

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

**STEWARD GOOD SAMARITAN MEDICAL
CENTER**

and

CAMILLE A. LEGLEY, JR., An Individual

CASE 01-CA-082367

1199SEIU HEATHCARE WORKERS EAST

and

CAMILLE A. LEGLEY, JR., An Individual

CASE 01-CB-082365

**COUNSELS' FOR THE ACTING GENERAL COUNSEL
BRIEF IN PARTIAL SUPPORT OF THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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I. OVERVIEW

This case involves Steward Good Samaritan Medical Center's (Respondent Employer or Employer)¹ violation of Sections 8(a)(1) and (3) of the Act by terminating its employee Camille Legley (Legley) because he engaged in union and protected concerted activities and violation of Section 8(a)(1) of the Act by maintaining and applying to Legley an unlawful policy concerning workplace civility. The case further involves 1199SEIU Healthcare Workers East's (Respondent or Respondent Union) violations of Section 8(b)(1)(A) and 8(b)(2) of the Act by unlawfully threatening Legley and other employees and by causing Legley's termination by the Employer in retaliation for his exercise of his Section 7 rights to engage in union and protected concerted activities.²

Legley was hired by the Employer, who is engaged in the operation of a Hospital in Brockton, Massachusetts (the Hospital), as a part time boiler operator. While attending his employee orientation on December 19, 2011,³ his first day of work, Legley informed Darlene Lavigne, the Union Delegate conducting that portion of the orientation, that he felt she was incorrect in stating that employees had to join the Union to work for the Employer. A disagreement between them followed. Lavigne threatened Legley with unspecified reprisals because he took this position. Thereafter, the Employer was informed of this disagreement by the Union and it terminated Legley.

¹ The name of the Employer has been corrected to that stated by Employer's counsel at the hearing in this matter.

² The charge in this case was filed against Respondent Employer on June 4, 2012 and amended on July 17, 2012. The charge against Respondent Union was filed on June 4, 2012 and amended on July 3, 2012 and again on August 9, 2012. The Consolidated Complaint issued on January 31, 2013. An Amendment to the Consolidated Complaint issued on March 4, 2013. The hearing in this matter was held on April 17 and 18, 2013 in Boston, Massachusetts..

³ All dates are 2011 unless otherwise indicated.

The Union's animus toward Legley is demonstrated by the threats it made to him. Although the Employer contends that it fired Legley because it had determined that he was not the right "fit" for the Employer under its Workplace Civility Policy, due to his conduct at the orientation meeting and in other interactions with the Employer, the evidence demonstrates that Legley's conduct at the meeting was union and protected concerted activity. Further, Legley's statements did not lose the protection of the Act under *Atlantic Steel*, 245 NLRB 814 (1979), and neither the Employer nor the Union can establish that Legley would have been discharged due to his alleged behavior in his other dealings with the Employer prior to the meeting. The evidence also establishes that the Employer's Workplace Civility Policy is unlawful and, further, that Legley was terminated by the Employer for violating this unlawful rule and because he engaged in union and protected concerted activities. The evidence further establishes that his termination was caused by Respondent Union.

After setting forth the facts leading to the termination of Legley and the Union's role in it, including its threats to Legley and other employees, the legal analysis that follows will establish that the Employer violated Sections 8(a)(1) and (3) of the Act by terminating Legley and Section 8(a)(1) of the Act by maintaining and applying an unlawful Workplace Civility Policy to his conduct. The analysis will further establish that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by threatening Legley and other employees and by causing the Employer to terminate him for engaging in union and protected concerted activities.

II. FACTS

A. The Workplace Civility Policy

For some period of time, the Employer has maintained as part of its Code of Conduct a policy on Workplace Civility. That policy states:

Steward recognizes that excellent care is best delivered in a work environment of respect and cooperation.

As a Steward workforce member I will:

- Treat all coworkers and individuals with respect, patience and courtesy;
- Refrain from conduct that would intimidate or threaten other individuals;
- Never engage in abusive or disruptive behavior;
- Not tolerate any threats of harm – either direct or indirect – or any conduct that harasses, disrupts or interferes with another workforce member’s work or performance or that creates a hostile work environment.

The Employer and the Union negotiated this policy. It was a cornerstone of their relationship. The Employer holds regular employee meetings at which this policy and its application are discussed. The Employer emphasizes that this policy requires employees to treat each other with “dignity and respect.” (T. 192-193). Union Delegate/lead boiler operator Kevin Jordan (Jordan) testified that the Employer has a zero tolerance for violations of its Workplace Civility Policy. (T. 297).

B. The Hiring of Camille Legley

Legley is a 72 year old man who has worked for over 30 years as a stationary engineer operating boilers. He has obtained a license as a second class stationary engineer (T. 28).⁴ In September, Legley saw an advertisement by the Employer for a part time boiler operator at the Hospital. The job called for the employee to work 16 hours a week on Friday and Saturday nights. It was not an attractive schedule. (T. 252). Legley was qualified for the position. Legley applied for the job and participated in three interviews with the Employer. Legley met with Facilities Manager Sean Brennan (Brennan) once, and with the lead boiler operator Jordan three

⁴ Citations to the transcript will be designated (T.); citations to General Counsel exhibits will be designated (GC Ex.); citations to Respondent Employer exhibits will be designated (RE Ex.); and citations to Respondent Union exhibits will be designated (RU Ex.).

times. (T. 32).⁵ Jordan corresponded by email with Legley on numerous occasions during the interview process. (GC Ex. 12). Legley also met with Union Delegate/HVAC refrigeration mechanic Neal Nicholaides (Nicholaides), who testified that he had had no objection to hiring Legley. (T. 203).

Legley was offered the job on November 28. Legley was instructed to report to the Employer's facility on December 19, 2011 for his orientation. (GC Ex. 13).

Legley was also instructed to come to the Hospital on December 5, to complete paperwork for his new job and to take a physical. (T. 243). Legley went as directed, completing a number of forms without incident and taking his physical. He also had an interview with the Human Resources Manager Jen Patnaude (Patnaude). Legley said that he had no conflicts or issues with any of the people he dealt with that day. He admitted that he asked for copies of forms he completed and asked questions about the purpose of blood tests that he didn't understand. (T. 38-42).

On December 5, Legley was called in to be interviewed by Patnaude. It was a brief interview. Patnaude said she didn't get to interview him before this and asked him about himself and his qualifications. Legley began describing his skills and qualifications. After a few minutes, Patnaude stopped him and ended the interview. Legley did not recall any conflicts or issues during this interview. He did not believe there were any problems with it. (T. 39-40).

Patnaude, however, testified that Legley's behavior during the interview concerned her. She said he seemed "put out" by the interview, giving one word answers. Patnaude was so concerned about this that she called Facilities Manager Brennan. Describing what she had

⁵ The transcript incorrectly identifies Sean Brennan as Sean Brown. (T. 67). Counsels for the Acting General Counsel respectfully move that this inadvertent error in the transcript be corrected.

observed, Patnaude asked him if he was sure he wanted to hire Legley. Brennan said that Legley had interviewed “well” in the department and he still wanted to hire him. (T. 251-252).

C. The Orientation Meeting

There were five employees at the December 19 orientation session held at the Hospital at issue in this case. In addition to Union Delegate Darlene Lavigne (Lavigne), who represented Respondent Union at the meeting, employees Legley, Kim Derby (Derby), Francaise Gaston (Gaston) and Aisha Patel (Patel) were present. (T. 46, 132; GC Ex. 7, 8, 9).⁶ Of these individuals, only three – Legley, Derby and Lavigne – testified in this proceeding.

It is undisputed that the employees met in the lobby of the Hospital shortly before 8 a.m. on December 19. According to the letter they had received (GC Ex. 13), they were to be met there by someone from Human Resources who would escort them to the conference room. Human Resources Senior Advisor Rebecca Cadima (Cadima) met the employees in the lobby and instructed them to follow her. Because the elevators were broken, the employees had to walk up five flights of stairs to the conference room. According to employee Derby, all of the employees were out of breath and grumbling about having to take the stairs when they got to the conference room. (T. 132). Derby could not specifically recall if she heard Legley complaining about having to take the stairs. (T. 160). Legley and Derby testified that Legley was the last one to arrive in the conference room. He arrived shortly after the meeting had started. (T. 46, 148).

i. Legley Describes the Meeting

When Legley entered the conference room, the meeting had already started. He did not hear Lavigne introduce herself. (T. 46). Legley had expected that the meeting would be

⁶ Another employee was present but Respondent Union disposed of her application when she quit shortly after being hired. Thus, the record contains no evidence as to her identity.

conducted by someone from Human Resources.⁷ Legley was confused when he heard a discussion about the Union. Legley raised his hand and, when called upon, asked Lavigne if she was a Union steward. She replied that she was a Union Delegate. (T. 47-48).

Legley heard Lavigne say that employees had to join the Union to work at the Hospital. (T. 48). Legley, believing this not to be true, told Lavigne that he believed that there was a law stating that you didn't have to join the Union. He testified that Lavigne got "stern" and replied that he did have to join the Union to work at the Hospital. (T. 49). Legley testified that Lavigne said "you have to join the Union to work here." (T. 49). In addition, he heard her say that the employees had to complete the form that she had passed out to them, referring to the Application for Membership form that she had distributed. (GC Ex. 5; T. 85). Legley testified that Lavigne told the employees four to six times that they had to join the Union in order to work for the Employer. (T. 51).

While reading the Union's documents handed out at the meeting, Legley found a passage which supported his position, in which the Union explained that employees did not have to join the Union and could become agency fee payers. (GC Ex. 5, p. 2). He read two lines of this portion of the document to Lavigne. Lavigne got "very upset and mad" and repeated that he had to join the Union. (T. 50). Legley testified that, at that point, Lavigne asked Legley his name, which he gave her. (T. 51). Legley understood that the Union, in this publication it distributed, was telling employees that they didn't have to join the Union. He was thus confused by Lavigne's statements that he did have to join the Union. (T. 57). Legley felt he was being intimidated by Lavigne into joining the Union. He also felt she was lying to them about whether they had to join the Union. (T. 93).

⁷ The letter sent to Legley on November 28 by the Employer read: "A representative from the Human Resources department will meet you at 8:15 am to walk you to the conference room where the orientation is held." (GC Ex. 13).

Legley also recalled Lavigne telling the employees about the Union's political action fund, to which she suggested that they contribute. Lavigne suggested an amount to contribute to the fund, but didn't tell the employees that they had to do so. (T. 53).

During the orientation meeting, Legley completed the Application for Membership form to join the Union. (GC Ex. 14). He asked Lavigne if he could make copies of his papers, which he then did. (T. 54). Legley did not contribute to the political action fund. In fact, of the four employees who attended the meeting and for whom records were produced, only one, Kim Derby, contributed to the Union's political action fund. (GC Ex.7, 8, 9, and 14).

Although admitting that he has a loud voice to begin with, Legley testified that he did not raise his voice during this discussion. (T. 52). He further stated that he did not feel he interrupted Lavigne, but admitted to asking questions, so that someone might think he did. (T. 52). He said that he did get angry at how Lavigne was treating him, particularly when she asked him his name. (T 92). He described Lavigne as being "stern" and "very upset and mad" with him. Legley said that Lavigne was rude and aggressive and was upset at some of the questions he asked. He said that she raised her voice to him and, and at one point, looked at him with "evil eyes." (T. 49, 50, 52, 57, 100).

Legley denied complaining about the elevator not working or having to take the stairs. (T. 56). He did not believe that he interrupted Lavigne. He denied disrupting the meeting or being rude to Lavigne. (T. 57). He did not recall Lavigne offering to speak to him after the session or saying that they were on a tight schedule and could not keep the HR people waiting. (T. 56).

ii. Derby Describes the Meeting Similarly to Legley

Kim Derby (Derby) was hired by Respondent Employer as a per diem polysomnography technician. She left Respondent Employer in March 2012 when she obtained a full time job elsewhere.

Regarding the December 19 orientation meeting, Derby testified that she heard Lavigne tell the employees that they had to join the Union to work for Respondent Employer. (T. 135). Derby said that she felt the meeting was an open forum at which the employees could ask questions. Derby asked Lavigne whether per diem employees could owe more in union dues than they earned, since their hours were not set. She said Lavigne answered that they could not. Another employee also asked a question relating to per diem employees, the specifics of which Derby could not recall. (T. 136).

Derby recalled Legley asking whether employees had to join the Union. As a per diem employee and having her own questions about union dues, she was interested in the answer to this question. (T. 137). Derby said that Lavigne quickly answered Legley that employees had to join the Union. Legley stated that he thought there was a law that said that you didn't have to join the Union. Lavigne stated that she was unaware of such a law and that they had to join the Union. Derby said that Lavigne appeared irritated with Legley at that point. (T. 138). Derby said that Legley asked about having to join the Union "more than once." (T. 153). Thereafter, Legley read aloud that portion of the Union's flyer which said that employees did not have to join the Union. Derby said that Lavigne became "pretty irritated" with Legley then. (T. 138). Lavigne did not provide the employees with any explanation after Legley read the Union paper to her which said that they did not have to join the Union. (T. 161). Derby testified that she still

felt she had to join the Union even after Legley had read about the agency shop from the Union's paper. (T. 166).

Thereafter, Legley asked Lavigne if he could make copies. Derby said that Lavigne then became really irritated with Legley. Derby could tell Lavigne was irritated with Legley by her voice and body language. (T. 156). Lavigne allowed Legley to make the copies. Around that time, Lavigne asked Legley to identify himself and what department he would be working in. Legley told her. Lavigne then said that "she knew the people that worked down there, and that she was going to warn them that he was coming, and that they would not put up with him." (T. 140). Derby took this comment as a threat by Lavigne to Legley and was "horrified" by it. (T. 140).

Derby testified that at no point did Legley threaten Lavigne, swear, or use accusatory adjectives towards her. (T. 142, 161). She did not recall Legley using the words liar or lie. (T. 158). She said that Legley did become irritated at Lavigne, which she could tell from his voice getting louder. She said Legley had a loud voice that "filled the room." (T. 137, 156). She said that Legley was "passionate" about his feelings. (T. 154). Both Legley and Lavigne became irritated with each other. Both of them raised their voices during the discussion. (T. 155). Derby felt that Lavigne was dismissing Legley and that his questions were not being validly answered. (T. 139). Derby thought that Lavigne was trying to shut out Legley and that he had legitimate questions. (T. 141).

Derby testified that she did not hear Lavigne say that she would talk to Legley after the session. (T. 158). She did not recall Lavigne saying that she was under time pressure to complete the meeting (T. 157). She did not hear Lavigne tell the employees that they had 30 days to join the Union. (T. 163)

iii. Lavigne Describes the Meeting.

Union Delegate Lavigne is a 30 year employee of Respondent Employer. She is a member of Respondent Union and has been a Union Delegate for five to ten years. (T. 322). She has been conducting orientations for the Union for new hires for 5 to 10 years. She has been the primary Union person conducting these orientations for much of this time and has conducted about 100 to 200 of these orientations. (T. 323). In conducting the orientations, she explains to new employees about the Union and its benefits and encourages them to get involved. (T. 324). Lavigne explains the Union's political action fund and requests that they all contribute \$1 a week to it. (T. 324). She passes out various Union documents to the employees, including a copy of the Union contract (GC 4), an information booklet for Union members (GC 6), and a booklet containing forms to apply to join the Union, to participate in dues check off, and to contribute to the Union's political action fund. (GC 5).

Lavigne testified that she gives employees an "informational form" (GC 5) and she instructs them that they must fill it out and return it to her before they leave the orientation meeting. (T. 326). The purpose of this form, Lavigne testified, is so that the Union will know where Hospital employees work in case the Union needs to contact them. (T. 325).

Lavigne testified that she has 20 minutes to complete her orientation presentation. (T. 327). At the conclusion of her 20 minute presentation, she asks for questions. Lavigne testified that, until the orientation of December 19, she had never before had an employee ask her a question during her presentation. (T. 343). She further testified that, until that session, she had never before had an employee say that they didn't have to join the Union or ask about the agency fee. (T. 354).

No one from management was present at the December 19 orientation. (T. 342). All of the employees arrived to the December 19 meeting mumbling about having to take the stairs. (T. 352). Legley arrived last and, at the start of the meeting, accused her of not meeting them downstairs and by complaining about having to climb the stairs and the elevators not working. (T. 329).⁸ She testified that he interrupted her several times to repeat these complaints. (T. 329).

Lavigne testified that she asked employees to complete the informational form she had passed out. She told them that they must do so and turn it in to her. (T. 332). She told them this once or twice. (T. 351). At the end of the meeting, she told the employees to hand in their forms, that she needed them. (T. 331)

The “informational form” which Lavigne told the employees that they must sign is titled “Application for Membership.” Just above the signature line, the application reads:

“I hereby accept membership in 1199SEIU Healthcare Workers East and designate 1199 to act for me as collective bargaining agent in all matters pertaining to conditions of employment. I hereby pledge to abide by the Constitution of 1199SEIU Healthcare Workers East.” (G.C. Ex. 5).

The application, on page 4, also contains language that informs employees that they do not have to join the Union and may become agency fee payers.

During the meeting, Lavigne asked employees to read the informational form. She saw that Legley was already reading it. She heard Legley say that federal law said that he didn’t have to join the Union. Lavigne three times said that they could talk about that later. She also claims she said that they had limited time and needed to finish. (T. 331). Legley said that he knew his rights and what he didn’t have to do. (T. 336). She testified that Legley read to her from the

⁸ As noted above, the letter sent to Legley on November 28 by the Employer in which he was informed of the date and time of the orientation only mentioned that someone from Human Resources would meet him in the lobby. (GC Ex. 13).

white section of the form but wouldn't let her explain, though she failed to describe how he did this. (T. 332).

Lavigne claims that Legley was rude by constantly interrupting her. She admits that Legley was not yelling, but contends that he was talking loudly. (T. 330). She felt that, with his interruptions, he was overbearing and was overpowering her presentation. (T. 333). Lavigne said that Legley wouldn't let her explain things, such as when he claimed he didn't have to join the Union. (T. 332). She contended that Legley was rude by constantly interrupting, by speaking loudly, by speaking with authority and by pointing to the back of the paper. Lavigne believed Legley was scaring the other women, though says she herself was not scared. (T. 350-351). She contended that Legley insinuated she was lying by saying that she was saying they had to join the Union, but it said right on the paper that they didn't have to join the Union. (T. 335).

Lavigne admitted to being angry at Legley, though she denied raising her voice to him. (T. 353).

Lavigne denied telling Legley that he had to be a member of the Union to work at the Employer. She did admit, however, to stating that it was a union shop and they were all Union members. (T. 339).

While Lavigne denied stating that she was going to call Legley's department and that they would not put up with him (T. 336), she admitted to asking Legley, towards the end of the orientation, his name and where he worked. Lavigne testified that she often does this if she has the time. (T. 336). She admitted, however, that she didn't have the time on this day, as her presentation ran 10 minutes beyond her 20 minute allocation. (T. 350). She further claimed that she asked these questions "in a friendly way" as "friendly conversation." (T. 349, 355).

However, there is no evidence that she asked any other employee at the meeting their name and where they worked.

iv. Leveille's testimony

Union Representative Mary Ellen Leveille (Leveille) testified that she trained Lavigne on how to conduct orientations and was very familiar with how Lavigne conducted herself during them. (T. 368). Leveille testified that Lavigne had never before encountered individuals who questioned the information that she gave them in an orientation. (T. 370). Leveille said that Lavigne "really likes to stay on her program," is "very structured," and "likes to read through her stuff and does what she is supposed to do." (T. 372). Leveille believed that Legley's questions during the orientation caused Lavigne to get "flustered." (T. 372).

D. The Discussions of December 19 Regarding Legley's Protected Activity

There were several discussions among Union and Employer representatives on December 19 concerning Legley's conduct at the orientation meeting.

After the orientation meeting on December 19, Lavigne's first call was to Union Representative Leveille. (T. 336). Among the things Lavigne told Leveille was that Legley said during the meeting that he knew his rights about not having to join the Union. (T. 336). While at first denying she was told that, Leveille eventually admitted that Lavigne told her that Legley said he didn't have to join the Union. (T. 373). During their discussion, Lavigne told Leveille that she asked Legley where he was going to be working. Legley had told her the boiler room. Leveille knew that Union Delegate/HVAC refrigeration mechanic Nicholaides was the Union Delegate for the boiler room, so she told Lavigne she would call Nicholaides. (T. 375).

After speaking with Leveille, Lavigne called Nicholaides herself. Lavigne told Nicholaides that Legley said that he didn't have to join the Union. (T. 337). Nicholaides

admitted that Lavigne told him that Legley kept saying that he knew his rights and that he didn't have to join the Union. (T. 203). Nicholaides said that he accepted what Lavigne told him as true and he reported this to his superiors, Sean Brennan and Scott Kenyon. (T. 218).

As soon as he was done speaking with Lavigne, Nicholaides called Human Resources Senior Advisor Cadima. (T. 227). Nicholaides told Cadima that Lavigne was very upset about what happened. Cadima told him she was not a witness to what had happened, but she *had heard* about it. (T. 206). Cadima said that they were going to have their hands full with Legley because he had run them through the ringer at HR. (T. 226-227). Notably, Nicholaides denied discussing with Cadima the content of Legley's questions to Lavigne during the orientation meeting. (T. 228).

Leveille called Nicholaides, who had already spoken to Lavigne. (T. 376). Leveille, using "some choice words," asked Nicholaides what was going on. (T. 376, ll. 12-15). They discussed what had happened with Legley and how his conduct, as described by Lavigne, violated the Employer's Workplace Civility Policy. (T. 375-76). During this conversation, Nicholaides discussed with Leveille that Legley had said during the orientation meeting that he knew his rights about not having to join the union. (T. 320).

E. The events of December 20

On December 20, Legley reported for work at 7:50 a.m. He went to Union Delegate/lead boiler operator Jordan's office. Legley had had trouble sleeping because of what had happened at the Union orientation the previous day. He began telling Jordan what had happened at the meeting. He told Jordan that the woman running the meeting had misrepresented the requirement that you did not have to join the Union. He told Jordan that she said that you did have to join and that she became upset with him, and he with her. Jordan stopped him and told

him to follow him. (T. 60-61). Jordan said he told Legley that he was only one of three Union Delegates and that they should all talk about this together. Jordan thought this might be a disciplinary issue and didn't want to be the only Delegate to hear the story. (T. 178).

They went down the hall to the plumbing shop where Union Delegate/HVAC refrigeration mechanic Nicholaides and Union Delegate/employee Gerry Monahan (Monahan) were. Jordan told Legley to tell them what he had just told him. Legley did so, describing what had happened at the orientation, as he had told Jordan. He told them that he was a new employee and that he was willing to meet with this lady and shake her hand to settle this. He asked them who she was and they said they did not know. (T. 61-62).

Legley said that he might have told them that he wasn't sure he wanted to work there. In light of these events, he said that he was thinking that, but couldn't be certain if he expressed it to the Delegates. (T. 63). Nicholaides described having a "calm" 10 minute conversation with Legley. (T. 213). He testified that Legley said he had told Lavigne that he didn't have to join the Union and she said that he did. Nicholaides said that Legley said Lavigne lied to him or didn't tell the truth about this. He said that Legley said that he knew his rights, that he had an attorney who he was friends with, and that he knew Scott Brown. (T. 228).⁹ In response to questions from him, Nicholaides testified that Legley stated that he had complained that no one had met him in the lobby, that he had to climb the stairs, and that he might have said that he didn't want to work in a place like this. (T. 229). Nicholaides said that he told Legley that Lavigne might not have been lying to him, that he had to fill out the information card and, after that, it was up to him whether he joined the Union. Nicholaides said that Legley responded that if they didn't want him there, he would leave. Nicholaides said that was up to him. (T. 229). Nicholaides

⁹ Legley denied making other statements attributed to him by Nicholaides. These included statements that he knew his rights, that he had an attorney who had advised him he didn't have to join the Union, and that he knew Scott Brown. (T. 63).

admitted that they did not discuss the agency fee. (T.230). Nicholaides denied making any statements to Legley about the political action fund. (T. 324). Nicholaides did not deny the remaining comments attributed to him by Legley, including the statement that this incident had gone beyond Legley's desire to meet with Lavigne and that Lavigne had reported the orientation incident to various management and union representatives.

Jordan recalled Legley saying that the woman had not been truthful about having to join the Union; that she had said you had to join the Union. He claims that Legley said he wasn't a good fit there. (T. 180). Jordan recalls that Nicholaides saying that the woman had called him and was very upset because she had never been treated that way. (T. 181). Jordan did not deny the comments attributed to Nicholaides by Legley about the political action fund.

Legley worked the remainder of the day with Jordan who trained him on aspects of his new job. At about 2:30 pm, Jordan asked Legley what time he was coming into work the next day. Legley asked what time he wanted him to come in. Jordan said 8 am.

F. Knowledge of Legley's union and protected activities and the decision to discharge Legley.

Since no representative of Respondent Employer was present in the room during the Union orientation meeting on December 19 (T. 342), Employer knowledge of what occurred in that room could only have come, directly or indirectly, from Union Delegate Darlene Lavigne or one of the new employees being oriented. The record is clear that Lavigne immediately contacted her superior in the Union about Legley's conduct at the meeting and from there news of their interaction then, in turn, quickly came to Respondent Employer's attention.

The following chronology explains how the word of Legley's union and protected concerted activities became known:

There were several discussions between and among Union and Employer representatives on December 19 concerning Legley's conduct at the orientation meeting. These are discussed above in section v.

In addition, at a luncheon on December 20, Nicholaides spoke with Human Resources Manager Jennifer Patnaude, Facility Director and Safety Officer Scott Kenyon (Kenyon), and Regional Human Resources Director Tom Watts (Watts). Nicholaides identified to them "rude and condescending behavior" he said Legley had engaged in with Lavigne at the orientation meeting. (T. 400). Patnaude said that Nicholaides discussed with them the "incidents at orientation," how rude Legley was to Darlene and how he had "made her cry." (T. 259). Nicholaides said that, at the time of this conversation, Patnaude already knew about what Legley had said at orientation about not having to join the union. (T.209). Nicholaides also discussed with them his conversation with Legley that morning (discussed below). Nicholaides discussed what he described as "negative behavior" by Legley in that conversation, including a statement by Legley that, if they didn't want him there, he would go. (T. 262).

Nicholaides testified that he *may* have expressed his concerns to Brennan about Legley's behavior at the orientation although he claims not to recall for sure. (T. 215). He does admit that he talked to either Brennan or Kenyon about how disrespectful Legley was at the orientation meeting and how upset he made Lavigne. (T. 216). Although he denies that he reported to either Brennan or Kenyon his own concerns that Legley was arguing with Darlene about membership in the Union (T. 219), he does not deny that Darlene told him about Legley's comments about not joining the Union. (T. 231).

Originally, when examined by Counsel for the Acting General Counsel, Nicholaides testified that, later in the afternoon of December 19, he "bumped into" Jennifer Patnaude at a

meeting. (T. 209). The following day, on direct examination by Union counsel, Nicholaides changed his testimony to say he never spoke with Patnaude on Monday, December 19, but that he spoke with her on Tuesday, December 20, sometime later in the day. (T. 231). On direct, he testified that he couldn't remember whether he spoke with Patnaude about Lavigne's complaints to him about Legley, but it was possible. (T. 209). They did discuss the incident about the orientation; that Legley had been a problem and Patnaude told him she had had prior dealings with him, which she described as "problematic." (T. 210). Nicholaides testified that he spoke with Patnaude about Legley but never spoke with Patnaude about the content of Legley's questions or interruptions of Lavigne. (T. 231).

Kenyon testified that, prior to the luncheon, he had previously heard of the rude and condescending behavior by Legley from other staff members, including Sean Brennan. Kenyon testified that all of the details he had received concerning Legley's behavior were "vague." (T. 400). Kenyon further admitted that, at the time of the decision to discharge Legley on December 20, he was aware that Legley, during the orientation, had disputed the requirement that he had to join the Union. During their luncheon discussion, Kenyon, Patnaude and Wells discussed that Legley had said at the orientation that he can't be made to join the Union. (T. 406). Patnaude also discussed her dealings with Legley and how she had not wanted to hire him. (T.397-399). At the end of the discussion, Kenyon, Patnaude and Watts jointly decided to terminate Legley.

Patnaude had already discussed the Legley incident with Rebecca Cadima prior to her conversation with Nicholaides on December 20. (T. 260).

Patnaude's notes dated December 20 (GC Ex. 17) clearly reflect that she had a conversation with Brennan, Nicholaides, and Jordan at some point that day. The notes record that they told her that "first thing in the a.m. he [Legley] said there was an incident at orientation.

He said he didn't believe the Union person presenting was telling the truth." Neal said, "I heard you were upset." Legley said, "Yes and proceeded to say it's true you don't need to join the Union; I talked to my attorney friend and was told joining the Union wasn't a requirement." Her notes also reflect that "the guys discussed what transpired with Scott Kenyon (Dir) and after reviewing with Jen and Tom all that had transpired, the decision to sever ties was made." After reviewing these notes, Patnaude acknowledged that she had this additional conversation, which included Neal and Kevin, at some point during the luncheon on December 20. Again, after all these discussions, the termination decision was made. (T. 270-273).

On the afternoon of December 20, following the decision to terminate Legley, Patnaude called Lavigne to verify that the decision they made was correct. (T. 253, 261). This was her first discussion with Lavigne about the incident with Legley. (T. 261). Patnaude could not remember many details of the discussion. All she recalled was that Lavigne said was that Legley was rude and disruptive, kept interrupting her and made her cry. (T. 253). Among the things that Lavigne told Patnaude was that Legley said to her that she couldn't make him sign the union application. (T. 258).

Patnaude testified that she also called employee health nurse Eileen Rainey (Rainey) on December 20 after the decision had been made to terminate Legley. She called to confirm what Human Resources administrative assistant Dorsey had told her that Rainey had said about Legley's December 5 meeting in Employee Health. (T. 267).¹⁰

Patnaude and Kenyon admitted that they did not discuss these incidents with any of the other witnesses to them – including Legley and the other employees in attendance at the orientation meeting – at any time before or after discharging Legley. (T. 263-264, 406-407, 261).

¹⁰ As noted below, in the absence of Rainey's testimony, this hearsay testimony cannot be relied upon for the truth of the matter asserted.

G. Legley's discharge

At around 3:45 p.m. on December 20, Legley was told by Jordan that the Facilities Director wanted to see him. They went to a conference room where Kevin Jordan, Sean Brennan, Rebecca Cadima, and a security guard were present. Brennan started the meeting by telling Legley that he was terminated because they had found that he was not a fit employee. Legley began to speak about what had happened at the orientation meeting. Brennan interrupted him and said that there was nothing further to say, that the decision had been made. Legley continued to speak and told them what had happened at the Union meeting, how Lavigne got upset when he said he didn't have to join the Union. He then told them about Nicholaides' comments about how this had gone way past Legley's desire to work it out with Lavigne. He said Nicholaides told him about her complaints to HR and the Hospital and how he was getting blamed because Lavigne didn't get donations to the political action fund. Cadima then said they were giving him an extra days pay and handed him his check. He was escorted out by the security guard. (T. 67-69).

The decision to fire Legley was made jointly on December 20 by Human Resources Manager Patnaude, Facility Director and Safety Officer Kenyon, and Regional Human Resources Director Watts. (T. 276). Respondent Employer asserts that Legley was fired for violating the Employer's Workplace Civility Policy. (T. 266). The decision was made during or after a luncheon (discussed above) they had attended on December 20. During that luncheon, Nicholaides discussed with them Legley's rude and condescending behavior at the Union orientation meeting. (T. 389, 400). Following this conversation with Nicholaides, Kenyon, Patnaude and Watts discussed the Legley situation and jointly decided to terminate him. (T. 391). During this discussion, they discussed the fact that Legley had said that he can't be made

to join the Union. (T. 406). Kenyon had heard this issue raised about Legley a couple of times. He contends it did not factor into his decision to terminate him. (T. 392).

H. The Employer's Evidence of Legley's Alleged Misconduct

At the time of the decision to terminate Legley on December 20, the Employer had not spoken to anyone who was present at the Union orientation meeting the previous day. (T. 263-264, 406-407). From second hand information provided by Nicholaides, it believed that Legley had engaged in "rude and condescending" behavior during the orientation. (T. 400).

The Employer contends that, in deciding to discharge Legley, it also relied upon other evidence of alleged misconduct by Legley in addition to what occurred at the orientation meeting. These incidents included Legley's dealings with Human Resources Manager Patnaude, Human Resources Administrative Assistant Jennifer Dorsey and Annette Miller.¹¹

Patnaude testified that, in her 15 minute interview with Legley, she had determined that Legley was rude, disrespectful and uncooperative based on the fact that he gave one word answers to questions and had a smirk on his face when answering questions. (T. 251-252). Patnaude told this to Sean Brennan, who stated that Legley had interviewed well in his department and he still wanted to hire him. (T. 252).

HR administrative assistant Jennifer Dorsey testified that she dealt with Legley on December 5. When she had called him to set that appointment, Dorsey felt Legley gave her a difficult time. He "made a fuss" when she told him he had to bring his immunization records because he said he didn't know where to find them. He asked extensive questions. She felt Legley jumped the gun in asking these questions. She had a script that she followed which

¹¹ Considerable testimony was also presented concerning Legley's dealings with Eileen Rainey in the Employee Health Department. Rainey did not testify. All of the testimony concerning Rainey's interactions with Legley was objected to as hearsay. The Administrative Law Judge denied the objections, stating that he was not receiving the evidence as being offered for the truth of the matter. Accordingly, that hearsay evidence cannot be relied upon as a basis for the Employer's decision to terminate Legley.

contained the answers to questions, but Legley kept interrupting to ask for an explanation before she could give it to him. (T. 299). Dorsey said that, from his “tone,” she knew Legley would be a difficult employee. (T. 289-290).

During their meeting on December 5, Legley numbered all of his paperwork in the corner, which Dorsey found “odd.” He asked for copies of his paperwork, which Dorsey found “weird.” (T. 291, 297). Dorsey contends that, when she asked Legley if he had been interviewed, he went off on a tangent by describing his interviews. She felt he “had an attitude” that they were making him go above and beyond. (T. 291-292). Dorsey said she reported these feelings to Patnaude on December 5. (T. 294). There is no evidence that Patnaude ever reported these incidents to anyone else.

Annette Miller is a medical assistant in the Employer’s employee health department. She did the pre-employment physical for Legley on December 5. She testified that Legley asked for copies of his paperwork, which she had never seen before. She further stated that Legley was a little bit agitated about why they were doing all of the tests on him. She told him it is Hospital regulations for all new employees. Miller testified that Legley’s was a difficult physical which took longer than usual, but she testified that Legley was “not rude.” She described Legley as “suspicious.” (T. 411-412). Miller reported these observations to Eileen Rainey, who said she would call human resources. There is no record evidence of Rainey reporting Miller’s observations to human resources prior to the decision to discharge Legley.

The Employer contends that it has fired other probationary employees in the past who were not a good fit. (T. 285). It further contends that it has fired others for violating its

Workplace Civility Policy. It cites the discharges of Lila Reed and Pete Beatrice as examples of the latter. (T. 282-283).¹²

III. ARGUMENT

A. Credibility

When in conflict, the testimony of the witnesses for Counsels for the Acting General Counsel should be credited over those of the Respondents. The Counsels' for the Acting General Counsel witnesses testified in a straight forward manner, listening to all questions and answering honestly to the best of their abilities.

As to the events of the orientation meeting, Legley was open and honest in his testimony. He admitted to matters that were not in his best interest, such as stating that his questions could have been perceived as interrupting Lavigne and allowing that, while he didn't think so, others may have felt his voice got loud. Moreover, his testimony was corroborated by that of Kim Derby on essential points. Derby was a particularly persuasive witness who had no incentive to do anything other than to testify truthfully. She corroborated Legley's statements that Lavigne told them employees had to join the Union to work for the Employer. She further corroborated Legley that he did not act out of line during the orientation.

In contrast, Darlene Lavigne was not a persuasive witness. She appeared to be overly emotional on direct and calculating on cross, giving the impression that she was disingenuous in her testimony. Lavigne showed a facility for giving inconsistent and contrary testimony. For instance, when asked why she questioned Legley on where he was going to work for the Employer, Lavigne testified that she frequently asked employees this question as friendly conversation when she had the time. (T. 336, 349, 355). She later admitted that she didn't have

¹² As discussed below, Counsels for the Acting General Counsel contend that these cases do not support the Employer's contention.

the time in Legley's case (T. 350), which she had previously testified was due to Legley's disruption of her meeting. Incredibly, she testified that she asked this question as friendly conversation, despite her testimony that she was upset with Legley who had she felt had given her a hard time and disrupted her meeting.

Respondents' other witnesses all tried mightily to avoid testifying to a critical fact – that they were aware of Legley's protected statements made during the orientation at the time the termination decision was made. Scott Kenyon, in particular, was extremely evasive on this point, while ultimately conceding its truth. Nicholaides also resisted admitting that he was aware of Legley's protected concerted activities. For instance, while admitting that he spoke to Kenyon or Brennan about how disruptive Legley was at the orientation meeting, he denied that he told them about Lavigne arguing with Legley about membership in the union. (T. 216, 219). Given the nature of what Legley said during that meeting, it is virtually inconceivable that Nicholaides could have discussed how "disrespectful" Legley was without also discussing the content of what he said while he was being "disrespectful." Similarly, when questioned by the administrative law judge, Nicholaides admitted that he had reported to his superiors that Lavigne had had an argument with Legley about whether employees had to join the union (T. 217-219), And yet, when, immediately following that line of questions, Nicholaides was asked by Counsel for the Acting General Counsel whether he reported to Brennan or Kenyon that Legley had been arguing with Lavigne about membership in the Union, Nicholaides denied doing so. For these reasons, the witnesses for the Acting General Counsel should be credited over those of the Respondents.

B. Legley Engaged in Union and Protected Concerted Activities

Legley's statements and questions during the Union orientation meeting on December 19 were protected, concerted activity. Section 7 of the Act protects an employee's right to refrain

from forming, joining, or assisting a labor union. An employee's assertions of his Section 7 rights are concerted when the employee is engaging "in with or on the authority of other employees, and not solely by and on behalf of the employee himself."¹³ The Board has repeatedly held that an employee who protests terms and conditions of employment common to all employees during a group meeting is engaged in protected concerted activity.¹⁴ Here, Legley, in a group employee/union meeting, questioned the legality of Lavigne's statements requiring employees to join the Union, a matter that affected all the employees present. He did so repeatedly in light of Lavigne's repeated insistence that membership was required. A requirement that an employee join a union in order to work for an employer is a working condition. Thus, the discussion concerned a working condition and was protected conduct. Derby testified that she shared Legley's concerns about this work requirement. She was interested in what Legley was saying because, as a per diem employee, she had concerns about joining the Union. Thus, Legley's statements were also concerted. Legley's conduct was protected under section 8(a)(1) the Act.

Legley's conduct was also protected under Section 8(a)(3) of the Act. The Act permits employees to refrain from engaging in union activities. By stating that he did not have to join the Union to work for the Employer, Legley was refraining from engaging in union activities.

This conduct is protected under Section 8(a)(3) of the Act.

¹³ *Meyers Industries*, 281 NLRB 882, 885 (1986), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied sub nom. *Meyers Industries, Inc. v. NLRB*, 108 S. Ct. 2847 (1988); see also *El Gran Combo*, 284 NLRB 1115, 1117 (1987) (finding two employees' attempts to persuade fellow employees to protest a condition of employment were protected concerted activity, even though they were unable to convince any coworkers to join their protest, because they were attempting to induce group action).

¹⁴ See *Chromalloy Gas Turbine Co.*, 331 NLRB 858, 863 (2000), enf'd. 262 F.3d 184, 190 (2d Cir. 2001) (protesting a new break policy in a group meeting found protected concerted activity); *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (questioning why employees were not receiving pay raises during a meeting called by the company's president held protected concerted activity because "in a group-meeting context, a concerted objective can be inferred from the circumstances"); *Cibao Meat Products*, 338 NLRB 934, 934 (2003), enf'd. 84 Fed. Appx. 155 (2d Cir. 2004) (finding that an employee who protested publicly in a group meeting engaged in group action).

C. Legley Did Not Commit Misconduct

The evidence establishes that Legley did not commit any serious misconduct either during the orientation meeting or at any other time. Clearly, Legley got into a disagreement with Lavigne during the orientation meeting. The disagreement centered on whether employees had to join the Union to work for the employer. Lavigne insisted that they did; Legley insisted that they did not. Legley persisted in his questions because he was certain he knew the law and was confused by Lavigne's unwillingness to admit that he was correct, even to the point of her denying that the statements in the Union's own literature about agency fees were correct. Legley did not believe that he committed any misconduct during the orientation, while allowing that his voice may have gotten loud and it may have been perceived that he interrupted Lavigne by asking his questions. This behavior was provoked by Lavigne's unfair labor practice of incorrectly informing the employees of their obligation to join the Union. Legley did not threaten, curse, use inappropriate language or act in an abusive manner towards Lavigne during the meeting.

Lavigne, for her part, identified Legley as someone who interrupted her frequently and raised a number of complaints. She admitted that Legley made the comments which constituted his protected activity.

While Legley and Lavigne disagree on what was said and done during the meeting, the most reliable version of those events comes from Derby, a former employee with no reason to lie, fabricate or exaggerate her testimony. Derby describes the meeting as one where Legley raised a legitimate question about having to join the union and Lavigne was dismissive of this question. Legley persisted in his questions on this topic, due in part to Lavigne's responses to him. Both Lavigne and Legley raised their voices. Lavigne kept getting increasingly irritated

with Legley's questions, culminating in her threatening Legley with unspecified reprisals from his co-workers, a threat which "horrified" Derby. As Derby describes it, Legley did no more than persist in asking questions because he wasn't getting correct answers. Based on this version of events, Legley committed no misconduct of any kind during the meeting.

Lavigne essentially admitted to improperly informing the employees about the obligations to join the union. While denying that she told employees that they had to join the union, which Legley and Derby both creditably testified she did, Lavigne admitted to telling people that they had to sign the "informational form," which was an application for membership into the Union. She told them more than once to complete the form and turn it in to her before they left. Any employee reading that form, as Legley did, would understand Lavigne's instruction to be that they had to apply to join the Union to work there. In so doing, Lavigne committed an unfair labor practice.¹⁵ Lavigne's contention that the form is just for the union to gain contact information cannot be credited. That contention contradicts the plain language of the form. Further, there is no evidence that Lavigne told the employees that the form was needed for correct information.

Lavigne's behavior in this meeting can be explained through the testimony of Leveille, the union official who trained her on giving orientation meetings. Leveille described Lavigne as a "very structured" person who really liked to read through her stuff and do what she is supposed to do. This belief is supported by Lavigne's testimony that she only took questions at the end of meetings. Leveille didn't believe that Lavigne had ever had anyone question something she had said before during an orientation. Clearly, it was Lavigne's rigidity in her behavior at the orientation session coupled with her inexperience in dealing with questions and her incorrect

¹⁵ See *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40 (2012).

understanding of the law, that in large part, caused the disagreement between her and Legley. Lavigne just wanted to get through her meeting in her own way without being interrupted. Legley wanted his question answered accurately. Lavigne was frustrated and upset with Legley that his persistence prevented her from doing her orientation as she ordinarily would have. Leveille testified that she believed that Lavigne was "flustered" by Legley's questions. It was this rigidity on Lavigne's part that caused her to get upset and to blame Legley when she couldn't finish the presentation as she was accustomed to doing. Frustrated and upset as she was that she was unable to conduct the orientation as she ordinarily would, Lavigne exaggerated Legley's behavior in order to place the blame for her own failures on him.

D. The Employer Terminated Legley Due to His Protected Concerted and Union Activities

The Employer contends that Legley was terminated because it had determined that he was not a "good fit" for the Employer and because he violated its Workplace Civility Policy.¹⁶ It came to these conclusions on his second day of employment. The primary factor in reaching this conclusion was what the Employer had heard about Legley's behavior during the orientation meeting. This behavior concerned Legley's protected concerted, and union, activities during the orientation meeting. It is evident that it was Legley's protestations about being told he had to join the Union that was the primary cause of the dispute between Legley and Lavigne.

At the time Legley was terminated, the Employer's three decision makers were aware of his protected concerted and union activities. They were certainly aware that this protected conduct was intertwined with the complaints about Legley's behavior. Based on the statements made to them by Nicholaides about Legley, they were also aware that the Union was unhappy with Legley's conduct at the orientation meeting. It was also clear to the Employer that the

¹⁶ Notably, the employer has never identified what part of the policy Legley allegedly violated.

Union was upset at Legley's protected activities. The Employer was aware of these activities and the only place it could have received that information was from the Union, since the Employer admittedly did not speak to any of the employees present at the meeting. Thus, when the Union complained to the Employer about Legley's behavior that got Lavigne so upset, it was evident to the Employer that Legley's offensive conduct included his statements disagreeing with Lavigne about union membership being required. Despite this knowledge, the Employer decided to terminate Legley for violating its Workplace Civility Policy.

What the Employer lacked when making that decision was any concrete knowledge of Legley's allegedly offensive behavior. While the Employer claims Legley was not a good "fit" for them under their Workplace Civility Policy, they had no objective basis for making this judgment. They had conducted no investigation of these events. They had not spoken to Legley, Lavigne, Derby, or the other employees who were at the orientation. They offered no explanation for this major oversight. These employees were all still working for the Employer and presumably, were available and could have been interviewed. The Employer did not do so, accepting instead the unsubstantiated claims of the Union as to what had occurred.

The Employer took the word of Union Delegate Nicholaides, who represented to Kenyon, Patnaude and Watts how he believed Legley had behaved during the orientation even though Nicholaides was not there. Even if Nicholaides accurately described what Lavigne had told him, the Employer made no attempt to verify Lavigne's claims until after the decision to terminate Legley. At the hearing, Patnaude could not provide a thorough description of what Lavigne had told her about the orientation. Thus, the Employer had no objective basis for terminating Legley. The Employer essentially took Nicholaides' word for what had happened. By accepting his description of Legley's behavior as rude and condescending, the Employer aligned itself with the

Union in this matter. By not investigating the claim, the Employer placed itself in the same position as the Union. Lavigne had a bad motive in making the complaint, and the Employer became a party to it. Lavigne exaggerated Legley's conduct or mistakenly described it, and the Employer, by not investigating, relied upon the Union's unsubstantiated account of Legley's conduct.

Thus, the Employer knew that Legley had engaged in protected activity and union activity during the union orientation. It received complaints about Legley from the Union about this conduct and, based solely on the Union's word, determined that Legley was not a good fit and that his behavior violated their Workplace Civility Policy.

While Lavigne claims that Legley also protested having to take the stairs and not being met in the lobby, these claims were credibly denied by Legley and do not have the ring of truth. Derby said that all of the employees commented negatively on having to use the stairs. The contention that Legley complained about not being met in the lobby makes no sense because the employees were, in fact, met in the lobby, as promised in the Employer's letter, by HR representative Roberta Cadima.

The other conduct that the Employer contends served as a basis for Legley's discharge does not support that conclusion. First, Patnaude's complaints about Legley from her December 5 interview had already been rejected by Brennan, who had hired him over her objections. Thus, the Employer had already made a decision to condone whatever conduct Legley had committed during that interview. The complaints of the other employees, Dorsey and Miller, are too insignificant and petty by any standard to serve as the basis for discharge. Dorsey identified Legley as difficult because he asked for copies of papers and numbered them in the corner. He also asked questions about the purpose of medical tests he was being given. Miller also testified

that Legley asked for copies of papers, while admitting that he wasn't rude to her. The fact that Legley may have asked for copies of his papers, asked questions about tests he was being given and numbered the pages of documents he received does not appear to violate any of the tenets of the Workplace Civility Policy. These requests by Legley hardly demonstrate that he wasn't a good fit for the Employer. While they might show that he is different, or perhaps eccentric, they do not serve as an objective basis for terminating his employment. Moreover, there is no evidence that these complaints were considered by the Employer in deciding to discharge Legley. While Patnaude may have been aware of these complaints, there is no evidence that she informed Kenyon or Watts of them. The Employer's citation of these reasons for discharge smacks of pretext.

The Employer's assertion that Legley was not terminated for what he said the orientation meeting, but how he said it, invokes the Board's holding in *Atlantic Steel*, 245 NLRB 814 (1979), to be discussed below. What Legley said and the manner in which he said it are inextricably intertwined and cannot be separated to justify a reason for discharge.

Further supporting the argument that Legley was terminated unlawfully is the precipitous nature in which he was fired on his second day of employment. The Employer had a 90-day probationary period (GC Ex. 4, p. 8) in which to consider his fitness as an employee. The fact that it acted so quickly after he engaged in protected concerted activities, and without investigation, supports the contention that Legley was terminated for his protected concerted activities

Even Lavigne's version of Legley's behavior does not rise to the level of a dischargeable offense. Lavigne testified that Legley was rude because he frequently interrupted her, spoke loudly and with authority. Even if this were true, there is no evidence that the Employer

considered this behavior a violation of its policy or that it had ever terminated an employee for similar conduct.¹⁷

Several items of hearsay evidence concerning alleged misconduct by Legley were introduced during the hearing. These hearsay matters were not introduced for the truth of the matter asserted, so they cannot serve as evidence to support the Employer's decision to terminate Legley.

It is no defense for the Employer and/or the Union to state that Legley was terminated for violating their Workplace Civility Policy which was validly negotiated with the Union. Even though the policy may have been the product of collective bargaining negotiations, its principles cannot serve to trump the rights of employees under the National Labor Relations Act. Therefore, it cannot be used as a valid defense to a discharge of an employee for protected concerted, or union, activities.

Based upon the foregoing, Legley was discharged because he engaged in protected concerted and union activities in violation of Sections 8(a)(1)(3).

E. Legley's Conduct Did Not Lose the Protection of the Act Under *Atlantic Steel*

When an employee engages in protected conduct for which he is disciplined, the Board applies the test set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979), to determine if the employee's conduct was so egregious that it lost the protection of the Act. Legley's statements did not lose the protection of the Act because of the manner in which he made them. In *Atlantic Steel*, the Board identified four factors to be balanced in the determination: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst;

¹⁷ As previously noted, there is no record evidence that the Employer was ever informed of the details of Lavigne's opinions prior to the decision to discharge Legley.

and (4) whether the outburst was provoked by an unfair labor practice.¹⁸ The Act allows some latitude for impulsive conduct by employees in the course of protected, concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order.¹⁹

The first, second and fourth *Atlantic Steel* factors clearly warrant a finding that Legley's conduct was protected. Regarding the first factor, the place of the discussion, it occurred in a conference room with only fellow employees present because it was, in effect, a union meeting. The conduct was in a non-working area and there was no public undermining of any supervisor's authority. In the absence of any management personnel, Legley's conduct could not have undermined workplace discipline or operations at the Employer's facility. As to the second factor, the subject matter of the discussion, the discussion involved Legley's protected concerted activity of questioning the union Delegate's inaccurate statements that employee had to join the union in order to work for the Employer. This subject matter weighs in favor of protection. Finally, with regard to the fourth factor, whether the employee was provoked, Lavigne's insistence on maintaining her incorrect position that employees had to join the union clearly provoked Legley. These statements by Lavigne were unlawful and provocative responses to Legley's inquiries, thereby weighing in favor of protection.²⁰

Factor 3, the nature of the outburst, also does not warrant the conclusion that Legley's conduct forfeited the protection of his Section 7 rights. While Legley may have raised his voice during the discussion, Lavigne did also. In doing this, Legley was provoked by Lavigne's insistence on maintaining her unlawful position about the requirement of union membership as a

¹⁸ *Atlantic Steel, supra*.

¹⁹ *Tampa Tribune*, 351 NLRB 1324, 1324-1325 (2001), enf. denied sub nom. *Media General Operations v. NLRB*, 560 F.2d (4th Cir. 2009); *NLRB v. Thor Power Tool*, 351 F.2d 584, 587 (7th Cir. 1965) enf. 148 NLRB 1379, 1380 (1964).

²⁰ *Felix Industries*, 331 NLRB 144, 145-146 (2000), enf. in relevant part 251 F.3d 1051 (D.C. Cir. 2001), supplemented 339 NLRB 195 (2003), enf. mem. 2004 WL 1498151 (D.C. Cir. 2004)

condition of employment. Legley did not use any expletives, make any threats or engage in otherwise egregious behavior.²¹ Essentially, Lavigne's complaint about Legley was that he interrupted her which, even if true, could not reasonably cause his conduct to be considered so egregious so as to become unprotected under the Act.

It is the Employer's responsibility to present all relevant evidence supporting its position, including, where appropriate, testimony concerning a speaker's tone or gestures.²² The Employer presented virtually no first hand evidence concerning Legley's protected behavior at the orientation meeting for which he was discharged. This is so because no Employer representatives were present at the meeting and the Employer conducted no investigation of the incident. There is testimony that the Employer was told by Nicholaides that Legley had engaged in "rude and condescending behavior." Kenyon admitted that the details of Legley's behavior at the orientation meeting were "vague." The Employer had nonetheless decided to discharge him. As to the information it received from Lavigne after making its decision, such after acquired information cannot be used to justify the Employer's decision. Moreover, Patnaude testified that she couldn't recall what Lavigne said about Legley, only that he was rude and disrespectful, kept interrupting her and made her cry. As to the Employer's contention that Legley was terminated for a pattern of conduct throughout his entire hiring process, there is little evidence of that conduct as well, beyond the contentions that Legley asked for copies of his papers, numbered them and asked a lot of questions, perhaps impatiently at times. These actions attributed to Legley are conclusionary and insignificant. They do not, either individually or collectively, warrant a finding that his otherwise protected conduct lost the protection of the Act.

²¹ See, e.g., *Noble Metal Processing*, 346 NLRB 795 (2006) (finding conduct was not so egregious as to lose protection despite the tone and volume of the discussion; there was no use of profanity or threats).

²² *Plaza Auto Center, Inc.*, 355 NLRB No. 85 fn 7 (2010).

As noted above, the Employer contends that Legley was terminated for his tone during the orientation meeting, not for the substance of what he said. This position concedes that Legley engaged in protected concerted activities, but argues that it is the manner in which he engaged in these activities that violated its Workplace Civility Policy and warranted his discharge. As shown above, Legley's conduct in presenting his points during the meeting does not violate the Board's holding in *Atlantic Steel*. Further, whether or not Legley violated an Employer policy in presenting his position is not the point. It has to be shown that his conduct exceeded the bounds set in *Atlantic Steel*. This the Employer has been unable to do. In *Consumers Power Co.*, 282 NLRB 130, 132 (1986), the Board stated

. . . when an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for duty.”

Thus, the Employer's position that it could terminate Legley for his tone and manner in conducting his protected concerted activities must be rejected. The tone and manner are part of the *res gestae* of the activity. They are inextricably intertwined and cannot be separated from the protected conduct. The tone and manner can be considered to establish whether the employee forfeited the Act's protection by his conduct, but it is the protection of the Act, not the Employer's policy on employee behavior, that will govern the analysis. In this case, Legley's conduct did not forfeit the Act's protection under *Atlantic Steel*. Therefore, he could not be lawfully discharged under the Employer's Workplace Civility Policy.

F. *Wright Line* does not apply in this case

Under a *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981) analysis, the General Counsel must first establish that the employee engaged in protected concerted activity and that the protected concerted activity was a motivating factor in the

decision to terminate. The burden then shifts to the Employer to demonstrate that it would have terminated the individual anyway despite his protected concerted activity. The Employer may argue that such an analysis is appropriate in this case.

In these circumstances, however, where the conduct for which Legley was terminated was his protected concerted activity, the *Wright Line* analysis is not appropriate.²³ The *Wright Line* analysis is appropriately used in resolving cases alleging violations where the Respondent's motivation for taking the allegedly unlawful action is in dispute. The analysis is used in dual motive situations, first to determine whether the employee's union or protected concerted activities were a motivating factor in the respondent's discipline of the employee, and then to determine whether the respondent would have taken the same action even in the absence of such activity.

Here, it is undisputed that Respondent discharged Legley because of his conduct at the orientation meeting. While Respondent argues that it relied on other conduct as well, it is clear that the Lavigne incident was the triggering factor in the Employer's decision to terminate Legley. Legley's tone and related behavior while engaged in his protected activities are certainly relevant to his discharge under the holding of *Atlantic Steel*. But, as has been shown, Legley's behavior did not warrant his discharge under *Atlantic Steel*. Thus, it is evident that Legley was terminated for his protected activities and the *Wright Line* analysis does not apply.²⁴

G. Even if *Wright Line* Did Apply, the Employer Has Failed to Meet its Burden

Even if a *Wright Line* defense was available to the Employer here, the Employer has failed to establish that Legley would have been discharged despite his protected concerted

²³ *Felix Industries*, 331 NLRB 144, 145-146 (2000), enf. in relevant part 251 F.3d 1051 (D.C. Cir. 2001), supplemented 339 NLRB 195 (2003), enf. mem. 2004 WL 1498151 (D.C. Cir. 2004); *Neff Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); *Mast Advertising and Publishing*, 304 NLRB 819 (1991).

²⁴ See *Felix Industries*, supra; *Plaza Auto Center, Inc.*, supra

activities. As noted above, the Employer has failed to substantiate any reasons for terminating Legley. While it has asserted that it has terminated probationary employees in the past, it failed to provide any examples of terminated probationary employees who were similarly situated to Legley, i.e., who were not a “good fit” or violated the Workplace Civility Policy.

The Employer contends that the examples of Lila Reid and Peter Beatrice provide support for its position. Yet they do not. Reid was terminated after a lengthy period of transgressions. The reasons for her termination included warnings for inappropriate behavior and job abandonment. (GC Ex. 18). Thus, they went far beyond a simple violation of the Workplace Civility Policy or being a “good fit.” Beatrice was also disciplined for a variety of reasons, including attendance violations, an incident involving an assault and another incident involving an altercation with a police officer. Beatrice was terminated for “less than competent performance under stressful conditions.” (GC Ex. 19) Neither of these examples are similar to Legley’s situation as they all involve behaviors that violated policies other than the Workplace Civility Policy.²⁵ Accordingly, they cannot serve as the basis for a *Wright Line* defense.

Therefore, the Employer has failed to provide any credible evidence that Legley would have been terminated despite his protected concerted activity. It has failed to substantiate a *Wright Line* defense.

Further, as has been previously discussed, the Employer’s reasons for Legley’s termination smack of pretext. A finding that the proffered reason for discipline is pretextual necessarily means that a respondent fails to meet its *Wright Line* rebuttal burden.²⁶

²⁵ The Employer’s treatment of Reid and Beatrice establish that the Employer’s practice is to progressively discipline employees. the Employer’s failure to progressively discipline Legley further underscores the Employer’s disparate treatment of Legley.

²⁶ *Station Casinos, LLC*, 358 NLRB No. 253 (2012).

H. The Employer’s Workplace Civility Policy Violates the Act

The Employer’s maintenance of its Workplace Civility Policy violated Section 8(a)(1). An employer violates Section 8(a)(1) by maintaining a rule that would “reasonably tend to chill employees in the exercise of their Section 7 rights.”²⁷ A work rule that explicitly prohibits employees from engaging in Section 7 activity is unlawful.²⁸ If a rule does not explicitly restrict Section 7 activity, the work rule is unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.²⁹ In making such a determination, the Board must “give the rule a reasonable reading” and “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”³⁰ Rules that are ambiguous regarding their application to Section 7 activity are unlawful unless they contain limiting language or context that clarify that the rule does not apply to Section 7 activities.³¹

Although the Employer’s rule here does not explicitly prohibit Section 7 activities, the rule contains ambiguous language that could reasonably be interpreted by employees to preclude interactions among employees that are protected by Section 7. This includes language such as “Treat all coworkers with respect,” and “Never engage in abusive or disruptive behavior.” The

²⁷ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999).

²⁸ *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

²⁹ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

³⁰ *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)).

³¹ See *University Medical Center*, 355 NLRB 1318, 1320-21 (2001), enf. denied in relevant part, 335 F.3d 1079 (D.C. Cir. 2003) (finding a work rule that prohibited “disrespectful conduct toward [others]” unlawful because it did not include language that removed the ambiguity or limited its scope).

Board has not treated this type of language consistently, sometimes finding similar prohibitions unlawful and other times lawful, depending upon the context of the ambiguous terms.³²

Here, the rule’s prohibition on “abusive or disruptive behavior,” when read in the context of more specific language precluding intimidating or threatening conduct and conduct that creates a hostile work environment, arguably would not reasonably be construed by employees to apply to protected activity. However, the rule has now been applied to justify the termination of Legley, who was engaged in protected concerted activity which caused his termination. Given that the rule has been applied to restrict Legley’s Section 7 activity, there is no question that employees would now reasonably construe the rule to prohibit protected interactions among all employees and any ambiguity has been resolved.³³ Accordingly, the Employer’s maintenance of the rule is unlawful and violates Section 8(a)(1).

I. The Employer’s discharge of Legley pursuant to its overly broad Workplace Civility rule violated Section 8(a)(1) of the Act

Discipline imposed pursuant to an unlawfully overbroad rule is unlawful.³⁴ As clarified by the Board in *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), when the conduct for which an employee is disciplined clearly falls within the protection of Section 7 of the Act, as was Legley’s, then the discipline violates the Act as well, unless the employer can establish that the employee’s conduct actually interfered with the employee’s own work or that of other

³² Compare *Palms Hotel and Casino*, 344 NLRB 1363, 1367-68 (2005) (finding lawful a rule which prohibits “injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons” because such behavior is not protected by Section 7) and *Lutheran Heritage*, 343 NLRB 646, 647 (2004) (finding a rule that prohibits “abusive or profane language” lawful because abusive and profane language are not an inherent part of Section 7 activity) with *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n. 4, 294 (1999) (prohibiting “false, vicious, profane, or malicious statements” held unlawful because it would prohibit statements that are merely false and may include union propaganda) and *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 2 (2011) (maintaining a work rule which prohibits the “inability to work harmoniously with other employees” is unlawful because the rule’s ambiguity could result in its application to interactions among employees protected by Section 7).

³³ See *Albertson’s, Inc.*, 351 NLRB 254, 259 (2007) (finding that where a confidentiality rule was unlawfully applied to discipline an employee for providing an organizing union with a copy of the employees’ work schedule, “there is a context of unlawful application ... and a factual basis for employees reasonably to view the confidentiality rule as prohibiting Section 7 activity”).

³⁴ *Double Eagle Hotel & Casino*, 341 NLRB 112, 112, fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.³⁵ As demonstrated above, the Employer has not established any of these defenses and, in fact, Legley was discharged for allegedly violating the overly broad rule.

J. The Union Unlawfully Threatened Employees

Occurring in the context of a mandatory orientation meeting at which she was the sole Union representative, Lavigne's statements to employees that they had to join the Union to work at the Employer and that they had to sign the application form to join the union at the orientation meeting were coercive and violated Section 8(b)(1)(A). She did not inform the employees that, under the law, they had 30 days in which to make the decision to join or not join the Union, as required under Section 8(a)(3) of the Act. In these circumstances, a reasonable employee would take, at face value, Lavigne's assertion that employees had to actually join the Union immediately or risk losing their employment. Lavigne's statements were incorrect under the law and were coercive of employee rights under Section 8(b)(1)(A).³⁶ Lavigne's demand for Legley's name and department, and her statement that she would notify co-workers who would not tolerate him, is a coercive threat of unspecified negative consequences for his protected behavior. Angry at his questioning of her during the meeting, Lavigne threatened Legley with unspecified reprisal from his co-workers. The statement would reasonably restrain Legley in the exercise of his Section 7 rights to refrain from joining the union. The Board has found that a

³⁵ *Id.* at 4.

³⁶ See *Service Employees Local 121 RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40 (2010) (Union restrained and coerced employees by threatening them to pay dues at a time when there was no union security provision in effect.)

union violated Section 8(b)(1)(A) by telling employees that if they asked any questions at a union meeting, they would never work again.³⁷

Lavigne's threat was credibly testified to by Derby, a former employee with no reason to lie. Lavigne's denial of the threat cannot be credited. Moreover, Lavigne admitted to asking Legley what department he was working in, an essential element of the threat. She provided no adequate basis for that inquiry. Lavigne testified that she asked that question "in a friendly way." She said she often asked that question if she has a minute or to, while admitting that, on this occasion, she did not have that extra time. Lavigne said she wanted to show she was interested in where Legley was working. Considering how upset she was with Legley for allegedly disrupting her meeting, it is illogical to believe that she would have made a "friendly" inquiry of him out of a genuine interest in where he would be working. Rather, it is more probable that she made the inquiry so that she could determine who his co-workers would be so she could seek their assistance in dealing with him.

Lavigne was sent by the Union to speak to these employees about the Union and was acting at the Union's agent in doing so. Lavigne's statements in telling employees that they had to join the Union and in threatening Legley were within the general scope of her authority as an agent of the Union in conducting this meeting. The Board has stated:

A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent. . . it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.³⁸

³⁷ *Avon Roofing and Sheet Metal Co.*, 312 NLRB 499, 501, 504 (1993); see also *International Union of Operating Engineers, Local 925 (Sims Crane Co.)*, 316 NLRB 441 (1995) (Union threatened an employee with unspecified reprisals by stating that his filing of a ULP charge would come back to haunt him).

³⁸ *Bio-Medical Applications of Puerto Rico*, 269 NLRB 827,828 (1984); *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337 (2004).

Lavigne was empowered by the Union to speak on its behalf to employees about the Union. Therefore, the Union is liable for the statements Lavigne made during the orientation meeting. For these reasons, the statements violated Section 8(b)(1)(A) of the Act.

K. The Union initiated the Employer’s investigation and thus caused Legley’s discharge in Violation of Section 8(b)(1)(A) and (2) of the Act

A union violates Section 8(b)(1)(A) and (2) of the Act when it “cause[s] or attempt[s] to cause an employer to discriminate against an employee in violation of subsection 8(a)(3).”³⁹ A violation of 8(b)(2) of the Act is derivative and thus, “it requires proof of an employer’s unlawful discrimination against the employee as well as proof that the union caused the employer to so discriminate.”⁴⁰ In order to prove a violation, the General Counsel needs to show less “than a direct union demand for the discharge of an employee made to an employer to support a finding of a violation of Section 8(b)(2) of the Act.”⁴¹ A *prima facie* violation is established if “the union’s actions [may] fairly be taken or were taken by the employer to be an attempt to cause the termination of an employee, or if the actions in fact caused the termination of an employee.”⁴² Accordingly, “a union’s actions may be direct or indirect, obvious or subtle, friendly or threatening.”⁴³ In some circumstances, if a union communicates information to an employer for an improper motive as a means of inducing the employer to terminate that employee, a violation may be found.⁴⁴ In the absence of direct evidence, an unlawful act is generally established through inference from the record as a whole, and, if there is no testimony as to an express

³⁹ *Paperworkers Local 1048*, 323 NLRB 1042, 1044 (1997) (quoting *Carpenters Local 626 (Strawbridge & Clothier)*, 310 NLRB 500 (1993)).

⁴⁰ *Graphic Arts International Union, Local 280*, 274 NLRB 787, 791 (1985) (citing *NLRB v. Theatrical & Stage Employees Local 776*, 303 F.2d 513, 519 (9th Cir. 1962)).

⁴¹ *Id.* at 792.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing *Yellow Freight Systems, Inc.*, 197 NLRB 979 (1972)).

request having been made by a Union to an Employer, one may be inferred from the overall circumstances.⁴⁵

In *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004), an unlawful demand for an employee's discharge was found where a union president made a complaint against a dissident employee that the employee threatened him when the union president did not actually fear physical harm from the employee and he knew that the complaint "would in all likelihood" result in the employee's termination under the employer's handbook rule. In that case, the union president knew that the employer discharged employees under its handbook rule for making threats to other employees or to customers. Thus, by the union president making his complaint, the employer's disciplinary action was foreseeable as a result.

The absence of an express Union request to discipline Legley does not exonerate the Union. The Board has held that a union is responsible for the foreseeable consequences of reporting alleged misconduct to an employer. In *Paperworkers Local 1048 (Smurfit Corp.)*, 323 NLRB 1042 (1997), the Board held that a union "caused" an employee's discharge when the union reported bogus allegations of the employee's racial harassment of a fellow employee to the employer, knowing the employer's policies regarding the conduct would result in serious discipline or termination. The union's knowledge that the employer strictly enforced its anti-harassment policy supported an inference that the Union's intent was to cause the employer to discipline the employee.⁴⁶

⁴⁵ *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 503 (1993) (Citing *Continental Can Co.*, 291 NLRB 290, 291 fn. 5 (1988) and *Key Waterproofing Co.*, 268 NLRB 879, 883 (1989)).

⁴⁶ In *Paperworkers*, supra, the Administrative Law Judge applied the *Wright Line* analysis to assess the lawfulness of the Union's conduct. For the same reasons described above that *Wright Line* is not applicable to assessing the Employer's action, it is not appropriate with respect to the charge against the Union. Unlike the unprotected racial slur in *Paperworkers*, Legley's conduct was the protected assertion of a right not to become a member of the Union.

Similarly, in this case, Union agents contacted the Respondent Employer's human resources department about Legley's conduct at the union orientation meeting, knowing full well that the Employer would issue discipline against Legley based on the Employer's strict policy on Workplace Civility and its desire to maintain a good relationship with the Union. For this reason, the Union's many statements to the Employer about Legley's conduct violated Section 8(b)(2). As testified by Jordan, the Employer had "zero tolerance" for violations of its Workplace Civility Policy. Nicholaides and Leveille had also discussed on December 19 how they believed that Legley's conduct, based on Lavigne's descriptions of it, violated the policy. Consequently, they were aware that any complaints about Legley would likely lead to disciplinary action against him. Further, because no employer representative was present in the orientation, if the Union Delegates did not complain to the Employer, the Employer would never have learned of any conduct by Legley in that meeting. There can be no other reason for the Union to have complained about Legley's behavior than to cause the Employer take action against him. That is the purpose of a complaint, to get some action taken concerning it.

Nicholaides complained both to Rebecca Cadima on December 19, and to Patnaude, Kenyon and Watts on December 20. It was Nicholaides' initiating of these latter complaints that directly led to these Employer representatives discussing the Legley situation and consequently, their decision to discharge Legley. All of these participants, Union and Employer, admit to being aware of the substance of Legley's complaints during the orientation meeting prior to the time the discharge decision was made. This evidence establishes a direct correlation between the Union's conduct in complaining about Legley and the Employer's actions in terminating him. In so doing, the Union violated Section 8(b)(2).

That the Union had bad faith in this endeavor is shown by the threats made by Lavigne and Nicholaides to Legley. Legley had clearly struck a nerve by insisting that Lavigne was incorrect in telling prospective members that they had to join the union. The Union's defense, that she merely told them to complete the "informational card" and then it was up to them whether they joined, is specious. The "informational card" is an obvious application to join the union, which is what Legley saw it as. By telling employees that they had to complete that form, as Lavigne admitted she did, she was instructing them to apply for membership in the Union, consistent with her oral insistence that Union membership was a term and condition of employment. The Union's bad faith is also demonstrated by Nicholaides's informing the Employer on December 20 of Legley's alleged "negative behavior," that morning, including an assertion that Legley stated that, if they didn't want him there, he would go. (T. 262). Nicholaides was engaging in character assassination and coming as close as he could to telling the Employer to fire Legley without actually uttering those exact words. Clearly, the Union was motivated by Legley's protected conduct at the orientation meeting, his having "upset" Lavigne, and his having caused at least three out of the four employees at the meeting not to have signed up to contribute to the Union's political action fund. (GC Exs.7, 8, 9, and 14)

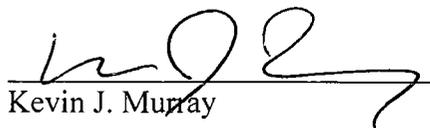
IV. CONCLUSION

For the reasons discussed above, Counsels for the Acting General Counsel contend that the Administrative Law Judge properly found that Respondent Employer violated Section 8(a)(3) and (1) of the Act by terminating Camille Legley because he engaged in protected concerted and union activities, and by maintaining and applying to him an unlawful Workplace Civility Policy. Counsels for the Acting General Counsel believe that the Administrative Law Judge properly ordered a remedy under which Respondent Employer is ordered to: reinstate Camille Legley to

his former position of employment; make Legley whole for any losses that he suffered by virtue of his unlawful termination; expunge all references to Legley's termination from its files; rescind its unlawful Workplace Civility Policy; and post an appropriate Notice to Employees.

Counsels for the Acting General Counsel contend that the Administrative Law Judge properly found find that Respondent Union violated Section 8(b)(1)(A) of the Act by threatening employees and Section 8(b)(2) of the Act by causing the termination of Camille Legley because he engaged in protected, concerted activities. Counsels for the Acting General Counsel believe that the Administrative Law Judge ordered an appropriate remedy against Respondent Union under which Respondent Union is ordered to: cease and desist from making threats to employees; inform the Employer that it has rescinded any objections that it had to the employment of Camille Legley; be found jointly and severally liable with Respondent Employer to make Legley whole for any losses he suffered by virtue of his termination; and expunge all references to Legley's termination from its files; and post that an appropriate Notice to Members.

Dated at Boston, Massachusetts this 30th day of September, 2013.


Kevin J. Murray

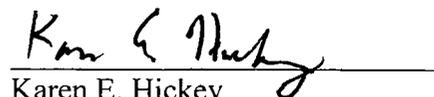

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