

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

_____)	
ADVANCED SERVICES, INC.)	
)	
and)	CASES 26-CA-63184
)	26-CA-71805
TABITA SHEPPARD HOWARD, an)	
Individual)	
)	
and)	
)	
PRINCESS BALLARD, an Individual)	
_____)	

**ADVANCED SERVICES, INC.'S ANSWERING BRIEF IN RESPONSE TO ACTING
GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Advanced Services, Inc. (“ASI” or the “Company”) submits this Answering Brief to the Acting General Counsel’s (“AGC”) Cross-Exceptions, which were filed on September 10, 2012. In the AGC’s Brief in Support of the Cross-Exceptions (“AGC Brief”), counsel for the AGC seeks to relitigate credibility determinations made by the Administrative Law Judge (“ALJ”) in rejecting the allegation that employee Tabita Howard (“Howard”) was terminated for engaging in protected, concerted activity. The ALJ found that ASI lawfully terminated Howard for dishonesty during an internal investigation concerning alleged misconduct by a supervisor.

Counsel for the AGC argues that Howard was engaged in protected, concerted activity when she allegedly warned employees that a supervisor was going to be “bragging” about disciplining employees for having newspapers and other reading material on their desks during working time. When the Company began an investigation into whether the supervisor, Russell Clack, had engaged in misconduct by publicly discussing discipline issued to another employee, the Company spoke with Howard to find out what happened. Even though she was not being accused of any misconduct, Howard lied during the investigation and, in that “one apparent impulsive action, Howard set in motion the events that ultimately lead to her discharge” for “lack of truthfulness” and “deception” during the investigation. ALJD at 18.

The ALJ did not find that Howard was engaged in protected, concerted activity or was even regarded as doing so. Further, the ALJ found that ASI bore no animus toward Howard’s allegedly protected, concerted activity and found that Howard would have been terminated for a legitimate reason – dishonesty – regardless of any protected, concerted activity. The Board should uphold the ALJ’s findings on all of these points.

Counsel for the AGC also attacks the judge’s rejection of Complaint Paragraph 7, which alleges that the Company orally promulgated “a rule prohibiting discussions among employees about their terms and conditions of employment, including discipline.” Further, counsel for the AGC improperly seeks to expand the scope of this allegation to encompass employee handbook provisions concerning confidentiality – an allegation that is beyond the scope of Paragraph 7 of the Complaint and that was not litigated at the hearing before the ALJ. The only issue litigated at the hearing was the Company’s oral instruction to employees to maintain the confidentiality of information provided during the investigation into supervisor Clack’s alleged misconduct. The ALJ rejected any Section 8(a)(1) violation related to this instruction. The Board should uphold this finding based on the Company’s legitimate business interest in protecting the confidentiality of witness testimony provided during this investigation.

STATEMENT OF FACTS

I. COMPANY BACKGROUND

ASI, headquartered and incorporated in Memphis, Tennessee, provides call center services for consumer appliances and electronics. (ALJD at 3; Tr. 346). ASI operates a customer relations center that handles calls regarding appliance delivery, warranty matters, repair services and other customer concerns related to home appliances and services. (Tr. 346).

ASI operates based on five core values. (Tr. 369). Chief among these core values is “always acting with honesty and integrity.” (Tr. 369-370). Being honest and comporting oneself with integrity is exceedingly important and must drive everything that an ASI employee does. (Tr. 369-372). ASI must meet this standard because ASI employees are the caretakers of and come into daily contact with personal and very sensitive consumer information, such as credit card numbers, addresses, and telephone numbers. (Tr. 369). Accordingly, ASI must

have a strong focus on the honesty and integrity of its employees as a means of preventing the improper use or theft of a consumer's personal information. (Tr. 369).

ASI begins evaluating an individual's honesty and integrity at the application stage, and applicants who are found to have provided false information during the application process are not hired. (Tr. 370). Once hired as an ASI employee, the individual must act with honesty in all aspects of his or her job. (Tr. 370). To help facilitate and maintain an operation with only the most honest individuals with a strong sense of integrity, ASI provides employee training on honesty and integrity; communicates the importance of honesty and integrity through email messages to employees; makes specific reference to the core values in the employee handbook; places its "Core Values" posters in and around the entire call center; and posts copies of its core values in individual employee workstations so they are reminded to always act with honesty and integrity. (Tr. 229, 257, 258, 371-72). Howard was aware of the existence of ASI's core values and the expectation that employees are to conduct themselves with honesty and integrity. (Tr. 228-29, 316-17, 338).

II. EVENTS LEADING TO HOWARD'S DISCHARGE FOR DISHONESTY

A. Trudie Dunlap Issues Email on Reading Materials at Work Stations, and Katina Powell Is Disciplined for Violation.

On August 10, 2011, at 8:56 a.m., the Parts Department Operations Director, Trudie Dunlap ("Dunlap"), sent an email to her Parts Sales Team indicating that during a walk through of the Parts Department, she noticed a violation of ASI's ban on newspapers or other similar reading material on workstation desks during working time. (ALJD at 8, GCX 6, Tr. 190, 585-86). Katina Powell ("Powell"), a Parts Agent supervised by Russ Clack ("Clack"), had a magazine or a coupon on her desk at the time and had been reading the material. (Tr. 188-

89). Dunlap's email indicated that a supervisor would be visiting with any employee who was in violation of the policy. (GCX 6).

At the time, Clack had been employed by ASI for only a matter of months and when he received a copy of Dunlap's email — having himself earlier seen Powell with the reading material on her desk — he sought counsel from a more tenured Parts Manager, Andrea Slaughter ("Slaughter"), concerning the most appropriate disciplinary approach. (ALJD at 8, Tr. 404-09). During his conversation with Slaughter, which took place on the call center floor at Slaughter's workstation, Clack "voiced" his displeasure about having to issue discipline. (ALJD at 8, GCX 5(a), Tr. 408-09, 544). But Clack understood that consistency of practice may require him to issue discipline if past practice required it. (Tr. 408).

Slaughter and Clack's work areas were both in the Parts Department, but their respective work areas were located apart from each other and comprised different functions of the Parts Department team. (GCX 5(a), Tr. 408-09, 544). Howard's workstation was located in Slaughter's work area and Slaughter was Howard's supervisor. (Tr. 597). During his conversation with Slaughter, Clack did not mention Powell as the employee who was in jeopardy of being disciplined. (Tr. 495). Having received verification from Slaughter that discipline was warranted, Clack then proceeded to issue a written corrective action to Powell on August 10, 2011, at about 9 a.m. or 10 a.m. (ALJD at 9, GCX 12, Tr. 189, 408-09). At the time, Powell "shared with none of her coworkers" that she had been disciplined by Clack. (ALJD at 9, Tr. 190, 193-94).

B. Powell Hears Howard Say Clack Was Bragging about "Writing-Up" an Employee That Morning.

At around noon on August 10, 2011, and after walking outside while on her break, Howard re-entered the call center through a back door that opened to Clack's work area

where Princess Ballard (“Ballard”), Powell, Pam Moore (“Moore”), and Shirley Bowles (“Bowles”) were all at their workstations during their working time. (GCX 5(a), Tr. 102-04). According to Powell, Howard stopped in the area between Ballard and Moore’s workstations and said, “Russ [Clack] down there bragging about somebody he wrote up.” (Tr. 190). Powell had “no doubt at all” about what she heard Howard say. (Tr. 209). Based on what she heard Howard say, Powell became very upset that Clack was openly discussing her specific disciplinary action. (Tr. 191-94, 209). ASI supervisory employees are prohibited from openly discussing specific disciplinary action taken against an employee. (Tr. 378, 422-23, 487, 522). Powell knew this and, based on Howard’s statement, Powell felt that it was now Clack’s “time to get written up” for publicly talking about her discipline. (Tr. 209).

C. Powell Complains to Dunlap about Clack’s Alleged Unprofessional Behavior.

About 15 or 20 minutes after hearing Howard’s statement, Powell sent Dunlap an email requesting Dunlap to “address” Clack for bragging about the discipline she received earlier in the morning. (ALJD at 9, GCX 13, Tr. 208). In her email, Powell stated the following in all caps: “THIS IS MY CONCERN: TABITA HOWARD CAME DOWN HERE SAYING RUSS [SIC] HAS BEEN BRAGGING ABOUT WRITING SOME ONE UP ON HIS TEAM.” (GCX 13). Powell went on to state she felt Clack’s conduct was unprofessional and that if it happened again she intended to complain to Jill Sullivan (“Sullivan”), the Center’s Manager and ASI Senior Vice President, among others. (ALJD at 9, GCX 13). Powell testified that she drafted the email in way to spur immediate action. (Tr. 209).

Dunlap received Powell’s email and, according to Dunlap, “[w]hen I received the e-mail communication, just reading through the notes of it, I could clearly see that the employee was upset. And I had two things to try to find facts on. Had this actually occurred? And had a supervisor been out on the floor or at some segment of our center speaking on disciplin[e]?” (Tr.

524-25). Dunlap responded to Powell's complaint by return email and let Powell know that, "I would start fact finding; that true, management should not be disclosing information of agents out on the floor with other agents or management; and that I would allow [Powell] to know as much as I could throughout the investigation and that I would start the process." (GCX 4, Tr. 526). Dunlap copied Angie Settles, Human Resources Generalist, on the response to Powell's complaint. (Tr. 526).

D. Dunlap Opens an Integrity Investigation and Starts with the Only Named Witness: Howard.

Dunlap launched an Integrity Investigation into Powell's complaint about Clack and sent an email to Howard asking that she come to Dunlap's office.¹ (ALJD at 9, Tr. 524, 526, 529). At this point in the investigation, Dunlap had not accused anyone, including Howard, of any misconduct; Howard was not in any trouble for claiming to have overheard Clack bragging about disciplining an employee. (ALJD at 10, Tr. 527-28). Dunlap further stated that her office was "open and inviting," and she did not have Howard sit at the table where Dunlap customarily issues discipline or administers performance coaching to employees. (Tr. 530).

When Howard arrived to Dunlap's office, Dunlap informed Howard that a complaint had been lodged against one of Dunlap's supervisors and that Howard was identified as having overheard the supervisor bragging on the call center floor about disciplining another employee. (ALJD at 10, Tr. 530-31). Dunlap informed Howard that the complaint was not against Howard, and Dunlap did not accuse Howard of any wrongdoing. (Tr. 531). Dunlap did not disclose to Howard the name of the supervisor or the complaining employee. (ALJD at 10,

¹ Integrity Investigations include, as examples, inquiries into allegations that an ASI employee used or misused personal consumer information (Tr. 380), disclosed ASI proprietary information (Tr. 380), was involved in a fight with another employee in the center and on the center floor (Tr. 380), allegations of managers broadly sharing disciplinary actions (Tr. 380), and allegations of dishonesty by ASI employees (Tr. 425).

Tr. 531). Dunlap simply asked Howard whether Howard knew anything about the situation. (GCX 3 Ex. 5, Tr. 531).

E. Howard Denies Overhearing Clack and Indicates She Had No Time to Engage in Conversation with Others.

According to Dunlap, Howard stated “that her immediate manager had not done anything wrong, hadn’t made any comments, and really wouldn’t do that. Her and her manager had a good relationship. She wouldn’t speak about disciplin[e] outside of the work area.” (Tr. 532). Dunlap continued her questions, asking Howard “why would another employee risk their integrity to send me a complaint and list these two facts, a supervisor and yourself?” (Tr. 532). As Dunlap continued to probe, Howard became nervous and seemed uncomfortable. (ALJD at 10, Tr. 532). Howard told Dunlap that “people or agents are out to get her or complain on her, want to see her fired.” (Tr. 532). Dunlap did not understand the basis for Howard’s statement, since Howard “hadn’t provided me with any examples to understand why she felt that way.” (Tr. 532). At some point during the conversation, Dunlap told Howard that though there was an email indicating that Howard had overheard a manager openly discussing discipline, given Howard’s denials, Dunlap would take Howard “at her word” that Howard did not know anything about the situation. (Tr. 533).

As Howard was responding to Dunlap’s statement, Ulrich — who happened to be walking by Dunlap’s office — saw agitated hand movements through the large picture window that looked into Dunlap’s office from the center floor. (Tr. 427). Ulrich decided to let herself into Dunlap’s office. (Tr. 427). As Ulrich was closing the office door, she overheard Howard explaining that what Dunlap “was saying couldn’t be true,” that Howard “had \$1,600 in sales that day,” and that Dunlap need only “look at the tapes” to show “that the only time that she had left her area was to go to break.” (Tr. 427).

There was a pause in the conversation, and Ulrich asked if everybody was okay. (Tr. 427). Dunlap explained that she was investigating something that another employee had sent her. (Tr. 427). Ulrich reminded them that she was there for them if they needed her and left the office to attend a meeting. (Tr. 427). Dunlap considered the statement Howard made as Ulrich was entering the office to mean that Howard had not been “outside of her work group, which is Andrea’s, that day except for break or lunch. And we should check the tapes.” (Tr. 534). Dunlap felt Howard was saying, in effect: “I’m primarily down here where I need to be, taking care of business. Check my sales; I’m having a great day.” (Tr. 535).

Dunlap ended the 15 or 20 minute meeting by asking Howard not to discuss their investigation of Clack’s potential misconduct and related questions with others in the center. (Tr. 76, 581). Next, Dunlap sent Settles an email recapping the discussion with Howard and indicating that the situation was a “mystery,” and that perhaps speaking with Clack would help clarify the situation. (ALJD at 10, Tr. 536). At this point in the investigation, Dunlap had “literally gotten nowhere.” (Tr. 537).

F. After Howard’s Interview, Dunlap Meets with Powell, Who Provides Moore’s Name.

Dunlap and Settles met with Powell after the Howard interview. (ALJD at 10, Tr. 540). According to Dunlap, “Powell was visibly upset” and “asked for assistance from us as the leader [sic] to make sure we find all the facts.” (Tr. 425). Powell then provided Dunlap with Moore’s name as an additional witness who “could shed light on the situation.” (ALJD at 10, Tr. 540). Dunlap asked Powell “if we go to the second witness . . . would that witness corroborate the same story that she was telling?” (Tr. 540). According to Dunlap, Powell “said yes.” (Tr. 540). Powell was not informed that Howard had been interviewed or that Howard had not verified what Powell stated she overheard Howard say. (Tr. 191, 521). Powell was asked to

keep the information related to the investigation confidential until the investigation was completed so as not to “taint” the information that would be received when others involved in the events were later questioned. (Tr. 490-91). Dunlap and Settles then met with Moore after speaking with Powell. (ALJD at 11, Tr. 541). Dunlap testified that the meeting was brief, but that Moore verified Howard’s involvement in the event that prompted Powell’s email concerning alleged misconduct by Clack. (Tr. 544). Thus, Moore’s testimony was in conflict with Howard’s testimony.

G. Dunlap, Ulrich, and Settles Watch the Surveillance Tape as Howard Requested.

After Dunlap and Settles completed interviewing Moore on August 10, 2011, the two joined Ulrich later that evening. At that time, Dunlap and Settles updated Ulrich on what the two had uncovered that day, which was that Howard did not acknowledge making the statement Powell attributed to Howard and that Howard had disavowed any involvement in the situation; that two witnesses stated they overheard Howard say that a supervisor was bragging about disciplining an employee; and that Clack and Slaughter stated they had met on the floor to discuss consistency with issuing discipline for having reading material on one’s desk, but had not mentioned an employee’s name. (Tr. 427-28, 544, 590, 592).

With respect to “proving or disproving” Howard’s involvement, Ulrich suggested the three view the surveillance tape as Howard had requested. (ALJD at 11, Tr. 428). According to Dunlap, the tape showed Howard going onto the row where Powell and Moore sat, which is not Howard’s work area. (Tr. 544-45, 551). At that point, Dunlap had objective evidence that Howard had been dishonest during the Integrity Investigation. (Tr. 595-96). Ulrich, likewise, saw that Howard had gone into Powell and Moore’s work area and reasonably concluded that Howard “didn’t tell the truth” about not being in Powell’s area that day. (Tr. 429).

H. After Speaking with Howard, Powell Attempts to Stop the Investigation.

Shortly after returning to her desk from her meeting with Dunlap and Settles on August 10, Powell received a text message from Howard asking Powell to call her. (ALJD at 11, Tr. 195). Powell went to a break room and called Howard, who had already left for the day. (Tr. 195). Powell testified Howard disclosed that Howard had been called to Dunlap's office and questioned about a complaint wherein Howard was named as one who had overheard Clack bragging about disciplining an employee. (ALJD at 11, Tr. 195-96). As Howard spoke, Powell began to realize that Howard was talking about Powell's complaint. (Tr. 195-96). Powell then explained to Howard that the person who lodged the complaint was in fact, Powell. (Tr. 196). Howard told Powell her statement was meant to convey that Clack *looked like* he was writing-up someone, not that he actually had done so. (Tr. 196-97). After hearing Howard's rendition of events, Powell indicated she would email Dunlap the next morning and ask Dunlap to stop the investigation into Clack's alleged misconduct. (ALJD at 11, Tr. 197).

On the morning of August 11, 2011, Dunlap received an e-mail from Powell stating that she and Howard had spoken the previous day about Howard's statement, and that Howard used the statement in "metaphor" form, rather than a statement directed against Clack's alleged misconduct. (ALJD at 11, Tr. 431-32, 544). Powell stated that she first should have asked Howard whether Howard was serious or joking when Howard mentioned that Clack was bragging about issuing discipline. (ALJD at 11, Tr. 431-32, 544). Powell then asked that Dunlap cancel the investigation into Clack's alleged wrongdoing. (ALJD at 11, Tr. 431-32, 544).

Dunlap contacted Ulrich and they held a meeting with Powell to better understand why Powell wanted to cancel the investigation. (ALJD at 11, Tr. 431-32, 555). Powell explained

that she had misunderstood what Howard had said — that Howard had not meant that Clack had actually written-up someone (namely Powell), but that Howard’s statement was more of an inquiry as to *who* Clack had written-up. (Tr. 433). Powell was reminded that the matter now was part of a formal Integrity Investigation and that Powell had provided a documented statement the day before. (ALJD at 11-12, Tr. 199-200, 433). Powell was asked to think hard about which version of events from the previous day she wanted to choose. (Tr. 433-34). Powell then indicated she wanted to tell the truth and, when asked what the truth was, Powell stated that the statement she placed in the email to Dunlap the day prior was the truth. (ALJD at 12, Tr. 221-22, 434); see also GCX 13 (“Tabita Howard came down here saying Russ has been bragging about writing some one up on his team.”). Thereafter, Powell was informed that she would be disciplined for attempting to change her story mid-investigation. (Tr. 614-15). On August 12, 2011, Powell was issued a written warning. (ALJD at 12, Tr. 436).

I. Howard Is Discharged for Dishonesty During the Investigation.

On August 11, 2011, Dunlap and Ulrich briefed Sullivan on the findings of the investigation and, after deliberating over all the evidence, they concluded that Howard was dishonest during the investigation and should be discharged. (ALJD at 12, Tr. 382, 436, 563). Dunlap and Settles shortly thereafter implemented the discharge decision. (Tr. 563-64). Howard was asked to join Dunlap and Settles in a meeting room. (Tr. 499-500). Dunlap proceeded to read the discharge letter to Howard. (GCX 2, Tr. 500). Howard asked whether Dunlap could hear Howard on the surveillance tape the managers had reviewed. (ALJD at 12, Tr. 89). Dunlap indicated that she could not, but that the tape revealed Howard had gone into Clack’s area, contrary to Howard’s express representation when previously questioned. (Tr.

89, 500-01). After Dunlap finished reading the termination letter, Howard got her belongings and she left the building.

ARGUMENT

I. THE ALJ CORRECTLY DETERMINED THAT COUNSEL FOR THE ACTING GENERAL COUNSEL FAILED TO MAKE OUT A *PRIMA FACIE* SECTION 8(A)(1) VIOLATION WITH RESPECT TO HOWARD’S DISCHARGE.

This is not a case that turns on just one element of a *prima facie* Section 8(a)(1) allegation. Rather, *all* of the elements of a *prima facie* case were found lacking by the ALJ, and counsel for the AGC’s cross-exceptions do nothing to establish all of the required elements.

To prove a violation of Section 8(a)(1) in a case turning on motivation, there must, at a minimum, be protected activity, knowledge of that activity by the decision-maker, and decision-maker animus or hostility toward that activity. ALJD at 14; *see also* *Columbian Distrib. Servs., Inc.*, 320 NLRB 1068, 1070-71 (1996); *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd*, 662 F.2d 899 (1st Cir. 1981). Additionally, a Section 8(a)(1) violation in this context necessarily depends on a causal connection between the employee’s protected activities and an adverse employment action. *See P. W. Supermarkets, Inc.*, 269 NLRB 839, 840 (1984). If these evidentiary burdens are met, the employer may still defend the charge “[b]y asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation.” *Cardinal Home Prods., Inc.*, 338 NLRB 1004, 1008 (2003). On any of these elements, the ALJ’s dismissal of this allegation should be upheld.

A. Howard Did Not Engage in Protected, Concerted Activity.

The ALJ correctly found that Howard was not engaged in protected, concerted activity and was not perceived by ASI to have engaged in protected, concerted activity:

For a number of reasons, I do not find that Respondent terminated Howard because she was either perceived to have engaged in protected concerted activity or because she actually engaged in protected concerted activity.

ALJD at 12. The ALJ's findings were based on the "total record evidence and the absence of credible testimony to support a finding of Respondent's unlawful motive" including a determination that Howard "generally lacks credibility" and gave testimony that was "implausible" and "unnatural." *Id.* at 12-13. The Board should defer to the ALJ's credibility determinations. *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d Cir. 1951).

Counsel for the AGC seeks to relitigate Howard's "general lack of credibility" by asserting that the ALJ made a factual error on the issue of whether Howard received one, or instead two, emails from management on the morning of August 11, 2011. AGC Brief at 15-17. Counsel for the AGC argues that this alleged error caused the ALJ "to mistakenly conclude that Howard's testimony regarding her protected concerted activity lacked credibility." AGC Brief at 15. This additional email is the thread with which counsel for the AGC seeks to unravel the entirety of the ALJ's credibility determinations. The thread does not travel nearly that far, however.

It is a stretch to even label this issue an error, much less a material error that unravels the entire case. The first email, sent by Dunlap at 8:56 a.m. and admittedly received by Howard, reminds employees about the workplace rule banning reading materials on employees' desks during working time, and states that supervisors are to meet with employees who fail to comply with the rule. GCX 6. The second email is a reply by Sullivan at 9:03 a.m., which simply adds that "corrective action" is warranted for failure to comply with this rule. *Id.* Thus, the second email merely reinforces the first. The possibility of discipline is evident from the first email; it is

implicit in the statement that a supervisor will meet with all employees who fail to comply with the rule. The second email, sent seven minutes later, merely confirms that discipline is warranted if the rule is violated. Therefore, it is immaterial whether Howard received one email or both. The possibility of discipline is apparent from the first email alone.

The issue is also immaterial because counsel for the AGC's case does not turn simply on the possibility of discipline; it turns on whether it was plausible for Howard to announce that supervisors were "bragging" about issuing discipline. The ALJ found implausible Howard's assertion that she warned employees that "supervisors would not only issue discipline, *but would in fact brag about doing so.*" ALJD at 17 (emphasis added). The ALJ found that this "alleged warning to employees appears as a rather cumbersome means of reconciling a reference to supervisors' 'bragging' with Powell's specific recall of what Howard said and Moore's limited recall of Howard's statement." *Id.* Neither the first email nor the second can be read to support any allegation that supervisors were "bragging" about issuing discipline. Therefore, even if Howard received both emails, as counsel for the AGC asserts, that would provide no basis for overturning the ALJ's determination that Howard's testimony "is not supported by the other employees and generally lacks credibility." *Id.*

Not only is the issue of the second email immaterial, it is not even accurate to call it an "error" as counsel for the AGC argues. The ALJ's finding that Howard did not receive the second email was *based on Howard's own testimony*:

Based on Howard's testimony, the only information that she received from management on the issue of reading material in the work area was the original email from Dunlap reminding employees of the rule restricting reading materials and Dunlap's statement that the employee's supervisor would meet with them if they were not following the policy.

ALJD at 13. Counsel for the AGC points to the address line for the second email, which includes the “@AppLight Consumer Sales Team” address, an address that would have included Howard. AGC Brief at 15-16. But when Howard was asked what she thought Dunlap was talking about during the investigation, Howard testified that it was the first email -- “[t]he e-mail that she [Dunlap] sent out earlier that morning.” (Tr. 56). When counsel for the AGC showed Howard a copy of the exhibit containing both emails, Howard merely referenced the second email as one later “forwarded” by Sullivan. (*Id.*). Thus, even if Howard was a recipient of the second email, it is apparent from her own testimony that she did not regard it to be any more significant than the first email.

For all of these reasons, the issue of whether Howard received the second email cannot be characterized as a material or “prejudicial” error, as counsel for the AGC argues. If it was an error at all, it was an error based on Howard’s own testimony. And it was immaterial because Howard’s testimony was “implausible” and “unnatural” whether or not Howard relied on one email or both as the basis for claiming that supervisors were “bragging” about issuing discipline. ALJD at 13. The Board should defer to the ALJ’s credibility determination, which was based not merely on this one email, but the entirety of Howard’s testimony as well as the lack of corroboration from other employees, whose testimony the ALJ found to be more credible than Howard’s. ALJD at 13, lines 9-10 (“Overall, I find Howard’s testimony less credible than other witnesses whose testimony was at odds with Howard’s.”) and lines 38-39 (“Overall, Howard’s testimony about her alleged statement is not supported by the other employees and generally lacks credibility.”).

Therefore, the Board should uphold the ALJ's finding that counsel for the AGC failed to prove her *prima facie* case. There was "no credible evidence that Howard engaged in the protected activity as alleged." ALJD at 14.

B. ASI Did Not Perceive Howard to Have Engaged in Protected, Concerted Activity and There Is No Evidence of Any Animus Toward Her Alleged Protected, Concerted Activity.

Even if Howard had engaged in protected, concerted activity, counsel for the AGC's *prima facie* case still fails. The ALJ found "not only insufficient evidence that Howard engaged in protected activity by telling employees that a supervisor had issued discipline, *but also a lack of evidence that demonstrates Respondent's animus in knowing or perceiving that she did so.*" ALJD at 15 (emphasis added). The ALJ rejected the allegation that ASI "perceived" Howard to have engaged in protected, concerted activity because it was inconsistent with Howard's own testimony:

There is no dispute that Howard told Dunlap that she did not know anything about any discipline. It was only when Howard testified in this hearing that she asserted that she warned employees that they could be disciplined and she has continued to deny that she made any mention of employees having been disciplined.

ALJD at 14. Therefore, the ALJ correctly concluded that the allegation that ASI perceived Howard to have engaged in protected, concerted activity was "undercut by the fact that Howard denied to Dunlap that she knew anything about discipline being given or that she told employees that discipline had been issued." *Id.*

The ALJ also did not find any basis for inferring that ASI bore any animus toward Howard's alleged protected, concerted activity. Howard's own testimony established that "even if [ASI] knew that Howard had discussed Clack's discipline to an employee, the employees had a practice of doing so and there was not anything unusual or unique about [Howard] having done so." ALJD at 14. Howard testified that "it is the practice for the other employees to not only

talk about the discipline and ask questions of each other, but to have what she described as ‘full-blown discussions about the whole thing.’” *Id.*

Thus, counsel for the AGC’s *prima facie* case fails on three counts: (1) Howard was not engaged in protected, concerted activity; (2) ASI did not perceive her to have engaged in protected, concerted activity; and (3) there is no evidence that ASI bore any animus toward Howard’s alleged protected, concerted activity.

II. THE ALJ CORRECTLY FOUND THAT ASI TERMINATED HOWARD FOR DISHONESTY DURING AN INTERNAL INVESTIGATION, AND REGARDLESS OF ANY PROTECTED ACTIVITY.

Even if counsel for the AGC could overcome the fatal defects in her *prima facie* case, the ALJ found that ASI proved its *Wright Line* defense. The ALJ found that, even assuming Howard engaged in protected, concerted activity, “Respondent would have terminated her despite any protected activity.” ALJD at 17. “The total record evidence supports a finding that Respondent terminated Howard because Respondent determined that she had not been truthful during the Integrity investigation.” *Id.* Indeed, “[t]here is no dispute that Howard did not answer Dunlap’s questions truthfully.” ALJD at 13.

Counsel for the AGC argues that Howard’s undisputed dishonesty should be excused because ASI “probed into conduct protected by Section 7 without providing assurances against reprisal.” AGC Brief at 25. The ALJ fully considered and flatly rejected this argument, finding “no evidence that Howard’s dishonesty occurred during an unlawful interrogation by Dunlap or any other manager.” ALJD at 13. ASI’s investigation was focused on supervisor Clack; Howard was questioned only in an effort to determine whether Clack had engaged in misconduct. As the ALJ found:

Howard was not under investigation for any wrongdoing or perceived wrongdoing at the time that she spoke with Dunlap. She

testified, without hesitation, that she did not feel that she was in trouble when she spoke with Dunlap.

ALJD at 14. The ALJ correctly concluded that “it was not the subject of Howard’s deception, but the actual act of deception that triggered her termination.” ALJD at 18.

Finally, counsel for the AGC argues that the ALJ should have found that Howard was terminated not because of her dishonesty, but because she breached the confidentiality of the investigation by speaking with Powell. AGC Brief at 24. The only piece of evidence linking a breach of confidentiality during the investigation with Howard’s discharge is a Tennessee Department of Labor unemployment compensation form, in which Ulrich stated that ASI terminated Howard for giving false information during an investigation *and* breaching the confidentiality of that investigation. ALJD at 15; GCX 16. But the ALJ found that, “[a]lthough Howard’s breach of confidentiality is referenced in Respondent’s reference to the State of Tennessee, I do not find that Howard was unlawfully terminated because of such breach.” ALJD at 15. The ALJ noted that Howard’s termination letter did not state that she was terminated for this reason. *Id.* Accordingly, the ALJ found that “the overall evidence does not support a finding that Respondent terminated Howard because she breached an unlawful confidentiality rule.” ALJD at 17.

For any and all of these reasons, the Board should adopt the ALJ’s recommendation of dismissal of the allegation that Howard’s termination violated Section 8(a)(1).

III. ASI’S INSTRUCTION TO KEEP THE INVESTIGATION CONFIDENTIAL WAS LAWFUL AND SUPPORTED BY LEGITIMATE BUSINESS CONCERNS.

Counsel for the AGC also excepts to the ALJ’s determination that the Company did not violate the Act by instructing Howard to maintain the confidentiality of the investigation into Clack’s alleged misconduct. Counsel for the AGC not only excepts to the ALJ’s finding on this point, but also improperly seeks to expand that allegation to encompass ASI’s handbook

provisions on confidentiality – provisions that had existed “since at least August 24, 2009.” AGC Brief at 21. These handbook provisions were not alleged to be unlawful in the Complaint, nor were they litigated at the hearing. The Complaint alleges that Dunlap “*orally promulgated, and since then has maintained, a rule prohibiting discussions among employees about their terms and conditions of employment, including discipline issued to Respondent’s employees.*” Complaint ¶ 7 (emphasis added). Thus, any allegation with respect to the provisions of ASI’s employee handbook, which have existed since at least 2009, are not within the scope of the Complaint allegation concerning a rule that was orally promulgated in 2011. *See Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, slip op. 2 (Jan. 3, 2012) (dismissing violation where complaint lacked allegation); *United Mine Workers of Am., Dist. 29*, 308 NLRB 1155, 1157-58 (1992) (dismissing finding of unlawful Section 8(b)(1)(a) threats in September 1989 when complaint only mentioned alleged threats in October 1989).

Counsel for the AGC is improperly seeking to expand the Complaint now based on the Board’s decision in *Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), which issued after the ALJ’s decision in this case. Without waiving any argument as to the impropriety of counsel for the AGC’s effort to raise this issue now, there are critical differences between this case and *Banner Estrella*. First, ASI’s investigation involved an allegation of misconduct by a supervisor, not an employee. “Dunlap’s admonishment to Howard did not relate to Howard’s discipline or even to another employee’s discipline.” ALJD at 16. *Compare Banner Estrella*, 358 NLRB No. 93, slip op. 2 (“[B]y maintaining and applying a rule prohibiting employees from discussing ongoing investigations of *employee* misconduct, [respondent] violated Section 8(a)(1) of the Act.” (emphasis added)).

Second, the ALJ found that ASI had a legitimate business justification for requiring confidentiality in this investigation. The investigation involved a serious allegation of supervisor misconduct and ASI “had reason to believe that Howard was a witness to a supervisor’s misconduct and as such it was reasonable that her identity should be protected in a confidential investigation.” ALJD at 16. Counsel for the AGC argues that the investigation “presented no danger than an employee would be harmed by drug dealers, or that evidence of criminal activity would be compromised...” AGC Brief at 23. But the law, either before or after *Banner Estrella*, does not require that there be an allegation of criminal activity or a threat of physical harm in order for an employer to legitimately seek to maintain the confidentiality of an investigation. There are many other legitimate business reasons for maintaining the confidentiality of an employer’s investigation. See *Banner Estrella*, 358 NLRB No. 93, slip op. 2 (identifying, as possible legitimate business justifications for confidentiality, whether “witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up.”).

In this case, the ALJ correctly found that ASI had a legitimate business reason for requiring confidentiality in this investigation -- to protect the identity of employee witnesses, including Howard, during an investigation concerning an allegation of serious misconduct by a supervisor. ALJD at 16.² Indeed, in cases of supervisor harassment, the EEOC states that “[a]n employer should make clear to employees that it will protect the confidentiality of [] allegations to the extent possible.”³ Furthermore, ASI had a legitimate concern about testimony being

² The ALJ cited the Board’s *Caesar’s Palace*, 336 NLRB 271 (2001) decision for support. ALJD at 16 (Although the circumstances of the instant case are somewhat different from those before the Board in *Caesar’s Palace*, there is a commonality in the respective purposes for the confidentiality restriction.”).

³ See <http://www.eeoc.gov/policy/docs/harassment.html>.

fabricated or altered – a concern that was validated when Powell and Howard communicated during the investigation and, as a result, attempted to stop the investigation. ALJD at 11-12.

For all of these reasons, the Board should uphold the ALJ’s finding that ASI did not violate Section 8(a)(1) by promulgating a confidentiality rule in this investigation. Any broader allegation with respect to confidentiality provisions in ASI’s employee handbook are clearly beyond the scope of the Complaint.

CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Board reject counsel for the AGC’s cross-exceptions.

Date: October 8, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Respondent's Answering Brief in Response to the Acting General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision have been served upon the following this 8th day of October 2012 by e-mail:

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