JD–11–13
University Park, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FEDERAL SIGNAL CORPORATION,

Respondent

and

Cases 13-CA-084282
13-CA-085359

JOAN BUTLER, an Individual

Elizabeth Cortez, Esq., for the Acting General Counsel.
Max Brittain, Esq. and Lisa Carey-Davis, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

Christine E. Dibble, Administrative Law Judge. This case was tried in Chicago, Illinois, on November 8 and 9, 2012. The Charging Party, Joan Butler (Butler), filed the charge in Case 13-CA-084282 on July 2, 2012.[1] Butler filed an amended charge in Case 13-CA-084282 on July 5, 2012. Butler filed a second charge in Case 13-CA-085359 on July 17, 2012. The Regional Director for Region 13 of the National Labor Relations Board (NLRB/the Board) issued Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on September 27, 2012. The Respondent filed a timely answer on October 10, 2012, denying all material allegations in the consolidated complaint. By motion dated November 16, 2012, the Acting General Counsel for NLRB moved to amend the complaint to delete paragraph IV and replace it with, and add the following:

> (a) About February 7, 2012, the Respondent, by Vanessa Hardaway, at the Respondent's facility, verbally forbade Joan Butler from discussing her discipline or ongoing investigation with other employees.

[1] All dates are in 2012, unless otherwise indicated.

(b) About February 17, 2012,[2] the Respondent, by Vanessa Hardaway, at the Respondent's facility, verbally forbade Joan Butler from discussing her discipline or ongoing investigation with other employees.

(c) About May 31, 2012, the Respondent, by Vanessa Hardaway and Peggy Szumski, at the Respondent's facility, verbally forbade employees from discussing discipline or ongoing investigation with other employees.

The motion to amend was unopposed. By Order dated February 13, 2013, I granted the motion to amend. *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

The amended complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) on or about February 7, 2012, Respondent, by Vanessa Hardaway (Hardaway), at the Respondent's facility, verbally forbade Butler from discussing her discipline or ongoing investigation with other employees; (2) on or about February 17, 2012, the Respondent, by Hardaway, at the Respondent's facility, verbally forbade Butler from discussing her discipline or ongoing investigation with other employees; (3) on or about February 17, 2012, the Respondent issued Butler a Last Chance Agreement charging she violated work rule A9 insubordination by speaking with coworkers about an ongoing investigation; (4) on or about May 31, 2012, the Respondent, by Hardaway and Peggy Szumski (Szumski), at the Respondent's facility, verbally forbade employees from discussing discipline or an ongoing investigation with other employees; and (5) on or about July 2, 2012, the Respondent terminated Butler for violating her Last Chance Agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures ticket machines, payment kiosks, and gates, among other related products for use in parking garages at its facility in University Park, Illinois. The Respondent annually sells and ships from its University Park, Illinois facility goods valued in excess of $50,000 directly to points outside the State of Illinois. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[2] The amended complaint alleges that the charged violations at paragraphs IV(b) and V(b) occurred on February 17. However, Butler and the Respondent clarified at the hearing that those incidents actually took place on February 16, 2012. Therefore, in the decision I will refer to those charged violations as occurring on the correct date, February 16, 2012.

II. Alleged Unfair Labor Practices

A. *Overview of Respondent's Operation*

The Respondent, a corporation and a subsidiary of Federal Signal Corporation, operates a manufacturing facility in University Park, Illinois, that makes products for parking garages and parking lots, signaling devices for safety vehicles, and other related products. The Respondent's manufacturing facility in University Park, Illinois, employs about 600 workers, with approximately 300 employees who are members of the International Brotherhood of Electrical Workers, Local Union 134 (Local 134/the Union).

Szumski is and was at all relevant times the director of human resources. She oversees recruitment, employee benefits and compensation programs, and other employee and labor relations matters for the Respondent's University Park facility. (Tr. 326.)[3] Hardaway is and was at all relevant times the labor relations manager. She reports directly to Szumski. Hardaway's duties include, but are not limited to, negotiating the union contract, hiring employees, and enforcing the attendance and progressive discipline policies. (Tr. 161.)

From 2003 until July 2012, Butler was employed by the Respondent at its University Park facility. At the time of her termination, Butler was an assembly worker in the automatic parking devices (APD) department. During the relevant time period, the APD department had between 22 to 35 employees. (Tr. 102, 225.) J. D. Richmond was Butler's immediate supervisor. (Tr. 21-22.) During her employment tenure with the Respondent, Butler was a member of Local 134. (Tr. 23.) At all relevant times, Joseph Fitzpatrick (Fitzpatrick) was Local 134 chief steward and Mary Ellen Duffy (Duffy) its business agent. (Tr. 273, 307.)

B. *Events Leading to Butler's Suspension on February 7, 2012*

On February 2, an employee, Annette Kelly (Kelly), complained to Hardaway that the APD department had become a hostile working environment, and specifically an employee, Janet Watts (Watts), had pointed her finger in Kelly's face. Kelly demanded that Hardaway take action against Watts. Hardaway informed Kelly that she would conduct an investigation into her complaint. She did not instruct Kelly to keep their conversation confidential. During the course of her investigation, Hardaway discovered that Kelly had purchased port-a-potties from an employee, Butler. Butler brought them into the APD area and gave them to Kelly. Later, Butler took them into the employees' breakroom and sat them on the lunch table with the lids removed. (Tr. 64-65; R. Exh. 4.) Several employees complained about the port-a-potties, resulting in Fitzpatrick telling the employees in the APD department that whoever brought them into the facility needed to remove them before the perpetrator was disciplined by management. (Tr. 162; R. Exh. 4) Kelly and Butler took them from the facility and put them in Butler's car. Kelly alleged that during her conversation with Fitzpatrick about the port-a-potties Watts, pointed her

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

finger in Kelly's face and demanded that she stop playing games. (R Exh. 4.) It was for this action that Kelly brought the complaint to Hardaway's attention.[4]

Hardaway interviewed several employees that Kelly identified as witnesses to the incident between her and Watts: Butler, Fitzpatrick, Pam Deleon (Deleon), Trish Wilbanks (Wilbanks), Kathy Bernard (Bernard), and Watts. (Tr. 163; R. Exh. 4.) None of the employees interviewed by Hardaway supported Kelly's version of the incident with Watts.[5] During the course of her investigation, however, several of the witnesses told Hardaway that Butler had created a hostile work environment in the APD department. They described instances of Butler "bumping" Bernard, walking through work cells without authorization, and mocking and harassing coworkers with the aid of Kelly.

C. *February 7, 2012 Meeting with Hardaway, Butler, Fitzpatrick, and Nero*

On February 7th Hardaway convened a meeting in her office with Butler, Fitzpatrick, and Camille Nero, a union steward. (Tr. 24.) Hardaway informed Butler that she was conducting an investigation into complaints of a hostile and harassing work environment in the APD department. She questioned Butler about her role in bringing the port-a-potties into the work area, intentionally "bumping" a coworker, "cutting through departments," and mocking coworkers. (Tr. 24, 176.) Butler initially denied placing the port-a-potties in the area, but subsequently admitted to it. She also denied walking (or "cutting through") the work cells, mocking coworkers, or intentionally making physical contact with Bernard. (Tr. 24.)[6] Butler gave Hardaway the names of witnesses who she felt would support her: Ophelia Pena (Pena), Ken Evans (Evans), Prince Brown (Brown), Kelly, Brandon Lacer (Lacer), Mike Dillard (Dillard), Tom Allen (Allen), and Ken Dosie (Dosie). Hardaway informed Butler that she was suspended pending the outcome of the investigation. Hardaway presented Butler with a suspension letter, which she and Fitzpatrick signed. However, Butler refused to sign the letter. (Tr. 178-180, R. Exh. 5.) Hardaway ended the interview by telling Butler not to interfere with the investigation because it could lead to further discipline, including termination. Hardaway told Butler that she should limit discussions about the investigation to her or Fitzpatrick. (Tr. 182-184.) Butler left the meeting to collect her belongings and to begin her suspension.

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[4] Hardaway's interview notes indicate that Watts was issued a verbal counseling for using "profane" language in a private conversation with Fitzpatrick at work. (R. Exh. 4.)

[5] Hayward's notes of her interview with Butler indicated that Butler witnessed Watts point towards Kelly. However, it does not indicate that Watts, as alleged by Kelly, pointed her finger ***in*** Kelly's face in a menacing manner. During the hearing, Butler did not corroborate Kelly's version of the incident involving Watts.

[6] Hardaway testified that Butler initially denied "bumping" Bernard, but later stated she did not "recall" if she "bumped" her. She also testified Butler first denied walking through the work stations, but admitted it on further questioning. (Tr. 175-177.) I found Hardaway was a very credible witness. She was consistent in her testimony regarding the complaint at issue, there is credible evidence corroborating her testimony, and her overall demeanor adds to the credibility of her testimony. Further, counsel for the General Counsel presented no persuasive evidence to impeach the credibility of Hardaway on this point. Therefore, I credit Hardaway's testimony on this point.

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D. *Butler's Conversations with Employees about her Suspension on February 7, 2012*

After Butler left Hardaway's office, she was upset and crying because of her suspension and pending investigation. The first person she encountered after leaving the meeting was Kelly who asked her why was she crying. She told Kelly that she had been suspended for allegedly bumping Bernard. Kelly told her she was going to inform management that it was wrong to suspend Butler. (Tr. 26-27, 120-121, 184.) As Butler proceeded to her workstation, she met Evans, who also asked why she was upset. She told him she had been suspended and the basis of the charge against her. As she was collecting her belongings to leave the premises, Pena and Allen stopped and asked Butler the reason for her distress. She relayed the story a third time. (Tr. 27-28.) Once she got home, Butler telephoned Barbara Dutka (Dutka), training and development manager, and explained the events leading to her suspension. Dutka informed her that she did not address disciplinary issues concerning union employees. (Tr. 29.) Butler apologized for contacting her and ended the call. She then called Hardaway to ask for the specific charge that formed the basis for her suspension. Hardaway told her the charge and ended the call. (Tr. 30.)

E. *On February 16, 2012, Butler Issued Last Chance Agreement and Instructed not to Discuss Ongoing Investigation with Coworkers*

Subsequently, Hardaway interviewed three of the eight witnesses that Butler identified: Pena, Evans, and Brown. Hardaway noted Brown had no firsthand knowledge about the complained of incidents. Pena told her about employee cliques, which she felt contributed to personality conflict among some of the workers. Hardaway documented Evans telling her that Butler and Kelly were being "malicious" and causing an "uncomfortable" work environment. Instead of interviewing all of Butler's named witnesses, Hardaway identified as "neutral" and interviewed: Daniel Weltmeyer (Weltmeyer), Yvonne Lopez (Lopez), and Felecia Thomas (Thomas). Each of these witnesses, according to Hardaway, observed Butler and Kelly engaging in hostile acts and exhibiting menacing attitudes towards Bernard and other employees. (Tr. 188-193.)

Approximately 3 or 4 days after the February 7 meeting, Hardaway left a message on Butler's answering machine notifying her that the investigation was ongoing. (Tr. 30.) On February 15, Hardaway contacted Butler to schedule a meeting for the following day. Prior to the meeting, Fitzpatrick contacted Hardaway to ask if a decision had been made regarding Butler's employment status. Based on the results of her investigation, Hardaway told him that there was enough evidence to support Butler's termination. Fitzpatrick suggested that Butler be given a Last Chance Agreement (LCA) in lieu of termination. Hardaway agreed but only if Butler truthfully answered her questions in the meeting scheduled for February 16. (Tr. 195-195, 283-284.)

On February 16, Butler received a text message from Duffy a few minutes before the start of the meeting. In the text, Duffy cautioned her to tell the truth because her job was in jeopardy. (Tr. 31, 310.) Butler met with Hardaway, Fitzgerald, and Duffy. Hardaway started the meeting

5 by inquiring of Butler whether she had any discussions with anyone other than her union steward or herself after she was suspended on February 6. Butler began to deny speaking with coworkers about the investigation, but quickly admitted it when prompted by Duffy to tell the truth.[7] (Tr. 24, 310.) Hardaway reminded her that speaking to other employees about the investigation was insubordination and subject to termination. (Tr. 31, 197-198; R Ex.7.) Butler was also
10 confronted with accusations of walking through workstations and mocking coworkers. Butler denied those charges.[8]

Hardaway presented Butler with the LCA for her signature. She explained that as a condition of her return to work, Butler had to sign the LCA and attend training on a "harassment
15 free" workplace. Hardaway, Fitzpatrick, and Duffy explained the terms of the LCA to her. (Tr. 297-298, 311.) Butler, Hardaway, Fitzpatrick, and Duffy signed the agreement. (R Exh. 7.) Butler attended a one-on-one training session on a "harassment free" workplace on February 21 and returned to work on February 22. (Tr. 35.)

20 F. *Renewed Complaints about Butler Causing a Hostile Work Environment*

The record is uncontroverted that there were no incidents or reports of Butler engaging in inappropriate behavior in the workplace until approximately May 2012. On May 21[t], however, seven employees approached Szumski to complain that Butler and Kelly were again harassing
25 certain employees. (Tr. 333-334) The complaining employees were: Sue Bostic (Bostic), Belinda Nelson (Nelson), Felicia Thomas (Thomas), Laura Rybalt (Rybalt), Watts (Watts), Bernard, and Vanessa Robinson (Robinson). Szumski referred their complaints to Hardaway for an investigation. Shortly after she began interviewing the complaining employees, Hardaway

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[7] Butler denied Duffy's testimony on this point. (Tr. 73.) However, I credit Duffy's testimony. As the Union's business agent and a seemingly neutral witness, I can find no reason for her to lie on this point; and the General Counsel did not set forth evidence to impeach her testimony. Furthermore, there was corroborating testimony. (Tr. 195.)

[8] Hardaway and Duffy testified that Butler admitted to all of the charges in the LCA. However, Butler testified that she told them she was guilty only of talking to coworkers about the investigation and her suspension. She denied the remaining charges in the LCA. She testified that she signed the LCA because she was guilty of talking to workers after she was suspended in violation of Hardaway's prior instruction; and she was afraid of being terminated. I do not credit Butler's testimony on this point. (Tr. 74-75.) First, she had no corroborating evidence. Several of the witnesses Butler identified to Hardaway as supportive of her position were less than persuasive. Pena told Hardaway she felt Butler and an unnamed employee did not like each other and seemed to suggest they were equally at fault. (Tr. 24.) Evans gave a statement to her that he had observed Butler engaging in harassing behavior towards coworkers. Brown noted he was not in a position to confirm or deny the complaints against Butler. (R. Exh. 4.) This can hardly be characterized as corroborating testimony. Second, her testimony on the stand was dismal. Often she responded to questions on cross examination with evasive and confusing answers. Frequently she provided what I perceived as deliberate nonresponsive answers to questions posed by the counsel for the Respondent. Several times I had to admonish her on this point. (Tr. 25-26, 51-52, 70, 77, 84, 90-93.) Third, the contemporaneous notes Hardaway made of her interview with Butler are in stark contrast to Butler's vehement denials at the hearing. Hardaway also testified to the substance of the notes at the hearing and had corroborating evidence. (Tr. 279-280.) Unlike Butler, I found Hardaway was a very credible witness. Further, counsel for the General Counsel presented no persuasive evidence to impeach the credibility of Hardaway on this point (or any other aspect of her testimony). Based on her overall demeanor and the totality of the evidence of the record, I found Butler was not a credible witness.

met with Szumski and advised her that Butler and Kelly should be suspended pending completion of the investigation. Szumski agreed.

G. *May 31, 2012, Butler and Kelly Suspended and Forbidden from Discussing the Investigation with Coworkers*

On May 31, Hardaway met with Butler, Fitzpatrick, and Deleon to inform them that she was investigating new allegations of harassment made against Butler. Hardaway asked Butler to respond to the allegations that she had continued to walk through work cells after a meeting held by Richmond telling the employees in APD to stop that practice. She also asked her to respond to the charge that she intentionally "bumped" a certain employee, and continued to create a hostile work environment. Butler denied all of the accusations. Butler told Hardaway to view the onsite facility video, which would prove she was innocent of the charges.[9] Hardaway asked for and Butler gave her the names of witnesses to support her denials. Hardaway presented Butler with a notice of suspension pending termination, which identified the infraction as a violation of the LCA. (R Exh. 9.) Butler refused to sign it but Hardaway, Fitzpatrick, and Deleon signed it. (R. Exh. 9.) Although, Duffy was not in attendance, she was informed of Butler's suspension. (Tr. 312.) Hardaway asked Butler not to discuss the investigation with her coworkers because it was a confidential matter and interfering with the investigation could lead to further discipline, including termination. She also told Butler that she could discuss the investigation with her or the union stewards. (Tr. 242-243, 288-290.) Thereafter, Butler collected her personal items from her workstation and left the building.

Also, on May 31, Hardaway and Szumski met with Kelly, Fitzpatrick, and Deleon. (Tr. 130-137, 244-245.) Hardaway informed Kelly that she was suspended indefinitely pending an investigation of her for violating the Respondent's harassment free workplace policy. (Tr. 131.) Szumski told Kelly that she could discuss the investigation with her or the union stewards, but none of her coworkers. (Tr. 136, 244-245, 338-339.) She also cautioned Kelly that discussing the investigation with coworkers could result in discipline, including termination for interfering with the investigation. (Tr. 337.) After approximately 40 minutes, the meeting concluded and Deleon escorted Kelly out of the facility.

H. *Investigation Conducted from May 24 to June 21*

From May 24 to June 21, Hardaway interviewed the seven employees who brought renewed complaints about Butler to Szumski's attention.[10] Bernard again accused Butler of intentionally making physical contact with her on several occasions. Most of employees'

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[9] The evidence established that the onsite video cameras were solely for the security of the facility and not used as surveillance against the employees. (Tr. 302-303, 328-329.) Furthermore, there is no evidence that any security tapes that ***might*** have existed were retained.

[10] Duffy presented undisputed testimony that the Union also conducted its own investigation into the May 2012 allegations against Butler. She also testified, without contradiction from the Acting General Counsel, that the Union's investigation revealed Butler had committed the charges filed against her. Duffy testified that after reviewing the Union's investigative report and consulting with its attorney, she was convinced the allegations against Butler were valid. (Tr. 290, 312-313.)

interviewed by Hardaway told her that they had also witnessed Butler intentionally "bumping" Bernard. (R Exh. 8.) Hardaway interviewed the witnesses provided by Butler in the meeting on May 31st and a subsequent meeting on June 14th. (Tr. 201-206, 211, 214-215; 288-289; R. Exh. 8.) Four of Butler's witnesses told Hardaway they had not observed Butler's "behavior either way". (R Exh. 8.) Two of Butler's witnesses recounted instances of Butler and Kelly exhibiting hostile, mocking, or harassing behavior towards employees. Hardaway was unable to contact two of Butler's witnesses. (Tr. 245-247; R Exh. 8.)

I. *July 2, 2012 Respondent Terminates Butler*[11]

After concluding the investigation into allegations of harassment against Butler, Hardaway discussed the results with Szumski. They determined that the evidence supported terminating Butler for "violating her Last Chance Agreement due to harassing, creating a harassing and hostile work environment." (Tr. 215, 339.) Szumski drafted the termination letter and submitted it to Respondent's attorney for review. (Tr. 216-217.) By letter dated July 2, 2012, Butler was notified that effective July 2 she was terminated for violating her LCA. (GC Exh. 3.) Butler received the termination letter on July 5. (Tr. 46.) The evidence is undisputed that since Butler's termination, th Respondent has not received any complaints of "harassment or mistreatment by coworkers" from APD employees. (Tr. 223.)

III. Discussion and Analysis

A. Legal Standards

Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or

[11] The Respondent presented undisputed evidence that a similarly situated employee, Angela Julian, was disciplined and ultimately terminated for using abusive and threatening language in the workplace. (GC Exh. 6.) In September 2010, Julian was suspended for 9 days and had to attend diversity training before she could return to work. (Tr. 355-356.) Julian was subsequently terminated effective October 4, 2011, because she continued to engage in the same behavior. (GC Exh. 6.)

preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3 Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Hoodview Vending Co..*, 359 NLRB No. 36, slip op. at 4–5 (2012).

An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Corp*., 358 NLRB 37 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[12] analysis to 8(a)(1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.,* supra; *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in concerted activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,supra 359 NLRB No. 36, slip op at 5.* Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted

[12]251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

5 activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

5 B. *February 7 and 16 and May 31, 2012, Respondent Forbids Butler (and Employees Subject to Disciplinary Investigations) from Discussing with Coworkers Discipline or Ongoing Investigations*

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by
10 promulgating, maintaining, or enforcing an oral rule prohibiting employees who are the target of disciplinary investigations from discussing with coworkers discipline or ongoing investigations against the employees by its human resources personnel.

The Board has held that if a rule specifically restrains Section 7 rights, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Waco, Inc*., 273 NLRB 746, 748
15 (1984) (work rule explicitly prohibits employees from discussing wages with coworkers a restriction on Sec. 7 rights). The Board requires that the judge use a balancing test in determining if the employer's right to promulgate a rule to maintain discipline in the workplace outweighs the employees' right to engage in Section 7 activity. Even if the rule does not restrict specific Section 7 rights, it may still be unlawful if employees would reasonably interpret the rule to
20 prohibit Section 7 activity. *Longs Drug Stores California, Inc*., 347 NLRB 500, 500-501 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, 647. In *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, the Board stated, ". . . in determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee
25 rights." See also *Lafayette Park Hotel*, 326 NLRB 824 at 828 (1998) (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

In order to justify a rule prohibiting employee discussions of ongoing investigations, the Respondent must show that it has a legitimate business justification. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (the Board held no legitimate and
30 substantial justification when an employer promulgates a blanket prohibition against employees discussing matters under investigation). The question becomes whether the Respondent's stated legitimate and substantial business reasons outweigh the employees' exercise of their Section 7 rights. See also *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. 2 (2012) (the Board quoting from *Hyundai America Shipping Agency*, "Rather, in order to minimize the impact on
35 Section 7 rights, it was the Respondent's burden 'to first determine whether in any give[n] investigation 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.'"). Id.

In this instance, the Respondent must show that the rule was necessary because witnesses needed protection, evidence was in danger of being destroyed, and testimony was likely to be
40 fabricated. I find that the Respondent has failed to meet its burden.

It is undisputed that at the meeting with Butler on February 7, Hardaway instructed her not to discuss with coworkers any aspect of the investigation into charges that she was harassing several employees. It is also undisputed that Hardaway told her, without objection from the Union, that discussions with anyone other than Fitzpatrick or Hardaway could result in her being
45 disciplined, including termination.

Likewise, the evidence is uncontroverted that at the meeting with Butler on February 16, Hardaway asked Butler if she had discussed with coworkers any aspect of the investigation into

charges that she was harassing several employees. The evidence establishes that Butler admitted to telling several coworkers about her suspension and the charge against her soon after she left the meeting on February 7. It is also undisputed that Hardaway informed her that speaking with other employees about the investigation was insubordination and subject to discipline, including termination. (Tr. 31, 197-198; R Exh. 7.)

In separate meetings with Butler and Kelly on May 31, Hardaway informed them that she was investigating new charges of harassment filed against them. During the meeting with Butler, Hardaway again asked Butler not to discuss the investigation with her coworkers because it was a confidential matter and interfering with the investigation could lead to further discipline, including termination. It is undisputed that Szumski, in the meeting with Kelly, told her that discussing the investigation with other employees could result in discipline, including termination for interfering with the investigation.

The Respondent admits that it gives this blanket instruction, through its human resources managers, to all employees who are the subject of an investigation. (Tr. 182-184.) The Union agrees with the blanket oral rule because it feels the rule protects the target of the investigation and possible witnesses.[13] (Tr. 288, 308-309.) The Respondent explains that it issues this instruction to protect against witness intimidation, collaboration among witnesses, and falsifying of information. (Tr. 182-184.) The Respondent, however, did not assert, nor present evidence that it conducted an analysis to determine if the integrity of its investigations would have been threatened without issuing the confidentiality rule. It is most likely that Butler would have been unable to compromise the investigation in any significant manner because she was suspended and escorted off of company property pending the outcome of the investigation. There is no evidence that during her suspensions she contacted any employee of the Respondent, other than Dutka, to discuss the matters under investigation. Butler provided undisputed evidence that upon learning Dutka was not authorized to address her concerns, Butler ended the call. Dutka was not called to testify that Butler coerced, threatened, or influenced her to provide information in her favor. Further, Hardaway admits during the investigations no employee accused Butler of asking or coercing them to fabricate testimony on her behalf, or threatened them with physical harm for testifying against her. (Tr. 255-257.) There is also no credible evidence that Kelly had threatened or coerced employees to provide evidence in her favor. The Respondent failed to show that Kelly (or Butler) had attempted to fabricate or destroy evidence.

I find that the Respondent produced no evidence to show that the integrity of the investigations would have been in danger absent the confidentiality. On the contrary, the evidence shows that the Respondent routinely orders its employees who are the target of an investigation not to discuss the matter with coworkers without first determining if the particular investigation warrants such a prohibition. This is clearly a restraint on Butler's and other employees' Section 7 right to speak with fellow employees to obtain evidence in support of a defense against the charges.

Based on the evidence of record, I find the Respondent has failed to demonstrate that a legitimate and substantial justification exists for promulgating and enforcing a blanket rule that

[13] While the Respondent places great emphasis on the fact that the Union agrees with the promulgation and enforcement of the rule, I find the emphasis is misplaced. The Union's acquiescence to an unlawful rule cannot make it lawful. See *NLRB v. Magnavox of Tennessee*, 415 U.S. 323 (1974).

5 restricts employees from exercising their Section 7 rights. Accordingly, I find that the Respondent has unlawfully maintained an overly broad and discriminatory oral rule prohibiting employees from discussing matters under investigation and by threatening employees with discipline if they violate the rule. The Respondent has violated Section 8(a)(1) of the Act as alleged in amended complaint paragraphs IV(a), (b), and (c).

10

C. *February 16, 2012, Respondent Issues Butler a Last Chance Agreement*

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by issuing Butler a LCA for being insubordinate in speaking with coworkers about an ongoing
15 investigation in violation of work rule A9. The Respondent's stated reasons for issuing Butler the LCA was for lying during the investigation and interfering with it by speaking with coworkers. (Tr. 195-196, 198, 252; R Exh.7) The Respondent argues that Butler's lying about her harassing behavior alone is sufficient to justify issuing her the LCA.

In order to sustain its initial burden of proof, the General Counsel must first prove that
20 Butler's protected activities were the substantial or motivating factor in the Respondent's decision to issue her the LCA. Upon such a showing, the Respondent then must present evidence that it would have issued the LCA to Butler even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2 (2010).

The evidence established that Butler engaged in concerted activities when she discussed
25 aspects of the ongoing investigation and her suspension of February 7. The Board has held that employees have a right under Section 7 to discuss "discipline or disciplinary investigations involving fellow employees." *Fresh & Easy Neighborhood Market,* 358 NLRB No. 65 (2012); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658-659 (2007). The evidence is undisputed that Butler engaged in such discussions.

30 I also found that the evidence establishes the Respondent had knowledge of the concerted activity. Hardaway and Szumski readily admitted that the Respondent promulgated and enforces a blanket oral rule that prohibits targets of investigations from discussing any aspect of it with other employees. They also admitted that Butler confessed to Hardaway that she had discussed her discipline and aspects of the investigation against her, despite being instructed not to do so in
35 the meeting with Hardaway on February 7, 16, and May 31.

Clearly, the LCA constitutes an adverse employment action because management admitted it was used as a basis for Butler's subsequent termination. The remaining question is whether the Respondent issued Butler a LCA because of discriminatory animus. I find that, in part, it was issued in retaliation for Butler exercising her Section 7 rights.

40 It is clear that one of the reasons Butler was issued the LCA is because the Respondent felt she "interfered with the investigation by speaking with coworkers and other salary personnel" about it in defiance of management's instructions. (R Exh.7.) Previously, I found that the Respondent's oral rule prohibiting employees that are targets of disciplinary investigations from discussing any aspects of it with fellow employees unlawfully restrains those employees
45 from engaging in concerted conversations with coworkers about their terms and conditions of employment. Thus, the Respondent's action establishes that discriminatory animus was, at least

in part, a motivating factor in the Respondent's decision to issue Butler the LCA. Accordingly, I find that the General Counsel has met its initial burden of showing discriminatory motive.

I find, however, that the Respondent has met its burden of showing that the LCA would have been issued to Butler even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089; *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3–4 (2011) (discharge violated Sec. 8(a) (1) because respondent failed to meet *Wright Line* rebuttal burden).

The Respondent argues that it issued Butler the LCA for several reasons. The LCA unambiguously sets forth two bases: Butler's admitted dishonesty during the initial stage of the investigation, and talking to coworkers about the investigation. (R Exh. 7) Hardaway testified that prior to the February 16 meeting with Butler, management had determined there was enough evidence of her causing a harassing and hostile work environment to terminate her. She noted that the Respondent most likely would have terminated Butler but for the Union's intervention on her behalf. (Tr. 193, 331.) Fitzpatrick and Duffy corroborated her testimony on this point. (Tr. 283-284, 310-312.)

The Respondent set forth sufficient credible evidence, as discussed earlier in this decision, showing that Butler lied to management about her role in harassing coworkers and contributing (with Kelly) to the creation of a hostile work environment. (Tr. 195-196.) As previously established, Butler admitted to initially lying to Hardaway about her role in bringing port-a-potties into the employees' breakroom and placing them on the lunch table with the lids open. However, the more serious infraction in my assessment, are the charges eight of the Respondent's employees brought to the human resources managers about Butler's intentional "bumping" of a coworker, menacing glares at coworkers, and mocking behavior of supervisors and coworkers. Significantly, even several of Butler's own witnesses detailed how her behavior caused problems with coworkers that adversely affected the work environment in the APD department. The record is undisputed that approximately 8 employees complained to Hardaway that Butler was creating a hostile work environment. Likewise, the evidence is uncontested that these employees told her Butler intentionally 'bumped' an employee on several occasions; maliciously mimicked an employee's disability; continued to walk through work stations in defiance of management's prohibition against the practice; repeatedly hit (unclear if intentional or unintentional) an employee with "tie wraps"; and engaged in other unspecified acts of harassment. Many of the same types of complaints were also leveled at Kelly. (Tr. 186-193; R Ex. 4) The evidence also established that on several occasions when confronted by management with some of these charges, Butler was dishonest in her responses. (Tr. 24, 175-176, 196, 279-280, 285; R Ex. 4) Butler, often with encouragement from Kelly, appeared to relish antagonizing other employees.

Even if some of the reported incidents were false or embellished, it is nevertheless reasonable that the Respondent, when confronted with serious allegations of harassment committed by one of its workers, had a responsibility to investigate those complaints. Butler's denial regarding several of the charges is irrelevant. The relevant questions are whether Hardaway and Szumski were told of the complaints and if the allegations appeared credible enough to warrant an investigation. It is undisputed that employees met with them to discuss their allegations against Butler. Based on her investigation, Hardaway discovered that Butler

had serious difficulty interacting with many of her coworkers, which negatively impacted the APD department's work environment. I find nothing in the record to cast doubt on Hardaway's sincerity in taking seriously the complaints. It must also be emphasized that Butler admitted to lying about the port-a-potties' incident during the initial stages of Hardaway's investigation.

In her brief, the counsel for the Acting General Counsel does not address the nonprotected reason the Respondent gave for issuing the LCA, nor does she argue that Hardaway and Szmuski conducted a deliberately inadequate investigation to justify the LCA because of discriminatory animus. Likewise, no argument or evidence has been presented to cast doubt on the legitimacy of Hardaway's and Szumski's concern about the seriousness of the allegations against Butler. The counsel for the Acting General Counsel simply fails to set forth a persuasive argument for rejecting the Respondent's rebuttal evidence. Therefore, I find that Butler's deceptive behavior regarding the port-a-potties' incident and conflicts with numerous coworkers is sufficient bases for issuing Butler the LCA, even in the absence of her concerted activity.

I find that the Respondent's issuance of the LCA to Butler does not violate Section 8(a)(1) of the Act. I recommend, therefore, that paragraph V(b) of the complaint be dismissed.

D. *July 2, 2012, Respondent Terminates Butler*

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by terminating Butler for violating an unlawful LCA, effective July 2, 2012. The Respondent, however, argues that the Butler was terminated solely because she continued to harass other employees in violation of the LCA.[14] (R. Br. 22.)

I find that the General Counsel has failed to establish that the termination of Butler effective July 2, 2012, violated Section 8(a) (1) for the reasons discussed below

A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue. I previously found the evidence establishes that Butler engaged in concerted activities when she discussed aspects of the ongoing investigation and her suspension of February 7. I also found that the evidence establishes the Respondent had knowledge of the concerted activity because Hardaway and Szumski readily admitted Butler confessed to Hardaway that she had discussed her discipline and aspects of the investigation against her, despite being instructed not to do so in the meeting with Hardaway on February 7, 16, and May 31. Clearly, the termination constitutes an adverse employment action. The remaining question the General Counsel must prove to establish its initial burden is whether the Respondent terminated Butler because of discriminatory animus. I find that the General Counsel has failed to prove this final prong of its initial burden.

[14] On January 7, 2013, The Respondent filed a Motion for Judicial Notice. The Respondent argues that taking judicial notice of Butler's NLRB charge filed against the Union and the Regional Director's Order dated December 26, 2012 dismissing Butler's charge is proper and relevant to the charge that Respondent unlawfully terminated Butler. On January 15, 2013, the Acting General Counsel filed a motion in opposition. Based on a careful review of the Respondent's motion and the Acting General Counsel's response, the Respondent's motion is DENIED.

In its brief the General Counsel argues, "The discharge flows from the enforcement of the unlawful last chance agreement, and therefore one should conclude that the discharge itself was unlawful too." (GC Br.) I, however, do not find this argument persuasive. Although I have found that the LCA included language regarding the unlawful oral rule, the second paragraph of the LCA clearly states one of the reasons it was issued to Butler is because she harassed coworkers. It goes on to note that other incidents of her contributing to a "hostile and harassing work environment" will lead to termination. (R Exh. 7.) Hardaway testified that her May investigation revealed that Butler continued to harass coworkers despite her promise stop as noted in the LCA. According to her, Butler's continued harassment of coworkers was the sole basis for her termination. (Tr. 215-216; R Exh. 7.) The termination letter reads in part:

> In February 2012 you signed a last chance agreement, in regards to inappropriate behavior in the workplace including insubordination and contributing to a hostile & harassing work environment . . . Through our recent investigation we find that your are continuing to create a harassing work environment. This is a violation of our work rules and the same kind of behavior for which you were suspended for previously which lead to the last chance agreement. Despite your promise to change, you have failed to do so. Accordingly, we have no option but, to terminate your employment for violation of the last chance agreement." [GC Exh. 3.]

Read in context, I find that Butler was terminated because she violated that portion of the LCA related to the harassment charge. (Tr. 215-216, 290, 312-313.) A plain reading of the letter shows it does not charge (or even reference) her discussions with coworkers in February about her discipline and investigation as a basis for the termination action.

Assuming *arguendo* the General Counsel established its initial burden of proof, I find, however, that the Respondent has met its burden of showing that Butler would have been terminated even in the absence of the protected conduct. See *Wright Line*, supra, 251 NLRB at 1089.

The Respondent argues that it terminated Butler solely because she flouted one of the terms of her LCA by continuing to cause a harassing and hostile work environment. The Respondent set forth sufficient credible evidence, as discussed earlier in this decision, showing that Butler lied to management about her role in harassing coworkers and contributing (with Kelly) to the creation of a hostile work environment. As noted earlier in the decision, Hardaway conducted another investigation in May to address renewed complaints by several workers that Butler had continued her campaign of harassment. Six of the eight witnesses provided by Butler either were unable to be contacted or failed to provide useful statements about the charges. However, two of the witnesses (Anita Phalen and Peggy Sullivan) corroborated the complaining employees' charges that Butler was instrumental in creating a hostile work environment. (R Exh. 8.) Although it was not relied on by the Respondent, it is interesting to note that the union's own investigation supported the charges of harassment against Butler. (Tr. 312-313.)

The weight of the evidence supports a finding that the results of the Respondent's May investigation would lead a reasonable person to find the charges were true, thus supporting the basis for Butler's termination. There is no evidence that in May the Respondent deliberately conducted a poor investigation into the charges against Butler so as to justify terminating her. I find that the counsel for the General Counsel simply fails to set forth a persuasive argument for

rejecting the Respondent's rebuttal evidence. Therefore, I find that Butler's continued harassment of coworkers is sufficient bases for terminating Butler, even in the absence of her concerted activity.

I find that the Respondent's action to terminate Butler does not violate Section 8(a)(1) of the Act. I recommend, therefore, that the complaint in paragraph V(c) be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Federal Signal Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating, maintaining, and enforcing an oral rule prohibiting employees from discussing with other employees discipline or ongoing investigations, the Respondent violated Section 8(a)(1).

3. The above violation is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Respondent unlawfully promulgated, maintained, and enforced a rule prohibiting employees from discussing with other employees discipline or ongoing investigations, the recommended order requires that the Respondent revise or rescind the unlawful rule, and advise its employees in writing that said rule has been so revised and rescinded.

Further, Respondent will be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Federal Signal Corporation, University Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and enforcing a blanket rule prohibiting employees from discussing with other employees discipline or ongoing investigations.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, advise employees that it has revised or rescinded the blanket rule prohibiting employees from discussing with other employees discipline or ongoing investigations.

(b) Within 14 days after service by the Region, post at its University Park, Illinois facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2012.

16 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(c) Within 21 days after service by the Regional, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10

Dated, Washington, D.C., March 20, 2013

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Christine E. Dibble
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

10

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

15 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

20

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

25 WE WILL NOT prohibit you from discussing with other employees discipline or matters under investigation by our human resources department.

WE WILL NOT threaten you with disciplinary action, including termination, if you engage in discussions or activities with other employees regarding discipline or matters
30 under investigation by our human resources department.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

35

FEDERAL SIGNAL CORPORATION
(Employer)

40 **DATED: _____ BY_____**
(Representative) (Title)

FEDERAL SIGNAL CORPORATION
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

209 S. LaSalle Street, Suite 1800
Chicago, Illinois 60604-1443
Telephone: (312) 353-7570
Hours of Operation: 8:30 a.m. to 5:00 p.m. CST

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 505-248-5128.