

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

MCPC, INC.

and

Case 06-CA-063690

JASON GALANTER, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF IN OPPOSITION TO MCPc, INC.'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Submitted by:

**Julie R. Stern
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**NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222**

Dated at Pittsburgh, Pennsylvania,

this 30th day of July 2012

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I. PRELIMINARY STATEMENT

Counsel for the Acting General Counsel hereby files and respectfully requests that the Board consider this Answering Brief in Opposition to MCPc, Inc.'s Exceptions to Administrative Law Judge Michael A. Rosas's Decision in the above-captioned matter which issued on June 7, 2012.¹ Counsel for the Acting General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions,² including those which are not specifically addressed herein.

The Administrative Law Judge correctly found that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality policy, discharging Charging Party

¹ ALJ Rosas issued an Errata to his Decision on June 14, 2012.

² Counsel for the Acting General Counsel notes that Respondent's Exceptions in this matter do not conform with Rule 102.46(b)(1), as they contain argument. Counsel for the Acting General Counsel requests that the Board address this deficiency in the manner that it deems appropriate.

Jason Galanter (hereinafter “Galanter”) on March 4, 2011 because he engaged in protected concerted activity, and discharging Galanter because he violated Respondent’s unlawfully overbroad confidentiality rule. (ALJD, p. 13)³

Examination of Respondent’s Exceptions reveals that Respondent has chosen to attack many of the conclusions of law and credibility resolutions reached by the Administrative Law Judge. Respondent’s Exceptions in this regard are, in many instances, a repetition of arguments made in Respondent’s Brief to the Administrative Law Judge. Respondent’s arguments and authorities presented in support of its Exceptions have previously been cogently considered and correctly rejected by the Administrative Law Judge. The Administrative Law Judge’s opinion carefully analyzes appropriate precedent and applies it to the facts. Respondent’s request that the Board not adopt the Administrative Law Judge’s recommendations in this matter should be denied.

It is submitted that the well-reasoned Decision of the Administrative Law Judge (“ALJ”, herein) fully supports all of the conclusions of law and adverse credibility determinations therein and should be adopted, in full, by the Board. Certain statements and arguments advanced in Respondent’s Brief,⁴ however, deserve further comment.

II. FINDINGS OF FACT

The ALJ’s Findings of Fact accurately describes the facts underlying the allegations in this case, so they will not be repeated herein. Many of the ALJ’s findings are based upon his

³ “ALJD, p.” refers to the page of the Decision of the Administrative Law Judge; GCX refers to Acting General Counsel’s Exhibits; RX refers to Respondent’s Exhibits; and numbers in parentheses refer to pages of the official trial transcript.

⁴ Unless otherwise noted, references herein to “Respondent’s Brief” refer to MCPc, Inc.’s Brief in Support of Its Exceptions to the Administrative Law Judge’s Decision dated July 3, 2012.

determinations regarding the credibility of the witnesses. As such, his findings should be upheld.⁵

In determining that Galanter was engaged in protected concerted activity when he raised the salary being paid to the newly-hired executive during the February 24 lunch with Director of Engineering Dominic Del Balso, the ALJ correctly found it was not necessary for Galanter to have involved other employees in his quest for information about the salary. The salary number was raised in connection with Galanter's complaint, which was echoed by other engineers at the lunch meeting, that Respondent needed to hire additional engineers. (ALJD, p. 4)

Respondent suggests that because Galanter was unable to specifically name the co-workers with whom he had searched for information regarding the salary being paid to a newly-hired executive, Galanter's testimony on this question should not have been credited. As Galanter himself stated, however, the question of the salary number was ". . . a scuttlebutt through almost the entire engineering staff . . ." (46)

Galanter was forthright in his testimony when he stated that it was his assumption, based upon his own logic rather than any assertions made by Respondent's managers, that the high salary paid to the new executive might impact upon Respondent's ability to hire additional engineers (48), and the ALJ correctly credited him. (ALJD, p. 4)

Respondent points out that the ALJ did not credit Respondent's CEO Michael Trebilcock's testimony that he learned of Galanter's disclosure at the lunch meeting from Doug Campbell, instead holding that it was Del Balso who reported to Trebilcock what occurred at the lunch meeting. (ALJD, p. 5, n. 19) Counsel for the Acting General Counsel notes that Campbell was not called to testify, there was no suggestion that he was unavailable, and it is undisputed

⁵ "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." Hyundai America Shipping Agency, Inc., 357 NLRB No. 80, p. 1, n. 1 (2011), citing Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (1951). Counsel for the Acting General Counsel submits that, in the instant case, the ALJ's credibility resolutions are amply supported by the evidence presented at the hearing, and should be adopted by the Board.

that Campbell did not attend the lunch. In addition, Del Balso did not address this issue in his testimony.

Counsel for the Acting General Counsel submits that there is nothing in the record to contradict the ALJ's finding in this regard. Nevertheless, it is further submitted that Respondent's discharge of Galanter is unlawful, regardless of whether Trebilcock learned about the lunch meeting from Campbell or from Del Balso. It is undisputed that Trebilcock became aware of what occurred at the lunch, and that he based his decision to discharge Galanter on his belief that Galanter had disclosed an executive's salary in violation of Respondent's unlawful confidentiality policy, and because Galanter engaged in protected concerted activity, as correctly found by the ALJ. (ALJD, p. 13)

In its Brief, Respondent argues that the ALJ was incorrect in finding that there is no evidence that Galanter discovered confidential salary information on Respondent's computer network. The evidence, however, fully supports the ALJ's findings in this regard. The ALJ correctly found that while it appears that Galanter may have had access to certain confidential information because of the internal project to which he had been assigned, there is no evidence that Galanter actually exercised that access. (ALJD, p. 3) Respondent conducted audits of Galanter's access and found no irregularity; Respondent was well aware of the extent of Galanter's access to Respondent's system in connection with his assigned task. (ALJD, p. 3, p. 4, n. 13) The ALJ correctly found that Galanter did not engage in any improper activity which would justify Respondent's decision to discharge Galanter. (ALJD, p. 13)

Respondent suggests that Galanter's testimony regarding his conversation with Trebilcock concerning how he learned of the executive salary should not be credited, particularly in light of the ALJ's comment that Galanter's testimony revealed that he was "purposely vague and evasive" in his explanation to Trebilcock. (ALJD, p. 5, n. 23) It should be noted, however, that it is understandable that Galanter would not want to identify individuals still employed by Respondent. In addition, and more importantly, the ALJ noted that Respondent

failed to conduct a thorough investigation into this matter, and was unable to produce evidence to show that Galanter obtained the information improperly. See ALJD, p. 5, n. 20 (referring to Respondent's "purported investigation").

Galanter's testimony that the topic of the newly-hired executive's salary was "scuttlebutt" among the engineers suggests that Galanter's method of obtaining this information was not particularly memorable. In fact, Galanter testified that the search for the salary was not a "big event in my life." (47) As the ALJ correctly found, Galanter guessed at the salary number based upon his internet search, which revealed what Galanter assumed the executive had been paid in his previous position. (ALJD, p. 4)

Respondent suggests that GCX-6, a copy of a website page that Galanter said he consulted, was produced for the first time within days of the hearing in this matter. While, in fact, the page was printed shortly before the hearing for evidentiary purposes, Galanter testified that GCX-6 was the website he consulted before the lunch with Del Balso. (24, 67-68) Galanter confirmed which salary he used to determine the amount he assumed the new executive was being paid. Respondent's suggestion that this website was fabricated merely for trial should be rejected. Counsel for the Acting General Counsel urges the Board to adopt the ALJ's finding that Galanter's statement regarding the salary he believed was being paid to the new executive ". . . was based on a combination of rumors and an estimate derived from internet research that he conducted several weeks earlier. . . ." (ALJD, p. 4) See also ALJD, p. 4, n. 18 ("Galanter's testimony on this point is credible and unrefuted.")

The ALJ correctly found that Respondent conducted a sparse investigation. There is an utter lack of any evidence to support Respondent's assumption that Galanter learned the salary information through improper means. (ALJD, p. 13) Respondent was embarrassed and acted on Trebilcock's "gut feeling", resulting in the unlawful discharge of Galanter. (ALJD, p. 5)

III. THE ALJ CORRECTLY FOUND THAT RESPONDENT VIOLATED THE ACT

A. The ALJ correctly found that Respondent maintained an overly broad confidentiality policy, in violation of Section 8(a)(1) of the Act.

Respondent's handbook contains a confidentiality policy which prohibits "dissemination of confidential information within MCPc, such as personal or financial information . . ." (GCX-9) There is nothing in the handbook which even suggests that this provision applies only to disclosure of the salaries of others. It is a blanket prohibition. (GCX-9; RX-1; 32, 125)

The ALJ found that this policy violates Section 8(a)(1) of the Act because "[e]mployees could reasonably interpret this language as prohibiting activities protected under the Act." (ALJD, p. 8) Respondent excepts to this finding, suggesting that the ALJ's finding is not supported by Board law. Counsel for the Acting General Counsel submits that Board law supports the findings of the ALJ, and requests that the Board adopt the ALJ's findings on this issue.

In its Exceptions, Respondent argues that the ALJ failed to consider the policy as a whole, and that the ALJ misapplied Board precedent. Respondent's argument, however, is not supported by the ALJ's well-reasoned decision. The ALJ specifically discussed Respondent's policy as a whole, noting that the initial provision of Respondent's policy, which requires its employees to maintain the confidentiality of certain aspects of its business, is lawful. (ALJD, p. 6) It is the portion of Respondent's policy which refers to the dissemination of "personal" information, not business information, which the ALJ correctly found to be unlawful.

The ALJ correctly applied the Board's standard as described in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). Using that standard, the ALJ found that employees could "reasonably interpret this language as prohibiting activities protected under the Act." (ALJD, p. 8) As the ALJ pointed out, Galanter's discharge following his disclosure of the estimated salary being paid to one of Respondent's executives shows that the policy was used

by Respondent to “inhibit employees from engaging in protected concerted activities.” (ALJD, p. 8)

Respondent argued in its position statement (GCX-5)⁶, as well as through testimony elicited from Trebilcock, that this policy does not prohibit employees from disclosing their own personal information. The policy as written, however, does not specifically allow such disclosure. The policy as stated in the handbook has not been modified in any way, and no evidence was presented at the hearing that the handbook was - in whole or in part - not applicable to Respondent’s employees at the time Galanter was discharged. (ALJD, p. 3; 33)

Respondent represented in its Answer to the Complaint that the provision of the handbook in question is “no longer controlling policy” [GCX-1(h)], and argued that the provision was not enforced in such a way as to limit the Section 7 rights of its employees. The ALJ correctly noted, however, that it is unnecessary to reach this argument because the policy is unlawfully overbroad as written. (ALJD, p. 8) The ALJ further correctly found that the instant case “. . . demonstrates that [Respondent’s] rule applies to inhibit employees from engaging in protected concerted activities.” (ALJD, p. 8) In addition, this provision of the handbook was cited by Respondent in its position statement as justification for Galanter’s discharge. (GCX-5) The evidence clearly shows that this provision of the handbook was in effect at the time Galanter was discharged.

Respondent argues in its Exceptions that the ALJ misapplied Board law, citing numerous examples from the cases cited by the ALJ to suggest that its policy does not run afoul of Section 8(a)(1).⁷ Respondent’s arguments are not valid, however. The language of the Respondent’s

⁶ As it did in its brief to the ALJ, Respondent argues in its Exceptions that the ALJ should not have received into evidence the position statement which Respondent submitted during the investigation of the instant charge. As the ALJ correctly analyzed and held, Respondent’s position statement was appropriately received into evidence and considered by the ALJ in making his decision in this case. Navigator Communications Systems, LLC, 331 NLRB 1056, 1058, n. 10 (2000).

⁷ See the ALJ’s discussion of Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3rd Cir. 1964), and other cases at ALJD, pp. 9-10.

policy, unlike policies addressed by cases it cites, on its face prohibits its employees from disclosing personal financial information. Respondent's confidentiality policy is not limited to a prohibition of the disclosure of business-related information such as pricing or matters specifically related to customers or vendors. In this respect, the ALJ correctly found that Respondent's policy is unlawfully overbroad. (ALJD, p. 13)

As the ALJ correctly noted, the Board has found that it is unlawful to prohibit employees from discussing their own wage rates and compensation. NLS Group, 352 NLRB 744, 745 (2008), enfd. 560 F.3d 36 (1st Cir. 2009); vac. 130 S.Ct. 3498 (2010); re-affd. 355 NLRB No. 169 (Sep. 28, 2010), enfd. 645 F.3d 475 (1st Cir. 2011). Such discussions are part and parcel of the rights conferred on employees by Section 7 of the Act. More importantly, the Board has said that "employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid." Northfield Urgent Care, LLC, 358 NLRB No. 17, slip op. pp. 23-24 (2012), citing Mediaone of Greater Florida, 340 NLRB 277, 279 (2003).⁸

Respondent's contention that the Board's decision in International Business Machines Corp., 265 NLRB 638 (1982), was inaccurately cited by the ALJ should be rejected. In International Business Machines, the Board noted that "discussion of wages is an important part of organizational activity." Id. The Board upheld the confidentiality policy in that case, but found, unlike Respondent's policy, that the policy in IBM did "not itself bar employees from compiling or determining wage information on their own." Id. Respondent's policy clearly includes such a bar, as evidenced by Respondent's discharge of Galanter.

⁸ Significantly, the Board's decisions in these cases are not limited to statutory employees, suggesting that employees are also protected from attempting to determine salaries paid to management employees. This comports with the Board's decision that held that policies which proscribe complaints about management's conduct are unlawful. Salon/Spa at Boro, Inc., 356 NLRB No. 69, slip op. pp. 14-15 (Dec. 30, 2010).

Counsel for the Acting General Counsel submits that the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by maintaining this policy, and respectfully requests that the Board adopt the ALJ's decision in this regard.

B. The ALJ correctly found that Respondent discharged Galanter because he engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

Galanter, like other employees of Respondent, was concerned about the shortage of engineers and the effect that it had on the workload of the existing work force. (52-53, 72, 74, 77, 86, 88, 91, 106, 122, 149, 162) Although Galanter's primary responsibility was to design computer solutions for Respondent's customers, he ultimately also became responsible for implementing those solutions because there were not enough engineers to accomplish the task. (ALJD, p. 3; 18)

There is no dispute that the shortage of engineers was a common topic among the employees, as the ALJ correctly noted. (ALJD, p. 4) In addition, management was well aware of the problem. (51) Trebilcock described Respondent's efforts to hire and retain qualified engineers, noting that at one time, existing employees were paid incentives for identifying qualified engineers. (122)

At least part of the discussion at the lunch with Del Balso concerned the engineers' complaints that Respondent needed more engineers, as the existing employees had more work than they could handle. (ALJD, p. 4; 21, 71, 72, 84, 102) Galanter supported this point by mentioning the salary he believed was being paid to the newly hired executive, suggesting that the Employer could have hired more engineers for what it was paying a new executive. (ALJD, p. 4; 21-22, 73, 74, 86, 87-88) The other engineers at the lunch agreed with him (86), and Del Balso did not say anything at the lunch to suggest that Galanter's mention of the salary number was a problem. (ALJD, p. 4; 25, 51, 71)

While there is no evidence that the engineers planned this conversation in advance, or that they asked Galanter to speak on their behalf, the evidence does show that this was a

general - and continuous - concern among the engineers regarding their working conditions. Galanter's comment regarding the executive salary was directly related to the issues being raised concerning the working conditions. The other engineers at the lunch confirmed that the lack of engineers was a topic of discussion at the lunch, as well as an ongoing concern among the employees. (ALJD, p. 4, n. 17) Galanter's comments were not designed merely to advance a concern specific to him, but to raise an issue which affected all of the engineers.

In its Brief, Respondent argues that the ALJ misapplied the law, suggesting that because Galanter raised an issue of ongoing concern - the lack of engineers - his comment did not constitute protected concerted activity. Respondent is misguided, however. The ALJ correctly interpreted and applied the law on this issue. (ALJD, p. 10) As the ALJ stated, "Galanter engaged in concerted conduct because group concerns were implicated in the course of a group activity." (ALJD, p. 10) (footnote omitted) Furthermore, the ALJ's finding that Galanter's activity was not only concerted, but protected, is fully supported by the record and relevant case law, as described in detail by the ALJ. (ALJD, pp. 9-10)

Galanter made complaints about the need to hire more engineers at a group meeting, noting that for the salary paid to an executive, many engineers could be hired. The ALJ correctly found that these comments constituted protected concerted activity. (ALJD, p. 10) "The Board has held, 'in a group meeting context, a concerted objective may be inferred from the circumstances.'" See Air Contact Transport, 340 NLRB 688, 695, n. 4, n. 5 (2003), *enfd.* 403 F.3d 206 (4th Cir. 2005), and cases cited therein.

Only about ten days after the lunch, Respondent discharged Galanter. His job performance was not an issue. (ALJD, p. 3; 29-30, 66) The alleged problems with Galanter's performance that Respondent belatedly raised occurred well over a year or more before his discharge. Moreover, nothing about Galanter's job performance was raised at his discharge meeting. (65) Because of the timing, and the lack of other justifiable motive, the ALJ correctly

found that Respondent discharged Galanter to punish him for having engaged in protected concerted activity, in violation of Section 8(a)(1) of the Act. (ALJD, p. 13)

Respondent contends that the ALJ misapplied the decision in Air Contact Transport, 340 NLRB 688. While it is true that the issue of whether the activity in that case was concerted was not before the Board, the Board's definition of the elements which support a finding of concerted activity were appropriately set forth and applied by the ALJ herein.⁹ (ALJD, p. 9)

At the hearing, and again in its Brief, Respondent made much of the lack of evidence that Galanter had made any arrangements with other employees in advance of the lunch with Del Balso to raise the issue of the engineer shortage. The ALJ correctly applied Board precedent, which indicates that this type of advance planning is not necessary for a finding that raising such issues, which directly impact the working conditions of several employees, constitutes protected concerted activity. (ALJD, p. 9) See Salon/Spa at Boro, Inc., 356 NLRB No. 69, slip op. p. 10 (Dec. 30, 2010); Meyers Industries, Inc. (II), 281 NLRB 882, 887 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert.den. 487 U.S. 1205 (1988).

In its position statement (GCX-5), Respondent cited the Board's decision in Asheville School, Inc., 347 NLRB 877 (2006), to support its position that Galanter was not engaged in protected concerted activity. In that case, the alleged discriminatee was discharged for disclosing confidential wage information to which she had access in her position as payroll accountant. The administrative law judge found that the accountant was not engaged in protected or concerted activity; that she, by her own admission, was "gripping," and that she did not intend to take any action. Id. at 881-882. Respondent argued both to the ALJ and again in its Brief that Galanter also was merely "gripping," and that his comments regarding the executive salary, in the context of his complaint that Respondent could have instead hired engineers, were not concerted, and, therefore, not protected.

⁹ It should be noted that the ALJ also cited Worldmark by Wyndham, 356 NLRB No. 104 (2011) in support of his decision on this issue. (ALJD, p. 9)

The Board in Asheville School, however, specifically did not pass on the administrative law judge's finding regarding the lack of concerted activity. 347 NLRB 877, n. 2. In the instant case, Galanter was not merely "griping;" he and the other engineers were describing to Del Balso serious issues affecting their employment. They were seeking additional engineers to help them manage the heavy workload, and Galanter criticized Respondent's decision to hire an executive at a high rate of pay. The ALJ correctly found that Asheville School presents a significantly different fact pattern and is not applicable herein. (ALJD, p. 10, n. 27)

Respondent contends that it was justified in discharging Galanter because he improperly obtained and disseminated confidential salary information, regardless of whether he was engaged in protected concerted activity at the lunch with Del Balso. As the ALJ correctly found, however, there is no evidence that Galanter accessed the salary information through any system maintained by Respondent. (ALJD, pp. 3, 4)

At trial, Galanter pointed out that the executive to whom he referred had previously been employed at a publicly traded company, and, therefore, his salary information was a matter of public record. (GCX-6; 39-40, 63) Galanter merely presumed the approximate amount of the salary that Respondent was paying based upon what he learned through internet research.¹⁰ Respondent was unable to prove that Galanter had obtained the salary information from Respondent's computer system; the assumption was made based upon Galanter's temporary extensive access due to his work assignment at that time. The real reason for the termination is that Trebilcock did not permit employees to discuss personal or financial information, and fired Galanter as a result. (ALJD, p. 6)

Respondent was well aware of the level of access afforded to Galanter. Contrary to IT Manager Jeff Kaiser's testimony at the hearing, Respondent's own documents show that Kaiser knew the extent of Galanter's as early as December 2010, when Kaiser conducted an audit of

¹⁰ The ALJ correctly found that Galanter's testimony on this point was "credible and unrefuted." (ALJD, p. 4, n. 18)

the system. (29, 136) The ALJ correctly found that Kaiser would certainly have been aware of the parts of Respondent's system to which Galanter had access, and that Kaiser did nothing to alter Galanter's access rights. (ALJD, p. 4; 26-29)

In order to bolster its decision to summarily discharge Galanter, Respondent raised at the hearing suggestions that Galanter's work performance was somehow deficient, apparently implying that these alleged performance problems supported Respondent's decision to discharge him. The instances raised by Respondent's witnesses occurred over a year before Galanter was discharged. (150-151, 155) Galanter was never disciplined, and the one formal job performance review that he received reflected Respondent's view that Galanter performed his job well.¹¹ (ALJD, p. 3; GCX-7)

In addition, it is undisputed that when Galanter was informed of his discharge, no job performance issues were brought to his attention. (30) According to Galanter, as confirmed by Trebilcock, nothing was said at the "exit" meeting to suggest that Respondent had any concerns regarding Galanter's work performance. (ALJD, p. 3; 29-30, 66) In fact, Respondent's position statement submitted during the investigation noted Galanter's disclosure of the salary information as the only basis for his discharge. (GCX-5)

¹¹ In its Brief, Respondent asserts that it presented evidence concerning the quality of Galanter's work performance only after the Acting General Counsel elicited testimony regarding Galanter's work history. Galanter's work history was raised merely to emphasize that Respondent had no reason, and at the time of the discharge stated no reason, for discharging Galanter other than his disclosure of the executive salary. There was no reason to delve deeper into Galanter's work history if there was no dispute that he was fired only for disclosing the salary being paid to the newly hired executive; if Galanter was fired only because he disclosed the salary, his past work performance would be irrelevant. Counsel for the Acting General Counsel elicited the testimony merely to confirm that Galanter's work performance played no part in Respondent's decision to discharge Galanter. Respondent, on its own, explored the work performance issue, perhaps as part of its "developing defense." (174-175) It is only now, in its Brief, that Respondent repeatedly refers to Galanter's "multiple acts of dishonesty," and "recurring and serious deceit." Only Galanter's disclosure of the salary information was initially given as the reason for his discharge. (GCX-5) By presenting evidence to suggest that it was dissatisfied with Galanter's work performance, Respondent suggested that it had additional justifications for its decision to discharge Galanter even though, as the ALJ correctly found, Galanter was never told that Respondent was unhappy with his job performance, or that he was in danger of losing his job. (ALJD, p. 3)

Respondent's attempt to raise Galanter's work performance as a reason for his discharge after the fact is evidence of a "shifting defense,"¹² indicating that the real reason for Respondent to discharge Galanter was his protected concerted activity.¹³ See Sound One Corp., 317 NLRB 854, 858 (1995), enfd. 104 F.3d 356 (2nd Cir. 1996); Taft Broadcasting Co., 238 NLRB 588, 589 (1978), enfd. in rel. part 652 F.2d 603 (6th Cir. 1980). While, at the hearing, Respondent presented testimony suggesting it had concerns about Galanter's work performance, there is no evidence that Galanter would have been discharged at that time because of those concerns.

In its Brief, Respondent argues that the ALJ misapplied the burden shifting mechanism enunciated by the Board in Rubin Bros. Footwear, 99 NLRB 610, 611 (1952) and the U.S. Supreme Court in NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964). Counsel for the Acting General Counsel asserts that Respondent's arguments on this point are not supported by the case law, and should not be adopted by the Board. A reading of those cases reveals that the ALJ did, in fact, appropriately apply the precedents described in those cases.

In Burnup & Sims, the Supreme Court held that Section 8(a)(1) of the Act is violated if it is shown that the discharged employee was at the time engaged in protected activity, that the employer knew it of the employee's protected activity, 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. 379 U.S. 21, 23. The ALJ correctly found that each of those elements is present herein. (ALJD, pp. 12-13)

¹² Respondent's attorney admitted that this was a "developing defense," highlighting the weakness in its argument. (174-175)

¹³ It should be noted that Respondent's shifting defense with respect to the reason for discharging Galanter is only one portion of Respondent's defense. In its Answer, Respondent asserted that the rule cited as the reason for Galanter's discharge was not controlling policy, while representing in its position statement and through testimony at the hearing that Galanter was discharged for violating that very rule.

In addition, the ALJ correctly rejected Respondent's argument that it discharged Galanter based on its good-faith belief that he engaged in misconduct. (ALJD, pp. 12-13) Noting that a low threshold exists for establishing an honest belief of misconduct, the ALJ found that even assuming Respondent believed Galanter engaged in the alleged misconduct despite its failure to produce the complete record of Galanter's access to its computer network systems, the argument fails for several reasons.

First, Respondent failed to show that its confidentiality policy was not the reason for the discharge. Also, Respondent conducted a sparse investigation of Galanter's alleged misconduct. Furthermore, Respondent's shifting defense indicates that its claim of misconduct is merely a pretext. Finally, Respondent's contention that Galanter actually engaged in the alleged misconduct has been refuted by the preponderance of the evidence. (ALJD, p. 13)

Counsel for the Acting General Counsel submits that the evidence overwhelmingly supports the ALJ's finding that Galanter was engaged in protected concerted activity, and that Respondent discharged him because he engaged in such activity, in violation of Section 8(a)(1) of the Act. (ALJD, p. 13)

C. The ALJ correctly found that Respondent discharged Galanter because he violated an unlawfully overbroad confidentiality rule in violation of Section 8(a)(1) of the Act.

At the time Galanter was discharged, Respondent's only basis for the discharge was the accusation that Galanter had accessed confidential information in violation of a policy in its handbook prohibiting disclosure of salary information. (GCX-5) The ALJ found that this accusation was based upon a report received by Trebilcock that there was discussion among the employees about the salary being paid to a recently-hired executive.¹⁴ Although Respondent contends that Galanter acquired this information improperly, Respondent was

¹⁴ The ALJ found that Campbell, who did not testify, was not the source of Trebilcock's information. The ALJ found it likely that Del Balso informed Trebilcock about Galanter's statement at the lunch meeting. (ALJD, p. 5, n. 19) Either way, there is no question that Trebilcock learned of what occurred at the lunch, and took action based upon that information.

unable to provide any evidence to support its post-discharge theory. (ALJD, p. 13) Respondent simply did not want employees talking about wages as set forth in its handbook, notwithstanding Respondent's belated assertion that its written policy is no longer controlling.

As described more fully above, the ALJ correctly found that Respondent maintained the unlawful policy prohibiting discussion of wages. (ALJD, p. 13) The Board has held that "... discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by ... engaging in protected conduct ... " Continental Group, Inc., 357 NLRB No. 39, slip op. p. 4 (August 11, 2011) An employer may avoid liability by showing that the employee's conduct interfered with his own work, the work of other employees, or with the operation of the employer. Id.

It is undisputed that Galanter did not discuss his estimate of the executive's wage with any third party or customers; his comments were only to Del Balso and his co-workers at the luncheon. Respondent cannot establish, and has not suggested, that Galanter actually interfered with Respondent's operations. Therefore, Respondent has been unsuccessful in meeting its burden of establishing that Galanter was fired for a reason other than violating the unlawful rule, as the ALJ correctly found. (ALJD, p. 13)

Counsel for the Acting General Counsel submits that the evidence supports the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by discharging Galanter because he violated an unlawfully overbroad rule, and respectfully requests that the Board adopt the ALJ's finding on this issue.

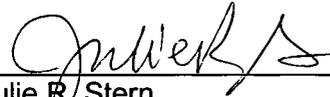
IV. CONCLUSION AND REQUESTED REMEDY

It is respectfully submitted that the record evidence amply supports all of the conclusions of law and resolutions of credibility made by the Administrative Law Judge to which Respondent takes exception. Counsel for the Acting General Counsel respectfully requests that the Board adopt the recommendation of the Administrative Law Judge and issue an order requiring

Respondent to cease and desist from the unlawful conduct alleged; to post an appropriate notice; and to take any other appropriate action.

Dated at Pittsburgh, Pennsylvania, this 30th day of July, 2012.

Respectfully submitted,



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