McClatchy Newspapers, Inc. d/b/a The Fresno Bee *and* Graphic Communications International Union, Local 404, AFL–CIO. Cases 32–CA–17791–1 and 32–CA–17986–1

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On August 27, 2001, Administrative Law Judge Lana H. Parke issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and supporting briefs; the Respondent filed briefs in response; and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions, except as follows.

The judge found the General Counsel met his initial burden of showing that the Respondent suspended and discharged employees Glen Evans, David Otero, Allan Washington, and Jose Aguirre in part due to union animus. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, she found that the Respondent affirmatively showed that Evans, Washington, and Aguirre would have been discharged for misconduct even if they had not been associated with the Union. The judge also found, and we agree, that union animus was not shown to be involved in the suspension and discharge of Robert Barrientez.

We agree, for the reasons stated by the judge, that the Respondent has shown that the suspensions and discharges of Evans, Washington, and Aguirre would have occurred even absent their protected, concerted activity. We need not pass upon the judge's initial finding that the suspensions and discharges of Evans, Otero, Washington, and Aguirre were motivated in part by union animus.[2] However, we find merit in the Respondent's exceptions to the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Otero. As explained below, we agree with the Respondent's argument that it has also affirmatively shown that it would have suspended and discharged David Otero even absent his union activity.

The credited evidence, including Otero's admission, shows that the Respondent's pressroom manager, William King, found Otero asleep at his workplace in the pressroom during the day shift on September 25, 1999, at a time when the presses were running. Otero did not move or open his eyes for more than a minute while King observed him, even though an AGV (robotic vehicle) carrying paper came through the pressroom, beeping as it moved.

The Respondent had a written policy stating that "sleeping while on duty" could result in "disciplinary action and/or termination." Only 2 months earlier, Otero had been found sleeping during worktime by another supervisor, Jack Wink, and Wink had warned Otero on that occasion that "you could lose your job" for that infraction.[3] Employee Kloss testified that Otero was the only employee he could recall having seen with his eyes closed at work (other than himself 4 or 5 years earlier, when he was coming to work sick).

[1] No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by assisting employees' decertification efforts and that the Respondent violated Sec. 8(a)(3) and (1) by suspending and issuing a final warning to employee Joseph Kloss.

[2] In adopting the judge's dismissal of these allegations, Member Cowen would find that the General Counsel failed to establish a prima facie case that union animus played a role in the Respondent's suspensions and discharges of employees Evans, Otero, Washington, and Aguirre. He notes, as an initial matter, that the judge found no evidence that the Respondent was aware that Glenn Evans was a union supporter. With respect to known union supporters Otero, Washington, and Aguirre, he notes that the judge found no direct evidence that the Respondent harbored union animus, and that she rejected arguments by the General Counsel and the Charging Party that (1) statements made outside the 10(b) period showed animus, (2) that the Respondent sought to discharge union adherents to insure that the Union would lose a decertification election, (3) that the Respondent's investigations of misconduct by union adherents were one-sided, (4) that union adherents were accorded disparate treatment, and (5) that the Respondent retaliated against union supporters. Member Cowen finds no merit in the argument, accepted by the judge, that the Respondent's removal of Dennis Lyall and Fred Van Der Muelen as pressroom managers, and its choice of William King for that position, indicate union animus. Member Cowen rejects the judge's reasoning that, because "low morale" was a factor in these decisions, and dissension lingering from the union election was a factor in the morale problem, the Respondent's choice of King must reflect an intent to "penalize" union supporters. The record shows that Van Der Muelen was removed for a number of managerial deficiencies, one of which was a "laisser-faire" style of personnel management not shared by his superiors, and that King replaced him because he was viewed as a hands-on, time- and cost-sensitive manager. As the judge rejected all arguments relating to reprisal or discrimination, and found that the Respondent had ample reason for discharging each of the employees at issue here, it seems that the sole basis for her inference of animus is that King may have been less popular than Van Der Muelen among unit employees. In doing so she has turned a blind eye to the range of considerations at play in managerial decisions, and the likelihood that perfectly lawful choices may sometimes displease employees, including union adherents.

[3] Although Otero testified that he had seen Wink observe other employees (whom he named) with their eyes closed while at work, the judge credited Wink's denial and found Wink to be generally credible. On the other hand, the judge found Otero "not to be fully credible."

We find insufficient record evidence to support the judge's inference that "the slowness of the work" during Otero's work shift that day would earlier "likely" have been treated as "an extenuating circumstance" for his being sound asleep during worktime.[4] The judge based her conclusion in large part on her conclusion that Otero's employment record was clear of prior discipline. The record, and the judge's findings, in fact demonstrate that Otero had a previous warning for excessive use of sick leave, a letter of reprimand for disrupting a meeting, and a second letter of reprimand for breaching building security. The record further shows that King reviewed Otero's record before deciding that he should be terminated. As the judge noted elsewhere in her decision, even though a disciplinary action might appear severe, where the employer shows that it would have taken the action regardless of the employee's protected activity, the Board does not substitute its own judgment for the employer's as to what discipline would be appropriate.

For these reasons, we find that the Respondent has shown that Otero, like the other alleged discriminatees, would have been discharged even if he had not been associated with the Union. The General Counsel has consequently failed to show that the discharge was unlawful. We therefore dismiss the complaint in its entirety.[5]

ORDER

The complaint is dismissed.

D. Criss Parker, Esq., for the Acting General Counsel.
Mark S. Ross and *Christopher J. Pirrone, Esqs. (Seyfarth Shaw LLP)*, of San Francisco, California, for the Respondent.
Victor Manrique, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Fresno, California, on October 31 through November 3, 2000, January 29 through February 1, March 6 through 9, and April 16 through 19, 2001. The charges in Cases 32–CA–17791–1 and 32–CA–17986–1 were filed against McClatchy Newspapers, Inc. d/b/a The Fresno Bee (Respondent or the Bee) on November 9, 1999, and February 25, 2000, respectively[1] by Graphic Communications International Union Local 404, AFL–CIO (the Union), and the order consolidating cases, consolidated complaint and notice of hearing was issued on June 13, 2000. During the course of the hearing, on February 22, 2001, the Regional Director for Region 32 issued another complaint against Respondent, which was consolidated with the prior consolidated complaint at the hearing on March 6, 2001.[2]

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

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation, is engaged in the publication and distribution of a daily newspaper at its facility in Fresno, California, where, during the 12 months preceding June 13, 2000, it derived gross revenues in excess of $200,000 and held membership in or subscribed to various interstate news services, published nationally-syndicated features, and advertised nationally-sold products. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Complaint Allegations

The consolidated complaint alleges that Respondent violated Section 8(a)(5), (3), and (1) of the Act by suspending and discharging employee Robert Barrientez (Barrientez) on June 15 and 18, respectively, by issuing a final warning to and discharging employee Glenn Evans (Evans) on August 18 and September 14, respectively, by suspending and discharging employee David Otero (Otero) on September 27 and 29, respectively, and by suspending and discharging employee Allan Washington (Washington) on October 10 and 18, respectively. The consolidated complaint further alleges that Respondent violated 8(a)(5) and (1) of the Act on October 1 by imposing new bereavement leave requirements on Lupe Falcon (Falcon). The February 22, 2001 complaint alleges that Respondent violated Section 8(a)(5), (3), and (1) of the Act by the suspension and final warning of employee Joseph Kloss (Kloss) and the discharge of employee Jose (Joe) Aguirre (Aguirre.)

Respondent raises as affirmative defenses the arguments that disciplinary events relating to Barrientez, Evans, and Falcon occurred more than 6 months prior to the filing of charge in Case 21–CA–17986, which charge delineates the 8(a)(5)

[4] Evidence regarding the Respondent's consideration of "extenuating circumstances" involved an employee who overslept between shifts, after he had been asked to work a double shift.

[5] Chairman Hurtgen, in agreeing with his colleagues as to the disposition of this case, finds it unnecessary to pass on the judge's finding that the Union did not waive any right to bargain about the terminations or reinstatements of employees Barrientez, Evans, Otero, and Washington.

[1] All dates are in 1999 unless otherwise indicated.

[2] The February 22, 2001 complaint did not permit Respondent the regulatory time to answer prior to resumption of hearing on March 6, 2001. Following the General Counsel's presentation of its case, Respondent presented defense witnesses only as to the allegations of the prior complaint. Respondent was thereafter granted a continuance to prepare its defense against the new allegations contained in the February 22, 2001 complaint. Proceedings resumed on April 16, 2001, at which time testimony was completed as to the February 22, 2001 complaint allegations.

[3] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

allegations of Respondent's conduct toward those employees. Therefore, Respondent urges, the 8(a)(5) allegations as to Barrientez' termination, Evans' final warning, and the events surrounding Falcon are barred by Section 10(b) of the Act. In light of my findings herein, I do not find it necessary to discuss Respondent's affirmative defenses in depth. However, I note that the initial charge herein, Case 21–CA–17791–1 alleges violations of Section 8(a)(3) and (5). Discharges of employees, including Barrientez, Evans, and Falcon are set forth in the body of the charge, and the complaint allegations are closely related to the allegations of the charge, involve the same legal theory, the same factual circumstances or sequence of events, and require similar defenses. Therefore, I find no merit in these defenses. See *Seton Co.*, 332 NLRB 979 (2000).

B. Background

Respondent's press area consists of two levels: an upper and a lower deck. The reels that feed rolls of paper to the presses are on the lower deck; the actual printing and color work take place on the upper deck where press operators, offside, and color employees work.

During times material hereto, Keith Moyer (Moyer) has been Respondent's publisher; Helen Wainwright[4] (Wainwright) has been Respondent's human relations manager, and Janet Owen (Owen) has been Respondent's production director/vice president of production. Reporting to her are the pressroom manager, night production coordinator, and assistant pressroom manager. Prior to November 1998, Dennis Lyall (Lyall) was pressroom manager. In November 1998, Lyall was removed as pressroom manager and made a quality control manager because of serious employee morale proble Employees were informed of the change. Thereafter, Lyall's duties were to lay out the press, and notify the pressroom of product quality proble Gerry Carlson (Carlson) was then appointed acting pressroom manager for a brief period. During this and a later period of acting pressroom management, Carlson also performed his job as night coordinator. During those periods where only an acting pressroom manager existed, the overall management of the pressroom was covered by Owen, Carlson, and Paul Marvin (Marvin), assistant pressroom manager.[5] This coalition was sometimes called "the committee."[6] From November 1998 until May, Fred Van Der Muellen (Van Der Muellen) was pressroom manager, followed again by Carlson as acting pressroom manager. William King (King), became the pressroom manager in early September. When he introduced himself to the press room employees, he said that he was not there to be the employees' friend, that he had a job to do.

At all times material hereto, Respondent has had in effect an employee handbook containing written employment rules and procedures. Respondent has also maintained a manager's manual giving direction to supervisors in handling various employment matters including discipline. A copy of the employee handbook is given to each newly hired pressroom employee as part of employee orientation. The employee handbook contains the following provisions:

> *DISCIPLINE*
>
> . . . employment may be terminated at will by the employee or The Fresno Bee at any time with or without cause and without The Bee's following any system of discipline or warnings. Nevertheless, The Bee may choose, in certain cases, to exercise its discretion to utilize forms of discipline that are less severe than termination. Examples of such forms of discipline include verbal warnings, written warnings, probationary action and suspension. Although one or more of these steps may be taken in connection with a particular employee and/or a particular form of prohibited conduct, no formal order or system is necessary. The Fresno Bee may terminate the employment relationship without following any forms of discipline addressed above.[7]
>
> *IMPERMISSIBLE CONDUCT*
>
> . . . examples of conduct that may result in disciplinary action and/or termination.
>
> 1. Insubordination, including improper conduct toward a supervisor or manager or refusal to perform tasks assigned by the supervisor or manager.
>
> 2. . . . appearing for work under the influence of [alcoholic beverages].
>
> . . . .
>
> 18. Sleeping while on duty.
>
> 19. Abuse of sick leave.
>
> 20. Use of abusive or vulgar language.
>
> *BEREAVEMENT LEAVE*
>
> A regular full-time employee who is eligible for sick leave will be granted bereavement leave of up to three working days with pay in the event of a death of a member of his or her family. For this purpose, an employee's family is defined to include a parent, spouse, child, sibling, grandparent, grandchild, mother-in-law, father-in-law, daughter-in-law, son-in-law, sister-in-law, brother-in-law,

[4] Wainwright was formerly Helen Van Ryswik. She did not assume the name Wainwright until after her marriage. However, I have referred to her herein as Wainwright.

[5] The parties stipulated that Marvin was a supervisor within the meaning of Sec. 2(11) of the Act, and Respondent agreed that Lyall was a supervisor until his November 1998 removal as pressroom supervisor.

[6] Owen initially testified that Lyall attended some of the committee meetings. In cross-examination, she admitted that she had testified before the NLRB on August 14 that Lyall served on the committee. There is no evidence as to what Lyall's function on the committee was or that Lyall was a supervisor following his November 1998 classification change. His presence on the committee is not sufficient to confer supervisory authority, and I find he was not a supervisor within the meaning of Sec. 2(11) of the Act after November 1998.

[7] Wainwright testified that the "at will" language of the employee handbook exists for purposes of protection under wrongful terminations cases and employment contract issues connected primarily with State of California causes of action. Ford testified its inclusion was to prevent the formation of an "implied in fact" contract under California law. Respondent does not, however practice "at will" employment or discipline policies. Respondent applies progressive discipline, dispensing more stringent discipline as a particular employee problem gets worse. Depending on the seriousness of the problem, Respondent may jump disciplinary steps, e.g., go straight from a verbal warning to a suspension or termination.

> foster parent, foster child, step-parent, step-child, step-sibling, half-sibling, aunt, uncle, niece, nephew or cousin.
>
> *SICK LEAVE*
>
> . . . .
>
> Eligible employees may take up to ten days of incidental sick leave per calendar year . . . [which] may be used for personal illness or injury, doctor and dentist appointments and family emergencies (such as a sick child). . . . The Fresno Bee expects employees to utilize the sick leave benefit only when necessary. Abuse of sick leave and family emergency policy is prohibited and will not be tolerated.
>
> *DOCTOR'S CERTIFICATE*
>
> Depending on an employee's record of attendance, a supervisor may, at his or her discretion and with the approval of the department manager and the division director, require an employee to provide medical certification of absence before payment for sick leave is approved.[8]

At one time, Respondent had provided employees with 25 days of sick leave per year. At some point not relevant to this matter, Respondent reduced the sick day allowance to 10 days, telling employees that sick leave was being abused. Respondent regularly addressed sick leave use with employees.[9]

Respondent maintains a file on each employee separate from its personnel files called a "manager file" into which memorialization of conversations and oral warnings may be placed as well as written warnings.

Following an election held in July 1998 among Respondent's employees, the Union was certified on August 17, 1998, as the exclusive collective-bargaining representative of employees in a unit of all full-time and regular part-time pressroom employees, including employees in the plateroom and utility workers. Prior to 1992, Local 4 out of San Francisco had represented unit employees. Local 4 was decertified in 1992. When the Union was certified, Respondent froze the policies covering pressroom (unit) employees.

C. Decertification Activity

Luis Cardoza (Cardoza), employed by Respondent for over 30 years, testified that he promoted a decertification effort at the Fresno Bee within 2 months after the union election. He initially gathered names of employees who were not happy with the results of the election to send to the NLRB. He was aware of the process as he and employee Leroy Lee (Lee) had been instrumental in the decertification of the predecessor union. Prior to collecting signatures, Cardoza told Owen what he planned and asked if it was all right with her. She said it was fine. Cardoza testified that after he collected a few names, he asked Owen if he could use a locker in addition to his own personal locker to store the names. He was given use of a second locker while working on decertification.[10] Owen testified that Cardoza asked her how he could decertify the Union shortly after the election. She told him nothing could be done for at least a year. Cardoza contacted the NLRB, and upon obtaining instructions from the NLRB on how to proceed essentially recommenced his decertification efforts in the appropriate time frame. Eventually, the decertification signatures were submitted to the NLRB.

Within a week of King's assuming his management position at Respondent, Cardoza told him of his decertification efforts, of the number of names collected, and of his locker use. According to Cardoza, King wanted to know what names had been obtained, and Cardoza told him. Unasked, Cardoza continued to report the decertification progress to King, including the names of disaffected employees. Falcon, Otero, Evans, and Barrientez did not sign the decertification petition. He also reported to King the substance of and attendance at union meetings. Cardoza talked about his efforts to Marvin and mentioned them to Moyer. Moyer told him to keep up the good work.[11] On more than one occasion, Marvin vacated his office to permit Cardoza to use his telephone in connection with the decertification effort.[12] Cardoza said he collected names during working hours, but it is not clear whether he did so during actual working time.

When the year following the union certification had expired, Cardoza said to King, "I've got names and it's about time for us to file and get the heck out of this union." King told Cardoza it was up to him, that he could not tell him to do anything. Cardoza filed a decertification petition in Case 32–RD–1345 with the Board on October 26. As an unfair labor practice complaint against Respondent was already pending, the petition was dismissed, subject to reinstatement, if appropriate, after final resolution of the complaint allegations.

D. Suspension and Discharge of Barrientez

Barrientez was employed by Respondent from October 1977 until his termination on June 18. Barrientez was a journeyman press operator from 1984 to 1998 when he was demoted to offside pressman. During the 1998 union campaigns, Barrientez openly wore union insignia, encouraged employees to support the Union, and attended union meetings. Prior to his

[8] Wainwright testified that Respondent's policy regarding sick leave was to place an employee on a "doctor's note program" if sick leave abuse was suspected, which required the employee to produce a doctor's note if claiming sick leave. In 1999, employees Aguirre, Kloss, Flores, Otero, and Galleguillos and Gamboa were placed on "doctor's note" restriction after Van Der Muelen identified possible sick leave abuse and requested the restrictions from human resources.

[9] Cardoza testified that Respondent discussed sick leave use approximately yearly.

[10] Owen denied that she gave Cardoza permission to use another locker. She said, and other evidence corroborated, that some pressmen use a second locker.

[11] Cardoza's testimony regarding his exchange with Moyer was somewhat confused. In response to questioning by union counsel, Cardoza said that Moyer asked him how he was doing. Cardoza thought Moyer was talking about the decertification and answered, "We're doing okay." However, under questioning by counsel for the General Counsel, Cardoza had previously testified that in answering Moyer, he "started in on what I was doing . . . to get the Union [out]," and that Moyer told him to keep up the good work. I conclude that Cardoza did inform Moyer of his antiunion activities and was encouraged to "keep up the good work."

[12] Owen testified that employees are permitted to use the telephone in Marvin's office to make personal calls.

discharge, Owen was aware that Barrientez was an active union supporter.

On June 12, Barrientez reported to work at about 8 p.m. as an offside man on press "A" with employees John Franco (Franco) and Otero. He testified that about 3 or 4 hours prior to that, he had two beers with his dinner.[13] During the shift, Jack Wink (Wink), assistant night pressroom manager and Barrientez' immediate supervisor, asked him if he had been drinking.

Wink testified that at the commencement of the shift, as the press crew was readying the press, Barrientez appeared to be "kind of loud" and was calling the operator, "Johnny Boy," which was unusual. When Wink approached Barrientez, he smelled an odor of alcohol. Wink said to Barrientez, "Don't show up for work in the shape that you're in again." Barrientez told him about his beer consumption and continued working.[14] According to Barrientez, as Wink walked away, he heard him say, "This is all she needs to fire someone."[15]

Franco testified that at the beginning of the shift on June 12, he observed Barrientez acting a little strangely and being a little loud. When they spoke together, Franco smelled alcohol on his breath. Franco saw Wink talking to Barrientez, after which Wink approached Franco and asked if he thought Barrientez had been drinking. Franco said yes.

Wink testified that he did not send Barrientez home because he was aware that Barrientez had previously had a problem with drinking, and he did not want to get him fired. Wink thought that if word of Barrientez' drinking got "up front," he would probably lose his job. Wink testified he figured Barrientez could get through the shift. In other instances, Wink testified, he would send an employee home that he thought was impaired from alcohol.

Later, according to Barrientez, while bending over to pick up a pile of jamming papers, his back popped, and he dropped to his knees. He called to Otero who was coming up the stairs, saying he had just hurt his back. Barrientez also called to Franco who looked but said nothing. According to Franco, at the time of the incident, he was standing about 2 feet away from Barrientez at the conveyor belt. He saw Barrientez scoop up papers from the conveyor and fall back. Franco asked him if he was all right.

Barrientez asked Otero to go into the manager's office with him to fill out an injury report since he considered Otero to be one of the union leaders, and employees always exercised the right to have somebody from the Union present when going into the company office. Wink was in the office, and Barrientez told him he had hurt his back and needed to go home. Wink gave him an injury report to fill out and asked if he was sure he couldn't finish out the shift. He advised that employees needed to be careful on the work floor. Wink said nothing about alcohol but asked if Barrientez could make it home all right. Since accidents had to be reported to the front office, Wink informed Marvin of the events of June 12 either that night or the following day, including his suspicion that Barrientez had been drinking. Marvin, in turn, notified Carlson who asked Wink and Franco to provide written statements. On June 16, Franco gave the following handwritten statement to Carlson:

> On Sat June 1212, Robert Berrentez smelled like alcohol at start of shift. He was loud and acting goofy. After observing this Wink spoke to him. 15 minutes later he picked up paper off conveyer, stumbled and fell back. Then said he hurt his back.

After consultation with Owen and Wainwright, Carlson telephoned Barrientez on the following Tuesday and told him he was being suspended pending further investigation of the Saturday night incident. According to Barrientez, he asked Carlson what incident he was referring to, but Carlson did not say. Barrientez reported the conversation to union representative, Marty Keegan (Keegan). According to Carlson, he told Barrientez he had information that Barrientez had reported for work on Saturday night in an impaired condition and had fallen into the conveyor, and he wanted his side of the story. Barrientez told Carlson that he had had a few drinks at dinner with his family before work. He said he did not want to lose his job, and Carlson told him that he was suspended pending further investigation.[16] Carlson thereafter reported his conversation with Barrientez to Owen and Wainwright.

Owen and Wainwright discussed Barrientez' situation. They considered his file, in which a prior alcohol problem was documented. The documentation showed that in 1991 Barrientez was terminated for 5 days absence without leave. He was reemployed under a 1-year rehabilitation program, which required him to enter an alcoholism treatment program as a condition of continued employment. Owen testified that although she did not believe Barrientez to have violated his reemployment agreement, she considered his prior alcohol abuse record in deciding to terminate him. Owen said the length of time between the two alcohol-related incidents did not ameliorate the seriousness of the second incident because the Company had already been through the substance abuse program with Barrientez.

The following Friday, June 18, Barrientez met with Owen and Julie Porter (Porter) from Respondent's human resources department. Barrientez testified that Owen told him he was being terminated because of the preceding Saturday night incident. Barrientez denied there had been any incident. Owen said that given his history, she had no choice but to terminate him. Barrientez told her that termination could cause him to lose his home. He reminded her that Carlos Mejoia and Scott

[13] In an affidavit given to the Board during the investigative stage, Barrientez stated he had had two beers 1 to 2 hours prior to the shift.

[14] Barrientez denied that any employees laughed at him during work or that he slurred his speech or stumbled.

[15] This statement is not recorded in Barrientez' Board affidavit. Wink was not specifically asked whether he made the statement. Because of Barrientez' lack of credibility, detailed hereafter, I give no weight to this testimony.

[16] I accept Carlson's version of the conversation. Barrientez' Board affidavit differed from his testimony at the hearing regarding the length of time that passed between dinner and reporting to work. In his hearing testimony, he doubled the number of hours elapsing between alcohol consumption and work in an apparent attempt to bolster his case. Further, I found him to be vague in recounting events and conversations while Carlson appeared careful and candid.

Simmer had been caught drinking in the parking lot, and they were still employed. Owen said their situations were different and she was not going to talk about them.[17] According to Porter, Barrientez did not deny Respondent's charge that he had come to work under the influence of alcohol but pleaded for his job and said it would not happen again. Owen testified that when she told Barrientez of the seriousness of coming to work under the influence of alcohol, he said he was sorry and that it would never happen again.[18]

Wink received a letter of reprimand dated June 23 for violating company policy on June 12 by, inter alia, allowing an employee to continue working while visibly intoxicated.

Other employees who worked on June 12 gave their opinions of Barrientez' condition. Otero testified that he observed Barrientez working on Saturday, June 12, that he appeared to be working normally, and that no one was laughing at him. In Otero's opinion, Barrientez was not drunk. Washington testified that he spoke to Barrientez in the locker room on June 12 and neither smelled alcohol nor believed he was intoxicated. Evans testified that he spoke to Barrientez for 10 to 15 minutes during work on June 12 and discerned no evidence of alcohol use or impairment. Falcon testified that although he worked on a different floor than Barrientez on June 12, he observed Barrientez during work that night. Barrientez appeared to be working normally, and Falcon smelled no alcohol on his breath although he stood close to him at the beginning of the shift.

Employee Leo Galleguillos (Galleguillos) testified that on New Year's in 1975, employee Jerry McPherrin was drunk at work; the foreman told him to sleep if off, and the other employees covered for him. In the late 1980s, Galleguillos was present when Lyall, then the man-in-charge, told employee, Bob Cougle who had been drinking, to sit down and not get up. Neither employee was disciplined. There is no evidence that Respondent's upper management was aware of these incidents.

E. Warning to and Discharge of Evans

Evans was employed by Respondent from October 31, 1990, until his termination on September 14. He testified that he attended union meetings off Respondent's premises both before and after the union election. He was friends with Otero, Washington, and Aguirre whom he considered to be among the most open union supporters in the preelection period. Owen testified that Evans was very "vocal" with her when she was on the pressroom floor and volunteered that he did not want anything to do with the Union.

Evans testified that he was called "Lightening," "Flash," and "Speed" because of his proficiency as a plate burner, and he set the standard to which other plate burners were held. He trained other employees and received an "Above and Beyond the Call of Duty" award in February. Marvin testified that in July, there was management discussion of giving Evans a pay increase.

According to Evans, in June 1998 Owen told him that the Union would not be a good thing for the pressroom, that it would just tie up the way they did things, indicating raises.[19] In August, Owen approached Evans and told him he had been doing a good job, and Respondent was going to promote him. Owen went on to talk about the results of the election, the closeness of the vote, and said the Company could not decide who voted what, but there would be consequences.[20] During that same month, Evans was asked to go to Owen's office. She complimented him on his work and said there was still some type of promotion and a raise on the table. She said she would try to get him an apprenticeship. Evans said that would be fine, but all he really wanted was peace, referring to the animosity and controversy that had existed in the pressroom since the union election. Later that same month, Owen told Evans that "they" had denied a raise for him. Owen testified that Evans approached her seven or eight time requesting more money or an apprenticeship, but that she never initiated any such discussion. Owen denied offering to help him get more money or a better job.[21]

Owen testified that in July, Evans was absent from a Saturday day shift without prior notice to Respondent. She talked to him about his "no-call, no-show" and the strain his absence put on the department. Evans discussed the problems he had as the single parent of a baby. Owen said she would overlook the absence, but it was not to happen again. According to Owen, between that conversation and August 18, Evans missed five more shifts.

Evans testified that on about August 10, he developed a prostate infection and missed 2 to 3 days of work. He called in to work on two occasions, speaking with Marvin once, and leaving a voicemail message the other time. Evans told Marvin that he was under a doctor's care and would call in each day until he returned. When Evans returned to Respondent's premises on August 13, Marvin told him Owen was upset about his taking days off. Evans gave his doctor's note to Marvin. Later, Owen told him, "Glenn, you've missed so many days, 13 days, and if you miss any more we're going to terminate you." Evans told her she was being unfair because the preceding year, he had only missed a couple of days, but he had become responsible for a newborn baby daughter on January 29, and the duties of a single parent accounted for his missed work in 1999.

[17] Regarding Carlos Mejoia and Scott Simmer, Carlson testified that security caught them in the parking lot with open alcohol containers, and both were suspended.

[18] The testimonies of Carlson, Owen, and Porter consistently report that Barrientez did not deny being under the influence of alcohol on June 12. I accept their versions of the conversations.

[19] Under cross-examination, Evans admitted that his Board affidavit did not contain an account of such a conversation.

[20] Under cross-examination, Evans admitted that his Board affidavit did not contain an account of this conversation either.

[21] I cannot credit Evans' testimony. He made no explanation as to why the conversations were omitted from affidavit testimony given much closer to the events than his hearing testimony, and his memory was inconsistent. Thus, while remembering the above conversations in some detail, he also testified under examination by union counsel that although he asked Owen how she felt about the Union in general, he could not recall her response. Those inconsistencies coupled with his manner and demeanor in testifying undercut his credibility so that I cannot rely on his testimony where it conflicts with that of other witnesses.

On August 18, Carlson called Evans into the pressroom office and gave him a "Final Warning."[22] Evans refused to sign the warning as he felt Respondent was treating him unfairly because of his union sympathy and because they were disregarding his family situation. According to Evans, he told Carlson that he believed the warning was political because of his union sympathy; Carlson did not answer. Carlson testified that after reading part of the warning notice, Evans returned it and accused Respondent of engaging in a conspiracy to get him. Carlson repeatedly asked him to read the warning. Evans wanted a copy, but Carlson refused, as Evans would not sign it.[23]

On Thursday, September 2, Marvin asked Evans to work an unscheduled night shift the following day, September 3, because another employee was ill. Evans did so, working from 5 p.m. until 12:45 a.m. During the shift, King, who had been pressroom manager for about 2 weeks, told Evans that he would be working alone the remainder of the night and to do the best that he could. King testified that because of being shorthanded in the plate room, he arranged with Jeff Gledhill, supervisor (Gledhill) to borrow employee Dan Hoard (Hoard) from prepress. Gledhill asked that Hoard be used as little as possible, as prepress needed him. King told Evans of the staff shortage and asked him to do the majority of the work. Evans said he would and, according to his testimony, worked the shift without a meal break. Evans testified that during the shift, at about 10:30 p.m., Hoard began assisting Evans in burning plates. At about 12:30 a.m., Evans, who was scheduled to begin vacation the next day, asked Hoard if everything was under control and if it was okay for him to leave. Hoard said it was no problem. Evans then left at about 12:30 or 12:45 a.m. He did not check in with Marvin before leaving since employees in the plate room rarely worked full shifts and could agree among themselves to leave early as long as someone remained until everything was done.[24]

Hoard testified that on September 3, he observed Evans working inefficiently. He appeared to be burning plates in a lackadaisical manner and putting plates in roughly, which necessitated pounding out the resultant bends. Hoard testified that he did not recall Evans saying anything to him when Evans left at about 12:40 a.m. He denied that Evans had asked if everything was in control before he left. Hoard continued to burn remaining plates until his shift ended at 1:30 a.m. Hoard reported to April Bell (Bell), night prepress supervisor, what he observed of Evans' work that night, and also told her that he had done 80 percent of the plate burning while working with Evans.[25] Bell sent an email message dated September 4 to Gledhill stating, in part, "Dan Hoard spoke with me . . . about Glenn's 'help' in the plate room. Dan said he didn't keep official track, but that he burned about 80% of the plates. We had a large pre-run along with a big paper. Glenn spent a lot of time doing 'busy work' according to Dan. Looking busy, but not really doing anything. Then Glenn left at 12:40 . . . so Dan had to stay over his time in order to burn the rest of the plates."

The following Tuesday, September 7, Evans returned to work as usual. On that same day, Gledhill forwarded Bell's email message concerning Evans to King. Upon reading the message, King looked at Evans' file and reviewed several documented disciplinary actions and an email from Brian Rathburn (Rathburn), night prepress supervisor, to Owen dated January 18 that accused Evans of leaving work before the plate burning was finished.[26] King spoke to both Hoard and Bell about the September 3 events.[27] After consulting with Owen and Wainwright, based on Evans' conduct of the preceding Friday night and his previous work history, King decided to terminate Evans unless he provided a good excuse.

According to Evans, on Thursday, September 9, Marvin approached Evans at work and told him, "Glenn, you know it's a conspiracy." Evans testified that, believing Marvin was referring to Respondent's singling out union supporters for disciplinary action and termination, he said he knew and asked why Marvin had to start him thinking about it. Marvin did not reply. Marvin specifically denied making such a statement. He testified that in the approximately 2 years prior to his termination, Evans expressed thoughts that somebody—the Government, the Company, the system—was watching him and that there might be video cameras in the plate room. Marvin said that although Evans might have said there was a "conspiracy," Marvin never agreed with him at any time. I accept Marvin's testimony over that of Evans.

Wainwright and Owen testified that King consulted them about the discharge of Evans, but that he made the decision. King had Evans' termination papers prepared and on September 14 asked Marvin to bring Evans to Owen's office. The

[22] Aguirre received a final warning regarding attendance at the same time, having had a prior warning in January. Meyers received a warning, but not a final one, as he had not had any prior warning.

[23] A one-page document entitled "Final Warning," which had been obtained from records subpoenaed from Respondent was marked as GC Exh. 14 and shown to Evans. Although Evans agreed that the subject of the warning was his attendance, he insisted that GC Exh. 14 was different from the warning notice he had refused to sign on August 18. No evidence was adduced that any other form of the warning notice existed, and it was received as R Exh. 44. Carlson identified the document as the one given Evans. I accept Carlson's testimony.

[24] Marvin essentially corroborated Evans' assertion, testifying that there was no clear rule about when an individual could leave. Quitting time was based on when the employees actually got the newspaper and their prework done. The press operator "will then kind of determine 'okay, the work is done,' and then [employees will] go."

[25] Counsel for the General Counsel contends that Hoard wanted to take Evans' place as pressman and was thus motivated to slant his testimony. There is no evidence of that or of any other motive that would prompt Hoard to testify falsely. As heretofore and hereafter detailed, I find inconsistencies in Evans' testimony. Therefore, I credit Hoard's testimony that Evans did not ask him if the work was under control and that he left before the work was finished.

[26] Owen testified that in January she received an email message from Rathburn stating Evans "went home after first run and he said that Jeffery was going to burn plates. I talked to Jeff and he said that he is not going to burn plates but he just left for lunch . . . now it is 1:00 and still nobody to burn plates." Owen asked Van Der Muelen to confer with her about the incident. He confirmed what had happened, but Owen was unaware of what, if any, discipline was given Evans over the incident. The email remained in Evans' manager file.

[27] King testified that he considered that Hoard may not have been accurate in saying he had done 80 percent of the work, so he inquired of Bell, as he felt a supervisor can tell who is working and who is not.

termination letter, dated September 13, reads, in part: "This decision has been made due to your past work history as well as your performance on Sept. 3, 1999. You have five other previous incidents including a final warning letter on Aug. 18, 1999." Concerning his termination, Evans testified that King said, "Glenn, you're being terminated from the Fresno Bee because of your work on September third." Under examination by union counsel, Evans said he might have asked what specific problems Respondent had with his performance on September 3, but he couldn't recall. According to Evans, he said, "I don't understand. What are you, some kind of hit man? I told you that I would do the best that I could." King said that apparently it wasn't good enough. Evans refused to sign the termination letter and left, saying, "Well, I don't understand; I'm going to see my doctor." The meeting lasted about 5 minutes. According to Evans, King did not explain what the problem was with Evans' work on September 3, and no other member of management had previously asked for Evans' version of that night's events.

King testified that during his meeting with Evans, he summarized the information he had obtained regarding Evans' work on the night of September 3 and asked for Evans' side of the story. Evans started yelling that King was a hit man, that he was feeling faint and wanted to go see his doctor. According to King, "It wasn't going anywhere, so I terminated him, tried to give him his paperwork; he wouldn't take it." Marvin testified that at the meeting with Evans, King reminded Evans that he had asked him to do most of the plate work because Hoard was needed in prepress, that Evans had not followed directions and had left before Hoard. King asked Evans for an explanation of what had happened, but Evans did not respond except to say that King had not talked to him until 45 minutes into the shift and that he had left at his normal time. Evans' voice was loud and he paced the office. Marvin was not clear as to what Evans said in response to King, but he recalled Evans saying he needed to see his doctor.[28] King testified that had Evans offered a good explanation, he would have torn up the termination letter.

F. Suspension and Discharge of Otero

Otero worked for Respondent from January 1977 until his termination on September 29. He was at that time a journeyman pressman. In March 1998, Otero who had been shop steward under Local 4 contacted the Union about organizing the unit employees. He thereafter solicited authorization cards, openly wore union insignia at work, distributed union literature in front of the Bee and its primary advertiser, served as a union observer during the representation election, testified in a prior NLRB case in August, attended union rallies in front of the Bee, carrying a banner reading "Bargain Now," and served as a member of the bargaining committee. King was aware that Otero was a supporter of the Union.

In June, prior to the union election, Lyall told Otero that he felt Respondent had given employees a fair shake, and that they didn't need a union. Otero answered that Respondent had made promises after the 1992 decertification that employees would be treated better, but it wasn't happening. In July, prior to the election, Marvin asked Otero to give the Company a chance, saying that he felt employees weren't being fair to Respondent, that if things were wrong, they would be corrected. Prior to the election, Wink told Otero that bringing the Union in would open up a whole "can of worms." On various occasions, Owen asked Otero to give the Company a chance. In late June 1998, Moyer, apparently in response to Otero's complaints that Moyer was speaking only to certain employees, said that if he felt Otero was going to go for the Company that he would talk to him.

Otero also testified that Respondent's management, including Gary Pruitt (Pruitt), Respondent's CEO, and Ray Steele, held a meeting with employees on July 21, 1998. According to Otero, during a separate conversation that day, Steele said he was disappointed that Otero had not alerted him to employee complaints with which he could have helped. In the general meeting, Otero recalled Pruitt saying he was disappointed that it had come to an election and that employees would not give the Company another chance. Marvin asked Otero to tell the Union to give the Company 60 days, and then they could bring the Union back in. After his recollection was exhausted, in response to a leading question, Otero recalled that Pruitt told employees that if they voted the Union in, the Company would play hard ball.[29]

Otero testified that in the last couple of years, both Marvin and Wink had told him that he was one of the best reel men in the reel room. He said he was usually assigned to "tough" reels.

On Saturday, September 25, Otero worked, as usual in the reel room. During the morning, the press repeatedly stopped operating. When the presses stopped, Otero and coworker, Galleguillos checked the reel units, determined they were functioning correctly and that the problem was upstairs in the press area. Otero then sat down on a chair by the staircase near "A"

[28] Evans expressed disdain of King's competence, testifying, "The guy'd only been there two weeks . . . it's quite a long time. He knew a lot. . . . I knew more about the way the operation was run and how to get the paper out . . . [w]e know why King came there." In addition to earlier stated concerns with Evans' testimony, I found Evans to be vague and sometimes hostile in testifying, which did not impress me as to his frankness. Moreover, his testimony in this instance was internally inconsistent. He testified that King did not give him reasons why his work on September 3 was not satisfactory, and yet his response—"I told you that I would do the best that I could"—clearly indicates he was told what the deficiencies were. I credit King and Marvin's testimony where it is inconsistent with that of Evans.

[29] Concerning the meeting or meetings, Otero's testimony was somewhat confused, and often conclusionary. It was not clear whether the statements Otero recalled were made in an informal meeting in which members of management spoke to him alone or in the general meeting. Regarding one statement, he initially recalled Pruitt saying there would be "hell to pay for," but upon counsel for the Acting General Counsel's prompting, "Now, as best you can recall, what phrase did he use," he changed his testimony and recalled that Pruitt had said the Company would "play hard ball." On redirect examination, he said Pruitt had said the company would play "hard ball to get a contract." Therefore, I find Pruitt did not say that there would be hell to pay or any words to that effect.

press.[30] When he returned from his lunchbreak at noon, the press was not running, and after checking the reels, Otero sat down until the press began functioning. Later that afternoon, when the press again stopped, Otero brought a stool to the chair he was using and elevated his feet. Galleguillos went upstairs saying he would see if help were needed. When Galleguillos called downstairs that the problem wasn't with the reel room, Otero closed his eyes off and on for 20-second periods while waiting for the press to start up. When a bell went off signifying the press was about to start, Otero got up, checked the two reels for which he was responsible, then resumed sitting.[31] He testified he would not be required to check the reels again until a glue roll (called the paster) "fired."[32] The firing would be signaled by a horn, and at that time, the reel workers needed to watch the reels to see that there was no slack and that the timing was accurate. At some point, King, a woman, and two children entered the reel room. King's visit was unexpected. Normally no manager or supervisor was at work on Saturdays, and the press operator was responsible for the press run. Otero continued to sit. Otero explained to the children that the paster was about to fire. After the paster fired, Otero removed the butt cord, put in a new roll, and made up the next paster. King said nothing to Otero.

King testified that he brought his wife and children to the pressroom on Saturday, September 25 at about 10 to 10:30 a.m. to look at the robot system (AGV). When he arrived in the pressroom, King observed Otero in a reclined position with his head back and his feet on a rag can. His mouth was open, his eyes were closed, and King believed he was "dead asleep." Galleguillos who was present when King arrived, immediately left the pressroom,[33] but King spoke to Kloss who was in the pressroom for a minute or so during which time Otero maintained the same posture and appeared to continue sleeping.[34] According to King, the AGV carrying the paper came through the pressroom, beeping, and Otero continued in his same position. King walked to Otero and stood directly over him for 30 to 45 seconds. Otero opened his eyes, stood up and went to one of the reels. King did not speak to Otero as it felt it inappropriate to do so in the presence of his family.[35]

King testified that on the following Monday, he discussed what he had seen of Otero with Owen and Wainwright. Owen asked King to check with other supervisors to determine if the problem was prevalent. King spoke to Marvin and Lyall, asking whether any employee had been disciplined for sleeping. Both denied seeing anyone asleep although Marvin said he had seen employees nodding while sitting. King also spoke to Wink who told him that a couple of months previously he had observed Otero sleeping at work with his feet up on a rag can and that he had had to kick the chair to wake him, telling him that he could be fired for sleeping.[36] King asked Wink to make a note of the incident; Wink made a notation on the back of the personnel calendar. King also checked Otero's file, reviewing a warning for excessive sick leave use, dated January 7, a letter of reprimand dated March 2 which referred to disruption of a sexual harassment training meeting, and a letter of reprimand also dated March 2 regarding a breach of building security by leaving visitors unattended in the tearsheet room. King informed Owen and Wainwright of the results of his investigation and that he wanted to terminate Otero, to which Owen subsequently agreed.

Otero worked on Sunday, September 26 without incident. On Monday, September 27, Otero reported for work at 6:30 p.m. He was met by Marvin who asked him to go to the office. There, Marvin told Otero he was suspended because King had caught him sleeping. Otero testified that he denied sleeping, and Marvin told him to report the next morning at 9 a.m. to see King. According to Marvin, Otero admitted sleeping, saying it wasn't his fault he had fallen asleep; it was Washington's for dragging his feet.[37]

On the following morning, September 28, Otero met with King and Marvin, and King told him he was suspended indefinitely for sleeping on the job, and Respondent would get back to him following its investigation. Otero testified that he denied sleeping, but King insisted he had been "out" and said that he had been brought in to do a job, and this was how the job was going to be; if employees didn't like it, that was just too bad. King testified that when asked why he was sleeping, Otero said that Washington was dragging his feet, the running was taking too long, and he got sleepy and fell asleep. According to King, after this meeting, but before his decision to terminate Otero, Marvin showed him a written record of his conversation with Otero. The record reads, in part: "Dave: . . . You

[30] Otero testified that it was customary for employees in the reel room to sit down after all preparation was completed. Employees could read during that time, periodically looking up and making sure the reels were properly running and listening for abnormal sounds.

[31] In cross-examination, Otero said that he also had his eyes closed and his feet elevated while the press was running.

[32] The paster glues an expiring roll of paper to a full roll.

[33] In rebuttal testimony, Galleguillos testified that he first saw King as he descended the stairs into the pressroom. Galleguillos checked his reels, but the press did not start up for 5 to 10 minutes later. He did not see King speak to Kloss.

[34] In rebuttal, Kloss testified that although he waved to King, he never spoke to him. Kloss said that Galleguillos was seated on the same side of the press as Kloss. Kloss could not see Otero as a staircase divided them.

[35] I accept King's testimony. Otero initially testified that he first noticed King directly in front of him, facing away from him and looking at the press. He then said that he saw King and his family walk into the area of the reel room where he was sitting. On cross-examination, Otero testified that he did not know how long King was in the pressroom before he opened his eyes. He also testified that his eyes were open when King entered and that he closed them thereafter, and he testified that when he became aware that King was there, the press was running "full tilt." These inconsistencies erode Otero's credibility. I do not find it necessary to resolve credibility between King's testimony and the rebuttal testimonies of Galleguillos and Kloss as the latter do not directly bear on whether Otero was sleeping at work.

[36] Wink corroborated King's account of their conversation. He also testified about finding Otero apparently asleep in the reel room in June while the presses were operating. According to Wink, Otero was stretched out in a chair, with his head back, mouth open, and his eyes closed. Wink bumped Otero's foot and said, "Hey, that's one of the things you could lose your job over."

[37] I credit Marvin's testimony over that of Otero. Although his testimony had to be refreshed by memoranda he had made at about the time of the events, he was straightforward and appeared candid.

get tired, you come in and want to get going, but [Washington] just drags his feet . . . we need leadership, the crews are getting away with to [sic] much. . . . Every body has slept down here." In parentheses, after his name, Marvin added: "(Dave did admit to me that he was sleeping, but tried to blame it on Allen for taking to [sic] long. He seamed [sic] more upset at Allen than worried about his job.)" According to King, he then told Owen of the meeting, that Otero had not denied sleeping and blamed it on somebody else. King told her that based on that and Wink's information, it was his decision to terminate Otero. King then prepared the termination letter.

Responding to a phone message, Otero returned to Respondent on Wednesday, September 29, at 2:30 p.m. Again he met with Marvin and King. King informed Otero he was being terminated for sleeping while at work the previous Saturday. Otero testified that he protested, saying he was just resting his eyes, and pointing out that two employees had just gotten caught with alcohol on their breath and beer cans in their hands in the parking lot and had only gotten a 3-day suspension. King said that he had made his decision. Otero said that Wink had his eyes closed all the time. King said he didn't want to hear about that. Otero said his termination was because of his union activity, and King denied that union activity was any part of it. According to King, he told Otero that because he had been sleeping, he was going to be terminated. Otero did not respond to that statement. He and Otero talked about his 401(k) plan and about the belongings he kept in a second locker. Marvin essentially corroborated King's testimony. He testified that he helped Otero take his personal property to his truck in the parking lot, and Otero again said it was Washington's fault.[38]

The General Counsel presented evidence of other employees caught apparently sleeping who were not terminated. Otero testified he has seen employees Ernie Felix, Wink, Howard Garris, Leroy Lee, and Kloss with their eyes closed while at work, and that Ernie Felix had slept in the quiet room while pulling a double shift. According to Otero, he had seen Wink observe but ignore the apparent sleeping. Wink denied observing employees sleeping or with their eyes closed and doing nothing about it. He said that employee Ernie Felix had, in the past, worked double shifts, and had slept between shifts, asking other employees to wake him. Sometimes people forgot to wake him, and on a couple of occasions he arrived late for his second shift because he slept into the starting time.[39]

Kloss, employed by Respondent since 1981, testified that about 10 years ago, when working a double shift, he lay down on rolls of paper with his eyes closed. Lyall nudged him and said, "Joe, if you're going to sleep, would you sleep in your chair over there." Kloss also testified that about 4 or 5 years prior to the hearing, he was coming into work sick, and sat in a chair with his feet up and his eyes closed. Although Marvin saw him doing it, he said and did nothing. Kloss was never disciplined for sleeping. Kloss testified that the only employee he could recall seeing with his eyes closed at work was Otero, and he had seen that on as many as fifteen occasions. Kloss recalled seeing employee Howard Garris in the reel room in 1999 with his eyes closed. He did not know if any supervisor saw him. In his affidavit given to the Board, Kloss stated that Respondent did not permit sleeping on the job.

Galleguillos testified that he has observed employees with their eyes closed: Louie Segura in 1977 and Jerry McPherrin in the 1980s. He has not noticed employees with their eyes closed when working days.

Carlson testified that in his 8 to 10 years of working nights, he has not observed employees sitting with closed eyes or sleeping. Marvin testified that on two or three instances he had seen employees with their eyes closed but clearly not asleep as they opened their eyes after a few seconds. They were not disciplined. Under cross-examination, Marvin testified that the only employee he could specifically recall with his eyes shut was Otero, 5 or 6 years prior to the hearing during a night shift. On that occasion, Marvin kicked Otero's foot as he passed by him. Otero was not disciplined.

G. Suspension and Discharge of Allen Washington

Washington worked for Respondent from August 27, 1990, until his termination on October 18, 1999, at which time he was employed as an offside press operator. Washington contacted the Union at the request of other employees to seek representation in 1998. He openly wore union insignia during the campaign and after the election, distributed union literature or handbills in front of Michaels Chevrolet and Respondent, attended union rallies at both premises, served as a union observer at the election and on the Union's negotiating team, and attended a prior NLRB hearing in August. Owen said she knew him to be an active union supporter. Washington said that no member of management commented on his union activities.

Washington testified that prior to the July 1998 election at a 30–45 minute meeting of employees, Pruitt said that if there was going to be a union in the Fresno Bee, Respondent was going to play hard ball, that he didn't want any union inside the Fresno Bee, and he was very surprised to hear that the Union was being brought into the pressroom.

Sometime in September, Washington asked to be taken off double shifts on Saturday. Marvin testified that on Saturday, October 2, he received a call at home from Washington who had seen the work schedule and was upset about having been taken off Saturday mornings. He wanted to be put back on Saturday mornings and taken off Saturday nights. According to Marvin, Washington was angry and raised his voice, but Marvin refused to change the schedule, telling Washington it was just for 1 week, and he and King would take a look at it.

[38] I accept Marvin and King's versions of the interview with Otero. As set out before, I find Otero not to be fully credible.

[39] I found Wink to testify in a straightforward, honest manner. He is no longer employed by Respondent and has no apparent self-interest in testifying falsely. It is clear that as a supervisor, he tended to be silent about employee conduct that might result in discipline. That trait militates against his being willing falsely to accuse employees of misconduct. Further, there is no evidence he bore animus toward any employee for Union or any other activity. I consider him to be a neutral witness and accept his testimony. I also note that although Otero testified of employees who closed their eyes while working, he did not name them to King at his termination. It is reasonable to conclude that if Otero had, indeed, thought himself treated differently than other sleeping employees, he would have pressed the issue at that time.

Marvin told Washington that if he were a team player he would work with Marvin on it. Washington said it was his right to have the schedule as requested. Marvin documented the conversation and provided King with the memorandum. In early October, Washington was removed as press shift man-in-charge. King testified the action was based on the press reports, which showed excessive down time, overtime, and problem resolution time compared to other reports.

Washington testified that on Saturday, October 9, he reported for the night shift. He perceived that the press had not been made fully ready for his shift by the earlier crew. On the following Monday, October 11, King appeared at work during Washington's shift. Washington went to King's office to inquire why the day crew had not made the press ready for the previous Saturday night. Dave Thompson was present, but Washington asked to speak alone with King on a personal matter, and he left. According to Washington, he asked King why the press wasn't made ready. King told him that he should not worry about the press but about his own job performance. Washington told King that he wasn't there to discuss his job performance, but why the press wasn't made ready because of the extra work the Saturday night crew had had to do. King said that Washington's performance had been poor, that he had more downtime than anyone in the pressroom. Washington asked King to compare his down time with that of other employees. King told Washington not to tell him how to do his job. Washington replied that he was not trying to tell King how to do his job, pointing out that King had not been at Respondent long, and if he would look into it, he would see that all press operators have down time. King pointed his finger at Washington and said that he should not be worried about others' downtime, but that he needed to worry about his own bad job performance. According to Washington, both he and King spoke with raised voices, and at some point, King told Washington he could fire him unless he quieted down.[40] Washington told King that was a bunch of bulls—. King told him his language would not be tolerated. Washington immediately apologized. King criticized Washington for an incident in which King had to burn plates that Washington should have taken care of. According to Washington, this reference was to an incident occurring about a week prior when King had unsuccessfully attempted to burn a plate. Washington asserted the problem occurred due to a staffing shortage. Washington also recalled that King made reference to an earlier conversation with Washington that he did not like. According to Washington, 2 weeks earlier, he was talking to King and jokingly told him not to sell his house. In that conversation, Washington was making reference to the previous pressroom manager, Van Der Muelen, who had sold his house to move to Fresno but had been fired after a few weeks. King answered that he would be there longer than Washington thought. Washington told him the earlier conversation had been a joke, that he hadn't meant anything by it. Washington said that he also complained that his pay and benefits were not in accord with the work he was doing. King said he would look into it. At the conclusion of the interchange, Washington apologized again for his language, and for getting into a heated argument without resolving anything. He asked to be excused to return to work. Washington specifically denied saying he was tired of "this f— sh—" or ". . . this f— sh— has got to stop."

King testified that prior to being hired by Respondent, he had learned of Washington from Owen. In the course of her recruitment discussion, Owen told King that Washington was somewhat of an intimidator in the pressroom, that some employees were scared of him, and she wanted King to know what he was stepping into. King said he was not aware Washington was a union supporter until he arrived at the Fresno Bee. Owen testified that she discussed problem employees with King when he was hired. Washington was at the top of her list as he had used profanities with her both before and after the union election.

King testified that his problems with Washington began shortly after he assumed the pressroom management. He said Washington treated him with disrespect from the beginning. On August 28, the first Saturday after he began at the Fresno Bee, Washington came into his office at work and introduced himself. After some chitchat, King asked him about the previous Saturday's press report where Washington had noted not having enough workers with resulting safety issues.[41] King said, "I've got some problems with your press report here . . . can you explain it to me?"

Washington replied, "It's self-explanatory, read it." King said he had read it, and he thought Washington was confusing manning issues and safety issues. According to King, Washington said, "Okay," turned, and walked out. King felt Washington had been disrespectful. Later that day, King walked into the quiet room. Washington was present and said to him, "See this f— sh—, we need a plate burner; we haven't got a plate burner; I need a plate." King asked if one of the men downstairs could burn the plate as the presses were then stopped. Washington said, "No, they're too busy." King again considered Washington's manner and words to be disrespectful. King said he would burn the plate himself and left. As he did not have experience with Respondent's system, King acknowledged he "didn't know what [he] was doing," and an employee from the reel room offered to burn the plate.

King testified that at an evening shift during the following week, he walked toward the quiet room where four to six employees, including Washington, were seated. When Washington saw him, he turned to the employees and said, "Here comes the boss man; everybody better shut up." King considered Washington's tone and words to be offensive. On a later occasion, when King entered the pressroom, Washington began singing a "cattle-driving song . . . like 'Keep Those Dogies Moving.'" King considered that to be a disrespectful reference to pressroom employees being overworked. King did not then take issue with Washington as he felt he was being baited and that it was best not to respond.

[40] Washington initially testified that King spoke to him in a "raging" voice. Later, he testified that he and King "exchang[ed loud] tone of voice," which I take to mean that both spoke with equal loudness and intensity.

[41] According to Marvin, Washington constantly complained about the reduction of the crew on Saturday day shifts.

According to King, while talking to several employees in the quiet room a couple of weeks after Evans' termination, Washington, broke into the conversation and asked, "Have you sold your house in North Carolina yet?" King said he had not. Washington said, "Well, don't you think you better hold onto it; the last guy didn't make it." King understood Washington to be referring to Van Der Muelen who had been terminated. King took it as a threat the employees would run him out of town. King replied he was not going anywhere. Washington looked around at the rest of the group and said, "It must be nice to be that confident."

At some point, King looked at Washington's manager file. In the file, King found various writeups, a memo from Owen about Washington being disrespectful, and a final warning. The final warning was from Van Der Muelen, dated February 10, and cautioned Washington about, inter alia, use of "abusive language and . . . derogatory comments directed at . . . employees . . . [which] verbal harassment is a serious matter and one that the company does not and will not take lightly." Washington was reminded that the warning was his second in 6 months related to work performance and that "unless you correct your behavior and conduct yourself properly . . . your employment at The Fresno Bee will be terminated."[42]

On October 11, King testified, he was in his office talking to Thompson. Washington asked if he could speak to King alone. When Thompson left, Washington said that the "f— sh— ain't right. Franco didn't do his make ready." Washington said that on the previous Saturday night, he had found the work undone, and that if it had been [Washington], he'd have hell to pay. King told him to stop cursing, which he did. Washington told King that if he knew how to do his job, he would know that Washington was a good operator. King told him that his press reports did not look good and said, "I'm also frustrated by . . . how you treat me as a supervisor . . . it's very disrespectful." Washington said that Owen, Carlson, and Lyall had not given him a chance, and King told him that he seemed to think it was everyone's fault but his own and that he needed to figure out a way to gain the respect of his supervisors. King told him the press problems he had were not of as much concern to Respondent as was the amount of time it took to correct them. King also told Washington that he was tired of his nasty mouth and taunting, specifying the cattle-driving songs and the "boss man" incident. During the course of the meeting, according to King, he decided that he wanted to fire Washington because of his lack of respect and unconcern about helping the group.

King informed Wainwright and Owen that Washington had been verbally abusive and that he wanted to terminate him. According to Owen, King was upset about Washington's asking him in front of the press crew whether he had sold his home in South Carolina and felt that Washington also baited him by singing "cattle herding" songs when King appeared on the pressroom floor. The managers discussed Washington's past warnings.

About 2 days later, according to Washington, King telephoned him and told him he was suspended until further notice. Washington asked for what reason, and King said he would rather not get into it.[43] According to Washington, King gave no reason for the suspension. Washington reported his suspension to the Union, but could not recall his conversation with the union representative.

On Friday, October 15, King telephoned Washington and left a message that he wanted to schedule a meeting among himself, Owen and Washington. After several phone messages, Washington spoke to King and said he could not attend the meeting. King told Washington to forget it, and he read the termination papers over the phone. Washington testified, "I asked him why and I apologized for what I did."[44] The termination letter stated, in part: "On February 10, 1999 you were give [sic] a Final Warning for poor job performance and abusive language. Since then you have repeated this mis-conduct [sic]. Specifically, you have failed to perform your job duties at an acceptable level. You have also continued to use personally abusive language in the work place."

On Sunday morning, October 17, Washington went to Respondent's premises to obtain a free Sunday newspaper as was permitted. When he attempted to gain entry with his employee security card, it didn't work. A mailroom employee admitted him, and Washington cleaned out his locker. A security guard escorted him from the premises. At some point following that Sunday, Washington's termination papers were mailed to him.[45]

I have carefully considered the testimonies of Washington and King. As noted, there are some significant inconsistencies in Washington's account of events. I also note that he did not deny the conduct that King considered to be disrespectful, although he did attempt to soften the effect, contending that he had not used certain language and, with regard to the house sale conversation, had only been joking. Because of the inconsistencies and because of the manner and demeanor of both witnesses, I accept King's testimony over that of Washington.

The General Counsel presented evidence intended to show disparate treatment. Otero testified that employees frequently use profanity and obscenities among one another while working and that employee David Freeze (Freeze) frequently berated other employees, calling them incompetent and stupid. Marvin and Wink told Otero that nobody wanted to work with Freeze.

[42] Received into evidence were a memo to Washington from Carlson dated August 18, 1998, regarding Washington's having permitted an entire crew meal break and the final warning from Van Der Meulen dated February 10, 1999. The final warning also dealt with Washington's failure to assist an apprentice. In his testimony, Washington denied refusing to help the apprentice, saying he had explained he was too busy with his own work. Washington did not deny that he had used abusive language on that occasion.

[43] King did not recount the suspension conversation.

[44] Washington's testimony regarding King's attempt to schedule a meeting with him was confused and somewhat resistant if not evasive. He was questioned several times about the sequence of events before it was finally learned that King had called and left a message, that Washington returned the call, leaving a message that he couldn't make the meeting because of illness, and that when King called again to reschedule, Washington again refused to meet because of illness.

[45] Washington testified that when his security card did not work, he, realized he had been terminated. Later testimony, however, revealed that he was fully aware of his termination before Sunday as King had already read the termination letter to him.

Otero agreed that he had never seen Freeze direct abuse at King. Evans testified that in March or April 1998, he observed Freeze say to Van Der Muellen that he didn't have to "take this sh—," and "get out of my f— face." Evans understood Freeze received a 3-day suspension for his conduct.

Kloss testified that the use of profanity among employees in the pressroom was common. In the last year, he recalled a night when 8 to 10 pressmen were working. Two employees had a dispute and began yelling at each other across the room. Wink was in a position to hear what was going on, but the profanity was not directed at him, and he did not get involved. Kloss also testified that employee Jerry McPherrin had said he was suspended for three days when, using profanity, he "told off" Lyall. Kloss could recall no other instances of employees using profanity to a supervisor.

Galleguillos testified that in 1995 or 1996, Dave Reynolds (Reynolds), maintenance supervisor, used profanity when telling Galleguillos that he was to follow Reynolds' directions. Galleguillos could not recall the profanity used. Galleguillos said he had heard many profanities used in the presence of supervisors, but could not recall any directed at supervisors.

Respondent countered with evidence that other employees were also disciplined for abusive behavior. On March 18, Freeze received a 3-day disciplinary suspension for "yelling and swearing" at another employee and Van Der Muelen. Freeze was directed to make an appropriate anger management appointment before returning to work and informed that failure to do so, would result in termination. Owen testified that Freeze gets frustrated if people don't work as hard as he does, and sometimes it comes out as confrontational. Respondent has received complaints about his confrontational manner, but he has not been terminated because he's one of the best workers in the pressroom. In August 1999, employee Scott Simmer was given a disciplinary letter for insubordinate and disrespectful conduct directed toward other employees, which stated similar future conduct could result in termination.

H. Alleged Imposition of New Bereavement Leave Requirements on Falcon

Falcon was employed by Respondent from January 7, 1991, until he terminated his employment on October 1, 1999, at which time he was a journeyman pressman.

According to Falcon, sometime in September 1998, following the union certification, Lyall spoke to a group of four employees: Cardoza, Franco, and Pat Meyers (Meyers), and himself. Lyall said, in effect, that employees were going to get it now; they should watch their P's and Q's, that things were going to start to change.[46]

Sometime in November 1998, the Union held a rally at Respondent's premises. According to Falcon, he asked permission to attend the rally, but Marvin said the press was running behind, and Falcon needed to stay and watch the press. Falcon noticed that 20 to 30 employees attended the rally, and he observed Owen, Carlson, and Lyall standing at the pressroom windows, watching the rally and writing. Later, Marvin spoke to Falcon in the presence of Cardoza and told him that it was best he did not attend as they were writing down names of those who attended. Carlson testified that he never observed a union rally at the Fresno Bee or wrote names of employees attending such a rally. Marvin denied that he had ever told Falcon he wouldn't let him go to a union rally or that Respondent was writing down the names of attendees.[47]

Respondent's leave policies permit paid bereavement leave. Employees seeking such leave fill out an absence form and check the box for "Bereavement Leave." The form has a line designated as "Reason for Absence" and directs employees to include specific information regarding the leave sought. The General Counsel submitted eight completed forms into evidence. In the "Reason for Absence" line, employees gave such information as "uncle died" or "death in family" or "funeral." On two forms, the lines were blank, but were nonetheless signed by the department manager as "eligible for paid absence."

Falcon testified that sometime in 1997, he claimed bereavement leave upon the death of his uncle, taking 3 days. He was not required to provide Respondent with any documentation related to the death. In February 1998, Falcon claimed bereavement leave on the death of his grandmother. He was informed of her death at work, left his shift, and took over 2 days of leave. He was not required to provide Respondent with any documentation concerning the death. In September, David Macias, who was unrelated to Falcon, but whom Falcon considered an uncle, died. Falcon was notified on September 21. The funeral was to be held about 25 to 30 miles outside of Fresno on September 23. Falcon had no responsibility for making funeral arrangements of for managing any of Macias' estate, but he did help with the catering.

According to Falcon, on September 21, he telephoned Marvin and told him he needed 3 days of bereavement leave. He did not say who had died, and Marvin did not inquire. Marvin asked if the funeral was out of town, and Falcon said it was. Marvin said he could not just hand out bereavement pay. According to Falcon, he said he wasn't worried about the money, he just needed the time off. Marvin said, "Okay." Marvin did not ask who had died or where the funeral was. Falcon understood Marvin to acquiesce in his request for leave. Falcon was absent from work for 3 days. Marvin recounted the conversation differently. He testified that when Falcon informed him that somebody had died and he needed to take bereavement leave, Marvin asked who had died. Falcon said it was his uncle and that he needed 3 days, that he had it coming. Marvin asked if the funeral was out of town, and Falcon said it was not. Marvin told him that he could not receive 3 days, and Falcon answered, "I have three days coming; I deserve it, and

[46] Falcon agreed that Lyall was, at that time, no longer the pressroom manager, but was responsible for quality control. Since Lyall's classification change occurred in November 1998, Falcon must be mistaken about the date. I find Lyall was no longer a supervisor when this statement was made.

[47] I accept Carlson's and Marvin's testimony. In addition to relying on manner and demeanor, I note Falcon's testimony suggests that he alone was left to watch the presses, but all other testimony about the pressroom shows that multiple employees were necessary when the press was running. Although called by the General Counsel, Cardoza was not asked about the conversation.

I'm going to take it. And you guys do whatever you need to do." He then hung up. Marvin testified that the information he sought from Falcon was information he asked of other employees requesting bereavement leave.

Falcon testified that on September 24, he telephoned Respondent to find out what his shifts would be. He spoke to Wink who said King wanted to talk to him. When King came on the line, he told Falcon that he, Falcon, was not running the show, and that he was suspended indefinitely. He gave no reason for the suspension. On September 28, King called Falcon at home and asked why he had not shown up to work. Falcon reminded King that he had suspended him. King said Falcon was to show a death certificate or not bother showing up. Falcon told King that he was inconsiderate and thoughtless and hung up. Falcon felt humiliated by his treatment.

King testified that after learning of Marvin's conversation with Falcon, he contacted Falcon by telephone. King told him he had been trying to reach him, and Falcon said he had just gotten back from Arizona, from a funeral. King said, "Well, you told Paul the funeral was in town." Falcon said he thought Respondent was playing games with him. King denied that and told Falcon he was not offering reasonable explanations and that he should try to bring something—a newspaper clipping, a death certificate—anything that would show he had been to a funeral. When Falcon did not report for work, King called him again. Falcon said he was not due back until he had the required information. King told him he did not have an indefinite amount of time to get the information, that he needed to get it and return to work. A day or two later, after conferring with Wainwright, King called Falcon again and told him that he had until the following Friday to bring in the requested information. Falcon again accused Respondent of playing games with him.[48]

On September 29, Falcon called Respondent's human resources department and spoke to Laura Janigian (Janigian), human resources manager. He told her to send him termination papers, as he was not returning to work because he had been forced to quit. He told her that in all the years he had been there, he had never been asked "this;" he was fed up with it; he and his wife were offended, and he was choosing not to return to work.

Wainwright testified that supervisors exercised discretion in determining the number of days granted for bereavement leave. Factors to be considered included the location of the funeral and the involvement of the employee in funeral planning or estate management. Time off to attend a funeral for a close friend is addressed in the manager's manual and permits such leave only with the approval of the department manager or division director. During September 1998, Falcon's department manager was King.

The General Counsel submitted testimony in support of his argument that Falcon was accorded disparate treatment. Washington testified he claimed bereavement leave in connection with family deaths in 1994 and 1995. He was not required to provide proof of the deaths or the funeral locations. At the time of his mother's death, Washington's supervisor would only allow him 2 days off, and Washington obtained extended time from Respondent's personnel office. Kloss testified that he claimed bereavement leave in 1996 and 1997 upon the deaths of his grandmother and uncle, respectively. Although employees were entitled to 3 days bereavement leave, he took only 2 on each occasion. He was not required to provide documentation of the deaths or locations of the funerals. Kloss' supervisor, Marvin, asked him who had died, which days he would need, and whether the funeral would be out of town. Galleguillos testified that he has claimed bereavement leave without being required to furnish any documentation or proof.

I. The Suspension and Final Warning of Kloss

Kloss was chapel chairman under the prior union. In the latest union campaign, he openly wore union insignia, engaged in other union supportive activities, and attended negotiations as a member of the bargaining committee. During the preelection period, he attended a meeting of employees at which Pruitt spoke. Kloss testified that Pruitt told employees that if the Union was elected, the Company would play hard ball.

Kloss testified that in the 1986 and 1989, respectively, while employed by Respondent, he received warnings about his use of sick leave and was placed on doctor's note restriction.

In January, Owen, feeling that employees were using excessive sick leave directed Van Der Muelen to investigate employee sick leave use. The investigation showed that sick leave use had increased almost 65 percent since the union election in July 1998. Consequent upon the rise of sick leave use was increased overtime. Thereafter, Respondent gave warning notices to employees with more than 10 days of sick leave in 1998, excluding employees with major medical problems or family issues. Van Der Muelen gave Kloss a written warning regarding excessive sick leave, which stated that during 1998, Kloss had been absent due to sickness a total of 14 days. Kloss was placed on doctor's certificate restriction. Employees Aguirre, Bobby Gamboa (Gamboa), Tom Flores (Flores), and Meyers received similar warning notices.[49]

On June 4, 2000, King gave Kloss a final warning/suspension, informing him he was being suspended for 3 days because of his sick leave use and pattern. Kloss pointed out that because of the peculiarity of scheduling, any extended sickness tied into days off and said he thought having a doctor's verification should suffice. According to Kloss, King said that anybody could get a doctor's excuse. Kloss said he intended to pursue the matter further. King told him to go ahead. King said he still considered Kloss a top employee other than his sick leave usage. Between June 4, 2000, and March 6, 2001—the date he testified—Kloss used no sick leave. Sometime in March 2001, King said he heard a rumor that Kloss feared termination if he took sick leave. King told Kloss that he thought

[48] I accept Marvin and King's accounts of their conversations with Falcon. I note the inherent unliklihood of an employee's requesting maximum bereavement leave without his supervisor asking for some details. Further, by his own admission, Falcon was not entirely candid. By his account, he led Marvin to believe that the funeral was out of town when in fact it was in the general vicinity of Fresno.

[49] Meyers was given a warning for poor attendance in August and a final warning/suspension letter dated May 22, 2000, regarding his absentee record and "history of being out in conjunction with . . . days off" and informed that further infractions could result in termination.

he was doing a great job and that if he were sick, he should not come to work, and he would not be punished for his absence.

J. The Discharge of Aguirre

Aguirre worked for Respondent from March 27, 1997, until his discharge on September 20, 2000. During the union campaign, he openly wore union insignia at work, attended union rallies on the Bee's premises, and distributed union literature in Respondent's parking lot during nonworktime, on one occasion handing literature to Wainwright and Owen. Aguirre served as an alternate on the Union's negotiating team.

Aguirre testified that about 3 weeks prior to the election, Marvin asked him and some other employees what the Union was going to do for them. He pointed out that the prior union did not do anything, and that the employees were going to wind up paying dues and possibly losing benefits. In another conversation, Marvin asked Aguirre if he had been at Denny's, which Aguirre inferred to be a question as to whether he had attended a union meeting held there earlier that day. At about that same time period, according to Aguirre, Owen saw him wearing a hat with union insignia and "looked like stunned." No words were exchanged. Owen's manner thereafter changed toward him, said Aguirre, and she did not speak to him until after the election.

Aguirre testified that his supervisor, Lyall had told him, that employees received 10 days sick leave per year. No one, he said, ever told him of what number of sick day use Respondent would consider to be excessive or of policies relating to doctor's verification or tying sick days to scheduled days off.

Aguirre admitted he took more than 10 days sick leave in 1998, the bulk of them in the latter half of the year. On January 7, Aguirre received a written warning from Van Der Muelen who said all employees who had gone over their 10 sick days in 1998 were receiving such letters except for employees Cardoza and John McDonald because the former had a heart problem and the latter a wife with cancer. Aguirre asked why, and Van Der Muelen said it appeared that employees were abusing sick leave. Van Der Muelen told Aguirre he would have to produce a doctor's note for future sick leave requests. Thereafter, Aguirre used additional family emergency leave for serious family problems, which was charged to sick leave although Aguirre had requested use of accrued vacation leave. Both Van Der Muelen and Marvin told Aguirre that since the need for leave arose under a family emergency, vacation leave could not be taken.

On August 18, Aguirre received a final warning regarding excessive absenteeism from Carlson. The notice stated, in part: "Not only is the number of days you were absent an issue but also the fact that all of these dates are tied to your days off or fall on weekends. In addition to this, there were eight incidents of sick time, 6 of which you failed to meet the requirements of bringing in a doctor's certificate." Aguirre said he told Carlson the warning was prompted by antiunion considerations, but Carlson did not respond.

Aguirre incurred 2 days of additional sick time in November. Aguirre was asked to meet with King and Marvin who asked him about his sick days and doctor's notes. King said that the doctor's notes were very vague and did not specify the health problem or the treatment. Aguirre suggested they call his doctor and check it out. King testified that he told Aguirre his sick leave record was horrible and that he expected him to improve on it.

On April 12, 2000, Aguirre met with King and Marvin and was given a written work suspension until further notice dated April 11, 2000, due to excessive absences and "the pattern" of sick time use. In addition to reciting the above events, the suspension stated: "On Jan 13, 2000, you called in sick for 4 consecutive days immediately following your normal Tuesday/Wednesday days off. Sunday night April 9, 2000, you called in sick again, when you were already scheduled to be off on April 10 and 11. The Fresno Bee has afforded you every opportunity to correct your behavior with no improvement."[50] Believing the doctor's notes appeared suspicious, after asking Aguirre's permission, King took the notes to the doctor's office where the office nurse verified them. King said Respondent decided to give Aguirre another chance.

The following month, Aguirre missed 2 days work because of his father's cancer surgery, another 2 in June 2000, and took 2 days of bereavement leave in July 2000. After discussion with Wainwright, King drafted a "time line" of Aguirre's absences for her to see, which showed 12 days sick leave use in 1998, 13 days in 1999, and 12 days in 2000 through September 16. Thereafter, King decided to terminate Aguirre for excessive sick leave use.

On September 21, 2000, King terminated Aguirre. Aguirre testified that King "started going on about my sick days and all, and then I proceeded to ask him, 'well, what, I can't take any sick days anymore?' and then he goes, 'well, I don't want to hear that.' So I just told him, 'fine, you know, I don't want to hear anything either, just give me my papers and I'll get out of here.'" Aguirre was given a termination letter, which he refused to sign. The termination letter stated, in part: "You are being terminated [as of September 20, 2000] for excessive absenteeism and the pattern in which you use your sick days." The letter summarized Respondent's actions taken through November, and stated, "April 11, 2000 you were suspended for 5 days for excessive use of sick time and using 5 days in conjunction with your days off. Since your suspension you have been out 8 more days. The Fresno Bee has given you every opportunity to correct your continued abuse of sick time with no success. Therefore at this time we must terminate your employment."

K. The Collective Bargaining

Frank Young (Young), union president at times material hereto until May 1999, was responsible for bargaining with Respondent from the Union's certification date until Brad Cagel (Cagel), president of the Union from May 1999 until October 2000, assumed those responsibilities in February 1999.[51] Employees Galleguillos and Kloss most consistently

[50] At the hearing, Aguirre said the suspension notice was erroneous in that he did not have normal days off. He did not, however, mention that discrepancy to King and Marvin because he "felt intimidated."

[51] Cagel's testimony was often fragmented and sometimes confusing. He tended to give conclusionary testimony. His testimony set forth herein is constructed from his statements given piecemeal in

attended negotiation meetings as members of the union negotiation committee after Cagel assumed bargaining responsibility. Other employees attended sporadically. Robert L. Ford (Ford), attorney, was Respondent's chief negotiator, accompanied by Owen and Wainwright.

By letter dated September 16, 1998, the Union advised Respondent, inter alia, that it could not make unilateral changes without affording the Union the opportunity to bargain. By letter dated September 30, 1998, the Union requested, inter alia, copies of all disciplinary actions for the preceding year, which information was subsequently furnished to the Union.

In February, Respondent, through its negotiator Ford, notified the Union that it intended to change employee lunch periods. The Union filed unfair labor practice charges with the Board alleging that Respondent had refused to bargain over the proposed changes, and a hearing was held. An administrative law judge's decision is currently before the Board on exceptions. By letter dated February 22, the Union requested bargaining over the decision and the effects of any changes, and specified, inter alia, that "no employee should be warned, counseled, disciplined or terminated without bargaining[.]"

Prior to their terminations or other discipline, Respondent gave no notification to the Union that it intended to terminate or otherwise discipline employees Barrientez, Evans, Otero, Washington, Aguirre, and Kloss and, prior to imposition of discipline did not offer to bargain about the discipline. Respondent gave no notification to the Union regarding the documentation requirement imposed on Falcon. According to Ford, at no time did any representative of the Union request bargaining over Respondent's discipline of these employees or Falcon's bereavement leave. Ford testified that discipline procedures were the subject of bargaining throughout negotiations and that the parties agreed to just cause as a standard for termination grounds.

According to Owen, subsequent to the termination of Barrientez, Keegan telephoned her and asked if there was anything Respondent could do to get Barrientez back to work. Owen said there was not. Thereafter, a bargaining session was held in June where, according to Cagel, he demanded to know on what basis the Company felt they could terminate Barrientez and asked if the termination was based on the policy of substance abuse that had been proposed by the Company. Ford said that Barrientez was not terminated based on the proposed substance abuse policy, but that the termination was consistent with the existing policy. Cagel asked what the existing policy was. Ford said he did not know but that the discharge was consistent with it. According to Cagel, Respondent's position was that there were existing conditions they did not have to bargain about or discuss, including the termination of Barrientez and that it was improper to discuss his termination at the bargaining table. Ford asked to leave the bargaining table and meet outside the room to discuss Barrientez. Ford, Wainwright, and Owen met separately with Cagel. According to Cagel, Respondent's representatives told Cagel that Barrientez' termination involved a medical condition that was not proper to discuss. Cagel told them they should reinstate Barrientez.[52] They refused. Cagel asserted that Respondent's policy had suddenly changed, that Respondent had decided to look for anything to let a union supporter stumble and fall on, and that they had known about Barrientez and his medical problem for 20 years. Ford said the Union could file a charge if it had a problem.

Wainwright testified that when Cagel asked about Barrientez' termination, she suggested that Respondent's representatives speak with Cagel outside the bargaining room. When the group met separately from the bargaining committee, Respondent's representatives told Cagel what had happened on the night of June 3, and that Barrientez had had a prior alcohol-related incident at the Company. Ford testified that he told Cagel in the separate meeting that Barrientez had come to work impaired under alcohol, that it was not the first time it had happened, that Respondent was applying progressive discipline to him, and that unfortunately, he deserved to be discharged. Ford said Respondent was willing to bargain about the discharge if that's what the Union wanted. Owen essentially corroborated the testimony of Wainwright and Ford. According to all three, Cagel made little response, and Owen testified that Cagel said he had not known the information they gave him. According to Ford, Cagel thereafter never brought up the subject of bargaining over Barrientez' termination.[53]

At some point, Keegan informed Cagel of Respondent's disciplinary actions against Evans, Otero, and Washington, and of the circumstances of Falcon's termination. Cagel testified that he telephoned Owen several times to discuss the discipline, but she did not return his calls. Owen denied that she had failed to return any of Cagel's calls.[54] On November 9, the Union filed a charge with the Board against Respondent alleging violations of Section 8(a)(1), (3), and (5) of the Act in the discharge of the alleged discriminatees and the circumstances surrounding Falcon's termination.

Cagel brought discharged employees Washington, Evans, and Otero to the bargaining session of November 15. Cagel spoke at length to Respondent about its failure to reinstate the employees. Cagel testified that he did not recall asking Respondent why Otero was terminated; he did ask Ford why Washington and Evans had been terminated, but Respondent

direct, cross, and redirect examinations. I have referred to the bargaining speakers as "Respondent" and "the Union" where appropriate unless specificity as to identity is pertinent.

[52] Cagel testified that in addition to asking for reinstatement, he "pitched some settlement," the specifics of which he could not recall.

[53] I accept the testimony of Respondent's witnesses in this regard. I note that the Union did not document its demand to bargain, and, although that is not dispositive of whether a demand was made, it is not unreasonable to expect documentation in so sensitive an area, particularly where the Union has put other demands in writing. Further, Kloss did not recall anything being said at the bargaining sessions about Barrientez' termination, which suggests that the Union did not significantly address the issue.

[54] I accept Owen's testimony in this regard. She appeared to be careful in the performance of her job. I don't believe she would have left Cagel's messages unanswered. Cagel did not testify that he complained about her failure to return his calls in any bargaining session, and there is no evidence that he made any written protest, both of which could reasonably be expected if his calls were not returned.

did not answer.[55] Cagel testified that Respondent's representatives consistently refused to discuss any of the discipline. Cagel said he made an oral request to Respondent to provide the Union information with respect to the terminations.[56] Cagel testified that at this bargaining session, he also raised the issue of the unfair labor practice charge, and told Ford that the Union was prepared to talk about the charges. He requested Respondent bargain with the Union concerning all of the disciplinary actions taken against all the alleged discriminatees and Falcon. According to Cagel, Respondent refused. Cagel's testimony was somewhat confused. He testified, essentially, that he told the company their lunchtime changes were causing pressure on employees to meet impossible expectations, and that the Company was, at the same time, choking employees with disciplinary writeups. Cagel initially testified that Respondent refused to discuss the disciplinary actions, but later testified that the Company avoided discussing them by calling for a lunchbreak. In redirect examination, he first testified that Respondent's representatives were "furious," and then testified that when he asked to discuss the unfair labor practice charges, they "just smiled." Under cross-examination, Cagel agreed that in affidavits given to the NLRB, he did not say that the Union had requested bargaining concerning any of the individuals who are the subject of the present case.

Ford testified that at the November 15 bargaining session, Cagel made a long speech about Respondent's terrorizing employees and violating the law. In response, Ford disagreed with his characterization of Respondent's conduct and said that if the Union wanted to argue about the law, the appropriate forum was the NLRB. He told the Union that the employees had been afforded progressive discipline, that the employees had been terminated for just cause, and that it was not a matter to be brought up over the negotiating table. He refused Cagel's request to reinstate the employees pending a determination of whether or not the discharges were justified. Ford said he offered to talk about individual discipline matters away from the bargaining table as negotiations were for contract issues and as important privacy issues were involved in discussing terminations. Ford said that he and Cagel went alone into the hallway. Ford told Cagel that if he wanted to talk about the terminations, Respondent was willing to do so; if he wanted to bargain about it, Respondent was willing to do so. Cagel said he could not discuss it that day as he had to go to a press conference called by the Union. Ford said that Cagel did not, thereafter, bring up the subject of any of the discharges at negotiations or otherwise contact Ford about them.[57] There is no evidence that the Union ever requested bargaining about sick leave use discipline.

L. Additional Evidence

Employee Leo Galleguillos testified that his supervisor is maintenance supervisor, Dave Reynolds, who reports to King.[58] In June 1998, Reynolds told Galleguillos that if the Union came in, "hell would be paid." Galleguillos said it would be the best thing for the shop to have a union. In the spring, after OSHA conducted an inspection, Reynolds told Galleguillos that he took it "personal" that Galleguillos had brought in OSHA, and said, "[H]ell will be paid for it." Reynolds also said that the Union was going to screw things up, and "let the games begin."[59]

Cardoza attended a union meeting in October where the discharges of employees were discussed. He told the employees he was sorry that they got fired but that he had warned them. Cardoza said he had previously discussed possible termination of employees with William King who told him that people were sleeping on the job, coming in late, drinking on the job, and that he was looking into it and would take care of it.

Prior to the termination of pressroom manager, Van Der Muelen, Owen prepared his written job performance review dated March 29. The review cited Respondent's dissatisfaction with Van Der Muelen's performance in several areas, including implementing a team concept of management at a time when the pressroom was in turmoil due to major operational changes and "dissension in the ranks because of union issues"; slowness in reacting to and correcting problems, e.g., repair of mechanical malfunctions and press run staffing; failure to meet deadlines and hold down expenses; lack of communication with supervisors; and lack of responsiveness to other departments. Following the performance review, on May 5 Moyer, in an email message to upper management, recommended that Van Der Muelen be terminated, stating that Van Der Muelen did not "have a clue as to how to run [the] newsroom"; that he was getting worse and "costing me way too much in pressroom overtime, late runs and lousy reproduction." Moyer added that morale was worse than before Van Der Meulen began management.

---

[55] According to Cagel, Respondent's representatives stared at him and did not say a word. Later, he seemed to admit that Ford did make some reply but stated that he said nothing responsive.

[56] Cagel agreed that an affidavit given to the NLRB did not reflect that he made any such request for information.

[57] I accept Ford's testimony. I found him to be a careful witness in contrast to Cagel's disjointed testimony described above. I find it unlikely that Respondent's representatives would have discussed Barrientez' discharge but refused to discuss those of other employees. Further, Cagle's affidavit is silent regarding the Union's bargaining requests, which, if they had occurred or been refused, I would expect to figure prominently in the evidence presented during investigation.

[58] Galleguillos testified that Reynolds, who was not alleged to be a supervisor in the complaint, assigns work, prepares and signs written evaluations, and can let employees go home early. I find him to be a supervisor within the meaning of the Act.

[59] When asked about the conversation, Galleguillos' testimony was a little confused:

> MR. GALLEGUILLOS: He [said] . . . "The union is going to screw this things up." That "I will play hard ball," is one of his quotes on that statement he said. Excuse me, can I change that? "We are going to play hard ball"—let's see, he's going to be playing hard ball. Oh, "let the games begin," that's what it was, "let the games begin."
>
> MR. PARKER: Was that in addition to or instead of "playing hard ball?"
>
> MR. GALLEGUILLOS: It was addition to the "hard ball."

Although Reynolds did not testify and, therefore, the conversation is undenied, Galleguillos' testimony was so convoluted that it is difficult to ascertain what Reynolds may have said or in what context. I cannot infer coercive effect from Galleguillos' testimony.

Owen testified that with regard to Van Der Muelen's performance review, her reference to "dissension in the ranks because of union issues" related to how close the election vote had been and the resulting division among pressroom employees. The reference to "long term problem employees" referred to Washington among others. She agreed with Moyer's May 5 e-mail statement that morale in the pressroom was bad but testified it was not necessarily because of union issues. According to Owen, the pressroom had gone through major changes in terms of staffing and running times, which contributed to lowered morale. She considered that Van Der Muelen did not do a very good job of managing the changes. Owen agreed that how he handled the union issues was part of the reason Van Der Muelen was fired, but she testified that there were other, bigger issues he was not handling well, e.g., maintaining his budget, meeting deadlines, operating the pressroom according to schedule, increasing overtime use, and failing to communicate with superiors or subordinates. She denied that management had made any decision to bring on a successor who would be stricter in enforcing discipline than Van Der Muelen had been or that King had represented he would be stricter. Owen testified that she recruited King as pressroom manager from his position as production manager at the Smithfield Herald, a McClatchy-owned newspaper in South Carolina. In discussing the job with him, she told him that the pressroom was in turmoil and that the Union had been voted in. The employees at the Smithfield Herald were not represented by any union. She did not discuss any specifics about the union organization drive with him.

Owen testified that Respondent would like to have a decertification of the Union and that such was discussed among Respondent's managers after the election along the lines of "They can decertify if they want to." Owen denied that she discussed with anyone obtaining a turnover in the work force after the election in order better to position the Company for a decertification election. She also denied that she or any other manager considered a possible decertification election at all in making discipline decisions.

King testified that when recruited by Owen, she told him employees had selected the Union, that the room was evenly divided regarding support of the Union, and it created a lot of problems with morale. She told him that Van Der Muelen had been an ineffective manager and mentioned increased employee sick leave use and consequent overtime surge. King was aware that since the unit employees were evenly split in their support of the Union, any change in the work force could affect any decertification election results.

III. DISCUSSION

A. The 8(a)(1) Allegations

The General Counsel alleges that Respondent engaged in conduct supportive of employee efforts to obtain union resignations or decertification, which constituted unlawful coercion and encouragement to employees to decertify the Union in violation of Section 8(a)(1).

While an employer does not violate the Act by providing accurate information about the decertification process when queried by employees, it may not otherwise assist employees in decertification efforts or provide more than ministerial aid. *Vic Koenig Chevrolet*, 321 NLRB 1255 (1996), enf. denied in part 126 F.3d 947 (7th Cir. 1997); *Quinn Co.*, 273 NLRB 795 (1984). There is no bright line test with which to distinguish unlawful assistance from mere ministerial aid.[60] The Board has found that unlawful assistance with a decertification effort includes planting the seed of the decertification concept, helping with wording, typing, etc., and knowingly permitting the activity on work time. *Exxel-Atmos, Inc.*, 323 NLRB 884 (1997); *Shen Automotive Dealership Group*, 321 NLRB 586 (1996); *Weisser Optical Co.*, 274 NLRB 961 (1985), enfd. 787 F.2d 596 (7th Cir. 1986), cert. denied 479 U.S. 826 (1986). In *Eastern States Optical Co.*, 275 NLRB 371 (1985), the Board stated:

> [W]e agree that it is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a "situational context free of coercive conduct." In short, the essential inquiry is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." [Footnotes and citation omitted.]

In *Ernst Home Centers*, 308 NLRB 848 (1992), the Board concluded that an employer's providing language to be used in a decertification petition constituted mere ministerial aid and not unlawful encouragement. In *Walter Garson, Jr. & Associates*, 276 NLRB 1226 (1985), the Board found that permitting petition circulation on work time and use of the plant telephone did not mean an employer had unlawfully assisted the decertification effort. In *Times-Herald, Inc.*, 253 NLRB 524 (1980), an employer's providing a list of employee names to a decertification committee was not found to be unlawful assistance. In those cases, as in *Eastern States Optical Co.*, supra, the Board appears to focus its assistance vs. ministerial aid inquiry on whether the inception, preparation, and processing of any decertification petition are the free and uncoerced acts of employees.

Here, the decertification plan clearly originated with employees. Cardoza, who was aware of the process from a prior decertification effort, voluntarily promoted the decertification drive and voluntarily told management of his activities. Upon Cardoza's informing her of his intended decertification activity, Owen said that was fine, and Moyer told Cardoza to "keep up the good work." King accepted Cardoza's reports of his decertification progress without remonstrance. Respondent's tacit approval of the decertification effort, however, does not equate to assistance. The only assistance that Respondent can be accused of is (1) permitting Cardoza to use a second locker for his

[60] The court in *Vic Koenig* expressed frustration with the lack of a clear definition, stating that the Board failed to indicate whether the "no more than ministerial aid" formula meant anything more than that the employer may not give aid that is likely to affect the outcome of the decertification effort. Id. at 949.

decertification materials, and (2) permitting him to make decertification-related telephone calls from King and Marvin's offices. While granting those privileges demonstrates a passive sort of assistance, I cannot find Respondent's actions to constitute unlawful endorsement or encouragement of the decertification activity. There was no threat of reprisal or promise of benefit made to any employee, including Cardoza, and it is uncontroverted that employees not involved in dissident activities had second lockers and that employees were generally permitted to make personal phone calls in Marvin's office. It is not clear whether Cardoza or Lee circulated the petition during working time. But even if they did, there is no evidence that Respondent knew of it or that permitting it was a departure from solicitation freedom accorded nondissident employees. The extension to Cardoza and Lee of the same privileges accorded to other employees cannot, in my opinion, constitute unlawful assistance, and refusal to do so might be disparate treatment. Finally, I have examined carefully whether Respondent's actions would in any way interfere with employees' free choice or be likely to affect the outcome of any election. I find they would not. Accordingly, I conclude that the preparation and circulation of the petition expressed the free and uncoerced intent of the employees concerned, and that Respondent did not unlawfully assist in its inception or fruition in violation of Section 8(a)(1) of the Act. I shall, therefore, dismiss that allegation of the complaint.

B. The 8(a)(3) Allegations

The General Counsel argues that Respondent displayed animosity toward its employees' union support by statements made prior to the election and outside the 10(b) period. Counsel for the General Counsel correctly observes that although independent 8(a)(1) allegations may be barred by Section 10(b) of the Act, such statements may establish antiunion animus. The credited evidence shows that prior to the election, Respondent told employees it would play "hard ball." It is not clear in what regard the term was used. No one testified that it correlated with any specific threat, and one witness testified it was used in conjunction with prospective bargaining. The use of the term "hard ball" without other evidence of threats or coercion does not constitute adequate evidence of antiunion animus where the statement may well refer to future bargaining rather than reprisals. Legitimate predictions of hard bargaining do not constitute animus. *Matthews Industries*, 312 NLRB 75 (1993); see also *Cla-Val Co.*, 312 NLRB 1050 (1993). The General Counsel also points to Lyall's statement that employees needed to watch their "P's and Q's" and that changes would occur as evidence of animus. I have found the statement was made at an undetermined time after Lyall ceased to be a supervisor and thus cannot be charged to Respondent.

The General Counsel also asserts that Wink's statement that union selection would open a "can of worms" shows animus. It is not clear what Wink meant by his statement, but it is reasonable to infer that he was predicting some unspecified turmoil at work if the Union were selected, although the expected source or ramification of the turmoil was not disclosed. It is not possible to infer any threat from the statement. While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force or promise of benefit. *Eckert Fire Protection, Inc.*, 332 NLRB 198 (2000). Clearly, Wink's statement does not rise to the level of an 8(a)(1) violation. However, conduct may exhibit animus that is not independently found to violate the Act and may shed light on the motive for other allegedly unlawful conduct. *Meritor Automotive, Inc.*, 328 NLRB 813 (1999). I cannot find Wink's statement exhibits animus or sheds light on the complaint allegations. A supervisor's statement that unrest will likely follow union selection does not, by itself, convey that the employer would author the unrest or thereafter act to the detriment of employees. The statement is too vague to constitute animus or reveal motive for Respondent's distant future actions.

Marvin's statement, prior to the election, that the prior union did not do anything for employees and that the employees were going to wind up paying dues and possibly losing benefits, reveals a clear preference that employees reject the Union, and arguably demonstrates animus. Marvin may also, preelection, have interrogated Aguirre as to his attendance at a union meeting held at Denny's. However, Marvin's preelection conduct is so remote from the alleged violations of the Act, that I cannot find it to cast any significant light on Respondent's actions occurring nearly a year later. There is no evidence of any intervening expression of animus toward employees' union activities generally or individually. Therefore, the relatively isolated and slight animosity expressed by Marvin cannot support a conclusion that animosity motivated Respondent's adverse employment actions. I conclude, therefore, that there is little evidence of overt animosity toward employees' union activities.

The General Counsel and the Charging Party's primary theory of the 8(a)(3) discharge allegations is essentially that Respondent, bearing animosity toward employees' union activities, desired to rid itself of the Union, and in anticipation of a decertification election sought to disbalance the union adherent ratio by terminating union proponents. It is conceded that Respondent's management was aware of the antiunion activity of Cardoza and other employees, and Owens candidly admitted that Respondent would welcome a decertification of the Union. If Respondent discharged employees in order to undercut the Union's majority, even though it may not have targeted the most prominent union activists, such is violative of Section 8(a)(3) of the Act. *Excel Case Ready*, 334 NLRB 4 (2001). In proving this, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in [Respondent's] decision." *Webco Industries*, 334 NLRB 608 (2001). While there is little or no explicit evidence of an antiunion motive behind Respondent's disciplinary actions herein, motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence. Since direct evidence is rare, evidence of an employer's motive in discharging an employee must frequently be gleaned from the circumstances surrounding the discharge. Indications of discriminatory motive may include failure to conduct a full and

fair investigation of alleged misconduct,[61] a failure to disclose the reason for the discharge,[62] a false assertion of lawful purpose,[63] a pretextual reason,[64] disparate treatment,[65] a departure from past disciplinary practice,[66] the insubstantial nature of the alleged misconduct versus the extreme severity of the punishment,[67] and/or the employer's inability to adhere to a consistent explanation for the discharge.[68]

Counsel for the General Counsel asserts that Respondent's failure to discourage Cardoza's "bubbling volcano of information" about the decertification drive shows motive. There is no authority requiring an employer to refuse to listen to an employee's voluntary report of union or antiunion activity, and I cannot draw any inferences from Respondent's failure to repress Cardoza's confidences. There is no evidence that Respondent encouraged employees to support the decertification effort or engaged in any coercive conduct directed toward it or toward employees' union activities generally. Simply listening to reports of decertification progress cannot constitute coercion or support.

Counsel also argues that Cardoza's talking with King about the possible termination of employees in conversations where the decertification effort was also discussed provides evidence of motive. Cardoza's testimony was as follows:

> MR. MANRIQUE: Did you discuss the possible terminations of employees with William King prior to that meeting at Denny's with the employees who had been discharged?
>
> MR. CARDOZA: Termination of employees. Yes, I did.
>
> MANRIQUE: Okay. And what did he say to you and what did you say to him?
>
> MR. CARDOZA: Things mentioned most were people sleeping on the jobs and coming in late. Drinking on the job. That's it.
>
> MR. MANRIQUE: And what did he say—what he was doing in connection with those matters?
>
> MR. CARDOZA: He says he was looking at it. He'd take care of it.

Cardoza's testimony unquestionably creates a substantial suspicion that King may have assessed the impact of terminations on the success of the decertification petition. But suspicion may not substitute for evidence and is not sufficient to establish motive. The Board has observed that even when the record raises substantial suspicions regarding adverse action against employees, the General Counsel is not relieved of his burden of proving that Respondent was illegally motivated. *Murphy Bros., Inc.*, 267 NLRB 718 (1983); *Carrom Division*, 245 NLRB 703 (1979). Cardoza's testimony does not show that King was planning to terminate any employee to shape the decertification outcome. While the testimony could arguably be viewed as revealing management deliberation of how to terminate prounion employees and thereby skew the decertification results (an unlawful object,) it could also be viewed as management cognizance of genuine employee misconduct and intent to resolve it (a lawful object.) As there is insufficient basis to ascribe an unlawful rather than a lawful meaning to King's words, I cannot find Cardoza's testimony establishes antiunion motivation. See *Pullman Power Products Corp.*, 275 NLRB 765 (1985).

The General Counsel's further arguments that animus is established by Respondent's selective and one-sided investigations of employee misconduct and disparate treatment are dealt with below. As set forth in greater detail in the discussions of individual discharges, there is no evidence to support any finding that Respondent discharged or otherwise disciplined employees in overt or tacit backing of the decertification effort or in retaliation against prounion employees. Therefore, I cannot find that Respondent took any adverse employment action against any of the alleged discriminatees because of his union activities or because he did not support decertification of the Union.

A more compelling (and subtle) theory implicit in the General Counsel and the Charging Party's arguments is that Respondent tightened discipline of employees as an indirect response to their selection and support of the Union or, as the Charging Party puts it, "exaggerated minor matters into maximum discipline." For brevity's sake, I will refer to this theory as the "low-morale" theory. Respondent was admittedly concerned with low morale among its pressroom employees. The low morale equated, at least in part, to its employees' selection of the Union. See *Intercon I (Zercom)*, 333 NLRB 223 (2001). Thus, Owen believed that employee dissension regarding union support or nonsupport was a factor in production problems and that dissension existed in the ranks, in part, because of union issues. While Owen testified that sick leave use had increased almost 65 percent following the election with a concomitant increase in overtime, neither Respondent nor the General Counsel provided documentation of comparative production or cost. Although I accept Owen's testimony of increased sick leave and overtime, that is only one factor of a business' operating expenses. It is not clear, therefore, whether an actual production dip or expense increase occurred during 1999. Moreover, although Owen clearly attributes the problem with sick leave to union factionalism, there was also a significant change in processing methods at that time, which admittedly caused workplace disruption. Other than Owen's testimony of low morale, there is no evidence that the employees' exercise of their protected rights resulted in a less harmonious or friendly work atmosphere than existed before the union issue arose or that it interfered with production. Respondent's perception was that production had been harmed by low morale, that the low morale was, in large part, a result of union activity, and that low morale needed to be addressed. However, the totality of evidence suggests that Respondent's viewpoint was a reaction to its dissatisfaction with an amorphous atmosphere of "dissension," which Respondent believed was engendered by conflicting employee opinions of the Union. I find, therefore, that

[61] *Bonanza Aluminum Corp.*, 300 NLRB 584 (1990).
[62] *NLRB v. Griggs Equipment*, 307 F.2d 275 (5th Cir. 1962).
[63] *Sahara Las Vegas Corp.*, 284 NLRB 337 (1987).
[64] *Pacific FM, Inc.*, 332 NLRB 771 (2000); *Fluor Daniel*, 311 NLRB 498 (1993).
[65] *NACCO Materials Handling Group*, 331 NLRB 1245 (2000).
[66] *Sunbelt Enterprises*, 285 NLRB 1153 (1987).
[67] *Detroit Paneling Systems*, 330 NLRB 1170 (2000).
[68] *Atlantic Limousine*, 316 NLRB 822 (1995).

employee protected activity was "inextricably intertwined" with Respondent's perception of low employee morale.[69]

Perceived low employee morale was a significant factor in Respondent's 1998 determination to change pressroom managers, and it seems clear that the replacement manager, King, had a stricter management approach than the pressroom had formerly experienced. His introductory words to Respondent's employees, i.e., that he was not there to be the employees' friend, that he had a job to do, portend a premeditated stricter approach to discipline. The evidence shows that under his management, a greater scrutiny of employees' work records and a more stringent approach to discipline occurred than with his predecessors. Further, following King's arrival at Respondent, an unprecedented number of discharges occurred, which strongly suggests tightened discipline. While an employer has an undeniable and legitimate concern in its productive and economic well being, it may not penalize employees because of a mere perception that their protected activities threaten that well being. The General Counsel argues that under King, employee behavior formerly condoned or less severely punished by Respondent elicited harsher discipline than would have been given under prior management and that a continuum of harsher discipline, instituted in response to employee union activities, culminated in the terminations of Washington, Evans, Otero, and Aguirre and in the suspension and final warning of Kloss.[70] An employer violates Section 8(a)(3) and (1) when it increases discipline in response to union activity among its employees. *Keller Mfg. Co.*, 237 NLRB 712 (1978), citing *Upland Freight Lines, Inc.*, 209 NLRB 165 (1974), enfd. 527 F.2d 766 (9th Cir. 1976); *Jennie-O-Foods*, 301 NLRB 305 (1991). Since the General Counsel has established that the pattern of discipline instituted by King differed from that of his predecessors, a prima facie case of discriminatory motive has been presented requiring Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities. Put another way, if discipline was imposed because of Respondent's attempt to eradicate low morale (intertwined with union activity) the discipline is unlawful. In support of that contention, it is not necessary for the General Counsel to prove that King bore any animus toward employees' union activities or was himself motivated by consideration of union activity in disciplining employees. Respondent's perception of low employee morale prompted the introduction of King into pressroom management and brought about a tightening of discipline. Therefore, Respondent set in motion a chain of events resulting in heightened employee discipline based, at least in part, on employees' union activities. Inasmuch as one motive for the changed management and tightened discipline was employee protected activity, an inference of unlawful motivation is established in the discipline accorded Washington, Evans, Otero, Aguirre, and Kloss. The General Counsel has, therefore, met his burden of showing that antiunion sentiment was a substantial or motivating factor in germinal management decisions, the aftermath of which encompassed the terminations of Washington, Evans, Otero and Aguirre and the suspension and final warning of Kloss.

In determining whether Respondent acted unlawfully by terminating Washington, Evans, Otero, and Aguirre and by suspending and giving a final warning to Kloss, I follow the Board's analytical guidelines in *Wright Line*.[71] Since the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in a chain of events leading to Respondent's discipline of these employees, he has made a prima facie showing of unlawful conduct. The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it would have made the same decisions, even in the absence of union activity.[72] *Avondale Industries*, 329 NLRB 1064 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995). Respondent must show that the discipline of those employees would have occurred even in the absence of the stricter management approach of King. In determining whether Respondent would have disciplined Washington, Evans, Otero, Aguirre, or Kloss notwithstanding the pressroom union activity, it must be noted that the mere fact that an employer may desire to terminate employees to curtail union activities or, as here, to correct employee "morale" problems, does not, of itself, establish the illegality of the discharges. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); *Avondale Industries*, supra. Further, it is well established that the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB at 1171, and cases cited therein. However, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. Id. With these guidelines in mind, the individual instances of discipline alleged as violations of Section 8(a)(3) and (1) are hereafter discussed.

1. The suspension and discharge of Barrientez

Barrientez was a long-term employee of Respondent. In 1991, he was terminated for 5 days' absence without leave and only reemployed under a commitment to undergo a 1-year alcohol rehabilitation program. Respondent has an employee rule that prohibits appearing for work under the influence of [alcoholic beverages]. The credited testimony establishes that Barrientez appeared for work on June 12 under what appeared to Supervisor Wink and employee Franco to be the influence of alcohol. The General Counsel argues that Respondent did not establish that Barrientez was intoxicated or work impaired that evening. Respondent is not required to do so. It is only mandatory that the motivating reason for the discipline is not dis-

[69] See *Dollar Rent-A-Car of Las Vegas*, 264 NLRB 997, 101 (1983).

[70] The discharge of Barrientez, occurring prior to King's employment, does not fit within this analysis and is dealt with separately below.

[71] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[72] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick, *Evidence*, at 676–677 (1st ed. 1954).

criminatory. Respondent is otherwise free to exercise its discretion with respect to employee discipline. The motive of Respondent in discharging Barrientez is, therefore, pivotal to this case.

Here, there is no direct evidence of an antiunion motive in the suspension and/or discharge of Barrientez. Although he was a known union adherent, no threatening or coercive statements were ever made to him, and there is no evidence that Respondent seized on or distorted a "minor" incident as an opportunity to get rid of a union adherent. Indeed, Barrientez' first-line supervisor, Wink, notwithstanding his opinion that Barrientez was to some extent under the influence of alcohol, permitted him to work on June 12 because he did not want to get him fired. Wink told Barrientez he was not to show up for work in "the shape [he was] in again." Wink clearly believed that if upper management learned of Wink's condition, he would be fired, and there is no evidence he believed the discharge would be pretextual. Wink permitted Barrientez to continue working as he thought he could "get through the shift," and the incident would have been overlooked had not Barrientez been injured. The General Counsel argues that Respondent has not shown the injury was alcohol related, but the General Counsel is trying to place on Respondent a burden it doesn't have to assume. Barrientez' injury merely brought Respondent's full scrutiny to the question of whether he was alcohol impaired at work, a clear violation of established rules. Having its attention flagged by the work injury, Respondent thereafter conducted an investigation. The General Counsel argues that the investigation was perfunctorily or inadequately conducted. However, it is clear that Respondent interviewed several people concerning the events of June 12, including employees. There is no evidence that Respondent sought to shape or distort the investigation or that there was not genuine fact gathering. Uncontroverted evidence shows that Barrientez had, in fact, consumed alcohol before reporting for work on June 12. His supervisor's credible perception of his condition coupled with Barrientez' accident is information Respondent was entitled to rely on in forming a good-faith belief that Barrientez had violated its alcohol prohibition rule.

Appearing for work in any degree alcohol impaired is very serious employee misconduct, and discharge is not unwarranted. There is no evidence that the proffered basis for Barrientez' suspension and discharge was pretextual. There is no evidence of shifting reasons; Respondent consistently maintained to Barrientez and to the Union that the discharge was based on Barrientez' alcohol use. There is no evidence of any departure from past practice. Evidence shows that Respondent had disciplined employees for any use of alcohol on its premises. Barrientez had already been extended lenience when he was rehired following a 1991 alcohol-related absence from work. The requirement that Barrientez undergo a rehabilitation program as a condition of employment is tantamount to a proviso that he not engage in any alcohol-related misconduct. It is not unreasonable that Respondent should be wary of a repeat performance, particularly in light of the potential for injury in alcohol-related accidents. Finally, there is no evidence of disparate treatment. While two other employees were suspended rather than discharged when caught in the parking lot with open alcohol containers, that fact supports rather than negates the lawfulness of Barrientez' discharge. The discipline given the two employees demonstrates Respondent's strict approach to alcohol use at work, even in the parking lot. Further, there is no evidence that the two employees were repeat offenders as was Barrientez, and there is no evidence that any injury occurred during the period they were found with open alcohol containers.[73] The General Counsel has not shown that discriminatory intent formed any part of Respondent's motivation in discharging Barrientez. Accordingly, I find the General Counsel failed to meet his *Wright Line* burden of establishing a prima facie case that Barrientez was suspended and/or discharged because of his or others' union activity, and I shall dismiss the allegations of the complaint relating to Barrientez.

2. The final warning and discharge of Evans

The uncontroverted evidence establishes that Evans was counseled in July and August about his attendance proble On August 10, Owen told him that he had missed 13 days of work and would be terminated if he missed any more. Evans argued that his recently assumed responsibilities as a single parent should procure Respondent's understanding and toleration of his absences. On August 18, Evans was given a final warning, which he refused to sign because he believed it based on his union sympathy and because Respondent was disregarding his family circumstances. There is no evidence that Respondent was in any way motivated by Evans' union activities or leanings in issuing the final warning. Although Evans testified without specific contradiction that Carlson was silent when he accused Respondent of union animus in issuing the final warning, that alone is not sufficient to show it was given unlawfully. There is no evidence that Respondent was aware of Evans' prounion sympathy or activity. Owens credibly testified that Evans told her he wanted nothing to do with the Union. Further, employees Aguirre and Meyers were also given written warnings at the same time.[74] King had nothing to do with the events leading up to Evans' final warning. There is no evidence to support the General Counsel's allegation that Evans' final warning was discriminatorily motivated. I find that the

[73] Although counsel for the General Counsel argues in his brief that Supervisors Marvin and Wink were aware Gamboa had appeared at work drunk and failed to discipline him, the transcript does not support such an assertion. Otero, on whose testimony counsel relies, testified that he believed Gamboa had been caught in the parking lot with a beer in his possession many years prior, and that he worked while under the influence of alcohol on that same occasion. He testified that Wink never said anything to him on that occasion to indicate he was aware Gamboa was drunk. Otero also testified that a few days after Gamboa came to work alcohol impaired (in Otero's opinion), Wink and Marvin told him that they believed Gamboa was drinking. Although counsel for the General Counsel has combined the testimony to prove Respondent knowledge of Gamboa's working while alcohol impaired, that conclusion is not justified. The statements of belief that Gamboa was drinking may simply reflect that both Marvin and Wink believed him to have an alcohol-related problem but not necessarily that he was under the influence of alcohol while at work. Otero's recall was hazy, apparently based on reports by nonsupervisory individuals, and, even if accepted, fails to show disparate treatment.

[74] The final warning issued to Aguirre in August is not alleged to violate the act although his later discharge is.

General Counsel has failed to meet his burden of proof as to this allegation.

The General Counsel contends that Respondent's discharge of Evans occurred because he was a known union supporter. There is no evidence that Respondent knew of Evan's union adherence, much less bore animus toward him. Evans professed himself to be antiunion, and while he did not sign the decertification petition, the absence of his name does not support an inference that Respondent thereby knew he was a union supporter. No coercive statements were directed toward him, and his freedom to engage in union activity was not abridged in any way.

Respondent asserts that Evans was given a final warning and discharged because he left work early on September 3 notwithstanding King's specific directions that he shoulder the burden of plate burning and not rely on Hoard who was needed in prepress. The General Counsel argues that King essentially leaped to judgement in finding Evans had contravened his orders, conducted an inadequate investigation, and accepted biased information, all of which points to animus. I cannot agree. The evidence shows that King spoke with all persons involved in Evans' work performance on September 3, and no reason has been shown why King should not have believed those he interviewed. See *American Thread Co.*, 270 NLRB 526 (1984). It is not clear that a method existed to determine which individual employee burned which plates, and there is no basis or legal authority for requiring Respondent to undertake extraordinary measures in its investigation. It is not necessary for Respondent to prove that Evans disobeyed instructions; it is only necessary to show that Respondent had a reasonable and nondiscriminatory belief that he had done so. Id. Moreover, while King may not have spoken to Evans about the September 3 events prior to his discharge meeting, interviewing the subject employee is not a requirement for an adequate investigation. *Frierson Building Supply Co.*, 328 NLRB 1023 (1999). Moreover, King credibly testified that had Evans proffered an acceptable explanation, he would not have been discharged. Evans offered no explanation, reacting in an accusatory and confrontational manner and essentially preventing King from obtaining any explanation. I conclude that Respondent's investigation was neither superficial nor inadequate and does not warrant any inference that the basis for Evans' final warning or discharge was pretextual.

The General Counsel also asserts that Evans was disciplined disparately, which warrants an inference of unlawful motive. A finding of disparate treatment must be supported by a showing that employees similarly circumstanced were treated differently than Evans. No such evidence was introduced. Evans engaged in the unprotected activity of failing to follow his manager's instructions, and he was fired for it. See *Tom Rice Buick, Pontiac & GMC Truck,* 334 NLRB 785 (2001). There is no evidence that any other employee was more favorable treated, and there is no evidence of antiunion motivation in the discharge.

The analysis of Evans' discharge does not, however, end there. Consistent with the "low-morale" theory, a factor in Evan's discharge was Respondent's tightening of discipline, which was motivated in part by unlawful considerations. Therefore, the burden of proof shifts to Respondent to establish by a preponderance of the evidence that it would have discharged Evans even in the absence of employees' union activity. I find that Respondent has met its burden. It is clear that Evans was already skating on disciplinary thin ice when on September 3, he failed to follow King's orders. He had a pending final warning about his attendance, and his conduct on September 3, involving leaving work early, related to his attendance problems as well as constituting insubordination in failing to follow orders. Moreover, there was documentation in his file that Evans had engaged in similar conduct in January when he left work saying that another employee was going to burn the plates. There is no evidence that any other employee had a similar history of infractions and warnings but had escaped discharge. I conclude that Evans' persistent misconduct would have procured his discharge even in the absence of changed management. Accordingly, I find that Respondent has established that it would have both warned and discharged Evans irrespective of his union activity or the union activity of other employees and irrespective of the selection of King as pressroom manager. Therefore, I find that the General Counsel failed to prove that Respondent violated Section 8(a)(3) and (1) of the Act by its discipline of Evans, and I shall dismiss the allegations of the complaint relating to Evans.

3. The suspension and discharge of Otero

As set forth above, I have concluded that Otero was, in fact, caught sleeping during working hours by King on September 25 and that he had previously been caught sleeping and orally warned by Wink. Respondent's lawfully established rules of employee conduct prohibit sleeping while on duty. While Otero was a known union adherent, there is no evidence that Otero's discharge was directly motivated by animus toward his union activities. The only question to be resolved under the theory explicated above is whether Otero would have been discharged irrespective of the identity of the pressroom manager.

The General Counsel argues that Respondent, historically, has not considered employees' sleeping at work to be a significant problem, but the evidence does not support any such conclusion. While there was some evidence of employees either sleeping or sitting with closed eyes when working double or evening shifts, it does not appear that such was generally tolerated by Respondent. Kloss testified that Respondent did not permit sleeping on the job. Galleguillos testified that he had not seen employees with their eyes closed during day shifts, and Kloss identified Otero as the only employee he had seen with closed eyes at work. Given these employees' testimony, I accept Marvin and Carlson's denials that they permitted employees to sleep during work hours. I find Otero was suspended and discharged for sleeping on the job—a clear violation of a known employee rule—and that neither his suspension nor his discharge was motivated by antiunion considerations.

Having reached the above conclusions, it nonetheless remains to consider whether Otero would have been suspended or discharged under King's predecessor managers. The evidence clearly suggests he would not have been. Otero's employment record was clear of prior infractions and discipline. Although

Wink had caught him sleeping and had orally warned him, he had no written warnings regarding sleeping on the job or any other breach of rules. The suspensions and discharges of other employees herein involved situations where the employees had existing written warnings. Otero had none. While the Board does not question an employer's discretion to bypass progressive discipline for egregious violations of its work rules,[75] I cannot find Otero's conduct so egregious as to dictate his suspension and termination under the standards followed by managers predecessor to King. It was apparently not unusual for employees to exhibit drowsy behavior at work, and Lyall testified he had seen employees with "church heads" (nodding off) without, apparently, considering it a disciplinary offense. Wink did not see fit to give Otero a written warning when finding him sleeping, although he did warn him he could be fired for his breach of rules. Moreover, Respondent appears to have considered extenuating circumstances (e.g., working a night or double shift) in reacting to employees with closed eyes at work. Here, the evidence is clear that press problems on September 25 left Otero with lengthy down time during which his relaxing was acceptable. The evidence of employee discipline overall suggests that the slowness of the work during Otero's September 25 shift would likely have been considered an extenuating circumstance by a manager other than King. Therefore, Respondent has not persuasively established by a preponderance of the evidence that it would have suspended or discharged Otero for sleeping on the job irrespective of the selection of King as pressroom manager. At best, Respondent has shown that Otero may or may not have been suspended and/or discharged but for Respondent's concerns over low morale. Thus, Respondent has not met its burden. *Pacific FM, Inc.*, supra. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Otero.

4. The suspension and discharge of Washington

Although Washington was a known union adherent, no management member ever commented on his union activity, and over a year had passed since the union election before his alleged unlawful discipline took place. However, under the low-morale theory, such evidence is not a necessary element of discriminatory conduct. If Washington was a victim of King's stricter discipline and would not, in the absence of that, have been suspended or fired, his suspension and discharge are unlawful. I conclude, however, that Respondent has persuasively established by a preponderance of the evidence that it would have suspended and terminated Washington even in the absence of employees' union activity or King's managerial role because of his insubordinate conduct.

Credible evidence shows that almost from the commencement of King's management of the pressroom, Washington exhibited a hostility toward King which manifested itself in disrespectful, disparaging, and confrontational conduct. In Washington's initial meeting with King, he disrespectfully refused to discuss one of his press reports, telling King the report was self-explanatory and walking out of the meeting. Washington thereafter dismissively rebuffed King's suggestion that he have a plate burned by reel room employees, made offensive reference to King as the "boss man" before whom employees should be silent, and sang cattle-driving songs when King appeared—an apparent jibe at how King "drove" employees. In front of other employees, Washington told King he had better hold on to his North Carolina home as the last manager "didn't make it." On October 11, Washington used obscene language in complaining to King that certain work had not been done prior to his shift and suggested that King did not know how to do his job. Respondent's employee handbook includes, as impermissible conduct, "insubordination, including improper conduct toward a supervisor or manager." Washington blatantly breached this rule by his overall conduct toward King. Evidence was presented showing that employees had been disciplined for inappropriate conduct toward each other. It is axiomatic that similar conduct toward a supervisor would be viewed even more seriously. Respondent has, therefore, shown that it "has a rule . . . and that the rule has been applied to employees in the past." *Avondale Industries*, 329 NLRB 1064. That showing is not, however, dispositive of the issue in the instant case. The Board has held that an employer does not meet its *Wright Line* burden by showing it would be reasonable to discharge an employee for his conduct; an employer must show it would have discharged the employee even in the absence of protected activity. *Becker Group, Inc.*, 329 NLRB 103 (1999). Respondent must also persuasively demonstrate not only that it could have discharged Washington for his contumacious behavior but that it would have done so even in the absence of changed management.

In support of his argument that Washington would not have been suspended or discharged but for the management changes resulting from employees' union activity, counsel for the General Counsel presented evidence assertedly demonstrating disparate treatment. The evidence consisted primarily of frequent instances of profanity among employees in the workplace that did not result in discipline or resulted in discipline less severe than discharge. The General Counsel also argues that Washington's profanity and disrespectful comments of October 11 occurred in a context of protected activity as Washington sought to discuss working conditions with King and therefore deserves a mantle of protection. *Marion Steel Co.*, 278 NLRB 897, 900 (1986). Even assuming Washington's use of profanity to King was uttered in the heat of presenting the concerted protected concerns of the press crew, Washington went beyond that and insulted King's managerial ability, saying that if King knew how to do his job, he would know Washington was a good operator. This disparagement was not spoken in the context of protected concerted activity but in response to King's criticism of Washington's performance. Moreover, Washington's October 11 behavior was only one instance in a series of disrespectful actions toward the manager, none of which other conduct was even arguably in the context of concerted protected activity.

Evidence revealed that Respondent regarded disrespect toward supervisors very seriously. Respondent's employee handbook cites "improper conduct toward a supervisor or manager" as impermissible. Respondent suspended employee Freeze for yelling and swearing at a manager and required he

[75] *Cotter & Co.*, 331 NLRB 787, 786 (2000).

take anger management instruction on penalty of discharge. The General Counsel and the Charging Party argue that the treatment afforded Freeze underscores the unequal discipline meted to Washington. I cannot agree. Washington, unlike Freeze, engaged in an ongoing and extended demonstration of deliberate disrespect toward King. The General Counsel did not present evidence of any employee behavior even approximating Washington's. Respondent argues, and I find, that any arguable disparity in treatment between Washington and other irascible employees is attributable to the severity and the target of Washington's misconduct. The General Counsel's examples of disparate treatment are, therefore, inapposite.

Counsel for the General Counsel argues, essentially, that King had an obligation to announce to employees his sensitivity to disrespectful behavior so that employees might adjust their conduct accordingly, pointing out that King neither made clear to Washington what he found offensive nor sought better communication. There is no requirement under Board law that a supervisor do so, but a failure to follow an established progressive discipline format may be indicative of unlawful intent. I have considered King's failure to warn Washington as evidence of harsher treatment than that formerly accorded employees. However, I find Washington's behavior was so obviously and openly disrespectful that Respondent could reasonably perceive it to be intentional if not malicious. There is no evidence that Washington or any other employee ever directed such behavior toward other supervisors, and there is no evidence that Respondent would have tolerated it if an employee had. Washington's behavior toward King constitutes egregious misconduct in violation of established workplace rules. The Board does not question an employer's "discretion to bypass progressive discipline and impose more severe discipline on employees, including suspension and discharge, for egregious violations of its work rules." *Cotter & Co.*, 331 NLRB 787 (2000). Accordingly, I find that Respondent has met its burden of showing that Washington would have been suspended and discharged for his misconduct even if there had been no union activity and no changed management, and I shall dismiss the allegations of the complaint relating to Washington.

5. The suspension and final warning of Kloss and the discharge of Aguirre

Respondent's move to rein in sick leave use began prior to King's employment. At Owen's direction, Van Der Muelen investigated sick leave use, and in January gave warning notices to employees who took more than the regulation 10 days in 1998. In addition to employees Kloss and Aguirre, employees Gamboa, Flores, and Meyers received warning notices.

Kloss had received warning notices and doctor's note restriction previously in 1986 and 1989. There is no suggestion that those disciplinary actions were unlawfully motivated. When he received a warning notice in January, he had been absent 14 days because of reported sickness in the preceding year. After his January warning notice, Kloss continued to use excessive sick leave. He was absent for 11 sick days in 1999, and in 2000 7 sick days through May 2000. On June 4, 2000, King gave Kloss a final warning and 3-day suspension, telling him that he considered him a top employee and that his only problem was sick leave usage. Thereafter, through the date of his testimony, Kloss used no sick leave. Hearing a rumor that Kloss was afraid to use sick leave, sometime in March 2001, King told him he should not come to work sick, that he should use sick leave if necessary.

Aguirre also took more than 10 days leave for sickness in 1998 and received a warning notice in January from Van Der Muelen. Between that warning and August 18, Aguirre was absent 8 days on sick leave. On August 18, Aguirre was given a final warning regarding his excess absenteeism, which noted that he had failed to bring in the required doctor's certificate in six of the instances and that the sick leave appeared tied to days off. Aguirre incurred two additional sick days in November, and King told him he was expected to improve his attendance. In January and April 2000, Aguirre was absent for sickness 4 days and 1 day, respectively. On April 12, 2000, Aguirre was given a written indefinite work suspension, which was reduced to 5 days upon King's verification of Aguirre's doctor's notes. The following month, Aguirre missed 2 additional days when his father had surgery, another 2 in June 2000, and 2 days of bereavement leave in July 2000. By September 12, 2000, Aguirre had been absent from work for 12 days of that year. On September 21, 2000, he was terminated for excessive absenteeism.

There is nothing in the effectuation of Kloss or Aguirre's discipline for absenteeism that shows either antiunion animus or management action fitting within the "low morale" theory. There is clear evidence of a past practice of issuing warning notices for excessive absenteeism. In order to show a departure from past practice, the General Counsel would have to show that in the past, even though employees persisted in absenteeism once warned, Respondent nevertheless did not proceed with further and progressive discipline. The General Counsel has not shown that. It is true that there is no evidence of suspensions and discharges due to absenteeism, but that alone does not establish disparate treatment. It may well be that previous employees, having been warned, corrected their leave use so as to avoid further discipline. Certainly, Kloss did following his suspension, and there is no evidence that Gamboa, Flores, and Meyer did not. It is, in fact, illogical to think that Respondent, having specifically warned employees about attendance, would not take further disciplinary action up to and including discharge if its warnings were ignored. Kloss and Aguirre did not correct their absenteeism, and they suffered the consequences. There is no basis for inferring discriminatory intent or disparate treatment from this sequence of events. Counsel for the General Counsel argues that Aguirre had compelling family reasons to miss work. That may be true. It may even be true that Respondent was insensitive to Aguirre's family problems, but that is not the issue. The Board will not substitute its judgment for the employer's as to what constitutes appropriate discipline. I find excessive sick leave use is not a trivial or insubstantial employment concern,[76] and there is no evidence of discriminatory motive in Kloss or Aguirre's discipline.

While King's having administered final discipline might raise a suspicion that it was more strictly dispensed, "mere

[76] See *Detroit Paneling Systems, Inc.*, supra at 1170 fn. 6.

suspicion cannot substitute for proof" of unlawful motivation. *Frierson Building Supply Co.*, supra at 1024. Accordingly, I find the General Counsel failed to meet the *Wright Line* burden of establishing a prima facie case that Kloss and Aguirre were disciplined because of their or others' union activity, and I shall dismiss the allegations of the complaint relating to Kloss and Aguirre.

C. The 8(a)(5) Allegations

The General Counsel argues that in conformity with *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), an employer is obligated to notify its employees' bargaining representative and bargain to impasse before implementing any form of employee discipline. Respondent admittedly gave no notification to the Union of its intent to terminate or otherwise discipline the employees named in the complaint, and, if the General Counsel's theory is correct, Respondent has thereby violated its bargaining obligation. The question is whether Respondent had any such duty.

An employer's alteration of existing terms and conditions of employment without prior discussion with its employees' bargaining representative is a "circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Indeed, unilateral conduct is so destructive to the collective-bargaining process that a showing of subjective bad faith by the employer is unnecessary to establish a violation. The Board and the courts have applied *Katz* to bar unilateral conduct by employers in a wide variety of situations.[77] In each situation, the unilateral conduct was found unlawful "because a condition of employment had been unilaterally changed . . . the vice involved . . . [being] that the employer has changed the existing conditions of employment." *Daily News of Los Angeles*, 315 NLRB at 1238. In *Daily News*, the Board cited *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970), with approval as setting a standard for whether an unlawful change has been implemented, which "neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor [discriminates] on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated . . . and condemns the conduct if it has." The focus, then, in discussing the 8(a)(5) allegations of this case must be on whether changes occurred in any term and condition of employment by Respondent's implementation of employee discipline.

Employee discipline is unquestionably a mandatory subject of bargaining,[78] and any alteration of a disciplinary system is also a mandatory subject of bargaining.[79] The General Counsel contends that Respondent exercised considerable discretion in disciplining its employees and is therefore required to notify and, upon request, bargain to impasse with the Union over each and every imposition of discipline. *Eugene Iovine, Inc.*, supra, and *Adair Standish Corp.*, 292 NLRB 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), also cited by counsel, deal with an employer's obligation to bargain about discretionary actions affecting terms and conditions of employment. In *Iovine*, the Board, citing *Katz*, held that the decision to reduce employee hours involved management discretion and required the employer to bargain with the newly certified union. The Board specifically noted that the employer in *Iovine* "failed to establish a past practice and further failed to establish that its . . . reduction of hours was consistent with its conduct in prior years." In *Adair*, the Board noted that the employer's determination as to which employees would be affected by its occasional economic layoffs was discretionary. In *Iovine*, there was a demonstrable change from preceding practices and in *Adair* there was no established method for determining when layoffs would occur or which employees would be selected.

While the General Counsel is correct in pointing out that the discipline administered to unit employees by Respondent is, at least in part, discretionary, applying *Iovine* and *Adair* to this case reveals significant differences. Employee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline. Here, however, Respondent maintains detailed and thorough written discipline policies and procedures that long antedate the Union's advent. The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy. The General counsel does not contend that Respondent's discipline policies were unilaterally altered or unlawfully established, and the Union made no such accusation during negotiations.[80] Rather, the General Counsel asserts that notwithstanding the legality of the long-established policies, inasmuch as the policies provide for managerial discretion and as Respondent exercises discretion in implementing the policies, i.e., by setting the type or degree of individual discipline, it must notify and give the Union an opportunity to bargain over every instance of discipline from oral warnings to terminations. There is no evidence that Respondent did not apply its preexisting employment rules or disciplinary system in determining discipline herein.[81] Therefore, Respondent made no unilateral change in lawful terms or

[77] See *Daily News of Los Angeles*, 315 NLRB 1236 (1994), for a discussion of prohibited unilateral changes.

[78] *Crestfield Convalescent Home*, 287 NLRB 328 (1987); *Ryder Distribution Resources*, 302 NLRB 76 (1991).

[79] *Pepsi-Cola Bottling Co.*, 330 NLRB 1025 (2000); *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982.)

[80] In his brief, counsel for the Charging Party argues that King instituted an entirely new disciplinary system with no "guideposts or criteria in common with the prior regime of just cause and progressive discipline." The Charging Party cites no specific changes, but essentially relies on the fact that increased numbers of discharges occurred after the Union's advent. Without more, the increased numbers cannot support findings of animus or disciplinary system changes. No credible evidence was adduced to show prior condonation of the type of misconduct targeted by Respondent's discipline herein or any change of rules.

[81] The General Counsel essentially argues but cites no authority for the proposition that employees' ignorance of the established disciplinary system meant there was no system. I do not find it necessary to resolve the question of whether all employees were given employee handbooks. At least one of the General Counsel's witnesses was, and there is no credible evidence to controvert Respondent's assertion that employees were given a handbook upon being hired.

conditions of employment when it applied discipline.[82] That is true even though the discipline may have been tightened. See *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991), where the Board cited with approval the finding of *Trading Port*, 224 NLRB 980 (1976), that where the standards [of productivity/efficiency] and sanctions remained the same, the related "tightening of the application of existing disciplinary sanctions did not require bargaining with the union."[83]

While Respondent has no obligation to notify and bargain to impasse with the Union before imposing discipline, Respondent has an obligation to bargain with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees. The law is clear that it is unlawful for an employer to refuse to bargain with respect to the termination or reinstatement of employees. *Parker Transport, Inc.*, 332 NLRB 547 (2000), citing *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209–210 (1964); *Ryder Distribution Resources*, 302 NLRB 76 (1991). A union may, however, waive its right to bargain about a mandatory subject if it does not request bargaining. *Parker Transport, Inc.*, supra. Here, the evidence shows that although the Union did not make a formal demand for bargaining, it protested Respondent's termination of employees and demanded their reinstatements, which can be taken as requests to bargain about those mandatory subjects. The Union did not, therefore, waive any right to bargain about the terminations or reinstatements of employees Barrientez, Evans, Otero, and Washington.[84] However, the credible evidence also shows that Respondent never refused to bargain regarding the terminations and/or reinstatements of those employees. Rather, Respondent's representatives discussed Barrientez' termination with Cagle, and Ford professed his willingness to meet and bargain with the Union about other terminations. There is no credible evidence that Respondent refused to meet its bargaining obligations in this regard.

Accordingly, the General Counsel has not met its burden of proving that Respondent violated Section 8(a)(5) and (1) of the Act by issuing discipline without first notifying the Union and affording it an opportunity to bargain over the discipline. The General Counsel also has not met the burden of proving that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union regarding the terminations and/or reinstatements of employees. I shall dismiss these allegations of the complaint.

The consolidated complaint also alleges that Respondent, without prior notice to or bargaining with the Union, imposed a new documentation requirement on employees seeking bereavement leave, the implementation of which resulted in Falcon's terminating his employment. Respondent's employee handbook clearly specifies the circumstances under which an employee is entitled to claim bereavement leave. There is no contention that the provision is unlawful as set forth or applied. There is no contention that the circumstances occasioning Falcon's request for bereavement leave on September 21 met Respondent's eligibility requirements or that Falcon was, in fact, entitled to bereavement leave.

The General Counsel's theory is essentially that Respondent, although free to apply the restrictions of the bereavement leave provision, had no policy or procedure requiring documentation of eligibility. Any such requirement constituted a change to the provision, and Respondent could not require employees to demonstrate they met the provision's requirements when requesting bereavement leave without first notifying the Union and bargaining over the change. According to the General Counsel, Respondent's demand for documentation or verification of eligibility from Falcon constituted an unlawful unilateral change, and when Falcon was required to submit documentation before returning to work, he was forced to accede to unlawfully imposed conditions in order to work. When he resigned rather than work under the allegedly unlawful conditions, the General Counsel argues that he was constructively discharged.

Credible evidence shows that Respondent had an established practice of requiring employees to provide information that they met the terms of the bereavement leave provision. While Respondent may, prior to Falcon's request, have been satisfied with oral employee communications regarding relationship to the deceased and location of the funeral, the fact that Respondent required more concrete verification from Falcon does not, in my opinion, constitute a unilateral change. Respondent did not abandon its rather informal verification approach to bereavement leave or change any of its terms. When faced with a questionable request for bereavement leave, Respondent simply required, ad hoc, more specific and verifiable information from Falcon. A violation of the duty to bargain by unilateral change requires material and substantial changes in employees' terms and conditions of employment. *Katz*, supra. In *Bath Iron Works*, supra, the Board stated: "When changes in existing plant rules . . . constitute merely particularizations of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a 'material, substantial, and significant' change. Only changes of

[82] See *Cotter & Co.*, supra, where the Board, citing *Great Western Produce*, 299 NLRB 1004, 1005 (1990), noted that "the discipline or discharge of any employee violates Sec. 8(a)(5) if the employer's unlawfully imposed rules or policies were a factor in the discipline or discharge"; *Van Dorn Plastic Machinery Co.*, supra at 3, where the Board stated: "the notification and enforcement of a *new* [absentee control] system is undeniably still a unilateral change in terms and conditions of employment." (Emphasis added.) *Dynatron/Bondo Corp.*, 324 NLRB 572, 573 (1997), where discipline of employees who violated a "unilaterally instituted new rule" violated Sec. 8(a)(5) of the Act. In an analogous situation, the Board noted that the "critical distinction" in the fact situations of *Daily News*, supra, and *American Packaging Corp.*, 311 NLRB 482 (1993), and *Stone Container Corp.*, 269 NLRB 1091 (1984), was that "the latter two employers applied the preexisting system for granting raises while the [*Daily News*] did not." *Daily News*, supra at 1240–1241.

[83] Although not alleged in the complaint, in his brief, counsel for the General Counsel argues that stricter enforcement of preexisting rules is a unilateral change that must be bargained to impasse with the Union prior to implementation. I cannot accept counsel's position as *Bath Iron Works Corp*, supra, and *Trading Port*, supra, provide contrary authority.

[84] See *American Diamond Tool*, 306 NLRB 570 (1992).

this magnitude trigger a duty to bargain under the Act."[85] Here, Respondent's requirement of additional verification in light of a suspicious request for leave is not a material or substantial change in its bereavement leave provision but rather an exercise of its right to police and administer the existing bereavement leave terms, which right is implicit in the bereavement leave provision. See *Optica Lee Boringuen, Inc.*, 307 NLRB 705, 723 (1992), where the Board affirmed the judge's finding that the employer's revision of how employees justify absences merely clarifies procedures implicit in the leave rules. As the request to Falcon for additional information was not unlawful, it follows that Falcon's refusal to accede to it did not make his consequent self-termination unlawful.[86] Accordingly, Respondent did not violate Section 8(a)(5) and (1) of the Act in this respect, and I shall dismiss the allegations of the complaint relating to Falcon.

[85] Situations that do not activate the duty to bargain include installation of a timeclock in place of a card system, *Rust Craft Broadcasting*, 225 NLRB 327 (1976); installation of a timing device to measure productivity, *Trading Port*, supra; implementation of an oral test as part of an established training program, *UNC Nuclear Industries*, 268 NLRB 841 (1984); installation of timeclock, *Bureau of National Affairs*, 235 NLRB 8 (1978); change of method to inform management of early leaving from oral to written, *Goren Printing*, 280 NLRB 1120 (1986).

[86] Employee discipline or discharge violates Sec. 8(a)(5) if the employer has unlawfully implemented work rules or policies, which were a factor in the discipline or discharge. *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001); *Great Western Produce*, 299 NLRB 1004, 1005 (1990). As I have found that Respondent did not unlawfully require verification of Falcon's bereavement, it is unnecessary to reach the question of whether his termination constituted a constructive discharge.

CONCLUSIONS OF LAW

1. By suspending David Otero on September 28, 1999, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By discharging David Otero on September 29, 1999, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

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

Respondent having discriminatorily suspended and discharged employee David Otero, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent also must expunge from its files any reference to the unlawful suspension and discharge of David Otero and thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

[Recommended Order omitted from publication.]