

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

LAURUS INSTITUTE, INC.

Respondent

and

Case 10-CA-093934

JOSLYN HENDERSON, AN INDIVIDUAL

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN  
OPPOSITION TO RESPONDENT'S EXCEPTIONS**

Submitted by:

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**I. PROCEDURAL STATEMENT**

On December 11, 2013 Administrative Law Judge Donna N. Dawson (“ALJ”) issued a Decision and Recommended Order<sup>1</sup> following a hearing on May 9 and 10, 2013 on allegations in the Complaint and Notice of Hearing in the above case. The ALJ found that Respondent violated Section 8(a)(1) by: (1) maintaining an overly broad no gossip rule (ALJD 13, lls. 6-8); and (2) suspending and terminating Charging Party Joslyn Henderson, An Individual (“Henderson” or “Charging Party”) because she engaged in protected concerted activity and/or because she allegedly violated Respondent’s unlawful gossip policy (ALJD 19, lls. 24-6).

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<sup>1</sup> Throughout this Brief, references to the Decision and Recommended Order will be “ALJD \_\_ [page number]” and, where appropriate, to line numbers as “ALJD \_\_, lls. \_\_.” References to the transcript of testimony and exhibits received in evidence at the hearing will be as follows. Transcript citations will be “T” followed by page numbers and, where appropriate, by line numbers as “T. \_\_, lls. \_ - \_” or as “T. \_\_, l. \_ to T. l. \_\_.” General Counsel and Respondent Exhibits will be “GC” and “R” respectively, followed by exhibit number and, where appropriate, by page number(s) as “p.” or “pps.”

On January 8, 2014, Respondent filed with the Board (copy received by Counsel for the General Counsel on January 9, 2014) Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions.<sup>2</sup> This Answering Brief in Opposition to Respondent's Exceptions is being filed pursuant to Section 102.46(d)(1) and (2) of the Board's Rules and Regulations.

## **II. SUMMARY OF ALJ DECISION**

Charging Party Joslyn Henderson was an admissions representative at Respondent's Decatur, Georgia campus from October 2007 through November 2012<sup>3</sup> when she was terminated. ALJD 3. Respondent claimed in a position statement to the Region during the investigation of this case that it learned in October the Charging Party the previous April had solicited employees to leave Respondent's employ to work for a competitor. Respondent suspended the Charging Party in October, pending a brief investigation, and thereafter discharged her in November. "But for that transgression [solicitation of employees to work for a competitor]," Respondent asserted in the position statement, it would not have discharged her. This offense was "the proverbial straw that broke the camel's back," Respondent claimed. ALJD 10; GC 2.

At the hearing, Respondent offered multiple additional and different reasons for her termination in November. ALJD 15-16. The ALJ rejected these additional "justifications," finding that Respondent suspended Henderson in October and then terminated her in November because she engaged in protected concerted activity by

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<sup>2</sup> Throughout this Brief, references to Respondent's Exceptions will be "REX \_\_ [Exception number(s)]," and references to Respondent's Brief in Support of Exceptions will be "RX BR \_\_ [page number(s)]."

<sup>3</sup> All dates hereinafter are in 2012, unless otherwise indicated.

discussing: (1) concerns about job security with coworkers<sup>4</sup> (ALJD 10, lls. 24-36); (2) various company policies which affected all of Respondent's admissions representatives (ALJD 15, lls. 36-38); and because (3) she violated Respondent's unlawful no gossip policy (ALJD 13, lls. 30-32).

### **III. ARGUMENT**

The main thrust of Respondent's Exceptions is that the ALJ "revealed impartiality" (REX 1) because she failed to credit Respondent's President and CEO Terry Hess and Charging Party coworkers, Florence Coram and Angela Cooper. RX BR 18. Respondent argues that the ALJ "cherry-picked" the record to support her findings. RX BR 18. However, the ALJ's key findings are supported by the record, in many instances by the testimony of Respondent's President. To the extent the ALJ discredited witnesses on material issues, Respondent has failed to meet the high threshold of proof necessary to reverse the ALJ's credibility findings. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012); *Standard Dry Wall Products*, 91 NLRB 544 (1950) *enfd.* 188 F. 2d 362 (3d Cir. 1951).

#### **Testimony of Respondent President and CEO Terry Hess**

With respect to Respondent's Exceptions pertaining to President and CEO Terry Hess, Hess either admitted or failed to dispute much of the testimony relied on by the ALJ. Respondent objects to the ALJ's findings that (1) Hess banned the Charging Party from discussing work issues with anyone except management (REX 2, 3); (2) Hess

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<sup>4</sup> The ALJ rejected Respondent's contention that the Charging Party deceptively and maliciously solicited coworkers to leave Respondent's employ; rather the discussions between the Charging Party and the other employees in April arose out of mutual concern and real fear for job security resulting from Respondent's precipitous unexplained mass terminations in the admissions department. ALJD 14, lls. 39-42. The ALJ found such discussions to be protected concerted activity. ALJD 16-18.

promoted the Charging Party to senior admissions representative and complimented her work (REX 11, 29); (3) Hess harbored animosity toward her because of her complaints about various work policies, that he referred to these complaints as “garbage” (REX 32); and (4) that Hess’s attempt to legitimize his actions in terminating the Charging Party was not truthful (REX 33).

With respect to Respondent’s first contention, the ALJ was wrong in concluding that Respondent “banned” the Charging Party from engaging in protected concerted activity, Respondent neglects to mention that Respondent President Hess did not deny that he admonished the Charging Party early on against engaging in such activity. In a meeting in February, a few months after Henderson filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment and retaliation, Hess reprimanded her for discussing her work issues outside the “chain of command,” and banned her from discussing any work issues with anyone except management. ALJD 3-4. Not only was the Charging Party’s testimony (T. 38-43) in this regard not disputed, it was actually *corroborated by Hess* in a document he authored which was given to the Charging Party shortly after this meeting. GC 4. In the document, Hess admonished her that she was “not to discuss her issues with anyone” except her immediate supervisor and Hess, and that if she violated this prohibition “she would be terminated.”

And just in case the written February admonition was not enough to deter the Charging Party, Hess told her a few days later that Respondent had adopted a “no-gossip” policy. The policy prohibited (among other things) “talking about a person’s professional life without his/her supervisor present” as well as “negative, or untrue, or disparaging

comments or criticisms of another person or persons.” Hess reminded her again for a third time by letter dated March 30 about the earlier discussion in February and about “the company’s new gossip policy.” T. 45-6; GC 5; T. 247-9; R-7, p.1 (first paragraph). The Charging Party’s testimony on these points is both undisputed and corroborated by President Hess in writing – not once, but twice. GC 4; GC 5; R-7.

Turning to Respondent’s second point, that the Charging Party was not a valued employee before she ran afoul of President Hess’s unlawful edicts, the record reveals otherwise. Though Respondent excepts to the ALJ’s finding that Hess promoted the Charging Party (REX 11) and complimented her work (REX 29), the record shows that Hess, himself, testified to this effect. He stated that Henderson’s performance was “excellent,” that she was “a very good performer in terms of production” during the first four years she was employed. He testified she had “wonderful working relationships” with colleagues and students. T. 241-2; ALJD 7. Further, that she was promoted to senior admissions representative a few months before her termination for “doing a good job” was also not disputed by President Hess. T. 74-5; R.3; ALJD 7.

With the arrival of the new admissions director in July, Henderson again began discussions with her coworkers in violation of Hess’s repeated admonitions not to discuss “her issues with anyone,” or “outside the chain of command.” She and her coworkers discussed their concerns about new policies pertaining to targeted admissions goals, favoritism in assigning “leads,” and paid time off requests. ALJD 7-8. Respondent’s third point with respect to Hess is the ALJ erred in finding that Hess harbored hostility toward the Charging Party because of her renewed protected concerted activity. However, the ALJ correctly found that Hess referred to this activity as “garbage” (T. 256,

lls. 7-9; ALJD 18, lls. 13-14). That Hess was furious at Henderson for continuing to discuss work issues with coworkers cannot be gainsaid. He made no attempt to hide his ire at the hearing; he repeatedly testified that Henderson talked to too many people about work concerns, without first speaking with him or her supervisor (as he had repeatedly warned her to do beginning in February). T. 248; 272-4.

Perhaps the most damning evidence of Hess's illegal animus toward Henderson is his opening comment to coworker Florence Coram during his investigation of Henderson in late October shortly before her discharge. Though Hess testified he interviewed Coram because of allegations that the Charging Party had solicited her and another coworker to work for a competitor, he failed to ask Coram even a single question about this during the tape-recorded interview. (See Coram testimony, T. 184 lls. 4-24; T. 186, lls. 18-22). Rather, Hess's emphasis with Coram was the Charging Party's renewed conversations with coworkers, notwithstanding Hess's repeated admonishment: Hess began the taped interview stating he heard that Henderson was "*talking negatively about the company, its managers, and people*, and just other situations." He then asked Coram, "can you give us some details. . . as to what you've heard."<sup>5</sup> (Emphasis supplied.) GC 18, p. 1 (first paragraph).

Respondent's last point with respect to Hess is that the ALJ erred in finding that Hess's attempt at the hearing to legitimize his actions was not truthful (REX 33). Hess belatedly offered multiple additional reasons for terminating Henderson, notwithstanding Respondent's earlier position that "but for" the Charging Party's alleged solicitation of

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<sup>5</sup> Coram never spoke a word during the interview about Henderson soliciting her to work for a competing employer. There is nothing – absolutely nothing – about this subject in the 7-page transcript of Hess's tape-recorded interview with Coram. GC 18.

coworkers to work for a competitor, the Charging Party would not have been discharged.<sup>6</sup>

GC 2. Hess's testimony with respect to these additional reasons was shifting, and internally inconsistent. Hess testified he sat in the cubicles with the admissions representatives from April on, and he initially characterized his interactions with Henderson during this period as "run of the mill," that she had no extraordinary complaints. T. 249, l. 19, to T. 250, l. 3.

Within moments of the above testimony, Hess contradicted it, stating that Henderson had engaged in "disruptive behavior;" that it was "very dysfunctional;" that this was "very very clear," that he "bore witness and experience to everything" from April through October as he sat in the cubicles with the admissions representatives; that "he had a very strong sense that there was some animosity or a negative tone, an unproductive environment;" and that "it wasn't going to get better." T. 252, lls. 1-15. However, he offered nothing but generalities when asked for specifics about her alleged "disruptive behavior." When the ALJ asked how this testimony squared with his earlier testimony that there was "nothing out of the ordinary" until late October (T. 258), he could not explain the obvious inconsistency with his testimony just a few moments earlier. (T. 259).

In addition to the slippery testimony described above, Hess did not explain why he promoted Henderson in June, and why she was never counseled, verbally warned, or disciplined in any fashion for any of this alleged disruptive behavior. T. 48-51; T. 100-

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<sup>6</sup> Respondent's Exception (REX 18) to this ALJ finding is utterly mystifying, as the ALJ explicitly quotes the text of the position statement in the decision, that Respondent counsel stated the "offense [actively soliciting coworkers to work for another company] . . . was the proverbial straw that broke the camel's back. . . but for that transgression," Respondent "would not have discharged her." ALJD 10; GC 2.

02. Nor did he explain why he discharged her without interviewing her, or without giving her any opportunity to respond to allegations leveled against her. Thus, the ALJ did not err in concluding that Hess's attempt to legitimize his actions should not be credited. Rather, his disingenuous testimony is further proof of pretext to disguise Respondent's real reason for getting rid of Henderson -- its animus toward her because she continued to engage in protected concerted activity, notwithstanding Hess's repeated edicts not to do so.

**Testimony of employees Angela Cooper and Florence Coram**

Respondent's Exceptions with respect to Cooper and Coram revolve around its contention that the Charging Party solicited them to work for a competitor in April, that this was not protected concerted activity (REX 23), and that this was legitimate basis for suspending and discharging the Charging Party a half year later in October and November. Respondent contends that what happened is completely different from the ALJ's findings and that the testimony of Cooper and Coram proves it. The ALJ erred, Respondent contends, in failing to find that their testimony was mutually corroborative and consistent (REX 10), and that Coram was particularly a reliable witness in this regard. REX 10, 13, 14, 15, 16.

Cooper and Coram's testimony proves, Respondent contends, that the ALJ's findings with respect to the April discussion, were all wrong: there were no "mass firings" in the admissions department in April. REX 4, 5. Also, Respondent President Hess did not, without warning, thereafter terminate the then admissions director in April. REX 6. Furthermore, the ALJ's findings as to what the Charging Party actually said to Coram and Cooper in April is similarly off the mark, according to Respondent. Their

testimony proves that Henderson told them explicitly they *would* be fired if they stayed employed with Respondent (REX 26, emphasis in original), that “Henderson was virtually pushing them out the door” (REX 30), and that the April discussion did not stem from a mutual concern over job security. REX 9.

Without meaning any disrespect, one wonders whether Respondent’s counsel attended a different hearing in this case in some alternate parallel universe in a Twilight Zone episode. The factual backdrop to the April discussion was as follows, consistent with the ALJ’s findings and *according to Respondent’s own witness, President and CEO Terry Hess*:

There was a high degree of turnover of admissions representatives and admissions department directors at the Decatur campus. T. 266-7. In the seven years of President Hess’s tenure, there were eight or nine different admissions directors. T. 239. At the beginning of April, there were four admissions representatives, including the Charging Party, at the Decatur campus. Early in the month, all but the Charging Party were terminated. T. 266. Within a week or so thereafter, then Admissions Director Waldo Bracy hired Coram and Cooper; Coram and Cooper had previously worked for him at a different facility operated by a different company. T. 53. Within two weeks after the new admissions representatives were hired in April, President Hess precipitously fired Admissions Director Bracy. T. 266.

President Hess admitted at the hearing he would have expected the remaining admissions department employees to have tremendous fear with regard to job security, as a result of the foregoing events – because he had just fired three of four admissions representatives and the admissions director who hired the replacements. T. 266. Coram

and Cooper testified the events were “shocking,” and they did not know what to expect. T. 170; 208. Both Coram and Cooper testified they feared for their own job security after the admissions director who hired them was fired. T. 169; 208. Coram, Cooper, and the Charging Party discussed what had happened; Coram admitted saying, “what is going on here. . . this is crazy.” T. 171 lls. 12-21.

The Charging Party next spoke over the phone (within earshot of Cooper and Coram) to Respondent’s former admissions director (Jackalyn Majors) who was working at the time at Westwood, a different technical school. The Charging Party asked Majors if there were any positions available at Westwood, as Cooper and Coram feared for their job security, as the person who hired them, Admissions Director Bracy, had just been fired. Majors told the Charging Party they could send their resumes, but that she could not promise anything.<sup>7</sup> T. 58. Cooper testified Henderson said “there was another school that was hiring and we should go and apply for the position.” T. 205, lls. 8-14. Coram initially testified to the same effect, that Henderson said “she knew of another place that maybe we could work. T. 150, lls. 6-7. Both Cooper and Coram believed at the time that Henderson was looking out for them.<sup>8</sup> T. 198; 212.

At this point, the Charging Party and Cooper agree what happened next: Cooper confirmed Henderson’s testimony, that Henderson said this only once to her in April, and that the Charging Party never raised this issue [working at another company] again with

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<sup>7</sup> Majors testified at the hearing and corroborated the Charging Party’s version of the phone conversation. T. 292. Cooper and Coram did not dispute the Charging Party’s testimony about the phone conversation.

<sup>8</sup> Coram thanked the Charging Party effusively after she spoke to Majors about a position at Westwood. Coram texted the Charging Party, “thank you for being such a wonderful person.” GC 6. p. 1 (second entry, 11:03 PM).

her.<sup>9</sup> T. 60, lls. 11-14; T. 205; T. 209, l. 25 to T. 210, l. 13. Coram, on the other hand, melodramatically testified that the Charging Party kept on pushing Coram and Cooper to leave. T. 199-200. However, as is discussed above, Cooper flatly disagreed. As to Coram, *all* of the evidence shows that it was she, not Henderson, who pushed for the position at Westwood. Coram sent her resume to Westwood on April 18, the same day Henderson spoke to Majors, the day they were told Bracy had been fired. Compare date on GC 15, and date on GC 7, p. 1 (“they just fired Waldo”). Coram insisted that the Charging Party ask Majors what the salary was at Westwood. Compare GC 6, p. 2 (Coram text “Pls don’t forget to ask Jackie about salary”) and GC 7, pp. 1 and 2. Further, Coram persisted with Henderson, texting her while she (Coram) was at Westwood for an interview if she (Henderson) believed Westwood was “seriously considering me,” that she (Coram) “want[ed] honesty” as “they have 9 people here.” GC 6, p. 2.

Coram’s lack of reliability as a witness is evident from her testimony about her contacts with Westwood: Coram was initially emphatically certain that she had not contacted Westwood on the day she found out Bracy was terminated. She was certain because she was “just in shock,” that she “wasn’t doing anything” that day, and that she would have needed time “to get my resume together.” T. 173, lls. 2-20. Even when

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<sup>9</sup> Cooper testified she told Henderson she was not interested in the job, that if it was such a great deal, then she (the Charging Party) should go. T. 205. Neither Coram nor Cooper left Respondent’s employ after Bracy was terminated. Though Respondent claims it first found out about this “solicitation” in October, the evidence shows that the Charging Party spoke to Respondent’s managers some time in mid to late May, telling them that Coram and Cooper feared for their jobs, and that she had mentioned other job possibilities to them. She told this to Steve Austin, director of operations, and Sonja Walker, director of financial aid. Both managers told the Charging Party “you guys are going to be fine,” and that she should relay these assurances to Cooper and Coram. Neither manager testified at the hearing. T. 70, l. 17 to T. 73, l. 18.

confronted with documentary evidence showing that she had indeed contacted Westwood the same day (April 18) she found out Bracy was fired, she refused to admit it, testifying “if that’s what you say.” T. 174, lls. 1-18.

Coram also refused to admit that she had an interview at Westwood on May 1, even though she referred to “the interview session” in her thank you note to Majors written just after midnight that night (in the early hours of May 2). GC 16. She insisted several times, ignoring the words in her own thank-you email: “this was not an interview,” it was a “soiree” (T. 175, lls. 3-11) and “this was not an interview” (T. 177, lls. 12-14), and “we just had a group soiree” (T. 178, lls. 3-4). She was hostile, evasive and sarcastic about whether she texted Henderson while she was at Westwood that night, stating “I don’t remember texting, I don’t remember every text I send.” T. 176, lls. 3-6. Coram also insisted at least twice that she had not met with Majors on May 1. T. 177, l. 23 to T. 178, l. 4; and T. 178, lls. 14-18. When she was confronted with her thank you email to Majors, thanking her “for your time” that night, she continued her denials, albeit with a grudging qualifier: “I did not meet and speak with Ms. Majors and/or anybody else *specifically about me, my qualifications.*” T. 179, lls. 5-9. (Emphasis supplied.)

Based on the foregoing, the ALJ correctly concluded that:

(1) as of April 18, because of the turnover in staff and firing of the admissions director, all of the admissions representatives (including Coram and Cooper) feared for their job security (ALJD 5, lls. 35-7);

(2) the Charging Party called Westwood to see if there were any positions available because Cooper and Coram were “afraid for their jobs” (ALJD 6, lls. 6-14; fn. 12);

(3) based on the Charging Party and Cooper's testimony, the Charging Party never intended any ill will or premeditated intent, and never maliciously tried to get Cooper and Coram to leave Respondent's employ, thus discrediting Coram's testimony in this regard<sup>10</sup> (ALJD 6, fn. 12); and

(4) after April 18, the Charging Party did not attempt to persuade Coram or Cooper to seek work elsewhere. ALJD 6, fn. 12.

As is discussed above, the ALJ's findings and conclusions were clearly supported by the record, and by the testimony of the Charging Party and coworker Angela Cooper, and President Hess (as to factual background). Furthermore, there is no basis for disturbing the ALJ's discrediting of Coram; in fact, the evidence discussed above shows overwhelmingly that the ALJ was correct in doing so. Based on the above factual findings, the ALJ also correctly concluded that Henderson's conversations with Coram and Cooper on April 18 were in furtherance of job security, and that such discussions do not lose the protection of the Act "even if the activity looks toward employment by another employer," citing *QIC Corp.*, 212 NLRB 63, 68 (1974); *Hoodview Vendng Co.*,

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<sup>10</sup> The ALJ had other ample reason to discredit Coram as a witness. ALJD 9, fns. 18 and 19. During President Hess's investigation of the Charging Party in October, Coram was interviewed and made numerous unsubstantiated and uncorroborated allegations against the Charging Party. During Coram's 10-minute harangue, she said, of the Charging Party, that: "everything that came out of her mouth was negative;" that the Charging Party told "terrifying" "stories;" that the Charging Party talked about a "conspiracy;" that "you constantly got that paranoia;" that the Charging Party was "sick;" that she had "gone off the edge;" that "she knows everything;" that "she had really just kinda gone off her rocker;" that the Charging Party was "just ranting and raving;" that the Charging Party said, "every person in here is the devil;" that these were "the rantings and ravings of somebody who was really kind of disturbed;" that the Charging Party was "just really going nuts;" that she was "very manipulative;" that the Charging Party "drains the air out of you;" that she was "in a nervous breakdown;" that she "would just walk back and forth in the hallway saying really insane stuff all the time;" and on and on. Even President Hess was rendered speechless. The transcript shows (GC 18, p. 6) he commented: "Um wow. . . is there anything else? . . . I honestly think that's sufficient."

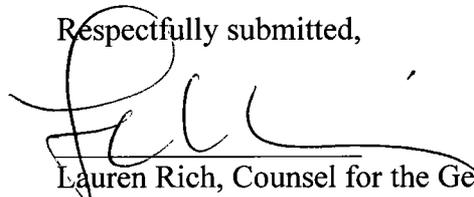
359 NLRB No. 36 (2012), and other cases. ALJD 16-18. In reaching this conclusion, the ALJ explicitly and correctly rejected Respondent's argument, as a matter of fact, that the Charging Party deceptively or maliciously tried to get Coram and Cooper to leave Respondent's employ, finding that Respondent's theory was mere speculation, and was unsupported by the evidence. ALJD 16, l. 43 to ALJD 17, l.12. Respondent has failed to cite to any record evidence – beyond Coram's melodramatic uncorroborated accusations – to meet the high threshold of proof necessary to reverse the ALJ's factual findings.

#### **IV. CONCLUSION**

Accordingly, for the foregoing reasons, it is respectfully submitted that Respondent's Exceptions be denied, as lacking in merit, and that the ALJ's Decision, including rulings, findings, and conclusions be affirmed in its entirety and that the ALJ's recommended Order be adopted in its entirety by the Board.

Dated: January 22, 2013  
Atlanta, Georgia

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

Pursuant to Sections 102.113, 102.114, and 102.42 of the Board's Rules and Regulations, I hereby certify that the foregoing Counsel for the General Counsel's Answering Brief in Opposition to Respondent's Exceptions was electronically filed with the National Labor Relations Board, and that copies were sent electronically to counsel, pursuant to agreement with counsel, at the email addresses below on this date:

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Dated at Atlanta, GA this 27<sup>th</sup> day of January, 2014.

  
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