police officers that he needed to call the owner, Hogan. Joseph called Hogan, and then handed the phone to one of the police officers, Grady Pierce, who spoke to Hogan on the phone, and then announced that he was advised to “escort us out of the building.”

Tessin testified that she then asked Joseph, “Does this mean we're fired?” According to Tessin, Joseph answered, “Yes.”⁵² At some point Sherrie Cvetnich asked, “What are they going to do about our paychecks?” Cvetnich then said to Officer Pierce, that “she felt she should go up, tear down the work that we put

⁵⁰ Hogan also testified that during the phone call he asked Joseph if Joseph had “asked them to leave,” and that Joseph replied “Yes.”

⁵¹ Also present in Tessin's office were her husband, and her son Zach Cvetnich, neither of whom testified.

⁵² Counsel for the Acting General Counsel asked Tessin, “When's the first you heard that you were being fired?” Tessin answered, “When I asked if we were fired.” No other witness supports this testimony, and Tessin, for reasons discussed herein, is not a reliable witness. I, thus, do not credit this testimony. However, as discussed herein, the complaint pleads, and the Respondent's answer admits, that, in fact, Sherrie Cvetnich, Burge, and Eric Cvetnich were discharged by the Respondent on October 16.

in that week setting up, because we had an event that night.”⁵³ Tessin told Sherrie Cvetnich that she needed to calm down and take a step back, that they wouldn’t want to tear anything down, that they had a bride coming in. According to Tessin, Sherrie Cvetnich followed her advice, and calmed down, and that after she spoke to Cvetnich, one of the police officers “told us that we could gather our own personal things,” and they (the police officers) would stay while we gathered them. The employees then gathered their personal belongings and left the premises about an hour after being so instructed.

Sherrie Cvetnich’s testimony as to what happened in Tessin’s office is similar to Tessin’s, except Cvetnich testified that her “tear down” comment was made after the police officer spoke to Hogan on the phone, but before he gave instructions to leave the premises. Burge testified that after the police officer ended his phone conversation with Hogan, he told the employees that that had five minutes to gather their belongings and exit the building. When asked by the counsel for the Acting General Counsel, “What, if anything, did you hear being said about your employment status there,” Burge answered, “We said, ‘are we fired?’ and the police officer said, ‘Take it any way you want it.’” On cross-examination by the Respondent’s counsel, Burge testified that Joseph at no time told her that she was laid off or fired.

Eric Cvetnich also testified as to being present in Tessin’s office on October 16, and as to the occurrences therein. According to Eric Cvetnich, Sherrie Cvetnich was upset, that she said that if she wasn’t going to be paid she would go upstairs and tear down the work she had done prior, that at some point thereafter a police officer spoke to Hogan on the phone, and that after the police officer hung up the phone he said “he was instructed to escort us out of the building.” Counsel for the acting General Counsel asked Eric Cvetnich “after the police officer said he was instructed to tell you to leave, what, if anything, was said about your employment status?” Eric Cvetnich answered, “Nothing,” and that he just gathered his belongings and left. He testified that he assumed he had been terminated, but didn’t know for sure.

Joseph testified that the police arrived about 1:30 p.m. on October 16, and that he spoke to them, but doesn’t remember the conversation. Then, in Tessin’s office, Joseph called Hogan, and one of the police officers spoke to Hogan on the phone, and then the officer announced that he was going to “city hall to verify that Mr. Hogan . . . does, in fact, have the authority to ask the people to leave the building.” According to Joseph, about 45 minutes later the officer returned to Heritage, and said that Hogan does have the authority, that he is the owner of the building and “he wants you to leave the building.”⁵⁴ Joseph said that after the officer spoke, Sherrie Cvetnich, Eric Cvetnich, Burge, and Tessin gathered their belong-

ings and left the building, but that before Tessin left he asked her for the keys to the building, and she gave them to him. Joseph further testified that “we talked,” that he couldn’t remember what was said, but that Tessin did not ask Joseph if she was terminated.

Analysis and Conclusions

The General Counsel’s complaint alleges that the Respondent discharged Sherrie Cvetnich, Eric Cvetnich, and Burge because Sherrie Cvetnich “concertedly complained to [the] Respondent . . .” “by demanding that [the] Respondent provide her and other employees with their paychecks.” In short, counsel for the Acting General Counsel argues, citing *Liberty Ashes & Rubbish Co.*, 323 NLRB 9, 11–12 (1997)⁵⁵ in his brief, that when Sherrie Cvetnich, accompanied by Burge, spoke to Joseph on October 16, she engaged in concerted and protected activity by demanding that employees receive their paychecks due for work already performed, and that Eric Cvetnich was also discharged in retaliation for Sherrie Cvetnich’s concerted activity.

The Respondent, in its counsel’s brief, essentially presents two arguments. First, the Respondent argues that “Sherrie Cvetnich and Eric Cvetnich are not statutory employees covered by the Act.” Second, the Respondent argues that the Acting General Counsel failed to meet his burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982),⁵⁶ in that the Respondent assertedly discharged Sherrie Cvetnich and Burge on a date earlier than October 16 and, thus, prior to any assertedly concerted activity,⁵⁷ and that, in the alternative, the Respondent met its resultant *Wright Line* burden by, assertedly, demonstrating that the discharges would have taken place, notwithstanding the asserted concerted activity.

I conclude, for the reasons set forth herein, that Sherrie Cvetnich, Eric Cvetnich, and Burge were discharged in violation of Section 8(a)(1) of the Act, as alleged in the complaint. In reaching this decision, I further conclude that all three were statutory employees, that they were discharged on October 16, and that the Acting General Counsel met the burden described by Board in *Wright Line*, while the Respondent failed to meet its resultant burden.

In so concluding, I have carefully weighed the credibility of the witnesses who testified, and find that neither Acting General Counsel’s witness Linda Tessin, nor the Respondent’s witnesses, Tim Hogan and Hogarth Joseph, have demonstrated either by testimonial demeanor or the quality of their testimony, that they are witnesses upon whom I can rely on in determining the substantive facts. As to Tessin, the substantive changes in her testimony from her appearance as part of the Acting General Counsel’s case to her appearance during rebuttal are re-

⁵³ Tessin testified that Sherrie Cvetnich made her “tear down” comment after Joseph said they were fired.

⁵⁴ Joseph at first testified that he didn’t remember what the officer said, and then added that he didn’t remember “exactly” what the officer said. When asked whether, even if he didn’t remember every word, what was his best recollection, Joseph testified, the officer said, “Mr. Hogan has the authority to ask you to leave the building, and you—he wants you to leave the building.”

⁵⁵ The case stands for the proposition that when an employer discharges an employee in the belief that the employee engaged in concerted protected activity, such action violates the Act, regardless of whether the employee engaged, or intended to engage in such activities. The case citation appears here as corrected from the brief.

⁵⁶ Citation appears as corrected from the brief.

⁵⁷ And, thus, could not have been motivated by the asserted concerted activity.

markable, as was her stubborn insistence on demonstrably ludicrous testimony while being examined by the Respondent's counsel.⁵⁸ Further, Tessin had to be excluded from the courtroom because of her behavior during the course of the testimony of other witnesses, which gave the undersigned concern that her courtroom gestures could impact the testimony of said witnesses, only to once again engage in such activity subsequent to being readmitted to the courtroom, pursuant to the request of the counsel for the Acting General Counsel. These actions demonstrated a single-minded focus on winning the litigation, with everything else, including the truthfulness and reliability of her testimony, of lesser consequence.

Hogan and Joseph also were unimpressive witnesses. Both tended to answer counsels' questions with long rambling, sometimes evasive, answers that occasionally never even began to deal with the question posed, giving rise to concern that they were less interested in answering said questions than in presenting their views that the Respondent had been wronged, principally by Tessin. Their answers to counsels' questions were sometimes internally inconsistent so that each presented more than one version of the same event or conversation.⁵⁹ For example, the first time Joseph was asked what Sherrie Cvetnich said to him in his office on October 16, he failed to mention her usage of the "f-word". Asked a second time, he added her usage of the obscenity.

All three of these witnesses, based on their record testimony, and based on my courtroom observations of their testimonial demeanor, seemed more interested in helping win the case for their "team," than in giving honest, straightforward, and truthful answers to questions. In short, I was given little reason to rely on the testimony of any of them, when in conflict with other testimony or evidence. However, the credited testimony of the other witnesses,⁶⁰ and the framing of the factual issues by the Regional Director's complaint and the Respondent's answer, provide a sufficient basis upon which to reach my conclusions.

As to the substantive issues, I first conclude that, in fact, Sherrie Cvetnich, Eric Cvetnich, and Teresa Burge are all statutory employees, and that they, thus, enjoy Section 7 rights, and that an employer interfering with, restraining, or coercing them in the exercise of their Section 7 rights would violate Section 8(a)(1) of the Act. The Respondent does not contest Burge's

⁵⁸ For example, Tessin was questioned by the Respondent's counsel as to an email, which she obviously authored and sent. When asked initially, Tessin testified that she didn't recall sending it. In response to further questions, she testified that the email address on the "from" line was not hers. She then testified that the email address was hers, but anybody could have sent the email from her computer. Finally, she acknowledged that she had seen the email before. On re-direct examination by the counsel for the Acting General Counsel, Tessin suddenly remembered the reason she assertedly worded the email in a certain way.

⁵⁹ A trait shared by Tessin.

⁶⁰ By contrast, the testimony of Sherrie Cvetnich, and particularly Teresa Burge and Eric Cvetnich, was generally directly responsive to the questions, rather than evasive, and their testimonial demeanors, in my close observation, were that of witnesses striving for accurate and truthful answers, rather than just answers that would be helpful to their side.

status as a statutory employee, but in its counsel's brief asserts that neither Cvetnich is a statutory employee because they are children of Tessin, who is alleged to be a supervisor in the complaint. In its answer as to Tessin's alleged supervisory status, the Respondent leaves the Acting General Counsel to its proofs.

Initially, I note that the Regional Director, in his complaint, alleges both Sherrie and Eric Cvetnich to be employees. Thus, in paragraph 8 of the complaint, the Regional Director alleges as follows: "On October 16, 2009, Respondent terminated its Charging Party [Sherrie Cvetnich], Eric Cvetnich, and Teresa Burge." The Respondent's answer in response to said allegation is as follows: "RESPONDENT ADMITS SAME."⁶¹ The answer of the Respondent was filed 2 days before trial by the same counsel who presented the Respondent's defense at trial, and now argues in brief that the Cvetnich's are not employees. And complaint paragraph 8, which the Respondent admitted in its entirety, didn't just allege that the Cvetnichs were terminated by the Respondent, but that the Cvetnichs were employees of the Respondent, whom it terminated.

The Respondent's answer, admitting the status of Sherrie and Eric Cvetnich, is binding upon the Respondent. In *D.A. Collins Refractories*, 272 NLRB 931 (1984), the Board held as follows in respect to the effect of such admissions in a party's answer: "The judge was correct in holding that a statement in a party's pleading is an admission. It is also true that a statement in a pleading constitutes a 'judicial' admission that is binding on the party making the admission. See 4 *Wigmore, Evidence*, Sec. 1064 (Chadborn rev. 1972). It is also well established, however, that when an amended pleading is filed, the 'judicial' admission loses its binding effect." No amended pleading was filed or moved by the Respondent, and the argument contained in its brief does not constitute such.

Even if the Respondent had amended its answer to place employee status in issue, its argument would be unavailing. In this regard, the Respondent argues that the definition of "employee" contained in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse," and that since Sherrie and Eric Cvetnich worked under the supervision of Tessin, their mother, and alleged in the complaint as a 2(11) supervisor and a 2(13) agent, they are excluded from the Act's protections afforded statutory employees.

But the cases cited by the Respondent's counsel in his brief, generally deal with the Board's responsibility, under Section 9(b) of the Act, for finding appropriate units for collective bargaining and whether certain employees, generally relatives of an owner, share a community of interest with the balance of a bargaining unit. See, generally, *N.L.R.B. v. Action Automotive, Inc.*, 469 U.S. 490 (1985). Thus, *Novi American Inc. Atlanta*, 234 NLRB 421 (1978) and *Rawalt Coal Co.*,⁶² 92 NLRB 58

⁶¹ All caps contained in the original.

⁶² Name of the case appears as corrected from the brief. In fact, the Board's decision here dealt only with the issue of commerce, finding that the employer did not meet the Board's discretionary standards, and dismissing the case. The *alj*'s decision found that certain relatives of management held interests significantly different from the rest of the bargaining unit, and should not be included in the unit.

(1950), cases cited by the Respondent in its brief, dealt with the issue of whether a relative of an owner shared a community of interest with the bargaining unit, but not with the issue of whether the individuals in question were statutory employees so as to enjoy the protection of the Act.⁶³

The dichotomy between the Board cases interpreting the statutory exclusions set forth in Section 2(3) of the Act and the Board's community of interest responsibilities is discussed in *Foam Rubber City #2 of Florida, Inc.*, 167 NLRB 623, 624 (1967). There, after discussing the application of Section 2(3) to the facts of the case, the Board said,

But even assuming, *arguendo*, that Section 2(3) of the Act is not susceptible to the foregoing interpretation, we would, nevertheless, reach the same result in determining the appropriate bargaining unit in accordance with Section 9(b) of the Act. Under that section, we are charged by Congress with the responsibility to find units appropriate for collective bargaining that assure to employees the fullest freedom in exercising the rights guaranteed by the Act. And in implementing this responsibility we have traditionally included in bargaining units those individuals who have a community of interest with their fellow employees, but we have excluded individuals whose interests are more closely identified with those of management. Consistent with this practice we would exclude the children of the principals of closely held corporations. For it is obvious that such children, because of their relationship with a substantial owner of this type of enterprise, have interests more closely identified with management than with their fellow employees.

Thus, whatever decision the Board would make if faced with a 9(b) community of interest issue in respect to Sherrie and Eric Cvetnich, an issue not presented here, there is no evidence that they are in any fashion the children of, or otherwise related to, owners of the Respondent.⁶⁴ Accordingly, even if the Respondent had not admitted their status as employees of the Respondent, I would find that neither Eric Cvetnich nor Sherrie Cvetnich are excluded from the protection of the Act, under Section 2(3), as employed by their parent or spouse.

The Respondent also maintains that Eric Cvetnich should be excluded from the Act's protection as a 2(11) supervisor. But the Respondent's answer, as noted above, admitted Eric Cvetnich's status as an employee, and the Respondent never moved to amend said answer. Accordingly, for the reasons discussed above, this admission is binding upon the Respondent, and I find that Eric Cvetnich is an employee entitled to the Act's protection, and not a supervisor within the meaning of Section

⁶³ The Respondent's counsel, in his brief, quotes as follows from the court's decision in *NLRB v. Hofmann*, 147 F.2d 679 (3rd Cir. 1945): "By the same token, his [the employee-son's] father would not be guilty of unfair labor practice by putting the kind of pressure upon his son which he would not be privileged to put upon a stranger." That quote is not helpful here because the court's reference is to an example, put forth by the court, to a situation where the individual at question was clearly excluded from the Act's protection as the child of an owner, a situation that does not exist here.

⁶⁴ The Respondent does not argue, and there is no evidence, that Tessin is an owner.

2(11).

But even notwithstanding the Respondent's admission in its answer, there is insufficient evidence from which I could conclude that Eric Cvetnich was a 2(11) supervisor. Particularly, in this regard, I note that the Respondent's counsel, in his brief, asserts that Eric Cvetnich had the authority to hire his son, Zach Cvetnich, as a temporary worker, citing as proof Eric Cvetnich's testimony at pages 196–197 of the hearing transcript. But, at the cited pages, Eric Cvetnich does not testify that he hired his son, Zach, or that he had such authority. Indeed, Linda Tessin testified that she "brought in Zach," who "worked 2 weeks, but he never got paid."

Section 2(11) of the Act provides that a supervisor is any person "having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The burden of establishing supervisor status rests on the party asserting such. *Alois Box Co.*, 326 NLRB 1177 (1998).

The Respondent's entire argument as to Eric Cvetnich's supervisory status is set forth in its counsel's brief, as follows: "There is undisputed evidence that Tessin's son Eric Cvetnich worked independently and was in sole charge of maintenance at Heritage Tower without any supervision by Tessin. Eric also had the authority to employ his son Zach as a temporary worker . . . This evidence establishes . . . that he qualified as a statutory supervisor . . ."⁶⁵

Suffice to say, the record contains no evidence that Eric Cvetnich exercised any of the 2(11) indicia in respect to any other employee, or that any other employee worked under his supervision. In fact, the record does demonstrate that Eric Cvetnich carried out his job responsibilities of building maintenance with little or no supervision from anybody else, including Tessin, and that he, thus, likely exercised some independent judgment in respect to such maintenance duties.⁶⁶ But the test of supervisory status is not whether he used independent judgment in carrying out his maintenance responsibilities, but whether he exercised such independent judgment with respect to one or more of the specific authorities listed in Section 2(11). *Alois Box Co.*, supra. There is no evidence that he, in fact, did such.

Having found that Sherrie Cvetnich and Eric Cvetnich were statutory employees on October 16, I next consider whether

⁶⁵ The two cases cited by the Respondent's counsel, in brief, are inapposite on their facts. Thus, in *Silvercup Bakers*, 222 NLRB 828 (1976), the administrative law judge found "the head" of an employer's maintenance department to be a supervisor where he was in charge of the day-to-day operations of the maintenance department and its 15 employees. Here, there is no other maintenance employee other than Eric Cvetnich. In *Grancare, Inc., v. NLRB*, 137 F.3d 372 (6th Cir. 1998), the court overruled the Board, and concluded that charge nurses were supervisors where they exercised independent judgment in carrying out supervisory indicia, including discipline and assigning work. There is no evidence here that Eric Cvetnich possessed such authority.

⁶⁶ Although Eric Cvetnich credibly testified that he received work assignments from Tessin and from Joseph.

they and Teresa Burge were discharged in violation of Section 8(a)(1). If the discharges arose out of the *res gestae* of protected activity, assertedly Sherrie Cvetnich's complaints to Joseph on October 16 as to the Respondent's failure to pay them and Cvetnich's concomitant use of profanity, then a *Wright Line* analysis is inapplicable. *Aluminum Co. of America*, 338 NLRB 20, 21 (2002).

However, the Respondent argues, in the alternative, that it discharged Sherrie Cvetnich, Eric Cvetnich, and Burge on a date earlier than October 16 because (1) of the malfeasance of Tessin (the Cvetnichs' mother), and (2) it would have discharged them anyway because of the Respondent's lack of financial resources. Such argument presents the issue of disputed or mixed motivation, and requires the use of a *Wright Line* analysis. *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2 (2010). Thus, before analyzing whether the discharges arose out of the *res gestae* of protected activity and the resultant issues, I must determine the Respondent's motive for the discharges.

Applying a *Wright Line* analysis, I first conclude that Sherrie Cvetnich and Burge engaged in protected, concerted activity on October 16 and that the Respondent had knowledge of such activity, as it took place in a conversation with Joseph, and Joseph reported the demand to be paid to Hogan. In this regard, Sherrie Cvetnich and Burge together confronted Joseph in his office on October 16, and Sherrie Cvetnich demanded their overdue paychecks from the Respondent.

I found that Sherrie Cvetnich told Joseph that if the Respondent didn't provide the paychecks, she would call the Labor Board, a state of Michigan government agency, and media outlets, and that she wanted the paychecks for everybody.⁶⁷ I further found that Joseph responded that "we're working on it."⁶⁸ I also found that during the course of the conversation, Sherrie Cvetnich referred to the paychecks as "fu****g paychecks," and that she further threatened that if she didn't receive the paychecks she would "tear down" the wedding banquet that she, and Burge, had already set up.⁶⁹ Finally, I found that upon

⁶⁷ For reasons discussed supra, I mostly rely on the testimony of Burge and Sherrie Cvetnich as to this conversation. However, Joseph specifically testified that Sherrie Cvetnich demanded paychecks for everybody, and I credit this admission.

⁶⁸ Credited testimony of Joseph. This testimony of Joseph was not specifically disputed, and there does not appear to be a reason why Joseph would concoct this.

⁶⁹ Here, for reasons discussed supra, I credit Burge, and the largely complementary testimony of Sherrie Cvetnich, over the testimony of Joseph. I note that Joseph testified that Sherrie Cvetnich used the word "trash" rather than the words "tear down." All agreed that in the banquet industry, "tear down" has a specific meaning that would include the work performed to return the banquet equipment to storage, as before the banquet was set up. In addition to my credibility assessments of the witnesses to this conversation, I consider it more likely in context, even with Sherrie Cvetnich upset over the paychecks, or lack thereof, that she used a term commonly used in the banquet business. Thus, I find that what Sherrie Cvetnich was threatening, was to simply undo the work that she and Burge had already performed, but which the Respondent had not paid them for. I specifically find that she was not threatening to damage the Respondent's facility or equipment, or any type of violence.

hearing Sherrie Cvetnich's complaints as to the paychecks, Joseph called Hogan and told him, among other things, that "they were demanding their paychecks."⁷⁰

Such employee complaints to an employer, specifically complaints about the failure of an employer to provide paychecks, are protected. See, for example, *Rogers Environmental Contracting*, 325 NLRB 144, 145 (1997), where the Board held that employees engaged in protected activity when they protested to their employer, its failure to allow them to cash their paychecks. "[T]here can be no doubt that there is no more vital term and condition of employment than one's wages, and employee complaints in this regard clearly constitute protected activity . . . [I]n this case [two employees] expressed complaints about the most fundamental aspect of this 'vital' term and condition of employment, the obligation of the employer to compensate with a check or other instrument that will be honored for payment." *Id.*

Further, Sherrie Cvetnich and Burge engaged in the activity together. I found that they spoke earlier in the day, and agreed they would meet at the Respondent's offices and inquire as to the overdue paychecks. Together they met with Joseph, and while Cvetnich presented the verbal complaint to Joseph as to their paychecks, Joseph credibly testified that Cvetnich was seeking paychecks for everybody. Finally, as found, none of the Respondent's employees had received the overdue paychecks and, thus, Cvetnich, accompanied by Burge, was complaining to Joseph about a concern that affected all of the employees, not just Cvetnich.⁷¹

I, further, found that when Sherrie Cvetnich complained to Joseph on October 16, she threatened to go to various media and government agencies, including the NLRB, if the Respondent failed to provide the paychecks. The Board has repeatedly held that such conduct is protected by Section 7. See, for example, *Williams Contracting*, 309 NLRB 433 fn. 2 (1992).

Having found that Sherrie Cvetnich and Burge engaged in protected concerted activity, and that the Respondent had knowledge of such, I further find that this activity was a motivating factor in the Respondent's decision to discharge them. In so deciding, I further conclude that the Respondent's proffered reasons for its decision to discharge Sherrie Cvetnich, Burge, and Eric Cvetnich are pretextual. "When the employer presents a legitimate basis for its actions, which the factfinder concludes is pretextual; the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal. . . ." *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995).

As to the pretextual nature of the Respondent's asserted reasons for the discharges, I first note that the Respondent's an-

⁷⁰ Joseph so testified on cross-examination, and I credit his admission.

⁷¹ Some of the words used by Sherrie Cvetnich in complaining to Joseph appear to address her own individual concerns over not being paid. However, the concerted nature of Sherrie Cvetnich's complaint to Joseph, is demonstrated by Joseph's own credited testimony that she was, in effect, asking for the paychecks for all the employees, and the fact that she was accompanied by Burge, who also did not receive her paycheck.

swer admits, and I find, that Sherrie Cvetnich, Burge, and Eric Cvetnich were all terminated on October 16. Again, as discussed supra, such admissions contained in an answer are binding upon a respondent. Here, the answer was filed only shortly before trial, by the same counsel who tried the case for the Respondent, and the Respondent made no attempt to amend its answer.

Indeed, the Respondent counsel's oral argument at the hearing, to the effect that the Respondent possessed information as to Tessin's asserted bad acts prior to October 16 and was "contemplating firing these people," and "was going to terminate these people," is consistent with its answer, and my finding, that the discharges took place on October 16, and not before. "Contemplating" is different from acting.⁷²

Based on the record evidence, I have little doubt that the Respondent, in the persons of Hogan and Joseph, had a reasonable basis to be concerned about Tessin's management of Heritage and/or to take action against her. Thus, Hogan was concerned about the state of disrepair of the building and the bank vault that he observed in mid-September, about Tessin's decision to contract-out the canopy removal work to a contractor that employed her son rather than to a competitor that seemingly offered to repair, not just remove, the canopy for about the same price, about opening supplier credit accounts with applications that contained the forged signature of Hogan, about Tessin's cutting of a check to her son for the canopy removal work thereby causing a check to Consumer's Energy to be returned by the bank, and about the incident involving the sheriff's visit to Heritage on October 15, to execute on the Respondent's property in respect to Tessin's personal garnishment.⁷³

⁷² Respondent's counsel argued on the record as follows: "Part of the defense is that not only was the atmosphere charged dramatically by the events that she caused the garnishment, the police coming in and grabbing, starting to take furniture and furnishings from the place, but they had just gone through receiving this check. There was very little money in the checking account. She presented false information to my client, saying that she got invoices from these people, and she was going to hire and have that done. She never told them she was hiring her son, and they had this information prior to October 16, which led to a severe atmosphere of distrust and there's going to be further evidence from my client with emails and everything that they were contemplating firing these people well before October 16th because of the acts, because of acts like this of hiring her son to do something that somebody else was going to charge less to do, things not being done in the building in a timely fashion, signing—forging, as a matter of fact, credit applications and having two of these claimants sign they witnessed Mr. Hogan signing that when, in fact, he wasn't even in the state. That's not his signature.

All of this information was available to them. They were going to terminate these people. And on top of that, she's writing checks to her son and a lot of money, at least as far as the business is concerned, at this point in time. And the payroll, there wasn't even enough to make the payroll."

⁷³ Essentially, here, the Respondent argues guilt by association. That because Tessin was a problem, it needed to get rid of Tessin's relatives and associates. But even here, it took no action until employees engaged in protected concerted activity. I also note that to the extent the Respondent argues, based on the discredited testimony of Joseph, that it ordered Tessin to lay off Sherrie Cvetnich and Burge prior to October 16, it makes no similar argument as to Eric Cvetnich.

But, despite legitimate concerns that the Respondent may have had about Tessin, I found that the Respondent took no action against either her, or any of the employees, until the time on October 16 that Sherrie Cvetnich and Burge engaged in the protected concerted activity of protesting the Respondent's failure to provide them with paychecks. As the Respondent's counsel argued at the hearing, the Respondent may have "contemplated" taking action, but it did not.⁷⁴ Even assuming, arguendo, that the Respondent had cash flow or other financial woes as testified to by Tessin, Hogan and Joseph, this precipitated no personnel actions by the Respondent, until the concerted, protected activity of October 16.⁷⁵

In sum, the Respondent was, assertedly, unhappy with Tessin as to the condition of the building and the bank vault, but took no action. The Respondent was, assertedly, unhappy with Tessin as to opening lines of credit utilizing Hogan's forged signature, but took no action. The Respondent was, assertedly, unhappy with Tessin's awarding the canopy work to her son's employer, but took no action. The Respondent was, assertedly, unhappy with Tessin's actions that may have resulted in the Respondent's check to Consumer's Energy being returned, but took no action. The Respondent was, assertedly, concerned with its financial situation, but took no action. Only when it was presented with a protected, concerted demand that its employees be paid, did the Respondent immediately discharge its employees.

Further, the Respondent, in its counsel's brief, appears to concede, in essence, that the Respondent discharged Sherrie Cvetnich, Burge, and Eric Cvetnich because of Sherrie Cvetnich's actions of October 16. Here, the Respondent argues: "While the immediate cause of their removal from Heritage Tower was Sherrie Cvetnich's behavior on October 16, 2009, the collective evidence presented at the hearing demonstrated Respondent would have terminated them in any event due to the Respondent's desperate financial circumstances and extreme distrust of Linda Tessin and her building staff."⁷⁶ This argument, consistent with the Respondent's answer to the Acting General Counsel's complaint, arguably concedes that the

⁷⁴ As discussed above, I find that neither Tessin, nor Hogan and Joseph are credible witnesses. I, thus, cannot rely on either Tessin's or Joseph's testimony as to their phone conversation on October 5. If Joseph is to be believed, he told Tessin to lay off Sherrie Cvetnich and Burge, and that it was to be their last week. If Tessin is to be believed, she convinced Joseph that Sherrie Cvetnich and Burge were needed for banquets, and Joseph agreed to simply reducing their hours. As noted, instead I rely on the pleadings, including the Respondent's admission that the discharges took place on October 16. In this regard, I further note that Joseph testified that in response to Sherrie Cvetnich's demand, on October 16, to be paid, he told her, "I'm working on it." Joseph's response would appear nonsensical if he believed that Sherrie Cvetnich had already been laid off.

⁷⁵ Sherrie Cvetnich's signature appears as a witness on the credit applications filed by Tessin, and containing the forged signature of Hogan. Any argument which the Respondent makes asserting that Sherrie Cvetnich's signature on the applications is a basis for the discharge is unpersuasive simply because she wasn't discharged when Joseph discovered the documents in early October, but on October 16, when she engaged in protected concerted activity.

⁷⁶ From the brief of the Respondent's counsel.

Respondent didn't, in fact, terminate the employees until October 16.

Based upon the above discussion, I conclude that the Acting General Counsel has established a prima facie case that protected concerted conduct was a motivating factor in the Respondent's decision to discharge Sherrie Cvetnich and Burge. In particular, the timing of the Respondent's actions, concomitant with the protected activity, is significant. See, *American Cyanamid Co.*, 301 NLRB 253 (1991).⁷⁷ "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of an unlawful motivation." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). "Timing alone may suggest antiunion animus as a motivating factor in an employer's action."⁷⁸ *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349 (7th Cir. 1984).

Inasmuch as I have rejected the Respondent's proffered non-violative reasons for the discharges as pretextual, the Respondent cannot meet its resultant *Wright Line* burden. *Austal USA, LLC*, 356 NLRB No. 65, slip op. 2 (2010). "[W]here an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not, in fact, relied upon." *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Timing and pretext are indicative of illegal motivation. *Active Transportation*, 296 NLRB 431, 432 (1989).

The Respondent, nevertheless, argues that even if Sherrie Cvetnich engaged in protected, concerted conduct, and the Respondent was so aware, she, nevertheless, lost the Act's protection by using obscene and assertedly threatening language in complaining to Joseph about not being paid.⁷⁹ This argument assumes the protected concerted nature of Cvetnich's complaint to Joseph, the conclusion I've reached above. Of course, the Board recognizes that the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984).

In such circumstances, when an employee is disciplined for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Stanford Hotel*, 344 NLRB 558 (2005). Thus, an employer violates the Act by discharging an employee engaged in protected concerted activity, unless, in the course of that activity, the employee engages in opprobrious conduct, costing her the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979).

In determining whether otherwise protected employee con-

duct is sufficiently egregious so as to lose the protection of the Act, the Board requires the careful balancing of the four factors enumerated in *Atlantic Steel Co.*, supra at 816-817 (1979). *Felix Industries, Inc.*, 331 NLRB 144 (2000). These factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

As to the *Atlantic Steel* factors, the conversation took place in Joseph's office in the Heritage building, in the presence of fellow employee Burge, who was also concerned about the failure to receive paychecks, and was limited to the subject matter of the Respondent's failure to provide paychecks. Sherrie Cvetnich's usage of the obscenity "f*****g" was as an adjective modifying the word "paycheck," and was not directed at either Joseph or the Respondent. Cvetnich's usage of the obscenity appeared to be in response to, and provoked by, Joseph's response to her demand to be paid, in which Joseph indicated that the overdue paychecks were not forthcoming. Finally, I concluded that Sherrie Cvetnich's usage of the words "tear down" was simply a reference to undoing the work employee had already performed, but had not been paid for, and was not a threat to do harm or violence to the Respondent's property.

As to the first *Atlantic Steel* factor, Sherrie Cvetnich's comments were made in the confines of an office occupied by Joseph, and not in a work area. Inasmuch as there was, apparently, only one other employee who may have been working at the time, Eric Cvetnich, he was not in Joseph's office during the conversational exchange between Sherrie Cvetnich and Joseph. According, I find that Sherrie Cvetnich's words did not adversely impact the work of other employees. While it's true that employee Burge was also present, Burge was also there to complain about the lack of paychecks. Thus, I find that the first factor weighs slightly in favor of finding Cvetnich's comments to be protected.

As to the second factor, the subject matter of Cvetnich's outburst dealt only with her complaint that employees had not received their paychecks. Her outburst, thus, occurred in the context of asserting statutory rights. Thus, subject matter weighs strongly in favor of finding her comments remain protected. *Stanford Hotel*, supra at 559.

As to the third factor, the nature of the outburst, I found that Sherrie Cvetnich used an obscenity in the course of her complaint to Joseph.⁸⁰ I further found that she did not threaten harm to Joseph, or damage to the Respondent's premises. Thus, while Cvetnich's outburst was profane, it was not personally abusive to Joseph, nor abusive to the Respondent.⁸¹ Accordingly, this factor militates moderately against continued

⁷⁷ While there is no direct evidence here that the Respondent harbored animus towards the protected activity, illegal motivation may be demonstrated by circumstantial evidence, including inferences from the pretextual nature of a discharge. *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007). Here, such circumstantial evidence including timing and the pretextual nature of the discharges.

⁷⁸ Or animus against the protected activity, as here.

⁷⁹ Of course, the same argument would not apply to Burge, who is not accused of untoward actions during protected activity.

⁸⁰ I cannot determine whether the usage of such words was typical or unusual by employees on the Respondent's premises as no evidence was introduced as to such.

⁸¹ Contrast this to the circumstances in *Stanford Hotel*, in which the employee directly called the supervisor "a f*****g son of a bitch." There, the Board found that the language militated against protection. Here, Cvetnich targeted nobody with her profanity.

protection.⁸²

As to the fourth factor, there is no evidence that Joseph provoked Cvetnich's profane outburst by committing or threatening unfair labor practices during their confrontation, although the confrontation itself was provoked by the Respondent's failure to pay its employees. Cvetnich appeared to be provoked to profanity simply because Joseph did not appear ready to immediately comply with her demand to be paid. Accordingly, this factor slightly militates against continued protection. See *Tampa Tribune*, 351 NLRB 1324, 1326 (2007), and *Noble Metal Processing, Inc.*, 346 NLRB 795 fn. 2 (2006).

In balancing the above factors, I conclude that the subject matter and location, which weigh slightly to strongly in favor of retaining the Act's protection, more than offset the nature of the outburst or the lack of provocation, which weigh slightly to moderately against retaining the Act's protection. I, thus, conclude that after carefully weighing the *Atlantic Steel* factors, Sherrie Cvetnich's usage of profanity was not so opprobrious as to remove her conduct from the protection of the Act. Thus, as I have already concluded that the Respondent discharged her for engaging protected activity and now conclude that her conduct did not lose the Act's protection, I find that the Respondent discharged Sherrie Cvetnich in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

I further find that the Respondent violated Section 8(a)(1) by discharging Teresa Burge on October 16. Thus, on the morning of October 16, Burge and Sherrie Cvetnich spoke, and agreed to meet at Heritage later that day to find out about their overdue paychecks. While Cvetnich, apparently, did all the talking to Joseph,⁸³ including demanding the employee paychecks, Burge accompanied her to Joseph's office, and was with her during the conversation with Joseph.

Further, and most significantly, Joseph testified that Sherrie Cvetnich told him that "she wanted paychecks for everybody," and, in turn, he told Hogan that "Sherrie was in the office and they want their paychecks now." The Board has repeatedly held that the usage of such collective terms ("everybody," "they," "their") signals to an employer that the activity is concerted. See, for example, *Office Professional Employees International Union*, 307 NLRB 264, 268 (1992) ("our"); *Bryant & Cooper Steakhouse*, 304 NLRB 750, 752 (1991), affd. 995 F.2d 257, 263-264 (D.C. Cir. 1993) ("we"); *Oakes Machine Corp.*, 288 NLRB 466 (1988), enfd. 897 F.2d 84 (2nd Cir. 1990) ("we").

Thus, I find that it was clear to the Respondent that Burge and Sherrie Cvetnich were acting concertedly on behalf of all the employees in demanding their paychecks. Inasmuch as Burge, thus, engaged in protected concerted activity, as the Respondent, in any case, perceived the activity as concerted, and as I have found that the Respondent's asserted reasons for

its actions were pretextual,⁸⁴ I conclude that the Respondent violated Section 8(a)(1) of the Act by discharging Burge, as alleged in the complaint.

As to Eric Cvetnich, he did not participate in the protected activity, and there is no evidence that he demanded his overdue paycheck from the Respondent. Joseph testified that when he discussed the status of Heritage employees with Hogan, sometime between October 3 and 11, no decision had been made as to the status of Eric Cvetnich. Shortly thereafter, the Respondent discharged Eric Cvetnich. There were no other intervening events arguably involving Eric Cvetnich during that period, except for the concerted activity of Sherrie Cvetnich and Burge. Inasmuch as I've already concluded that the Respondent's proffered reasons for the discharges, i.e. Tessin's malfeasance in her job, and the Respondent's asserted financial problems were pretextual, I further conclude, thus, that the Respondent discharged Eric Cvetnich because of the concerted protected activity engaged in by Sherrie Cvetnich and Burge.

Where it is alleged that an employee was discharged because of the protected concerted activities of other employees, the Board does not require either that the employee, herself/himself, had engaged in protected activity or that the employer had knowledge of such, in order to find the discharge in violation of the Act. For example, in *City Stationery, Inc.*, 340 NLRB 523, 524 (2003), the Board held that neither the employee's participation in protected activity, nor the employer's knowledge of such participation, are necessary to find a violation, where the discharge was part of a larger termination of employees who did participate in such activity with the employer's knowledge.

Here, there is no other valid reason presented for Eric Cvetnich's discharge other than the protected concerted activity of Sherrie Cvetnich and Burge.⁸⁵ Accordingly, I conclude that the Respondent discharged Eric Cvetnich because of the protected concerted activity of Sherrie Cvetnich and Burge, in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

⁸⁴ The alleged signature of Burge appears as a witness on one of the credit applications containing the forged signature of Hogan. Burge credibly testified, without contravention, that the signature was not hers. The Respondent's counsel, in arguing against the counsel for the Acting General Counsel's objection to relevance as to questions about Burge's signature, stated as follows: "The relevance is this *would be* a basis upon which she was terminated by Random Acquisitions (emphasis supplied)." This argument is consistent with the Respondent's defense, in the sense of searching for a lawful reason for the discharge.

⁸⁵ To the extent that the Respondent argues that Eric Cvetnich either played some role in the asserted poor condition of portions of the Heritage building or the asserted partial dismantling of the building's bank vault and selling-off of the removed parts, and that such was a basis for his discharge, I am not persuaded. First, Eric Cvetnich testified, credibly, that he sold the parts or "scrap" in order to fund supplies for the building, and Joseph testified that Eric Cvetnich told him that he was selling the scrap, and that Joseph, thereupon, inferred that Cvetnich was telling him that he was using the money obtained to fund supplies for the building. Further, whatever suspicions the Respondent may have had about what Eric Cvetnich used the money for, or his culpability in the asserted condition of the building, it admittedly took no action against Eric Cvetnich until October 16, the date of the protected concerted activity.

⁸² See, *Tampa Tribune*, 351 NLRB 1324, 1326 (2007), where the Board found the usage of the words "stupid f****g moron" "clearly intemperate", but only militating moderately against protection. In *The Tampa Tribune*, the words were used by the employee to directly describe a manager, although not to his face. Here, the words were not used towards a manager, but in a manager's presence.

⁸³ None of the witnesses testify to anything Burge said during the conversation.

CONCLUSIONS OF LAW

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

2. The Respondent, by discharging Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich on October 16, 2009, has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

3. The unfair labor practices set forth above affect commerce within the meaning of Section.

THE REMEDY

As I have found that the Respondent discharged Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich in violation of the Act, I will recommend the traditional remedy for such violation, of a cease and desist order, reinstatement, backpay, and posting of an appropriate remedial notice. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Finally, the notice shall also be posted electronically. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings and conclusions of law, and on the entire record, including my credibility resolutions, I issue the following recommended⁸⁶

ORDER

The Respondent, Random Acquisitions, LLC, with offices and place of business in Battle Creek, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their participation in protected concerted activities or because of the protected concerted activities of other employees.

(b) In any like or related manner restraining, coercing, or interfering with employees in the exercise of their Section 7 rights.

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

(a) Within 14 days from the date of this Order, offer full reinstatement to Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich to their former jobs, or if those jobs no longer exist, offer them a substantially equivalent position, without prejudice to their seniority and other rights and privileges previously enjoyed.

(b) Make whole Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich for any loss of earnings and other benefits suffered as a result of their discharges by the Respondent. Backpay is to be computed as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from

its files any reference to the discharges of Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich, and notify each of them in writing within 3 days thereafter that this has been done and the evidence of the unlawful actions will not be used against them.

(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 Regional Director, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(e) Within 14 days after service by the Region, post at its Battle Creek, Michigan facility copies of the attached notice marked as "Appendix."⁸⁷ Copies of the notice, on forms provided by the Regional Director of Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices 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 materials. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means. In the event that, during the pendency of proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its expense, copies of the notice to all employees and former employees of the Respondent at any time since October 16, 2009.

Dated, Washington D.C. March 21, 2011

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 employees because they act together with other employees for their benefit and protection.

WE WILL NOT in any like or related manner interfere with, re-

⁸⁶ In no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

⁸⁷ 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."

strain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, within 14 days of the date of the Order, offer Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the date of the Order, remove from our files any references to the discharges of Sherrie Cvet-

nich, Teresa Burge, and Eric Cvetnich, and notify each of them in writing, within 3 days thereafter, that this has been done, and that such references will not be used against them.

WE WILL make Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich whole for any loss of earnings and other benefits resulting from our actions against them, less any interim earnings, plus interest.

RANDOM ACQUISITIONS, LLC