

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

**FOOD SERVICES OF AMERICA, INC.,  
a subsidiary of SERVICES GROUP OF  
AMERICA, INC.**

**and**

**Case 28-CA-063052**

**PAUL LOUIS CARRINGTON, an Individual**

**BRIEF IN SUPPORT OF THE ACTING GENERAL  
COUNSEL'S CROSS-EXCEPTIONS**

Chris J. Doyle  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 640-2198  
Facsimile (602)-640-2178  
Email: [christopher.doyle@nlrb.gov](mailto:christopher.doyle@nlrb.gov)

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT AS ALLEGED .....	3
1.	Respondent Violated Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory No Solicitation Rule in Its Handbook.....	3
2.	Respondent’s Confidentiality Rules Violate Section 8(a)(1) of the Act, Including by Conveying Threats of Unspecified Reprisals .....	5
a.	Respondent Violates Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory Rule and Policy Prohibiting Employees From Disclosing Employees’ Cell-Phone Numbers .....	7
3.	Respondent Violated Section 8(a)(1) of the Act by Discharging Rubio; Its Other Conduct on March 4 Also Violates the Act .....	9
a.	Factual Background .....	9
b.	ALJ Credits Carrington’s Testimony Regarding the March 4 <sup>th</sup> Meeting .....	11
c.	Respondent Violated the Act by Interrogating Its Employees.....	11
d.	Respondent Violated the Act by Creating the Impression of Surveillance .....	12
e.	Respondent Violated the Act on March 4 by Threatening Its Employees .....	13
f.	Respondent Violated the Act on March 4 by Orally Promulgating and Overly-Broad and Discriminatory Rule Prohibiting its Employees from Talking to Each Other.....	15
4.	Respondent Violated Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory Rule Prohibiting Employees from Providing Personal References to Other Employees .....	17
5.	Respondent Violated Section 8(a)(1) of the Act by Discharging Rubio Because She Engaged in Protected Concerted Activities Protected by Section 7 of the Act.....	18
a.	General Counsel’s Prima Facie Case .....	18

b.	Respondent Has Failed to Meet Its Wright Line Burden With Regard to the Discharge of Rubio .....	21
6.	Respondent Violated Section 8(a)(1) of the Act by Discharging Carrington ..	22
a.	Carrington Engaged in Protected and Concerted Conduct .....	22
b.	<i>Wright Line</i> Analysis .....	25
c.	<i>Burnip &amp; Sims</i> Analysis .....	30
d.	Respondent Discharged Carrington Because He Violated Respondent’s Unlawful Rules.....	31
III.	CONCLUSION .....	33

## TABLE OF AUTHORITIES

<i>Aladdin Gaming, LLC</i> , 345 NLRB 585, 595 (2005).....	12
<i>Alberts, Inc.</i> , 213 NLRB 686 (1974), enfd. 543 F.2d 417 (D.C. Cir. 1976) .....	4
<i>Anserphone of Michigan</i> , 184 NLRB 305, 306 (1970).....	9
<i>Automatic Screw Products Co.</i> , 306 NLRB 1072 (1992) .....	16
<i>Bourne v. NLRB</i> , 332 F.2d 47 (3d Cir. 1964) .....	11
<i>Brunswick Corp.</i> , 282 NLRB 794, 795 (1987) .....	17
<i>Buck Brown Contracting Co.</i> , 283 NLRB 488, 489 (1987).....	15, 24
<i>Conley Trucking</i> , 349 NLRB No. 30 (2007).....	13
<i>Continental Group, Inc.</i> , 357 NLRB No. 39, slip op. at 2–5 (Aug. 11, 2011).....	31, 33
<i>Costco Wholesale Corp.</i> , JD(NY)-30-10, slip op. at 20 (2010).....	9
<i>Dillon Companies, Inc., d/b/a City Market</i> , 340 NLRB No. 151 (2003).....	16
<i>Double Eagle Hotel &amp; Casino</i> , 341 NLRB 112, 112 n. 3 (2004).....	31
<i>Ellison Media Company</i> , 344 NLRB 1112, 1113 (2005) .....	24
<i>Emery Worldwide</i> , 309 NLRB 185, 186 (1992) .....	11
<i>F.P. Adams Co.</i> , 166 NLRB 967, 968 (1967).....	16
<i>Fred’k Wallace &amp; Son, Inc.</i> , 331 NLRB 914 (2000) .....	13
<i>Grand View Health Care Center</i> , 332 NLRB 347, 348 (2000) .....	17
<i>Gray Flooring</i> , 212 NLRB 668 (1974).....	9
<i>Hawaii Tribune-Herald</i> , 356 NLRB No. 63, slip op. at 16, (2011), enfd. 2012 WL 1372162 (D.C. Cir. Apr. 20, 2012).....	11
<i>Intermountain Rural Electric</i> , 253 NLRB 1153, 1163 (1981), enfd. 732 F.2d 754, 763 (10 <sup>th</sup> Cir. 1984) .....	24
<i>J.C. Penney Company, Inc.</i> , 266 NLRB 1223 (1983).....	4
<i>Lafayette Park Hotel, supra; The Loft</i> , 277 NLRB 1444, 1461 (1986) .....	16
<i>Liquitane Corp.</i> , 298 NLRB 292, 292-93 (1990) .....	11
<i>Marshall Field &amp; Co.</i> , 98 NLRB 88 (1952), enfd. 200 F.2d 375 (7 <sup>th</sup> Cir. 1953).....	4
<i>Matthews Readymix, Inc.</i> , 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999) .....	11
<i>May Department Stores</i> , 59 NLRB 976 (1944), enfd. as modified 154 F.2d 533 (8 <sup>th</sup> Cir. 1946) .....	4
<i>McBride’s of Naylor Road</i> , 229 NLRB 795 (1977).....	4
<i>Mid-Continent Petroleum Corp.</i> , 54 NLRB 912, 932-934 .....	22
<i>Mountaineer Steel, Inc.</i> , 326 NLRB 787 (1998), enfd. 8 Fed.Appx. 180 (4th Cir. 2001) .....	13
<i>NLRB v. Burnip and Sims, Inc.</i> , 379 U.S. 21, 23 (1964).....	22, 30
<i>NLS Group</i> , 352 NLRB 744 (2008), incorporated by reference in 355 NLRB No. 169 (Sept. 28, 2010), enfd. 645 F.3d 475 (1st Cir. 2011)) .....	32
<i>Northeastern Land Services, Ltd.</i> , 352 NLRB 744, 745-46 (2008) .....	31
<i>Richboro Community Mental Health Council</i> , 242 NLRB 1267 (1979) .....	24
<i>Ridgely Manufacturing Co.</i> , 207 NLRB 193, 197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975) .....	9
<i>Rubin Bros. Footwear, Inc.</i> , 99 NLRB 610, 611 .....	22
<i>Saia Motor Freight Line, Inc.</i> , 333 NLRB 784, 785 (2001) .....	31
<i>Sanderson Farms, Inc.</i> , 340 NLRB 402, 403 fn. 1, 406 (2003).....	14

<i>Senior Citizens Coordinating Council</i> , 330 NLRB 1100 (2000).....	20
<i>St. Margaret Mercy Healthcare Centers</i> , 350 NLRB 203, 212 (2007) .....	6
<i>Standard Oil Co.</i> , 91 NLRB 783, 790-791 .....	22
<i>Stoddard-Quirk Mfg. Co.</i> , 138 NLRB 615 (1962).....	4
<i>Tele Tech Holdings</i> , 333 NLRB 402, 403 (2001).....	17
<i>Teskid Aluminum Foundry</i> , 311 NLRB 711 (1993).....	16
<i>The Loft</i> , 277 NLRB 1444, 1465 (1986).....	16, 24
<i>Tracer Protection Services</i> , 328 NLRB 734, 741 (1999) .....	24
<i>Vought Corp.</i> , 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986) .....	24
<i>Wright Line</i> , 251 NLRB 1083, 1089 (1980) .....	18, 21, 25, 27, 29

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

**FOOD SERVICES OF AMERICA, INC.,  
a subsidiary of SERVICES GROUP OF  
AMERICA, INC.**

**and**

**Case 28-CA-063052**

**PAUL LOUIS CARRINGTON, an Individual**

**BRIEF IN SUPPORT OF THE ACTING GENERAL  
COUNSEL'S CROSS-EXCEPTIONS**

**I. INTRODUCTION**

This case, at its core, deals with a very simple proposition -- whether employees are engaged in conduct protected by the Act when they forward or receive emails to and from each other to buttress their claims of unlawful discrimination under the Act; to establish the fact that they had in fact engaged in protected conduct and been subjected to retaliation; and to be able to defend against what they see as retaliatory accusations of misconduct or poor performance. In this case, after Elba Rubio (Rubio) was unlawfully fired in retaliation for having engaged in protected conduct, her coworker, Paul Carrington (Carrington) forwarded to Rubio a number of emails for the purposes described above, i.e., for their mutual aid and protection. As a result, and despite the fact that the emails were those that Rubio had already received or sent during her employment, Respondent immediately discharged Carrington for doing so. Respondent attempts to defend on the ground that the emails contained confidential or proprietary information. As discussed below, Respondent's proffered defense is baseless. The act of exchanging emails, like other concerted activity engaged in for the types of mutual aid and protection described

above, is protected and is at the core of Section 7 rights.<sup>1</sup> Moreover, Respondent's reliance on overly-broad confidentiality rules as a basis for discharging Carrington is, in and of itself, and independent basis for finding a violation of the Act.

More specifically, though the ALJ had little difficulty in finding that Respondent maintained overly-broad and discriminatory rules in its "FSA & You: Associate Handbook for Regular Non-Union Associates" (Handbook) and Confidentiality and Non-Disclosure Agreement (Confidentiality Agreement), the ALJ failed to find that by relying on such rules in discharging Carrington, such a discharge was unlawful. Specifically, as to the rules themselves, two confidentiality rules in Respondent's Handbook and Confidentiality Agreement -- which the ALJ found violated the Act -- forbade its employees from engaging in Section 7 activities and threatened employees with discharge and/or legal recourse if such rules were violated. Despite such findings and conclusions, the ALJ failed to find that Respondent violated Section 8(a)(1) when it terminated employee Carrington for violating such confidentiality rules.

As to Carrington's discharge, and as discussed below, General Counsel also excepts to the fact that the ALJ found that Carrington was not engaged in protected concerted activity when he forwarded e-mails to himself and to his co-employee Rubio (whom Respondent unlawfully discharged three days earlier) which showed Rubio's concerted discussions with other employees; complaints to Respondent about religious and national origin discrimination by her supervisor; favoritism at work; and retaliation for alerting Respondent of these work-related issues.

---

<sup>1</sup> Moreover, Respondent has, in fact, filed a complaint, and secured a consent restraining order, in federal District Court against both Rubio and Carrington alleging that they violated state law by Carrington's forwarding of emails to Rubio.

In addition to the core issue discussed above -- i.e., the ALJ's failure to find that Carrington was engaged in protected conduct and unlawfully discharged for forwarding the emails to Rubio -- the ALJ also failed to find that Rubio was unlawfully discharged in retaliation for her having engaged in protected conduct. Specifically, the ALJ found that Respondent did not violate the Act when it terminated Rubio because she (with the assistance of another employee, Michelle Aparicio (Aparicio)) attempted to catch their supervisor engaging in national origin discrimination, one of the work-related issues Rubio repeatedly discussed with her fellow employees.

As described more fully below, it is respectfully submitted that the Board should find that the conduct engaged in by Carrington and Rubio was protected by the Act, and that Respondent violated the Act as alleged, including by discharging Rubio and Carrington and maintaining and applying unlawful rules, including other rules discussed below, and specifically find that:

## **II. RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT AS ALLEGED**

### **1. Respondent Violated Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory No Solicitation Rule in Its Handbook**

Respondent requires all new employees to sign for and receive its Handbook (GCX 2; Tr. 43:15-24) The Handbook's rule on solicitation prohibits employees from soliciting in work areas during non-working hours:

Solicitation by outsiders is prohibited on Company premises at any time in the interest of safety and to avoid disruption of our operations. Inform your Department Manager or Branch President immediately if you see such activity.

**Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)**

(GCX 2, page 24) (Emphasis added.)

The ALJ concluded that the non-solicitation rule did not violate the Act because “(1) limiting solicitation to non-working hours is clearly lawful especially since the rule specifies that meal or break periods are not included in working hours [;]” (citations omitted), and (2) insofar as the rule limits solicitations to non-working areas, the rule “properly restricts solicitations to the time that employees are working, and in working areas, while allowing other solicitation.” (ALJD 5:19-25) Stated differently, the ALJ interprets the rule to prohibit employee solicitation in non-working areas **only** when the employee is working.

The ALJ’s interpretation of the rule is flawed because the rule clearly prohibits solicitation in nonworking areas, period. The ALJ’s interpretation is inconsistent with Board law, which has long held that, with certain exceptions not applicable here (i.e., retail stores and health care industry),<sup>2</sup> employees have the statutory right to engage in solicitations for a union in both work areas and nonwork areas during their nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Respondent is neither a retail store nor a health care provider. Thus, Respondent cannot forbid its employees from soliciting in nonworking areas, even during working time. Thus Respondent’s rule violates Section 8(a)(1) of the Act.

---

<sup>2</sup> In the case of retail establishments, an employer may prohibit solicitation in the selling areas of a retail store even when employees are on their own time.” *J.C. Penney Company, Inc.*, 266 NLRB 1223 (1983); see also *McBride’s of Naylor Road*, 229 NLRB 795 (1977); *Alberts, Inc.*, 213 NLRB 686 (1974), enfd. 543 F.2d 417 (D.C. Cir. 1976); *Marshall Field & Co.*, 98 NLRB 88 (1952), enfd. 200 F.2d 375 (7<sup>th</sup> Cir. 1953); *May Department Stores*, 59 NLRB 976 (1944), enfd. as modified 154 F.2d 533 (8<sup>th</sup> Cir. 1946).

**2. Respondent’s Confidentiality Rules Violate Section 8(a)(1) of the Act, Including by Conveying Threats of Unspecified Reprisals**

The ALJ found that Respondent’s confidentiality policies in its handbook and its Confidentiality Agreement violate the Act. (ALJD 4:30-51; Amended Complaint paragraphs 4(a) and 4(b)(3)), though failed to address the allegation that such rules also threaten its employees with unspecified reprisals if they engaged in protected conduct which would fall under the broad reach of the rules.

Specifically, Respondent’s Confidentiality Agreement broadly defines the term “Confidential Information” to mean “any and all information . . . related to Company[,]” including, but not limited to, “customers” and “payroll or employee information (other than payroll or employee information about Associate.” (GCX14) Under the Confidentiality Agreement, employees agree “not to use or disclose any Confidential Information, directly or indirectly, except in furtherance of the Company’s business or as consented to in writing in each instance by a Company officer, or, upon reasonable prior notice to Company, as required by law.” More importantly, the Confidentiality Agreement authorizes Respondent to seek all “legal or equitable remedies[,]” including preliminary and permanent injunctive relief, if the employee violates the Confidentiality Agreement.

In Respondent’s Handbook, the confidentiality provision states, in pertinent part, that “No one outside the Company needs to know anything about our Company unless the Chairman or President has identified a specific benefit to the Company. This includes the press and news media in general and trade journals and industry groups in particular.” (GCX 2, pg. 18) Furthermore, by this provision, Respondent threatens employees with discipline, including termination, for the “[u]nauthorized disclosure of information about our Company.” Id.

As stated above, the ALJ found that Respondent's confidentiality policies violate the Act. (ALJD 4:30-51). As to the Confidentiality Agreement, the ALJ observed that it stifles employees from engaging in protected concerted activities, to wit:

This [rule] excepts from the confidentiality definition payroll "information about Associate," in other words payroll information about the employee himself or herself; a reasonable reading of this provision is that each employee could discuss his/her terms and conditions of employment with fellow employees, or anybody else, without fear of discipline. However, the discussions of terms and conditions of employment requires (sic) the participation of two or more employees. If one of those employees refuses to permit the other employees to discuss his terms and conditions of employment, pursuant to the Respondent's rule, the discussion would be unduly restricted, or foreclosed entirely, thereby limiting the employees' protected concerted activities.

(ALJD 4: 22-30)

Based on the threatening language found in the both confidentiality rules, paragraph 4(d) of the Amended Complaint alleges that both confidentiality rules amount to threats of unspecified reprisals if employees engage in concerted activities. However, the ALJ did not rule on this allegation. Considering that the ALJ found both confidentiality rules violate Section 8(a)(1), and inasmuch as both rules threaten employees with discipline and/or legal action if they violate the rules, it naturally flows that the confidentiality rules threaten employees with reprisals if they violate the rules, including, as the ALJ noted, even where employees were to discuss with each other their terms and conditions of employment.

Respondent's rules leave no doubt for its employees that they will suffer consequences, legal or disciplinary, if they violate either policy. Thus, the rules threaten employees with unspecified reprisals and violate the Act. See, generally, *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 212 (2007) (employer violated Section 8(a)(1)

by informing employee that she was to “adhere to the Franciscan Values” and that similar conduct in the future would result in disciplinary or corrective action).

a. Respondent Violates Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory Rule and Policy Prohibiting Employees From Disclosing Employees’ Cell-Phone Numbers

Respondent admits that its confidentiality rules forbid its employees from disclosing employees’ cell phone numbers, even though such cell numbers are included in Respondent’s employees’ standard email-signature blocks. Respondent admitted to such an expansive reading of its confidentiality rules at trial.<sup>3</sup>

More specifically, in an effort to excuse itself from fully complying with General Counsel’s subpoena duces tecum, Respondent filed a Motion to Exempt From Disclosure or for Protective Order (Motion). (SX 3) Respondent’s Motion sought an order from the ALJ allowing Respondent to redact certain alleged “confidential” and “proprietary” information contained in the subpoenaed documents. (SX 1) One example of such purportedly “confidential information” are the cell phone numbers of Respondent’s employees (SX 3, page 1), which Respondent’s employees include in the signature block of their emails. (GCX 7, 8, and 9) In support of its Motion, Respondent attached a sworn and subscribed affidavit from Senior Vice-President and Chief Merchandising Officer Scott Bixby (Bixby). In defending Respondent’s contention that “employee cell phone numbers” (as well as the other subpoenaed information, including Respondent’s vendors’ names) are confidential information, Bixby stated:

This information in the documents [Respondent] seeks to protect have great potential economic value, are closely guarded, and are not shared with persons outside of the company. In the hands of a competitor, the information located therein could severely undermine planning,

---

<sup>3</sup> At the outset of this discussion, it is important to again note that Respondent relied on its confidentiality rules as the basis for discharging Carrington because he forwarded emails to Rubio.

marketing, promotion, and future sales. Due to their commercially sensitive nature if this information were to be publicly displayed it would cause irreparable damage to [Respondent] not only economically but also it's (sic) vital relationships with its vendors and customers.

(SX 3, Exhibit A, page 4)<sup>4</sup>

Respondent's confidentiality rules in the Confidentiality Agreement and Handbook -- which the ALJ found violate the Act -- state that vendors' names are confidential information which employees are forbidden from disclosing. By Bixby's admission, employee cell phone numbers, just like vendors' names, are also considered by Respondent to be confidential information subject to its overly-broad rules. Hence, Respondent's confidentiality rules forbid its employees from disclosing employee cell phone numbers.

Notwithstanding Bixby's admission and the ALJ's finding that Respondent's confidentiality rules violate the Act, the ALJ concluded that "Respondent does not have a policy regarding the disclosure of personal cell phone numbers[.]" and "there was no other evidence" to support such a finding. (ALJD 13:25-31) In so finding, the ALJ appears to have relied only on the self-serving testimony of Senior Vice-President of Associate Services Steve Manuszak (Manuszak), who simply denied that Respondent maintains such a policy, to the exclusion of Bixby's written admission to the contrary. (ALJD 12:20-22; Tr. 501:15-19) It is respectfully submitted that the ALJ appears to have simply overlooked the conclusive evidence establishing that Respondent considers its confidentiality rule as encompassing the release of employee cell phone numbers.

---

<sup>4</sup> Over the General Counsel's opposition (SX 4), the ALJ granted Respondent's Motion, including Respondent's request to produce the subpoenaed documents with various types of information, including, but not limited to, employee cell phone numbers, redacted. (Tr. 29:19-30:14; 32:1-8)

As a result, General Counsel urges the Board to find that Respondent's confidentiality rule specifically, and unlawfully, encompass information such as employees' cell phone numbers, and that Respondent has a policy prohibiting employees from disclosing employee cell phone numbers. By maintaining such rules, and buttressing them with its threat of reprisal, Respondent stifles the ability of employees to engage in Section 7 activities. *Costco Wholesale Corp.*, JD(NY)-30-10, slip op. at 20 (2010) (rule defining as "confidential" employee names, addresses, phone numbers and e-mail addresses, a violation). The Board has routinely held that employees may use for organizational purposes information and knowledge that comes to their attention during the normal course of their employment. See, *Ridgely Manufacturing Co.*, 207 NLRB 193, 197 (1973), *enfd.* 510 F.2d 185 (D.C. Cir. 1975); *Gray Flooring*, 212 NLRB 668 (1974); *Anserphone of Michigan*, 184 NLRB 305, 306 (1970).

**3. Respondent Violated Section 8(a)(1) of the Act by Discharging Rubio; Its Other Conduct on March 4 Also Violates the Act**

a. Factual Background

On March 4, 2012, Respondent terminated Rubio. Contrary to the findings and conclusions of the ALJ, the record fully supports a finding that Respondent discharged Rubio because she engaged in protected concerted activities for the mutual aid and protection of Respondent's employees. In fact, Respondent, by its own documents, admits that it discharged her, in motivating part, because she was trying to secure the help and attention of another employee in exposing her supervisor's mistreatment of employees. Thus, Respondent admits that Rubio was discharged, in part, because she was "being manipulative and vindictive with her supervisor [Merissa Hamilton] by trying to catch her to do (sic) something wrong, which was that string of emails -- IMs." (ALJD 9: 24-25;

Tr. 498:12-499:3) The specific conduct upon which Respondent bases its discharge of Rubio involves her overtures to employee Aparicio. Rubio sought Aparicio's help in witnessing supervisor Hamilton engaging in racial discrimination towards Rubio and Aparicio when they spoke in Spanish -- a concerted act Respondent also deemed to be a "disruption."

In fact, Respondent made it clear to the other discriminatee in this case, Carrington, that it viewed Rubio's concerted conduct to be a disruption. Specifically, on March 4, Carrington (Rubio's coworker and boyfriend,<sup>5</sup>) watched Rubio being escorted from Respondent's facility, as Bixby brought Carrington into his office for a one-on-one meeting. (Tr. 275:17-276:25) Bixby told him of Rubio's discharge, and said that Carrington's name had come up in connection with Rubio's "disruption," namely, the instant messages between Rubio and Aparicio. (ALJD 9:40-41; 9:46-48; Tr. 91:4-93:5) During the same conversation, Bixby told Carrington that he had a future with Respondent if he stopped talking to Rubio and learned how to work with supervisor Hamilton. (ALJD 9:41-44) Bixby offered Carrington some "free advice" -- he could get involved in all the positive things at work, or go in a different path, namely, "participat[ing] in activities like Ms. Rubio's issues of the recent week or so." Bixby concluded the meeting with an ominous warning to Carrington, i.e., that on Monday, March 7, Carrington had to decide whether he wanted to perpetuate the disruption or come in with a clean slate and focus on his work. (ALJD 5:1-5; Tr. 277:1-19; 441:12-442:15; 447:17-448:4; 449:1-9)

---

<sup>5</sup> Respondent was aware that Carrington and Rubio lived together at the time.

b. ALJ Credits Carrington's Testimony Regarding the March 4<sup>th</sup> Meeting

The ALJ credited Carrington's version, and discredited Bixby's account, of their meeting on March 4. The ALJ found Bixby's testimony "unconvincing[]" and "sounded more like something that was prepared for trial rather than a spontaneous discussion with Carrington about his relationship with Rubio." (ALJD 12:43-46) As a result, it is respectfully submitted that the Board should, based on such testimony and findings of fact, conclude that Respondent violated the Act in a number of ways during that March 4 meeting.

c. Respondent Violated the Act by Interrogating Its Employees

It is respectfully submitted that the ALJ erred by concluding that Respondent did not interrogate Carrington during the March 4 meeting because "Bixby did all the talking, and he never questioned Carrington about his concerted activities, or those of other employees including Rubio." (ALJD 12:48-50.)

An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), *enfd.* in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *Bourne v. NLRB*, 332 F.2d 47 (3d Cir. 1964). The ALJ's failure to find that Respondent interrogated Carrington runs contrary to the credited record evidence and the Board's application of the *Bourne* factors. The ALJ failed to take into account, or improperly disregarded, that Bixby's statement to Carrington that his name had

come up in connection with Rubio's "disruptions" would reasonably tend to elicit, and call for, a response from the employee regarding his concerted activities, a salient point the Board has recognized in finding that an interrogation occurred. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 16, (2011), enfd. 2012 WL 1372162 (D.C. Cir. Apr. 20, 2012); *Aladdin Gaming, LLC*, 345 NLRB 585, 595 (2005).

Moreover, the ALJ's failure to find that Respondent interrogated Carrington fails to take into account the following: (1) Bixby's meeting with Carrington occurred against the background of great hostility toward Rubio's Section 7 activities, for which she was terminated; (2) the information sought specifically related to Carrington's Section 7 activities, i.e., his name being associated with Rubio's "disruption;" (3) the questioner was a high-ranking supervisor; (4) Carrington was alone with Bixby when the questioning took place; and (5) the questioning was performed in a manner designed to intimidate.

Accordingly, it is respectfully submitted that the record supports a finding that on March 4, Respondent interrogated its employees about their own and other employees' protected concerted activities.

d. Respondent Violated the Act by Creating the Impression of Surveillance

As noted above, the ALJ found that Bixby informed Carrington during their meeting that his name had come up in connection with Rubio's name and with Rubio's "disruption." (ALJD 9:40-41; 9:46-48) Even though this finding would leave little doubt for Carrington that Respondent was aware of his concerted activities with Rubio, and that Respondent became so aware as a result of its observations of Rubio's protected conduct, the ALJ concluded that there was "no evidence" that Respondent, through Bixby, created

an impression among its employees that their concerted activities were under surveillance. (ALJD 12:50-13:2.)

The Board has held that “[e]mployees should not have to fear that ‘members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.’” *Conley Trucking*, 349 NLRB No. 30 (2007), quoting *Fred’k Wallace & Son, Inc.*, 331 NLRB 914 (2000). The test for whether an employer creates an unlawful impression of surveillance is whether, under the circumstances, an employee could reasonably conclude that his protected activities are being monitored. See *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), *enfd.* 8 Fed.Appx. 180 (4th Cir. 2001). In the instant case, Respondent brought Carrington into the office, told him that his fellow employee, Rubio, had just been discharged because of her (protected and concerted) disruption, and that Carrington’s name had come up in connection with such disruptions. Under these circumstances, it is not only reasonable that Carrington would conclude that his contacts with Rubio and other employees were being monitored, such a conclusion would be the only reasonable conclusion.

As a result, it is respectfully submitted that the record supports a finding that Respondent, by Bixby, created the impression among its employees that their protected concerted conduct was under surveillance by Respondent in violation of Section 8(a)(1).

e. Respondent Violated the Act on March 4 by Threatening Its Employees

The ALJ found that at the March 4 meeting, Bixby, after he told Carrington of Rubio’s discharge, informed Carrington that he could have a future with Respondent, and have a “clean slate,” if he ceased talking to Rubio and tried to get along with supervisor Hamilton. (ALJD 9:40-44) Bixby told Carrington that he had a future with Respondent if

he stopped talking to Rubio and learned how to work with supervisor Hamilton.

(ALJD 9:41-44) Bixby also offered Carrington an ominous warning, i.e., that on Monday, March 7, Carrington had to decide whether he wanted to perpetuate the disruption or come in with a clean slate and focus on his work.

Despite these findings, the ALJ concluded that Bixby's statements were not threats of unspecified reprisal because there was no evidence that Carrington and Rubio were at the time "preparing to take any lawful group action" against Respondent, nor did Bixby's statements directly address any group action. (ALJD 13:17-19) Instead, the ALJ found that "the words that Bixby used were meant to convince Carrington not to repeat the unprotected conduct that they engaged in with the instant message to Aparicio[.]" (ALJD 13:20-21) The instant message was the very "disruption" to which Respondent made reference and, as discussed above, both protected and concerted.

The only reasonable reading of Bixby's carefully phrased threats, which were connected to Respondent's just effectuated discharge of Rubio (e.g., that Carrington "could really have a future with the company" if he stopped talking to Rubio, and that he has the ". . . opportunity to get involved in all the positive things that we do or you can go in a different path[]" (ALJD 9:41-42; 10:3-4)), is that Carrington would face adverse consequences, like Rubio, if he did not cease engaging in concerted conduct with employees about working conditions. As a result, Bixby's statements amount to a threat of unspecified reprisal. *Sanderson Farms, Inc.*, 340 NLRB 402, 403 fn. 1, 406 (2003) (employer impliedly threatened employee with negative consequences if he associated with a known union supporter by telling him "to stay away from" him).

In any event, as relates to the discharge of Carrington, which is discussed in greater detail below, it is implicit that by his threats, Bixby sought to prevent Carrington from having any further contact with Rubio about her “disruption.” This would, of course, include Carrington offering assistance to Rubio in any discrimination claim (a form of protected concerted activity) she might have against Respondent. This is precisely what Respondent warned Carrington against, and precisely what Carrington did.

More specifically, Respondent’s threats came to fruition when it discharged Carrington just days after the March 4 meeting. As it turns out, and as detailed in the record, on March 5 and 6, Carrington assisted Rubio in connection with her discharge by forwarding to her personal e-mail account the work e-mails related to Rubio’s concerted complaints about Hamilton’s religious discrimination, Hamilton’s favorable treatment of Aparicio, and related to Rubio’s increased workload. (ALJD 10:8-16)<sup>6</sup> As discussed below, on March 7, Respondent discharged Carrington because he had engaged in such protected concerted activities with Rubio.

f. Respondent Violated the Act on March 4 by Orally Promulgating and Overly-Broad and Discriminatory Rule Prohibiting its Employees from Talking to Each Other

The ALJ also dismissed the allegation that Bixby’s statements to Carrington contained an oral promulgation of an overly-broad and discriminatory rule prohibiting Carrington from talking with Rubio or other employees who may be engaged in conduct akin to the “disruption” purportedly created by Rubio. (ALJD 13:20-21)

---

<sup>6</sup> As noted by the ALJ, citing *Buck Brown Contracting Co.*, 283 NLRB 488 (1987), an employee’s communications with a discharged employee can constitute concerted activities, (ALJD 13:12-14). The ALJ also found, Carrington forwarded the same e-mails to his personal account, concerned about “his job security” as a result of his March 4 meeting with Bixby. (ALJD 10:16-19)

Any rule prohibiting employees from discussing their terms and conditions of employment violate the Act. See generally, *Lafayette Park Hotel, supra; The Loft*, 277 NLRB 1444, 1461 (1986) (when a rule is unlawful on its face, the General Counsel is not required to show that the employer enforced the rule, possessed an illegal motive in promulgating the rule, or enacted the rule in the absence of an organizing drive); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992). Bixby's statement to Carrington that he had a future with Respondent if he ceased talking to Rubio explicitly restricted Carrington from discussing his working conditions with Rubio, an employee who had been discharged for unlawful reasons.

In addition to being explicitly restrictive of activities protected by Section 7, Bixby's no-talking rule was announced and implemented with the specific purpose of interfering with Carrington's exercise of Section 7 rights. (ALJD 9:40-41; 9:46-48) By its no-talking rule, Respondent hoped to silence Carrington's involvement in protected concerted activities with Rubio and others. The Board has routinely held that the implementation of a rule to coincide with union or concerted activity can be unlawful where the "surrounding context is devoid of unlawful activity." *F.P. Adams Co.*, 166 NLRB 967, 968 (1967); see also *Dillon Companies, Inc., d/b/a City Market*, 340 NLRB No. 151 (2003); *Teskid Aluminum Foundry*, 311 NLRB 711 (1993). Here, there can be no question that Bixby's statement was implemented to thwart Carrington from engaging in concerted activities.

**4. Respondent Violated Section 8(a)(1) of the Act by Maintaining an Overly-Broad and Discriminatory Rule Prohibiting Employees from Providing Personal References to Other Employees**

The ALJ found that, on March 7, 2012, Rubio e-mailed several employee employed by either Respondent or another subsidiary of Service Group of America, Inc. Rubio's e-mail stated she was seeking references from them because she was fired on March 4 "for blowing the whistle on manager abuse in January, no further reasoning provided."

(ALJD 11:36-41; 13:35-43; GCX 8) The ALJ also found that three of the Rubio's colleagues agreed to be a reference for her and that Respondent, upon learning of Rubio's e-mail, blocked all future e-mails from Rubio to employees of Respondent or the subsidiary of Service Group of America, Inc. (ALJD 11:51-52; 13:40-43) Manuszak testified that he ordered the blocking of Rubio's future incoming e-mails because Respondent has a policy forbidding employees from giving references regarding their coworkers. (Tr. 56:3-58:6)

Notwithstanding Manuszak's testimony and the ALJ's findings of fact set forth above, the ALJ found that Respondent did not have a rule prohibiting employees from giving personal references. (ALJD 14:3) The ALJ's reasoning is twofold. First, there was no testimony that any employee was aware of such restriction, and none of the employees who agreed to give a reference to Rubio were disciplined. (ALJD 14:1-3) It is respectfully submitted that the ALJ erred by dismissing this allegation. Overly-broad rules that prohibit employees from discussing their terms and conditions of employment violate the Act even when they are not enforced. See *Tele Tech Holdings*, 333 NLRB 402, 403 (2001); *Grand View Health Care Center*, 332 NLRB 347, 348 (2000); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

Second, the ALJ reasoned that Respondent blocked Rubio's future incoming e-mails because: (1) she had been fired, (2) Carrington transferred over 300 e-mails to Rubio, and (3) Respondent saw "no valid reason for [Rubio] to communicate with the employees."

(ALJD 13:50-14:1)<sup>7</sup> By blocking Rubio's incoming e-mails, Respondent ensured that its employees would be unable to converse with Rubio, including by providing references, or about Rubio's discharge and/or the reasons therefor.<sup>8</sup>

**5. Respondent Violated Section 8(a)(1) of the Act by Discharging Rubio Because She Engaged in Protected Concerted Activities Protected by Section 7 of the Act**

a. General Counsel's Prima Facie Case

The ALJ found that the General Counsel failed to establish a *prima facie* case under *Wright Line*, 251 NLRB 1083, 1089 (1980), that Respondent discharged Rubio because of her concerted activities. (ALJD 14:18-24) The ALJ found that Rubio engaged in concerted activities when she discussed with her coworkers, and complained to Respondent in January 2011 about supervisor Hamilton's "unwanted religious interaction" with Rubio in a November 2010 e-mail between them. (ALJD 6:14-7:44; 14:24-26) Notwithstanding this finding, the ALJ also found that there was no evidence that Respondent harbored animus towards Rubio as a result of her religious harassment complaint, and there was no evidence of any connection between her January 2011

---

<sup>7</sup> Respondent saw "no valid reason for [Rubio] to communicate with the employees[]" because Rubio's e-mail states the reason for her discharge: "[...] blowing the whistle on manager abuse in January[. . .]"

<sup>8</sup> Should the current allegation, framed in terms of the maintaining an unlawful rule, is not sufficient in breadth to encompass Respondent's conduct in this regarding, General Counsel moves to amend the Complaint to allege that such conduct is both a promulgation of such a rule or an otherwise independent violation of the Act, i.e., the act of restricting employees contacts with each other because of their activities protected by Section 7 of the Act.

complaint and her discharge two months later. (ALJD 14:30-34) Rather, the ALJ concluded, “the evidence establishe[d] that the February 25 instant message between Rubio and Aparicio resulted in her discharge a week later.” (ALJD 14:33-34)

The ALJ failed to recognize that the General Counsel’s *prima facie* case relies not simply on the protected conduct related to Respondent’s alleged religious discrimination in the workplace, but also Rubio’s concerted February 25 instant messages with Aparicio -- the conduct Respondent views as a “disruption.” Moreover, such instant messages must be viewed in the context of Rubio’s broader protected concerted activities. Specifically, one of the complaints Rubio discussed with Aparicio (and coworkers Carrington and Armbruster) was that supervisor Hamilton made anti-Hispanic comments, including by telling employees that they cannot speak Spanish at work, and telling Rubio, who is Hispanic, that she should “talk to” her “people” because they were promoting violence against other races and that Hamilton was scared that someone was going to come and chop her head off in the middle of the night. (Tr. 116:10-117:12)

Rubio’s instant messages directly relate to such protected conduct, yet such conduct was overlooked or discounted by the ALJ. Specifically, in the February 25 instant message, Rubio and Aparicio discussed that Hamilton had previously “scolded” another employee for speaking Spanish to a coworker. Having previously discussed with her coworkers Hamilton’s anti-Hispanic conduct, Rubio wanted to see if Hamilton would continue her discriminatory conduct by saying “something racist again” should Rubio and Aparicio speak Spanish to each other. (ALJD 8:17-21; GCX 4, GCX 24)

Such conduct goes to the heart of Section 7 activity. Obviously, the utterance of derogatory and discriminatory statements by a supervisor toward employees creates an

atmosphere -- a working condition -- that impacts on all employees, even if such comments are not directed specifically to them. Thus, Rubio's discussion with Aparicio in the instant message about supervisor Hamilton's discriminatory behavior constitutes concerted activity. See *Senior Citizens Coordinating Council*, 330 NLRB 1100 (2000) (employee complaints about a supervisor constitute concerted activity).

The instant messages are protected in other respects, as well, in that they include discussion by employees of Aparicio's work performance and supervisor Hamilton's frustration towards Rubio for recommending Aparicio for the job. (ALJD 8:22-29; GCX 4, GCX 24) Again, the instant message reflects two employees discussing terms and conditions of employment; hence, Rubio engaged in concerted activity by engaging in such discussions.

Having established that Rubio's February 25 instant message constitutes protected concerted activity, the remaining elements of the General Counsel's *prima facie* case -- Respondent's knowledge of the concerted activity; Respondent's animus toward such activity; and Respondent's discharge of Rubio because of her concerted activity -- are well established in the record. In fact, regarding Respondent's knowledge of such activity, the ALJ found Aparicio forwarded the February 25 instant message to Hamilton, who in turn, forwarded it on March 3 to Director of Quality Assurance and Supplier Information Jeff Chester. (ALJD 8:52-9:9) The next day, Respondent discharged Rubio.

As to the final element of General Counsel's *prima facie* case, the ALJ found that Respondent discharged Rubio because of the instant messages. Quoting Manuszak, the ALJ found Rubio was "being manipulative and vindictive to Hamilton by trying to catch

her doing something wrong[.]” which, according to Respondent, constituted gross misconduct. (ALJD 9:24-26)

Based on the foregoing, and contrary to the ALJ’s findings, the General Counsel established a *prima facie* case that Respondent terminated Rubio because of her protected concerted activities.

b. Respondent Has Failed to Meet Its Wright Line Burden With Regard to the Discharge of Rubio

The ALJ found that “the evidence establishe[d] that the February 25 instant message between Rubio and Aparicio resulted in [Rubio’s] discharge a week later.” (ALJD 14:33-34) As noted above, the record shows that General Counsel established a *prima facie* case of discrimination: Having established a *prima facie* case, the ALJ noted that, under *Wright Line*, “the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.” (ALJD 14:22-23)

Here, Respondent cannot meet that burden because Respondent’s witness, Manuszak, admitted at trial it discharged Rubio because of the February 25 instant message. The only defense Respondent offered at trial was that Rubio’s instant message constituted “gross misconduct.” (ALJD 9:26) But there are two fatal flaws in Respondent’s defense. First, Respondent failed to establish, including by documentary evidence, of which there was none, that proved Rubio’s instant message violated any of Respondent’s policies and, therefore, constituted any form of misconduct, let alone “gross misconduct.”

Second, and without regard to Respondent’s *Wright Line* burden, even if Respondent believed that Rubio’s instant message amounted to misconduct, which is was

not, Rubio's "misconduct" arose out of her protected activity, i.e., discussing with co-employee Aparicio Hamilton's anti-Hispanic bigotry and Aparicio's work performance. The Supreme Court has held that an employer violates Section 8(a)(1) when it terminates an employee for alleged misconduct that occurred in the course of protected activity, and the employee was not guilty of such misconduct, to wit:

Over and over again the Board has ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. See, e.g., *Mid-Continent Petroleum Corp.*, 54 NLRB 912, 932-934; *Standard Oil Co.*, 91 NLRB 783, 790-791; *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 [footnote omitted].

In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected concerted activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

*NLRB v. Burnip and Sims, Inc.*, 379 U.S. 21, 23 (1964).

Here, there is no doubt that the Employer knew, or should have known, that discussions among employees about working conditions, including their treatment by supervisors, is protected conduct. Respondent has failed to show that Rubio engaged in misconduct by enlisting the assistance of another employee to garner further support for her complaints about the supervisor's bigoted statements. Respondent has failed, utterly, to establish that Rubio lost the protection of the Act while engaged in the conduct upon which Respondent based her discharge.

**6. Respondent Violated Section 8(a)(1) of the Act by Discharging Carrington**

**a. Carrington Engaged in Protected and Concerted Conduct**

The ALJ properly found that on March 4, 2011 -- the day that Respondent terminated Rubio -- Carrington and Rubio discussed that Carrington would forward to

Rubio e-mails reflecting the following work-related issues which Rubio had discussed with co-employees, and her complaints to Respondent: (1) supervisor Hamilton's religious and national origin discrimination; (2) Rubio's increased workload because of her complaints; and (3) Respondent's favorable treatment of Aparicio. (ALJD 10:8-16) The ALJ further found that Carrington believed he needed to send himself these e-mails, too, because he "was concerned about his job security after his March 4 discussion with Bixby about his connection to Rubio and he thought that emails praising his work performance would be helpful to him in case his job status was affected." (ALJD 10:16-19) It is evident that the employees, in deciding to send such emails, wanted not only to protect themselves against real and anticipated retaliation by Respondent, but that such emails were themselves protected by the Act. It is worth repeating that these were emails that Rubio, who remained an employee within the meaning of the Act based on her unlawful discharge, had either seen or written.

As to the factual underpinning for this violation, the ALJ found that on March 5 and 6 Carrington forwarded to himself and Rubio over 300 e-mails. Some of these e-mails contained names and addresses of Respondent's vendors and customers (and their employees). (ALJD 10:23-32) It is respectfully submitted that the ALJ erred by concluding that Carrington's forwarding of e-mails containing the names of Respondent's customers and vendors did not constitute protected concerted activities because such information had "no relation" to Carrington's and Rubio's terms and conditions of employment. (ALJD 15:9-17)

It is respectfully submitted that the ALJ erroneously failed to find that Carrington forwarded the e-mails to Rubio (and to himself) in an effort to help his terminated

coworker in connection with her claim of unlawful retaliation by Respondent (which is the subject of the instant Board charge). It is well settled that when one employee takes action on behalf of or in support of another employee in connection with their terms and condition of employment, this constitutes concerted activity. *Tracer Protection Services*, 328 NLRB 734, 741 (1999) (communication from one employee to another in an attempt to protect the latter's employment constitutes protected concerted activity); *Buck Brown Contracting Co.*, 283 NLRB 488, 489 (1987) (attempt of one employee to assist another in procuring employment with employer is protected concerted activity); *The Loft*, 277 NLRB 1444, 1465 (1986) (one employee's complaint to employer about employer's handling of another employee's problem is concerted activity); *Intermountain Rural Electric*, 253 NLRB 1153, 1163 (1981), *enfd.* 732 F.2d 754, 763 (10<sup>th</sup> Cir. 1984) (one employee requesting that employer contact another employee on the radio for clarification of that employee's job status engaged in concerted activity); *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979) (letter of employee protesting discharge of another employee is concerted activity). See also *Ellison Media Company*, 344 NLRB 1112, 1113 (2005) (two employees discussing alleged sexual harassing conduct by supervisor engaged in protected concerted activity).

Moreover, Section 7 of the Act extends protection to employees' discussions regarding an employment claim, such as a discharge. *Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enfd.* 788 F.2d 1378 (8th Cir. 1986). That is precisely what happened in this case. The ALJ found that Carrington and Rubio discussed what course of action should be taken to assist Rubio in her discharge case. They concluded that Carrington forward

e-mails to himself and Rubio reflecting Rubio's concerted activities. Hence, Carrington, by forwarding such e-mails, engaged in protected concerted activities.

b. Wright Line Analysis

1. *ALJ Erred in Not Finding that General Counsel established a Prima Facie Case*

Because the ALJ concluded that Carrington's actions in forwarding the e-mails did not constitute protected conduct, the ALJ concluded that General Counsel did not present a *prima facie* case under *Wright Line* regarding Carrington's discharge. (ALJD 15:16-19) But the facts (and the ALJ's findings) demonstrate otherwise. As discussed above, Carrington's actions were protected and concerted activities under the Act. The record shows that General Counsel established that Respondent had knowledge of Carrington forwarding the e-mails to in and Rubio, and that Respondent discharged Carrington for such actions. The evidence of animus is palpable -- not only as a result of Bixby's March 4 meeting with Carrington, during which he threatened and interrogated Carrington about his concerted conduct with Rubio -- and as is evidenced by Respondent's admission that it discharged Carrington because he sent such emails.

Regarding Respondent's awareness of Carrington's e-mails, the testimonial and documentary evidence painstakingly details the progression of Respondent's knowledge, which was the fruition of Respondent's effort to prevent Rubio communicating with her former co-employees. On March 7, at 7:41 a.m., Rubio e-mailed some of her former coworkers and supervisors, informing them that she was seeking references from them because she was fired on March 4 "for blowing the whistle on manager abuse in January, no further reasoning provided." (GCX 8) Some of Rubio's colleagues replied to her

e-mail, agreeing to be a reference, wishing Rubio luck, or otherwise checking-in with her.  
(GCX. 11)

At 9:22 a.m., Brian Donaldson – one of the recipients of Rubio’s e-mail – forwarded it to Sherry Donald, Director of Transportation GAMPAC Express, a company for whom Rubio used to work. (GCX 8; Tr. 478:17-479:21) Eleven minutes later, Donald forwarded that e-mail to Manuszak. (GCX 8, GCX 9). Manuszak, having received the e-mail, determined that a firewall had to be established immediately in order to prevent Respondent’s employees from communicating with the pariah Rubio. At 9:39 a.m., Manuszak e-mailed Guy Babbitt, Respondent’s Chief Solutions Architect, asking him to “block incoming emails from [Rubio’s] personal email address to any SGA associates.” At 9:42 a.m., Manuszak e-mailed Babbitt and requested “copies of all correspondences sent from and to [Rubio’s] personal email address the last 90 days.” However, Manuszak did not instruct Babbitt to examine any inbound and outbound e-mails of the employees from whom Rubio sought references.

(GCX 8; GCX 9; Tr. 56:3-58:11; 352:22-363:14; 391:6-392:2) Respondent’s first priority had to be single out those employees who might be currently communicating with Rubio and block that communication immediately.

At 3:00 p.m., Respondent first learned of Carrington’s e-mails. Babbitt e-mailed Manuszak and Bixby, stating, “[Carrington] is sending a whole bunch of emails to [Rubio]. We are trying to pull those emails, but the easiest solution for now is just to give you access to his mailbox. I am working on that now. In the meantime this spreadsheet shows you the general info. I have also attached an email that we recovered.” (GCX 7) The “spreadsheet” Babbitt attached to the e-mail was an 11-page document that reflected the

following information: (i) the date the e-mail was sent; (ii) the size of the e-mail; (iii) the sender's e-mail address; (iv) the recipient's e-mail address; (v) the status of the email (i.e. whether the e-mail was delivered); and (vi) the subject heading of the e-mail.

(ALJD 10:34-41; GCX 7) At 3:30 p.m., Respondent discharged Carrington.

Regarding Respondent's reason for terminating Carrington, the record reflects that Respondent thought highly of Carrington, prior to his association with Rubio. Of all the employees laid off in August 2009 because of a reduction in force, Carrington was the only employee recalled, and his name "was the first one that popped into" Bixby's mind when determining who to recall. (Tr. 436:7-437:3) And prior to March 7 -- Carrington's termination date -- Bixby did not have any complaints with Carrington, had a "positive impression" of his work performance, noting that he and was "excellent" employee of Respondent during his employment. However, upon seeing the e-mails Carrington sent Rubio, Respondent terminated him. Indeed, that is precisely what the ALJ found.

(ALJD 11:7-8)

Thus, General Counsel respectfully submits that the record establishes a *prima facie* case that Respondent discharged Carrington because of his protected concerted activities.

2. *Respondent Has Failed to Meet Its Wright Line Burden Regarding Carrington's Discharge*

Under *Wright Line*, once the General Counsel established a *prima facie* case of discrimination, Respondent shoulders the burden of proving that it would have discharged the alleged discriminatee even in the absence of his protected concerted activity. The evidence established that Respondent failed to meet that burden.

Respondent's sole defense for terminating Carrington was that most of the 300-plus e-mails Carrington forwarded to himself and Rubio contained "confidential" or "proprietary" information. But the record reflects -- especially through the testimony of Respondent's witnesses -- that Respondent never inspected nor thoroughly read the e-mails to decipher whether "confidential" or "proprietary" information was contained in the e-mails before it discharged Carrington. In fact, Guy Babbitt admitted he never opened any of the e-mails that Carrington had forwarded to Rubio, so he had no knowledge of the actual content of any of the e-mails being forwarded by Carrington. (Tr. 376:13-377:8)<sup>9</sup>

Similarly, Manuszak and Bixby, the two managers who were the ultimate decision-makers behind Carrington's discharge, showed a profound lack of interest and urgency in reviewing the actual content of the e-mails. Manuszak admitted not reading any of the e-mails -- before or after Carrington's discharge -- to determine if any "confidential" or "proprietary" information were contained in those e-mails. (Tr. 55:6-18) Bixby, on the other hand, testified that he merely "conceptually" remembered the "activity" of opening and reading somewhere between 10-50 e-mails (and their attachments). But when pressed for the specific e-mails he read that purportedly contained "confidential" or "proprietary" information, Bixby could not remember. (Tr. 97:3-24; 455:3-19)

The only logical explanation behind Respondent's lax behavior in not reading Carrington's e-mails is the fact that the e-mails did not contain "confidential" or "proprietary" information. Indeed, the record demonstrated that much of the information that Respondent deemed as proprietary or confidential -- reputedly contained in

---

<sup>9</sup> In fact, it was not until after Respondent fired Carrington that Babbitt finally opened any of the e-mails. Even then, he opened fewer than 12 of Carrington's e-mails. (Tr. 391:1-392:2) It is respectfully submitted that the Board should find that Respondent, after it discharged Carrington, came up with its "confidential and proprietary" defense in an effort to mask its unlawful conduct.

Carrington's e-mails -- is accessible on the websites of Respondent, its customers, and/or its vendors, or on the web generally. (GCX 19; GCX 20; GCX 22; Tr.216:23-217:21; 219:24-220:2; 301:17-303:2; 304:15-18; 308:6-11)<sup>10</sup> Moreover, not one of Respondent's customer or vendor contacted Respondent -- from the date of Carrington's discharge through the conclusion of the unfair labor practice hearing -- about the 'confidential' or "proprietary" information contained in Carrington's e-mails. (Tr. 470:1-5)

Furthermore, a cursory review of the subject heading of those e-mails Carrington forwarded would apprise Respondent that the e-mails involved employees' terms and conditions of employment: "Shifts in Responsibilities" and "Schedules" (RX 1, page 1); and "Direct Request Training" (RX1, page 8) and "FSE Training" (RX1, page 10). Indeed, Respondent's lack of training Michelle Aparicio was one issue Carrington and Rubio discussed with one another and complained to Respondent, within two months of their terminations. (Tr. 127:19-128:6; 273:11-275:16).<sup>11</sup>

Based on the forgoing, General Counsel respectfully urges the Board to find that Respondent did not sustain its burden under *Wright Line*, and that Carrington's discharge violated the Act.

---

<sup>10</sup> As noted by Carrington in his exceptions to the ALJD, the alleged "confidential" information claimed by Respondent can be found on its website (<http://www.fsafood.com>), its Facebook webpage (<https://www.facebook.com/FoodServicesofAmerica>), alliance websites (<http://www.imaforce.com> & <http://www.dmadelivers.com>), and posted on its twitter account (<http://twitter.com/#!/fsafood>). *Paul Louis Carrington's Exceptions To The Administrative Law Judge's Decision*, at page 9.

<sup>11</sup> Another e-mail Carrington forwarded contained the subject heading "My blog." (RX 1, page 11) That e-mail was originally sent by supervisor Hamilton to Rubio in September 2010, when Hamilton started proselytizing her religious views on Rubio (GCX 16, FSA 0382-0384). The ALJ found that Rubio engaged in protected concerted activities when she complained about Hamilton's religious harassment. (ALJD 14:24-30)

c. Burnip & Sims Analysis

Even if Respondent believed that Carrington's e-mails contained "confidential" or "proprietary" information (which it did not), and that Carrington sending such e-mails amounted to misconduct (which it does not), Carrington's discharge was protected under *Burnip and Sims, Inc., supra*. Carrington's alleged misconduct arose of his protected concerted activity, i.e., forwarding e-mails to Rubio (and to himself) in an effort to help his terminated co-employee in a future wrongful discharge claim.

More significantly, Respondent knew or should have known that some of the 300-plus e-mails Carrington forwarded included e-mails reflecting the terms and conditions of employment he and Rubio discussed with other employees. That is because the "spreadsheet" Guy Babbitt e-mailed to Manuszak and Bixby on March 7, outlining Carrington's 300-plus e-mails, included the subject heading of Carrington's e-mails. (GCX 7) A cursory review of those subject headings would highlight those e-mails wherein the subject of discussion between Rubio and Carrington involved their working conditions. As is evident from the content of those e-mails -- and by the act of sharing such e-mails -- Carrington engaged in protected concerted activities and not misconduct, as Respondent mistakenly believed when it fired Carrington. Hence, Carrington's discharge is best summed up by the Supreme Court's holding in *Burnip and Sims, Inc.*: "In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected concerted activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." *Burnip and Sims, Inc.*, 379 U.S. at 23.

Based on the foregoing, it is evident that Respondent has failed to show that Carrington engaged in misconduct when he e-mailed to himself and Rubio 300-plus e-mails, allegedly containing “confidential” or “proprietary” information. Furthermore, Respondent failed to demonstrate that Carrington lost protection of the Act while engaged in the conduct upon which Respondent based his discharge.

d. Respondent Discharged Carrington Because He Violated Respondent’s Unlawful Rules

The ALJ found that Respondent’s confidentiality policies in its Confidentiality Agreement and its Handbook violated the Act. (ALJD 4:30-51) Moreover, Manuszak admitted on the witness stand he determined that Carrington’s discharge was appropriate because Carrington’s actions violated the confidentiality policy in Respondent’s Handbook. (GCX 2; Tr. 511:5-512:9) Notwithstanding this admission, the ALJ, perhaps due to his finding on other bases that Carrington’s actions on March 5 and 6 were not protected under the Act, overlooked the undisputed fact that Respondent discharged Carrington for violating an overly-broad and discriminatory rules that the ALJ found to be unlawful. Thus, because Carrington’s termination was pursuant to unlawful rules, Carrington’s discharge violates the Act.

In *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 2–5 (Aug. 11, 2011) the Board recently clarified its analysis<sup>12</sup> regarding when discipline pursuant to an unlawful

---

<sup>12</sup> More specifically, the Board has held that an employee’s discipline or discharge for violation of an unlawful employer rule is itself a violation of the Act without consideration of *Wright Line*’s dual-motivation analysis. *Northeastern Land Services, Ltd.*, 352 NLRB 744, 745-46 (2008); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n. 3 (2004); *Saia Motor Freight Line, Inc.*, 333 NLRB 784, 785 (2001). In *Saia Motor Freight Line*, the Board affirmed the administrative law judge’s finding that the employer violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad no-solicitation/no-distribution rule. 333 NLRB at 784-85. The Board further held that the employer’s discipline of an employee for violation of that overly-broad rule was a violation of the Act without consideration of *Wright Line*’s dual-motivation analysis, stating that “[a]ny disciplinary action taken pursuant to an unlawful no-solicitation rule is likely unlawful, analogous to the ‘fruit-of-the-poisonous-tree’ metaphor often used in criminal law.” *Id.* at 785.

rule violates Section 8(a)(1). The Board explained that an employer does not violate the Act by disciplining an employee for conduct prohibited by an overbroad rule if the conduct is “wholly distinct” from the concerns of Section 7. *Id.* at 4. Where the conduct for which discipline is imposed pursuant to an unlawfully overbroad rule “touches the concerns animating Section 7,” the discipline has a “chilling effect” on other employees’ exercise of protected rights, even if the conduct could have been proscribed pursuant to a more narrowly drawn rule. *Id.* at 3–4. For this reason, the Board concluded that it will find unlawful discipline imposed pursuant to an overly broad rule for conduct that concerns subjects “protected” by Section 7, even if the conduct is not concerted. *Id.* at 4. For example, as the Board noted, it has held that an employer’s discharge of an employee for violating an overbroad confidentiality rule by complaining to a client about an *individual* compensation issue violated the Act. *Id.* at 4 fn.10 (citing *NLS Group*, 352 NLRB 744 (2008), *incorporated by reference in* 355 NLRB No. 169 (Sept. 28, 2010), *enf’d*, 645 F.3d 475 (1st Cir. 2011)). Thus, because the subject of the employee’s communication concerned wages, a matter that “touches the concerns of Section 7,” the discharge pursuant to an overbroad confidentiality rule was unlawful even though the employee’s comments were not concerted.

In this case, Respondent admitted to firing Carrington because (1) he sent e-mails to himself and Rubio, some of which purportedly contained “confidential” information, and (2) Carrington’s actions violated Respondent’s confidentiality provision in its

---

The Board concluded that “[b]ecause [the employee] was disciplined for violating the Respondent’s unlawful overly broad no-solicitation/no-distribution rule, that discipline itself constitutes a violation of Section 8(a)(3) and (1), without consideration of *Wright Line*’s dual-motivation analysis.” *Id.* The Board went on to say that in circumstances “where the conduct for which the Respondent claims to have [disciplined the employee] was protected activity, the *Wright Line* analysis is not appropriate.” *Id.*

Handbook.<sup>13</sup> However, the record facts establish that Carrington forwarded the e-mails to Rubio (and to himself) in an effort to help his terminated coworker in connection with her claim of unlawful retaliation by Respondent for her concerted activities (which is the subject of the instant Board charge). This is precisely what flows from the ALJ's factual findings: Carrington and Rubio discussed what course of action should be taken to assist Rubio in her discharge case. (ALJD 10:8-16) It is beyond reasonable dispute that Carrington's conduct fell within the ambit of protection under Section 7.

Respondent discharged Carrington because his conduct – protected under Section 7 - violated Respondent's confidentiality rules, rules that the ALJ found overly-broad and discriminatory, and violative of the Act. Therefore, under the Board's reasoning in *Continental Group, Inc.*, Carrington's termination, pursuant to an unlawful rule, violates Section 8(a)(1).

### **III. CONCLUSION**

Based upon the foregoing and the record evidence considered as a whole, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) by maintaining an overly-broad and discriminatory no-solicitation rule; maintaining an overly-broad and discriminatory rule prohibiting its employees from disclosing employee cell phone numbers; promulgating overly broad and discriminatory rules prohibiting its employees from talking to other employees and from providing personal references to other employees; threatening its employees with unspecified reprisals if they engage in concerted activities; interrogating its employees about their concerted activities; creating an impression among its employees that their concerted

---

<sup>13</sup> Respondent's Confidentiality Agreement, like the confidentiality rule in the Handbook, prohibits employees from disclosing any confidential information to the public, unless authorized by Respondent.

activities are under surveillance; discharging its employee Rubio because of her concerted activities; and by discharging its employee Carrington because of his concerted activities and because he violated Respondent's overly-broad and discriminatory confidentiality rules, and that the Board issue an order providing a full and appropriate remedy for such violations.

Dated at Phoenix, Arizona, this 22<sup>nd</sup> day of May 2012.

Respectfully submitted,

/s/ Chris J. Doyle  
Chris J. Doyle  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 640-2198  
Facsimile (602)-640-2178  
Email: [christopher.doyle@nrb.gov](mailto:christopher.doyle@nrb.gov)

CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS in FOOD SERVICES OF AMERICA, INC., a subsidiary of SERVICES GROUP OF AMERICA, INC., Case 28-CA-063052, was served by E-Gov, E-Filing, and E-Mail, on this 22<sup>nd</sup> day of May 2012, on the following:

***Via E-Gov, E-Filing:***

Lester A. Heltzer, Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

***Via E-Mail:***

Richard K. Walker, Attorney at Law  
Walker & Peskind, PLLC  
SGA Corporate Center  
16100 North 71<sup>st</sup> Street, Suite 140  
Scottsdale, AZ 85254  
*E-Mail: rkwalker@azlawpartner.com*

Mr. Paul Louis Carrington  
1351 North Pleasant Drive, Unit 1095  
Chandler, AZ 85225  
*E-Mail: perplexity@gmail.com*

/s/ Chris J. Doyle  
Chris J. Doyle  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 28  
2600 North Central Avenue, Suite 1400  
Phoenix, AZ 85004-3099  
Telephone: (602) 640-2198  
Facsimile (602)-640-2178  
Email: [christopher.doyle@nrb.gov](mailto:christopher.doyle@nrb.gov)