Parexel International, LLC *and* Theresa Neuschafer.
Case 5–CA–33245

January 28, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On December 11, 2007, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, the Respondent filed limited cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent 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[1] and briefs and has decided to reject the judge's recommended holding in part, for the reasons explained in this Decision and Order.[2]

The primary issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by discharging employee Theresa Neuschafer. The judge recommended dismissal of the allegation. For the reasons set forth below, we reverse the judge and find that the Respondent's discharge of Neuschafer violated the Act.

Facts

The Respondent performs research studies for pharmaceutical companies at its Baltimore, Maryland facility. The Baltimore facility employed a number of people from South Africa. Theresa Neuschafer, who was not from South Africa, worked as a licensed practical nurse on one of the Respondent's research teams.

On July 28, 2006,[3] Neuschafer entered into conversation with employee John Van der Merwe at the nurses' station. Two other employees, including Monique Gray, were in the area at the time. Neuschafer asked Van der Merwe, who had left the Respondent's employ in June but returned on July 24, if he had been given a raise upon his return. In response, Van der Merwe told Neuschafer, untruthfully, that he had received a raise and was now the shift supervisor. Neuschafer then asked if Van der Merwe's wife, who had left the Respondent's employ 1 week earlier, would also be returning with a raise. Van der Merwe replied, again falsely, "Absolutely, we're clever people and Liz [Manager of Clinical Operations Liz Jones] is going to look after us." Both of the Van der Merwes and Jones were South Africans, and it is undisputed that by "us," Van der Merwe meant the South Africans on Respondent's staff.

A day or two later, Neuschafer told Nurse Manager Lisa Turek, her immediate supervisor, about her conversation with Van der Merwe. Neuschafer said that Van der Merwe had come back with a raise and that his wife would be coming back with a raise, and that she thought the whole unit should quit and come back with a raise. Neuschafer also told Turek that all the South Africans socialized together and that Liz Jones was going to look after them. Turek reported what Neuschafer had told her to Jones.[4]

On August 4, Jones and human resources consultant Lisa Roth summoned Neuschafer to discuss her conversation with Van der Merwe. Jones and Roth were concerned about a "rumor," which they believed originated with Neuschafer, that South African employees were receiving favored treatment and "taking over."

At the meeting, Neuschafer recounted the substance of her discussion with Van der Merwe. Neuschafer also stated her belief that the Respondent was paying South Africans higher wages and that Jones was going to continue favoring the South Africans in that manner. In response, Jones asked Neuschafer if she had discussed the Van der Merwe conversation with anyone other than Turek. Neuschafer said she had not. On August 10, the Respondent discharged Neuschafer.

Judge's Decision

The judge found that Neuschafer's discharge did not violate the Act. In reaching that conclusion, the judge found that (1) the Respondent would not have discharged Neuschafer but for Neuschafer's conversations with Van der Merwe and Turek, and (2) that those conversations concerned terms and conditions of employment, specifically wages and discrimination in the setting of wages, so

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by promulgating and maintaining an overbroad solicitation and distribution ban.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We shall modify the judge's recommended Order to substitute a narrow cease-and-desist Order for the broad one recommended by the judge and to conform to the violations found. We shall also issue a new notice to correct an inadvertent omission and to conform to the modified Order.

[3] All dates are 2006, unless otherwise specified.

[4] Turek, whose testimony the judge generally credited, testified that, within the same timeframe, she was approached by employee Gray, who said she had overheard the conversation between Neuschafer and Van der Merwe and was upset by it. Nevertheless, the judge found only that their conversation "may" have been overheard by other employees.

that, if the conversations had been "concerted activity," they would have been statutorily protected. The judge further found that the Respondent terminated Neuschafer in part to prevent her from discussing those matters with other employees. But, while deeming the discharge a "pre-emptive strike," the judge held that there was an insufficient basis under Board law to find that the initial conversations were concerted activity. Accordingly, the judge dismissed the discharge allegation.

Analysis

We agree with the judge that Neuschafer's discharge was "a pre-emptive strike to prevent her from engaging in activity protected by the Act." Contrary to the judge, however, we find that the policies of the Act and our precedent support a finding that the discharge therefore violated Section 8(a)(1) of the Act, regardless of whether the initial conversations were themselves concerted activity.

I.

First, we address whether the preemptive strike theory is properly before the Board. In its exceptions, the Respondent asserts that it was error for the judge to have considered the theory because it was not encompassed within the General Counsel's complaint. The Respondent maintains that the only protected concerted activity alleged was the Neuschafer-Van der Merwe conversation. Because, as we now show, the preemptive strike theory "is closely connected to the subject matter of the complaint and has been fully litigated," *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), we find that it is properly before us.

A.

To begin, the preemptive strike theory is closely connected to the subject matter of the complaint. Paragraph 4 of the amended complaint alleges that "[o]n or about July 28, 2006, Respondent's employee Theresa Neuschafer engaged in concerted activities with other employees for the purposes of collective bargaining, and/or mutual aid and protection, by discussing their wages." Paragraphs 9(a) and (b) allege that "[o]n or about August 10, 2006, Respondent discharged its employee Theresa Neuschafer . . . to discourage employees from engaging in these or other concerted activities." Firing Neuschafer in order to prevent her from having further conversations with employees about wages and discrimination in the setting of wages is the type of unlawful intent alleged in the complaint—"to discourage employees from engaging in these or other concerted activities."

The conversation between Neuschafer and Van der Merwe referred to in the complaint and described in the statement of facts above involved an intertwined discussion of wages and discrimination in the setting of wages. The judge found that the Respondent's discharge of Neuschafer was a preemptive strike to prevent her from discussing those same matters with other employees. The prevention of future discussions among employees about wages and discrimination in their setting is closely connected to the specific allegations of the complaint, and we so find.

B.

We also find that the preemptive strike theory was fully litigated. That is not surprising because evidence that Respondent terminated Neuschafer in order to prevent future protected, concerted activity was clearly relevant to the question of whether the Respondent terminated her in retaliation against her original, allegedly protected concerted activity.

Neuschafer testified at length. The Respondent's attorney did not object to her testimony about her discussions with Van der Merwe on July 28, her report of that discussion to Turek, or her meeting with Jones and Roth on August 4. In fact, the Respondent's attorney led Neuschafer through a series of questions exploring Neuschafer's perception that the Respondent favored the South African employees with higher wages and would continue to do so. Both Turek and Jones were witnesses, and both testified regarding their own dealings with Neuschafer. Jones testified that she asked Neuschafer if she had discussed the Van der Merwe conversation with anyone other than Turek, and Roth candidly acknowledged that they met with Neuschafer out of concern that Neuschafer had been talking to other employees about the matters raised in the Neuschafer-Van der Merwe discussion.

In short, the testimony we now rely upon is part of the record, and Respondent had a full and fair opportunity to cross-examine Neuschafer and to examine its own witnesses, as well as to present any other relevant evidence. Respondent also had a strong incentive to do so as any suggestion that it terminated Neuschafer to prevent future concerted activity was clearly relevant both to the preemptive strike theory and to the theory that the Respondent terminated Neuschafer simply in retaliation for her prior, allegedly protected activity. We conclude that the preemptive strike theory was fully litigated. See *Golden State Foods Corp.*, 340 NLRB 382 (2003) (unalleged violation fully litigated where respondent had opportunity to cross-examine witnesses who testified about the relevant statements); *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), enfd. in relevant part 128 F.3d 271 (5th Cir. 1997) (unalleged violation fully litigated where respondent did not object to the testimony of witnesses

regarding crucial facts, cross-examined those witnesses, and presented its own witnesses to testify about the same course of conduct).

C.

Accordingly, we find that both prongs of the *Pergament* standard have been satisfied.[5] We recognize that the Board "may not change theories in midstream without giving respondents reasonable notice of the change." *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted).[6] Here, however, the General Counsel did not "change horses in mid-stream." Rather, the two theories amount to different parts of the same horse. Both theories rest in the premise that Respondent terminated Neuschafer because it did not want her to discuss wages and discrimination in the setting of wages with other employees. A discharge triggered by Neuschafer's past conversation obviously foreclosed any similar future conversations. Upon careful review of the course of this litigation, therefore, we conclude that our consideration of the preemptive strike theory does not violate the Respondent's due process rights.

II.

Having found that the preemptive strike theory of the case is properly before us, we now address the merits. As stated above, the judge found that the Respondent's discharge of Neuschafer was "a pre-emptive strike to prevent her from engaging in activity protected by the Act." In our view, such conduct by an employer violates the Act.[7]

Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Among those rights is the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." *Triana Industries*, 245 NLRB 1258, 1258 (1979). In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most critical element in employment," are "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988). Discussions about wages are often the precursor to organizing and seeking union assistance. *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Triana Industries*, supra.[8]

But whether such discussions lead to union activity or not, our precedents provide that restrictions on wage discussions are violations of Section 8(a)(1). *Valley Slurry Seal Company*, supra. Applying those principles, we have often found that maintenance or enforcement of a rule against discussing wages effectively interferes with employee rights and violates Section 8(a)(1) even if no employee has yet engaged in protected activity and been disciplined under the rule. See cases cited supra. If maintenance of such a rule violates the Act, a fortiori, the discharge of an employee to prevent her from engaging in such conduct violates the Act. When an employee is discharged on that basis, both she and the employees with whom she would have spoken are denied the opportunity to compare their wages and other terms of employment and to determine whether to take further concerted action. Cf. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) ("organization rights are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others").

[5] In support of its exception the Respondent relies on the General Counsel's statement on the record that "[t]he essence of the whole complaint is that [Neuschafer] was disciplined for discussing wages." Contrary to the Respondent's contention, we find that this statement in no way precludes the Board from finding a violation on the preemptive strike theory. In *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003), cited by the Respondent, the General Counsel expressly limited his theory of the case, both in statements at the hearing and in his posthearing brief. Given the close connection between the two theories, we do not believe the Respondent would reasonably have understood the oral statement to narrow the General Counsel's theory of the case to exclude the preemptive strike theory. The statement offered no positive assurance that the General Counsel would not argue that Neuschafer was disciplined for discussing wages in order to prevent her from continuing to do so. Moreover, to say that the "essence of the case" is that Neuschafer was disciplined for discussing wages, in no sense precludes the argument that she was disciplined to prevent her from continuing to do so.

[6] In *Lamar Advertising of Hartford*, supra, the change of theory would have required litigation of a different set of facts. Here, as discussed below, the violation is based on inferences drawn from the same set of facts that were relevant to the admittedly litigated theory.

[7] In light of our disposition of this case on this ground, we find it unnecessary to pass on the judge's finding that Neuschafer was not engaged in concerted activity within the meaning of the Act when she discussed wages and favoritism in the workplace with Van der Merwe and then Turek. For purposes of deciding this case, we assume arguendo that Neuschafer had not yet engaged in protected concerted activity at the time of her discharge.

[8] The principles explained above apply equally to employees' discussion of possible discrimination in the setting of terms or conditions of employment.

Under Section 8(a)(1), an employer may not "interfere with, restrain, or coerce employees" in the exercise of Section 7 rights. It is beyond dispute that an employer violates Section 8(a)(1) by threatening to terminate an employee in order to prevent her from exercising her Section 7 rights, for example, by discussing wages with coworkers. It follows that an employer similarly violates Section 8(a)(1) by simply terminating the employee in order to be certain that she does not exercise her Section 7 rights. Indeed, the Board has often held that an employer violates the Act when it acts to prevent future protected activity.[9] After all, the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity. As the Supreme Court explained in affirming the Board's holding that a refusal to hire union members is unlawful, such practices are "a dam . . . at the source of supply." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). We agree with the judge that the Respondent terminated Neuschafer because of its concern that she would discuss wages and employment discrimination with other employees and its fear of what those discussions might lead to. The Respondent sought to erect "a dam at the source of supply" of potential, protected activity. The Respondent thereby interfered with employees' exercise of their Section 7 rights.

The judge declined to find a violation because, in his view, Neuschafer had not yet engaged in concerted activity. He opined that Board law requires that an employee must have already engaged in protected concerted activity in order for the Board to find that she was unlawfully discharged to prevent protected concerted activity. We disagree. If an employer acts to prevent concerted protected activity—to "nip it in the bud"—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more.

That conclusion is supported not only by the plain text of Section 8(a)(1), by the policies underlying Sections 7 and 8(a)(1), and by the authorities cited, but it is consistent with other lines of Board precedent holding that, under certain circumstances, employees who have engaged in no concerted activity at all are protected from adverse action. For example, an adverse action taken against an employee based on the employer's belief that the employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not in fact engage in such activity.[10] Similarly, a mass discharge undertaken without concern for whether individual employees were engaged in concerted activity—where "some white sheep suffer along with the black"—violates the Act.[11] What is critical in those cases is not what the employee did, but rather the employer's intent to suppress protected concerted activity. So here.

As shown in our discussion of the facts, Neuschafer, after discussing wages with employee Van der Merwe, reported that discussion to her immediate supervisor, Turek. Having heard, albeit falsely, that Van der Merwe and his wife were getting raises, Neuschafer told Turek that perhaps everyone ought to quit and come back with a raise. Turek immediately passed what she learned up the chain of command. Upper management was sufficiently concerned with what it heard that it called Neuschafer in for a meeting, where management expressed concern about two questions: what Neuschafer and Van der Merwe had discussed, and whether Neuschafer had discussed the substance of the conversation with anyone other than Turek. Satisfied that Neuschafer had not yet stirred up any concern about wages or possible discrimination among other employees, the Respondent discharged her before she could do so.

Neuschafer's discharge had the obvious effect of restricting her own further protected discussions of wages and possible discrimination with other employees, thus interfering with her Section 7 rights. As discussed above, the discharge also had the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, and possibly inquiring further

[9] See, e.g., *Monarch Water Systems, Inc.*, 271 NLRB 558 fn. 3 (1984) ("actions taken by an employer against an employee based on the employer's belief the employee . . . intended to engage in protected concerted activity are unlawful"); *Koronis Parts, Inc.*, 324 NLRB 675, 698 (1997) (employer violated the Act by terminating an employee's continued employment or refusing to hire her because of its suspicion that she was "sympathetic to the Union and likely would become a supporter of the Union"); *Compuware Corp.*, 320 NLRB 101 (1995), enfd. 134 F.3d 1285 (6th Cir. 1998), cert. denied 523 U.S. 1123 (1998) (employer unlawfully discharged employee to prevent him from expressing work-related concerns at an upcoming meeting with state representatives); *Phoenix Processor Limited Partnership*, 348 NLRB 28, 28 fn. 7 (2006), petition for review denied sub nom. *Cornelio v. NLRB*, 276 Fed. Appx. 608 (9th Cir. 2008), cert. denied 129 S. Ct. 490 (2008) (employer discharged employee to prevent further discussions with fellow employees about wages and hours).

[10] See, e.g., *Monarch Water Systems, Inc*,. supra, 271 NLRB 558 fn. 3; *Bo-Ty Plus, Inc.*, 334 NLRB 523, 528 (2001); *Hamilton Avnet Electronics*, 240 NLRB 781, 791 (1979) (employer mistakenly believed that employee was part of a group of employees at the forefront of organizing activity; her discharge was unlawful even though she engaged in no union activity); *Metropolitan Orthopedic Assn.*, 237 NLRB 427, 427 fn. 3 (1978) ("The discharge of 4 employees . . . because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act").

[11] *Majestic Molded Products v. NLRB*, 330 F.2d 603 (2d Cir. 1964), and cases cited.

or acting in response to, substandard wages or perceived wage discrimination. We therefore find that the Respondent's discharge of Neuschafer violated Section 8(a)(1) of the Act.[12]

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully discharged Theresa Neuschafer, we shall order the Respondent to offer her full reinstatement to her former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[13] Further, the Respondent will be required to remove from its records all references to the unlawful discharge of Theresa Neuschafer and to notify her in writing that this has been done and that the discharge will not be used against her in any way. In addition to the physical posting of paper notices, the Respondent shall be required to distribute the notices electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Parexel International, LLC, Baltimore, Maryland, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging its employees in order to prevent them from engaging in protected concerted activities.

(b) Maintaining an overly broad solicitation and distribution rule that does not convey a clear intent to permit protected activities in nonworking areas on nonworking time, and which requires employees to seek advance approval by the Respondent of protected activities.

(c) Distributing to any employee of any employer who works at the Parexel facility, in proximity to Parexel employees, any document that can reasonably be read to prohibit that employee from discussing wages, hours, and other terms and conditions of employment with employees.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Theresa Neuschafer full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make Theresa Neuschafer whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Theresa Neuschafer, and within 3 days thereafter, notify her in writing that this has been done and that her discharge will not be used against her in any way.

(d) Rescind or revise its solicitation and distribution rule so as to convey a clear intent that protected activities are permitted in nonworking areas on nonworking time and that advance approval for protected activity is not required, and advise employees in writing that this has been done.

(e) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Baltimore, Maryland facility, copies of the attached

[12] The judge found that the Respondent would not have discharged Neuschafer but for her conversations with Van der Merwe and Turek. In so finding, the judge necessarily rejected the Respondent's defense that it would have discharged Neuschafer for performance failings or other legitimate business reasons even absent any alleged protected activity. We agree with the judge and find that the Respondent failed to show that Neuschafer would have been discharged in the absence of the Respondent's fear that she would engage in protected activity in the future.

[13] We agree with the judge, for the reasons he states, that Neuschafer's entitlement to reinstatement and backpay was unaffected by Neuschafer's taking study documents home in violation of the Respondent's rules.

notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 2006.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER HAYES, dissenting.

For the reasons set forth by the judge, I would affirm his dismissal of the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Theresa Neuschafer. I do not reach the merits of the legal theory on which my colleagues rely in reversing this finding, inasmuch as I would find that it has not been alleged or fully litigated.

The General Counsel litigated this case on the theory that Theresa Neuschafer engaged in actual concerted activity when she discussed wages and her perception of wage favoritism with coworker John Van der Merwe and/or Supervisor Lisa Turek. The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e., activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984).[1] However, the judge correctly found that Neuschafer's conversations with Van der Merwe and Turek were not for mutual aid and protection, and therefore were not concerted.

My colleagues do not pass on the judge's finding that Neuschafer did not engage in actual protected concerted activities. Instead, they build on the judge's conjecture that the Respondent was "in some respects" motivated to discharge Neuschafer as a preemptive strike to prevent her from engaging in protected concerted discussions with coworkers in the future. I disagree with their view that this theory of violation is closely related to the complaint or that it was fully litigated.[2] As alleged and litigated, the violation turns on whether the Respondent discharged Neuschafer for what she did, not for what it supposed she might do. Consequently, the Respondent lacked notice that it should adduce facts concerning its motivation beyond the conceded fact that it discharged Neuschafer for her prior conversations with Van der Merwe and Turek. Further, the Respondent had no notice that it would have to marshal a legal defense to a theory that the General Counsel did not urge before or during the hearing and that judge conceded was unprecedented. As a matter of fundamental due process, no violation should be found on the preemptive discharge theory.

In sum, the General Counsel has failed to prove the theory of violation that was alleged and litigated. The Respondent did not discharge Theresa Neuschafer for engaging in actual protected concerted activity. I would therefore adopt the judge's recommendation to dismiss the complaint on this point.

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

[1] Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[2] Inasmuch as the finding of a violation on the preemptive strike theory is procedurally barred, I need not address the merits of that theory. However, I note that finding a Sec. 8(a)(1) motivational discharge violation in the absence of any actual concerted activity is unprecedented, and, at the very least, in tension with *Meyers Industries*, supra. I have serious reservations about this finding and the potential breadth of its application in future cases.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees in order to prevent them from engaging in protected concerted activity.

WE WILL NOT maintain a rule prohibiting solicitation and distribution that does not convey a clear intent to permit protected activities, such as activities relating to wages and hours and other terms and conditions of employment, in nonworking areas on nonworking time, and/or which requires employees to seek advance approval by us of such protected activities.

WE WILL NOT distribute to any employee of any employer who works at our facility, any document that prohibits the discussion of wages, hours, and other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Theresa Neuschafer full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Theresa Neuschafer whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Theresa Neuschafer, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL rescind or revise our solicitation and distribution policy to convey a clear intent that our policies do not prohibit protected activities, such as activities relating to wages, hours and other terms and conditions of employment, in nonworking areas on nonworking time, and do not require employees to seek advance approval by us of such protected activities.

PAREXEL INTERNATIONAL, LLC

Thomas J. Murphy and *Daniel M. Heltzer, Esqs.,* for the General Counsel.

Harold R. Weinrich and *Joseph E. Schuler, Esqs. (Jackson Lewis LLP),* of Vienna, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on September 18–20, and October 1–3, 2007. The charge was filed September 21, 2006, and the complaint was issued August 2, 2007.

The General Counsel alleges that Respondent Parexel International, LLC violated Section 8(a)(1) of the Act by firing its employee, Theresa Neuschafer, on August 10, 2006. The General Counsel alleges she was terminated for engaging in concerted activities with other employees for the purpose of mutual aid and protection, by discussing wages. He also alleges that Respondent violated the Act in orally promulgating a rule prohibiting employees from discussing their wages, interrogating employees about protected activities and accusing Neuschafer of violating its confidentiality policies and agreements.

The General Counsel also alleges that the provision in Respondent's employee handbook regarding solicitation and distribution violates the Act. He makes the same allegation with regard to the paragraph on "confidentiality" in Respondent's code of business conduct and ethics.

At trial, the General Counsel amended his complaint to allege that Respondent violated the Act by distributing to an employee of temporary employment agency, who had been referred to Respondent, a document prohibiting this employee from discussing her wages.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Parexel International, LLC, a corporation, performs research studies for pharmaceutical companies at the Harbor Hospital in Baltimore, Maryland. It purchases and receives goods valued in excess of $50,000 at this Baltimore facility which originate from points outside of Maryland. Parexel derives gross revenues in excess of $250,000 at this location. 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.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Allegation Relating to Theresa Neuschafer

Respondent hired Theresa Neuschafer, a licensed practical

nurse (LPN), in August 2004. She worked at Respondent's Baltimore, Maryland facility, which is located on the seventh floor of the Baltimore Harbor Hospital. Neuschafer worked as a research nurse performing safety and efficacy studies on new medicines, or medicines that were being tested for new applications. Throughout most of her employment at Parexel's Baltimore facility, Neuschafer worked on a team headed by Miempie Fourie, a study cocoordinator. Teams were generally staffed by a research nurse, such as Neuschafer, a research technician, and a research assistant. Only nurses were permitted to administer medication to the study participants.

There is conflicting testimony as to how well Theresa Neuschafer performed her job. The testimony of her study coordinator, Fourie, is that her performance was satisfactory. The testimony of other management officials, particularly Elizabeth Jones, nurse manager, and then manager of clinical operations beginning in July 2006, is far less complimentary. Jones, who also supervised Neuschafer, testified that she was moving towards terminating Neuschafer by the end of July or early August 2006.

At the end of July or early August 2006, Fourie asked Jones to remove Neuschafer from her team. It is well established that Neuschafer did not get along well with other members of her team, particularly, Mary Ann Green, the research assistant, and to a lesser extent, Nicole Rykowski, the research technician. Fourie testified that she requested that Neuschafer be transferred simply because it was easier to replace one person from her team than two.

It is unnecessary to resolve the conflicts in testimony regarding Theresa Neuschafer's performance. That is so because it is absolutely clear that she would not have been fired on August 10, 2006, but for a conversation she had with employee John Van der Merwe on the night of July 28, 2006, and her conversation with Lisa Turek, the new nurse manager, a day or two later. Turek, who had been promoted to this supervisory position a few weeks earlier, went to Elizabeth Jones and relayed to Jones what Neuschafer had told her about Neuschafer's conversation with Van der Merwe.[1]

As I told the parties on the last day of the hearing, I find that Respondent would not have fired Theresa Neuschafer on August 10, 2006, but for her conversation with Van der Merwe and the fact that this conversation was relayed to Elizabeth Jones by Turek. I base that finding on the record as whole, such as:

> The timing of Ms. Neuschafer's termination in relation to her conversations with Van der Merwe, Turek, the August 4, meeting, and the absence of any intervening event relevant to her discharge; Elizabeth Jones' testimony that the conversation Neuschafer had with Van der Merwe was a factor in Neuschafer's termination [Tr. 580-81]; The testimony of Respondent's H.R. consultant Lisa Roth at transcript 622 that this conversation was "the last straw," leading to Neuschafer's termination; The testimony of Jones and Roth that no decision had been made to terminate Ms. Neuschafer prior to Jones becoming aware of Neuschafer's July 28 conversation with Van der Merwe and the subsequent conversation between Neuschafer and Turek [Tr. 1059–060, 1124].

B. The July 28, 2006 Conversation Between Theresa Neuschafer and John Van der Merwe

I fully credit Theresa Neuschafer's uncontradicted account of her conversation with John Van der Merwe. Van der Merwe left his employment with Respondent at the end of June 2006 and returned to work with Parexel on July 24.

Neuschafer saw Van der Merwe at the nurse's station between 7 and 8 p.m. on July 28. Employees Monique Gray and Michelle Scott were also present, but apparently did not participate in the discussion. There is no evidence that Neuschafer consulted with either Gray or Scott before making inquiries to Van der Merwe.

Neuschafer asked Van der Merwe if he got a raise to return to work for Respondent. Van der Merwe responded by telling her that he got a raise and was now the night-shift supervisor. In fact, he had not gotten a raise to come back. Neuschafer then asked if Van der Merwe's wife, Izel, who had left Respondent the prior week, would also be returning with a raise.

Van der Merwe responded, "Absolutely, we're clever people and Liz [Jones] is going to look after us." Van der Merwe, his wife, and Elizabeth Jones are white "Afrikaners," descendents of the Dutch settlers in South Africa.[2] Jones worked for Parexel in South Africa and her first language is Afrikaans, the Dutch dialect spoken by the ethnic Dutch in that country.

C. Neuschafer's Conversation with Lisa Turek, a Day or Two Later

Neuschafer talked to her immediate supervisor, Lisa Turek, the new nurse manager, a day or two after her conversation with Van der Merwe. She told Turek that Van der Merwe told her he had come back to Parexel with a raise and that Neuschafer thought the whole unit should quit and come back with a raise. Neuschafer also told Turek that Izel Van der Merwe would be coming back with a raise. Lastly, she told Turek that John Van der Merwe said to her that Liz Jones was going to look after the South Africans and that they all socialized together.[3] Turek reported her conversation with Neuschafer to Elizabeth Jones.[4]

[1] Tr. 1180, L. 10 should read: "supervisor and agent," rather than "supervising agent."

[2] Miempie Fourie is also an "Afrikaner."

[3] Turek's account of the conversation is not materially different. However, she testified that rather than telling her that John Van der Merwe and his wife were returning to Parexel with a raise, Neuschafer was asking Turek the terms on which they were returning. According to Turek, Neuschafer also discussed another Afrikaner, Elizabeth Langenhugen, who Neuschafer described as "another clever South African," who was making more money as a temporary coordinator. I find both accounts credible.

[4] Turek testified that Monique Gray approached her and told her that she had overheard the conversation between Van der Merwe and Neuschafer on July 28. She testified further that Gray was upset and that is why she went to Jones. However, she also testified that she could have talked to Jones about Neuschafer's conversation with Van der Merwe before she spoke with Gray.

D. Jones and Lisa Roth Meet with Neuschafer on August 4, 2006

Jones summoned Neuschafer to meet with her and Human Resources Consultant Lisa Roth on August 4, 2006, to discuss her conversation with Van der Merwe. Neuschafer related the substance of her conversation with Van der Merwe to Jones and Roth. Jones asked Neuschafer if she had talked to anyone about the conversation other than Lisa Turek. Neuschafer replied that she had not. Neuschafer testified that Jones then said that she had violated Respondent's confidentiality agreements and that in that agreement she promised not to discuss salaries. Jones, at least implicitly denied that she did so (Tr. 1145–1149). Neuschafer did not make this contention in a deposition taken by Respondent's counsel on August 14, 2007, in a parallel proceeding under the Sarbanes-Oxley Act. For this reason, I credit Jones.[5]

Lisa Roth testified that at this meeting, Jones stated that she had heard that the South Africans had barbeques together every weekend.[6] Neuschafer responded that's what she heard and that South African employees were being accorded favored treatment.[7]

Elizabeth Jones fired Theresa Neuschafer on August 10, 2006. She did not meet with Neuschafer between August 4 and 10.

Analysis

There is only one issue in this case, namely whether Theresa Neuschafer engaged in activity protected by Section 7 of the Act when she spoke to John Van der Merwe on July 28, 2007, and/or when she spoke to Lisa Turek a day or two later. If either conversation is protected, Respondent violated Section 8(a)(1) in terminating Neuschafer's employment. If both conversations are unprotected, Respondent did not violate Section 8(a)(1) in terminating Neuschafer.

Regardless, of whether one believes that Jones was moving towards termination, it is clear that she would not have fired Neuschafer on August 10 but for these conversations. Moreover, given the fact that Neuschafer had been transferred to a new study team just before her termination, I do not credit Jones' testimony to the extent it suggests that Neuschafer's termination was imminent before she learned of the conversation with Van der Merwe.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." (Emphasis added.)

In *Myers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers II)*, 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co.*, 330 F.2d 683, 685 (3d Cir. 1964).

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

For the reasons stated below, I conclude that Respondent did not violate Section 8(a)(1) in terminating Theresa Neuschafer's employment.

E. Neuschafer's Activity was not "Concerted"

Concerted complaints about favoritism generally and/or favoritism with regard to wages are protected, *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006)*; Rock Valley Trucking Co.*, 350 NLRB 69 (2007). The issue herein is whether any discussion between employees or between an employee and a supervisor about wages or about favoritism concerning wages is concerted, and if not, under what circumstances would such discussions not be concerted.

Theresa Neuschafer did not consult with any other employees before discussing with John Van der Merwe the terms upon which he returned to work for Respondent. Similarly, she did not consult with other employees before relaying the substance of that conversation to Turek. Neuschafer did not claim to be speaking on behalf of other employees to the extent that she suggested to Turek that the favored treatment of "South Africans" was unfair. Similarly, Neuschafer did not indicate to Turek that she was speaking for other employees when she said that "the whole unit should quit and come back with a raise."[8]

[5] As a result of crediting Jones, I dismiss the allegations contained in pars. 5 (a)-(c), 8, 9(c), and 10(b) which are all predicated on Neuschafer's testimony that Jones told her that she was violating her confidentiality agreement by discussing wages with other employees.

[6] Jones apparently heard this from her boss, Rachel Garrido. Garrido testified that in about July 2006, employee Cecelia Laughlin told her that the South Africans were having barbeques every weekend, that they were planning on taking over the Baltimore facility and that they were after Garrido's job. Garrido testified that Laughlin told her that she heard this from Theresa Neuschafer.

Jones testified that Garrido came to her and told her that she had been warned that Jones was going to take her job. Jones testified that she was led to believe that Neuschafer was the source of this rumor.

[7] The General Counsel argues that I should draw an adverse inference from Roth's inability to produce notes she believed she took at the August 4 meeting. I agree that if Roth could produce notes of her August 2 meeting Jones, one would expect her to be able to produce notes for August 4. However, I believe Roth's inability to find the August 4 notes is an insufficient reason for crediting Neuschafer's account of the August 4 meeting over that of Jones. Neuschafer's testimony regarding Jones' alleged statement that she violated the confidentiality agreement by discussing wages is sufficiently significant that I would expect that she would have mentioned it in her deposition, if that is what Jones said.

[8] *Bryant & Cooper Steakhouse*, 304 NLRB 750, 752 (1991), cited by the General Counsel at p. 24, fn. 25 of his brief is easily distinguisha-

Thus, there is no direct evidence that Neuschafer had these conversations with the object of initiating or inducing group action.

In a number of cases the Board has found that concerns raised by a single employee in a group meeting are assumed to have a concerted objective. *Cibao Meat Products*, 338 NLRB 934 (2003); *Winston-Salem Journal*, 341 NLRB 688 (2003); *Air Contact Transport, Inc.*, 340 NLRB 688 (2003).

In the instant case, Theresa Neuschafer did not discuss wages or favoritism in a group meeting. Her conversation with Van der Merwe was a one-on-one conversation, although two other employee bystanders may have overheard it. Also she never indicated to Van der Merwe that she was speaking on behalf of anyone other than her self.

Each of the cases relied upon by the General Counsel at page 22 of his brief are materially distinguishable from the instant matter.[9] In each of those cases, save one,[10] the discriminatee or discriminatees discussed wages with at least one other employee, whose interests were consistent or compatible with their own. In this case, Neuschafer discussed wages with only one employee,[11] John Van der Merwe. She was clearly not discussing Van der Merwe's wages because she was concerned with his interests.

F. Neither Neuschafer's Conversation with John Van der Merwe nor her Conversation with Lisa Turek was for "Mutual Aid or Protection"

Neuschafer certainly wasn't concerned with the welfare of Van der Merwe or his wife when she talked to him on July 28. Similarly, she was not talking to Turek because she was concerned with Turek's interests or that of the Van der Merwes.

The issue herein is whether it can be inferred that she engaged in the conversation for the mutual aid or protection of all non-South African employees at Parexel. Unlike the situation in *Phillips Petroleum Co.*, 339 NLRB 916 (2003), there is no evidence that Neuschafer had consulted with other employees about favoritism towards South Africans before speaking to either Van der Merwe or Turek. There is no evidence, as there was in *Phillips*, that any other employee encouraged her to speak up about the issue of favoritism generally or favoritism with respect to wages.

G. Assuming Either Conversation was Concerted and for "Mutual Aid or Protection" was it "Protected"

Finally, there is an issue in this case as to whether Theresa Neuschafer's conversations are protected by Section 8(a)(1), assuming that she was engaged in concerted activity for the mutual aid and protection of employees at Parexel. Neuschafer was certainly promoting ethnic disharmony at Parexel and while one may be protected by conceitedly objecting to favoritism on the basis of ethnic origin in some circumstances, it may well be that an employee may not be so protected in others. In this vein, I would rely on *Kormatsu America Co.*, 342 NLRB 649, 650 (2004), and *Noah's New York Bagels*, 324 NLRB 266, 275 (1997).

In the instant case, I conclude that Neuschafer's conversations would have been protected, if they met the other criteria under Section 7. John van der Merwe led Neuschafer to believe that South Africans were benefiting from favored treatment and she thus had a protected right to protest such favoritism.

H. Did Respondent's Termination of Theresa Neuschafer Violate Section 8(a)(1) in that it was a Preemptive Strike to Prevent Her from Discussing her Perception of Favoritism with Other Employees

I find that Respondent terminated Theresa Neuschafer, in part, so that he she could not discuss her perception that Afrikaners were the beneficiaries of favoritism with other employees who might also be concerned with this matter. (At Tr. 687–688.) Neuschafer testified that on August 4, Jones asked her who she talked to about her conversation with Van der Merwe. Neuschafer testified that she told Jones that she only discussed this conversation with Turek. According to Neuschafer, Jones replied, "Are you sure. Is there anybody else you talked to about this? And I said no, I talked to Lisa Turek."

Elizabeth Jones did not specifically contradict this testimony. Moreover, the proposition that Respondent terminated Neuschafer to prevent her from spreading her concern over favoritism towards Afrikaners is supported by Jones' testimony at a deposition taken in connection with Neuschafer's proceeding under the Sarbanes-Oxley Act.

At this deposition, Jones testified that,

> [Van der Merwe] comes back to work. The next week I heard stories on the unit of how Terry just gave the conversation she had with him. . . . It was reported to me by one of the night employees, also by [Lisa Turek] . . . [Monica] Gray, what did she report to you? That there was a conversation with Terry, and Terry is telling the unit, or Terry is telling people that

ble. The employee in that case, who denied being a spokesman for others, had in fact spoken with other employees, prior to telling his employer, "we are unhappy." His employer had also overheard him suggesting that he was going to go to the NLRB and "the Union."

[9] The General Counsel cites the following cases for the proposition that any discussion between two employees that touches on upon wages constitutes concerted activity for mutual aid and protection: *Salvation Army*, 345 NLRB 550, 561 (2005); *Trayco of S.C.*, 297 NLRB 630, 633–634 (1990); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995); *Super One Foods*, 294 NLRB 462, 463 (1989); *U.S. Furniture Industries*, 293 NLRB 159, 161 (1989); *North Carolina License Plate Agency #18*, above at 293.

L.G. Williams Oil Co., 285 NLRB 418, 423 (1985), cited by the General Counsel at p. 23 of his brief, is also a case in which the discriminatee discussed her concerns, regarding the fairness of other employees' wages, with at least one other employee who may have had similar interests.

[10] In *North Carolina License Plate Agency*, supra, the discriminatees complained in unison at a meeting with management about favoritism towards another employee.

[11] Lisa Turek was a statutory supervisor and therefore not an employee within the meaning of the Act.

> John is a clever person if he's coming back with a raise or something.

(Tr. 1161), quoting Jones' deposition testimony.[12]

Lisa Roth's testimony also indicates she and Jones met with Neuschafer on August 4, due to a concern that Neuschafer had been talking to other employees about her conversation with Van der Merwe.

In some respects, Neuschafer's termination was a preemptive strike to prevent her from engaging in activity protected by the Act. See *Compuware Corp.*, 320 NLRB 101, 102–103 (1995). However, I have not encountered any precedent for the proposition that I can find a violation on this basis without evidence that the alleged discriminate had in fact engaged in concerted protected activity. Therefore, I decline to affirm the complaint on this basis.

I. Assuming Theresa Neuschafer was Discharged in Violation of Section 8(a)(1), the Fact that She Violated the Respondent's Rules by Taking Study Documents Home does not Affect Her Entitlement to Reinstatement and Backpay

Respondent argues that even if Neuschafer was discharged in violation of the Act, she should not be entitled to reinstatement and backpay because she violated Respondent's rules by taking home documents from drug studies that the Company performed. I find, however, assuming that I am wrong on the issue of protected concerted activity, that Neuschafer's violation of these rules should not affect her entitlement to reinstatement and backpay.

It is absolutely clear that Respondent was lax in enforcing this rule. Rachel Garrido, Respondent's manager of clinical operations, testified that occasionally employees took study documents home. She also testified that Respondent asks (but apparently does not demand) that employees bring these documents back to its worksite and shred them. However, there is no evidence as to how uniformly employees were told about the importance of bringing the documents back. There was obviously no mechanism to assure that employees did so.

Thus, if Neuschafer violated Respondent's rules by taking study documents home, this conduct was to some extent condoned. The danger to the confidentiality of the study documents was not materially increased by the fact that Neuschafer failed to return them. If she was inclined to disclose the documents to parties who Respondent would not want to see them, she could easily have done so and then returned the materials to the hospital. She could also have copied the study documents before returning them.

[12] At the instant hearing, Jones testified that she did not speak to Monique Gray herself. She stated that Lisa Turek reported to her what Gray had said.

1. Alleged facially overbroad rules[13]

The General Counsel alleges that two rules maintained by Respondent violate Section 8(a)(1) because they are overbroad. These rules are:

The solicitation and distribution rule found at page 43 of Respondent's employee handbook (GC Exh. 9), which provides:

> PAREXEL employees deserve the opportunity to perform their work without interruption by unwarranted solicitation or distribution of nonwork-related materials. For this reason, persons not employed by the company may not solicit or distribute literature on the premises at any time. Additionally, PAREXEL employees are prohibited from distributing literature on the premises at any time by any means, including through the company's mail system. Such solicitation/distribution must be approved, in advance, by Human Resources.

2. Respondent's confidentiality rule

Respondent Code of Business Conduct and Ethics (GC Exh. 10, provides at p. 2):

> Employees, officers and directors must maintain the confidentiality of information entrusted to them by the Company and other companies, including our clients and suppliers, unless disclosure is authorized or legally mandated. Unauthorized disclosure of confidential information is prohibited.

[13] Sec. 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge. The United States Supreme Court in *Fant Milling Co.*, 360 U.S. 301, 307–308 (1959), held that a charge merely sets in motion the NLRB's inquiry; it need not be a specific as a judicial pleading. The General Counsel's complaint can therefore deal with any unfair labor practice related to those alleged in the charge and which grow out of the allegations in the charge while the proceeding is pending before the Board.

In *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board held that a complaint allegation satisfies the *Fant Milling* criteria if it involves the same legal theory as that contained in a pending timely charge, arises from the same factual circumstances or sequence of events as a timely charge, and whether a respondent would raise similar defenses.

The second amended charge in this case filed on April 18, 2007, alleges that Respondent has maintained an overly broad solicitation/distribution policy. Sec. 10(b) of the Act does not preclude litigation of a policy, such as the Parexel policies at issue in this case, which remains in force within 6 months of a related charge. *Carney Hospital*, 350 NLRB 627 (2007).

The allegation raised at trial pertaining to Parexel's distribution of the Sparks policy on confidentiality is sufficiently related to the second amended charge to meet the *Redd-I* and *Fant Milling* criteria. It was also fully and fairly litigated.

> You should take appropriate precautions to ensure that confidential or sensitive business information, whether it is proprietary to the Company or another company, is only communicated to people who need to know such information in order to perform their responsibilities for the Company and is not communicated to anyone outside the Company unless an appropriate confidentiality agreement is in place.
>
> Only the Company's authorized spokesman may respond to inquiries concerning the Company from the media, market professionals (such as securities analysts, institutional investors, investment advisors, brokers and dealers) and security holders. If you receive inquiries of this nature, you must decline to comment and refer the inquirer to your supervisor or one of the Company's authorized spokespersons. The Company's policy on Corporate Disclosure, which includes a list of the Company's authorized spokespersons, is available in the "Legal Affairs" section of the "Policies and Procedures" section of the Company Intranet.

You must also abide by lawful obligations that you have to your former employer or others. These obligations may include restrictions on the use and disclosure of confidential information, restriction on the solicitation of former colleagues to work at the Company and noncompetition obligations.

The standard for evaluating these rules is set forth in *Lutheran Heritage Village Hospital-Livonia*, 343 NLRB 646, 647 (2003). If the rule explicitly restricts Section 7 activities, it is illegal. If not, the rule's legality depends on whether (1) employees could reasonably construe the language to prohibit Section 7 activities; or (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict Section 7 rights.

Since I have not credited Theresa Neuschafer's testimony that Elizabeth Jones relied on the confidentiality policy in their meeting of August 4, the only issue is whether either of these rules is illegal because employees could reasonably construe either one to prohibit Section 7 activities.

Applying this standard, I find that the solicitation and distribution rule violates Section 8(a)(1) and that the confidentiality rule does not. With regard to the latter, it is obviously directed mainly to confidential information the company receives from and provides to pharmaceutical company clients.

The solicitation and distribution rule, however, clearly could be construed to apply to literature about unionization or wages, benefits and other terms and conditions of employment.

In recognition of the fact that a hospital's primary function "is patient care and that a tranquil atmosphere is essential to carrying out that function," the Board has permitted health care facilities to impose somewhat more "stringent prohibitions" on solicitation and distribution than are generally permitted. *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (approving the standard applied by the Board in *St. John's Hospital*). A hospital may prohibit solicitation and distribution at any time in immediate patient care areas (such patients' rooms, operating rooms, X-ray areas, therapy areas), even during nonworking time. *St. John's Hospital*, supra at 1150–1151; see also *Health Care & Retirement Corp.*, 310 NLRB 1002, 1004–1005 (1993). However, a hospital may not ban solicitation and distribution in other areas to which patients and visitors have access (such as lounges and cafeterias) unless the evidence shows that such a ban is necessary to avoid a disruption of patient care. Id.

To justify such a facially unlawful rule, an employer bears the burden of showing that it communicated or applied the rule in a way that conveyed a clear intent to permit protected activities in nonworking areas on nonworking time, *Ichikoh Mfg.*, 312 NLRB 1022 (1993). In the present case, Respondent did not meet this burden.

Additionally, any rule that requires employees to secure permission from their employer prior to engaging in protected activities on an employee's free time and in nonwork areas is unlawful. *Teletech Holdings, Inc.*, 333 NLRB 462 (2001); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

3. Confidentiality agreement provided to temporary employees

At trial, the General Counsel moved to amend the complaint to allege that Respondent violated Section 8(a)(1) in giving temporary employee Enid Dukule a "Confidentiality Agreement for Parexel" to sign on or about April 17, 2007. It is uncontroverted that Respondent gave this document (GC Exh. 20) to Dukule when she reported to work at Parexel, at the direction of Sparks, the temporary employment agency which referred her to Respondent. The document was not provided to Parexel employees, but may have been given to other temporary employees referred to Respondent by Sparks.

The document provides in pertinent part:

> PAREXEL considers non public information about the Company and its customers to be proprietary and confidential. Under no circumstances should you discuss with a friend, acquaintance or other person any of the confidential affairs of PAREXEL or its customers. When your work assignment at PAREXEL ends, all Company and customer information, including personal data must remain at the company.
>
> We must impress the importance of confidentiality upon each employee who goes on assignments at PAREXEL; therefore, you are requested to sign the following pledge:
>
> During my work assignment at PAREXEL, I understand that I may have access to confidential proprietary and trade secret information at the Company. This information includes, but is not limited to information regarding the Company's:
>
> Existing and future projects
>
> . . . .
>
> Customers, suppliers, and consultants
>
> . . . .
>
> Personnel information (including, without limitations, employee addresses, telephone numbers, compensation and benefits)
>
> I understand that both during and after my work assignment at the Company, I must keep such infor-

> mation confidential and not use it or disclose it to anyone without the written consent of the Managing Director, Legal Affairs on behalf of the Company, except auth authorized in the performance of my work assignment.

Both parties have focused on whether Respondent can be held responsible for the dissemination of this document to Dukule, who worked at Parexel under the supervision of Parexel management, although nominally an employee of Sparks, a temporary employment agency.[14]

Neither party addressed whether the document is violative of Section 8(a)(1) under the standards set forth in *Lutheran Heritage Village Hospital-Livonia*, supra. It is I believe a close question as to whether an employee would reasonably conclude that the policy addresses discussions of wages and benefits with other employees. The context of the document is clearly Sparks concern that its employees not reveal the vast amount of confidential information they might have access to at Parexel. On the other hand, the reference to personnel information does not make clear that employees are allowed to discuss their wages and other terms and conditions of employment. On balance, I conclude that the document violates Section 8(a)(1).

Regardless of the fact that Respondent did not draft the document and did not provide it to its employees, its dissemination could impact their Section 7 rights. A temporary employee, who interpreted the document to prohibit him or her from discussing wages, would feel restrained from entering into such a discussion with Parexel employees. Since the temporary employees worked with Parexel employees, this also restrained the Section 7 rights of Respondent's employees.

REMEDY

Having found that the 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.

[Recommended Order omitted from publication.]

[14] While Respondent would seem to be a joint employer of Dukule, the General Counsel did not make such an allegation. Thus, I cannot find that Respondent violated the Act on a joint employment theory because this was not fully and fairly litigated.