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Milum Textile Services Co. and UNITE HERE! Cases
28–CA–20898, 28–CA–20906, 28–CA–20973, 28–
CA–21050, and 28–CA–21203

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On October 5, 2007, Administrative Law Judge Lana H. Parke issued the attached decision.¹ The Respondent, the General Counsel, and the Charging Party each filed exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings, and conclusions³ as modified, to modify the

¹ This proceeding was heard on several dates in March and April 2007 in Phoenix, Arizona, before Administrative Law Judge Joseph Gontram ("the trial judge"), now deceased. On August 7, 2007 the case was transferred to Administrative Law Judge Lana H. Parke ("the judge") to render a decision based on the record made, all parties having agreed to that procedure.

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

In her decision, the judge inadvertently referred to Respondent's production supervisor, Jamie Chavez, as "Mr. Garcia" at p. 12, LL. 39–40. At paragraph 2(a) of the Order, the judge inadvertently directed reinstatement of Evangelina Guzman. Guzman was unlawfully suspended. The issue of Guzman's termination was not before the judge.

³ We adopt the judge's findings, in the absence of exceptions, that the Respondent violated Sec. 8(a)(1) of the Act by granting employees the benefit of providing nametags, impliedly threatening to reduce employees' wages if they selected the Union, and interrogating employees during preparation for the hearing in this case.

We also adopt the judge's findings, for the reason she stated, that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule prohibiting employees from wearing union buttons while working, and violated Sec. 8(a)(3) and (1) by suspending employee Evangelina Guzman because she refused to take off a union button and by discriminatorily discharging employees Denise Knox and Soe Moe Min.

Chairman Pearce and Member Becker find it unnecessary to pass on the allegation that the Respondent solicited and promised to remedy employee grievances when President Craig Milum told employees that he would talk to Manager Angela Kayonnie after the employees complained about her, as any such finding would be cumulative of the violation involving the Respondent's unlawful provision of nametags, above, and therefore would not materially affect the remedy. Member Hayes also does not find the violation, but he would adopt the judge's

remedy, and to adopt the recommended Order as modified and set forth in full below.⁴

This case arises out of the Union's efforts to organize the Respondent's approximately 70 commercial laundry workers beginning in February 2006.⁵ The Union sought to educate the public about its efforts and gain public support through a publicity campaign that included letters and handbills directed to the public at large, the Respondent's restaurant customers, and the customers' patrons.

I. THE RESPONDENT'S LAWSUIT AGAINST THE UNION

The complaint alleges that the Respondent unlawfully filed a complaint and motion for a temporary restraining order (TRO) in the United States District Court for the District of Arizona, and unlawfully maintained its lawsuit for approximately 1 month. We agree with the administrative law judge, but for different reasons as described below, that the Respondent's filing and maintenance of the motion for a TRO violated Section 8(a)(1). We have decided, however, to remand this case to the judge to analyze whether the remaining aspects of the litigation (the filing and maintenance of the District

dismissal for the reasons the judge stated: After employees complained about Manager Kayonnie, President Milum specifically refused their requests to remove her and told employees that Kayonnie was a very good supervisor. His statement that he would talk to her in no way amounted to a promise to change conditions, particularly here, where he expressly *denied* their requests.

Except as discussed herein, we affirm the judge, for the reasons she stated, with respect to the remaining complaint allegations that she dismissed. In dismissing the allegation that the Respondent unlawfully interrogated employee Ruiz about whether she was distributing buttons during worktime, Member Becker notes that the Respondent had a reason to believe that Ruiz had previously distributed union buttons during working time. In dismissing the allegation that the Respondent unlawfully disciplined employee Guzman in December 2006 and January 2007, Chairman Pearce and Member Becker find it unnecessary to rely on the portion of the judge's rationale that appears to suggest that the Respondent's inconsistent disciplinary history made it easier for the Respondent to meet its rebuttal burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Member Hayes would adopt the judge's findings for the reasons she stated.

⁴ We shall modify the judge's conclusions of law and recommended Order to conform to our findings, and we shall substitute a new notice to conform to the Order as modified and set forth in full below.

In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

We modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁵ Dates are in 2006 unless otherwise noted.

Court complaint until shortly after the TRO proceeding) were similarly unlawful.

A. Facts

On March 10, the Union began writing to some of the Respondent's restaurant customers, telling them that they should be concerned about the risk of contaminated linens and urging them not to use the Respondent's services. The letters stated that they were from "Milum Exposed," which "is dedicated to informing the public of important issues in infection control," and the letterhead further described Milum Exposed as an "independent website in the Public Interest by UNITE HERE." The letters suggested that a 2002 Arizona Department of Environmental Quality Notice of Violation and an Arizona Division of Occupational Safety and Health "Citation and Notification of Penalty" supported its claims.

On April 24 or 25, the Union distributed a press release headlined: "UNITE HERE Media Alert: SCOTTSDALE AND PHOENIX RESTAURANT CUSTOMERS BE AWARE: TABLE LINENS AND NAPKINS EXPOSED TO BLOOD AND BACTERIA AT LOCAL LAUNDRY." The release announced an April 27 rally at a mall where two of the Respondent's restaurant customers were located and stated that employees would release a report at the rally revealing "that restaurant customers cannot be assured of the quality of the linen used in these establishments." The press release listed 11 restaurants that used the Respondent's services. The release further stated:

Bruce Raynor, General President of UNITE HERE will accompany workers as they present the findings about the laundry to Fox and restaurant customers in Phoenix and Scottsdale. Milum workers will speak about dirty and dangerous conditions in an effort to protect their own health and safety and the health and safety of restaurant patrons.

On April 3, the Respondent filed a charge with the Board's Regional Office alleging that the Union's communications violated Section 8(b)(4)(ii)(B) and requesting an injunction.⁶

On April 26, while the above charge was pending, the Respondent filed a complaint against the Union in Federal district court, citing diversity jurisdiction. The complaint alleged five causes of action: illegal secondary boycott; intentional interference with economic relations; intentional interference with prospective economic advantage; libel; and fraud. The complaint alleged that the Union made knowingly false statements with malice and

that the Respondent suffered damages as a result. The complaint sought a preliminary and permanent injunction

enjoining the Defendant and any affiliated persons or entities from directly or indirectly sending or transmitting via any medium any unsolicited letters or documents to Plaintiff's customers or the customers of Plaintiff's customers, or verbally contacting or communicating with Plaintiff's customers or the customers of Plaintiff's customers.

The complaint also sought damages in an amount to be proven at trial, costs, and attorney's fees.

With the complaint, the Respondent filed a motion for a TRO. The motion was based exclusively on Section 303 of the Labor-Management Relations Act.⁷ In the motion, the Respondent argued only that the Union's communications with the Respondent's customers and their customers constituted an unlawful secondary boycott. The motion sought to enjoin the Union from "picketing and distributing leaflets" to its customers' customers and from distributing "false materials."

At the hearing on the motion, the Respondent conceded that it could not obtain an injunction under Section 303. It nevertheless argued for an injunction under its pendent State law tortious interference and libel claims. The court denied the motion. It found that the expressive activity the Respondent sought to enjoin arose out of a labor dispute and therefore the Respondent would have to prove malice and actual damages in order to prevail on its claim. The court found that the Respondent had offered no proof of either of those essential elements of its claim. The court further found that the petitioned-for relief would constitute a highly disfavored prior restraint on speech.

On May 26, the District Court dismissed the Respondent's lawsuit, without prejudice, at the Respondent's request.

B. Analysis

The Judge Correctly Analyzed the TRO Proceedings Separately From the Remainder of the Lawsuit

As an initial matter, we conclude, contrary to the Respondent's exceptions and our dissenting colleague, that the judge correctly analyzed the filing and pursuit of the motion for a TRO separately from the remainder of the action. Separate consideration of the two phases of the proceedings is appropriate under existing Board law, see, e.g., *Grinnell Fire Protection Systems Co.*, 328 NLRB

⁶ On April 28, the Region dismissed the Respondent's unfair labor practice charge. On June 7, the Office of Appeals upheld the dismissal.

⁷ Under Sec. 303(a) it is unlawful for a union to engage in conduct prohibited by Sec. 8(b)(4).

585, 603 (1999) (“the Board has enjoined an employer from prosecuting specific portions of a lawsuit . . . while deferring action on others”), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001); *Manno Electric, Inc.*, 321 NLRB 278, 298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997), and the Respondent cites no authority to the contrary.⁸ By analogy, Federal Rule of Civil Procedure 11 applies to “[e]very pleading, written motion and other paper” presented to a Federal court. Fed. R. Civ. P. 11(a). Just as one pleading or motion filed in Federal court can be grounds for sanctions under Rule 11 because it is baseless or filed for an improper purpose, even if the filing of the original complaint or other actions taken during the course of the litigation are not improper, so the filing of one motion may violate the Act even if the remainder of the litigation does not. A motion for a TRO or preliminary injunction is a distinct phase of a lawsuit and imposes separable costs on the defendant. Moreover, the potential abuse of such motions has been recognized in Federal labor law since before the passage of the Act. See generally, Federal Anti-Injunction (Norris-LaGuardia) Act, Pub. L. No. 72-65, 47 Stat. 70 (1932), codified at 29 U.S.C. § 101 et seq. (2011); Felix Frankfurter & Nathan Greene, *The Labor Injunction* (1930). We thus first consider whether the judge correctly concluded that the filing and maintenance of the motion for a TRO⁹ violated Section 8(a)(1).

The TRO Proceedings

All parties agree that the legality of the Respondent’s efforts to obtain a TRO (and its filing and maintenance of the lawsuit outside the TRO proceedings) should be evaluated under the framework established by the Supreme Court in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Applying that framework, we find that the pursuit of the motion was unlawful.¹⁰

⁸ Although *Grinnell* and *Manno* involved different causes of action rather than distinct phases of litigation, they support our decision to consider the TRO separately from the remainder of the lawsuit.

⁹ Contrary to the suggestion in the dissent, the holding here extends only to a motion for a TRO or similar immediate, preliminary relief, not to any “other motions.”

¹⁰ The judge found that the Respondent’s request for a TRO was barred by Federal labor law in the absence of any evidence of actual malice. However, no party suggests that this case should therefore be analyzed under footnote five of *Bill Johnson’s Restaurant v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983), rather than under *BE&K*. Most importantly, the General Counsel’s theory of the case, as reflected in the complaint and the parties’ briefs, was that the Respondent’s lawsuit was unlawful because it was both baseless and retaliatory, and the case was litigated under that theory. The General Counsel did not argue before the Board that the Respondent’s pursuit of the TRO motion should be found unlawful solely because the motion was preempted. Accordingly, and in light of our determination that the motion was both baseless and retaliatory, we find it unnecessary to reach that issue.

In *BE&K*, the Supreme Court held that the Board could not find all unsuccessful litigation unlawful simply because it was initiated or maintained with a retaliatory motive. Rather, the Court held that, due to the compelling First Amendment interests at stake, the General Counsel must ordinarily prove that even an unsuccessful action was both baseless and retaliatory in order for the Board to conclude that its maintenance was an unfair labor practice. On remand, the Board in *BE&K* articulated the following standard for determining whether a lawsuit is baseless: “[A] lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could realistically expect success on the merits.’” *BE&K II*, 351 NLRB 451, 457 (2007) (quoting *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). In *Allied Mechanical Services*, 357 NLRB No. 101, slip op. at 10–11 (2011), the Board recently considered what type of evidence will suffice to prove that a baseless lawsuit was brought with a retaliatory motive. The Board held that retaliatory motive may be inferred from, among other things, the facts that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the lawsuit obviously lacked merit. Id.

Applying the principles set forth in *BE&K II* and *Allied Mechanical* to the present case, we find that the General Counsel has demonstrated that the TRO motion both lacked a reasonable basis and was filed with the requisite retaliatory intent. First, the motion was baseless. The Respondent’s written motion for a TRO relied exclusively on Section 303. But while Section 303(b) permits a party injured by a violation of Section 8(b)(4) to seek damages in Federal court, on its face it does not authorize private parties to seek injunctive relief. In fact, over 30 years ago, the Supreme Court clearly held, “[C]ongressional policy, as expressed in the NLRA, remains that employers are not permitted to obtain injunctions of secondary activity.” *Burlington-Northern Railroad Co v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 448 (1987). The Act thus gives the Board exclusive jurisdiction to seek injunctions against unlawful secondary activity. For that reason, the written motion for a TRO as filed with the District Court was baseless. In fact, at the hearing concerning the motion, Respondent’s counsel conceded, “[w]ere we to have only alleged a secondary boycott, we could not be in federal court asking for an injunction because exclusive jurisdiction for that would be [with] the NLRB.”

After conceding at the hearing that the only grounds for a TRO advanced in its moving papers were clearly inadequate, the Respondent attempted to advance other

causes of action pleaded in the complaint as grounds for the TRO, specifically the libel and the tortious interference with contract claims. Each of these claims is, however, subject to the partial preemption articulated in *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (applying actual malice requirement to libel claims); see also *Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (applying *Linn* requirement of actual malice to tortious interference claim).¹¹

Indeed, Federal courts have held that tortious interference claims arising out of a labor dispute are wholly preempted or, at least, preempted absent outrageous or violent conduct. See, e.g., *In re Sewell*, 690 F.2d 403, 408 (4th Cir. 1982) (holding that the Act preempts state law tortious interference with contract claim); *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372, 381–382 (3d Cir. 1981), cert. denied 454 U.S. 1143 (1982) (“where parties to a labor dispute are charged with tortious interference with a collective bargaining agreement, at least in the absence of outrageous or violent conduct, state law causes of action are preempted.”). The judge’s law clerk pointed this out to Respondent’s counsel at the hearing, explaining that the Respondent could not prevail on these claims absent proof of actual malice, i.e., proof that the statements were published with “knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

Despite the clear requirement of actual malice, Respondent’s counsel pointed to no evidence suggesting that the Respondent would be able to prove actual malice and, in fact, made no argument addressing the issue. Indeed, he appeared not to accurately understand the concept, stating, “In terms of the actual malice, Your Honor, we have an unfair labor claim against Unite Here presently pending. . . . I will be happy to show you those things that we have alleged against Unite Here that has crossed the line and seems to have done all in their power to be as malevolent as can be under the circumstances.” In other words, counsel confused the legal concept of actual malice which, as discussed above, requires knowledge that the published statements are false or reckless disregard of whether the statements are false or not, with the ordinary meaning of malice, i.e., ill will. See, e.g., *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666 (1989) (“the actual malice standard is not satisfied merely through a showing of ill will or ‘mal-

ice’ in the ordinary sense of the term.”); *Celle v. Filipino Reporter Enterprises*, 209 F.3d 163, 183 (2d Cir. 2000) (“Standing alone, however, evidence of ill will is not sufficient to establish actual malice.”); *Dunn v. Air Line Pilots Assn.*, 193 F.3d 1185, 1198 fn. 17 (11th Cir. 1999) (“Ill-will, improper motive or personal animosity plays no role in determining whether a defendant acted with ‘actual malice.’”), cert. denied 530 U.S. 1204 (2000); *Philander Smith College*, 246 NLRB 499, 506 (1979) (“[Defamation] liability, based upon hatred, spite, ill will, or desire to injure is clearly impermissible.”). As the judge found in denying the motion, “there’s really no attempt at showing actual malice.”

The judge also denied the motion for a TRO on the grounds that the Respondent advanced no argument that would have justified a departure from the courts’ ordinary reluctance to impose a prior restraint. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (injunction that operates as a prior restraint carries a “heavy presumption against its constitutional validity”). This is particularly so in the context of the libel claims and the tortious interference claim sounding in libel given the longstanding rule against enjoining a libel. See *Metropolitan Opera Assn., v. Local 100, HERE*, 239 F.3d 172, 177 (2d Cir. 2001) (“[E]quity will not enjoin a libel.”); *Cnty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) (“The usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.”) (internal quotations omitted); *American Malting Co. v. Keitel*, 209 F. 351, 354 (2d Cir. 1913) (“Equity will not restrain by injunction the threatened publication of a libel, as such, however great the injury to property may be. This is the universal rule in the United States”).

Further, while not raised by the District Court, “the Norris-LaGuardia Act [NLA] establishes a strong Federal policy against the issuance of labor injunctions, except in very narrowly prescribed circumstances”¹² and only then if the movant satisfies the NLA’s heightened evidentiary standards, which include a requirement that no court “shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testi-

¹¹ In fact, the Eight Circuit held in *Beverly Hills Foodland* that peaceful handbilling is protected speech under the First Amendment and cannot be restrained based on a tortious interference claim. *Id.* at 197.

¹² *Trinidad Corp. v. Marine Engineers Beneficial Assoc.*, 723 F.2d 70, 77 (D.C. Cir. 1983). The NLA denies jurisdiction to district courts to issue preliminary injunctions that would prevent union members from, inter alia, “(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; and (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.” 29 U.S.C.A. § 104. The Respondent’s broad prayer for relief targeted both of the above-described types of activities.

mony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath.”¹³ Strict compliance with the NLA’s provisions is a jurisdictional prerequisite to the issuance of temporary restraining orders arising from labor disputes.¹⁴ The Respondent proffered no testimony in support of its motion. Thus, both substantively and procedurally, the motion was baseless.

Moreover, even if the Respondent had set forth a colorable ground for some relief in its moving papers or at the hearing and properly supported it with evidence, the relief sought in the motion was so overbroad that we would still find the motion was baseless. The motion sought to restrain the Union from “[p]icketing and distributing leaflets to the customers of Fox Restaurants and any other customers of Plaintiff.” Thus, the relief sought was not limited to restraining communications urging a secondary boycott (even if that were unlawful and enjoined at the request of a private party) or to restraining defamatory or even false communications (even if the Respondent had come forward with some evidence suggesting it was likely to succeed in proving the essential elements of its libel claim). Rather, the Respondent sought to enjoin all communications with its customers, even those clearly protected by the Act (e.g., flyers simply informing the customers of the organizing effort) and those not even alleged to be unlawful in the Respondent’s complaint. The Respondent’s attempt to obtain such broad relief was clearly baseless.

For each of these reasons, applying the standard articulated by the Board on remand in *BE&K* – whether a “reasonable litigant could realistically expect success on the merits”¹⁵ — we conclude that the filing and maintenance of the motion for a TRO was baseless.¹⁶

¹³ 29 U.S.C.A. § 107 (a)-(e); *Marine Engineers Beneficial Assoc.*, supra at 77 fn 7.

¹⁴ *Marine Engineers*, supra at 76–77.

¹⁵ 351 NLRB 451, 457.

¹⁶ In its exceptions, the Respondent relies heavily on *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997). The Respondent argues that the claims in that case paralleled those here and the court of appeals upheld the grant of preliminary injunctive relief. In that case, however, the District Court denied a motion for a TRO and granted a preliminary injunction only after an evidentiary hearing. The Ninth Circuit (over a dissent by now Chief Judge Kozinski) upheld the injunction based only on a defamation claim, holding that the tortious interference claims were preempted and that Sec. 303 does not permit a private party to seek an injunction. Moreover, unlike in this case, the employer sought only to enjoin the continued publication of a statement, the “most natural reading” of which, the Ninth Circuit found, “the Union concedes, is not true, nor has the Union ever believed it to be true.” *Id.* at 1236. Accordingly, the Ninth Circuit found there was a “reasonable probability” that the employer would be able to “successfully prove” actual malice. *Id.* at 1237.

The second requirement of *BE&K* was also satisfied in relation to the motion proceedings. We find that the motion was filed and maintained with a retaliatory motive for two distinct reasons. First, on its face, the motion sought to enjoin protected activity. As explained above, the motion sought a TRO preventing the Union from “Picketing and distributing leaflets to the customers of Fox Restaurants and any other customers of Plaintiff.” Communicating with customers in support of a union’s position in a labor dispute is protected activity under the Act. See *DeBartolo Corp. v. Florida Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988); *D’Alessandro’s, Inc.*, 292 NLRB 81, 83 (1988) (holding that Sec. 7 protects peaceful distribution of handbills advertising a labor dispute to employer’s customers). Even if some forms of communication with customers are unprotected or even unlawful, the motion was not limited to any such forms, but broadly sought to enjoin all communication with customers and was thus retaliatory on its face. Accordingly, we find that the Respondent’s TRO motion, by its very terms, demonstrated that it was motivated by a desire to retaliate against the protected activity of the Union and employees it sought to represent. See *Allied Mechanical Services*, supra, 357 NLRB No. 101, slip op. at 11.¹⁷

Moreover, we cannot conclude that the Respondent’s motion “reflected only a subjectively genuine desire to test the legality of the conduct” that was targeted in the motion and lawsuit.¹⁸ As we just explained, the Respondent sought to enjoin Union and employee communica-

The dissent also cites *Sutter Health v. UNITE HERE*, 186 Cal.App.4th 1193, 113 Cal.Rptr.3d 132 (2010), but, as the dissent acknowledges, the verdict in that case was overturned on appeal based on erroneous jury instructions. Moreover, it does not appear that any injunctive relief was granted in that case.

¹⁷ The dissent’s position is that the requisite subjective, retaliatory motive does not exist so long as the plaintiff genuinely desired to obtain the relief prayed for in the complaint. But a genuine desire to obtain an injunction on baseless grounds barring clearly protected conduct is a retaliatory, not a proper motive. The dissent does not dispute the fact that the motion for a TRO was baseless nor does it dispute the fact that the TRO sought would have enjoined clearly protected activity, i.e., distribution of any and all leaflets to customers. Thus, this case illustrates our statement in *Allied Mechanical*: “the implications of our colleague’s position are that an employer can initiate an objectively baseless action aimed directly at clearly protected conduct—for example, suing employees for trespass in state court seeking an injunction and damages on the grounds that the employees discussed forming a union during a break in the employees’ break room—and the lawsuit would not ‘interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7’ absent some additional evidence of retaliatory motive. Such a result is not suggested by either *BE&K* or *Petrochem*, is not required by the First Amendment, and would be jarringly inconsistent with the words and purpose of Section 8(a)(1).” Slip op. at 12.

¹⁸ *BE&K*, supra, 536 U.S. at 533–534.

tions far beyond those it contended were illegal. Further, in analyzing whether the Respondent had a retaliatory motive in filing the TRO motion, we may also consider whether the Respondent's other conduct demonstrates animus against the Union. As we stated in *Allied Mechanical*, supra, slip op. at 12, *BE&K* did not rule out use of an employer's animus toward a union as evidence that the employer's lawsuit against the union had a retaliatory motive. Here, as the judge found, throughout 2006–2007 the Respondent engaged in other conduct demonstrating animus against protected activity and a willingness to retaliate against those who engage in protected activity. Thus, the Respondent retaliated against employee efforts to publicize the labor dispute by discharging employee Denise Knox shortly after she appeared on a news program about the union campaign.¹⁹ The Respondent also unlawfully discharged employee Soe Moe Min; suspended employee Evangelina Guzman because she refused to take off a union button; granted the benefit of providing nametags in order to discourage employees from engaging in union activity; promulgated and thereafter maintained a rule prohibiting employees from wearing union buttons while working; created the impression of surveillance by operating a security video camera in its lunchroom; impliedly threatened to reduce employees' wages if they selected the Union as their bargaining representative; and interrogated employees during preparation for the hearing in this case.²⁰ The Respondent further demonstrated animus when, in discussing the union campaign with his customers, its president referred to the Union as “cockroaches” and “monsters” and compared the Union campaign to an organized crime shake-down.

This evidence of animus and, in particular, the discharges in retaliation for the publicity campaign support our finding that the Respondent was motivated by a desire to retaliate against the Union and employees who

¹⁹ The dissent emphasizes the close relationship between the unlawful discharges and the lawsuit by explaining that “the unlawful discharges were in response to the Union’s corporate campaign,” i.e., both the discharges and the lawsuit aimed to stop the Union’s protected speech.

²⁰ Citing *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 637 (2007), our dissenting colleague suggests that it is improper for us to rely on conduct that occurred after the Respondent filed and withdrew its lawsuit. That case is distinguishable. There, all of the misconduct that postdated the discriminatory action at issue occurred 7 to 8 months later, and that misconduct was confined to statements violating Sec. 8(a)(1). By contrast, as noted above, the Respondent here committed three “hallmark” violations—two discharges and a suspension—just over two months after it sought the TRO against the Union, and unlawfully prohibited the wearing of union insignia at about the same time.

publicized the labor dispute.²¹ Accordingly, we find that the Respondent had a retaliatory motive in filing the TRO motion against the Union.²²

The Remainder of the Lawsuit

As to the filing of the district court complaint itself and the maintenance of the complaint for a limited duration until it was voluntarily dismissed without prejudice shortly after the court denied the TRO motion and prior to any discovery, we remand to the judge to determine whether the General Counsel sustained his burden of showing that the action was baseless, and if so, that it was retaliatory.

We believe the judge properly allocated the burden of proof on the baselessness issue to the General Counsel. Of course, ordinarily the General Counsel has the burden to prove each element of an unfair labor practice and the Board has not altered that rule in the context of allegedly unlawful litigation. In fact, a contrary allocation here might encourage a plaintiff in the position of the Respondent to continue to litigate in court in order to conduct discovery and obtain evidence needed to demonstrate that its initial filing was not baseless rather than voluntarily dismiss or withdraw its complaint.

But while we agree that the judge properly imposed the burden of proof on the General Counsel, she did not adequately explain what the General Counsel must prove or assess the considerable evidence produced by the General Counsel against any standard.

The question of whether the initial filing and limited maintenance of the complaint was baseless must be analyzed differently than we analyzed pursuit of the TRO above. The motion for a TRO was litigated to completion. Thus, we are able to evaluate the actual arguments and evidence presented by the Respondent in order to determine if it had reasonable grounds for seeking the TRO. At the complaint stage, however, the question is different. At the complaint stage, the question is whether a plaintiff, with the factual information in its possession

²¹ The dissent’s suggestion that decisions in *San Antonio Community Hospital* and *Sutter* are somehow relevant to the Respondent’s subjective motive is misplaced both for the reasons stated above and because there is no evidence in the record that the Respondent was aware of those decisions at the time it sought the TRO. In fact, the jury award in *Sutter* (overturned on appeal) postdates the events at issue here.

²² In concluding that the TRO motion was brought with retaliatory motive, we also find, as we did in *Allied Mechanical*, supra, slip op. at 11, that the motion’s “obvious lack of merit is further evidence that the Respondent sought to retaliate against the Union[] by imposing on [it] the costs and burdens of the litigation process.”

Because the dissent’s discussion of the retaliatory motive issue largely parallels the dissent in *Allied Mechanical* and was fully addressed by the majority opinion in that case, supra, slip op. at 11–12, we do not repeat the analysis here.

and whatever additional factual information a reasonable potential litigant would have acquired prior to filing, could reasonably have believed it had a cause of action upon which relief could eventually be granted. This does not mean that a plaintiff must possess all the evidence necessary to prove its case at the time of filing. Some necessary evidence is not within the possession or control of the plaintiff and cannot be acquired without discovery. In respect to the actual malice element of the libel claim, for example, the Second Circuit has observed that “resolution of the . . . actual malice inquir[y] typically requires discovery.” *Karedes v. Ackerley Group*, 423 F.3d 107, 113 (2d Cir. 2005), quoting *Church of Scientology International v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001), cert. denied 534 U.S. 814 (2001). In contrast, a reasonable plaintiff would be in possession of evidence of the actual damages that it would have had to prove at trial under *Linn*. See *id.*, 383 U.S. at 65 (“We . . . hold that a complainant may not recover except upon proof of such harm.”). See also *Intercity Maintenance Co. v. Local 254, Service Employees*, 241 F.3d 82, 89–90 (1st Cir. 2001) (“In explicitly requiring proof of harm, *Linn* preempts . . . reliance on the common law presumption of damages in those jurisdictions where libel is actionable per se.”), cert. denied 534 U.S. 818 (2001); *Beverly Health & Rehabilitation Services*, 336 NLRB 332, 333 (2001) (“For the plaintiff to prevail, he must prove not only defamation under State law, but also the Federal overlay of actual malice and damages.”).

So what was the General Counsel’s burden here? The General Counsel had to prove that the Respondent, when it filed its complaint or during the time before it voluntarily dismissed the action, did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action. In *Bill Johnson’s*, supra., 461 U.S. at 746 fn. 11), the Supreme Court explained that “in making reasonable basis determinations, the Board may draw guidance from the summary judgment and directed verdict jurisprudence.” Under summary judgment procedure in the federal courts, a party moving for summary judgment against a plaintiff need not prove the absence of a genuine dispute of material fact in respect to each element of the claims in relation to which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Rather, “the burden on the moving party may be discharged by ‘showing’ —that is, pointing out to the district court— that there is an absence of evidence to support the nonmoving party’s case.” *Id.* If the motion is made prior to the close of discovery, the nonmoving party may, under Fed. R. Civ. P. 56(d) (formerly 56(f)),

respond by presenting via affidavit an explanation of why it is unable at that time to present evidence needed to support its claim. This standard is instructive, but the General Counsel’s burden here is a heavier one. The General Counsel must prove not simply that summary judgment would have been granted had the Union moved for it prior to the voluntary dismissal, but that the Respondent would not have been able to present a colorable argument in opposition to the grant of summary judgment at that time.

In order to determine if the General Counsel has carried this burden, a judge must determine the elements of the causes of action that the General Counsel has placed at issue and then evaluate the evidence offered by the General Counsel to prove that the Respondent did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action, and consider also evidence offered by the Respondent to prove the contrary, including evidence in the nature of a statement under Fed. R. Civ. P. 56(d). In this case, the General Counsel presented substantial evidence relevant to the truth of the allegedly defamatory statements, the lack of actual malice on the part of the Union in publishing the statements, and the lack of actual damage suffered by the Respondent as a result of the statements.

The judge, understandably, did not evaluate the evidence using the above-described standard. Unfortunately, the judge did not expressly evaluate the evidence at all.²³

Rather, she dismissed the complaint allegation as it related to the filing and maintenance of the lawsuit apart from the TRO proceeding on the sole grounds that “[w]hile relevant, the voluntary dismissal of the remaining allegations of the lawsuit does not establish that the Respondent subjectively believed its lawsuit had no merit when it was filed and prosecuted or that it acted in bad faith in doing so.” While the judge’s statement is true, the General Counsel did not rest his case solely on the voluntary dismissal but presented substantial additional evidence.

Given our clarification of the General Counsel’s burden above and our recent clarification of the evidence necessary to prove a retaliatory motive in *Allied Mechanical*,²⁴ we believe fairness to the parties requires that

²³ The dissent suggests that the judge did consider “much of the evidence,” but other than briefly stating the facts of the case, the judge did not do so and, specifically, did not do so in relation to any of the elements of the Respondent’s causes of action.

²⁴ Retaliatory motive would, of course, be relevant here only if the filing and maintenance of the action was found to be objectively baseless.

we remand this portion of the case to the judge with directions that she permit the parties to file additional post-trial briefs addressing the question of whether the General Counsel carried his burden of proving baselessness and retaliatory motive under these clarified standards.²⁵

II. UNLAWFULLY CREATING THE IMPRESSION OF SURVEILLANCE

There are three unlawful surveillance allegations. We adopt the judge's finding that the Respondent unlawfully created the impression of surveillance by installing a security video camera in the employees' lunchroom in January 2007. As the judge found, the Respondent did not communicate to employees any reason for placing a security camera in the lunchroom.²⁶ We agree with the judge that the "unprecedented and unexplained" placement of a security camera in the lunchroom where union activity regularly took place would reasonably lead employees to assume that their protected activity was under surveillance.

We thus find it unnecessary to reach the allegation that Supervisor Parra created an impression of surveillance by telling employee Guzman that the cameras were to "keep her in check," as any such finding would be cumulative of the other surveillance violation, *supra*, and therefore would not materially affect the remedy.

We dismiss the surveillance allegation concerning manager Kayonnie for the reasons the judge stated.

III. TELLING EMPLOYEES THAT IT WOULD BE FUTILE TO SELECT THE UNION

Contrary to the judge, we find that the General Counsel properly pleaded the allegation that the Respondent told employees that it would be futile to select the Union as their bargaining representative, despite imprecise dates in the complaint, but we dismiss the allegation. The judge found that the Respondent told employees that "the process of getting a union could be a long one; there could be a lot of problems because employees could strike, and they might have to go to court to obtain a union election." An employer does not violate the Act

²⁵ The dissent proceeds to analyze the evidence without the benefit of any additional arguments the parties may make on remand. We believe the record produced by 14 days of hearing and contained in 2270 pages of transcript and numerous exhibits contains sufficient evidence, particularly concerning actual malice and actual damages, to merit a remand to permit the parties to address the matter under the clarified standards and for the judge to decide it in the first instance. We thus do not believe it would be appropriate to respond to the dissent's characterization of the evidence at this time. Moreover, contrary to the dissent's suggestion, nothing in our remand order precludes the parties from moving the judge to reopen the record.

²⁶ In fact, as the judge noted, the Respondent never articulated any reason for placing a security camera in the lunchroom until it was preparing for the hearing in this case.

merely by telling employees that it intends to oppose unionization by lawful means or that bargaining may be delayed while the employer exercises its lawful right to contest a union's certification in court. *Winkle Bus Co.*, 347 NLRB 1203, 1205 fn. 12 (2006). Such a statement is unlawful only if, in context, it discloses a "threat of reprisal of force or promise of benefit." *Id.* Notably, the Respondent's president's statement to employees about the possibility of going to "court" to obtain an election did not mention that the Respondent would unnecessarily delay proceedings or that it would refuse to deal with the Union in any event. *Cf. International Medication Systems*, 244 NLRB 861, 869 (1979) (employer's statement that he would *not deal with the union* until after a court fight implied futility in violation of Section 8(a)(1)). The inaccuracy of the Respondent's statement, i.e., that it is necessary to go to "court" to obtain an election, rather than to the Board, amounts, at most, to an unobjectionable misrepresentation. In these circumstances, we find that the Respondent's statement did not disclose a threat of reprisal of force or promise of benefit, and we dismiss the allegation.

IV. TELLING EMPLOYEES TO REPORT UNION ACTIVITIES

Also contrary to the judge, we find that the General Counsel properly alleged that the Respondent unlawfully asked employees to report on their own and other employees' union activities, as the trial judge had granted the General Counsel's motion to amend the third consolidated complaint to include that allegation. However, we dismiss the allegation on the merits. At the March 4 meeting, an employee complained that a union organizer told her niece, who had not wanted to sign the union petition, that the organizer would sign the petition for her. The Respondent's President Milum testified that he "probably" told employees that "you should report that, that's wrong." Notably, Milum's request that employees report instances of fraud was unaccompanied by a request that they also report other lawful conduct that they felt was pressuring or harassing. In these circumstances, we find that Milum's statement to employees was a lawful response to an account of an unprotected threat of fraud.

V. THE GISSEL BARGAINING ORDER

The judge found that the Union obtained authorization signatures from a majority of the Respondent's employees in March, and that its majority support was dissipated, "at least in part," by the Respondent's unfair labor practices.²⁷ Nevertheless, she found that the Respon-

²⁷ Employees presented the authorization petition to the Respondent on March 4. It was signed by 42 of the approximately 70 production employees.

dent's unfair labor practices did not warrant a bargaining order, noting that "the Respondent has not discouraged employees from openly meeting with union representatives outside the facility, wearing prounion stickers, distributing prounion literature, displaying a prounion banner and setting up in the lunchroom a union-donated microwave decorated with prounion stickers." She concluded that the Respondent's "partial respect for employees' Section 7 rights" suggested that the Board's traditional remedies could adequately remedy the coercive effects of the Respondent's conduct. For the reasons stated below, we disagree.

In *NLRB v. Gissel Packing Co.*,²⁸ the Supreme Court identified two categories of employer misconduct that may warrant imposition of a bargaining order: "Category I" cases involving outrageous and pervasive unfair labor practices that make a fair election impossible, and "Category II" cases involving less extraordinary and less pervasive unfair labor practices, but which nonetheless have a tendency to undermine majority union support, once expressed through authorization cards, and render the possibility of a fair election slight.²⁹ The case at bar meets the standard for a category II bargaining order. In reaching this conclusion, we have examined the seriousness of the violations, the number of employees directly affected by the violations, the extent of the dissemination among employees, and the position of the individuals committing the unfair labor practices.³⁰

The Respondent's unfair labor practices include the unlawful, discriminatory discharges of two union supporters. The Board and courts have long considered the discharge of union adherents to be among the "hallmark" violations justifying the issuance of bargaining orders.³¹ Such violations are among "the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity persists." *Traction Wholesale Center Co.*³² In *NLRB v. Jamaica Towing, Inc.*,³³ the Second Circuit Court of Appeals noted, in enforcing

a Board Order, that the discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force," and would remain in employees' memories for a long time. Indeed, here it did: the judge found from the evidence that the Union obtained authorization from a majority of employees in March and that the Respondent's unfair labor practices "at least" contributed to the erosion of union support, particularly after the Respondent discriminatorily discharged Knox and Min.³⁴ As Union organizer Daisy Pitkin testified, attendance at Union meetings fell from 10–15 per meeting to just 1 or 2, and some employees reported to her that they were afraid to wear union insignia. It is plain that knowledge of the violations was disseminated throughout the workforce and significantly affected union support.³⁵

Further, the involvement of the Respondent's president heightened the coercive impact of the violations. The Board has long held that "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them."³⁶ Here, the Respondent's president, right after learning of Knox's appearance on a television news broadcast about the labor dispute, went to the worksite early in the morning for the sole purpose of catching her violating time-clock rules that until then had not been punishable by termination, and discharged her along with her coworker Min. It was also the Respondent's president who suspended Guzman for wearing her union button and who

³⁴ Our dissenting colleague cites no basis for his assertion that the unlawful discharges were motivated by the Union's "corporate campaign, as opposed to employee organizing efforts." Moreover, it is undisputed here that the employees' activity was protected and that it was connected to both the Union and the organizing effort. In fact, the Respondent's president confirmed that he had perceived Knox's television appearance as "promoting the Union." Thus, there is little doubt that the discharges would chill employees' association with and support for the Union.

³⁵ In *Desert Aggregates*, 340 NLRB 289, 294 (2003), cited by our dissenting colleague, the two temporary layoffs at issue were found to have had a "colorable explanation . . . from the perspective of other employees," and the only other violation of the Act found was a solicitation of grievances. In *Cardinal Home Products*, 338 NLRB 1004, 1010 (2003), the only "hallmark" violation found to have been widely disseminated (a discharge) occurred shortly after the union had lost an election, and all but one of the 8(a)(1) violations found occurred in one-on-one situations between an employee and a supervisor. The misconduct found in those two cases consequently did not have the same degree of destructive impact as we find here.

³⁶ *Stevens Creek Chrysler*, 357 NLRB No. 57, slip op. at 7 (2011), citing *California Gas Transport*, supra at 1324 (quoting *Michael's Printing, Inc.*, 337 NLRB 860, 861 (2002), enf. 85 Fed. Appx. 614 (9th Cir. 2004)).

²⁸ 395 U.S. 575 (1969).

²⁹ Id. at 614; *California Gas Transport*, 347 NLRB 1314, 1323 (2006), enf. 507 F.3d 847(5th Cir. 2007).

³⁰ *Abramson, LLC*, 345 NLRB 171, 176 (2005) (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enf. 245 F.3d 819 (D.C. Cir. 2001) (footnotes omitted)).

³¹ *Adam Wholesalers, Inc.* 322 NLRB 313, 314 (1996) citing *The Exchange Bank* 264 NLRB 822, 824 fn. 12 (1982) enf. 732 F.2d 60 (6th Cir. 1984).

³² 328 NLRB 1058, 1077 (1999) (citations omitted), enf. 216 F.3d 92 (D.C. Cir. 2000).

³³ 632 F.2d 208, 212–213 (2d Cir. 1980).

sought the TRO to silence clearly protected publicity efforts directed at the Respondent's customers.

In addition to the discriminatory discharges and suspension, we also rely on the coercive impact of the Respondent's other violations, including seeking to enjoin clearly protected Section 7 activity through the TRO motion, implicitly threatening to reduce employees' wages if they selected the Union, prohibiting employees from wearing union buttons while working, and giving employees the impression that their union activities were under surveillance.

In light of the violations found and their corrosive effect on union support, we conclude that the possibility of ameliorating the effects of the Respondent's conduct and of ensuring a fair election by the use of traditional remedies is slight.³⁷ In deciding that a bargaining order is necessary, we have considered the Section 7 rights of all employees involved. As the Board has stated, "the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights 'to bargain collectively' and 'to refrain from' such activity."³⁸ The rights of the Respondent's employees favoring unionization, which were expressed in the March petition, are protected by the bargaining order. The rights of those employees who may be opposed to the Union are safeguarded by their access to the Board's decertification procedure under Section 9(c)(1) of the Act, following a reasonable period of time to allow the collective-bargaining relationship a fair chance to succeed.

Finally, we reject the Respondent's argument that the passage of time since the foregoing violations weighs against a bargaining order. As we have stated on previous occasions, the Board's established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations are generally not considered. See, e.g., *Evergreen America Corp.*, 348 NLRB 178, 181–182 (2006).

AMENDED REMEDY

We amend the remedy as stated at footnote 4, and above. In addition to the remedies set forth by the judge, the Respondent is ordered, on request by the Union, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees in the appropriate unit concerning terms and condi-

³⁷ We reject our dissenting colleague's suggestion that a respondent's apparent respect for Sec. 7 rights on some occasions negates the coercive impact of the serious violations of those rights it committed on other occasions.

³⁸ *Stevens Creek Chrysler*, above, slip op. at 7, quoting *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1019 (2001), enf'd. 309 F.3d 452 (7th Cir. 2002).

tions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Respondent is also ordered to reimburse the Union for all legal and other expenses incurred in defending against the motion for the temporary restraining order, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),³⁹ compounded daily as set forth in *Kentucky River Medical Center*, supra. The amount shall be determined at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Milum Textile Services Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising and/or granting benefits in order to discourage employees from engaging in union activity.

(b) Instituting and pursuing any lawsuit against the Union that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act.

(c) Promulgating and maintaining an overly broad rule prohibiting employees from wearing union buttons while working.

(d) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(e) Threatening to reduce employees' wages or other benefits if they select the Union as their bargaining representative.

(f) Unlawfully interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(g) Suspending any employee for engaging in union or other protected concerted activities.

(h) Discharging any employee for engaging in union or other protected concerted activities.

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

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

³⁹ *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835–836 fn. 10 (1991), enf'd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

(a) Rescind the rule prohibiting employees from wearing union buttons while working and inform employees that it has been rescinded.

(b) Reimburse the Union for all legal and other expenses incurred in the defense of the Respondent's unlawful motion for a temporary restraining order, with interest as described in the remedy section of this decision, as amended.

(c) On request, bargain with the Union as the exclusive representative of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate bargaining unit is:

All full-time and regular part-time production employees employed by the Respondent at its laundry facility located at 333 North 7th Ave., Phoenix, Arizona, excluding all other employees, office clericals, mechanics, route drivers, confidential employees, guards and supervisors as defined in the Act.

(d) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Denise Knox and Soe Moe Min to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Evangelina Guzman, Denise Knox, and Soe Moe Min whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision, as amended.

(f) Expunge from its files any reference to the unlawful suspension of Evangelina Guzman and discharges of Denise Knox and Soe Moe Min and thereafter notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.

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

(h) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona copies of the attached notice marked "Appendix."⁴⁰ Copies of the notice, in

English, Spanish, Burmese, Karen, Arabic, Somali, and Russian, on forms provided by the Regional Director for Region 28 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 customarily 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2006.

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

IT IS FURTHER ORDERED that the portion of this proceeding relating to the filing and maintenance of the District Court complaint until shortly after the TRO proceeding is remanded to Administrative Law Judge Lana H. Parke for further appropriate action as set forth above.⁴¹

IT IS FURTHER ORDERED that the judge to whom the case is assigned shall afford the parties an opportunity to file additional post-trial briefs addressing the remanded issues and shall prepare a supplemental decision setting forth findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision

tional 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."

⁴¹ The Board has been advised that Judge Lana H. Parke is scheduled to retire shortly. In the event that Judge Parke is now retired, the issue is remanded to Chief Administrative Law Judge Robert A. Giannasi, who may designate another administrative law judge in accordance with Sec. on 102.36 of the Board's Rules and Regulations.

⁴⁰ 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 Na-

shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

The nonunion Respondent understandably sought to exercise its First Amendment right to petition a court for redress of the Union's corporate campaign claims that the Respondent's laundry service provided its restaurant clients with table linens contaminated by blood, feces, and pathogens. It filed a lawsuit in a Federal district court and, as part of that lawsuit, sought a temporary restraining order (TRO). The court denied the request for a TRO, and shortly thereafter the Respondent withdrew the lawsuit without prejudice. My colleagues today find that the TRO request violated Section 8(a)(1) of the Act and remand to the judge the issue of whether the lawsuit was likewise unlawful. I dissent from both actions.¹

The isolated focus on the legality of the TRO stage of litigation is unprecedented. Further, as in the recently decided *Allied Mechanical Services*,² the analysis of both the TRO and the overall lawsuit is inconsistent with precedent set forth in Supreme Court³ and Board⁴ prece-

¹ For the reasons stated below, I also dissent from my colleagues' imposition of a bargaining order in this case.

I also disagree with my colleagues' finding that the first-time installation of a security camera in the lunchroom was unlawful. The installation was part of a plant-wide upgrade of the Respondent's existing security camera system. In my view, the General Counsel failed to adduce sufficient evidence that the installation of the lunchroom camera would reasonably convey to employees the impression that their union activities in that area were under surveillance. I would also adopt the judge's dismissal of the allegation that supervisor Parra gave employee Guzman the impression that her union activities were under surveillance. The General Counsel failed to show why a reasonable employee would assume unlawful surveillance from what the judge described as Parra's "jocular statements." There is no evidence that Guzman would even reasonably believe that Parra even knew of Guzman's union activity.

Except as noted herein, I join the majority's disposition of this case in all other respects.

² 357 NLRB No. 101 (2011).

³ *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

⁴ *BE&K Construction*, 351 NLRB 451 (2007)

dent establishing a two-part test for determining whether a lawsuit is baseless and retaliatory. That test was carefully crafted to insure that the First Amendment right to petition the courts for redress of legitimate grievances is not chilled by the prospect of Board litigation. Although the majority purports to follow this precedent, their opinions in this case and in *Allied* represent an interpretation that effectively nullifies the prophylactic purpose underlying requirements for proof of the retaliatory prong of the *BE&K* test.

I. THE LAWSUIT

To coerce the Respondent to recognize it, the Union, in the guise of a public interest group dedicated to "infection control," targeted the Respondent's restaurant clients and their customers with claims that their table linens were contaminated with blood, feces, and pathogens as a result of the Respondent's laundry practices. The goal was to force the Respondent's restaurant clients to stop using the Respondent's services or face a loss of customers who believed that dining at the restaurants posed health risks. The Respondent filed a lawsuit against the Union on April 26, 2006,⁵ alleging libel, fraud, intentional interference with economic relations and prospective economic advantage, and illegal secondary boycott. The Respondent also moved for a temporary restraining order (TRO) under Section 303 of the Labor-Management Relations Act. As previously stated, that motion was denied, and the lawsuit was thereafter dismissed, without prejudice, at the Respondent's request on May 26.⁶

The Board's post-remand decision in *BE&K Construction* which implemented principles formulated by the Supreme Court, establishes the framework for our analysis. The Board held in *BE&K* that a lawsuit targeting protected activity may only be found to be an unfair labor practice if it is both objectively baseless and was brought with the requisite kind of subjective retaliatory purpose.⁷

The majority begins their *BE&K* analysis by separating the TRO motion from the remainder of the litigation and analyzing it as an independent lawsuit. My colleagues conclude that no reasonable litigant could have expected

⁵ All dates are in 2006 unless otherwise noted.

⁶ I note that The Union's claims of laundry cross-contamination mirror accusations it leveled in a 2003 corporate campaign against another non-union laundry, Angelica Textile Services. One targeted hospital, Sutter Health, sued the Union for defamation and intentional interference with prospective economic relations in California state court and was awarded \$17 million in damages by a jury. *Sutter Health v. UNITE HERE*, 186 Cal.App.4th 1193, 113 Cal.Rptr.3d 132 (Cal.App. 3 Dist., 2010) (overturning verdict based on faulty jury instructions).

⁷ 351 NLRB at 458.

success on the merits of the motion. They further find the requisite retaliatory motive based on the following: (1) the motion sought to enjoin activity the Act protects, i.e. leafleting and picketing, and the relief sought swept too broadly, encompassing nondefamatory communications without any secondary objective; (2) the Respondent's purported animus against union activity, as shown by its other unfair labor practices; and (3) the asserted objective baselessness of the motion. They remand the remainder of the lawsuit for the judge to more fully explain her finding that the lawsuit itself did not violate the Act, under a standard purportedly clarifying the General Counsel's burden under *BE&K Construction*, and under the retaliatory motive standard they crafted in *Allied Mechanical*, supra.

A. My colleagues err by treating the TRO motion as a separate lawsuit

Contrary to my colleagues, I would not carve out a motion for injunctive relief from the remainder of the lawsuit for separate scrutiny as an unfair labor practice. Such motions are part and parcel of the litigation as a whole. Treating them separately impermissibly exposes lawsuits to unfair labor practice findings regardless of their overall merit.⁸ Our precedent requires that we provide sufficient breathing room to avoid chilling the First Amendment right to petition the courts for redress of grievances. Thus, “[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice,”⁹ and even a baseless lawsuit is afforded protection unless filed for retaliatory purposes.¹⁰ If a plaintiff's failure to adequately argue a motion in the course of litigation can be fodder for an unfair labor practice complaint even where the overall lawsuit is not unreasonable, that would turn all litigation—meritorious and not—into a potential minefield of Board complaints and would have precisely the deterrent effect on protected

petitioning that the Supreme Court mandates that we avoid. It flouts Board and Supreme Court precedent to suggest that, where a lawsuit cannot be condemned as an unfair labor practice, requests for temporary relief and other motions occurring during the litigation are nevertheless fair game.

B. Viewed as a whole, the lawsuit was not filed for a retaliatory purpose

As explained in my dissent in *Allied Mechanical*,¹¹ the subjective retaliatory motive prong of the *BE&K* test requires the General Counsel to prove that the litigation was subjectively intended to abuse process, consistent with the antitrust sham litigation standard in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries (PRE)*.¹² The *PRE* subjective prong requires proof that the litigant's subjective motivation “conceals an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental process—as opposed to the *outcome* of that process” *BE & K Construction Co. v. NLRB*.¹³ Here, that showing has not been made.¹⁴

The General Counsel effectively concedes that the Respondent was motivated to file the lawsuit by a desire to stop defamatory claims about the safety of its laundering services, explaining in its brief to the Board that the Respondent filed its verified complaint and TRO motion because it was “concerned about the Union’s April 27 press conference and the report criticizing its practices, and anxious about the circulation of the customer letters,” and that the Respondent sued “to stop these practices from occurring.”

Further, the Respondent attached an affidavit to its complaint and motion contesting the Union’s claims, the substance of which is uncontroverted. The Respondent’s president Craig Milum testified, also without contradiction, about the inaccuracy of the Union claims, and that he filed the lawsuit because he believed the Union’s conduct was “illegal, libelous, hurtful, and interfering with our customer relations . . . that our recourse was through the court system to have that behavior restrained,” and that he wanted to prevent problems for his customers. The General Counsel did not adduce evidence undermining Milum’s credibility, and the judge did not question his credibility. Her only basis for finding retaliatory mo-

⁸ *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997), on which my colleagues rely, involved jurisdictional issues where some allegations were preempted by the Act and two others fell within state-court jurisdiction. Such jurisdictional questions concern allegations that *must* be handled separately, in separate venues. Contrary to my colleagues, a discrete complaint allegation is not analogous to a mere request for temporary relief, the merits of which are largely tied to the merits of the complaint. My colleagues also rely on the similarly inapposite *Grinnell Fire Protection Systems*, 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001), where the administrative law judge quoted *Manno* for the proposition that the Board could separately analyze federal and pendent state-law counts of an ongoing lawsuit, some of which were alleged to be baseless. In any event, my colleagues concede that neither of these cases involved the legality of a particular phase of a lawsuit.

⁹ *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

¹⁰ *BE&K Construction*, supra, 351 NLRB at 458.

¹¹ 357 NLRB at slip. op. 13–16.

¹² 508 U.S. 49, 60–61 (1993).

¹³ 536 U.S. 516, 526 (2002), citing *PRE*, 508 U.S. at 60–61 (emphasis in original).

¹⁴ Given the absence of evidence of a subjective retaliatory purpose, and because the TRO motion in any event should not be treated separately from the lawsuit, I need not pass on my colleagues’ application of the objectively baseless prong of the *BE&K* standard to that motion.

tive (only with respect to the lawsuit as a whole) was that it targeted activity that is normally protected, a rationale the Supreme Court has expressly rejected, as discussed below.

Moreover, the Respondent's lawsuit and its pursuit of a TRO track closely other litigation involving similar union tactics. See *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230, 1236 (9th Cir. 1997) (hospital prevailed on defamation claim where Union banner falsely stated "THIS MEDICAL FACILITY IS FULL OF RATS"); *Sutter Health v. UNITE HERE*, above. While these cases may differ in certain particulars from the plight in which the Respondent found itself, its independent decision to choose the same path as other litigants, who were at least initially successful with similar claims, supports a finding that the Respondent acted out of a "genuine desire to test the legality" of the Union's conduct here and to obtain a favorable result in court, rather than to impose the burden of litigation costs.¹⁵

C. My colleagues rely on rationale previously rejected by the courts to find retaliatory motive

As noted above, my colleagues contend that the motion was retaliatory because it sought to enjoin protected activity. In my dissenting opinion in *Allied Mechanical*, I note that the *BE&K* Court expressly rejected that rationale, explaining that the Board's prior view that a retaliatory suit is one "brought with a motive to *interfere* with the exercise of protected [NLRA §] 7 rights . . . broadly covers a substantial amount of genuine petitioning."¹⁶

. . . an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that petitioner believed was unprotected . . . If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.¹⁷

¹⁵ *BE&K* 536 U.S. at 533–534.

¹⁶ *Id.* at 533.

¹⁷ *Id.* at 533. See also *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001), cert. denied 534 U.S. 992 (2001)(same).

Contrary to my colleagues, my position is not "inconsistent with the words and purpose of Section 8(a)(1)" but is instead dictated by the

My colleagues further err by relying on the Respondent's purported animus to infer an unlawful retaliatory motive. This too is rationale the *BE&K* Court expressly rejected:

The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. . . . Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors*, 508 U.S., at 69 . . . (STEVENS, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.¹⁸

Even if animus evidence were relevant to the issue of retaliatory motive, which it is not, my colleagues rely on conduct that occurred after the Respondent filed and withdrew its lawsuit.¹⁹ Most of this conduct occurred after the Union intensified its campaign and escalated its claims about the safety of the Respondent's restaurant clients, and has no bearing on the Respondent's motivations at the time it filed its complaint. The Respondent's only unfair labor practice occurring before the lawsuit was that it provided nametags to employees—after an employee asked for them—because the employees complained that an unpopular manager poked them to get their attention instead of using their names. This cannot seriously be found to infer animus and is not relevant to the motive for filing the lawsuit.

My colleagues further err, as they did in *Allied Mechanical*,²⁰ by finding that the motion's "obvious lack of merit is further evidence that the Respondent sought to retaliate against the Union[] by imposing on [it] the costs and burdens of the litigation process." By allowing evidence of baselessness to substitute for an independent showing of retaliatory motive, the majority diminishes the quantum of evidence required to establish a violation of the Act, and thereby subverts the purpose of requiring a subjective component, which is to provide constitution-

Supreme Court and Board decisions in *BE&K* in order to ensure the required "breathing room" for activity protected by the First Amendment.

¹⁸ 536 U.S. at 534.

¹⁹ *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 637 (2007) (unlawful statements made 7–8 months after other allegedly unlawful conduct are not evidence that animus motivated the prior conduct).

²⁰ *Supra*, 357 NLRB No. 101, slip op. at 11.

ally protected breathing room for even unmeritorious lawsuits.²¹

In sum, the General Counsel has failed to show the Respondent was motivated by “the requisite kind of retaliatory purpose,” and the majority’s contrary holding cannot be reconciled with the Supreme Court’s decision in *BE&K Construction*. As such, this complaint allegation must be dismissed.

D. A remand is unwarranted

My colleagues remand for the administrative law judge to consider whether the remainder of the lawsuit was baseless under the standard they articulate here, and whether it was retaliatory under the standard they formulated in *Allied Mechanical*, supra. Because I would dismiss the complaint allegation for the reasons stated above, I find no need for a remand. Even on its own terms, however, the remand for a retaliatory motive finding is erroneous because it is based on the flawed *Allied Mechanical* framework. And for the reasons that follow, the remand to determine if the lawsuit was baseless is flawed as well.

The judge found that the General Counsel failed to establish that the lawsuit had no reasonable basis in fact or law, and that the Respondent’s voluntary dismissal of the lawsuit was insufficient to compel a contrary conclusion. The General Counsel’s exceptions argue that the judge erred in so finding on the basis that the Respondent failed to prove malice or actual damages at the hearing in this case. My colleagues properly reject this contention, and place the burden of proof where it belongs—on the General Counsel. They nevertheless overturn the judge’s finding on the basis that the judge failed to consider “substantial evidence” presented by the General Counsel relevant to the truth of the allegedly defamatory statements, the lack of malice on the part of the Union, and the lack of actual damage suffered by the Respondent. I respectfully disagree.

First, it appears that the judge did consider much of the evidence my colleagues cite. Her decision notes that the Union sent letters to restaurants using the Respondent’s laundry service stating that they should be concerned about the risk of contaminated linens because the Respondent allegedly mixed hospital linens with restaurant linens. The judge found that the letters cited a 2002 report by the Arizona Department of Environmental Quality and Arizona OSHA as authority for this proposition, that the Respondent was cited in a 2006 report for addi-

tional violations, but that the Union admitted at the hearing that its only basis for believing the Respondent mixed hospital and restaurant linens was employee reports. The 2002 and 2006 reports were not admitted for the truth of the matter asserted therein, and for this reason alone do not support the Union’s claims.²² Moreover, Milum’s affidavit and uncontroverted testimony refutes these claims. The judge evidently found the evidence as a whole insufficient to show that the Union’s claims were true, and the majority offers no reason to disturb that finding. Insofar as the majority asserts that the hearsay on which the General Counsel relies is “substantial evidence,” I respectfully disagree.²³

Second, the trial judge improperly excluded evidence directly relevant to the issues my colleagues remand. The trial judge did not allow counsel for the Respondent to elicit testimony from union organizer Daisy Pitkin, who directed the letters to the Respondent’s customers, about whether the Union had any evidence that Milum mixed restaurant and medical linens in the washers or that doing so might pose a health risk, and precluded questioning probative on the issue of malice. Likewise, the trial judge sustained the General Counsel’s objections to evidence the Respondent sought to introduce that was relevant to these issues on the basis that it went beyond the allegations of the Respondent’s complaint. The majority effectively concedes that this ruling was too narrow given the preliminary stage of the litigation, as the Respondent at a minimum was entitled to explain why it was not able to offer evidence essential to its case at the time the case was dismissed.²⁴ But my colleagues appear to contem-

²² The Respondent asserts that the 2002 report did not involve its facility that handles commercial laundry for restaurants and the 2006 report did not find any cross-contamination issues relating to restaurant linens. As such, it contends that neither report supports the General Counsel’s case, and that all linens are disinfected during washing and thus there is no safety issue in any event.

²³ The same is true with the issue of damages, where the “substantial evidence” presented by the General Counsel appears to be media reports of statements by Milum that he had not lost customers as a result of the Union’s campaign. But my colleagues agree that it was the General Counsel’s burden to show that the Respondent could not have established damages, which “may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law” and are not confined to whether the Respondent’s customers sought to break their contracts with the Respondent, the limit of the General Counsel’s “substantial evidence.” *Linn v. Plant Guards*, 383 U.S. 53, 65 (1966). In this regard, the General Counsel had ample opportunity to question Milum at the hearing regarding such damages, but failed to do so. Media reports are no substitute for evidence of this character.

²⁴ The majority specifically requires the judge to consider any evidence of this character, but the Respondent obviously was not on notice during the hearing that any such showing was required or permitted.

²¹ Id. See also *Petrochem v. NLRB*, supra, 240 F.3d at 32 (“Yet not all meritless suits against unions or employees amount to unfair labor practices. Otherwise, *Bill Johnson’s* would not have required the Board to determine whether unmeritorious lawsuits were filed for retaliatory reasons.”)

plate that the judge will decide the remanded issues on the basis of the flawed record all the same.

In these circumstances, a remand unjustifiably gives the General Counsel a second opportunity to litigate this issue despite his failure to persuade the judge the first time around. And a remand that does not require consideration of the clearly relevant evidence the trial judge improperly excluded would make a mockery of due process. I cannot join in this ill-considered course.

II. THE BARGAINING ORDER

I agree with the judge that a remedial bargaining order is unwarranted. The judge found that the evidence as a whole indicates the Respondent's "partial respect" for the employees' organizing efforts, which suggests that the coercive effects of its conduct can be ameliorated through traditional remedies. Further, the Respondent's unfair labor practices are not sufficiently egregious or pervasive to warrant a bargaining order.²⁵ Here, the unlawful discrimination directly affected only three employees out of approximately seventy.²⁶ Additionally, the unlawful discharges were in response to the Union's corporate campaign, as opposed to employee organizing efforts within the facility, and employees would likely view them as an unlawful effort to protect the Respondent's public reputation rather than to stop the Union from coming in.²⁷ In any event, I would not issue a bargaining order on the basis of the passage of time since the March 2006 petition. *Wallace International de Puerto Rico, Inc.*²⁸ (declining to issue bargaining order where 5 years had passed since the election).

For all the foregoing reasons, I respectfully dissent.

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

²⁵ *Desert Aggregates*, 340 NLRB 289, 294-295 (2003) (traditional remedies adequate to redress employer's discriminatory layoff of two union supporters and its solicitation and promise to remedy grievances, notwithstanding unit's small size of 11 employees).

²⁶ *Cardinal Home Products*, 338 NLRB 1004, 1010 (2003) (violations not directly impacting a significant portion of unit unlikely to require more than traditional remedies).

²⁷ In analyzing these discharges, the judge cited Mr. Milum's hostility to the Union's corporate campaign, in which Knox actively participated.

²⁸ 328 NLRB 29 (1999).

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 promise and/or grant you benefits in order to discourage you from engaging in union activity.

WE WILL NOT institute and pursue any lawsuit against the Union that is preempted by federal law or that lacks a reasonable basis and is motivated by an intent to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT promulgate and maintain an overly broad rule prohibiting you from wearing union buttons while working.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten to reduce your wages or other benefits if you select the Union as your bargaining representative.

WE WILL NOT unlawfully interrogate you about your union membership, activities, and sympathies or the union membership, activities, and sympathies of other employees.

WE WILL NOT suspend you for engaging in union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union or other protected concerted activities.

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

WE WILL rescind the rule prohibiting you from wearing union buttons while working and inform you that it has been rescinded.

WE WILL reimburse the Union for all legal and other expenses incurred in the defense of the Respondent's unlawful motion for a temporary restraining order, with interest.

WE WILL, on request, bargain with the Union as the exclusive representative of unit employees concerning terms and conditions of employment and, if an under-

standing is reached, embody the understanding in a signed agreement. The unit is:

All full-time and regular part-time production employees employed by the Respondent at its laundry facility located at 333 North 7th Ave., Phoenix, Arizona, excluding all other employees, office clericals, mechanics, route drivers, confidential employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer full reinstatement to Denise Knox and Soe Moe Min to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, insofar as we have not already done so, make whole Evangelina Guzman, Denise Knox, and Soe Moe Min for any loss of earnings and other benefits resulting from their suspension or discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Evangelina Guzman and discharges of Denise Knox and Soe Moe Min, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.

MILUM TEXTILE SERVICES, CO.

John Giannopoulos, Atty., for the General Counsel.
Laurie A. Laws, Atty. (Farley, Robinson & Larsen), of Phoenix, Arizona, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Judge Joseph Gontram heard this case in Phoenix, Arizona, on March 5 through 9, 20, and 21, April 2 through April 5, 9, and 10, 2007.¹ The hearing closed on April 11, 2007, and the parties submitted their briefs on June 15, 2007.¹ Judge Gontram died on July 18, 2007, prior to issuance of his decision in this case. Thereafter, all parties agreed that a trial de novo was unnecessary and that the case could be transferred to another administrative law judge to write the decision based on the record created before Judge Gontram without the need for demeanor credibility findings. On August 7, 2007, the case was transferred to me for decision.

This matter was tried upon a third consolidated complaint (the complaint) issued February 23, 2007, by the Regional Di-

¹ All dates herein are 2006, unless otherwise specified.

¹ Counsel for the General Counsel's unopposed posthearing motion to correct the transcript is granted. The motion and the corrections are received as ALJ Exh. 1.

rector for Region 28 of the National Labor Relations Board (the Board) based upon charges filed by the UNITE HERE! (the Union). After issuance of the complaint, the Regional Director amended the complaint on February 27, March 16, and April 9, 2007. The complaint, as amended, alleges Milum Textile Services, Co. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent essentially denied all allegations of unlawful conduct.

II. ISSUES

1. Did Respondent violate Section 8(a)(1) of the Act by the following conduct:

soliciting employee grievances, promising and granting benefits, interrogating employees, implying employee organizing efforts were futile, filing and maintaining a lawsuit against the Union, promulgating a rule prohibiting employees from wearing union buttons at work, seeking the arrest of union supporters, creating the impression of surveillance and engaging in surveillance of employees' union activities, threatening employees with reduced wages, and violating employees' *Johnnies Poultry*² rights.³

2. Did Respondent violate Section 8(a)(3) of the Act by discharging Denise Knox and Soe Moe Min on July 8?

3. Did Respondent violate Section 8(a)(3) of the Act by suspending and placing on probation Maria Minjarez on October 19?

4. Did Respondent violate Section 8(a)(3) of the Act by suspending Evangelina Guzman on July 4 and disciplining her on December 26 and January 20, 2007?

5. Is a bargaining order pursuant to *NLRB v. Gissel Packing Co.*,⁴ an appropriate remedy?

III. JURISDICTION

At all times relevant, the Respondent, an Arizona corporation, with a facility and place of business located in Phoenix, Arizona (the facility), has been engaged in the business of providing commercial laundry services.⁵ During the 12-month period ending July 6, the Respondent, in conducting its business operations purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Arizona. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. THE FACTS

A. The Respondent's Business Operation

The Respondent commercially launders restaurant and healthcare linens at its laundry in Phoenix, Arizona, which

² 146 NLRB 770 (1964).

³ In his posthearing brief, counsel for the General Counsel withdrew complaint allegation 5(b)(2), which alleged the Respondent unlawfully prohibiting employees from wearing union T-shirts at work.

⁴ 395 U.S. 575 (1969).

⁵ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

occupies a block between Sixth and Seventh Avenues and provides pickup and delivery services to customers in the area, including hospitals and restaurants.

During the relevant period, the following individuals served as supervisors and agents of the Respondent in the indicated positions:

Craig Milum (Milum)—President
 Angela Kayonnie (Kayonnie)—Production Manager
 Jaime Chavez (Chavez)—Production Supervisor
 Rafael Parra (Parra)—Chief Engineer
 Jason Myer (Myer)—IT Director

The Respondent's production department, which includes finishing, washing, and sorting employees, numbering approximately 70, operates Monday through Saturday in two basic shifts: 6 a.m.–2 p.m. and 2 p.m. until the work is completed for the day. The washing and sorting employees generally start a few hours before the finishing employees. Employees "clock" in and out of work using a computer system into which individual employees type their respective employee numbers. Company policy requires employees to notify and to obtain authorization from supervisors for absences or to leave work.

Both the Respondent and counsel for the General Counsel introduced into evidence copies of written disciplinary notices given to employees since 2003. Review of the notices reveals that at all relevant times the Respondent exercised significant discretion as to the scope and number of oral or written warnings given for infractions of company rules. The majority of the disciplinary notices deal with such time and attendance issues as unexcused absences, tardiness, and leaving work without permission or before work is finished. Other notices warn against misuse of worktime, e.g., smoking, slowness, and talking. The notices show that occasionally employees are placed on probation in connection with warnings, including first warnings. Frequently, the disciplinary notices include warnings that additional infractions will result in suspension or termination.

I find that at all times relevant, the Respondent's disciplinary practices have followed no clearly discernible pattern. The evidence does not show clear-cut disciplinary progression from warnings to suspension or termination. However, except in extraordinary circumstances, it appears that the Respondent has generally given employees one or more oral and/or written warnings before imposing suspension or termination. After one or more warnings, the Respondent has both suspended and failed to suspend employees for time and attendance problems. In the year preceding the union campaign, various employees left work without permission and received warnings with the threat of subsequent suspension or discharge upon repeated offense.

B. The Union Organization Drive

The Union distributed union literature to production employees at the facility beginning February 27. Thereafter, employees supporting the Union passed out union flyers at work and placed stacks of flyers in the employee lunchroom. By letter dated March 3, Kurt Edelman, laundry director of the Union,

asked Milum to discuss participating in a neutral-party examination of written employee union authorizations to determine whether a majority of the Respondent's employees wished to be represented by the Union, which the Respondent declined.

On March 4, at about 3 p.m., all scheduled production employees (about 40) stopped working and asked to speak to Milum. Milum joined the employees in the production area, and an employee presented him with a multipage document (the petition), saying that the workers wanted the Union to represent them. The petition was in Spanish and English, the fore page of which read, "For Respect and Dignity [and] Safer Working Conditions." Succeeding pages bore the following heading and the seriatim names, addresses, telephone numbers, and dated signatures of 42 individuals:

WE DEMAND TO JOIN WITH UNITE HERE
 AND 40,000 UNION
 LAUNDRY WORKERS ACROSS THE COUNTRY!

I hereby accept membership in UNITE HERE, the international laundry workers union, and authorize UNITE HERE to represent me in negotiations with my employer about wages, hours and all other conditions of employment.

On March 7, the Union distributed to employees entering work adhesive name tags on which union representatives had written "Unite Here!" Receptive employees wrote their names on the tags and affixed them to their clothing without comment or objection from any supervisor.

During the Union's organizational efforts, the Union held biweekly employee meetings and recruited employees to distribute union literature and paraphernalia at the facility.⁶ Many employees wore the union-distributed items at work, including approximately 3-inch-diameter adhesive paper emblems that bore the words "QUEREMOS UNION YA~WE WANT UNION NOW" around the circumference and UNITE HERE! in the center. The Union provided employees with a 9-by-4 foot banner that employees displayed in the employee lunchroom, which read, as translated from Spanish, "THE COMMUNITY SUPPORTS YOU! UNITE." The Union also presented employees with a microwave oven for the lunchroom on which employees affixed multiple stickers bearing the following messages (in English and Spanish): UNITE HERE! IT'S TIME FOR A UNION! UNION ORGANIZE! WE WANT A UNION! After their placement in the employee breakroom, both the microwave oven and the banner remained there at least until the date of the hearing. No evidence was adduced that any supervisor objected to or commented on the union paraphernalia worn or displayed at the facility except for metal union buttons, as related below.

Beginning March 10, the Union, assertedly relying on the findings of governmental regulatory agencies and employee reports, wrote to some of the Respondent's restaurant customers and leafleted their patrons, asserting that the Respondent disregarded established health and safety practices. The Union also created a web site entitled "milumexposed," on which safety and employee issues were discussed. Sometime in April,

⁶ Employees handed out union flyers, shirts, wristbands, stickers, and buttons.

a television newscast featured an interview with employee Denise Knox (Knox) as a union supporter. On April 24, the Union issued a press release repeating its criticism of the Respondent's health and safety record. On April 28, The Arizona Republic published an article bearing the headline, "*Laundry service targeted by Valley union officials*," which dealt with the same issues. In June, union representatives and employee supporters, accompanied by a television news crew, filmed a news segment at the facility.⁷ On July 6, the Union sponsored a community forum in Tucson, Arizona. A news segment of the event in which some of the Respondent's employees appeared was televised.⁸ The Respondent has referred to the Union's appeal to the Respondent's customers and to the community as the "corporate campaign," distinguishing it from the Union's organizational campaign among employees. The Respondent's posthearing brief describes the so-called corporate campaign as "a form of economic warfare," which the Respondent had assertedly been defending since 2005.

Over the course of the union organizational campaign, Kayonnie reported to Milum which union organizers were at the facility and which employees were talking to them. By April, Milum believed that several production employees were "strong" union supporters, including Evangelina Guzman (Guzman), Maria Minjarez (Minjarez), Knox, and Brandy Ibarra (Ibarra).⁹

C. Alleged 8(a)(1) Violations

1. The March 4 meeting

On March 4, after the Respondent's employees presented Milum with the petition, Milum spoke with them for about 45–60 minutes (the March 4 meeting) with Chavez translating. Witnesses to the March 4 meeting gave essentially corroborative accounts. The following is an amalgam of credible testimony. Upon presentation of the petition, Milum asked the congregated employees why they wanted a union. Some employees complained that Kayonnie did not treat them with respect and dignity and that she clapped her hands or poked them instead of using their names. Milum said he could not tell the employees anything for or against the Union, but the process of getting a union could be a long one; there could be a lot of problems because employees could strike, and they might have to go to court to obtain a union election. He said there was no need for the Union, as he could resolve the problems at the plant, and he would speak to Kayonnie. Employees suggested Milum change supervision, but he refused, telling them Kayonnie was a very good supervisor. Minjarez recommended Milum provide employees with nametags, to which Milum agreed. In response to an employee's description of union per-

⁷ The employee supporters included Knox, Brandy Ibarra, and Zulema Ruiz.

⁸ Milum went to Tucson in anticipation of being interviewed, but the interview did not take place.

⁹ In a February 9 e-mail to the manager of the Respondent's customer, Fox Restaurant, Milum identified Guzman as the "number one union supporter" at the Company.

sistence in urging a relative to sign an authorization card, Milum told employees they should report such conduct.¹⁰

About a week after the meeting, Milum disseminated to employees 3-by-1-1/4 inch plastic nametags on which were printed employee first names. The nametags were secured to clothing by a 1-1/4-inch horizontal metal pin on the back of the nametag that could be secured by a rotating closure. Employees wore the nametags, some of which fell off and were lost.

2. The Respondent's lawsuit against the Union

By letters dated March 10, the Union wrote to some of the Respondent's restaurant customers warning that they "should be concerned about the risk of contaminated linens" processed by the Respondent, as the Company "mixed hospital linens with restaurant linens in the washers." For authority, the Union cited 2002 investigative reports by the Arizona Department of Environmental Quality and Arizona OSHA.¹¹ On April 3, the Respondent filed an unfair labor practice charge with the Region alleging that the Union violated Section 8(b)(4)(ii)(B) of the Act by transmitting the letters and requesting injunctive relief.¹² On April 28, the Region, citing *NLRB v. Servette*, 377 U.S. 46 (1964), dismissed the charge, noting that unions are not prohibited from making "noncoercive entreaties" to secondary employers to cease doing business with primary employers.¹³

On April 26, the Respondent filed a verified complaint for injunction and damages (Respondent's complaint) and a motion for temporary restraining order (Respondent's motion) in Arizona Federal District Court. Respondent's complaint set forth five causes of action: illegal secondary boycott, intentional interference with economic relationships, intentional interference with prospective economic advantage, libel, and common law fraud. The Respondent contended the Union sought to induce the Respondent's customers to cease doing business with the Respondent by mailing and faxing letters to them that contained false and misleading material, and to damage the Respondent's reputation by making statements the Union knew were false or without reasonable grounds for belief of truthfulness. The Respondent sought damages and prohibition against the Union's contacting its customers.

On April 27, the District Court denied the Respondent's request for injunction on grounds the issues were preempted by Federal law. The Respondent continued to maintain and prosecute its lawsuit until May 26 when it obtained voluntary dismissal of the action without prejudice. The Union incurred legal expenses consequent to the lawsuit.¹⁴

¹⁰ Guzman testified that Milum asked employees in favor of the Union to so indicate by a show of hands or by moving to one side. No other witness testified of this incident, which would reasonably have been expected to excite recall, and I give the testimony no weight.

¹¹ On May 4, Arizona OSHA issued another report citing the Respondent for five "serious" violations relating to blood or other potential infectious material contamination. At the hearing, the Union admitted its only basis for believing the Respondent mixed hospital and restaurant linens was employee reports.

¹² Case 21-CC-1008.

¹³ By letter dated June 7, the NLRB Office of Appeals upheld the Region's dismissal of charges.

¹⁴ Counsel for the General Counsel sets the amount of expenses at \$2000; the Union sets them at \$3000.

3. The Respondent's alleged prohibition on distributing and wearing union buttons at work

On June 27, Zulema Ruiz (Ruiz), order assembler, appeared at work wearing a round metal button on which the message UNITE HERE! was engraved (union button) and gave a similar button to a coworker. The attachment device on the union button consisted of an approximately 1-inch pointed horizontal shaft with a crookneck safety latch to hold the shaft in place after insertion in fabric. Milum asked Ruiz if she were handing out union buttons during work hours, which Ruiz denied doing.¹⁵ Milum told Ruiz she could not wear the union button while working because the attachment pin posed a danger to employees when holding piles of linens close to the body and a danger to equipment if it fell into the machinery.¹⁶ Ruiz asked why the Respondent permitted name badges. Milum explained he had ensured the badges had a rotating locking mechanism to enhance safety, but since it was impractical to inspect every pin an employee might wear, the Company had a rule not to wear pins in production. Ruiz protested she did not work around equipment. Milum said order assemblers worked near equipment, were sometimes assigned to work on equipment, and it was not practical to remind employees to remove pins during reassignments.

On July 4, Guzman appeared at work wearing a union button. Milum told her she could not work unless she removed the button because it created a safety problem. He said he did not care what the button said, but it could fall into and scratch the ironer or hurt her. Guzman protested, and Milum told her she could not work while wearing the button and if she left she would lose the July 4 holiday pay. Guzman left work rather than remove the button; she did not thereafter wear it at work.¹⁷

Although a warning notice on the feeding machine cautioned employees: "Tie hair back, no loose clothes, Remove all jewelry," employees commonly wore watches, earrings, chains, and necklaces while working.¹⁸ Demonstrations conducted at the hearing showed the nametags readily separated from material upon abrupt movement, and several employees testified that the nametags fell off as they worked. After conducting tests, expert witness, Dr. Gary Bakken, industrial engineer and college professor at the University of Arizona, concluded the nametags furnished by the Respondent were more likely to become unlatched during work activities than the union button.

¹⁵ Ruiz testified, "He told me if I was handing buttons over to employees during work hours." In his posthearing brief, counsel for the General Counsel characterizes Milum's words as a declarative statement. However, it is clear that Ruiz understood Milum to be asking a question.

¹⁶ Milum had not examined the union button, but he assumed it had a sharp pin on the back, as he saw no other type of fastening.

¹⁷ The General Counsel alleges this incident as a independent violation of 8(a)(1) as well as a suspension of Guzman in violation of Sec. 8(a)(3).

¹⁸ Kayonnie testified she told employees to remove long necklaces and loose bracelets at work, but in an affidavit given to the Board, she denied telling employees to remove jewelry. I accept employee testimony that employees regularly wore jewelry without supervisory objection.

4. Soliciting third parties to contact law enforcement agencies and attempting to instigate the arrest of union handbillers

After the Union commenced its publicity campaign directed toward the Respondent's customers, the Respondent regularly contacted the Phoenix police department seeking police response to and intervention in the handbilling the Union conducted at customer facilities. Milum e-mailed some customers with suggestions on how to effectuate arrests of handbillers for trespassing, urging them to warn handbillers of criminal liability and to contact the police. He occasionally referred to the Union as cockroaches and monsters. Milum also urged customers to file unfair labor practice charges with the Board against the Union.¹⁹ One of Respondent's customers reported to the Respondent that the police had caused union handbillers to leave its private property. In an interview given to a local newspaper in February 2007, Milum compared the union organizational campaign to "an organized-crime shakedown."

5. Alleged unlawful surveillance/creating impression of surveillance

While eating lunch in her husband's truck parked on 6th Avenue outside the facility, Kayonnie saw various employees meeting with union agents and reported her observations to Milum the first time she saw them.²⁰

When the union campaign commenced in early 2006, the Respondent's security system included seven to eight video cameras mounted at various locations, only a few of which were functional. In January, the Respondent's information technology director, Meyers inquired if Milum wanted to replace its 3-year old security camera system with a new one. Milum initially declined but at the end of 2006, when Meyers again proposed a camera revamp, authorized the change, saying business was good and it might be a good time to do it. In late January 2007, the Respondent installed approximately 15 cameras in the production, laundry, storage, office, and some perimeter areas of the facility. Milum vetoed placement of a camera on the 6th Avenue perimeter because employees regularly met with the Union there but approved one in the lunchroom where no camera had before been placed.

During the installation, Guzman asked Parra why cameras were being installed. Parra laughingly replied they were to keep her "in check" and that while all other images would be in color, she would appear in black and white.

¹⁹ In consequence, one customer and the Respondent on behalf of another customer filed unfair labor practice charges alleging illegal secondary boycotts by the Union, which the Region later dismissed.

²⁰ Counsel for the General Counsel urges that Kayonnie's testimony of a long history of eating lunch in her husband's truck be discredited. It is true that Kayonnie appeared to equivocate on this point, but Kayonnie's primary language is Navajo, and the transcript shows she did not always clearly understand questions put to her. Although employee Maria Velasquez testified it was "really rare" that Kayonnie would eat lunch in her husband's truck on 6th Avenue, she also testified that she had never been on 6th Avenue when Kayonnie was there. I accept Kayonnie's testimony that her choice of a lunch spot preceded the Union's organizational campaign.

6. The computer video presentation to employees

In December, the Respondent individually showed employees a company-created computer video. At that time, the Respondent paid new employees between \$8 and \$9.25 and experienced employees between \$8 and \$9.25 per hour. In pertinent part, the video pointed out that the Respondent paid its employees higher wages than its Arizona competitors, including several unionized companies, and stated:

If the Union was representing employees and bargaining for wages, wages would be open to serious bargaining between the Company and the Union and the result of the bargaining could be wages of \$6.75 per hour or higher.

7. Prehearing employee interviews

In preparation for the hearing, the Respondent's attorney, Laws, in company with Milum interviewed a number of employees at the facility. The following employees testified as to what the interviews entailed: Maria Zambrano (Zambrano), Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts (the latter four employees were interviewed at a group). Although each employee described a slightly different notification by Milum or Kayonnie that the Respondent wanted to interview them, all employees denied that they had been informed their participation in the interview was voluntary or that they had been assured no reprisals would be taken.²¹ At the interview itself, neither Laws nor any representative of the Respondent assured any employee that the meeting was voluntary and/or that the employee need not fear reprisal.

D. Alleged 8(a)(3) Violations

1. The discharges of Denise Knox and Soe Moe Min

Prior to their discharges on July 8, Knox and Soe Moe Min (Min) worked for Respondent as soiled laundry sorters. Because she openly championed the Union, Milum believed Knox to be a strong union supporter. Min, a Burmese-speaking employee, also openly supported the Union, wearing T-shirts enscripted "UNITE HERE" to work almost daily.

On Thursday, July 6, Knox appeared on a Tucson television newscast as a union supporter. On Friday, July 7, Zambrano, lead person for the Respondent's early shift soil sort department, told Kayonnie and Chavez that after clocking in Knox and Min sat in the lunchroom instead of working.²² Kayonnie

²¹ Pat Goebel testified that Milum asked her to meet with the company lawyer, "If you want to." Maria Teresa Velasquez testified that Milum asked her if she wanted to help him in supporting him; he told her he was not demanding anything of her. I do not find Milum's statements assured either employee that the prospective interview was voluntary.

²² Counsel for the General Counsel argues that Zambrano gave inconsistent testimony as to whether she had told Kayonnie that Knox and Min delayed starting work. It is true that Zambrano's testimony given during the Respondent's case was fragmented and sometimes ambiguous. However, her testimony engendered a number of objections, counsel colloquy, and procedural discussions among the judge and the parties, and I cannot blame her resultant confusion on lack of credibility. In spite of some imprecise and nearly incoherent testimony,

related the complaint to Milum, who knew of Knox's July 6 Tucson television appearance.²³

On Saturday, July 8, Knox and Min, who were scheduled to start work at 4 a.m. in the soil sort department, clocked in at 3:53 a.m.²⁴ With the object of verifying Zambrano's report, Milum arrived at the facility before 4 a.m. and covertly reconnoitered the lunchroom, waiting outside it until 4:08 a.m., at which time he entered.²⁵ According to Milum, he saw Knox and Min, the former sitting and the latter talking with a janitor. Milum asked Knox if she had punched in. When she said she had, he asked her if it was normal for her to punch in and then go sit down. She said it was not. Milum asked why she was doing it that day, and she said she was waking up. Milum told her it was wrong to punch in and sit in the lunchroom rather than start work and that stealing time was stealing money. Milum directed her to punch out and go home. Knox replied that everyone, including Zambrano, went to the lunchroom after clocking in.²⁶ Knox clocked out at 4:11 a.m.

Knox did not testify. According to Min, after clocking in on July 8, he worked at assigned tasks for about 5 or 10 minutes,²⁷ after which he repaired to the lunchroom to get a drink from the vending machine. In the lunchroom, Min saw Milum talking to Knox. He obtained a soda, drank some of it, and returned with the soda to his station, the round trip taking about 3 to 5 minutes. Min worked for about 10 more minutes, after which Milum approached and spoke to him, gesturing at the time clock. Although Min did not speak English, he understood Milum to be accusing him of wasting time and not working. Milum left for 6 to 7 minutes and returned with Arafat, a Burmese-speaking janitor, who told Min he was fired. Min

Zambrano consistently maintained that she had told Kayonnie the two employees "would be talking in the dining room and then would go to work . . . it was already worktime and we were already working."

²³ Regarding his knowledge of Knox's July 6 Tucson television appearance, Milum initially testified that on July 8 he was aware firing Knox was "a pretty explosive situation with Denise being on television Thursday in Tucson and promoting the union against Milum Textile Services and here we are less than two days later and I'm firing her." He almost immediately corrected his testimony, stating that although he knew of Knox's April television appearance, he did not know she had been on television in Tucson until after he fired her. Given Milum's spontaneous and specific initial testimony, I do not credit his later denial. I find that at the time Milum heard of Zambrano's complaint, he knew of Knox's July 6 television appearance.

²⁴ Min initially testified that he arrived at work at 4:10 a.m. The Respondent's time records show he clocked in 17 minutes earlier. The inconsistency is probably due to translation error, as Min also testified that he arrived before 4 a.m.

²⁵ Milum waited until after 4:07 a.m. to satisfy the vagaries of the Respondent's timeclock, which reverts to the quarter hour if activated on or before 7 minutes after the quarter hour.

²⁶ In an affidavit given to the Board on September 1, Zambrano admitted that all soil sort department workers went to the lunchroom after clocking in, including herself, remaining there the several moments between clocking in and actual start time plus "several minutes after the exact hour."

²⁷ Min initially testified he worked for 10 minutes, then said for 5 minutes.

clocked out at 4:17 a.m.²⁸ Two days after the terminations, Milum and Chavez asked Zambrano if Knox and Min often stayed in the lunchroom after clocking in.

Before he fired Knox and Min, Milum did not discuss the disciplinary action with supervisors, to whom he generally referred disciplinary issues; he did not review the two employees' personnel files, which were devoid of any prior warnings, and he did not, apparently, consider Knox's assertion that early morning lunchroom loitering was a common employee practice. Although there is no evidence any employee had committed an identical infraction in the past, the evidence shows the lunchroom was a draw for many employees who stopped work early, delayed work, extended a break, or detoured from a restroom trip to pause there. Milum's practice was to give new employees engaging in such work evasions a "stern discussion," and before Knox and Min's discharges, no such employee had been disciplined beyond a written warning. In January, Kayonnie issued a written warning to an employee who, among other work violations, left his workstation to visit the restroom every 15 minutes after reporting to work. Two months prior to the discharges, an employee who twice left work for smoking breaks was issued a written warning. Milum estimated that in the 5 years prior to July 8, he had terminated without prior notice about 10 employees for severe misbehavior. However, Milum detailed far fewer terminations for that period, citing terminations that spanned a period of more than 25 years and involved significant property theft: 1983 and late 1980s, office employees fired for depositing checks in separate accounts; 1989, production employee fired for stealing linens; 1994, supervisor fired for fraudulently claiming gasoline expense; 2003, engineer fired for theft of a tool; 2003–2004 security janitor fired because of missing hand tools.

2. Maria Minjarez

The Respondent hired Minjarez as a production worker in January. Without notice, Minjarez voluntarily terminated her employment on May 10 by not showing up for work. In July, the Respondent rehired Minjarez on condition she would notify the Company every time she had to be off.

Beginning in October, Minjarez actively participated in union organizing: distributing union fliers to employees at the facility and collecting signatures on a petition asking for set work schedules. At all relevant times, Milum knew Minjarez to be a firm union supporter.

On October 16, while at work Minjarez felt ill and left work without permission because she did not think the Company would authorize her absence.²⁹ Minjarez had her mother notify

²⁸ I cannot fully credit Min's testimony. Although Min insisted the timeclock was off by a few minutes, there is no evidence of that; I accept that Min clocked in at 3:53 a.m. and clocked out at 4:17 a.m. Min's testimony appeared calculated to fit the established time period rather than to present a straightforward account. Accordingly, I give weight to Milum's testimony.

²⁹ Minjarez' testimony on this score was somewhat equivocal. She testified that she did not ask anyone for permission because "they had just switched the person that used to work with me, I didn't think they were going to replace that person and I didn't—couldn't find the supervisor and I went home." When questioned further, Minjarez testified that she did not know how long she looked for Chavez and that she did

Chavez on the following day that she would not be at work. When Minjarez returned to work on October 18, Kayonnie sent her home, telling her she had quit.³⁰ Minjarez returned to the facility that afternoon and spoke to Chavez. Chavez told her Kayonnie had said she had quit and that she was "very problematic." Minjarez waited several hours to speak to Milum who told her that Kayonnie had reported she was a "troublemaker." Milum also told Minjarez she was slow and not at the level of the rest of the workers. According to Minjarez, a few weeks earlier Milum had told her she could not receive a requested transfer from her department because she was a very good worker. Minjarez had no prior record of discipline.

On October 19, the Respondent suspended Minjarez for 3 days and placed her on probation for 90 days. The accompanying employee warning notice, signed by Chavez, read, in pertinent part:

On Monday, October 16, early evening you left your position without seeking approval or notifying your supervisor. You later indicated that you were feeling too ill to work and that you were afraid that I would not approve of your leaving before the work was done.

Since you . . . were re-hired in July after you quit without notice in May at which time you committed to not again leaving the company's employment without notice, 1) you have been missed days of work and 2) you have been late days. You also have also 3) worked at a slower pace than is considered a good and acceptable on a long term basis.³¹

3. Evangelina Guzman

Guzman worked for the Respondent during three separate periods (in 2005, in 2006 until September 28, and commencing again in early October), beginning each period as a new employee. During her second period of employment, a photograph of Guzman and the regional manager of the Union appeared in an April 28 news article in *The Arizona Republic*. The caption read: "*Unite Here workers protest conditions at Milum Textile Services. Unite Here Regional Manager Christina Vasquez (center) interprets for Evangelina Guzman, who tells of an injury she suffered on the job.*" On July 4, also during Guzman's second period of employment, as detailed above, the Respondent refused to permit Guzman to work unless she removed the union button she wore. Guzman terminated her

not think about notifying Milum. She then agreed that the statement in her Employee Warning Notice was accurate: "You later indicated that you were feeling too ill to work and that you were afraid that I would not approve of your leaving before the work was done." I infer from her testimony that she did not seek permission to leave because she thought it might be denied.

³⁰ In its posthearing brief, the Respondent states that Minjarez missed a second day of work on October 18 without notice to the Company. Although Minjarez testified under cross-examination that she did not report a prospective absence for October 18, it is clear from her credible testimony that she did not voluntarily miss work on October 18, rather the Respondent refused to let her work.

³¹ Minjarez agreed that she had missed work because of her child's bouts with asthma and that she sometimes clocked in late but denied working slowly.

second period of employment on September 28 when her work permit expired. When Guzman presented the Respondent with a renewed work permit on October 10, the Respondent rehired her.

On December 25, during Guzman's third period of employment, Guzman worked until 5:43 p.m. and then told Kayonnie she was leaving because she had finished her work and her ride had arrived. Kayonnie told her she had to stay until the entire production was finished and if she left she would not have a job. Guzman said, "Okay" and left. When Guzman reported to work the following day, December 26, Kayonnie signaled to her that there was no work. Guzman left but returned sometime later and spoke to Milum with Kayonnie present. Kayonnie denied she had fired Guzman, telling Milum that on the preceding day, contrary to specific instructions, Guzman had left work before her assigned tasks were completed. Later that afternoon, Kayonnie gave Guzman an employee warning notice that imposed a 3-day suspension and 90-day probation, and which stated in pertinent part:

On Monday, December 25, you left your position without securing [my] approval. . . . In the future, you may not leave your work position until directed by the supervisor on duty. Yesterday, we had an unusually bad day. It was Christmas and we were all in a hurry to finish the production. . . . When you left without the rest of us being finished, this was a serious failure to perform your duty and will not be tolerated in the future.

On January 20, Guzman was scheduled to work. According to Chavez, she requested the day off but was refused. According to Guzman, she intended to report to work, but while in transit, her car malfunctioned. Guzman called the Respondent and left a message when no one answered. On January 22, Guzman reported to work and tried to give Kayonnie an invoice from Gorditos Emission Repair to show her car had been repaired the preceding Saturday. Kayonnie told her to show it to Garcia. Because she believed Garcia had gotten the message she left on January 20, Guzman did not show him the invoice, which read in pertinent part: "Car Needs Mass Air Flow Sensor, Oz sensor & Fuel Pressure Regulator Fix To Continue \$537.00."

On January 23, 2007, Chavez told Guzman he was going to give her a warning for her absence on the preceding Saturday. Guzman told him she had been absent because her car had broken down and that Kayonnie had refused to look at the mechanic invoice. She asked if he had gotten the message she left on the answering machine. Chavez said he had not and that the warning he was going to issue her would be her third, as the Company was counting a warning Guzman had received in September.³² Guzman protested that as the Company had hired her as a new employee in October, her warnings from the past should not count. Chavez told Guzman to speak to Kayonnie about that.

³² The Respondent had issued Guzman an employee warning notice dated September 26, stating, "Warning for absent on 9/23/06 & 9/25/06 which is your workday. (No call in)."

In Spanish, Chavez read to Guzman an employee warning notice bearing his signature, which stated in pertinent part:

Last week, you asked me if you could not work Saturday, the 20th, and instead work on the following Thursday which is your normal day off. I responded that we could not do that and that you needed to be here on Saturday, your regular work day.

You failed to come to work on Saturday. You indicated today when questioned about your unexcused absence that you went to look for a car to purchase on Saturday. Looking for a new car is not sufficient reason for an unexcused absence.

This is the third time in less than six months where you have either left work early against direct instructions . . . or have failed to come to work on a [scheduled] day. . . . This is the third and final warning. If you again fail to timely report to work or leave early without authorization before the end of your shift, you will be subject to immediate dismissal. This status will be in effect through July 23, 2007.

Guzman protested that she had not gone to buy a car but that her car had broken down. Chavez said it was the same thing.³³

E. Majority Authorization of the Union and Later Dissipation of Union Support

As of March 4, the Respondent employed 70 production workers at its facility. As evidenced by the signatures of production employees on the March 4 petition, 43 of the production employees had authorized the union to represent them.³⁴

Prior to Guzman's suspension and Knox and Min's discharges, the Union held biweekly meetings of the Respondent's employees with an average attendance of 10–15 employees. Following the suspension/discharges, employee attendance at union meetings decreased, and the Union's two August meetings were attended by only one and two employees, respectively. Before the suspension/discharges, employee volunteers distributed union flyers to other employees inside the plant; afterwards, they declined to do so. Employees also declined to accept union buttons. Employee Salvador ____ told union representatives he no longer wanted to wear the union sticker because he was afraid he would be fired. Milum estimated that

³³ I do not find Guzman's account credible. The proffered mechanic's invoice does not support her testimony of car trouble. The invoice evidences no malfunction; rather it shows only that the vehicle needed emission control procedures performed. Under cross-examination, Guzman testified that her car broke down after she left "emissions" at 12:30 p.m. and while she was on her way to work. Under cross-examination, Guzman said she left the emissions facility at 10:30 a.m. Although she was scheduled to report for work at 1 p.m., by her account Guzman did not telephone the Company and leave a message until 3 p.m. The inconsistencies prevent my crediting her account, and I find that she deliberately failed to report for work on January 20 after being denied leave.

³⁴ I discount the testimony of three employees who variously claimed they did not read the petition, did not understand the petition, or signed in reliance on union promises as inconsistent with their testimonies as a whole and at odds with the clear meaning of the petition language.

by February 2007, of the 40 employees participating in the March 4 work stoppage, only Guzman still wanted the Union.

A. Alleged 8(a)(1) Violations

1. Alleged interrogation, promise, and grant of benefits, threat of futility

The complaint alleges that in the course of Milum's March 4 meeting with employees, he engaged in the following conduct: (1) interrogated employees about their union membership, activities, and sympathies; (2) solicited employee complaints and grievances, promised employees increased benefits, and improved terms and conditions of employment if employees refrained from selecting the Union as their bargaining representative.

When the Respondent's employees presented Milum with the petition, Milum asked them why they wanted a union. Counsel for the General Counsel contends this question constituted unlawful interrogation in violation of Section 8(a)(1) of the Act, but an employer's questioning of employees about their union sentiments does not necessarily violate Section 8(a)(1) of the Act, particularly where the employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177-1178 (1984), *affd.* sub nom. *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (questioning of open and active union supporter about pronoun mailgram he sent to employer was not coercive). Here, the employees, having engaged in a work stoppage for the purpose of presenting a signed union authorization petition to their employer, could scarcely have more openly or actively demonstrated their union support. Milum's subsequent question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees' statutory rights. I shall, therefore, dismiss this allegation of the complaint.

Counsel for the General Counsel also argues that Milum unlawfully interrogated employees by asking pronoun employees to raise their hands or to separate themselves from other employees. I have not credited testimony to that effect and therefore find no violation of the Act with regard to it.³⁵

After listening to employees' complaints—primarily about an unpopular supervisor—Milum told them there was no need for the Union, as he could resolve the problems at the plant, and he would speak to the supervisor. He rejected employee suggestions that he get rid of the supervisor but agreed with an employee recommendation that he provide nametags. Counsel for the General Counsel argues that Milum thereby solicited grievances and promised improved terms and conditions of employment. The Board has held that a solicitation of grievances by an employer during a union campaign is not itself unlawful but merely raises a rebuttable inference that the em-

ployer is promising to remedy the grievances, which implicit promise violates Section 8(a)(1) of the Act. *George L. Mee*, 348 NLRB 327, 329 (2006). Here, Milum made no express promises to employees. Indeed, he specifically rejected a proposal that he remove an offending supervisor. However, his agreement with and later provision of individual nametags to assist supervisors in addressing employees was a grant of benefit in response to employee grievances and violated Section 8(a)(1) of the Act.

In his posthearing brief, counsel for the General Counsel argues that other March 4 statements also violated the Act: (1) Milum's statement that unionization could take years and could lead to strikes and lawsuits conveyed to employees that their support for the Union was futile, and (2) his direction to employees to report to him if they were being harassed or pressured into signing with the Union violated Section 8(a)(1) of the Act. Although the complaint sets forth the first allegation, it places its occurrence in mid-March and clearly contemplates statements separate from those made on March 4. The complaint fails to allege the second statement as a violation of the Act. Neither the complaint allegations nor the General Counsel's presentation of evidence put the Respondent on notice that these statements were at issue. Accordingly, I do not address them. See *International Baking Co.*, 348 NLRB 1133 (2006); *Dilling Mechanical Contractors*, 348 NLRB 98, 106, 107 (2006).

The complaint alleges that in mid-March Milum informed employees that it would be futile for them to select the Union as their collective-bargaining representative. No evidence was presented in support of this allegation. I shall, therefore, dismiss it.³⁶

The General Counsel argues that on June 27 Milum unlawfully interrogated Ruiz when he accused her of passing out union buttons. I have found that Milum did not accuse Ruiz of anything but merely asked her whether her open distribution of a union button in the workplace occurred on worktime. For a finding of unlawful interrogation, a supervisor's words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, *supra* at 1177-1178. Here, Milum apparently accepted Ruiz' denial that she had given out the button on worktime and, although he told her she could not wear the button while working because of safety considerations, he said nothing to dissuade her from distributing buttons. His question could not reasonably have tended to restrain, coerce, or interfere with Ruiz' statutory rights. I shall, therefore, dismiss the complaint allegation that the Respondent unlawfully interrogated employees on June 27.

2. The Respondent's lawsuit against the Union

The General Counsel argues that by filing a lawsuit and motion for a temporary restraining order against the Union, the Respondent violated Section 8(a)(1) of the Act, asserting the lawsuit lacked a reasonable basis in law or fact and was retaliatory.

³⁵ In light of the disposition of this allegation of the complaint, I find it unnecessary to consider the Respondent's arguments that the allegation is outside the 10(b) period.

³⁶ In light of the disposition of this allegation of the complaint, I find it unnecessary to consider the Respondent's arguments that the allegation is outside the 10(b) period.

Drawing on the principles enunciated in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Board in *Manufacturers Woodworking Assn. of Greater New York Incorporated*, 345 NLRB 538, 541 (2005), notes:

[A]s a general rule a lawsuit enjoys special protection and can be condemned as an unfair labor practice only if it is filed with a retaliatory motive, i.e., motivated by a desire to retaliate against the exercise of a Section 7 right, and if it has no reasonable basis in fact or law. However, a lawsuit that is aimed at achieving an "unlawful objective" (or is preempted) "enjoys no special protection" under *Bill Johnson's* and may be enjoined. . . . "In determining whether an employer's [conduct] violates Section 8(a)(1), the Board considers the "totality of the relevant circumstances." *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003).

The General Counsel bears the burden of proving that the Respondent's motive in filing the lawsuit was a desire to retaliate against the exercise of a Section 7 right and that the lawsuit had no reasonable basis in fact or law. As the General Counsel argues, to the extent the Respondent sought a temporary injunction for the Union's alleged illegal secondary boycott and interference with economic relationships, its lawsuit was preempted by Federal law,³⁷ and the district court so found. The Respondent's attempt to obtain injunctive relief under those theories had, therefore, no reasonable basis in law and was unlawful under Section 8(a)(1) of the Act.

As to the remaining causes of action alleged in the Respondent's lawsuit—fraud, slander, and libel—I accept, *arguendo*, that the lawsuit embodied the Respondent's desire to retaliate against the Union's appeal to the Respondent's customers to cease doing business with the Respondent, an activity normally protected by Section 7 of the Act. *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964); *DeBartolo Corp. v. Florida Building Trades Council (DeBartolo II)*, 485 U.S. 568 (1988); *Great American*, 322 NLRB 17 (1996). However, the existence or nonexistence of a reasonable basis for those allegations is not clear. While the question of whether a lawsuit has a reasonable basis in fact or law may be answered by its outcome in court, here the Respondent obtained voluntary dismissal of its lawsuit before an outcome was reached. Consequently, other evidence must provide the key.

Both the General Counsel and the Charging Party argue that the Respondent's failure to provide evidence that the Union made false statements with actual malice (i.e., with knowledge of falsity or in reckless disregard of the truth) proves absence of reasonable basis. But the General Counsel and the Charging Party's argument subverts the burden of proof. The General Counsel must show the lawsuit had no reasonable basis in fact or law; it is not the Respondent's burden to show the contrary. While relevant, the voluntary dismissal of the remaining allegations of the lawsuit does not establish that the Respondent subjectively believed its lawsuit had no merit when it was filed and

prosecuted or that it acted in bad faith in doing so. Accordingly, I find the Respondent did not violate Section 8(a)(1) of the Act by continuing to prosecute the undismissed allegations of its lawsuit.

3. The union button prohibition

The complaint alleges that on June 27 and again on July 4 the Respondent promulgated and thereafter maintained an overly broad and discriminatory rule prohibiting employees from distributing and wearing union buttons at work. In his posthearing brief, counsel for the General Counsel does not argue that Milum's June 27 button discussion with Ruiz, in which he asked her if she were handing out union buttons during work hours, constituted an unlawful prohibition of button distribution, and there is no evidence that the Respondent otherwise curtailed or interfered with button distribution. Accordingly, I will dismiss the complaint allegations relating to unlawful prohibition of union button distribution.

The General Counsel contends the Respondent's prohibition against wearing union buttons—announced to Ruiz on June 27 and to Guzman on July 4—violated Section 8(a)(1) of the Act. Employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. The General Counsel need not show that Respondent's insignia prohibition was unlawfully motivated; "rather, the test is whether an employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act." *St. Luke's Hospital*, 314 NLRB 434 fn. 4 (1994). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378 (2004). The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000). However, "[t]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety [or] damage machinery or products. . . ." *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). *Smithfield Packing Co.*, 344 NLRB 1, 5 fn. 20 (2004); *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1086 (2003).

The Respondent defends its prohibition of union buttons on safety grounds, asserting that the union button attachment device created a danger to workers and machinery alike. However, the evidence is clear that the nametags distributed by the Respondent were no less hazardous to employees and equipment than the union buttons, and the employees did not need the expert testimony of Dr. Bakken to tell them so. Employees could see for themselves that some nametags fell off as they worked, and they must have been able to see the Respondent's inconsistency in banning union buttons while permitting the wearing of nametags and jewelry. The Respondent's prohibition may not have been unlawfully motivated. Indeed, since the Respondent permitted the employees to wear prounion stickers and to decorate the lunchroom with prounion paraphernalia, evidence suggests it was not. However, motivation is not

³⁷ See *Teamsters v. Morton Local 20*, 377 U.S. 252, 260–61 (1964); *Burlington Northern R Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

the test; the test is whether the Respondent's conduct reasonably tended to interfere with its employees' free exercise of their guaranteed rights. By prohibiting the wearing of prounion paraphernalia without apparent justification, the Respondent interfered with its employees' Section 7 right to wear and display union insignia while at work and violated Section 8(a)(1) of the Act.

4. Soliciting third parties to contact law enforcement agencies and attempting to instigate the arrest of union handbillers

The General Counsel alleges that Milum unlawfully "contrived a plan to have union handbillers arrested and charged with trespassing when they were engaged in union activities at his customers' businesses" with the object of interfering with the Union's lawful activities. In furtherance of the plan, Milum obtained information from the Phoenix police department and emailed to affected customers instructions for obtaining trespassing arrests, urging customers to contact the police when handbilling occurred and to request the police to warn the handbillers of potential arrest. One of Respondent's customers reported to the Respondent that the police had caused union handbillers to leave its private property on one occasion. In the General Counsel's view, Milum's machinations interfered with employees' Section 7 rights.

The General Counsel cites no authority for the proposition that discussing possible police intervention with law enforcement agencies and/or customers threatens, interferes with, or coerces employees in the exercise of their protected rights. The cases cited by the General Counsel³⁸ relate to actual police action or threat of such action directed toward individuals engaged in protected activity. Here, there is no evidence that protected rights were impacted by Milum's behind-the-scenes maneuvers.³⁹ Inasmuch as the General Counsel has failed to prove interference with or coercion of employees in these circumstances, I shall dismiss this allegation of the complaint.

5. Alleged unlawful surveillance/creating impression of surveillance

The complaint alleges that the Respondent engaged in surveillance of its employees union activities beginning in March through Kayonnie and since January 2007 through use of video surveillance cameras. The complaint further alleges that the Respondent created an impression of surveillance since January 2007 by installing and maintaining the video surveillance cameras and in January 2007 through Parra.

As to Kayonnie's alleged surveillance of employees' union activity at work, I have credited her testimony that she regularly ate lunch while parked on a street adjacent to the facility where she observed employees engaging in prounion activities. Mere supervisory observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance." *Town & Country Supermarkets*, 340 NLRB 1410 (2004); *Fred'k Wallace & Son*, 331 NLRB 914 (2000).

³⁸ *Indio Grocery Outlet*, 323 NLRB 1138 (1997); *Bristol Farms, Inc.*, 311 NLRB 437 (1993).

³⁹ In one instance the police directed hand billers to remove from a customer's private property, but there is no evidence the action was legally unjustified.

Kayonnie's observation and report of open union activity in the course of her normal routine cannot be deemed surveillance. Accordingly, I shall dismiss this allegation of the complaint.

The complaint alleges that by installing video surveillance cameras at the facility in January 2007, the Respondent engaged in and created an impression of surveillance of its employees protected activities. "[P]ictorial recordkeeping tends to create fear among employees of future reprisals." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), enf. 156 F3d 1268 (D.C. Cir. 1998). Therefore, "although employers have the right to maintain security measures necessary to the furtherance of their legitimate business interests during union activity, an employer engaged in photographing and videotaping such activity has the burden to demonstrate that it had a reasonable basis to anticipate misconduct by employees." *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). The "inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances." *National Steel & Shipbuilding Co.*, supra at 499.

The following circumstances are relevant to the question of whether the Respondent's 2007 replacement of and addition to its security camera system violated the Act: the replacement security cameras were not installed for a full year after union organizational efforts commenced; during that time, employees openly met with union representatives outside the facility, engaged in a work stoppage, presented a union authorization petition to the Respondent, wore prounion stickers, distributed prounion literature to other workers, displayed a prounion banner and decorated a lunchroom microwave with prounion stickers, all without comment or objection from the Respondent. I find a reasonable employee would not view the replacement and/or addition of security cameras in production, office, and perimeter areas other than 6th Avenue as being directed at employee protected activities. The installation of the lunchroom camera, however, merits additional scrutiny.

Prior to January 2007, no video camera existed in the Respondent's lunchroom where employee contact frequently occurred. The Respondent asserts that prior vandalism of lunchroom vending machines, employee complaints of stolen lunches, and the use of the lunchroom to pass out paychecks justified enhanced security there. As pointed out by counsel for the General Counsel, the Respondent did not articulate its assertedly legitimate reasons for placing a security camera in the lunchroom until preparation for the hearing and never communicated the reasons to employees. The unprecedented and unexplained placement of a security camera in the lunchroom where employee interaction, including union activity, regularly took place, would reasonably give rise to an assumption among employees that their nonwork activities, including protected activities, had been placed under surveillance. Although there is no evidence that the Respondent actually surveyed the union activities of its employees, since the Respondent has failed to show that it installed the lunchroom surveillance camera because of legitimate security concerns, I find the Respondent thereby violated Section 8(a)(1) of the Act by creating the impression of surveillance. See *Trailmobile Trailer, LLC*, supra.

The General Counsel contends that Parra created an impression of surveillance when, in response to Guzman's inquiry

about installation of surveillance cameras at the facility, he told her they were being installed to keep her “in check” and would thereafter record her appearances in black and white rather than color. The General Counsel has the burden of establishing, by a preponderance of the evidence, that an employer unlawfully created an impression of surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). Whether an employer’s statement has created an unlawful impression of surveillance is based on the objective test of “whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance,” based on the perspective of a reasonable employee. *Flexsteel Industries*, 311 NLRB 257 (1993). In response to Guzman’s inquiry, Parra laughingly made the patently absurd rejoinder that the cameras were being installed to keep her in check and that she alone would be recorded in black and white. Parra said nothing about Guzman’s union activities. Indeed, the General Counsel adduced no evidence that Parra had ever said anything to Guzman about her union activities or that he even knew she engaged in any. The General Counsel has not shown why a reasonable employee would assume from Parra’s jocular statements that the Respondent intended to scrutinize her union activities. See *Sunshine Piping, Inc.*, 350 NLRB 1186 (2007). Accordingly, I dismiss this allegation of the complaint.

6. The computer video presentation to employees

The complaint alleges that in the course of the Respondent’s December computer video presentation to employees, the Respondent threatened to reduce employees’ wages if they selected the Union as their bargaining representative. At the time of the presentation, the Respondent paid new employees between \$8 and \$9.25 and experienced employees between \$8 and \$9.25 per hour. The statement the General Counsel labels a threat followed the Respondent’s declaration that it paid its employees higher wages than its Arizona competitors, including several unionized companies, and asserted:

If the Union was representing employees and bargaining for wages, wages would be open to serious bargaining between the Company and the Union and the result of the bargaining could be wages of \$6.75 per hour or higher.

An employer may communicate views about unionism, “so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *Gissel Packing Co.*, supra at 618, citing Section 8(c) of the Act. Predictions concerning the precise effects of unionization, however, “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” *Id.* The Court cautioned that If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement loses protection of the First Amendment. Neither the subjective reactions of employees nor the intent of the speaker are determinative in finding 8(a)(1) violations. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999); *Swift Textiles*, 242 NLRB 691 fn. 2 (1979). Rather, “the issue is whether objectively . . . remarks reasonably tended to interfere with the employee’s right to engage in

[a] protected act.” *Southdown Care Center*, 308 NLRB 225, 227 (1992).⁴⁰ Here, the Respondent discussed wage reduction as something that “could” result from future bargaining with the Union, and the Respondent argues that the statement is a simple recognition of the fact that in the collective-bargaining process, wages are negotiated. However, in the absence of any explication by the Respondent of bargaining eventualities or economic conditions that might lead to wage reduction, the statement reasonably communicated to employees that selection of the Union threatened current wages. See *President Riverboat Casinos of Missouri*, supra. Accordingly, I find the statement violated Section 8(a)(1) of the Act.

7. Prehearing employee interviews

Pursuant to Board’s decision in *Johnnie’s Poultry*, supra, an employer, when interviewing employees in preparation for trial, must communicate to them the reason for the questioning, explicitly assure them that no reprisals will occur, and obtain voluntary participation. The Board has “generally taken a bright-line approach in enforcing the requirements established in *Johnnie’s Poultry*.”⁴¹ The testimony of Zambrano, Carlos Zambrano, Edgar Villagrande, Pat Goebel, Edel Davilla, Alvaro Munoz, Maria Martinez, Rosa Reyes, Maria Teresa Velasquez, and Lydia Roberts is consistent with a finding that neither Laws, Milum, nor any other company representative clearly communicated to any of the witnesses that the Respondent’s prehearing questioning was voluntary or what the purpose of the questioning was. Further, the evidence shows that neither Laws nor Milum gave any witness assurances that no reprisals would take place for refusing to answer or for the substance of any answer. As the Respondent did not follow the requirements of *Johnnie’s Poultry* in its interviews of the named employees, I find the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating them.

B. Alleged 8(a)(3) Violations

1. The discharges of Denise Knox and Soe Moe Min

The question of whether Respondent violated the Act in discharging Knox and Min rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in the *Wright Line* case.⁴² To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee’s protected conduct was a motivating factor in the employer’s decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts “to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089; *United Rentals, Inc.*, 350 NLRB

⁴⁰ Consequently, the Respondent’s argument that no evidence demonstrated that any employee perceived the statement to be a threat is immaterial.

⁴¹ *KFMB Stations*, 349 NLRB 373(2007), citing *Freeman Decorating Co.*, 336 NLRB 1 (2001) enf. denied on other grounds sub. nom. *Stage Employees IATSE*, 334 F.3d 27 (D.C. Cir. 2003).

⁴² 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

951 (2007); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon & Its Subsidiary Teleselector Resources*, 350 NLRB 542 (2007); *Group Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the elements are clearly met as to Knox, who openly championed the union cause among employees and assisted the Union with what the Respondent terms the Union's "corporate" or community publicity campaign by appearing on television in the role of vocal employee supporter. Milum knew of Knox's public pronoun appearances and admittedly believed her to be a strong union supporter. Moreover, Milum exhibited unquestionable hostility toward the Union's publicity campaign. In his communications to other companies, Milum urged his customers to seek criminal sanctions against the Union for promoting its organizational drive at their premises, referring to the Union as a "monster," its representatives as "cockroaches," and its organizing tactics as an "organized crime shakedown." Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Knox's protected activity was a motivating factor in the Respondent's decision to discharge her. See *Wright Line*, supra at 1089.

The circumstances involving Min's discharge require a different though correlative analysis. As did Knox, Min openly supported the Union, wearing union T-shirts to work almost daily, and the Respondent must have been aware he was pronoun. However, Min's union adherence was no more pronounced than that of many other employees against whom the Respondent exhibited no animosity, and there is no reason to suppose the Respondent focused on his union activity at all. Nevertheless, if an employer, in a retaliatory strike against one pronoun employee, entangles an unintended victim, the employer is culpable for both adverse actions. Knox and Min engaged in identical workplace misconduct at the same time and in the same location; if the Respondent seized upon that misconduct in order to rid itself of Knox because of her union activity, any collateral victim of the scheme is in the same posture as the discriminatee. I therefore focus this analysis on Knox's discharge; if her discharge was unlawfully motivated, it follows that Min's was also. Consequently, the burden shifts to Respondent to demonstrate that it would have discharged both Knox and Min even in the absence of Knox's protected activities.

The Respondent argues that Milum fired Knox and Min because they dallied in the lunchroom after clocking in instead of going directly to work. I have found that on July 8, the two employees did, in fact, delay starting work. The question of whether they were subsequently discharged because of that delay or because of antiunion considerations depends on the Respondent's motivation. There is no overt evidence of union animus directed specifically toward either Knox or Min, but direct evidence of unlawful motivation is seldom available, and unlawful motivation may be established by circumstantial evidence, the inferences drawn therefrom, and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99 (2001); *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *Shattuck*

Denn Mining Corp., 362 F.2d 466, 470 (9th Cir. 1966). Indications of discriminatory motive may include expressed hostility toward the protected activity,⁴³ abruptness of the adverse action,⁴⁴ suspicious timing,⁴⁵ disparate treatment,⁴⁶ and/or departure from past practice.⁴⁷

Milum bore particular animosity toward the Union's corporate campaign, as evidenced by his rancorous descriptions of the Union as monstrous, pestilent, and mafia-like. On Thursday, July 6, Knox appeared on a Tucson television newscast as a union supporter, a circumstance of which Milum was aware. On Friday, July 7, Zambrano reported to Kayonnie and Chavez that after clocking in Knox and Min remained in the lunchroom rather than reporting to work. When Kayonnie relayed the complaint to Milum, he acted upon it with notable promptness, undertaking to catch the two employees in dereliction of duty early the following morning and promptly firing them. Timing is a significant factor in ascertaining motive. See, e.g. *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2005); *Desert Toyota*, 346 NLRB 118, 119-120(2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000). Only 1 day passed between Knox's newscast appearance and her discharge. During that intervening day, Milum learned Knox and Min were violating company rules by failing to start work on time, and he contrived to catch them at it and to fire them in one swift transaction. Although Milum assertedly considered Knox and Min's infractions to be momentous enough for immediate discharge, he did not, apparently, care that other employees might be breaking the same work rule. Knox told Milum that early morning lunchroom loitering was a common employee practice, but there is no evidence Milum took any steps to alert supervisors to watch for and control similar misconduct or that he conducted any post-discharge investigation beyond an after-the-fact inquiry of Zambrano as to how often Knox and Min remained in the lunchroom after clocking in. Milum's belated inquiry into Knox and Min's past conduct underscores the precipiteness of the discharges, and his indifference to other possible malefactors strongly suggests the alleged offense was not his primary concern. It is reasonable to infer from these circumstances that Knox and Min's abrupt discharges were related to Knox's well-publicized support of the Union's corporate campaign.

The most compelling evidence of the Respondent's unlawful motive in discharging Knox and Min rests in its deviation from past practice and its disparity of treatment.⁴⁸ Milum did confer with any supervisor about the discharges, and he did not take into account Knox and Min's lack of any prior warnings. The Respondent's disciplinary notices show the Respondent followed at least a semblance of a progressive disciplinary system. Before Knox and Min's discharges, no employee had been disciplined beyond a written warning for stopping work early, delaying work, taking extended breaks, or detouring from a

⁴³ *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

⁴⁴ *Dynabil Industries, Inc.*, 330 NLRB 360 (1999).

⁴⁵ *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003); *Bethlehem Temple Learning Center*, 330 NLRB 1177 (2000).

⁴⁶ *California Gas Transport, Inc.*, supra; *NACCO*, 331 NLRB 1245 (2000).

⁴⁷ *Sunbelt Enterprises*, 285 NLRB 1153 (1987).

⁴⁸ See *Tubular Corp. of America*, 337 NLRB 99 (2001).

restroom trip to pause at the lunchroom. Even Milum took no action against shirkers beyond sternly cautioning them. In the months before the discharges, the Respondent issued written warnings to, but did not discharge, employees for misconduct similar to that of Knox and Min, i.e., twice leaving work for smoking breaks and leaving the work station to visit the restroom every 15 minutes.⁴⁹ Finally, prior to the July 8 discharges, the Respondent had rarely terminated employees and had terminated none for conduct approximating that of Knox and Min. The Respondent has not justified its digression from prior practice or its disparity in the treatment accorded Knox and Min, and it is reasonable to find, as I do, that the only rational explanation is that the Respondent was motivated by a desire to retaliate against Knox for her unabashedly public display of union support, and that Min was an unfortunate casualty of that unlawful motivation. In these circumstances, I find that the Respondent violated Section 8(a)(3) and (1) of the Act on July 8 by terminating Knox and Min.

2. Maria Minjarez

Counsel for the General Counsel argues that the Respondent pretextually suspended and placed on 90-day probation union supporter Minjarez. The *Wright Line* analysis described above applies, and the General Counsel has the burden to persuade, by a preponderance of the evidence, that Minjarez' protected conduct was a motivating factor in disciplining her. Only if the General Counsel makes such a showing, "will the burden of persuasion shift to the Respondent to demonstrate it would have taken the same action in the absence of Minjarez' protected conduct." *Wright Line*, supra at 1089; *United Rentals, Inc.*, supra; *Donaldson Bros. Ready Mix*, supra.

The General Counsel has met the elements of discriminatory motivation: union activity, employer knowledge, and employer animus. *Verizon & Its Subsidiary Telesector Resources*, supra; *Group Farmer Bros. Co.*, supra. Minjarez engaged in extensive union activities, and Milum knew her to be a firm union supporter. As detailed above, the Respondent revealed significant animus toward the Union's "corporate" organizational activities, and the Respondent's supervisors described Minjarez as "problematic" and a "troublemaker," which suggests, in the absence of other explanation, antipathy toward her individually for supporting the Union. Accordingly, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Minjarez' protected activity was a motivating factor in the Respondent's decision to suspend her and to place her on probation, and the burden of persuasion shifts to the Respondent "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The Respondent argues that the evidence shows no disparate treatment between Minjarez and any other similarly situated employee and that it would have taken the disciplinary action it did regardless of her union activity. The evidence supports the Respondent's position.

⁴⁹ The Respondent unsuccessfully tries to distinguish Knox and Min's conduct by calling it time "theft". I see no significant difference between the work avoidance of employees who received only written warnings and that of the two discharged employees.

When the Respondent rehired Minjarez in July, it did so on condition she notify the company every time she had to be off, which she had failed to do during her prior period of employment. Minjarez did not abide by her commitment, leaving work without permission on October 16. Consequently, the Respondent suspended her for 3 days and placed her on probation for 90 days.

Counsel for the General Counsel does not contend that leaving work without permission is not a disciplinary offense, but he asserts the discipline imposed on Minjarez was disparate to that given other employees. While the evidence of employee discipline shows that the Respondent's supervisors exercised considerable discretion in determining when and what discipline should be imposed, it is clear that the Respondent has, after one or more warnings, both suspended employees and placed them on probation for time and attendance infractions. Here the Respondent rehired Minjarez after her earlier voluntary no-show termination and required her to commit to giving prior notification of absences. On October 16, Minjarez breached her agreement. Minjarez' unexcused departure from work differed from other employees' leave infractions as it involved flagrant abrogation of her commitment to the Respondent. In those circumstances, the Respondent's discipline was neither unreasonable nor demonstrably disparate. The employer's arguable satisfaction in disciplining Minjarez because she was a "troublemaker" is not relevant. If an employee provides an employer with sufficient cause for discipline, the fact the employer welcomes the opportunity does not render the discipline unlawful. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). An employer can meet its *Wright Line* burden by showing that it has a rule and that the rule has been applied to employees in the past. *Avondale Industries*, 329 NLRB 1064, 1066 (1999). Counsel for the General Counsel argues that Minjarez' personnel file showed no disciplinary notices, but his argument overlooks the fact that Minjarez had admittedly, in the not-too-distant past, voluntarily terminated her employment by not showing up for work. It also overlooks Minjarez' admission that she sometimes missed work because of her child's illness and sometimes clocked in late. In disciplining Minjarez on October 19, the Respondent could reasonably take into account Minjarez' past attendance problems and her breached commitment not to repeat them, even though neither had been preceded by written warnings. The Board will not "substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems*, 330 NLRB 1170 fn. 6 (2000), and cases cited therein. Here, the Respondent had attendance rules and enforced them with various forms of discipline, including suspension and probation. When Minjarez violated those rules, she became subject to discipline that the Respondent has shown was neither unprecedented nor unjustified. The Respondent has successfully borne its burden of showing that it would have disciplined Minjarez in the circumstances regardless of her union activities. Accordingly, I dismiss this allegation of the complaint.

3. Evangelina Guzman

On July 4, the Respondent unlawfully refused to permit Guzman to work unless she removed the union button she

wore. The General Counsel alleges the refusal to permit Guzman to work was a suspension in violation of Section 8(a)(3). An employer may not suspend an employee for refusing to comply with an unlawful order prohibiting protected activity. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 850 (2001); *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994). A refusal to comply with an unlawful order does not constitute “insubordination upon which a sustainable [adverse action can] be based.” *Kolkka*, supra, citing *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977). Since, as detailed above, I have found the Respondent unlawfully demanded that Guzman discard her union button as a condition of working, I find the Respondent suspended Guzman for the day she refused to work sans button, and thereby violated Section 8(a)(3) of the Act.

Counsel for the General Counsel argues that the Respondent pretextually suspended Guzman on December 26 and disciplined her on January 23. The General Counsel has the burden to persuade, under *Wright Line*, that Guzman’s protected conduct was a motivating factor in disciplining her. Only if the General Counsel makes such a showing, will the burden of persuasion shift to the Respondent to demonstrate it would have taken the same action in the absence of Guzman’s protected conduct.” *Wright Line*, supra at 1089; *United Rentals, Inc.*, supra; *Donaldson Bros. Ready Mix, Inc.*, supra.

The General Counsel has met the elements of discriminatory motivation: union activity, employer knowledge, and employer animus. *Verizon & Its Subsidiary Telesector Resources*, supra; *Group Farmer Bros. Co.*, supra. Guzman engaged in extensive union activities, and Milum knew her to be involved in the Union’s “corporate” organizational activities to which the Respondent bore specific animosity. Accordingly, I find the General Counsel has met his initial burden by “making a showing sufficient to support the inference” that Guzman’s protected activity was a motivating factor in the Respondent’s decisions to discipline her, and the burden of persuasion shifts to the Respondent “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089. The Respondent argues that the evidence shows no disparate treatment between Guzman and any other similarly situated employee and that it would have taken the disciplinary action regardless of her union activity.

There is no dispute that on December 25, Guzman disobeyed Kayonnie’s direct order to stay until the production was finished under penalty of termination. Although the Respondent did not terminate Guzman, it did impose a 3-day suspension and a 90-day probation. On January 20, when Guzman ignored a denial of leave for that day and failed to report to work as scheduled, the Respondent refused to accept her proffered excuse and issued her a written warning along with a 6-month probation. Counsel for the General Counsel argues that the disparity of treatment afforded other employees with similar infraction histories demonstrates the pretextual nature of the discipline applied to Guzman.

The Respondent’s history of discipline shows no clear cut pattern, although, as counsel for the General Counsel points out, a 6-month probation period is unprecedented. However, the Respondent has meted out suspensions and probations,

either separately or combined, for time and attendance infractions, and the evidence provides no predictability as to whether the Respondent is likely to be longsuffering or intolerant of any particular misconduct. In these circumstances, the Respondent’s disciplinary record cannot provide evidence of disparate treatment.

It is not for the Board to decide “whether a nondiscriminatory reason for discharging an employee is wise or well supported,”⁵⁰ and it is well established the Board “cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline.”⁵¹ Here, Guzman’s deliberate flouting of her supervisor’s December 25 order and her unexcused absence of January 20 constitute legitimate bases for discipline. See *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006). Nonetheless, the Board’s role is to ascertain whether an employer’s proffered reasons for disciplinary action are the actual ones. *Ibid.* In determining Respondent’s actual motivation for twice disciplining Guzman in a 1-month period, I have considered the Respondent’s animus toward her support of the Union’s corporate campaign. However, I find that animus outweighed by the circumstances of Guzman’s reemployment on October 10. On September 28, some months after Guzman had engaged in public support of the Union, she was obliged to terminate her employment with the Respondent because her work permit had expired. When Guzman presented a renewed work permit on October 10, the Respondent rehired her. The Respondent’s willingness to rehire Guzman in spite of her past union activity effectively vitiates the significance its animosity toward her union support might otherwise have. In these circumstances, I find the Respondent has met its burden of proof, and I shall dismiss the allegations that the Respondent’s December 26 and January 20, 2007 discipline of Guzman violated the Act.

C. Appropriateness of Bargaining Order

Accepting that the Union obtained bargaining authorization from a majority of the Respondent’s employees in March and that its majority support was dissipated, at least in part, by the unfair labor practices found herein, it nonetheless remains to determine whether a bargaining order under *Gissel*, supra, is appropriate herein.

The question to be answered in determining the appropriate remedy for the Respondent’s unfair labor practices is whether the conduct so tainted the workplace atmosphere that traditional remedies will not erase the coercive effects, rendering a fair representational election impossible. In *Gissel Packing Co.*, supra, the Supreme Court identified two categories of cases in which a bargaining order is appropriate: category I cases are exceptional situations involving outrageous and pervasive unfair labor practices that traditional remedies cannot resolve and which make a fair election impossible. Category II cases involve unfair labor practices that are less extraordinary but that nonetheless have a tendency to undermine majority support and impede the election process. As such unfair labor practices

⁵⁰ *West Limited Corp.*, 330 NLRB 527 fn. 5 (2000).

⁵¹ *Detroit Paneling Systems*, 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein.

render the possibility of a fair election slight, “employee sentiment once expressed through cards would . . . be better protected by a bargaining order.” *Id.* at 614–615. This case falls into the latter category.

The Board considers a *Gissel* bargaining order to be an extraordinary remedy and prefers to order traditional remedies for unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Intermet Stevensville*, 350 NLRB No. 94 slip op. 14 (2007). I examine, as the Board directs, the “seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices.” *Id.*

I have found that the Respondent engaged in the following unlawful conduct: granted employees the benefit of nametags, filed a preempted lawsuit, prohibited the wearing of union buttons, created the impression of surveillance of union activities, implicitly threatened decreased wages if the Union were selected, engaged in *Johnnies Poultry* violations, and discriminated against three prounion employees, firing two of them. Those are serious violations, particularly the discriminations. In tempering their ineradicable effect on employees, I have noted that throughout the Union’s organization campaign, the Respondent has not discouraged employees from openly meeting with union representatives outside the facility, wearing prounion stickers, distributing prounion literature, displaying a prounion banner, and setting up in the lunchroom a union-donated microwave decorated with prounion stickers. While the Respondent’s partial respect for employees’ Section 7 rights in no way excuses or remedies its unlawful conduct, it does suggest that the coercive effects of the Respondent’s conduct can be adequately remedied by the Board’s traditional remedies. The lingering effects of the Respondent’s unlawful interference with Section 7 rights can be addressed by detailed notice postings, and the lingering effects of the discriminatory discharges of Knox and Min and the discriminatory suspension of Guzman can be remedied by reinstatement and backpay. In the circumstances of this case, the traditional remedies are likely to assure employees that interference with their Section 7 rights will not be tolerated. *Abramson, LLC*, 345 NLRB 171, 178–179 (2005). See also *Guard Publishing Co.*, 344 NLRB 1142 (2005); *Hialeah Hospital*, 343 NLRB 391 (2004); *Jewish Home for the Elderly*, 343 NLRB 1069 (2004). Accordingly, I decline to recommend a *Gissel* bargaining order as a remedy herein.

CONCLUSIONS OF LAW

1. The Respondent, Milum Textile Services, Co., is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, Unite Here!, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(3) and (1) of the Act on July 4, 2006, by suspending employee Evangelina Guzman because she refused to take off a union button.

4. The Respondent violated Section 8(a)(3) and (1) of the Act on July 8, 2006, by discharging employees Denise Knox and Soe Moe Min because of their support of and protected activities on behalf of the Union.

5. The Respondent violated Section 8(a)(1) of the Act in mid-March 2006 by granting the benefit of providing nametags in order to discourage employees from engaging in union activity.

6. The Respondent violated Section 8(a)(1) of the Act on April 26, 2006, by filing and pursuing a lawsuit against the Union that was preempted by Federal law.

7. The Respondent violated Section 8(a)(1) of the Act on June 27 and on July 4, 2006, by promulgating and thereafter maintaining a rule prohibiting employees from wearing union buttons while working.

8. The Respondent violated Section 8(a)(1) of the Act in January 2007 by creating the impression of surveillance by operating a security video camera in its lunchroom.

9. The Respondent violated Section 8(a)(1) of the Act in December 2006 by impliedly threatening to reduce employees’ wages if they selected the Union as their bargaining representative.

10. In the course of preparing for hearing herein, the Respondent violated Section 8(a)(1) of the Act at various time since February 6, 2007, by interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

11. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily suspended employee Evangelina Guzman on July 4 and discriminatorily discharged employees Denise Knox and Soe Moe Min on July 8, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having unlawfully instituted and pursued a lawsuit against the Union that was preempted by Federal law must reimburse the Union for costs associated with the lawsuit.⁵²

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵³

⁵² The question of the costs associated with the institution and pursuit of the unlawful lawsuit is left to the compliance stage of these proceedings.

⁵³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Milum Textile Services, Co., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Suspending any employee for engaging in union or other concerted protected activities.
 - (b) Discharging any employee for engaging in union or other concerted protected activities.
 - (c) Promising and/or granting benefits in order to discourage employees from engaging in union activity.
 - (d) Instituting and pursuing any lawsuit against the Union that is preempted by Federal law.
 - (e) Promulgating and thereafter maintaining an overly broad rule prohibiting employees from wearing union buttons while working.
 - (f) Creating the impression of surveillance by operating a security video camera in the employees' lunchroom.
 - (g) Threatening to reduce employees' wages or other benefits if they select the Union as their bargaining representative.
 - (h) Unlawfully interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.
 - (i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Evangelina Guzman, Denise Knox, and Soe Moe Min to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Evangelina Guzman, Denise Knox, and Soe Moe Min whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
 - (c) Remove from its files any reference to the unlawful suspension of Evangelina Guzman and discharges of Denise Knox and Soe Moe Min and thereafter notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.
 - (d) Compensate the Union for costs incurred by the institution and pursuit of its lawsuit against the Union that was preempted by Federal law.
 - (e) Rescind the rule prohibiting employees from wearing union buttons while working and inform employees that it has been rescinded.
 - (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."⁵⁴ Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.⁵⁵ Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 4, 2006.

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

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

Dated: Washington, D.C. October 5, 2007.

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 do anything that interferes with these rights. More particularly,

WE WILL NOT suspend or discharge any of you for supporting Unite Here! (the Union) or any other union.

WE WILL NOT promise and/or give you any benefits in order to discourage you from supporting the Union.

WE WILL NOT file any lawsuit against the Union with the unlawful purpose of retaliating against the Union.

⁵⁴ 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."

⁵⁵ The notices are to be posted in the following languages: English, Spanish, Burmese, Karen, Arabic, Somali, and Russian.

WE WILL NOT issue or enforce any unlawful rule preventing employees from wearing union buttons while working.

WE WILL NOT make our employees think we are watching them engage in union or protected activities by operating a security video camera in the lunchroom.

WE WILL NOT threaten to cut employees' wages or other benefits if they select the Union to represent them.

WE WILL NOT unlawfully ask employees about their union membership, activities, and sympathies and/or the union membership, activities, and sympathies of other employees.

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

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer full reinstatement to Evangelina Guzman, Denise Knox, and Soe Moe Min to

their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, insofar as we have not already done so, make whole Evangelina Guzman, Denise Knox, and Soe Moe Min for any loss of earnings and other benefits resulting from their suspension or discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Evangelina Guzman and discharges Denise Knox and Soe Moe Min, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension or discharges will not be used against them in any way.

MILUM TEXTILE SERVICES, CO.