

**Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing, a Single Employer and Vanessa Morris.** Case 20–CA–035511

April 19, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On April 27, 2012, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and the Charging Party each filed answering briefs, and the Respondent filed a reply brief to the Acting General Counsel’s answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief. The Charging Party filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.

We agree with the judge, for the reasons set forth in his decision as well as those discussed below, that the Respondent violated Section 8(a)(1) of the Act by discharging employees Holli Thomas, Vanessa Morris, and Brittany Johnson for engaging in protected concerted activity, and by maintaining a “Wage and Salary Disclosure” rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee.<sup>3</sup>

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup> The Respondent has 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.

<sup>3</sup> Unlike our colleague, we decline to find an additional 8(a)(1) violation based on the Respondent’s maintenance of its “Confidential Information Security” rule. The only handbook rule alleged in the complaint as unlawful was the “Wage and Salary Disclosure” rule. Further, the unalleged rule was not mentioned during the course of the hearing. Nevertheless, we note that any rule maintained by the Respondent that “forbids employees from disclosing wages and compensation to each other or to any third party” will be prohibited by par. 1(b) of our Order in this case.

1. We agree with the judge’s finding that Thomas and Morris were engaged in protected concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood to their supervisor and to the Respondent’s owner, and that their Facebook postings were a continuation of that effort. But we also find that the Facebook postings would have constituted protected concerted activity in and of themselves. The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns. The employees also discussed looking at a book about the rights of workers in California so that they could determine whether the Respondent was violating labor laws. Such conversations for mutual aid and protection are classic concerted protected activity, even absent prior action. *Rhee Bros., Inc.*, 343 NLRB 695, 695 fn. 3 (2004) (“[C]oncerted employee protests of supervisory conduct are protected under Section 7 of the Act where such protested conduct affects employees’ working conditions.” (quoting *Trompler, Inc.*, 335 NLRB 478, 479 (2001), enfd. 338 F.3d 747 (7th Cir. 2003))).

The judge correctly rejected the Respondent’s “discharge conspiracy” theory. The Respondent contends that the Facebook postings were not protected because the employees had “no ‘honest and reasonable belief’ that the purpose of their conduct was for the mutual aid and protection of employees,” and that instead, the employees “schemed to entrap their employer into firing them.”<sup>4</sup> The judge found the conspiracy theory to be “nonsensical,” and we agree. There is no credited evidence that the employees’ actions were undertaken to entrap the Respondent into committing an unfair labor

Member Block would find that the Respondent’s handbook rule entitled “Confidential Information Security,” as written, also violated Sec. 8(a)(1) both because it prohibits employee disclosure of “personnel information” to “third parties during or after employment” and because it forbids the disclosure of such information without the Respondent’s “express written approval.” See *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB 545, 547 (2013); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012). Although the complaint did not challenge the “Confidential Information Security” rule, Member Block would find that this rule is closely related to the challenged “Wage and Salary Disclosure” rule, and that the lawfulness of the “Confidential Information Security” rule was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enfd. 920 F.2d 130 (2d Cir 1990). Here the rule was reviewed by the judge, who clearly suggested in his decision that it was unlawful, and the matter was sufficiently briefed by the parties pursuant to the Respondent’s exceptions to the Board.

<sup>4</sup> In support of its theory, the Respondent relies on the postdischarge Facebook posting by Morris, which stated, “Muhahahahaha!!! ‘So they’ve fallen into my crutches.’” R. Exhs. Br. 1–3; 16–23. The judge credited Morris’ explanation that, in jest, she was quoting dialogue from “The Monkees” television show.

practice. But even if the employees were acting in the hope that they would be discharged for their Facebook postings, the Respondent failed to establish that the employees' actions were not protected by the Act.<sup>5</sup> Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) by discharging employees for engaging in that activity.

2. We also agree with the judge that the Respondent's discharge of employee Brittany Johnson violated Section 8(a)(1) of the Act. The Respondent discharged Johnson about a month after it unlawfully discharged Thomas and Morris. Johnson was a minor participant in the Facebook conversation that precipitated the discharges of Thomas and Morris: she contributed only one comment, which was characterized by the judge as "rather innocuous." Credited evidence, however, establishes that the employees' supervisor, Hayley Griffin, who made the decision to discharge Johnson, linked Johnson with Thomas and Morris and disapproved of their continued association. Thus, shortly after Thomas and Morris were discharged, Griffin noticed that Johnson had received a text message from Thomas. Griffin told Johnson that, although Griffin could not tell her whom to be friends with, she was tempted to put a "gag order" on her so that Johnson would not be able to talk with others about her working conditions. It is plain that the Respondent believed that Johnson was linked with Thomas and Morris and their protected activity, and we find that the Respondent targeted her because of those associations.

That finding is bolstered by the evidence showing that the Respondent's explanation for the discharge of Johnson, her tardiness, does not withstand scrutiny. As the judge found, although Johnson was chronically tardy, other employees at the store were consistently late for work as well. In fact, despite widespread tardiness among employees, the Respondent enforced its progressive disciplinary rule addressing "habitual tardiness" sporadically and arbitrarily, at best, and, prior to Johnson, had never discharged anyone at the store for such habitual lateness. In these circumstances, we agree with

<sup>5</sup> See *Circle K Corp.*, 305 NLRB 932, 933 (1991) (finding that employees "may act in a concerted fashion for a variety of reasons—some altruistic, some selfish—but the standard under the Act is an objective one"), enfd. mem. 989 F.2d 498 (6th Cir. 1993); see also *Dreis & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976) ("The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to . . . working conditions and hours, or other matters of 'mutual aid or protection' of employees."); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967) ("Even if it were true that [the employee] was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights.").

the judge that the Respondent's reliance on tardiness to justify Johnson's discharge was a pretext. Accordingly, we adopt the judge's finding that the Respondent failed to establish that it would have terminated Johnson in the absence of her protected concerted activity and her perceived connection to other employees who had engaged in protected concerted activity.<sup>6</sup>

#### AMENDED REMEDY

As recommended by the judge and in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to reimburse discriminatees Holli Thomas, Vanessa Morris, and Brittany Johnson an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the discriminatees, it will be allocated to the appropriate periods. As requested in the Acting General Counsel's cross-exceptions and pursuant to *Latino Express*, we shall modify the judge's recommended Order to include the tax compensation and Social Security reporting requirements in the affirmative action section of the Order.

We agree with the judge that the Respondent should be ordered to rescind the rule alleged to be unlawful in the complaint. Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007), the Respondent may comply with our order of rescission by rescinding the unlawful provision and republishing its employee handbook without it. We recognize, however, as we did in *Guardsmark* and *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB 545, 549 fn. 20 (2013), that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful

<sup>6</sup> We agree with the judge that there is no merit to the Respondent's contention that Johnson should be denied a make-whole remedy because of dischargeable misconduct during her employment; namely, the alleged failure to disclose a prior misdemeanor DUI conviction on her employment application. If an employer, having committed an unlawful discharge, discovers subsequently that the discriminatee had engaged in misconduct for which the employer would have lawfully discharged any employee, reinstatement is not ordered and backpay is terminated as of the date the employer first acquired knowledge of the misconduct. *Berkshire Farm Center*, 333 NLRB 367 (2001). Here, the Respondent did not satisfy its burden. The Respondent became aware of Johnson's DUI conviction during her employment but neither discharged her at that time nor made any effort to determine whether she had disclosed it on her employment application. In these circumstances, more fully discussed by the judge, the Respondent failed to show that Johnson's criminal record or the failure to disclose it disqualifies her from further employment with the Respondent.

rule has been rescinded, or with a new and lawfully worded rule on adhesive backing that will correct or cover the unlawfully broad rule, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rule must include the inserts before being distributed to employees.<sup>7</sup>

The Charging Party excepted to the judge's failure to order a companywide notice posting because the unlawful handbook rule was in effect at the Respondent's other stores in addition to the San Francisco store at issue in this case. We agree with the Charging Party that a companywide notice posting is appropriate in this case. "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, supra, 344 NLRB at 812. In enforcing a nationwide notice-posting in *Guardsmark*, the D.C. Circuit observed that "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." *Guardsmark, LLC v. NLRB*, 475 F.3d at 381; accord: *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011). Accordingly, because the handbook rule found unlawful in this case applied at the Respondent's other locations, we shall amend the remedy and the judge's recommended Order to provide for posting of a remedial notice at all of the Respondent's locations where the handbook containing the unlawful rule was in effect. Accord: *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB 545, 549. Therefore, the Respondent shall be required to post the attached notice marked "Appendix A" at its San Francisco, California location, where the discharges of Holli Thomas, Vanessa Morris, and Brittany Johnson and the handbook rule violation occurred. The Respondent shall also be required to post the attached notice marked "Appendix B" at all its other facilities companywide where its employee handbook containing the unlawful rule is applicable. *Id.*, slip op. at 549 fn. 24.

The Charging Party also requests that the Respondent be ordered to purchase copies of the California workers' rights book referred to in the employees' Facebook postings and to distribute copies of that book to libraries and schools along with a copy of the Board's decision in this case. In addition, the Charging Party requests that the notice posting period be extended from 60 days to "the length of time from the beginning of the commission of the unfair labor practices until the notice is actually posted"; that the reference to the "right to refrain" language

be deleted from the notice "since there was no interference with such rights"; that the Respondent be required to mail and email the Board's notice of employee rights to past and present employees; and that litigation expenses be imposed against the Respondent. We do not find it appropriate to impose these remedies in this case.

#### ORDER

The Respondent, Design Technology Group, LLC, d/b/a Bettie Page Clothing, and DTG California Management, LLC, d/b/a Bettie Page Clothing, a single employer, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by 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, revise or rescind its unlawful handbook rule, entitled "Wage and Salary Disclosure," and advise employees in writing that it has done so, and that the rule will no longer be enforced.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute revised handbooks that (1) do not contain the unlawful rule, or (2) provide the language of a lawful rule.

(c) Within 14 days from the date of this Order, offer Vanessa Morris, Holli Thomas, and Brittany Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Vanessa Morris, Holli Thomas, and Brittany Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(e) Reimburse Vanessa Morris, Holli Thomas, and Brittany Johnson an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

<sup>7</sup> We shall modify the judge's recommended Order and notice consistent with *Guardsmark* and *DirectTV*.

(f) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Vanessa Morris, Holli Thomas, and Brittany Johnson, it will be allocated to the appropriate periods.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Vanessa Morris, Holli Thomas, and Brittany Johnson, and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(h) 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 such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its San Francisco, California facility copies of the attached notice marked "Appendix A" and within that same time period post at all its facilities companywide where its employee handbook is in effect copies of the attached notice marked "Appendix B."<sup>8</sup> Copies of the notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 10, 2010.

(j) 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 at

testing to the steps that the Respondent has taken to comply.

#### APPENDIX A

##### 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 or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT maintain a rule that forbids employees from disclosing wages and compensation to each other or to any third party.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, revise or rescind our unlawful handbook rule entitled "Wage and Salary Disclosure," and WE WILL advise employees in writing that we have done so and that the unlawful rule will no longer be enforced.

WE WILL furnish all of you with inserts for the current edition of the employee handbook that (1) advise you that the unlawful provision has been rescinded, or (2) provide the language of a lawful rule; or WE WILL publish and distribute a revised employee handbook that (1) does not contain the unlawful rule or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of the Board's Order, offer Vanessa Morris, Holli Thomas, and Brittany Johnson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Vanessa Morris, Holli Thomas, and Brittany Johnson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

<sup>8</sup> 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."

WE WILL reimburse Vanessa Morris, Holli Thomas, and Brittany Johnson an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Vanessa Morris, Holli Thomas, and Brittany Johnson, it will be allocated to the appropriate periods.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Vanessa Morris, Holli Thomas, and Brittany Johnson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DESIGN TECHNOLOGY GROUP, LLC D/B/A  
BETTIE PAGE CLOTHING, AND DTG  
CALIFORNIA MANAGEMENT, LLC D/B/A BETTIE  
PAGE CLOTHING, A SINGLE EMPLOYER

#### APPENDIX B

##### 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 maintain a provision in our employee handbook that forbids employees from disclosing wages and compensation to each other or to any third party.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, revise or rescind our unlawful handbook rule entitled "Wage and Salary Disclosure," and WE WILL advise employees in writing that we have done so and that the unlawful rule will no longer be enforced.

WE WILL furnish all of you with inserts for the current edition of the employee handbook that (1) advise you

that the unlawful provision has been rescinded, or (2) provide the language of a lawful rule; or WE WILL publish and distribute a revised employee handbook that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

DESIGN TECHNOLOGY GROUP, LLC D/B/A  
BETTIE PAGE CLOTHING, AND DTG CALIFORNIA  
MANAGEMENT, LLC D/B/A BETTIE PAGE  
CLOTHING, A SINGLE EMPLOYER

*Christy J. Kwon and Yasmin Macariola, Esqs.*, for the General Counsel.

*David R. Koch, Esq. (Koch & Scow, LLC)*, of Henderson, Nevada, for the Respondent.

*David A. Rosenfeld and Nina A. Fendel, Esqs. (Weinberg, Rogger & Rosenfeld)*, of Alameda, California, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Francisco, California, on February 1–3, 2012. Vanessa Moore, an individual, filed the charge on April 5, 2011,<sup>1</sup> and the General Counsel issued the complaint on October 25, 2011. The complaint as amended at the hearing alleges that Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing, a single employer (Bettie Page) violated Section 8(a)(1) by maintaining a rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee, and by discharging employees Vanessa Morris, Brittany Johnson, and Holli Thomas. Bettie Page filed a timely answer which, combined with a joint stipulation of facts, admits the allegations in the complaint concerning interstate commerce, jurisdiction, and agency and supervisory status. Bettie Page denied that it had violated the Act.

At the hearing, I granted the General Counsel's motion to amend the complaint to allege that Design Technology Group, LLC d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing is a single employer and Bettie Page admitted that allegation.

On the entire record,<sup>2</sup> including my observation of the de-

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

<sup>2</sup> Prior to the trial, counsel for the Charging Party, David Rosenfeld, Esq., filed a motion for a more definite statement and a notice for request for remedy; both are frivolous and simply waste time and resources. Also, Bettie Page served a subpoena on Vanessa Morris, the Charging Party, and David Rosenfeld, Esq., counsel for the Charging Party, filed a motion to quash. At the trial the following ensued.

JUDGE KOCOL: Mr. Rosenfeld, please listen to me. The—in your petition to revoke, you agree to turn over certain items. Please turn those items over.

MR. ROSENFELD: It will take me a month or so, Your Honor. I've got to talk with the client and see where they are. I don't know whether they are here or not. Your honor, she was served late. Fine, I'll go look. I don't care. Your Honor was late, I'll be late.

manner of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Bettie Page, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Bettie Page, a corporation, is a wholesale and retail clothing sales company with facilities in the States of California, Nevada, and Minnesota, including a store located in San Francisco, California, where it annually derives gross revenues in excess of \$500,000 and purchased and received goods and services valued in excess of \$5000 directly from points located outside the State of California. Bettie Page 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. Background

Bettie Page runs an upscale women's clothing store in San Francisco in the Haight-Ashbury district. Jan Glaser and his wife Tatyana Khomyakova own Bettie Page. They opened the San Francisco store on about July 2; Hayley Griffin is the manager of that store. Bettie Page also has a store located in Las Vegas, Nevada; Carla Avila is the manager of that store. Avila also assists managers at other Bettie Page stores with any managerial issues they might have. Jan Hutto provides services to Bettie Page, including advising Glaser on human resources matters. Holli Thomas, Vanessa Morris, and Brittany Johnson worked at the San Francisco store as sales personnel.

MR. KOCH: We're talking about Facebook postings that can be pulled off the computer and printed out.

MR. ROSENFELD: I'll have to talk with the client.

JUDGE KOCOL: No, that won't do, Mr. Rosenfeld.

MR. ROSENFELD: Then I can't do anything until I talk to the client and find out where they are.

JUDGE KOCOL: Mr. Rosenfeld, when a subpoena is served and you agree to turn over certain documents; you're expected to be prepared with those documents.

MR. ROSENFELD: I'm not prepared now.

JUDGE KOCOL: Is there an explanation why you are not?

MR. ROSENFELD: No, other than the fact that I haven't talked to her about it, because I was under

....

JUDGE KOCOL: Okay. Mr. Rosenfeld, I'm thinking now of excluding you from this hearing for not being cooperative. Now, I'm putting you on notice of that. We will take a—aside from other possible repercussions from your inability to perform your legal obligations here, so we're going to take a five-minute break, for the record, and you will tell how quickly those documents will be here.

(Off the record at 1:57 p.m.)

JUDGE KOCOL: Mr. Rosenfeld?

MR. ROSENFELD: She has nothing in response to the subpoena.

So much for Rosenfeld's representation on the record that it would take him "a month or so" to provide the documents! Indeed, in its brief Bettie Page asserts that by the above conduct the Charging Party "flip-pantly" defied the subpoena power of the Board and therefore does not have "clean hands" in this proceeding.

###### B. Credibility

There were five main witnesses in this case: the alleged discriminates Thomas, Morris, and Johnson, and Bettie Page Management Officials Glaser and Griffin. The facts that follow are largely based on documentary evidence and the testimony of Thomas, Morris, and Johnson. Their testimony was mutually corroborative and their demeanor was entirely convincing. They impressed me with both their ability to recall the events and relate them as accurately as they could. The demeanor of Glaser and Griffin, on the other hand, was entirely unconvincing; it seemed they were prone to exaggerate, stretch the truth, and simply fabricate testimony to suit the situation. I give more specific examples below why I have decided generally not to credit their testimony unless it stands as an admission of a party opponent.

###### C. Handbook

Bettie Page's employee handbook stated:

###### Wage and Salary Disclosure

Compensation programs are confidential between the employee and [Bettie Page.] Disclosure of wages or compensation to any third party or other employee is prohibited and could be grounds for termination.

###### Analysis

Section 7 protects the right of employees to discuss the wages and other benefits with each other and with nonemployees. *Mobile Exploration & Producing U.S.*, 323 NLRB 1064 (1997), enf. 156 F.3d 182 (5th Cir. 1998). An employer may not forbid employees from doing so. *Hyundai America Shipping Agency*, 357 NLRB 860 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). By maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party, Bettie Page violated Section 8(a)(1).

Bettie Page claims, and the General Counsel concedes, that after the complaint issued in this case Bettie Page omitted this section from its employee handbook, but there is no evidence that employees were informed of the change. And as the General Counsel points out, another provision in the handbook that remains in effect states as follows:

###### Confidential Information Security

As a matter of course employees of [Bettie Page] will have access to confidential and proprietary information. This information includes, but is not limited to, **personnel information**, pricing client lists, contractual agreement, intellectual property and marketing/sales strategies. **It is a condition of employment that you not disclose this information to third parties during or after employment. Disclosure of [Bettie Page] confidential information without express written approval is prohibited.** [Emphasis added.]

This provision, although not alleged to be unlawful in the complaint, continues to forbid employees from disclosing wages and compensation, which are subsumed within the ban on disclosure of personnel information. I conclude that a full remedy is required. *Passavant Memorial Area Hospital*, 237 NLRB

138 (1978).

*D. Facts*

On July 14, shortly after the store opened, Thomas sent Glaser a message with a few ideas to make the store “the best it could possibly be.” Griffin selected an employee of the month for special attention. Griffin twice selected Morris as the employee of the month, including for the month of November. As will be seen below, Morris as well as Thomas was fired on November 10.

Store Manager Griffin and the employees socialized together outside of work. In late August while Griffin and another employee were partying together after work, Griffin tore her dress. Griffin then told the employee to repair the dress and that if the employee did not Griffin would cut her hours at the store. This event, among others, did not sit well with the other employees. Thomas began calling Avila on behalf of herself and the other employees complaining about the way Griffin managed the store and other personnel<sup>3</sup> matters. Avila told Thomas to write down the issues as they occurred and send them to her. On September 12, Thomas sent a message to Avila that was also signed by Morris, Johnson, and two other employees. The message indicated that the “management situation in our store has become extremely unstable, unsafe, and unprofessional.” The message contained a long description of Griffin’s alleged shortcomings, including that Griffin “used her position to bully, manipulate, and intimidate” the workers. In response to the message, Glaser and Avila visited the store and spoke to Griffin and the employees, including Thomas, Morris, and Johnson. None of the employees were disciplined by Glaser concerning the message they sent about Griffin. However, after the letter was sent Griffin tearfully told Thomas that someone was trying to get her fired and had written a letter to top management complaining of all the bad things she was doing. Griffin asked Thomas if she had sent that letter and Thomas untruthfully answered that she had not. Griffin told Allison Jones, also employed by Bettie Page as a sales employee, that she suspected that Thomas and Morris had sent the letter.

During monthly meetings at the store, employees asked Griffin whether the store could close at 7 p.m. instead of at 8 p.m. The employees explained to Griffin that other stores in the area were closing earlier and that the employees working late sometimes were harassed late at night by the street people after the tourists had left the neighborhood. Griffin’s reply was that she would raise the issue with corporate, but nothing was resolved.

On November 4 Thomas and Morris were working together; Griffin was out of town at the time. After speaking by telephone with Jan Hutto, Bettie Page’s human resources consultant, about a computer issue, Thomas and Hutto began speaking about sales for the day. Thomas indicated that the season seemed to be winding down as the tourists were not there as much and sales were declining. Hutto asked if that was the case for other stores in the area and Thomas indicated that the other stores were closing as 6 or 7 p.m. and Bettie Page was the only store that remained open until 8 p.m. Hutto said that management was unaware of that fact and said that she would talk

to Glaser about the matter. Glaser then called and Thomas again reported about sales. Then Thomas explained how typically Griffin opened the store and Thomas typically closed the store. She told Glaser what the employees had expressed to Griffin during the store meetings about closing the store earlier. Thomas explained to Glaser that the employees had expressed their concerns about safety because Bettie Page was the only store open late in the area and street people occasionally harassed the employees from outside the store—even came into the store—and the store had no alarm or security system to assist the young women who were working until 8 p.m.. Glaser told Thomas that Griffin had never raised the subject with him and they were unaware of the fact that the other stores were closing earlier. Glaser gave his approval to close the store at 7 p.m. Contrary to what Bettie Page later claimed, Thomas did not indicate that Griffin had agreed that the store should close earlier. As she was walking home that evening after closing the store at 7 p.m., Thomas received a call from Griffin; Griffin, as mentioned, was out of town. Griffin angrily asked why Thomas was not answering the phone at the store. Thomas explained that Glaser had agreed that the store should close at 7 p.m. going forward. Griffin replied that she did not believe Thomas and would call Glaser. Thomas then called Glaser and told him of the call from Griffin; Glaser said that Thomas should not worry and that he would handle Griffin. Continuing, Griffin then again called Thomas and indicated that she had just spoken with Glaser and the store would again close at 8 p.m. Griffin said that she could not believe that Thomas had spoken with Glaser about the matter. Thomas then called Morris and informed her of the turn of events. Later that evening Morris, Thomas, and Johnson posted the following messages on Facebook:

Holli Thomas needs a new job. I’m physically and mentally sickened.

Vanessa Morris. It’s pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I’m am [sic] unbelievably stressed out and I can’t believe NO ONE is doing anything about it! The way she treats us in [sic] NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS DONE!!

Holli Thomas. bettie page would roll over in her grave.

Vanessa Morris. She already is girl!

Holli Thomas. 800 miles away yet she’s still continues our lives miserable. Phenomenal!

Vanessa Morris. And no one’s doing anything about it! Big surprise!

Brittany [Johnson]. “bettie page would roll over in her grave.” I’ve been thinking the same thing for quite some time.

Vanessa Morris. hey dudes it’s totally cool, tomorrow I’m bringing a California Worker’s Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that’s going on that’s in violation 8) see you tomorrow!

The next day or so Morris brought the book about worker’s rights to the store and placed it in the breakroom where other employees looked through it. The book covered matters such

<sup>3</sup> Certain errors in the transcript are noted and corrected.

as benefits, discrimination, the right to organize, safety, health and sanitation.

Brynn Michel, sales employee at Bettie Page and a friend of Griffin's, told Griffin of the Facebook postings described above. Griffin then accessed Michel's Facebook page and viewed the postings. Griffin then called Avila who then called Hutto. On November 6, Hutto sent Glaser the following message entitled, "Facebook comments by Vanessa Morris and Holli Thomas San Francisco":

I screen printed these so you could see them. Carla (Avila) gave me the heads up. I guess she also stated that her mom picked up a California employment book and that we are doing all kind of things wrong. I didn't see that post. Maybe ask Carla about it. I think we need to take action right away. Also I don't know if Hayley (Griffin) is the right person to do it.

Attached to this message were copies of some of the Facebook postings described above. Later Hutto also sent Glaser a copy of the Facebook posting wherein Thomas indicated her intention to bring the worker's rights book to work.

On November 10, Thomas arrived at work and observed that Griffin had returned early from her trip. Griffin immediately directed Thomas to her office and summoned Morris from the work floor to join them. Also present was Ashley Cunningham a/k/a Doris Mayday, who had been flown in by Bettie Page to assist Griffin in the termination process that follows. Griffin stated that they were being fired because things were not working out. Griffin gave them their paychecks, stated that they were paid until 3 p.m. that day, told them to leave the premises immediately and that they were not allowed on Bettie Page premises again.

Griffin testified that after she fired Thomas and Morris:

[T]hey started giggling and smiling and [Thomas] looked at me and said so we don't have to work today? And I said nope and they were so happy and they gave each other hugs and [Morris] ran to the back and grabbed the new dress she just bought which I checked the bag to make sure she had the receipt. Just so ecstatic, ran out to the store and gave the other girls hugs and high fives. And said we'll be back. I don't remember who said that. But just absolutely thrilled that they got to leave.

I conclude Griffin's testimony concerning the happiness of Morris and Thomas at being fired is exaggerated to say the least; to the contrary, I conclude this uncorroborated testimony was created to fit neatly in with the Facebook posting described below. Instead, I credit Thomas' testimony denying that she and Morris laughed, giggled, and hugged each other after they were fired and Morris' testimony that admitted only that they may have hugged each other outside the store as they were leaving.

After they were fired the following comments were posted on Facebook by Morris and her Facebook friends:

VANESSA MORRIS. OMG the most AMAZING thing just happened!!!! 8D  
ANNA GARCIA. What?!

VANESSA MORRIS. Oh just the best thing came happen at the job!!

SHANNON IMPERO. did they fire that one mean bitch for you?

VANESSA MORRIS. Nooooo they fired me and my assistant manager because "it just wasn't working out" we both laughed and said see yaaaaah and hugged each other while giggling

ANNA GARCIA. Hahaha

VANESSA MORRIS. Muhahahahaha!!! "So they've fallen into my crutches"

Although Bettie Page contends that this posting shows it was setup by the employees to be discharged Morris credibly explained at trial that she and her sister were big fans of "The Monkees," a popular band with a television program in the 60's; this sentence is something they said on that program.<sup>4</sup>

I now describe several incidents that Bettie Page claims caused it to fire Thomas and Morris. A day or so after November 5 Thomas was outside the store during a break period talking with Johnson on her mobile phone. Thomas and Johnson were discussing the early closing matter and Thomas was stating how she felt Griffin had been unprofessional and incompetent. Then Thomas discovered that she had accidentally dialed Griffin's number. Thomas hung up and returned to the store. Griffin then called Thomas and announced she had heard what Thomas had said about her and that she could not believe Thomas was talking to the other employees about her. Thomas credibly denied describing Griffin as a "bitch." The foregoing facts are based on the credible testimony of Thomas, Johnson, and Allison Jones. Their testimony was mutually corroborative and their demeanor was convincing. Griffin, on the other hand, testified that after receiving the call "I heard noise and then I heard [Thomas'] voice and it sounded like maybe three or four other girls' voices and I heard other noises, I heard my store, customers." She also claimed that she heard Thomas calling her a "bitch." I do not credit this testimony and I also do not believe that Griffin's hearing was such that she could hear the voices of other employees and hear and distinguish them from the voices of customers and at the same time hear the noises that indicated that Thomas was inside the store as she was talking. Importantly, in the affidavit that Griffin provided during the investigation of the charge in this case she made no mention of hearing any customers during this incident. Based on testimony such as this<sup>5</sup> and on my observation of Griffin's demeanor I hesitate to credit any of her testimony.

On November 5, Hutto was sent messages from a service that monitors the emails sent from Bettie Page's computers. The messages indicated the following three emails were sent by Morris from those computers:

<sup>4</sup> In his brief that the General Counsel states that Bettie Page's "conspiracy theory is nonsensical." I agree and give in no more consideration.

<sup>5</sup> Other examples are Griffin's testimony during cross-examination by the General Counsel concerning why she did and did not make certain markings on tardiness records, concerning when Griffin began to more strictly enforce the tardiness policy, and concerning usage of the company computer for personal use.

Vanessa Morris—Seeking Sales Associate Position!!!

Hello, My name is Vanessa Morris and I am seeking a full time position but I will take part time if there are no full time positions available. I love customer service and retail because I love the constant interactions with different types of people on an everyday basis. I currently work for a 1950's reproduction dress boutique in the city.

Vanessa Morris—Craig's List POSTING!!!!!!!!!!

Hello my name is Vanessa Morris and I am inquiring about your post. I love reproduction clothing and I love working retail. I have open availability and can start immediately. Attached is my resume.

Thanks you for your time.

V. Morris

Vanessa Morris—Job Resume

The record is unclear when Morris sent those messages and what prompted the monitoring service to send the messages to Hutto. On November 9, Bettie Page was sent message from the email monitoring service that showed that Johnson had used the company's computer to send two resumes seeking employment elsewhere.

With those events in mind, I now describe the reasons Bettie Page has given for its termination of Thomas and Morris. Glaser made the decision to fire Thomas. In his pretrial affidavit, given under penalty of perjury, Glaser stated:

My decision to terminate. . . . Thomas was because while Griffin was out of town. . . . Thomas did things. Thomas called me to change operating hours and close early. She told me that she had spoken with Griffin and that Griffin agreed to close early. The next day I spoke with Griffin and she told me that she had never talked to her. Soon after we hired the employees in late June 2010, Thomas sent me a long letter about how she thought the store should be run. She was not complaining about Griffin, but about what she thought Griffin should be doing at the store. I told her to talk to Griffin. It appeared from the beginning that there was a competing issue for manager between them. The behavior manifested into insubordination in November 2010 with Thomas contravening Griffin's decisions. The conflicts continued, finally resulting in her termination.

At the trial Glaser testified that he fired Thomas for two instances of insubordination. The first was for calling him on his mobile phone and telling him that "we" decided that since there are no customers in the store after 7 p.m. "we" are going to permanently close the store 1 hour early. Glaser explained that the insubordination "was unilaterally deciding to close the store while giving me the impression she had (the) consent (of) the manager to do so, which she did not." Glaser explained that Thomas gave him the impression that Griffin, the store manager, had agreed to the early closing time when Thomas used the word "we" in the phone conversation. Glaser admitted, however, that Thomas never specifically mentioned the manager during that conversation. Glaser claims that he also spoke with Jan Hutto about closing the store early. According to Glaser, Hutto told him that Thomas had called her and they discussed the matter of closing the store at 7 p.m. Hutto suggested that

Thomas call Glaser first to get his permission. According to Glaser, Hutto said that she too was "under the impression" that Thomas had discussed the matter with Griffin. However, I have concluded above as a matter of fact that Thomas never indicated that Griffin had agreed to close early to either Glaser or Hutto; on the contrary, Thomas indicated that Griffin was passively resistant to that suggestion. And if Griffin had wanted to close the store early, Glaser must have wondered why she did not raise the matter directly with him instead of having that suggestion come from a subordinate. The second instance of insubordination, according to Glaser, occurred when Thomas referred to Griffin "as a bitch while on the sales floor of our store in the presence of customers and other employees." He learned of this from Griffin. Glaser admitted, however, that Griffin was not present on the sales floor during this incident. Rather, Griffin was in San Diego and heard the remarks over her mobile phone. According to Glaser, Griffin "heard customers and talking and the cash register and other people." Glaser also claimed that Thomas had called Griffin a bitch in his presence and in front of other people in the past, but he did not discipline her for using that language. However, on the unemployment insurance claim form for Thomas, Bettie Page indicated that:

Holli Thomas was fired for not performing her duties as an assistant manager by working against her manager at all times and taking too many days off after being written up for it.

So the name calling incident not only did not occur but was not even mentioned as a reason for termination in the unemployment insurance claim and had been tolerated in the past if it had occurred. Finally, at trial, Respondent's counsel asserted still other reasons for Thomas' termination. Among them were that Thomas had decided to take off the week of Thanksgiving to go on vacation with her mother. Of course, that event had not yet occurred because Thomas was fired 2 weeks before Thanksgiving.

According to Glaser, he fired Morris for insubordination after she disobeyed specific requests from Griffin to perform expected functions as a sales associate "(c)ontinually since her employment began, but it accelerated while Ms. Griffin was in San Diego." At trial Glaser explained:

She was told not to text from the salesroom floor, personal texting. She did so. She was told not to eat on the salesroom floor behind the register. She would do so. She was told not to change the displays without talking to the manager. She would do so. And, most specifically, she signed a specific document to not use company computers for personal purposes, and instead she used company computers to send out her resume looking for jobs with our competitors.

I can tell you that the proximate cause of firing her was using the computer, the company computer to send out her resume to competitors.

Glaser admitted that Brittany Johnson also used the company computer to send out her resumes and that Jan Hutto was aware of this but Johnson was not fired for this conduct. According to Glaser, Griffin told him that she would see Morris "constantly texting" and Griffin would be "constantly telling her to stop it."

On one occasion in around August or September Glaser waited outside the store while his wife Tatyana went inside to act as a secret shopper. They discovered that Morris was eating potato chips behind the counter. On the unemployment insurance claim form for Morris, Bettie Page indicated that Morris:

[H]as been written up for a few different things and caused an overall negative work environment. Her overall attitude towards the company was not acceptable. She stated on many occasions that she hated her job and Bettie Page store and sent out resumes from the company computer.

On an appeal form contesting Morris' unemployment insurance claim Bettie Page indicated:

Attached are documents of postings on Facebook and proof that Vanessa Morris was using the company computer after signing documents stating it was not to be used for personal use. She not only was undermining [illegible] the Bettie Page company. Her attitude was affecting all staff.

Attached to the appeal form were copies of the Facebook postings described above. At Morris' unemployment compensation hearing Glaser testified that the reasons Morris was fired were:

Insubordination, defamation on public media regarding our personnel and our company, tardiness to her job, personal use of company equipment in direct violation of the employee handbook and the specific document prohibiting the same.

At the trial in this case Glaser explained the reference to Morris' use of the public media in his testimony at the unemployment compensation hearing as follows:

She was fired—the proximate cause was because of her personal computer use. The reason the defamation was referred to in [the transcript of the unemployment compensation hearing] is probably—it's my fault. But after she was fired, I noticed on Facebook that she wrote that I fell into her trap, fell into her clutches

And I was really upset. I said that I was setup, that it was entrapment and I was just livid. And so, when I went to this hearing, that was on my mind. And it's the only reason I threw in this defamation as part of a number of reasons, which were the real reason, she was dismissed.

Yet at the unemployment compensation hearing the judge asked Glaser why Morris was fired and he testified, in part, referring to the Facebook postings described above:

Mr. Glaser: I don't know if this would warrant discharge, but there's a comment prior to that, hey dude, totally cool; tomorrow I'm bringing a California Worker's Rights Book to work. My mom works for a law firm that specializes in labor laws and, boy, will you be surprised by all the crap that's going on in violations.  
See you tomorrow.

I conclude that Bettie Page's and particularly Glaser's explanations concerning the reasons for the discharges of Morris and Thomas morphed as needed based on the exigencies of the situation.

Bettie Page's handbook permitted use of its computers for

personal reasons only during breaktime or lunchtime, and then only to "an absolute minimum." Employees were also required to sign a lengthy computer use policy in October that restricted use of company computers for personal matters to "minimal and incidental use." The evidence, however, shows that employees and especially Griffin used the work computers for personal matters such as viewing online dating, shopping, and Facebook. Indeed, on August 17, 2011, employee Brynn Michel used the work computer for personal use, including sending her resumes to another employer. She was given a first warning for this conduct. The evidence also shows that other employees, including Griffin, ate food on the sales room floor without being disciplined.

#### Analysis of the Terminations of Thomas and Morris

For over three-quarters of a century Section 7 of the Act has given employees the right to act together (concerted activity) to improve their working conditions. Concerted activity is activity that is "engaged in, with or on the authority of other employees, and not solely by and of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Likewise, "It is well-settled Board law that concerted protests of supervisory conduct are protected under Section 7 of the Act where such protested conduct affects employees' working conditions." *Rhee Bros., Inc.*, 343 NLRB 695, 695 fn. 3 (2004), quoting *Trompler, Inc.*, 335 NLRB 478, 479 (2001), enf. 338 F.3d 747 (7th Cir. 2003). Thomas and Morris engaged in protected concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood to Griffin and then when Thomas presented those concerns on behalf of the employees to Glaser. In the conversation with Glaser, Thomas explained those concerns were shared by other employees who also wanted the store to close early. Their Facebook postings were a continuation of that effort culminating in the employee rights handbook being brought to work for the employees to peruse.<sup>6</sup> Clearly Bettie Page knew of the concerted nature of these activities.

I now apply the shifting burden analysis required by *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),<sup>7</sup> to determine whether the General Counsel has met his initial burden of showing that Thomas and Morris were fired because of those activities. See also *T&J Trucking Co.*, 316 NLRB 771 (1995). Stripped of its fabricated patina, Glaser's testimony amounted to an admission

<sup>6</sup> The General Counsel urges that I consider the September 12 message, described above, as part of the protected, concerted activity of Thomas and Morris. To be sure, it was. But I discount the role that activity played in the discharges of the employees because there is no evidence that Glaser harbored any animus towards the employees because of that activity. Remember it was Glaser who decided to fire Thomas and Morris.

<sup>7</sup> In its brief, Bettie Page cites *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977), for the proposition that the General Counsel must establish that the unlawful motive was the "dominant" motive. But this and similar cases were implicitly overruled by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

that he fired Thomas because she raised the concerns of the employees about safety and the store closing time. And Bettie Page's presentations to the unemployment insurance department are admissions that the Facebook postings were a reason Bettie Page terminated Morris. Remember also that Avila advised Glaser that, "I think we need to take action right away" concerning discharging Thomas and Morris for their Facebook postings. These admissions alone easily satisfy the General Counsel's burden. The element of timing strengthens the case, inasmuch the terminations came quickly on the heels of the protected concerted activity by Thomas and Morris. Finally, as explained above the shifting and specious reasons given by Bettie Page for the terminations further strengthen the General Counsel's case.

I now examine whether Bettie Page has met its burden of showing that it would have fired Thomas and Morris even if they had not engaged in protected concerted activity. Where, as here, the General Counsel makes a strong showing of discriminatory motivation, an employer's rebuttal burden is substantial. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); see also *Van Vlerah Mechanical*, 320 NLRB 739, 744 (1996). I have already noted the shifting and specious nature of the reasons for discharge and I therefore conclude that Bettie Page has failed to meet its burden. By discharging Vanessa Morris and Holli Thomas for engaging in protected concerted activity, Bettie Page violated Section 8(a)(1).

Bettie Page claims that Thomas is not entitled to reinstatement because she gave an incorrect social security number on her employment application. However, Thomas credibly explained that when she filled out that application she had just moved to San Francisco from Los Angeles away from her parents' house for the first time and she did not have credentials such as her birth certificate or social security card with her. So she called her mother to obtain her social security number who gave Thomas the number based on her memory. Well, it turned out that the last four digits were incorrect. Thomas discovered this in the course of her application for unemployment compensation and she then sent Hutto a message advising her of the error. Moreover, on June 29, Bettie Page did a background check on Thomas; the report it received had Thomas' correct social security number. Under these circumstances, I conclude that this was nothing more than an isolated, inadvertent error and Bettie Page would have viewed it as such. I conclude Bettie Page has failed to show that it would have fired Thomas had it known of this mistake.

Turning to the discharge of Brittany Johnson, shortly after Thomas and Morris were fired on November 10, Griffin told Johnson that she could not tell Johnson who Johnson could be friends with, but she was tempted to put a gag order on Johnson so she would not be able to talk about work. Griffin made this comment after she noticed that Johnson had received a text message from Thomas.

Griffin posted a schedule for the employees, but she would change the schedule and sometimes forget to tell employees she had done so. On December 11, Johnson believed she was scheduled to start work at 2 p.m. However, shortly after 12 p.m. she received a call from Griffin asking where she was and that she was supposed to start at 12 p.m. Johnson explained

that she thought she was scheduled to start at 2 p.m. but she would get to the store as soon as possible. When she arrived Griffin terminated Johnson's employment. Griffin made the decision to fire Johnson and informed Glaser of it after the fact. The termination form indicated that Johnson "was supposed to be @ work @ 12 pm. I called Brittany she thought she worked @ 2 pm. Brittany didn't show up until 1:10 pm" and "also Brittany was obviously hung over." Brynn Michel, a sales employee for Bettie Page who was working the day that Johnson was fired noticed that Johnson was wearing sunglasses when she arrived to work that day but that Johnson in the past had frequently admitted to being hung over when she arrived to work. On the unemployment insurance claim form for Johnson, Bettie Page indicated that Johnson "had been written up 2 times over a 4-month period for being late but continued to be late. Almost everyday." In its statement of position submitted during the investigation of the charge filed in this case, Bettie Page indicates that Johnson was fired for "for chronic tardiness and insubordinately challenging her supervisor Griffin when she was reprimanded for being over an hour late to work in December."

Bettie Page has the following provision in its employee handbook:

#### ATTENDANCE

Punctual attendance is mandatory for efficient job performance. . . . [H]abitual tardiness will be subject to appropriate disciplinary action, up to and including termination. Habitual tardiness, regardless of how minor, reflects negatively on the employee and the company. . . . Late is late. 1 incident is cause for verbal warning. 2 incidents earn a written warning, at management's discretion. Multiple incidents are cause for further action.

Despite this provision in the handbook, employees regularly arrived late for work and were not disciplined, although the length of their tardiness was, for the most part, in the range of 10 minutes or less. More specifically, on August 23, Griffin gave Morris a verbal and written warning for tardiness and on September 17 Griffin gave Thomas a verbal and written warning for tardiness, both warnings indicated that if it happened again it could lead to a suspension or termination. However, notwithstanding the written policy in the handbook and the comments on the warnings, Griffin told employees that so long as someone is present to open the store on time, it did not matter much if employees arrived 10 minutes or so late. After receiving the warnings, Thomas and Morris continued to be late but were not disciplined. Allison Jones worked for Bettie Page as a sales employee. One day Griffin called Jones and told her that she was supposed to be at work. Jones told Griffin that she did not realize the schedule had been changed, but she lived nearby and quickly came to work. Jones was not disciplined for arriving late.

I now examine Johnson's tardiness record. On August 28, Griffin gave Johnson a verbal and written warning for arriving 40 minutes late to work that day. The warning indicate "if happens again—will be suspended, and if happens a third time can result in termination." Johnson continued to be tardy on a regular basis but was not warned or disciplined until December

6, when Griffin issued Johnson another written warning, this time for being 15 minutes late for work. This warning indicated that Johnson “has been late to work multiple times in the last month” and that “If happens again—possible termination.” The only other written discipline given to employees relating to tardiness before or near the time Johnson was fired was given to employee Jennifer Townsend on October 2.

#### Analysis of Johnson’s Termination

Johnson engaged in protected concerted activity when she joined the Facebook postings of Morris and Thomas by posting “‘bettie page would roll over in her grave.’ I’ve been thinking the same thing for quite some time.”<sup>8</sup> Although viewed alone, this was a rather innocuous comment, at least compared to the postings of Morris and Thomas. But other evidence shows that Griffin more strongly connected Johnson with Morris and Thomas than a more disinterested observer might think. Shortly after the terminations of Morris and Thomas, Griffin warned Johnson that she would like to place a “gag order” on Johnson so that she would not be able to talk about working conditions; this was after Griffin observed that Johnson was reading a text message from Thomas. I take into consideration my conclusion that Bettie Page unlawfully terminated Thomas and Morris thereby showing its hostility towards the fact that those employees made those Facebook postings. In sum, the evidence shows that Johnson engaged in protected concerted activity and Bettie Page knew this. Bettie Page continued to link Johnson with the protected concerted activity of Morris and Thomas and expressed a desire to disrupt that link. Bettie Page had unlawful animus towards that protected concerted activity. I conclude that General Counsel has met his initial burden under *Wright Line*.

I now determine whether Bettie Page has met its burden of showing that it would have fired Johnson anyway. To be sure, Johnson had been late on the day she was fired and she had been warned about tardiness just days before. But the record shows that no employee had ever before been fired for tardiness despite the widespread, continuing tardiness of employees. Remember, Bettie Page cannot merely point to employee misconduct to meet its burden; rather, it must show that it would have terminated the employee based on the misconduct. *Cardinal Home Products*, 338 NLRB 1004, 1008 (2003). I conclude it has failed to do so. It follows that by terminating Brittany Johnson, Bettie Page violated Section 8(a)(1).

Bettie Page claims that Johnson is not entitled to reinstatement because of comments she made after she was fired. According to Brynn Michel, the sales employee who was working the day that Johnson was fired, after she had been terminated Johnson said that she always knew that Griffin was “a horrid bitch from the moment I met you.” According to Griffin, John-

son:

[W]as pissed off. She was very, very mad. She stormed out of the store. She maybe ran and grabbed like her, you know, something maybe a CD she had and something else and came behind the counter and stormed out and when she left, she said “Hayley, now I can finally tell you, I’ve always thought that you were a horrid bitch. Screamed it through my store in front of customers. Huge scene.

Although Johnson did not deny this event, I do not entirely credit Griffin’s testimony that the name calling occurred in front of customers or caused a “huge scene.” Rather, I attribute this part of her testimony to her propensity to exaggerate. I do conclude, however, that Johnson did call Griffin a “bitch.” But this inappropriate outburst was triggered directly by Bettie Page’s unlawful termination of Johnson. I have concluded that there is no credible evidence that this occurred in front of customers and that the comment was brief and isolated. Remember that Glaser himself admitted that an employee called Griffin a “bitch” in his presence and he did not even discipline, much less terminate, that employee. Under these circumstances, I conclude that Johnson’s intemperate outburst is not sufficient to deprive her of an offer of reinstatement.

Bettie Page also contends that Johnson is not entitled to reinstatement because on her employment application she indicated that she had not been convicted of a crime yet in fact she had. Bettie Page has an employee handbook that contains the following provision:

#### CRIMINAL CONVICTIONS

Criminal convictions are taken very seriously by [Bettie Page.] We reserve the right to disqualify any applicant for employment that has been convicted of a criminal offense. Furthermore, conviction of a crime may result in automatic termination. [Bettie Page] will make every effort to evaluate the nature and circumstances of the conviction. With safety and well being of co-workers at stake, convicted employees may be subject to appropriate disciplinary action, up to and including termination.

Johnson’s conviction was a misdemeanor DUI that occurred in 2005. Johnson was required to attend classes on Thursday evenings as part of her probation. Johnson told Griffin that she needed to have those evenings off to attend the classes, specifically mentioning that they were DUI classes. Moreover, Griffin herself admitted to Johnson that she had spent 6 months in jail in Georgia for involvement with crystal meth, although there is no evidence concerning whether Griffin listed this conviction on her employment application. There is no evidence in the record concerning how Bettie Page learned that Johnson had not listed the conviction on her employment application. I do not read the “after-acquired” evidence cases as allowing an employer to troll through an unlawfully discharged employee’s work record in search for something that might serve to deprive the employee of reinstatement; to do so would allow the employer to continue to subject the employee to negative employment consequences that the employee would not have otherwise suffered had the employee not engaged in protected activity and been unlawfully discharged.

<sup>8</sup> Johnson also engaged in protected concerted activity when she signed the September 12 message. However, there is no evidence that Griffin knew that Johnson signed that message. Rather, as described above, Griffin concluded that Thomas and Morris had sent the message. And while Glaser knew that Johnson signed the message, there is no evidence that Glaser was angry at the employees for sending that message. I therefore discount the impact this activity had in the decision to terminate Johnson.

## CONCLUSIONS OF LAW

1. By discharging Vanessa Morris, Holli Thomas, and Britany Johnson for engaging in protected concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By maintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party Respondent violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The General Counsel seeks two additional remedies. For reasons that follow I grant both of them. Section 10(c) of the Act gives the Board the power to devise remedies for unfair labor practices that will "effectuate the policies of the Act." The discriminatees here will receive lump-sum payments of backpay. This may result in higher State and Federal income

taxes than they would have paid had they not been unlawfully fired. To this extent the unlawfully discharged employees will not have been made whole. To more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to reimburse the unlawfully discharged employees for the amounts equal to the difference in taxes they owe upon receipt of the lump-sum payment and the amount of taxes they would have owed had they not been unlawfully terminated. Next, the General Counsel points out that the Social Security Administration generally credits backpay to an individual's earnings record in the year reported by the employer. Here, the unlawfully discharged employees will likely receive backpay several years after they were fired. In some cases this may result in lower benefits or even the failure to qualify for any benefits due to a lack of the required credits. Again, to the extent that this happens, an unlawfully discharged employee will not have been made whole for the unlawful discharge. Again, to more fully remedy the violations I have described above and therefore to more fully effectuate the policies of the Act, I shall order Respondent to complete the paperwork needed to properly notify the Social Security Administration so that it may properly allocate the backpay to the appropriate periods.

Having found that Respondent maintained an unlawful rule in its handbook, I shall require it to revise or rescind the unlawful rule and advise employees in writing that the rule has been rescinded or revised.

[Recommended Order omitted from publication.]