

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 28**

In the Matter of)
)
FOOD SERVICES OF AMERICA, INC.,)
a subsidiary of SERVICES GROUP OF)
AMERICA, INC.,)
)
and) **Case 28-CA-063052**
)
PAUL LOUIS CARRINGTON, an Individual)

**RESPONDENT’S RESPONSE TO CHARGING PARTY PAUL CARRINGTON’S
EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE**

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May 21, 2012

COMES NOW RESPONDENT FOOD SERVICES OF AMERICA, INC.

("Respondent" or "FSA"), by its attorneys Walker & Peskind, PLLC, and pursuant to the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, 29 C.F.R. § 102.46(d), hereby submits its brief in response to Paul Louis Carrington's ("Carrington" or "Charging Party") Exceptions to the Administrative law Judge's Decision and accompanying Brief (collectively, "Exceptions and Brief"),¹ filed in this proceeding on May 7, 2012.² Carrington's Exceptions and Brief suffer from a number of problems, not least of which is the fact that they do not conform to the procedural requirements set forth in 29 C.F.R. § 102.46(b) and (c). In particular, the Charging Party's Exceptions do not "identify that part of the administrative law judge's decision to which objection is made," and largely fails to "designate by precise citation of page the portions of the record relied on." *Id.* at § 102.46(b)(1). In addition, Carrington's Brief does not conform to the requirements of § 102.46(c) in several respects, including but not limited to the fact that it contains matter beyond the scope of his Exceptions. In accordance with 29 C.F.R. § 102.46(b)(2), the Charging Party's Exceptions should be disregarded.

Beyond their procedural infirmities, the Charging Party's Exceptions and Brief suffer from a variety of substantive defects. These include many assertions of fact not reflected in the record of this proceeding, attempts to introduce new evidence that was not made part of the

¹ Citations to the Charging Party's Exceptions are referenced as "Exc.," and citations to his accompanying Brief are referenced as "Br." References to the ALJ's decision are reflected herein as "(J.D. at p. ____)." References to the transcript of testimony at the hearing before Judge Joel P. Biblowitz, conducted January 24, 2012 through January 27, 2012, are shown generally as "(Tr. ____)," with citation to both page and line numbers, and when the reference is to testimony from a witness, the name of the witness is shown in brackets (e.g., "(Tr. ____ [Manuszak].)"). References to exhibits introduced at the hearing by the Acting General Counsel and Respondent are shown as "(GCX____)" or "(RX____)," and Joint Exhibits are referenced as "JX____." In those instances where a particular portion of a lengthy exhibit is referenced, either page numbers or Bates numbers of the particular portions referenced are also provided.

² The Acting General Counsel ("AGC") filed no exceptions to the decision of the Administrative Law Judge ("ALJ").

record before the ALJ and on which no testimony was received, and numerous misinterpretations, mischaracterizations, and outright misrepresentations of the facts established by evidence that *is* in the record. For these reasons, among others, Carrington’s Exceptions should be overruled and the ALJ’s decision adopted by the Board, except to the extent objected to in FSA’s previously filed Exceptions and accompanying Brief.³

I. CHARGING PARTY’S EXCEPTIONS

Carrington, without citation to any portion of the ALJ’s decision as required by 20 C.F.R. § 102.46(b)(1)(ii), has indicated (Exc. at 3) that he is excepting to:

1. The ALJ’s finding that the terminations by FSA of Elba Rubio (“Rubio”) and himself did not violate Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). (*See* AGC Amended Cmplt. at ¶ 4(i) and (j);⁴ JD at p. 14, l. 5 – p.15, l. 19.)
2. The ALJ’s finding that Carrington and Rubio were not engaged in activities protected under Section 7 of the Act. (*See* Amended Cmplt. at ¶ 4(f); JD at p. 14, l. 37 – p. 15, l. 19.)
3. The ALJ’s finding that Scott Bixby (“Bixby”) did not engage in unlawful interrogation of Carrington. (*See* Amended Cmplt. at ¶ 4(g)(1); JD at p. 12, ll. 42-50.)
4. The ALJ’s finding that Bixby did not create an impression of unlawful surveillance. (*See* Amended Cmplt. at ¶ 4(g)(4); JD at p. 12, l. 42 – p. 13, l. 23.)

³ Due to unanticipated computer problems, Respondent’s Exceptions and accompanying Brief were filed electronically at 12:07:46 a.m. and 12:08:05 a.m. Eastern Daylight Savings Time (“EDT”), respectively, on May 9, 2012, a few minutes past the deadline of May 8, 2012 at 11:59 p.m. FSA filed a Motion to Accept Respondent’s Exceptions To Decision of Administrative Law Judge And Brief In Support Of Exceptions on May 16, 2012.

⁴ The Amended Complaint erroneously alleges that Carrington was discharged on March 4, 2011, and that Rubio was discharged on March 7, 2011. In fact, the termination dates in the Amended Complaint are reversed, and it was Rubio who was terminated on March 4, with Carrington then terminated on March 7. (Tr. 45, ll. 1-5 [Manuszak]; Tr. 283, ll. 22-23 [Carrington].)

5. The ALJ's finding that Steve Manuszak did not promulgate an overly broad and discriminatory rule prohibiting employees from providing personal references for other employees. (*See* Amended Cmplt. at ¶ 4(h)(1); JD at p. 11, l. 32 – p. 12, l. 22 and p. 13, ll. 25-31.)

Notably, Carrington's Exceptions raise no objection to the ALJ's decision declining to find that Respondent: (1) promulgated any overly-broad and discriminatory rule prohibiting employees from talking to other employees (*see* Amended Cmplt. at ¶ 4(g)(2)); (2) threatened employees with reprisals for engaging in concerted activities (*see* Amended Cmplt. at ¶ 4(g)(3)); or (3) violated Section 8(a)(1) of the Act by maintaining an overly-broad and discriminatory rule regarding solicitation (*see* Amended Cmplt. at ¶ 4(a)(4)). Accordingly, pursuant to 29 C.F.R. § 102.46(b)(2), any potential objections to those aspects of the ALJ's decision must be deemed to have been waived.⁵

II. FACTUAL BACKGROUND

A. The Nature of FSA's Business

FSA is a broad line food distributor. Respondent screens and assembles suppliers (vendors) to provide it with manufactured products and distributes those products to a wide range of food service operators across the Pacific Northwest. (Tr. 404, l. 24 – 405, l. 10 [Bixby].) The market served by FSA is highly competitive. (*Id.* at 406, ll. 22-25 [Bixby].) Key variables that figure in the success of participants and provide the bases for competitors to differentiate themselves in that market include identity of the vendor base, product specifications, volume of products purchased from specific vendors, customer identities, array of products sold to specific customers, pricing, and the ability to maintain the confidentiality of vendor and customer

⁵ Carrington does advance factual assertions and arguments with respect to these issues in his Brief, but such assertions and arguments violate the proscription against including matters in the Brief that are beyond the scope of the Exceptions and must, therefore, be disregarded.

information. (*Id.* at 405, l. 18 – 413, l. 12 [Bixby].) Such information is highly valuable, and its disclosure to FSA’s competitors could be very harmful to its ability to compete effectively against its business rivals. (*Id.*)

B. Employment Histories of Rubio and Carrington

Rubio was employed by Knight Brokerage, an affiliate of Knight Transportation, Inc. (“Knight”), prior to commencement of her employment with FSA as a Supplier Information Specialist on May 27, 2008. (Tr. 108, l. 22 – 109, l. 4 [Rubio]; Tr. 172, ll. 8 - 19 [Rubio].) After only about three months with FSA, Rubio transferred to a position with GAMPAC Express, Inc. (“GAMPAC”), another subsidiary of FSA’s corporate parent, where she worked for a little less than two years, and then was hired back into FSA in the position of Supplier E-Commerce Specialist in June of 2010. (Tr. 109, ll. 6-16 [Rubio].) Throughout the time Rubio worked for FSA – both before and after her employment with GAMPAC – Merissa Hamilton (“Hamilton”) was her supervisor. (*Id.* at 110, ll. 11-25 [Rubio].) It was Hamilton who brought to Rubio’s attention the Supplier E-Commerce Specialist opening and the opportunity to return to work at FSA in Hamilton’s department. (Tr. 181, l. 11 – 182, l. 7 [Rubio].)

Carrington began his employment with FSA as a Supplier Information Specialist in September of 2008. (Tr. at 270, ll. 6-22 [Carrington].) He was laid off as part of a reduction in force in August of 2009, and then recalled to the same position in early November of that year. (*Id.*) He also reported to Hamilton throughout his tenure with FSA. (Tr. 270, l. 25 – 271, l. 2 [Carrington].)

C. Rubio’s Relationship With Hamilton

Rubio and Hamilton first came to know each other, and became close friends, while Rubio was employed by Knight Brokerage, and Hamilton was employed by Knight

Transportation. During this period, they hung out together, got to know each other's families, talked about a broad range of issues, spent time in each other's homes, and celebrated holidays together, including Christmas, when they exchanged Christmas cards and presents. (Tr. 172, l. 8 – 173, l. 19 [Rubio]; Tr. 174, l. 25 – 175, l. 11 [Rubio].) Indeed, they became so close that Hamilton considered Rubio to be her “best friend and we talked about religion all the time throughout our friendship for the several years we were close friends.” (Tr. 485, ll. 11-14 [Hamilton].) Rubio even served as a bridesmaid at Hamilton's wedding in October of 2010. (Tr. 183, l. 15 – 184, l. 11 [Rubio].) By late 2010, however, their friendship had soured. (Tr. 486, ll. 10-13 [Hamilton].)

In January of 2011, Rubio lodged an oral complaint with Steve Manuszak, FSA's Senior Vice President for Associate Services (“Manuszak”), alleging that she had been subjected to religious discrimination (Rubio claims to be agnostic, and Hamilton is Christian)⁶ by Hamilton and asserting that Hamilton had been less than honest in her dealings with employees and her superiors. (Tr. 122, l. 10 – 123, l. 10 [Rubio].)⁷ The allegation of religious discrimination arose out of an exchange of emails between Rubio and Hamilton that had occurred November 6-8, 2010. (GCX21; Tr. 118, l.22 – 119, l.23 [Rubio]; Tr. 159, ll. 12 – 160, l. 9 [Rubio].)

Rubio interpreted the emails from Hamilton in this exchange as “encouraging me to be religious and that my life would change in that, you know, I would be more promotable at work if I became religious.” (Tr. 119, ll. 9-11; Tr. 120, ll. 10-11.) In fact, Hamilton repeatedly

⁶ (Tr. 118, l. 22 – 119, l. 11 [Rubio].)

⁷ At the hearing, Rubio claimed that she had reported to Manuszak that she been subjected to discrimination on the basis of her national origin, in addition to alleged religious discrimination. (Tr. 116, l. 10 – 118, l. 21 [Rubio]; Tr. 120, ll. 16-24.) Manuszak recalls her having only made allegations of religious discrimination when she lodged her complaint with him. (Tr. 47, ll. 7-18 [Manuszak]; Tr. at 48, ll. 8-12 [Manuszak]; Tr. 72, ll.17-23 [Manuszak]; Tr. 499, ll. 14-20 [Manuszak].) Carrington also understood Rubio's discrimination complaint as having had to do with religious discrimination. (Tr. 278, l. 20 – 279, l. 5 [Carrington].)

emphasized in this exchange that she was concerned about Rubio as a friend and was offering, not imposing, religion as a possible solution for Rubio's personal problems.⁸

Nevertheless Manuszak counseled Hamilton that, her long-term friendship with Rubio notwithstanding, communications about such subjects with subordinate employees was not appropriate. (Tr. 72, ll. 4-16 [Manuszak].) This counseling was reinforced by Jeff Chester, Hamilton's immediate supervisor, in a separate conversation. (Tr. 428, ll. 2-17 [Bixby].) This seemed to have resolved the issue. (Tr. 428, ll.18-23 [Bixby].)

D. Rubio's Harassment of Coworker Michelle Aparicio

Rubio recommended that Hamilton hire for a part-time position in her department Michelle Aparicio ("Aparicio), with whom Rubio had become friends when Aparicio worked for another subsidiary of FSA's corporate parent. (Tr. 114, l. 24 – 115, l.4 [Rubio].) Although Rubio and Aparicio were friends when the latter began working for FSA in October of 2010, that changed over time because of Rubio's repeatedly telling Aparicio that she was on the verge of getting fired, and because Aparicio discovered that Rubio had lied to a mutual friend about her. (Tr. 257, l. 4 – 258, l. 5 [Aparicio].)

Rubio started telling Aparicio that she was about to be fired in December of 2010 (two months after Aparicio started her job with FSA), and continued to do so every other day, until Rubio was terminated in early March of 2011. (Tr. 258, l. 6 – 259, l. 4 [Aparicio].) It was a lie. In fact, Hamilton was quite pleased with Aparicio's job performance, had no thought of

⁸ (GCX21 at 1.) Notably, Rubio effectively acknowledged in the exchange itself that she was "distressed because of my personal life, and problems with my family I can't control or help with." (*Id.*)

terminating her, and even changed her status from part-time to full-time at the beginning of January of 2011. (Tr. 229, ll. 2-6; 230, l. 9 – 231, l. 16 [Hamilton].)⁹

The malicious nature of Rubio's fabrications is made all the more egregious by the fact that she knew Aparicio is the single parent of three minor children and the sole source of financial support for her family. (Tr. 126, ll. 3-4 [Rubio]; Tr. 187, ll. 22-24 [Rubio].) As a result of being constantly told by Rubio that she was going to be losing her job at any time, Aparicio was sufficiently concerned that she began actively looking for employment elsewhere to ensure that she could continue to provide for her family, and Rubio actively encouraged this by sending Aparicio links to sites with job openings so she could fill out applications on line. (Tr. 259, ll. 11- 22 [Aparicio]; Tr. 262, l. 24 – 263, l. 2 [Aparicio].)

By early March, 2011, Aparicio had become convinced that Rubio had not been truthful with her, however, and she informed Hamilton. (Tr. 261, l. 8 – 262, l. 10 [Aparicio].) By way of corroboration, Aparicio sent Hamilton an Instant Message ("IM") exchange between Rubio and herself (GCX4), which was in Spanish, and she helped Hamilton translate it into English. (Tr. 263, l. 9 – 265, l. 17 [Aparicio].)

In the IM exchange, Rubio again repeated her refrain that Hamilton wanted to fire Aparicio. (GCX4.) Rubio also said she wanted to see whether Hamilton "says something racist again," and she tried to enlist Aparicio in a scheme to ambush Hamilton by provoking her: "Let's talk in Spanish when she comes back several times and see if she can get pissed off and say something stupid." (*Id.*) Aparicio declined the invitation (*Id.*)

⁹ Both Rubio and Carrington admitted at the hearing that they actually thought Aparicio was receiving "preferential treatment" from Hamilton. (Tr. 158, ll. 14-15 [Rubio]; Tr. 338, l. 12 – 339, l. 2 [Carrington].) This is a theme further advanced in Carrington's Brief, although much of what he has to say on the subject is based on factual assertions not in the record in this case. *See* Br. at 31-33.

E. The Termination of Rubio's Employment

When Manuszak and Scott Bixby (“Bixby”), FSA’s Senior Vice President and Chief Merchandising Officer, learned of what Rubio had been up to, they decided it was necessary to terminate her employment with FSA on Friday, March 4, 2011. (Tr. 45, ll. 6-8 [Manuszak]; Tr. 89, l. 19-21 [Manuszak].) The decision was based primarily on Rubio’s maliciously false representations to, her harassment and manipulation of, and her attempt to bring about the departure of, Aparicio. (Tr. 71, ll. 3-20 [Manuszak]; Tr. 431, ll. 16-24 [Bixby]; Tr. 498, ll. 12-24.)¹⁰ Manuszak also weighed in the factor of Rubio’s vindictiveness toward Hamilton and her attempt to undermine Hamilton’s authority as a supervisor. (Tr. 498, l. 25 – 499, l.6 [Manuszak]).¹¹

F. Carrington's and Rubio's Theft of Confidential Trade Secret and Proprietary Information and the Termination of Carrington's Employment

Acting at Rubio’s behest, Carrington went to FSA’s offices early in the morning of Saturday March 5, 2011, the day immediately following her termination, picked up his FSA-issued computer, and proceeded to transmit, over that day and the next, more than three hundred email strings (in excess of 2,100 pages in hard copy), most of which contained highly confidential trade secret or proprietary information belonging to FSA, its vendors, and its customers. (*See* RX7; JX1-9; Tr. 163, l. 20 – 164, l. 8 [Rubio]; Tr. 191, l. 4 – 192, l.10 [Rubio]; Tr. 278, ll. 110-19 [Carrington]; Tr. 295, l. 6 – 296, l. 18 [Carrington]; Tr. 298, l. 2 – 308, l. 23

¹⁰ For Bixby, an additional consideration was a violent episode a few weeks earlier when Rubio had lost control of her temper in the workplace and had slammed a chair and thrown a keyboard. (Tr. 431, l. 25 – 432, l. 9 [Bixby].)

¹¹ Both Manuszak and Bixby testified unequivocally that Rubio’s discrimination complaint had played no role in their decision to terminate her. (Tr. 432, ll. 16-19 [Bixby]; Tr. 499, ll. 7-13 [Manuszak].)

[Carrington].)¹² Carrington had no legitimate, work-related, reason to be in FSA's offices over that weekend, or to access FSA's computer system, and he was not in any sense authorized to disclose such information to anyone outside the Company, including most particularly a recently terminated former employee. (Tr. 323, l. 13 – 324, l. 19 [Carrington].)

The email strings Carrington transmitted contained confidential and commercially sensitive information including the names of FSA's vendors, names of FSA's customers, manufacturer codes, brand names, pricing information, and terms of sale. (Tr. 103, l. 14 – 104, l. 7 [Rubio]; Tr. 281, ll. 8-24 [Carrington].) He opened each of the emails before transmitting them, so he knew full well the nature of the information he was sending to Rubio and himself. (Tr. 299, l. 16 – 301, l. 5 [Carrington].) The value of the materials taken by Rubio and Carrington on March 5 and 6, 2011, is estimated to be well in excess of \$25,000. (Tr. 484, ll. 10-25 [Hamilton]; Tr. 489, l. 10 – 492, l. 14 [Hamilton].)¹³

There is also evidence that Carrington took another large amount of confidential trade secret and proprietary information in early February of 2011 (“the February Dump”), which was not discovered until after his termination. (RX6; RX7; Tr. 367, l. 20 – 370, l. 10 [Babbitt]; Tr. 379, l. 15 – 382, l. 21 [Babbitt].) The ALJ cut off a witness who was testifying about the contents of the materials taken in February, however, and stated on the record: “I’m not interested in the February ones” (Tr. 383, ll. 4-8.)

¹² Carrington's transmission of these email strings on March 5 and 6, 2011 was frequently referred to at the hearing, and will be similarly referenced hereinafter, as “the March Dump.”

¹³ Neither the AGC nor Carrington adduced any evidence challenging this estimate. The significance of the \$25,000 figure lies in the fact that theft of property or services with a value of \$25,000 or more is a class 2 felony in Arizona, punishable by up to 10 years in prison for a first offense under Arizona law. A.R.S. §§ 13-1802, 13-702(D). Similarly, violations of the federal Computer Fraud and Abuse Act where the value of the information affected exceeds \$5,000 are punishable by fines and imprisonment for up to five years. 18 U.S.C. § 1030(a)(2) and (c)(2)(B).

There is also evidence that Rubio stole similar information from her prior employer Knight Brokerage. (RX3; Tr. 209, l. 12 – 213, l. 23 [Rubio].) The ALJ refused to receive evidence of this, however, on the ground that it was not relevant. (Tr. 214, l. 6 – 216, l. 4.)

G. Refusal by Carrington and Rubio to Return Stolen Information

On March 8, 2011, Steven J. Twist, FSA’s General Counsel, sent letters to both Rubio and Carrington informing them that FSA was aware that they had “wrongfully, illegally, and without authority” acquired confidential and proprietary information belonging to Respondent, and demanding its return. (RX2; RX4.) Rubio never responded to the letter and returned none of the stolen information in her possession. (Tr. 198, l. 23 – 200, l. 20 [Rubio].) Carrington responded with an email to Mr. Twist on March 14, 2011 (RX5), in which he asserted that he had no such information. At the hearing, however, Carrington admitted that this assertion had been false. (Tr. 315, l. 3 – 316, l. 16 [Carrington].)

III. ARGUMENT

A. The ALJ’s Findings With Respect To The Credibility And Other Evidence Of A Lack Of Credibility In Rubio And Carrington

The ALJ found Rubio to be “the least credible” among the key witnesses who testified at the hearing, and he noted in particular that her “testimony was often evasive on cross examination.” (JD at p. 14, ll. 16-17.) Carrington, he found, was “at times, evasive in [his] testimony, but, at times . . . also fairly credible.” (*Id.* at p. 14, ll. 18-19.)

Beyond the ALJ’s express findings, however, there is considerable evidence in the record of prevarication in the testimony of both Rubio and Carrington. Perhaps most glaringly, there is the problem with their testimony about what happened on the morning of Saturday, March 5, 2011, the day following Rubio’s termination. Both acknowledged that Rubio had accompanied Carrington when he went to the building where FSA’s offices are located, but both vehemently

denied that she had entered the building. (Tr. 193, l. 1 – 194, l. 18 [Rubio]; Tr. 294, ll. 12-25 [Carrington].) Unfortunately for the two of them, Marcus Smith, a Computer Operator employed by Respondent, was in the building that day and personally witnessed Rubio entering the building in the company of Carrington. (Tr. 396, l. 12 – 397, l. 9 [Smith].)

In addition, there is the problem of Carrington's having been forced to admit that his email to FSA's General Counsel on March 18, 2011 (RX5), denying that he had any of FSA's materials in his possession was a bald-faced lie. (Tr. 315, l. 3 – 316, l. 16 [Carrington].) Where Rubio is concerned, the evidence in the record of her campaign of incessant lies to Aparicio about Hamilton's wanting to get Aparicio fired is overwhelming. (GCX4; Tr. 257, l. 4 – 259, l. 4 [Aparicio].)¹⁴ Significantly, no testimony or other evidence was introduced at the hearing controverting this.

Rubio's credibility is further undercut by internal inconsistencies. In one instance, she testified that Hamilton had reprimanded an employee for speaking Spanish in the workplace in *July or August of 2009*. (Tr. 120, ll. 16-24 [Rubio]; Tr. 124, l. 22 – 125, l. 5 [Rubio].) She also testified that Aparicio had been present when Hamilton allegedly had expressed disapproval of an employee's speaking Spanish in the workplace. (Tr. 126, ll. 6-12.) The record is clear, however, that Aparicio did not even begin working for FSA until *October of 2010*. (Tr. 111, ll. 1-8 [Rubio].) And at another point, Rubio testified that she herself had only *heard* about the alleged incident from another employee. (Tr. 120, ll. 19-22 [Rubio].)

Yet another instance clearly showing Rubio's and Carrington's credibility deficits is to be found in their testimony about the pricing information that was included in the massive amount of materials in the email strings Carrington transmitted to Rubio and himself on March 5 and 6,

¹⁴ With respect to Aparicio's credibility, the ALJ found: "As regards credibility, . . . I found Aparicio clearly the most credible. Although she was still employed by the Respondent and had been harassed at work by Rubio, it appeared to me that she was attempting to testify in an open and truthful manner." (JD 14, ll. 12-15.)

2012. Rubio denied that she had had any access to pricing information in her job with FSA. (Tr. 113, ll. 9-13 [Rubio]). Carrington claimed that whatever pricing information to which he had access in his job was sent to a separate email address, and not to his own work email address. (Tr. 272, l.24 – 273, l. 10 [Carrington].) When the email strings transmitted on March 5 and 6, 2011, are examined, however, one finds considerable pricing information to which both of them had access and that had been received by them at their work email addresses. (JX1 p. FSA0035; JX3 p. FSA0371; JX4 pp. FSA0514-FSA0515 and FSA0573-0576; Attachments – FSA4215-FSA4216; FSA4341 – FSA4343; FSA4353 – FSA4354; FSA 4412 – FSA4419).

B. The AGC Failed To Establish A Prima Facie Case That There Was Anything Unlawful About The Terminations Of Rubio And Carrington.

As the ALJ held (J.D. at p. 14, ll. 18-21), under the Board’s decision in *Wright Line*, *Wright Line Div.*, 251 NLRB 1083, 1089 (1980), *enf.* 662 F.2d 899 (1st Cir. 1981, *cert. den.* 455 U.S. 989 (1982), the AGC was required to make a prima facie showing sufficient evidence to support an inference that protected conduct was a “motivating factor” in Rubio’s and Carrington’s terminations. The AGC and Carrington in his Brief have sought to suggest that Rubio’s termination was an act of retaliation for her having lodged a complaint of discrimination with Manuszak in mid-January of 2011. As the ALJ held, however, there was “no credible evidence that Respondent harbored animus toward Rubio as a result of her complaint about the religious email and there is no evidence of any connection between the complaint that she made and her discharge two months later.” (J.D. at 14, ll. 30-34.) Carrington has pointed to no record evidence in his Brief that would supply the missing evidence of animus or a connection between Rubio’s complaint and her termination.

There can, of course, be no violation of § 8(a)(1) by the employer if there is no underlying § 7 conduct by the employee. Conduct must be both concerted and protected to fall within § 7.

Yesterday's Children, Inc. v. NLRB, 115 F.3d 36, 44 (1st Cir. 1997), accord *Smithfield Packing Co. v. NLRB*, 510 F.3d 507, 516 (4th Cir. 2007).

The record in this case is devoid of any evidence indicating that either Manuszak or Bixby, both of whom were involved in the decisions to terminate Rubio and Carrington, had any knowledge of their involvement in protected concerted activity subject to protection under Section 7 of the Act. There was nothing whatever concerted about the complaint Rubio lodged with Manuszak in January of 2011. It was strictly about Hamilton's allegedly discriminatory treatment of Rubio and no one else. (Tr. 71, l. 21 – 73, l. 8 [Manuszak].)

Rubio's attempt to enlist Aparicio in a scheme to provoke Hamilton to "say something stupid" (GCX4 at 1.) also cannot be said to be conduct protected by the Act. While it is imbued with a "concerted" element, it is not worthy of Section 7's protection because it has nothing to do with "mutual aid and protection." It is not an instance of an employee seeking to engage a co-worker in complaining about existing terms and conditions of employment, and it is not an instance of employees working in concert to propose new terms and conditions. Given the duplicitous scheme that was central to Rubio's campaign to convince Aparicio that she should find employment elsewhere, her motivation behind proposing that the two of them speak Spanish to see if they could get Hamilton "pissed off" was much more likely motivated by a desire to see if she could get Aparicio in trouble than it was to have been about "mutual aid and protection" sanctioned by the Act.

Beyond this, Rubio's invitation to Aparicio was, on its face, calculated to see if they could bring about supervisory conduct that she thought would, if it occurred, be objectionable. To extend Section 7's protection to employee attempts to *precipitate* employment conditions so they will have something to protest would be to convert the shield the Act was conceived to

provide employees into a sword that could be used to stir up employment disputes where there are none. This would stand on its head the expressly declared Congressional purpose of eliminating or minimizing “[i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce” 29 U.S.C. § 141.

Nor did the AGC fare any better in his attempt to establish a *prima facie* case for a violation of the Act based on Carrington’s termination. The theory seems to be that his involvement in the massive theft of valuable trade secret and proprietary information was undertaken in support of Rubio’s claim of alleged “discrimination” and that somehow transforms clearly criminal conduct into conduct worthy of Section 7’s protection. If that was indeed the motivation behind Carrington’s March email dump,¹⁵ the problem is that no one who participated in the decision to terminate him for it had even the slightest awareness of a connection between Carrington and Rubio’s allegations of discriminatory treatment. Carrington himself testified that he never filed any sort of discrimination complaint with FSA, and that he never told anyone in Management that he was supporting Rubio’s allegations of discrimination. (Tr. 324, l. 20 – 325, l. 6 [Carrington].)

Moreover, in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the United States Supreme Court held that, when an employee “attacks” his employer, whether or not the employee is engaged in “a concerted activity wholly or partly within the scope of those mentioned in § 7,” the attack deprives the employee of Section 7’s protection if it constitutes “insubordination, disobedience or disloyalty,” which, the Court made clear, is “adequate cause for discharge.” 346 U.S. at 477-78; *see also Endicott Interconnect Technologies*,

¹⁵ As the ALJ astutely pointed out, Carrington took two days to accomplish the March email dump, which was more than adequate time to sort through them and transmit only those relating to Rubio’s and his issues with working conditions. That he was not selective and has never even attempted to explain any relationship between the commercial information he transmitted and such issues severely undercuts his claim that the transmission had anything to do with protected activity.

Inc. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006) (applying *Jefferson Standard* to deny enforcement of Board's finding of § 8(a)(1) and (3) violation despite employee's "disloyal" derogatory comments about employer).

C. Even If Rubio And Carrington Engaged In Some Form Of Protected Activity, Their Acts Of Disloyalty And Criminal Conduct Forfeited The Act's Protections.

Surely, there can be no more disloyal act by an employee than the commission of a crime against his employer. Regardless of their motives, and regardless of whether they were engaged in some sort of otherwise protected concerted activity, if Carrington and Rubio transgressed the bounds of the criminal law in taking FSA's confidential trade secret and proprietary information, they placed themselves beyond the bounds of any protection accorded by the Act.

"Confidential business information has long been recognized as property." *Carpenter v. U.S.*, 484 U.S. 19, 26 (1987) (citations omitted). Whatever their status under Section 7 before they decided to help themselves to FSA's confidential business information, Carrington and Rubio lost the right to claim its protections upon doing so. Regardless of their motive, their taking Respondent's trade secret and proprietary information effectively put them in the same category as they would have been in had they backed a truck up to the entrance to the building where FSA's offices are located and helped themselves to several thousands of dollars of office equipment. Clearly, the question of whether Carrington and Rubio committed crimes in which Respondent was the victim is indisputably pertinent to the question of whether the *Wright Line* analysis is ever reached.

The Economic Espionage Act makes it a federal felony for one with intent to convert a trade secret to "without authorization cop[y], duplicate[], download[], upload[] . . . replicate[], transmit[], deliver[], send[], mail[], communicate[], or convey[]such information" to the benefit

of anyone other than the owner of the information. 18 U.S.C. § 1832(a)(2). “Trade secret” is defined for this purpose to include “all forms and types of financial, business, scientific, technical, economic, or engineering information” 18 U.S.C. § 1839(3). The record in this case leaves no room for doubt that Rubio and Carrington have engaged in conduct violating this criminal prohibition.

Similarly, it is a felony under the federal Computer Fraud & Abuse Act for one, acting intentionally without authorization, or in excess of his authorization, to obtain information from a protected computer (which includes any computer used in interstate commerce), or intentionally to access a protected computer without authorization and cause resulting damage and loss. 18 U.S.C. § 1030(a)(5)(A). Here again, on this record, it is indisputable that Carrington and Rubio have also violated this proscription, making themselves subject to its criminal penalties.

Under the Arizona Criminal Code, a person commits theft if “without lawful authority, the person knowingly . . . [c]onverts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant’s possession for a limited , authorized term or use” A.R.S. § 13-1802(A)(2). Where the property converted has a value of \$1,000 or more, the theft constitutes at least a Class 6 felony. A.R.S. § 13-1802(G). The record in this case establishes beyond a doubt that FSA’s property has been converted in violation of this statute.

Computer tampering, also a Class 6 felony under the Arizona Criminal Code, is defined to include conduct in which one “who acts without authority or who exceeds authorization of use . . . [to] knowingly access[] any computer, computer system or network or any computer software, program or data that is contained in a computer, computer system or network.” A.R.S.

§ 13-2316(A)(8). That Carrington and Rubio transgressed the prohibition in this statute is also very clear.

Arizona's version of the Uniform Trade Secrets Act ("UTSA") defines trade secrets to include information that "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." A.R.S. § 44-401(4)(a). Misappropriation of trade secrets includes "[d]isclosure or use of a trade secret of another without express or implied consent . . . [that] was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use" A.R.S. § 44-401(2)(b)(ii). It is clear that misappropriation of trade secrets as defined in the UTSA is also subject to criminal remedies, including those for theft set forth in A.R.S. § 13-1802. *See* A.R.S. § 44-407(B)(3) (criminal remedies not supplanted by USTA). There can be no legitimate debate that the materials stolen from FSA by Carrington and Rubio fit the definition of trade secrets under Arizona law.

These violations of federal and State criminal law were compounded by the failure of Carrington and Rubio to return the materials they had stolen immediately upon their receipt of the letter from FSA's General Counsel demanding that they do so. Even worse is Carrington's email response to that letter fraudulently representing that all such information had been removed from his computer and he had retained none of it. (RX5.)

Finally, the AGC's claim on behalf of Rubio is beset with further problems arising from her campaign of lies to Aparicio seeking to induce her to leave FSA's employ. First, the Board has made it clear that an employee's lies and deliberate deception, even when part of the *res gestae* of protected activity, will cause him to lose the Act's protection. *See Oghara America Corp.*, 347 NLRB 110, 112-113 (2006). Moreover, even straightforward attempts to induce a

fellow employee to leave his current employment to take a job with another employer constitute acts of disloyalty that exceed the protections of the Act. *See Abell Engineering & Manufacturing, Inc.*, 338 NLRB 434, 435 (2002).

D. Bixby Did Not Engage In Unlawful Interrogation Or Create An Impression Of Unlawful Surveillance.

The centerpiece of Carrington's testimony about his meeting with Bixby on March 4, 2012, in the wake of Rubio's termination is that Bixby told him not to speak with Rubio. (Tr. 277, ll. 1-9.) It is inherently implausible to suggest, however, that an employer would purport to prohibit an employee's contact with *any* former employee. How exactly, one wonders, does a supervisor imagine he would enforce such a prohibition? The very absurdity of the proposition casts a dark shadow over all of Carrington's testimony about his March 4 meeting with Bixby. There may be a supervisor somewhere who would fail to see the utter futility of such a proscription, but there is absolutely nothing in the record in this case suggesting that Bixby would be so foolish. Especially when coupled with the considerable other evidence outlined above indicating that major portions of Carrington's testimony is not to be believed, this representation of Bixby's comments in the meeting are simply not to be believed.

Neither in his Brief nor in his testimony, even if taken at face value despite the many indications of its unreliability, has Carrington described anything that could remotely be described as interrogation. Every sentence he ascribes to Bixby is a declarative statement, except that, in response to a leading question from the AGC, Carrington claims that Bixby asked him if he knew why they were meeting. (Tr. 277, l. 1 – 278, l. 3.) Whatever else might be said about it, this is not interrogation in any sense, and it is certainly not interrogation of the unlawful kind.

Nor was there anything said in the meeting – again, putting aside the indicia of unreliability in Carrington's testimony and accepting his description of the meeting at face value

– that could reasonably be described as creating an impression of surveillance. Carrington testified that Bixby had told him his name had come up in connection with Rubio’s. (Tr. 277, ll. 3-4.) This comment is unremarkable, especially in light of the fact that Carrington’s name was specifically mentioned in the instant message between Rubio and Aparicio that figured in Rubio’s termination, in which Rubio specifically stated that: “[Hamilton’s] also started to fight with Paul [sic] over stupid stuff.” (GCX4 at 2). For Bixby to have mentioned this is hardly a suggestion that Carrington or any other employee was being subjected to unlawful surveillance.

E. There Is No Evidence Of An FSA Rule Prohibiting Non-Management Employees From Giving References For Other Employees

The only evidence in the record in this case of *any* rule regarding a restriction on giving references is Manuszak’s testimony that *management* employees are instructed to refer all requests for references to Associate Services (HR) because of concerns about exposure to libel and slander claims. (Tr. 506, l. 21 – 507, l. 8.) This testimony was uncontroverted.

IV. CONCLUSION

For all the foregoing reasons, Carrington’s Exceptions should be overruled and the portions of the ALJ’s decision to which they are addressed should be confirmed and adopted by the Board.

DATED: May 21, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Response to Charging Party Paul Carrington's Exceptions to the Decision of Administrative Law Judge was served on the following parties to this matter, their counsel of record, the Regional Director of the National Labor Relations Board Region 28, and the Administrative Law Judge, on this 21st day of May, 2012, by the NLRB's e-filing system:

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