UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S SECURE SOLUTIONS (USA), INC.

and **Case 28-CA-023380**

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

ACTING GENERAL COUNSEL'S AMENDED ANSWERING BRIEF

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By its exceptions, G4S Secure Solutions (USA), Inc. (Respondent)[1] seeks to have the Board ignore the record evidence establishing that Respondent engaged in numerous unfair labor practices as part of an extensive and pervasive campaign against union activities by its employees in violation of Section 8(a)(1) of the Act. Respondent's anti-union campaign culminated in the termination of Donald Wickham, the main union organizer, in violation of Section 8(a) (3) of the Act. Respondent would have the Board ignore the well-reasoned findings of fact, conclusions of law, and credibility determinations made by Administrative Law Judge Eleanor Laws (the ALJ). In its 112 exceptions, Respondent disagrees with virtually each and every piece of record evidence relied upon by the ALJ as a basis to establish Respondent's illegal conduct; Respondent's attempt to overturn the ALJ's findings, and well reasoned decision, is unpersuasive.

The ALJ properly found that Respondent committed numerous and serious unfair labor practices in violation of Sections 8(a) (1) and (3) of the Act, including: (a) maintaining

[1] G4S Secure Solutions (USA), Inc. is referred to as Respondent. International Union, Security, Police and Fire Professionals of America, (SPFPA) is referred to as Union. References to the ALJD show the applicable page number. "Tr.__" refers to pages of the transcript from the hearing held October 18-20, 2011. "GCX__" refers to exhibits introduced by the Acting General Counsel at the hearing. "RX__" refers to exhibits introduced by Respondent at the hearing. "UX__" refers to exhibits introduced by the Union at the hearing.

and/or enforcing illegal rules in its Security Officer Handbook regarding personal appearance, conversations and confidentiality; (b) maintaining illegal rules in its social networking policy; (c) coercively interrogating employees about union support or union activities; (d) giving employees the impression that their union activities were under surveillance; (e) threatening employees with unspecified reprisals for engaging in union activities; (f) disciplining employees for engaging in protected concerted activities; and (g) terminating Donald Wickham for engaging in union organizing efforts and other union activities. Respondent's exceptions are without merit and should be denied. Except as otherwise set forth in the Acting General Counsel's Cross-Exceptions, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

I. PROCEDURAL HISTORY

A hearing in this matter was conducted before ALJ Eleanor Laws on October 18 through October 20, 2011,[2] in Phoenix, Arizona, based upon allegations contained in the Complaint dated April 29. (The Complaint) (GCX 1(e)) The ALJ issued her decision (ALJD) on March 29, 2012, properly finding that Respondent engaged in numerous violations of Section 8(a)(1) of the Act by: maintaining overly-broad and discriminatory rules regarding personal appearance of employees, unnecessary conversations of employees, confidentiality and the use of social networking; threatening employees with unspecified reprisal for engaging in Union and concerted activities; creating the impression of surveillance of Union and concerted activities; threatening to not re-hire employees who supported the Union; and disciplining employee Debra Sterling for engaging in protected, concerted activities. Finally, the ALJ found that Respondent violated Section 8(a) (3) of the Act by terminating employee Donald Wickham for his activities as the lead union organizer.

[2] All dates are in 2011 unless otherwise noted.

On April 26, 2012, Respondent filed with the Board 112 exceptions to the ALJD and a supporting brief. In its exceptions, Respondent generally excepts to all of the ALJ's findings enumerated above, along with her credibility determinations.

II. QUESTIONS INVOLVED

Respondent's exceptions to the ALJD are both extensive and difficult to discern. Quite literally, Respondent has excepted to virtually every aspect of the decision where the ALJ found a violation, including the associated findings of fact, conclusions of law, and remedies. In an attempt to give order to Respondent's exceptions, the Acting General Counsel (General Counsel) will address what appears to be the general categories of exceptions. Respondent contends that the ALJ erred by finding that: (1) Respondent's Security Officer Handbook includes rules that unlawfully restrict employees in the exercise of their Section 7 rights; (2) Respondent's Social Networking Policy unlawfully restricts employees in the exercise of their Section 7 rights; (3) Supervisor Clemons' statements to employees constituted an unlawful threat; (4) Supervisor Armstrong's statements to employees created the impression of surveillance; (5) Supervisor Jimenez unlawfully threatened employees and created the impression of surveillance; (6) Respondent unlawfully disciplined employee Debra Sterling for engaging in protected, concerted activities; (7) Respondent unlawfully terminated employee Donald Wickham for engaging in Union and concerted activities. Respondent also objects to certain of the ALJ's credibility determinations involving the various violations.

As demonstrated below, Respondent's exceptions are without merit and should be rejected. The ALJ's findings of fact and conclusions of law regarding the meritorious unfair labor practices are firmly grounded in Board law and, therefore, should be adopted.

Similarly, the Board should adopt the ALJ's credibility resolutions, as they are fully supported by the record evidence.

III. RESPONDENT'S OPERATIONS

Respondent is a nationwide security contractor. (Tr. 23) In Arizona, Respondent has over 65 locations, including the East Valley Metro Light Rail (the light rail) (Tr. 24), a mass transit system that operates from Mesa to Phoenix, Arizona. (Tr. 44) Respondent provides security officers on the light rail who are responsible for watching the park and ride parking lots, the train platforms, the rail line, and the train cars. (Tr. 292)[3]

Across the county, the jobs performed by Respondent's security officers are numerous and varied, each unique to the job location. (GCX 2) For example, Respondent's security officers' duties can consist of sitting in the lobby of a building; sitting at a security officer gate and checking cars that enter a property such as a meat packing plant; walking the perimeter of a water treatment facility; transporting detainees from the Arizona - Mexico border for the Immigration and Customs Enforcement Agency; sitting in a control room monitoring cameras with no interaction with the public; radio response control; performing concierge services at hotels and other locations; reception duties; and ambassador-type positions. (Tr. 25-35)

[3] The light rail is overseen by General Manager Larry Pablo (Pablo). (Tr. 21) The light rail's Project Manager is Major Jason Armstrong (Armstrong). (Tr. 23, 40) Under Armstrong are shift supervisors called Lieutenants (Tr. 41), who act as the direct supervisors of the security officers. (Tr. 42) There are currently four lieutenants at the light rail. (Tr. 41) Janelle Kercher (Kercher) is the Human Resources Director for all locations in the Phoenix area. (Tr. 24)

IV. DISCUSSION AND ANALYSIS

A. Respondent's Security Officer Handbook Rules Found to Violate Section 8(a) (1) of the Act

1. The ALJ's Findings

The Complaint alleges, and the ALJ found, that certain rules in Respondent's Security Officer Handbook are overly-broad and discriminatory in violation of Section 8(a) (1) of the Act. (ALJD at 20-22) Respondent argues that the ALJ's findings are incorrect in numerous aspects: Particularly, Respondent asserts that the ALJ erred in her: (1) finding regarding a job classification of Passenger Assistant Area (PAA) lack of interaction with the public; (2) finding that the rule doesn't distinguish when employees are on or off duty; (3) not discussing the uniform standards dictated by one client; (4) order including too much of the rule; (5) crediting of an employee over a supervisor's testimony; and (6) failure to consider that another Region did not object to certain rules alleged in this complaint. Respondent's arguments have no merit and should be rejected.

2. The Record Evidence

The Complaint alleges that three rules in Respondent's Security Handbook, the confidentiality rule, professional image rule, and unnecessary conversation rule, are overly-broad and discriminatory. The record evidence concerning these rules are as follows:

a. Confidentiality Rule

Respondent's confidentiality rule reads as follows:

> **Page 31: Confidential Information**
>
> The protection of confidential information, trade secrets and Wackenhut-specific operating procedures is vital to the interests and success of the Wackenhut Corporation. Additionally, in the line of duty you may come in contact with our customer's confidential information.

Such Confidential information includes, but is not limited to:

- wage and salary information
- computer programs and/or codes
- financial information
- marketing strategies
- technological data
- work processes and systems
- customer lists
- labor relations strategies
- communication systems
- personal data on employees and others

Employees who compromise, destroy, improperly use, copy or disclose confidential company or customer information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit form [sic] the disclosed information.

Do not give interviews or make public statements about the activities or policies of the company or our client without written permission from the Wackenhut Corporation.

The above language is from Respondent's March 2008 handbook (GCX 16) and was in effect until the handbook was revised on or about January 1. The only change to this provision in January was that the handbook deleted the paragraph that begins with "Such confidential information includes…", the bullet list that follows, and changed the name from Wackenhut Corporation to G4S Secure Solutions USA.[4] All other language remains in the new handbook. (GCX 15)

b. Professional Image Rule

Respondent's professional image rule states:

Pages 26-27 Professional Image

You must be neat and clean while on duty. You must wear only the complete uniform as prescribed by your supervisor. Any uniformed security personnel who become pregnant will be provided with appropriate uniform clothing to maintain a professional appearance. The area or branch office will be responsible for acquiring maternity pants and larger shirts through the Purchasing Department.

[4] Wackenhut Corporation was the previous name of Respondent.

> Due to the public nature of our business and the business necessity that uniformed personnel represent figures of authority, we have established the following rules for personal appearance.
>
> No insignias, emblems, buttons, or items other than those issued by the company may be worn on the uniform without expressed permission.

Both the March 2008 Handbook, and the new handbook issued in January, have the exact same language as listed above regarding "professional image." (Tr. 142; GCX 15 and 16)

The record contains several examples of pins that are worn in support of the Union by security officers employed by other private companies. (GCX 52 and 53) Robert Inman, Business Agent for four locals of the Union in Arizona, testified that armed security officers working at the Palo Verde nuclear facility in Tonopah, Arizona, have worn a union patch on their uniforms for 14-15 years. (Tr. 441, 446-447) During those 14-15 years, the Union has never received any reports that the public did not show respect for, or follow the directives of, the security officers because of the Union patch on their uniforms. (Tr. 447)

c. No Unnecessary Conversations Rule

Respondent's rule prohibiting unnecessary conversation is found at page 29 of the handbook, and states that security personnel must "[e]ngage in no unnecessary conversations." Both the March 2008 handbook and the January handbook have the exact same language as listed above regarding no "engaging in unnecessary conversations". (Tr. 142 - 143; GCX 15 and 16)

3. Legal Analysis

a. General Principles

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board explained that an employer may violate Section 8(a)(1) through the mere maintenance of certain work rules even absent enforcement. The appropriate inquiry for such a case is whether the rule in question "would

reasonable tend to chill employees in the exercise of their Section 7 rights." Id. at 825. The Board refined this standard in *Lutheran Heritage Village—Livonia,* 343 NLRB 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1). First, the rule is clearly unlawful if it expressly restricts Section 7 protected activities. If the rule does not, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. Moreover, a rule that prohibits, among other things, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See, e.g., *Flamingo Hilton—Laughlin,* 330 NLRB 287, 288 n. 4, 294 (1999) (rule prohibiting "false, vicious, profane, or malicious statements unlawful because it prohibits statements that are "merely false" and might include union propaganda).

The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, in *Claremont Resort and Spa,* 344 NLRB 832, 836 (2005), the Board found that a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarifications or examples, was unlawful because of its potential chilling effect of Section 7 protected activity. The Board held that, absent more guidance from the employer, an employee could reasonable construe the rule to limit his or her Section 7 right to engage in protected protest. See also Id. at 832, n. 5 (Member Schaumber, relying on the context of the other policies promulgated with the challenged rule, finding the Board's conclusion of the rule's the chilling effect to be reasonable).

The Board has also instructed that "[t]he test of whether a statement is unlawful is whether the words could reasonable be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group, Inc.,* 339 NLRB 303, 304 (2003). Thus, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 rights; any reasonable interpretation is sufficient to sustain a violation. And to the extent rules may be subject to competing interpretations, lawful and unlawful, the Board has long held that any ambiguities must be construed against the promulgator of the rule. *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992), quoting *Paceco,* 237 NLRB 299 n. 8 (1978); *Teletech Holdings, Inc.*, 333 NLRB 402, 404 (2001). In this case, the promulgator is Respondent.

b. Confidentiality Rule

The confidentiality rule at issue is overly-broad. The old rule specifically deemed as confidential employee wage and salary information, along with Respondent's labor relations strategies. Although the rule changed slightly in January, by changing the name of Respondent and removing the list of items that were considered confidential, the remaining rule is still overly-broad and discriminatory.[5] A reasonable employee is likely to believe that he may not acquire, use, access copy, remove, modify, alter, or reveal to any third parties essential information about terms and conditions of employment including, for example, wage and benefits information or the results of personnel investigations. Such a restriction violates the Act. In *Double Eagle Hotel,* 341 NLRB 112 (2004), the Board found violative a broad rule that prohibited communication of any "confidential or sensitive information concerning the company or any its employees to any non-employee" without approval from management.

[5] As the original charge in this matter was filed in February, and the amended charge in March, the 10(b) period regarding Respondent's handbook covers both the old rule and the new rule,

See also, e.g., *Waco, Inc.*, 273 NLRB 746, 748 (1984) (rule prohibiting employees from discussing their wages violates Section 8(a)(1)); *University Medical Center,* 355 NLRB 1318, 1322 (2001) (rule prohibiting disclosure of information about employees "is unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages"); *IRIS USA, Inc.,* 336 NLRB 1013 (2001). Respondent's confidentiality rule, both old and new, violates the Act because it is ambiguous and could reasonably be construed to encompass employee terms and conditions of employment.

The Board addressed a similar situation in *Aristook County Regional Ophthalmology Center,* 317 NLRB 218 (1995), where the employer's manual stated: "No office business is a matter for discussion with spouses, family, or friends." The Board determined that "office business" could reasonably be interpreted to include employees' terms and conditions of employment. Noting that the provision followed a heading entitled "confidentiality," not "patient confidentiality," the Board concluded that the manual provision was ambiguous. Applying the principle that ambiguities are construed against the drafter, the Board held that the rule violated Section 8(a)(1). Similarly, in this case, "confidential company information," without more, is impermissibly vague, and must be construed against the promulgator. Finally, Respondent's confidentiality rule applies to all security officers throughout the nation, which provides further basis to construe it against Respondent, because it is not directed to employees who would have access to, and a better knowledge of what constitutes, the type of confidential information Respondent would legitimately seek to protect. See *IRIS USA,* 336 NLRB at 1013.

Regarding the confidentiality rule, Respondent's main complaint is its contention, that Respondent entered into some type of settlement agreement in Region 14, which required Respondent to amend its handbook in January 2011. However, settlement agreements from another Region do not constitute Board law and have no control over the ALJ. Moreover, other than Respondent's bare assertion in its brief, there is no record evidence that "Region 14 approved of the revisions." Resp't Br. Supp. at 15. Moreover, the settlement agreement is not in the record While Respondent asks that the Board take administrative notice of the settlement, if the Board chooses to do so, it will find that neither the language of the settlement agreement or notice contains any evidence that "Region 14 approved of the revisions" to Respondent's handbook. The Board should disregard Respondent's attempts to use a settlement in another case, involving another Region, with no background or record evidence regarding the facts therein, as precedent in its exceptions.

Finally, Respondent's argument that by adding the words "or client information" makes it clear that this provision is not overbroad has no merit. The added language does not cure the previous statement regarding confidential "G4S" information. Respondent's exceptions have no merit and should be disregarded.

c. Professional Image Rule

i. Legal Standard

Absent special circumstances, Section 7 entitles employees to wear union insignia, including union buttons, in the workplace. *Republic Aviation Corp., v. NLRB,* 324 U.S. 793 (1945); *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). The burden is on the respondent to prove the existence of special circumstances that would justify a restriction. *W San Diego*, 348 NLRB 372 (2006). Special circumstances include situations where display of union

insignia might "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees. *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. 99 Fed. Appx 233 (D.C. Cir. 2004), citing *Nordstrom Inc*., supra. The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. *Meijer, Inc*., 318 NLRB 50 (1995), enfd. 130 F. 3d 1209 (6th Cir. 1997); Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition. *United Parcel Service*, 312 NLRB 596, 596-598 (1993), enfd. denied 41 F. 3d 1068 (6th Cir. 1994).

ii. Lack of Evidence of Special Circumstances

A rule based upon special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co*., 307 NLRB 1036 (1992). Respondent has argued that the mere fact that employees have a job title of "security officer" establishes special circumstances allowing them to sacrifice employees' Section 7 rights. However, Respondent utterly failed to present evidence of special circumstances at any location, let alone nationwide, nor has its rule been narrowly drawn. Respondent applies this rule to all security officers no matter what the jobsite entails or whether employees have any access to the public. For example, some of Respondent's security officers sit in a control room monitoring computers all day long, while others perform reception services. Some security officers sit in a kiosk all day. Even if employees deal with customers or the public at their specific jobsite, Respondent has presented no justification showing that fact alone constitutes special circumstances.

Respondent believes that, because some of its employees deal with the public or have the ability to write citations to employees, this privileges Respondent to maintain its overly-broad rule, disregarding employees' Section 7 rights to satisfy the public, its customers, and its own image. In *Howard Johnson Motor Lodge*, 261 NLRB 866, fn 6 (1982), the Administrative Law Judge stated "The lawfulness of the exercise by employees of their rights under the Act, including union button wearing, does not turn upon the pleasure or displeasure of an employee's customers."

The Board has never made a blanket rule that because a group of employees have a security role, special circumstances exist that allow for a rule such as Respondent's.[6] In *Albert Einstein Medical Center*, 316 NLRB 1040, 1053 (1995), the employer sought to enforce a rule prohibiting only security officers from wearing union insignia. The Board held that this rule was overly-broad and discriminatory and found no special circumstances regarding security officers. While Respondent has cited various Advice Memoranda, issued under a previous General Counsel, on very specific fact circumstances in support of its exceptions. However, Advice memoranda from a General Counsel are not precedent, and are not binding on the Board. *Midwest Television, Inc.*, 343 NLRB 748, 768 (2004). Such memoranda only reflect the views of the specific General Counsel at the time. Here, the ALJ properly applied long-standing and established legal principles, finding that the wearing of union pins and insignia while at work is allowed. See *Republic Aviation Corp. v. NLRB*, supra.

Respondent next argues that the ALJ was incorrect in determining that PAA employees had no contact with the public. Respondent is just wrong. PAA employees sit in a

[6] In *FJC Security Services, Inc.*, 2008 WL 4377557, the ALJ found that a similar rule was a violation as no special circumstances were found to exist regarding security officers.

control room where they take phone calls and monitor screens that show light rail locations. (Tr. 423) PAA employees do not themselves go to a situation that requires assistance, but dispatch other employees. (Tr. 423) There is absolutely no evidence that a "tour group" has ever, or will ever, be given a tour of the PAA location. The only evidence of "tour groups" is that these groups have gone to the waste water treatment facility at times. (Tr. 35) Moreover, even if there is the slightest possibility that PAA employees may have an encounter with someone from the public, that in and of itself, does not constitute special circumstances to allow the prohibition of non-approved pins and buttons.

Respondent also argues that the ALJ was incorrect in finding that the rule applies to on and off-duty uniform appearances. Respondent points to one sentence in the rule that states "you must be clean and neat on duty" in support of its argument that the rule only applies to employees while on-duty. (GCX 15, 16) However, the prohibition against insignia and buttons in the rule does not makes it clear to employees that this rule only applies to employees on-duty. Although Respondent argues that employees would only be wearing the uniform on-duty, employees can travel to and from work in uniform, stop at a grocery store, gas station, or other location, either on their way to work or after work, in uniform, and there is no evidence that Respondent provides lockers or changing facilities for employees, ensuring that employees would be able to only wear their uniforms at the work place.

Respondent argues that the ALJ ignored the contract between Respondent and one of its clients, the Metro Light Rail, that sets forth the uniform requirement. (RX 1) The ALJ was correct in giving this argument little to no weight. Respondent choose to be a party to that contract, and just because Respondent's client has an unlawful provision that Respondent agreed to, does not absolve Respondent of its obligations under the Act. Further, the

"professional image rule" at issue applies at all job locations throughout the United States. Respondent could have chosen to narrow its rule to specific locations where special circumstances exist and used the third party contract as one element of its special circumstances. Respondent chose however to apply this rule to all "security officers" no matter what location or what duties those employees perform.

Here, the record evidence regarding security officers wearing union insignia, shows that security officers have worn union insignia, a large union patch on their uniform, for 14-15 years at the Palo Verde Nuclear Plant, a high security area. These security officers are armed, and deal with the public. They have worn a large union patch on their uniform for 14-15 years without any disruption in discipline, public safety or the security officers' ability to maintain security and discipline. Despite Respondent's arguments, the fact that this patch is allowed due to an agreement between the employer and the Union is irrelevant. Agreements between an employer and the bargaining representative regarding uniforms is standard and does not reflect that special circumstances exist at all locations where Respondent's employees work. What is important for this case is that the record is devoid of any evidence that a small union pin or patch would cause any difficulty in safety, discipline or the public image of the security officers at all locations nationwide of Respondent.

d. No Unnecessary Conversations Rule

Applying the standards of *Lafayette Park Hotel*, supra. and *Lutheran Heritage Village-Livonia,* supra., an employee would reasonably construe Respondent's rule prohibiting "unnecessary conversations" to restrict Section 7 activity. Respondent's prohibition utilizes broad terms that commonly apply to protected criticism of Respondent's labor policies, treatment of employees, and employee terms and conditions of employment. Moreover,

Respondent does not define what is encompassed by the broad term "unnecessary conversations," nor does it limit the rule to exclude Section 7 activity. Absent such limitations or definitions, employees can reasonably interpret the rule to prohibit discussions of their terms and conditions of employment, either amongst themselves or with third parties. Employees clearly are allowed to discuss non-work subjects such as sports, television, purchases, etc. Yet, Respondent attempted to inhibit employees from discussing the Union while at work, given Lieutenant David Clemons's (Clemons) admonishment to employees.[7]

Respondent argues that the ALJ should not have credited employee Carol Tarash's (Tarash) testimony regarding this conversation. However, Respondent's only argument to this is that an earlier statement made by Clemons was only testified to by Lieutenant Danny Rice (Rice) even though other employees were present, the General Counsel did not ask those employees about the conversation even thought they appeared at the hearing, and the ALJ should have credited Clemons' testimony. If Respondent's logic is taken at face value, then Clemons' testimony cannot be credited by the ALJ either, as Respondent failed to corroborate his denial with other witnesses. Respondent has no other reason to attack the ALJ's credit of Tarash's testimony.

Respondent also argues that because Clemons' did not specifically state that he was enforcing the "no unnecessary conversations" rule when he admonished employees not to discuss the Union at work, the ALJ incorrectly found his statements to be an enforcement of the unlawful rule. Respondent's arguments have no merit. Clemons was extremely clear that the Union should not be discussed at work—meaning it is an unnecessary conversation. The

[7] Clemons, in approximately November 2010, informed employee Tarash at the workplace that she should be careful who she talks to about the Union and where she talks about the Union, because the Union shouldn't be discussed at work. (Tr. 552)

ALJ properly found this to be an enforcement of the unlawful rule and it is not required for Clemons to have specifically cited the rule to make that finding.

Employees would reasonably believe that discussions about the union or terms and conditions of employment would constitute "unnecessary conversations" in Respondent's belief, sending a chill throughout the workforce regarding protected activity. The ALJ's findings were proper in this regard and Respondent's exceptions have no merit and should be disregarded.

B. Respondent's Social Networking Policy Found to Violate Section 8(a)(1) of the Act

1. The ALJ's Findings

The ALJ properly found that a provision of Respondent's Social Networking rules violated the Act. (ALJD at 21)[8]

2. The Record Evidence

Besides the Security Officer Handbook, Respondent also maintains work rules. One of those work rules is a rule addressing social networking. (GCX 13) The provision of the rule found by the ALJ to violate Section 8(a)(1) is as follows:

Social Networking Policy, November 22, 2010:

- Do not comment on work-related legal matters without express permission of the Legal Department.[9] (GCX 13)

3. Legal Analysis

The Board's analysis in *Lafayette Park Hotel*, supra., and *Lutheran Heritage Village-Livonia*, supra. is appropriately applied to the social networking rule regarding no

[8] There were two provisions of the social networking rule that were alleged to violate the Act. The ALJ did not sustain the provision regarding photographs. General Counsel has filed a cross-exception to that determination under separate cover.

[9] General Counsel filed a Motion to Amend the Complaint, (GCX 43), to add this policy as being overly-broad and discriminatory. That Motion was granted by the Administrative Law Judge. (Tr. 281-288)

commenting on work-related legal matters by employees. Although this rule does not expressly prohibit Section 7 activity, the rule is so broad that it can reasonably be understood as encompassing protected conduct. The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (21984), revd. sub non *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention. *Meyers II*, 281 NLRB at 887. If employees are engaged in discussions about wages, hours and terms and conditions of employment, those discussions are protected activity; such a finding does not change just because the statements are communicated by employees via the internet. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. *Nevada Service Employees Union, Local 1107 v. NLRB* , 358 Fed. App'x 783 (9th Cir. 2009).

Respondent has sought to bar employees from discussing legal matters, a rule that would essentially bar employees from discussing Board cases, unfair labor practice charges, complaints of workplace safety pending with the Department of Occupational Safety and Health, as well as the discussions that took place between employees Debra Sterling (Sterling) and Asucena Banuelos (Banuelos) regarding EEOC complaints.[10] Respondent argues that the ALJ went through a "tortured interpretation" of the policy to find a violation. It is actually Respondent's argument regarding its exception that is tortured. "Legal Matters" can mean

[10] Sterling was later found by the ALJ to have engaged in protected, concerted activity. (ALJD at 32)

upcoming Board investigations and hearings, EEOC matters, workplace safety matters, wage and hour violations, and a myriad of other subjects that relate to wages, hours and working conditions that can be raised by a group of employees in a legal setting. This is the plain reading of the rule. Respondent argues that this provision is lawful because Respondent is a federal contractor, required to post employee rights notices on its bulletin boards, therefore removing all doubt in an employee's mind that this provision relates to non-wages, hours and working condition subjects. However, the posting of notices regarding employee rights does not absolve Respondent from unlawful provisions in its work rules and Respondent can provide no support for such a claim. Further, Respondent's disclaimer[11] is so broad and vague that a reasonable employee would not understand that this provision does not apply to its right to discuss upcoming legal matters that deals with wages, hours and working conditions. These activities would be protected, concerted activities and a reasonable employee would believe that they could not engage in those activities on their social networking sites despite the modern world environment where a large majority of conversations between people occur on those very sites. Respondent's social networking policy cited above is overly-broad and discriminatory and Respondent's exceptions should be disregarded.

C. Respondent's Section 8(a)(1) Violation By Telling Employees Not to Discuss the Union at Work.

1. The ALJ's Findings

The ALJ found that Respondent's supervisor, Lieutenant David Clemons (Clemons) violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisal. (ALJD at 26) Further, the ALJ found that Clemons violated Section 8(a)(1) of the Act by

[11] The disclaimer is as follows: "This policy will not be construed or applied in a manner that interferes with employees rights under federal law". (GCX 13)

enforcing the "no unnecessary conversations" rule when he told employees not to discuss the Union at work. (ALJD at 22) Respondent argues that the ALJ improperly credited employee witnesses, did not put the statements made by Clemons into context, and improperly found Clemons' statement to be an enforcement of the "no unnecessary conversations" rule. Respondent's arguments have no merit and should be rejected.

2. The Record Evidence

In approximately November 2010, Clemons had a discussion with employees about the Union. (Tr. 551) Rice had asked a few employees about joining the Union because they were a few people short. (Tr. 552) In front of other employees Clemons told Rice that he would take the union literature but that the union shouldn't be discussed at work. (Tr. 552)

Approximately a week later, Tarash was alone with Clemons in the McClintock kiosk. (Tr. 552) Tarash started talking about the Union to Clemons. (Tr. 552) Clemons immediately stated that Tarash should be careful who she talks to about the Union, and where she talks about the Union, because the Union shouldn't be discussed at work. (Tr. 552)

Employees had never been given an admonishment in the past to not talk during work. (Tr. 563) Employees had been able to talk about sports, buying cars, houses, what was on television, etc., without any repercussions. (Tr. 563) The only subject matter employees were informed not to talk about at work was the Union. (Tr. 563)

3. Legal Analysis

Clemons's statements to employees in November 2010, that they should not be talking about the Union at work, not only constituted an oral promulgation of an overly-broad and discriminatory rule and an unlawful enforcement of the "no unnecessary conversations" rule

in the security officer handbook, but also constituted a veiled threat that if the union discussions continued, employees could face adverse action.

The Board has repeatedly instructed that the term "work hours" is inherently ambiguous and thus presumptively unlawful, because it connotes all hours of the workday, including employees' break and lunch times. *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), enfd. 261 F. 3d 493 (3d Cir. 2001); *Southwest Gas Corp.*, 283 NLRB 543, 546 (1997); *MTD Products, Inc.*, 310 NLRB 733 (1933); *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984); *Our Way, Inc.*, 268 NLRB 394, 395 (1983). In order to avoid a violation under these circumstances, the employer must prove that it communicated or applied the rule in a way that conveyed a clear intent to permit discussions and/or solicitation during break time or other periods when employees are not actively at work. *MTD Products*, at 733; *Ichikoh Mfg*., 312 NLRB 1022 (1933), enfd. 41 F. 3d 1507 (6th Cir. 1004); *Our Way, Inc.*, 268 NLRB at 395 n.6. A clarification of an ambiguous rule, or a narrowed interpretation of an overly broad rule, must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994). "Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule." *Teletech Holdings*, 333 NLRB 402, 403 (2001), citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992). *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003) (prohibiting discussion of union unlawful).

Respondent first argues that the ALJ was incorrect in crediting Tarash's testimony over Clemons'. This argument, as discussed above, should be rejected.

Respondent follows this argument by stating that the ALJ has made the determination that threats were made by Clemons in a vacuum, ignoring the surrounding circumstances.

Respondent is incorrect. The ALJ properly found that the threat was made in an atmosphere of union organizing, when employees were talking about the union, and trying to decide whether to support the union. (ALJD at 26) The ALJ specifically cites evidence that employees were talking about the Union, and that Union literature was being passed out at the work site. (ALJD at 26) This is the background for the threats made by Clemons, properly considered by the ALJ, and used as the surrounding circumstances in finding the violation. Respondent's argument that this cannot be a violation because Clemons is the only one who made this threat and he was actually protecting employee rights because, if upper management discovered they were supporting the Union, possible adverse action could occur directly, is absurd and supports the finding of an unlawful threat. Informing employees not to talk about the Union at work because "something might happen" is exactly what violates the Act—chilling employees' exercise of their Section 7 rights because they fear retaliation.

Additionally, Clemons' rule prohibiting talk about the Union at work is overly-broad and vague, as it does not exclude time on breaks or on lunch or in the restroom, etc. An employer may not prohibit discussions about a union even during working time while permitting discussions about other non-work subjects. *M.J. Mechanical Services,* 324 NLRB 812, 814 (1997). "Even a rule prohibiting union solicitation in actual working areas at all times has been upheld only in certain settings," *Cooper Tire & Rubber Co. v. NLRB,* 957 F. 2d 1245, 1250 (5th Cir. 1992), cert. denied 506 U.S. 985 (1992), such as hospitals, restaurants and retail stores.

It is unlawful to restrict conversation about union matters during work time while permitting conversations about other non-work matters. *Emergency One, Inc.*, 306 NLRB 800 (1992). Finally, even if this oral rule announced by Clemons was not overly broad and

ambiguous, it would still violate Section 8(a)(1) because it was issued in response to employees' Union and concerted activities. See *Dillon Companies, Inc. d/b/a City Market*, 340 NLRB 1260 (2003); *Onan, a Div. of Ona Corp.*, 261 NLRB 1378, 1392 (1982) (supervisor's statement to employee that he should "not talk to 'company' employees about the union violates Section 8(a)(1) as it contained an implicit threat of discharge or discrimination if the employee did so). In this case, Clemons' rule prohibiting talk about the Union at work is overly-broad and vague, as it does not exclude time on breaks or on lunch or in the restroom, etc.

The ALJ made proper credibility resolutions, put Clemons' statements into context, and properly found the statements to be an enforcement of an unlawful rule. Respondent's exceptions have no merit and should be disregarded.

D. Respondent's Section 8(a)(1) Violation by a Supervisor Telling Employees He Knew They Were Talking About the Union

1. The ALJ's Findings

The ALJ found that Armstrong created the impression of surveillance in violation of Section 8(a)(1) of the Act when he informed employee Sean Nagler (Nagler) that he knew Nagler and other employees had been discussing joining the Union. Respondent argues that the ALJ erred in this finding because the ALJ did not consider the "context" in which the statement was made, and that Armstrong did not express any negative statements about the Union when he made the statement to Nagler. Respondent's arguments are without merit and should be rejected.

2. The Record Evidence

In or around mid-December 2010, Nagler was at the McClintock kiosk. (Tr. 545) During a discussion with Nagler, Armstrong stated "I know you've been talking to several

officers about joining a union." (Tr. 545) Nagler responded "I talked to several officers, yes, and I had put a bug in their ear if they would like to join a union, here's the person you need to speak to." (Tr. 545) After Nagler said this, Armstrong stated "Being in the position I am, I'm not able to join a union." (Tr. 545) Armstrong told Nagler that he didn't have anything against the Union but he was not able to join the Union. (Tr. 547-548) The conversation ended at that time. (Tr. 545)

3. Legal Analysis

Armstrong's statements to Nagler that he knew Nagler had been talking about the Union constitutes an unlawful creation of the impression of surveillance. Armstrong made it clear that he was aware of Nagler and other employees' union activities letting Nagler and other employees know that he was either watching them or wanting employees to believe he was watching their Union activities. *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (supervisor's statement that "it's an open secret that you've joined the Union" an impression of surveillance). Armstrong's comments that followed, that he couldn't join the Union but he had nothing against it doesn't cure the initial statement, creating the impression that employees' Union activities were under surveillance. See *Flexstell Industries,* 331 NLRB 257 (1993) (supervisor's statement that he had "heard" rumors about the employee's union activity an impression of surveillance); *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001) (supervisor's statement "I know you are the one that is disbursing Union cards out" an impression of surveillance) , *Avondale Industries,* 329 NLRB 1064, 1265 (1999).

Respondent's argument that the ALJ took this statement out of context is incorrect. The ALJ specifically pointed to the context by pointing out record evidence that employees' union activities at that time were not well-known, that Nagler was specifically not showing

outward support for the Union, and an employee would reasonably assume that Respondent was watching them when told by a supervisor that he knew he and other employees were involved in Union activities when that activity had been kept fairly secret by those employees. (ALJD at 27-28) Further, Respondent's argument that Armstrong's statement that he has nothing against Union's cures the initial statement is without merit. Respondent provides no Board law in support of this argument. Respondent's exception has no merit and should be rejected.

E. Respondent's Directive to Employees Not to Talk to a Suspended Employee or the Employee Could Be Terminated Violated Section 8(a)(1) of the Act.

1. The ALJ's Findings

The ALJ found that Armstrong's statement to employees that Rice had been suspended and that employees were to have no contact with him, and if they were found to have had contact with Rice, they would lose their jobs and be terminated constituted an unlawful threat in violation of Section 8(a)(1) of the Act. Respondent argues that despite no evidence in support, the ALJ erred in not finding that this directive was only in effect during the suspension period of Rice. Respondent's arguments are without merit and should be rejected.

2. The Record Evidence

On February 11, Rice was suspended pending investigation for his being involved in union activity. (Tr. 51) At the time, Rice was a Lieutenant and a statutory supervisor.[12] During second shift on the day of Rice's suspension, Armstrong announced to employees at the jobsite that Rice had been suspended and that employees were to have no contact with

[12] Rice was demoted from his supervisor position at the end of his suspension and transferred to a different job site. (Tr. 51-53)

him—no phone calls, no texts, no nothing. (Tr. 392) Armstrong went on to state that if any of the employees were found to have had any contact with Rice, they would lose their jobs and be terminated. (Tr. 394) There was further testimony that employees had never been given that instruction before regarding any suspended individual. (Tr. 394)

Regarding Respondent's argument that its instructions to Rice not to contact anyone only applied to the time during Rice's suspension, Rice testified that General Manager Larry Pablo (Pablo) told Rice after he was demoted to an employee that he was not to contact any of the employees on the light rail, he could not go to the light rail, and he was to stay away from other employees. (Tr. 480) Rice testified that that rule was never rescinded. (Tr. 480)

3. Legal Analysis

The record evidence clearly establishes that Armstrong told employees they could not talk to Rice or they would be subject to discharge. This constitutes a direct threat to employees. In *Intermet Stevensville,* 350 NLRB 1359 (2007), and *Bryant Health Center, Inc.,* 353 NLRB No. 80 (2009), the Board summarily adopted an ALJ's reasoning that employees have a right to discuss discipline with fellow employees and a statement that they could not talk about employee discipline was a threat. Respondent argues that, because Rice was a supervisor at the time of his suspension, there is no Section 7 right for employees to talk to supervisors. However, Respondent misses the point—Rice was demoted in short order after February 11. Upon his demotion, Rice became an employee, protected by the Act. Further, conversations with Rice about wages, hours and terms and conditions of employment by other employees are also protected by the Act. Respondent provided no record evidence that it ever lifted the prohibition. In fact, Rice was given even harsher directives from Respondent upon

his demotion and the end of his suspension. Respondent's arguments have no merit and its exception should be disregarded.

F. Respondent's Threat to Discriminatee Debra Sterling Concerning Overtime Violated Section 8(a)(1) of the Act.

1. The ALJ's Findings

The ALJ found that Armstrong's statements to employee Debra Sterling (Sterling) constituted a threat because the statement was made at a time when Respondent was disciplining known union supporters and employees who were known to have engaged in protected, concerted activities. (ALJD at 29-30) Respondent argues that the ALJ cited nothing other than timing in her finding and that is insufficient to find a violation. Respondent's arguments have no merit.

2. The Record Evidence

The record is replete with evidence of Sterling's union and protected, concerted activities. Those activities will be discussed at length below. However, after engaging in extensive union and concerted activities, Sterling was at work when she became ill on March 1. (Tr. 519) Because she became ill, Sterling left work. (Tr. 519) The next day, Sterling arrived at work to start her shift at approximately 2:00 p.m. (Tr. 519) At that time, Armstrong came to Sterling and stated that he had an issue with her, that she had been absent three times within the year and a half, and each time she was sick, she had overtime on her hours. (Tr. 520) Sterling informed Armstrong that she always worked overtime and getting sick was not something she planned. (Tr. 520) Armstrong told her that "According to a manager's point of view, that's a problem." (Tr. 520) The ALJ found this statement to be an unlawful threat due to the context in which it was made—in the atmosphere of a union

organizing drive and Sterling's pending EEOC complaint—and the timing of the statement. (ALJD at 29-30)

3. Legal Analysis

Armstrong's out of the blue statements to Sterling about her being sick at work immediately after two employees who were union leaders were transferred and terminated and after Respondent attempted to give Sterling a final warning, constituted a threat of unspecified reprisal. There was no record evidence that Sterling had any problems with sick leave, that Respondent had talked to her about sick leave in the past, or had talked to anyone else for that matter. Armstrong singled out Sterling due to her union and protected, concerted activities, and threatened her with unspecified reprisal for being sick at work. Nonspecific threats in the context of someone who is well-known to be involved in union and/or protected, concerted activities, as was Sterling, violate Section 8(a)(1) of the Act. See *In re SKD Jonesville Div. L.P.*, 340 NLRB 101 (2003). In *McCovey Sheet Metal Works*, 326 NLRB 1066 (1988), the Board agreed with the ALJ's finding that the Employer violated the Act when he told a Union supporter not to mess up.

Respondent argues that the ALJ's sole reason for finding this statement to be a violation was timing and that is insufficient. Respondent ignores that portion of the ALJ's decision where she goes into extensive findings regarding Sterling's union and concerted activities. (ALJD at 7-10) This sets the context for the statement made by Armstrong. The statement, as argued by Respondent, cannot be taken in a vacuum but looked at in the context of surrounding circumstances. Respondent utterly failed to defend this allegation by presenting evidence of any other context or reason for the statement besides Sterling's protected activities. Respondent's exception has no merit and should be disregarded.

G. Respondent Violated Section 8(a)(1) of the Act by Informing Employees that Respondent Would Not Rehire Union Supporters

1. The ALJ's Findings

The ALJ found that Supervisor Dustin Jimenez (Jimenez) threatened employees and created the impression of surveillance when he told employees that Respondent would not re-hire Union supporters. Respondent argues that because General Manager Pablo denies telling Jimenez that he would not re-hire union supporters, Jimenez' statements cannot violate the Act. Respondent's arguments have no merit and should be rejected.

2. The Record Evidence

Employee Asucena Banuelos[13] (Banuelos) worked at the light rail from May 2010 until April 2011. (Tr. 422-423) For the last two months of her employ at the light rail, Banuelos was assigned to the Passenger Assistance area due to her pregnancy. (Tr. 422-423) The Passenger Assistance area is composed of computer monitors where employees watch the platforms on the light rail. (Tr. 423) Her supervisor at the Passenger Assistance area was Jimenez. (Tr. 423)

In March, Banuelos was in the Passenger Assistance area when Jimenez came up to her and stated that "Larry Pablo told him that once the light rail contract expires, he was not going to rehire anybody who he found out was involved—to be in favor of the Union". (Tr. 432) Jimenez then stated that Debra Sterling wasn't going to be around longer because six individuals had written memos that she was talking to other people and that Lieutenant Tim Taylor would not be demoted so he could not support the union. (Tr. 432) Jimenez also stated that they were not going to fire Sterling until after the Union election so it did not seem that they were firing her because of the Union. (Tr. 433)

[13] Although Banuelos is no longer working at the light rail, Banuelos is still an employee of Respondent, working in California. (Tr. 421-422)

3. Legal Analysis

Jimenez' statements to employees concerning Pablo's alleged statements, constituted an impression of surveillance (finding out who was involved in the union), and a threat of unspecified reprisal and of not re-hiring employees when the light rail contract was up for renewal. Jimenez is an admitted supervisor whose statements to employees constitute statements of Respondent. Regardless of Pablo's testimony, it is Jimenez who made the statements. It is the impression of the employee to whom the statements were made that is at issue. An employee creates the impression of surveillance when it indicates it is closely monitoring the degree of employees' involvement in the union. *Emerson Electric Co.,* 287 NLRB 1065 (1988).

Additionally, Respondent failed to call Jimenez to testify, relying upon Pablo's denials. Pablo was not present during this conversation and has no way of knowing what Jimenez said. The failure of a party to call a witness to testify on its behalf is evidence that if they had testified, their testimony would have been adverse to that party. See *Satilla Rural Electric Membership Corp.*, 129 NLRB 1084, 1091 (1960). Respondent made the decision not to call Jimenez and offered no explanation as to why Jimenez was unavailable to testify. The only testimony of these statements was presented by Banuelos, a witness the ALJ found to be credible. (ALJD at 30) Respondent's exceptions have no merit and should be disregarded.

H. Respondent violated Section 8(a)(1) of the Act by Issuing Warnings to Sterling

1. The ALJ's Findings

The ALJ found that Respondent violated Section 8(a)(1) of the Act when it issued discipline to Sterling for engaging in protected, concerted activities. Respondent argues that

the ALJ was incorrect in her finding because one supervisor did not know about Sterling's protected, concerted activities, there is no connection between Sterling's protected activities and her discipline, and the ALJ's remedial order is moot. Respondent's exceptions have no merit and should be rejected.

2. The Record Evidence

a. Protected, Concerted Activities of Debra Sterling

Sterling has been an employee of Respondent since 2008, working the entire time as a security officer on the light rail. (Tr. 494) Prior to November 2010, Sterling had no discipline and had a perfect record.

In April 2010, Sterling began to experience what she perceived as sexual harassment from Major Thario. (Tr. 495-496) Sterling confided in fellow employees Banuelos, Wickham, and Tarash and based upon their encouragement, went to Human Resources Director Kercher on June 30, 2010. (Tr. 189; 385; 424- 425; 497-499; 555) Sterling filed a complaint with Respondent's hotline[14] As well as the EEOC. (Tr. 427; 500; RX 11) At that meeting, Sterling informed Kercher that she had spoken with Banuelos about Thario. (Tr. 500) Sterling sent Kercher an email later that day, detailing what had occurred with Thario. (GCX 30)

Sterling also informed Pablo of her concerns with Thario. (Tr. 502-503) Pablo's response to Sterling's concerted complaints was to send an email to Thario, Former Operations Manager Ed Martini and Kercher, with orders to separate Sterling and Banuelos so they no longer worked together on the same shift. (Tr. 87; GCX 14) Receiving word from

[14] Respondent's hotline is a program where employees can call a 1-800 number that is answered at Respondent's corporate headquarters by a call center team that transcribes the call into an official document and is assigned a case number. At that point, if the complaint is from the Phoenix office, Pablo will be notified and must address the complaint to a resolution. (Tr. 120-121)

Rice that Pablo did not believe Sterling's report about Thario's sexual harassment, Sterling filed an EEOC complaint on July 15, 2010. (Tr. 504-505; RX 14) Additionally, Sterling received word that her hotline complaint was going no where as well.[15] Sterling also sent an email to Kercher, expressing her disappointment in how her complaint had been handled and explaining that she had discussed the matter with "Susie B." who was Banuelos. (Tr. 194; GCX 31)

b. Debra Sterling's Discipline

On November 9, 2010, Sterling was alleged to have not shown up for an overtime shift that she had initially signed up for. (Tr. 209; 507) On November 10, 2010, Sterling was informed that she would be receiving a final warning for missing a shift the previous day. (Tr. 211; GCX 34) As of that date, Sterling had never previously received any discipline while employed by Respondent. (Tr. 210) The situation was a simple misunderstanding, yet Respondent went immediately to the second to last step in its progressive disciplinary policy.[16] (Tr. 212; GCX 7) Sterling had originally signed up to work an overtime shift on November 9, 2010. A week before she was to work the shift, Sterling was approached by Lieutenant Eggleston and told that he was sorry but he had to remove all overtime because overtime had to be distributed to part-time employees. (Tr. 508) Sterling confirmed this by looking on the white board in the McClintock kiosk where employees receive messages and saw a large notice that stated "All Overtime is Cancelled." (Tr. 508) Sterling also looked at the official typed schedule kept in the kiosk and saw that her name was not on the schedule to

[15] When employee Tarash complained about Thario's behavior directly to a supervisor without discussing the matter with her fellow employees, her complaint was treated seriously and Thario was discharged. (Tr. 557-558)
[16] In the past, no employee was given a final warning for a one time no-call, no show without prior discipline. GCX 36 – 39 show four other incidents where employees were either given lesser punishment for a one time no call no show or had previous discipline prior to receiving a harsh punishment for a no-call, no-show. (GCX 35-39)

work the overtime shift. (Tr. 508-509) The next day, Sterling arrived at work and was told by Armstrong that Operations Manager Ed Martini wanted to fire her but that the lieutenants had talked Martini out of terminating Sterling.[17] (Tr. 509) Armstrong stated that the termination had been turned into a final warning. (Tr. 510)

Upon learning that Sterling had allegedly missed a shift, Respondent decided that either termination or a final warning was appropriate, despite this being Sterling's first alleged infraction. (Tr. 210) Respondent was unable to provide any justification as to why Sterling was given a final warning for her first infraction. Even if Sterling had actually purposely missed a day of work, this was a departure from Respondent's progressive discipline plan for an employee who had no previous disciplinary problems. (GCX 7; 36-39) Respondent failed to present any comparable discipline where an employee with a spotless record was given a final warning for their first "no-call, no-show."

Sterling filed a hotline complaint over the final warning on December 2, 2010. (Tr. 512; RX 12) After Sterling filed the hotline complaint, Kercher reduced the discipline to a verbal written warning. (Tr. 217) Respondent has no plausible reason for continuing with the discipline of Sterling at all, given the facts of what occurred.

3. Legal Analysis

It is well established that Section 7 of the Act provides workers "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising her right to engage in protected concerted activity. Id. at 17; *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001). Here, the evidence adduced at trial demonstrates that, but for the fact that the employee Debra Sterling had concerns and voiced those concerns to employees Banuelos,

[17] Rice also testified that Armstrong told him that Operations Manager Martini wanted Sterling fired. (Tr. 463)

Tarash, and Wickham, to management, and ultimately to Respondent's hotline and the EEOC, Sterling would not have received any discipline for a misunderstanding regarding the overtime schedule on November 9, 2010. Accordingly, Sterling's entire disciplinary record for the incident on November 9, 2010, should be removed from her file.

a. The Legal Standard

The General Counsel has the initial burden of establishing a prima facie case. To establish that an employer has retaliated against an employee for exercising her right to engage in protected concerted activity, the following four elements must be established: (1) the employee engaged in concerted activities; (2) the employer knew of the concerted nature of the activities; (3) the concerted activities were protected by the Act; and (4) the adverse action taken against the employee was motivated by the activities. *Triangle Electric Co.*, supra; *Meyers Industries*, 268 NLRB 493, 497 (1984).

Once a prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *NLRB v. Mini-Togs, Inc*., 980 F. 2d 1027, 1032-1033 (5th Cir. 1993). To carry its burden, Respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's protected activity. See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("[b]y assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination

charge.") Moreover, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 n. 14 (1993). A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F. 2d 799 (6th Cir. 1982).

b. The General Counsel Has Established a Prima Facie Case

(i) Sterling's Complaints Were Protected.

Sterling engaged in protected activity when she spoke to other employees about the behavior of Major Thario, when she was encouraged by those employees to speak up and file complaints about those concerns, and when those employees filed complaints as well.

(ii) The Complaints Were Concerted.

Respondent is unable to argue that the complaints were not concerted as all the evidence shows that Respondent knew that Sterling had discussed her issues about Thario with Banuelos, that Kercher was aware that other employees had complained about Thario's behavior, and that Banuelos had also filed complaints about Thario. In *Meyers Industries*, (Meyers I), supra., the Board explained that activity is concerted if engaged in, with, or on the authority of, other employees, and not solely by and on behalf of the employee himself. Id. at 497. In *Meyers Industries*, (Meyers II), supra. the Board stated that for individual activity to be concerted it must be designed to initiate or induce or to prepare for group action or must concern *truly group complaints*. The Board has long held, with court approval, that concerted activity may consist solely of a speaker and a listener, so long as the speaker is seeking to

induce group action. This is so because such activity is viewed as an indispensable first step to employee group activity. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

Sterling's discussions with Banuelos, Tarash, and Wickham about problems with Thario including their problems with Thario were concerted activity. See *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953), enfg. 99 NLRB 849 (1952).

(iii) Respondent Knew of the Sterling's Protected Concerted Activities.

There is no doubt in this case that Respondent was aware that Sterling had spoken with other employees about Thario. Sterling not only specifically told Kercher that she had spoken with Banuelos but also put it in her email to Kercher, expressing that she needed support from others regarding her issues. Pablo was well aware that Sterling and Banuelos were engaged in protected, concerted activities. Pablo's knowledge is manifested by his email to Martini and Thario, directing that Sterling and Banuelos be separated and not assigned to the same shifts. Respondent argues it its Exceptions that there is no evidence that Armstrong knew of Sterling's protected activities and since he was the project manager at the time of the discipline, his alleged lack of knowledge of Sterling's protected activities means General Counsel has failed to establish the knowledge of Respondent. Respondent's argument has no merit. Kercher and Pablo were well-aware of Sterling's activities. Kercher was consulted during the discipline process regarding Sterling in November 2010. Knowledge of protected activity by any supervisor is imputed to Respondent and Armstrong's alleged lack of knowledge has no bearing on this element. Moreover, Martini clearly know of Sterling's protected conduct, having received Pablo's email, and Armstrong admitted that it

was Martini who wanted Sterling disciplined. Respondent's claim that it lacked knowledge of Sterling's protected conduct is unavailing.

(iv) Respondent Was Motivated By Sterling's' Protected Concerted Activities.

Sterling was singled out for a final warning because she had engaged in protected, concerted activity as defined in Section 7 of the Act. Respondent was not happy with Sterling's complaints to the EEOC or the hotline. As soon as the EEOC complaint was dismissed on November 1, 2010, Respondent waited for a moment to discipline Sterling. That moment came when Respondent believed that Sterling had been a no-call, no-show on November 9, 2010, despite the knowledge that there was confusion about the overtime cancellation. In fact, Armstrong made this point very clear by telling Rice that Martini was angry at Sterling and wanted her fired. Respondent's immediate jump to a final warning for an exemplary employee is further evidence of an unlawful motive. Respondent has failed to provide any comparative disciplinary evidence regarding Sterling's discipline and seems to infer that Sterling should be grateful that Kercher reduced the discipline to a verbal written warning. Respondent misses the point. Sterling should not have received <u>any</u> discipline as the facts clearly show that Sterling's overtime had been cancelled and that her name was not on the official schedule. Moreover, the record evidence shows four other incidents where employees were either given lesser punishment for a one time no call/no show, or had other previous discipline prior to receiving a harsh punishment for a no-call, no-show. (GCX 35-39) Respondent overplayed its hand and should be held accountable.

c. The ALJ's Proposed Remedy

Respondent argues that because it has already changed the final warning in Sterling's personnel file to a verbal warning, the ALJ's order for Respondent to remove the final warning from her file is moot. There is simply no way to know whether Respondent has removed the document that was initially a final warning, then a written warning and finally a verbal warning from Sterling's file. It is all one document, written over and changed numerous times. This document, no matter what Respondent calls it, is to be removed from Sterling's file and it has not. Therefore, the ALJ's order is not moot and the order should stand.

I. Respondent Violated Section 8(a)(3) of the Act when It Disciplined and Terminated Employee Donald Wickham

1. The ALJ's Findings

The ALJ found that Respondent terminated employee Donald Wickham (Wickham) due to his union activities. (ALJD at 39-40) Respondent argues that this finding was erroneous because Pablo had no knowledge of Wickham's union activities, Pablo had no union animus towards Wickham, and Wickham would have been terminated even in the absence of union activity. Respondent's arguments have no merit and should be rejected.

2. The Record Evidence

a. Wickham's Employment and Union History

Wickham had worked for Respondent for two years. (Tr. 380) During that time, Wickham had no discipline until his termination on February 11.

Wickham became involved in the union campaign in early October 2010. (Tr. 381) Wickham began discussing the Union with Rice and, based upon that, Wickham made a call to the International Union in Michigan, speaking to Mary Mulvaney. (Tr. 382) Based upon

his discussion with Mulvaney, the Union sent Wickham a package that contained sign-up or authorization cards, newsletters and information packets and pamphlets. (Tr. 382) Wickham received the package from the Union in early November 2010. (Tr. 383) Wickham brought the package to Respondent's worksite, took the box out of his truck, took some of the information out of the package, and gave the rest to Rice. (Tr. 384) Wickham proceeded to distribute the information he received from the Union to his co-workers at the three kiosks. (Tr. 384) Wickham called the Union in Michigan every week, (Tr. 390) and also created a code name for the Union—the Mickey Mouse club. (Tr. 391-392)

In January, Wickham was asked directly by Lieutenant Taylor as to whether Wickham had heard anything from the "Mickey mouse club" or when they were going to be here. (Tr. 393) It was clear that Respondent at this point was aware that Wickham was a main leader in the union organizing effort.

b. Wickham's Protected, Concerted Activities

In late November, early December 2010, Wickham was in the McClintock kiosk when Armstrong asked everyone to leave the kiosk except for him, Clemons, and Wickham. (Tr. 386) Armstrong then asked Wickham if he still wanted to have a job in September because if he did, he needed to work special events.[18] (Tr. 386) Wickham responded that he did want to work those events and Respondent would not get anyone to volunteer for those events because of the way Respondent paid employees. (Tr. 387) Wickham testified that, if a holiday falls on a regular 40-hour shift they would be paid straight-time; for those who had the day off and worked a special event, they received overtime pay. (Tr. 387) Wickham had discussed this issue with numerous co-workers prior to informing Armstrong of the issue.

[18] Special events are entertainment events such as football games, parties in downtown Tempe, New Year's Eve party, fireworks, Fourth of July, etc. (Tr. 386-387)

(Tr. 387) Armstrong told Wickham that he could offer him the higher rate of pay for the time but if he wanted his job, he had to work the special events. (Tr. 388)

c. February 4 Incident

On February 4, the day that all supervisors were called to an anti-union meeting, Wickham was accused of sleeping on duty. Wickham arrived at work that day and was assigned to the Apache kiosk. As shown by GCX 44-49, that kiosk is a concrete building that is located in the park and ride parking lot near the light rain train platform. Inside the kiosk, the employee sits at a desk and watches monitors showing various locations such as the parking lot and the train platform. (RX 18 – 19) Employees spend part of their shift in the kiosk watching monitors, and other parts of their shift patrolling the parking lot or train platform; their is no set schedule as to when guards are to patrol the parking lot and platform, as long as they do it throughout their shift. (Tr. 301-302)

On February 4, Wickham was working from 4:00 a.m. to 2:00 p.m. (Tr. 397) He arrived at his shift, and at some point went to the Apache kiosk. (Tr. 397) Wickham sat in the kiosk, observing the monitors. (Tr. 398) As Wickham and Gilberto Robles testified, the heat was off in the kiosk that day, and it was very cold. (Tr. 372, 397; GCX 50) On February 4, Wickham was sick with a head cold and a sinus infection, but he had not taken any medication. (Tr. 397-98) Wickham was wearing not only his regular uniform, but thermals, a fleece, a jacket, a stocking cap (beanie hat) pulled down over his ears, and gloves. (Tr. 373, 399) Wickham testified that he had drawn his arms in towards his body and was looking down at the monitors, trying to stay warm. (Tr. 401) Wickham is 5'11" and while sitting down, he had to look down to the monitors on the computer. (Tr. 401) The evidence shows that the lights in the kiosk are turned on by motion detectors; when an employee is

sitting, monitoring the computer screen and not moving around, the light sensors go off, and stay off, until substantial movement is detected by the sensors. (Tr. 373-374, 400-401)

While Respondent's witnesses Eggleston and Clemons both testified that Wickham was sleeping, they were not consistent in their testimony as to what occurred. Additionally, Eggleston left out pertinent facts in his statement written on the day he allegedly found Wickham sleeping that he remembered in his testimony several months later at an unemployment hearing. (RX 9) Eggleston tried to bolster his testimony by stating that Clemons had walked around the kiosk and looked directly at Wickham through the front glass windows before he knocked on the door yet Clemons testified that he was standing by Eggleston the entire time and only looked into the kiosk through the door. (Tr. 360-361, 577)

Wickham finished his shift and worked four more days after that. (Tr. 405-406) In fact, Eggleston called him and asked him to work the overtime shifts. (Tr. 406) As testified to by Eggleston, Wickham was his "go-to-guy". (Tr. 358)

d. Decision to Terminate Wickham

Kerchner testified that she took the video tapes of the kiosk and determined that the light in the kiosk was off for approximately twenty minutes and did not come on until the lieutenants entered the kiosk. (Tr. 146) She also testified that she could see Wickham and the word "security" on the back of his jacket while he was in the kiosk. (Tr. 146) However, watching the tape in the hearing room, it was clear that there was no way to determine whether the lights were on or off as there was no change in the lights in the kiosk when the Eggleston and Clemons entered the kiosk. Moreover, at no time could Wickham be seen on the tape, let alone his jacket or the word "security." (Tr. 231 – 240; GCX 42)[19] Further,

[19] Kercher testified that she had Jimenez watch the video tape with her on her computer monitor and he was explaining what she was seeing on the video tape. (Tr. 241-242, 274) Kercher admitted, however, that no

despite Kerchner's testimony that the lights in the kiosk had nothing to do with Wickham's discharge, the actual termination documents use as its only basis the video tape of the kiosk showing no movement inside the kiosk and directing that the light should always be on. (Tr. 242; GCX 18) There is no mention of the statements made by Eggleston or Clemons in Wickham's termination document. (GCX 18) During the termination meeting, Kercher told Wickham that, because she had reviewed the video evidence and that the lights were out and never came on, it indicated that he was asleep or amiss in his duties and was therefore terminated. (Tr. 409) When Wickham objected because others had not been terminated for one time sleeping on duty, Armstrong told Wickham "Well, I guess now we are following the rules." (Tr. 410)

Pablo states that he made the final decision to terminate Wickham. (Tr. 84) At one point, Pablo stated that he did not personally conduct the investigation of Wickham's alleged sleeping on duty and assigned that to his operations team and Kercher. (Tr. 84) Pablo also inconsistently said in later testimony, upon questioning by Respondent's counsel, that he always investigates and substantiates sleeping before he terminates an individual, testifying that he watched the video in employee Brian Pike's case prior to terminating him. (Tr. 591) Yet, Pablo never watched the video of the kiosk used as a basis for the termination of Wickham. (Tr. 596)

e. Respondent's Treatment of Other Employees

The record is full of other situations that show, despite Respondent's assertions that every employee who is caught sleeping on duty is immediately terminated, other employees

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enhanced video equipment was used and that the screen on her computer was much smaller than the screen in the hearing room. (Tr. 241, 275) It was obvious to everyone that watched the video tape that there was no discernable difference in the light in the kiosk from when Wickham was in it alone to when the lieutenants entered the kiosk.

were caught sleeping but not terminated. Those incidents have occurred from 2008 through 2011. For example, Gerald Hill was caught sleeping on November 12, 2009, and received an oral warning and is still employed by Respondent.[20] (Tr. 153-154; GCX 19) GCX 20 – 29 shows numerous examples of other employees who had been caught sleeping on duty who were not terminated immediately, regardless of prior disciplinary actions. This treatment of other employees belies Pablo's testimony that Respondent always terminates employees for sleeping on duty.

Respondent's exceptions argue that because Pablo didn't know about the incidents where employees were not terminated, then Respondent's disparate treatment is immaterial. However, Kercher is the individual who reported Wickham to Pablo. Kercher has been the human resources manager for all the Phoenix area employees since 2006, and is responsible for all disciplinary actions that are maintained in employees' personnel files. (Tr. 130-132) Respondent cannot simply state that they did not know about items from their own personnel files.

3. Legal Analysis

a. Legal Standard

Under *Wright Line*, the General Counsel has the initial burden of persuasion and must present evidence "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980). In meeting the initial burden of persuasion, General Counsel must establish four elements: (1) the alleged discriminate engaged in protected activity; (2) the employer had knowledge of that protected activity; (3) animus on the part of the employer; and (4) an adverse employment

[20] Rice testified as to how he observed Hill for a lengthy period, shined his flashlight on him and called for a witness prior to writing Hill up for sleeping on duty. (Tr. 473)

action because of the employee's protected activity. *Roadway Express, Inc.*, 327 NLRB 25, 26 (1998). The *Wright Line* "burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation. For example, inferential evidence arising from a variety of circumstances such as animus, timing and pretext." Id.

Once the General Counsel makes the required, initial showing, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB at 1089. If the employer presents such evidence, then General Counsel must rebut the defense by demonstrating that the employer would not have taken the action in the absence of the employee's protected activities. *Operating Engineers Local Union No. 3,* 324 NLRB 1183, 1188 (1997).

Finally, "where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), *enfd.,* 705 F. 2d 799 (6th Cir. 1982).

b. Wickham's Alleged Sleeping on Duty

Respondent's proffered reasoning of Wickham being caught sleeping on duty is not supported by the facts of the case. Initially, the statements of Eggleston and Clemons are inconsistent and changed over the course of several months. This inconsistent and bolstering behavior smacks of falsification and pretext, as pointed out by the ALJ. Further, both Eggleston and Clemons did not prepare their written statements until after attending an "anti-union" meeting of all supervisors and after allowing Wickham to remain on duty. If his alleged sleeping on duty was such a serious breach in conduct, Wickham should have been

sent home on the spot. Instead, Respondent continued to let him finish his shift and scheduled him for four more shifts along with a request to work overtime. Respondent argues that the ALJ made a "hyper-technical" evaluation of Eggleston and Clemons' testimony and the ALJ incorrectly focused on problems and inconsistencies with their testimony. In determining the credibility of witnesses, ALJ's must review the testimony for inconsistencies and problems and make a decision as to how much weight to give those inconsistencies in her decision. To call this "hyper-technical" is to discount the obligation of the ALJ to carefully evaluate the testimony presented. Respondent simply does not like that the ALJ used those inconsistencies and problems to find Respondent's witnesses less credible.

Respondent's own evidence of Wickham sleeping is no evidence at all. Despite Respondent's sudden pronouncement in the hearing that the video tape of the kiosk had nothing to do with the decision to terminate Wickham, after the video clearly did not show what Respondent claimed it showed, Respondent's own documentation and its statements to Wickham on the day he was terminated state otherwise. The video tape clearly shows us nothing—namely, there is no way to tell when the light was on in the kiosk and when the light was off. Despite that, Respondent, in its own records, states that the light stayed off until the lieutenants came into the kiosk, evidence that they say shows that Wickham was either sleeping or inattentive. After a review in the courtroom of the video tape, there was no way that Respondent could have come to that conclusion. Further, despite Pablo's statements that he investigates each case to determine whether an individual was actually asleep, and does not just take the word of others, he never viewed the video tape nor talked to Eggleston and Clemons.

Finally, the record evidence shows that Wickham was treated differently than other employees. Despite Respondent's statements that a first time sleeping on duty is always an automatic termination, they provided no evidence supporting that contention. Their only evidence was Pablo's statements and a list of terminations. Although the list shows individuals being terminated for sleeping on duty, there is no evidence as to whether it was the employee's first time being disciplined. For all we know, each of those terminations, outside of Wickham's, constituted an employee's second, third, fourth, or more, disciplinarily actions. Respondent simply failed to support those statements with records it clearly has in its possession.

Instead, the record shows otherwise. Numerous employees, who had nothing to do with the Union, were caught sleeping on duty, but were not fired, or were given second or third chances, before they were fired. Such disparate treatment is evidence of Respondent's illegal motive. *Joseph Chevrolet, Inc*., 343 NLRB 7, 8 (2004) Where an employer, as here, treats employees in a disparate manner with respect to their terms and conditions of employment, because they have publicly committed themselves in favor or against union representation, the employer thereby engages in conduct which tends to impinge on employee Section 7 conduct. *Wimpey Minerals USA, Inc.,* 316 NLRB 803, 805 (1995).

Respondent has argued that there is no evidence that it was aware of Wickham's union activities. This argument is not supported by the evidence. First of all, Rice, an admitted supervisor, was well aware that Wickham was the leader of the union organizing campaign, was the one contacting the Union, was receiving all the union literature, and was speaking to employees about the Union. Second, Wickham was asked by Lieutenant Tim Taylor when the "Mickey Mouse club" was going to be coming. Taylor clearly was aware that Wickham

was a leader in the union organizing efforts given this question. Further, Taylor was aware of the code name that Wickham had given the Union—the Mickey Mouse club. Knowledge of union activity is imputed to Respondent by a supervisor's knowledge. *Quality Control Electric, Inc*., 323 NLRB 238, 239 (1997) (Supervisor who made Section 8(a)(1) statements was not the hiring official but that supervisor's knowledge of union activity imputed to Respondent, finding knowledge requirement met when applicants were denied jobs based upon union activities); See also *Pinkerton's Inc.*, 295 NLRB 538 (1989). Respondent argues that Wickham's testimony is not to be believed because General Counsel did not call Taylor to corroborate these statements. Respondent chose to not call Taylor to rebut the statements.

Finally, Wickham conducted much of his union activities at, and around, the McClintock kiosk, a place that not only is the office of the supervisors but has cameras and perhaps a recording device. Respondent knew, at least by January 31, the date the petition was received by Pablo, that employees were engaged in a union campaign. (Tr. 47; GCX 33) Additionally, there were 24 employees in the petitioned-for unit. "The courts and the Board have long held that an employer's knowledge of union activities by its employees is inferable where these activities are conducted in a small plant, particularly where as here there is evidence of probing by supervisors to obtain information concerning the union activities of employees." *Wells Dairies Cooperative*, 110 NLRB 875, 891 (1954) Wickham was fired less than two weeks after Respondent received the petition. Despite Respondent's protestations, there is no doubt that Respondent was well-aware of Wickham's union activities.

Not only was Respondent aware of Wickham's union activities, but Wickham was engaged in protected, concerted activities in December 2010, when he discussed the special duty assignments and holiday pay with Armstrong. Wickham had been engaging in protected,

concerted activities with other employees in discussing the problem with the pay for special events and holidays. Upon telling Armstrong that he and other employees were not going to work the special events if there were problems with pay, Armstrong threatened Wickham with not being re-hired when the contract was up. So whether Respondent terminated Wickham for union activities, or for protected, concerted activities in complaining about the special events, Respondent was aware of Wickham's protected actions.

Despite Respondent's arguments that the record is devoid of anti-union animus by Pablo, there has been a strong and persuasive showing that anti-union animus was harbored by Respondent and contributed to Respondent's decision to discharge Wickham. Respondent, specifically Pablo, held anti-union meetings with employees immediately after the petition was filed, told employees not to talk about the Union at work, interrogated employees about union activities and support, and Jimenez' statements show just how much animus Respondent held toward the Union.

Despite its argument, Respondent, under *Wright Line*, supra, failed to establish that it would have discharged Wickham if he had not engaged in union or protected concerted activities. Indeed, General Counsel has strongly shown that Respondent's conduct was discriminatory and contrary to its behavior over the past two years with regard to employees allegedly caught sleeping on duty. Under these circumstances, Respondent is unable to demonstrate that it would have taken the actions against Wickham notwithstanding his protected activity.[21] Respondent's discharge of Wickham clearly constitutes a violation of Sections 8(a)(1) and (3) and Respondent's exceptions have no merit and should be disregarded.

[21] In *Vemco, Inc.*, the Board stated that an employer has a "particularly heavy burden" establishing a *Wright Line* defense when General Counsel establishes a strong prima facie case. 304 NLRB 911, 911-912 (1991), enfd. in part and denied in part, 989 F. 2d 1468 (6th Cir. 1993).

J. Credibility Determinations of the ALJ

1. The ALJ's Findings

The ALJ made certain credibility findings throughout her decision, some that have been discussed above. To summarize, the ALJ generally credited the testimony of current and former employees that testified but found many of the statements made by Respondent's witnesses with substantial justification, to be not credible.

2. Legal Analysis

Respondent wants nothing more than to convince the Board to ignore the ALJ's careful, well-supported determinations, ignore the credibly testimony, and instead credit its own witnesses' version of events. The Board should firmly decline because Respondent has not provided any concrete examples where the ALJ's credibility findings were glaringly erroneous. See *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951) (Board will not overrule an administrative law judge's credibility resolutions absent clear preponderance of the evidence dictates that the resolutions are incorrect); *Painters and Allied Trades District Council No. 51 (Manganaro Corporation, Maryland),* 321 NLRB 158 (1996). Rather, Respondent argues that the ALJ's statements as to why she credited General Counsel witnesses are nothing more than "generic and vague clichés," yet when she goes into specific and lengthy details regarding her credibility determinations against Respondent witnesses, Respondent calls them "hyper-technical." The facts are that the ALJ credited the witnesses she did due to appropriate observations, and discredited other witnesses for the same appropriate and legitimate reasons.

III. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. Except for the General Counsel's limited cross-exceptions which are filed under separate cover, the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order in all respects. It is further requested that the Board order whatever other additional relief it deems appropriate to remedy Respondent's numerous and serious violations of the Act.

Dated at Phoenix, Arizona, this 15th day of May 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S AMENDED ANSWERING BRIEF in G4S SECURE SOLUTIONS (USA), INC., Case 28-CA-023380 were served by E-Gov, E-Filing and by E-mail, on this 15th day of May 2012, on the following:

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