

Fresh & Green's of Washington, D.C., LLC and United Food and Commercial Workers, Local 400.
Case 05-CA-065595

June 28, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On May 8, 2012, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the United Food & Commercial Workers, Local 400 (the Union) filed answering briefs, and the Respondent filed a reply brief. Further, the Acting General Counsel filed exceptions and a supporting brief, the Union filed exceptions, and 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 and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

At issue in this case are the allegedly unlawful discharges of employees Maria Yliquin and Esam Amireh from the Respondent's Washington, D.C. store (D.C. store). The judge found that Yliquin's discharge violated Section 8(a)(3) and (1) of the Act, but he dismissed the allegation regarding Amireh. On exceptions, the Respondent argues that the judge should have dismissed the allegation regarding Yliquin, while the Acting General Counsel and the Union contend that the judge should have found the violation as to Amireh.

For the reasons stated by the judge, we affirm his finding that Yliquin's discharge violated the Act. Specifically, we agree that the Respondent, by D.C. Store Manager Mary Huffman, selected Yliquin to be part of a reduction in force (RIF) because Yliquin, acting as a union steward, aggressively pursued her own and other employees' work-related complaints with Huffman. However, contrary to the judge, we find that the Respondent similarly violated Section 8(a)(3) and (1) of the Act by selecting Amireh for the RIF because he engaged a union representative to assist him in pursuing a work-related complaint with management.

¹ 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. BACKGROUND

Before 2011, A & P operated various retail grocery stores in Washington, D.C. and Maryland under the name "Super Fresh." Certain of its employees were represented by local unions affiliated with the United Food & Commercial Workers (UFCW). In May 2011,² the Respondent's parent company successfully bid on eight of A & P's stores—one in Washington and seven in Maryland—in a bankruptcy auction. Various UFCW local unions represented the employees at the eight stores, with the Union representing the D.C. store employees. On July 8, the Respondent formally acquired the D.C. store, hired most of the predecessor's employees, and reached an agreement with the Union on a contract covering its employees. Article 9 of the contract provided that all new employees were subject to a 90-day probationary period, during which the Respondent could discipline or discharge them for any reason. On July 9, employees returned to work at the D.C. store, which reopened to the public as "Fresh & Green's" on July 13. As of the hearing, the store had about 50 employees, all of whom the Union represented except Store Manager Huffman and her comanager.

Matthew Williams, the Respondent's president, testified that initial sales at the eight stores "were far below our expectations" based on the previous year when the stores operated as Super Fresh. Consequently, the Respondent decided that a RIF was necessary at all eight stores. The Respondent left the decisions concerning who would be terminated to each store's manager, in consultation with Regional Director Alan Thompson and Regional Manager Bill Snyder. Williams did not directly participate in the termination decisions. Rather, he advised Thompson to work through the lists of employees with Snyder and each store manager to identify terminable employees based on "overall job performance" and those whom the store managers would want to keep after the probationary period.

Anywhere from three to eight employees were terminated at each of the eight stores. At the D.C. store, Huffman decided to terminate six employees, including Yliquin, a shop steward, and Amireh. She informed them of her decision on September 6, stating only that they were terminated pursuant to the probationary clause in the contract. Although the termination notices for both employees stated that they were recommended for rehire, Huffman testified that she did not consider either of them when hiring four employees in October and November.

² All dates refer to 2011, unless otherwise indicated.

II. DISCHARGE OF AMIREH

Facts

Amireh began working for Super Fresh on December 8, 1975. Beginning in about 2009, he worked part time in various positions at the D.C. store under Huffman's supervision. During the school year, he also drove a bus for Fairfax County public schools in Virginia. Beginning on July 10, he worked for the Respondent part time about 26 hours per week, along with some weekends. During his first week working for the Respondent, Amireh spoke with Huffman about his work schedule, saying that he would like to continue having both Fridays and Saturdays off, as he had under Super Fresh. Huffman said that she would probably have to schedule Amireh to work either Friday or Saturday each week, to which he replied, "Okay."

Thereafter, Amireh spoke to Union Representative Richard Wildt about his request to continue getting both Friday and Saturday off each week. Specifically, Amireh told Wildt "how they [the Respondent] are trying to, you know, they're making us work like Friday or Saturday when they actually, they can easily do without, you know, they have many other new employees. They can schedule them." Wildt agreed to speak with Huffman about this issue. Later, Wildt did ask Huffman about Amireh's schedule and that of another employee raising a similar issue. Huffman replied that the Respondent would not be honoring the same schedules as had A & P/Super Fresh, and all employees had to be available to work weekends, but that she would try to work with employees whenever possible. Neither Amireh nor Wildt ever told Huffman that Amireh refused to work Fridays and Saturdays.

In August, Alex Noguera, an assistant manager and unit employee at the D.C. store, approached Amireh and asked him which days he would like off on the work schedule she was preparing. He requested Friday and Saturday. Noguera told him he needed to be available both days. Amireh replied that Huffman had approached him the previous week and asked which day—Friday or Saturday—Amireh wanted off. Noguera became angry and reiterated, "This is Fresh & Green's; you have to be available the two days."

A few minutes later, Amireh was called to Huffman's office. Huffman said, "Esam, I know you have [an]other job, I know you have a family, and this job may not be right for you. . . . [Y]ou have to be available the two days, Fridays and Saturdays." Amireh explained that she had told him just the prior week that he would not be scheduled to work both Friday and Saturday. Huffman denied doing so and said that he had to be available to work both Friday and Saturday or he had to go. Amireh

replied, "No, I'm going to stay, but I would appreciate it if I could get at least one of—one or the other day off."

Huffman terminated Amireh in person on September 6 pursuant to the contractual probationary period. When Amireh asked for a reason, Huffman responded that she did not need a reason to terminate him because he was a probationary employee. Huffman testified at the hearing that she terminated Amireh "because of scheduling conflicts," including his purported unavailability to work both Fridays and Saturdays.

As previously stated, Huffman also terminated Maria Yliquin on September 6. This action was motivated by the Respondent's animus against Yliquin's aggressive pursuit of job-related issues with Huffman. Those issues included scheduling matters.³ In response to this activity, Huffman complained to Union Representative Wildt that Yliquin was a troublemaker and was getting employees "riled up." While Huffman testified about a number of alleged performance shortcomings that justified Yliquin's termination, the judge discredited this testimony and essentially found that the Respondent's reliance on these factors was pretextual. We have affirmed the judge on this point, and affirmed his finding, based upon it, that the Respondent's termination of Yliquin was unlawful.

Analysis

Under the *Wright Line*⁴ test, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse employment action. See, e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The General Counsel satisfies this burden by showing that (1) the employee was engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the employee's protected activity. *Id.* If the Acting General Counsel meets his initial evidentiary burden, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

Applying *Wright Line*, the judge found that the Acting General Counsel failed to carry his initial burden of

³ We correct one error in the judge's decision. Although there is ample record evidence that Yliquin complained directly to Huffman about various employment issues, the judge erred in seeming to imply that Yliquin complained directly to Huffman about an initial lapse in employee health insurance coverage after the transition from Super Fresh to Fresh & Green's. In fact, in a process parallel to that used by Amireh, Yliquin raised the health coverage issue with Union Representative Richard Wildt, who in turn discussed it with Huffman.

⁴ *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 495 U.S. 989 (1982).

showing that protected union activity was a motivating factor in Huffman's decision to terminate Amireh. Specifically, he found that Amireh, aside from attending a union rally held on July 8, had engaged in no union or other protected activity.⁵ Further, the judge determined that Amireh's complaints about his work schedule were "purely personal complaints," and that there was no evidence suggesting that Huffman "resented Amireh's actions, and retaliated against him because of it." We disagree.

The judge failed to recognize that Amireh clearly engaged in union activity protected by Section 7 of the Act when he enlisted Union Representative Wildt to pursue a work-related complaint with management. This is so even if Amireh's specific scheduling complaint was about his own situation and did not invoke a contractual right under the collective-bargaining agreement.⁶ In this instance, it is the unit employee's enlistment of the union representative's assistance that necessarily brings the rights protected under Section 7 into play. And plainly, the Respondent, through Huffman, was aware of Amireh's protected union activity because Wildt referred to him by name when discussing the scheduling problem.

Further, contrary to the judge, ample circumstantial evidence in the record supports the inference that Huffman bore animus toward this protected activity. First, she unlawfully discharged Yliquin at the same time for getting employees "riled up" by aggressively pursuing work-related complaints, both directly and through the Union. Second, after Wildt spoke to Huffman on behalf of Amireh, Huffman falsely denied that she previously suggested the possibility of a scheduling accommodation and insisted that Amireh either quit or be available to work on both Fridays and Saturdays. Third, although the separation notices for both Amireh and Yliquin indicated they were recommended for rehire, Huffman did not consider either of them when filling vacant positions in October and November.

Finally, and most significantly, Huffman's assertion that she discharged Amireh because of scheduling conflicts was pretextual, just as her purported reliance on

Yliquin's alleged performance issues was pretextual. In fact, Amireh repeatedly told Huffman that there was no scheduling conflict and Huffman had no reason to believe there was one. The judge credited Amireh's testimony that he never refused to be available to work both Fridays and Saturdays. To the contrary, when Huffman gave him an ultimatum to quit if he could not be available, Amireh said he would stay.

It is well established that animus and unlawful motive may be inferred from circumstantial evidence based on the record as a whole. E.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991), enfd. in relevant part 985 F.2d 801, 805 (5th Cir. 1993). For the foregoing reasons, we find it appropriate to draw such inferences here.

In sum, we find that the Acting General Counsel met his initial *Wright Line* burden of proving that the Respondent was motivated to discharge Amireh because he sought to voice his scheduling complaint through the Union, just as it was motivated to discharge Yliquin for voicing job-related complaints as a union steward. Once this burden is met, the burden of persuasion shifts to the Respondent to prove that it would have taken the same action even in the absence of Amireh's protected union activity. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). As previously stated, we find that the Respondent's purported reliance on a scheduling conflict was pretextual because, in fact, the Respondent knew that no scheduling conflict existed. We therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Amireh.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4 in the judge's decision.

"4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Esam Amireh on September 6, 2011."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to

⁵ There is no evidence that the Respondent knew Amireh attended the rally.

⁶ Thus, the basis for finding Amireh's union activity protected is distinct from cases where an individual employee engages in concerted activity by invoking, in good faith, a right grounded in a collective-bargaining agreement. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). Moreover, although we need not pass on whether Amireh's direct contacts with Huffman about his scheduling request amounted to concerted activity, we do not endorse the judge's description of them as "purely personal complaints." They were raised at the same time as Union Representative Wildt's discussion with Huffman about another employee's scheduling issue and employee Yliquin's contemporaneous challenges to scheduling procedures.

effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully discharged Esam Amireh, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his discharge. 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). In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012), we shall order the Respondent to compensate both Esam Amireh and Maria Yliquin for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, Fresh & Green's of Washington, D.C., LLC, Washington, District of Columbia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the United Food & Commercial Workers, Local 400, or any other labor organization.

(b) 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, offer Maria Yliquin and Esam Amireh 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.

(b) Make Yliquin and Amireh 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 as amended in this decision.

(c) Reimburse Yliquin and Amireh an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination against them.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to

Yliquin and Amireh, it will be allocated to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Yliquin and Amireh, 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.

(f) 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.

(g) Within 14 days after service by the Region, post at its Washington, D.C. facility copies of the attached notice marked "Appendix."⁷ 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. If 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 September 6, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

⁷ 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."

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 or otherwise discriminate against any of you for supporting the United Food & Commercial Workers, Local 400, or any other labor organization.

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 from the date of the Board's Order, offer Maria Yliquin and Esam Amireh 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 Maria Yliquin and Esam Amireh whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL compensate Maria Yliquin and Esam Amireh for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maria Yliquin and Esam Amireh, 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.

FRESH & GREEN'S OF WASHINGTON, D.C., LLC

Gregory Beatty, Esq., for the General Counsel.
John Ferrer, Esq. and Amanda Dupree, Esq. (Morgan, Lewis & Bockius, LLP), for the Respondent.
Carey Butsavage, Esq. (Butsavage & Associates), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 27 and 28, 2012, in Washington, D.C. The complaint, which issued on December 30, 2011,¹ and was based upon an unfair labor practice charge that was filed on September 28 by United Food & Commercial Workers, Local 400 (the Union), alleges that Fresh & Green's of Washington, D.C., LLC (the Respondent), discharged employees Maria Yliquin and Esam Amireh on September 6 because they assisted the Union and engaged in concerted activities, in violation of Section 8(a)(1)(3) of the Act.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Prior to 2011, A & P operated numerous supermarkets in the Washington, D.C., and Maryland area under the name "Super Fresh." Certain of its employees were represented by local unions affiliated with the United Food & Commercial Workers union; at the store involved here, the only one located in Washington, D.C., the employees were represented by the Union. Matthew Williams, the president and CEO of the Respondent, testified about the circumstances of the Respondent assuming the operation of eight of the A & P stores.² The Respondent participated in a bankruptcy auction of 23 stores operated by A & P in the area, and the Respondent was the successful bidder on eight of these stores, including the store involved here (the facility). Williams testified that after acquiring these eight stores through an asset purchase, the Company decided to staff the stores with the same employees who had previously been employed by A & P at the stores, and met and bargained with the unions who had previously represented these employees. At the conclusion of these negotiations, on July 8, the Respondent, the Charging Party, and the Union representing the employees in the seven Maryland stores entered into collective-bargaining agreements³ covering these eight stores and the Respondent offered employment to the employees previously employed at these stores, except that the manager of each store had the authority to refuse to rehire A & P employees of their choosing. In addition, apparently because the Respondent's pay rate was lower than A & P's, some employees elected not to work for

¹ Unless indicated otherwise, all dates referred to here relate to the year 2011.

² Shortly prior to the hearing here, the Respondent sold two of the eight stores.

³ The agreements contain a 90-day probationary period for all employees.

the Respondent. Respondent became the owner of the store involved here on July 8 and the rest of the stores on about the first week of July; they reopened for business on July 13.

Williams testified that, unfortunately, the stores, sales "were far below our expectations." The first week's sales were 70 percent behind the prior year and the first month's sales were in excess of 50 percent below the prior year, and the Respondent decided that a reduction in force was necessary at all of these stores. It was further decided that the decision on the precise number of reductions at each store, and the employees to be "RIFd," would be determined by each store manager in consultation with Alan Thompson, Respondent's regional director, and Bill Snyder, its regional manager. Although Williams was not involved in the selection of the employees affected, the "guidance" that he gave was to determine which employees should be terminated "based on their overall job performance," and which employees they wanted to retain "going forward . . . for their business in the future. I then relied on Alan and Bill and each of the eight store managers to determine which of the team they wanted to keep and which wouldn't be continuing with us" The RIFs were announced on about September 6. Of the eight area stores, the number of employees employed at each store prior to the terminations ranged from 73 to 30, and the number of employees terminated ranged from 3 to 10. The facility previously had 56 employees and 6, including Yliquin, a shop steward at the facility, and Amireh were told on September 6 that they were being terminated. Store Manager Mary Huffman, in consultation with Thompson and Snyder, made the decision to terminate these six employees. After the termination, Williams was informed that Yliquin had been one of the shop stewards at the store. In addition, two employees at one of the Maryland stores, who were shop stewards, were also RIFd. He testified that none of these employees were selected because of their union activity.

On July 8 there was a demonstration in front of the facility attended by about 25 to 30 of the store's former employees, including Yliquin and Amireh. Yliquin arrived at about 8 a.m. and left at about 5 p.m. At the time, Huffman and about 15 employees were present in the store accepting deliveries and stocking the shelves. It was very hot that day, and Huffman brought water to the individuals outside the store and told them that they could come into the store to use the bathrooms. That night, Yliquin received a telephone call from Richard Wildt, union representative for the Union, telling her that the Respondent wanted the employees to come to work the following day, and he asked her to call other employees. She and most of the former employees began working for the Respondent on the following day. Amireh also arrived at the demonstration at the store at about 8 a.m., but only stayed for about 2 to 3 hours. That evening he received a call from either Wildt or Yliquin, telling him to report for work the following day, which he did. The employees voted on July 13 to ratify the contract agreed to by the parties; the vote took place in the basement of the facility.

Wildt testified that, in addition to Yliquin and Amireh, four other employees at the facility were terminated on September 6; Sally Crabb, the other shop steward at the facility was not part of the RIF. The Union filed a grievance on behalf of the six

employees and the Respondent defended that they were terminated pursuant to the 90-day probationary clause in the contract. Wildt testified that the grievance is still pending.

Huffman testified about the reasons that she chose Yliquin and Amireh (as well as four other employees at the facility) to be RIFd. She was initially questioned by counsel for the General Counsel as a 611(c) witness, and then was called by counsel for the Respondent as his witness. Initially, in answer to questions from counsel for the General Counsel, she testified that she chose Yliquin because she had "issues" and "improper relations with the vendors," and she was rude and disrespectful toward management: "It just did not make for a proper workplace type of behavior." In addition, she had some "issues" with associates in the store, in that some employees told her, "that they felt threatened . . . they were upset . . . they didn't like what was being said to them." Some were actually "scared," although the employees never told her what Yliquin said that caused that reaction. She testified about a situation that occurred at the store shortly after Respondent took over when approximately 17 employees, including Yliquin, received incorrect paychecks. Huffman recognized the problem, called the Respondent's main office, and was told that the situation would be corrected on the next pay cycle, and she informed the affected employees that the mistake would be corrected. Yliquin came to her office to complain that her paycheck was short, and when Huffman tried to explain to her that it was being corrected, Yliquin became upset and didn't want to listen to her. Yliquin demanded the telephone number of the Respondent's payroll department, and she gave it to her: "Her demeanor and attitude towards me was very disrespectful." After the Respondent took over the operation of the store, the employees' health insurance benefits were supposed to continue uninterrupted. However, there was a short timeframe where none of the employees had health insurance benefits and a number of them asked her to look into it, which she did, although she does not recollect Yliquin asking her about this. There was also a problem with the weekly work schedule. Yliquin, and a number of other employees, told her that the schedule should be listed in order of the employees' seniority. Huffman told them that the computer couldn't print it out that way, so, in order to correct the situation, they wrote out the schedule by seniority, and laminated it for the employees to see.

She also testified that Yliquin also had issues with vendors. In one instance, Yliquin complained that a vendor was not doing what she had asked. Huffman spoke to the vendor, heard his side of the story, and told him that he had to deliver the products the way she requested, "or else he could leave." On another occasion a driver told her that he wouldn't deliver to the store if he had to deal with Yliquin. Crabb, the other shop steward is the full-time receiver, and she has not had "issues" with vendors. She testified that she also had complaints from other employees who were "very upset" with her, or "in tears" from comments that she allegedly made to them, but they were not willing "to go on the record" about it and Huffman did not name any of these employees, or testify about any specifics of these alleged incidents.

On August 19, Huffman sent an email to Thompson and Snyder stating:

Store 118 presently has 55 associates, including myself and my Co. 33 staffers were hired prior to 2004. We have terminated 9 staffers who were pre 2004. I plan to replace my produce mgr and seafood mgr. I also have 3 pt staffers hired prior to 2004 that I am going to terminate. One being the shop steward.

She testified that this email represented her thoughts at that time, and the final decision on whom to terminate was not made until shortly before September 6. When she met with Yliquin on September 6, she told her that pursuant to the 90-day probationary clause in the contract, her services were no longer required by the Respondent. Yliquin asked why she was being terminated, and she repeated that it was because of the 90-day probationary clause. She also told Amireh on September 6 that pursuant to the 90-day probationary clause in the contract, his services were no longer required by the Respondent.

The termination forms given to Yliquin and Amireh state that they were terminated on September 6 for the reason: "under 90 days probation," and under "Recommended for rehire." Yes is checked for each of them. Huffman testified that in October and November she hired about four employees, a service deli employee to replace one who left, a grocery employee, and two cashiers/grocery employees because she only had one grocery employee remaining. Neither Yliquin nor Amireh were considered for either of these positions.

Huffman testified that Amireh was one of those chosen to be terminated because of "scheduling conflicts." Amireh works as a school busdriver during the school year from about early September through the end of May. While employed by A & P, he had both Fridays and Saturdays off regularly. She discussed the situation with him shortly after Respondent took over the operation of the store, and he said that he would like to be off every Friday and Saturday. She told him that Fridays and Saturdays were busy days and that they could not promise him both days off, but that she would attempt to alternate working him Friday or Saturday, "but I couldn't guarantee that he would have every one of them." Amireh said that he would try to work with that. In addition to the Friday-Saturday issue, Amireh occasionally had a problem arriving at work on time during the week. He drove a schoolbus during the day, and had a long commute, although that was not a reason that he was terminated on September 6 and he was never written up for being late.

Yliquin began working at the facility in 1996, and has been one of two shop stewards at the facility since about 2008. She began as a cashier, and has worked in customer service, receiving, scanning, health and beauty care and stocking; she worked an average of 30 hours a week. A & P awarded "Gold Stars" to deserving employees, and she received four Gold Stars in about 2006. A & P also had Employee of the Month awards, and she was chosen on at least two occasions for this award, the last time by Huffman in 2010, and was given a \$150 gift card as an award. Yliquin testified that she has discussed her work complaints, as well as other employees' complaints, with Huffman both as manager for A & P and the Respondent. This includes complaints about the schedule not being listed in order of seniority, health insurance coverage, and other issues relevant to the employees. When the store changed over from A & P to the

Respondent, she gave union authorization cards to about 10 to 15 employees in the employee breakroom. A few weeks after the changeover, she realized that her health insurance had not yet taken affect, and when a customer heard of it, he spoke to Williams (who was at the store at the time) about the problem, and he also told Williams that she was the best employee in the store. At about the same time, about six employees told her that they had not been paid for 30 minutes of lunch; Yliquin also had not received this pay, and she told Huffman about the problem. She testified that Huffman answered "in a nasty way" and said that employees who were missing hours should bring their problem to her. Wildt testified that shortly after the Respondent took over the operation of the store, Huffman told him that Yliquin was a troublemaker: "That she was stirring up issues with the employees. Getting them riled up, I believe was the term she used." One of the issues involved Yliquin's complaint that the work schedule was not listed in seniority order, as it should have been.

Amireh began working for A & P in 1975 and has worked in a number of their stores since that time. He began working at the facility in about 2009 as a cashier, in the dairy department, stocking shelves, and scanning. He averaged about 26 hours a week. In about September 2009, as he was getting ready to leave the store, Huffman said that she wanted to do a "spot check" on him to check to see what he had in his bags. Amireh said that he didn't object to a spot check, but asked if she could do it elsewhere, rather than being done in front of customers and other employees, but she refused. She checked his bags and did not find anything improper in them. On November 5, 2009, the Union filed an "official protest" of this spot check and there was a meeting with him, Huffman, and a union representative in January 2010. Amireh repeated that he didn't object to being searched, but objected to being searched in front of fellow employees and customers; Huffman responded that she had the right to search anyone anywhere and anytime. The Union subsequently dropped the case.

Janet Lim, a customer at the store for about 10 years, wrote an email to the Respondent on September 8, after learning that Yliquin had been terminated, stating that the Respondent "should be honored to employ" her, that she is "diligent, smart, extremely service minded, respectful and highly energetic" and, "there is no employee more dedicated than" her. She stated further that many customers purposely waited on Yliquin's line, "just to receive her very excellent service." She expressed her disbelief of learning that Yliquin had been terminated, rather than being promoted. Alan Thompson, another longtime customer at the facility, also testified that Yliquin was an excellent, friendly, and helpful employee.

Yliquin testified that Huffman never complained to her about her work, never told her that other employees were complaining about her, and never told her that she had improper interactions with vendors. She testified further that she did not have a good relationship with Huffman because, "It's impossible to talk to her . . . she always doing her way." On September 6, Huffman called her into the office and told her, "By 90 days of probation, we don't need you no more." Yliquin responded that employees who transferred from A & P are not covered by the 90-day probationary period and Huffman said that she wasn't

going to discuss it, "Ask your Union rep." When Yliquin asked why she was fired, Huffman again told her to speak to her union representative.

Amireh testified that while employed by A & P, he had Fridays and Saturdays off. When he began working for Respondent in July, he told Huffman that he would like to continue having Friday and Saturday off, and she said, "I'll probably have to work you one day or the other" and he said, "Okay." In August, Alex Noguera, the assistant manager at the store, approached him and said that she was going to prepare the work schedule and asked what days he would like to have off and he said Friday and Saturday. She told him that he couldn't have those days off, and he told her that Huffman had told him that as school was about to begin, he should tell her which day he preferred to be off, Friday or Saturday. Noguera got angry and told him that he had to be available both days. A few minutes later he was called upstairs by Huffman, who told him that she knew that he had another job, and ". . . this job may not be right for you, so you have to be available the two days, Fridays and Saturdays . . . otherwise, you have to go." Amireh told her that she had told him the week before that he could choose either day, and she said, "No, you have to be available Friday and Saturday." She again said that if he couldn't work both days, maybe this job wasn't right for him, and he said that he was going to stay, but he would appreciate it if he could get one of the days off. He never told her that he would not work either day. When he arrived at work on September 6, he was told to go upstairs to see Huffman, who told him that his services were no longer needed. He asked, "Does that mean I'm being fired?" and she said yes. He asked for what reason, and she said that because he was under the 90-day probationary period, but no other reason was given. Wildt testified that when he saw Amireh at the facility, Amireh told him that he was having a scheduling conflict with Huffman, who wanted him to work Fridays and Saturdays, and that he would prefer having one of those days off. Wildt asked Huffman about it, and she said that the Respondent would no longer be honoring the same availability as A & P, and that all employees had to be available to work on the weekends.

III. ANALYSIS

A number of facts here are undisputed. The Respondent purchased eight of the A & P Super Fresh stores, including the facility in Washington, D.C., the only one involved here, at a bankruptcy auction and began converting these stores to its Fresh & Green's facilities on about July 8 and offered to hire, and in fact did hire, a vast majority of the employees who had previously been employed by A & P. At the same time, the Respondent recognized, and negotiated a collective-bargaining agreement with, the Union covering these employees; this agreement contained a 90-day probationary period for all the employees. Over the next 4 to 6 weeks, sales at each of the stores, including the facility, were down substantially from the prior year's sales, and the sales that the Respondent had anticipated, and the Respondent decided that some employees at each of these stores would have to be terminated. The number of employees, and the selection of the employees to be terminated, was left to the discretion of the store managers, in consultation

with Thompson and Snyder. Huffman selected Yliquin and Amireh, along with four other employees at the facility, to be terminated on September 6. The sole issue here is whether Yliquin and Amireh were selected "at random" based upon their overall job performance, or were they, or either one of them, selected because of their union or other concerted activities at the facility.

It is initially necessary to make credibility determinations. Of Respondent's principal witnesses, as clear, concise, and credible as Williams was, Huffman's testimony was confusing, at times, contradictory, and incredible. She initially testified that she chose Yliquin to be terminated because she had issues and problems with vendors while acting as a receiver, was rude and disrespectful to management, and had issues with fellow employees, who felt threatened, scared, and upset by her. There was absolutely no evidence to support the latter allegation and in Huffman's testimony about her issues with vendors, she seemed to side with Yliquin. The remaining allegation, that she was rude and disrespectful to management, appears to refer to Yliquin's actions in attempting to correct payroll problems when the employees were not paid properly, or where they weren't provided with the proper health insurance coverage, or where the work schedule was not properly listed by seniority. What Huffman refers to as rude and disrespectful, was Yliquin's insistence that the employees receive the pay and health insurance that they were legally entitled to and that the contract be enforced; in other words, she was engaging in protected concerted activities and union activities as a shop steward at the facility. Where there is a conflict, I therefore credit the testimony of Yliquin and Amireh over that of Huffman.

The facts here are judged by *Wright Line*, 251 NLRB 1081, 1089 (1980). The initial issue is whether counsel for the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to terminate Yliquin and Amireh. If that has been established, the burden then falls to the Respondent to demonstrate that it would have terminated them even in the absence of the protected conduct. These determinations depend solely upon the motivation of Huffman, as the evidence establishes that the choice of employees to be terminated at the facility was ultimately hers.

It is clear that Yliquin was an aggressive shop steward, complaining to Huffman whenever her rights or benefits, or those of the other employees, were affected. After the Respondent began operating the store there were, apparently, some payroll and scheduling problems in the turnover, including the failure to provide health insurance coverage for the employees, the failure to pay them for 30 minutes for lunch, and the failure to post the work schedule by seniority, and Yliquin was active in trying to correct these problems for all the employees, not just for herself. It is also clear that Huffman did not like Yliquin's aggressive attitude as a shop steward, and she sometimes responded to Yliquin's complaints in a dismissive way.⁴ In addition,

⁴ I note that there is no evidence that Yliquin's actions ever crossed the line from protected to nonprotected under *Atlantic Steel Co.*, 245 NLRB 814, (1979); *Air Contact Transport, Inc.*, 340 NLRB 688, 690 (2003).

tion, when Yliquin repeatedly asked Huffman on September 6 why she was being terminated, Huffman responded brusquely, stating, "Ask your Union rep." More directly, however, Huffman complained to Wildt that Yliquin was a troublemaker, and was getting the employees "riled up." The Respondent defends that Yliquin was one of two shop stewards, and that it did not terminate the other shop steward, Crabb, however, may not have been as aggressive in that position as Yliquin, and Huffman never complained to Wildt about Crabb's attitude. I therefore find that counsel for the General Counsel has satisfied his initial burden in establishing that Yliquin's protected conduct was a motivating factor in Huffman choosing her as one of the employees to be terminated. I further find that the Respondent has not presented any convincing evidence that it would have terminated Yliquin even absent her protected conduct as a shop steward. She was an excellent employee as shown by the awards that she won while employed by A & P and by the testimony of Lim and Thompson. Her only fault was, apparently, being too aggressive as a shop steward for Huffman. I therefore find that the Respondent has not satisfied its burden, and that by terminating Yliquin on June 6, the Respondent violated Section 8(a)(1) and (3) of the Act.⁵

I find that counsel for the General Counsel has failed to carry his initial burden that Amireh's protected conduct was a motivating factor in Huffman's decision to terminate him along with the other employees on September 6. Amireh worked for A & P and the Respondent for about 36 years at five of the stores, including the facility. He was neither a shop steward, nor was he an active union member. The only union or protected activity that he engaged in was his participation in the July 8 rally (with almost all of the other employees). Counsel for the General Counsel, in his brief, argues that Amireh's complaints about the "spot check" that Huffman performed on him about 2 years earlier contributed to Huffman's decision to terminate him, as did his workday complaints to Wildt, who discussed

⁵ As counsel for the General Counsel argues in his brief, when the trier of facts finds that the stated motive for discharge is false, as I have found, he/she can infer that there is another motive, and that it is an unlawful one, as long as the facts reinforce that inference, which they do here. *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004).

them with Huffman. However, unlike the situation involving Yliquin, there is no evidence that Huffman resented Amireh's actions, and retaliated against him because of it. In addition, his complaints about the spot check and his workday schedules were purely personal complaints, whereas Yliquin's complaints about lost pay, the work schedule, and health insurance coverage was for the protection of herself and some of the unit employees. Although I have credited Amireh's testimony that he did not refuse to work the requested days, and Huffman never explained why she hired four employees in October and November and did not consider rehiring Amireh, I find the evidence insufficient to establish that he was chosen for termination because of his union or protected activities. I therefore recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Maria Yliquin on September 6, 2011.
4. The Respondent did not violate the Act as further alleged in the complaint.

THE 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. The Respondent having discriminatorily discharged Maria Yliquin, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[Recommended Order omitted from publication.]