Edifice Restoration Contractors, Inc. *and* Mike R. Pelfrey Jr. Case 08–CA–090945

January 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On May 20, 2013, Administrative Law Judge David I. Goldman issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Edifice Restoration Contractors, Inc., Holland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Holland, Ohio facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2, 2012."

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 direct you not to discuss your pay rates with other employees.

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

EDIFICE RESTORATION CONTRACTORS

[1] In the absence of exceptions, we adopt the judge's 8(a)(1) finding that the Respondent unlawfully directed Charging Party Mike Pelfrey not to discuss his pay rate on July 2, 2012. We note that the Acting General Counsel only filed exceptions to the judge's failure to find two additional violations concerning similar pay-related comments and his dismissal of the allegation that the Respondent unlawfully discharged Pelfrey on September 6, 2012. We agree with the judge, for the reasons stated in his decision, that it is unnecessary to reach the two additional allegations of pay-related comments.

We also agree with the judge that the Respondent did not unlawfully discharge Pelfrey, although we do not rely on the judge's discussion of the test to be applied under *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In this case, even if we assume, contrary to the judge's findings, that the Acting General Counsel met his initial burden of proving discriminatory motivation under *Wright Line*, we conclude that the Respondent successfully rebutted it by establishing that the Respondent would have discharged Pelfre on September 6 even in the absence of his protected activity. In so holding, we find it unnecessary to pass on the judge's discussion of the post-September 6 events.

Member Johnson agrees with his colleagues but finds it unnecessary to comment on the judge's discussion of the *Wright Line* test. He emphasizes that, under that test, the General Counsel bears the initial burden of showing that a substantial or motivating factor in an employer's decision was an employee's protected concerted activity. As he has previously noted, *Wright Line* is inherently a causation test and "[t]he ultimate inquiry" is whether there is a nexus between an employee's protected activity and the adverse employer action in dispute. *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53 fn. 2 (2013) (H. Johnson, concurring) (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir 2012)).

[2] We conform the judge's recommended Order and notice to the Board's standard remedial language.

Gina Fraternali, Esq. (NLRB Region 8), of Cleveland, Ohio, for the Acting General Counsel.
James Allen, Esq. (Burdzinski & Partners, Inc.), of Batavia, Ohio, for the Respondent.
Thomas P. Timmers, Esq. (D'Angelo, Szollosi, & Hughes Co., LPA), of Toledo, Ohio, for the Charging Party.

DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves an employee hired by a construction employer for a job waterproofing a university building. The pay was not what the employee anticipated prevailing wage rules would require. The employee was highly productive at caulking—a key part of this project—and as a result received several merit pay raises during the project. He discussed his pay rate and prevailing wage concerns with other employees. The employer instructed the employee not to discuss his pay with the other employees, but continued to provide the employee with merit raises and told him that after completion of this job there would likely be additional work for him in the near future. When the university job was nearly completed the employee was let go. According to the employer, this was part of the "winding down" of the project and was not motivated by the employee's wage complaints and discussions.

Within a week or so the employee made complaints to a union-affiliated organization that blossomed into an investigation of the appropriate prevailing wage for the recently-completed university job. As a result, the employer was required to pay a retroactive wage increase to employees. In addition, in the aftermath of the completed project, the employee contacted the university and complained that the employer had performed substandard quality work on the project. The employee was not rehired for future jobs. The employer insists that the reason is that it does not want to hire someone who reported to the customer of the construction employer that the employer's work was substandard.

The government issued a complaint that contends that the employer violated the National Labor Relations Act (Act) by directing the employee not to discuss his wage rate with others. As discussed here, I agree. Under well-settled precedent this is a violation of the Act.

The government also contends in the complaint that the employer terminated the employee at the end of the job, and the government contends that there was no intention to rehire him, because of his discussion of protected activity, namely, his discussion of pay and prevailing wage rates with other employees. As discussed here, there is little evidence for this and I dismiss that alleged violation.

Rather, the evidence strongly supports the conclusion that the employee was terminated from the job as part of the winding down of a completed project and for no other reason. The evidence further supports the conclusion that the employer only later decided, because the employer learned that the employee had gone to the university and complained about the quality of the work performed for the university, that it would not subsequently rehire the employee. As discussed here, this motive for refusing to rehire the employee is not a violation of the Act under the circumstances.

STATEMENT OF THE CASE

On October 9, 2012, Mike R. Pelfrey (Pelfrey) filed an unfair labor practice charge alleging violations of the Act against Edifice Restoration Contractors Inc. (Edifice), docketed by Region 8 of the National Labor Relations Board (Board) as Case 08–CA–090945. Pelfrey amended the charge on October 26, again on November 28, and a third time on December 28, 2012.

On December 31, 2012, based on an investigation into the charge, the Acting General Counsel (General Counsel), by the Regional Director for Region 8 of the Board, issued a complaint and notice of hearing against Edifice alleging violations of Section 8(a)(1) of the Act. On January 11, 2013, Edifice filed an answer denying all violations of the Act.

A trial in this case was conducted in this matter on March 20, 2013, in Toledo, Ohio. Counsel for the General Counsel, for Pelfrey, and for Edifice filed briefs in support of their positions by April 24, 2013. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

Edifice is an Ohio corporation engaged in the construction industry and has an office and facility located in Holland, Ohio. In conducting its operations, Edifice purchases and receives goods valued in excess of $50,000 at its Holland, Ohio facility or at its Ohio jobsites directly from points outside the State of Ohio, and/or from other enterprises located within the State of Ohio which have received goods directly from points outside the State of Ohio. Edifice admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

The University Waterproofing Project

Edifice provides a variety of building restoration and repair services. Edifice was founded in 2004 by its owner and president John Hall (Hall). Amanda Hensley holds a variety of management positions for Edifice (safety coordinator, EEO compliance, payroll, and "anything that has to do with the office"). John Miller is Edifice's general superintendent. Kyle Leeth is a foreman. In the summer of 2012, Edifice was hired to perform a waterproofing job at the University of Toledo Medical Center. The work began June 5, and ended September 7, 2012.[1]

At the risk of oversimplifying the description of the process, the waterproofing work performed by Edifice at the university required employees to first scour the building surface, cleaning and washing it and removing dirt. This reveals cracks and damages in the building surface that needed to be repaired. After washing the building "bad" rotted caulk and "spider cracks" are cut out and replaced with new caulk. When the new caulk work is dry, the building is water blasted with a high pressure hose to remove loose particles or dirt. When that dries, the waterproofing chemicals are applied to the building surface.

[1] Hereinafter, all dates are 2012, unless otherwise stated.

Daily records are kept of how much caulk is removed and replaced and the extent of the "spider cracks" fixed each day by employees. As one witness explained, the work was not easy: "It was hot. It was hard. Lot of rigging, lot of weights. I mean it was, it was a pain. The whole job was a pain."

Approximately eight nonsupervisory employees worked for Edifice over the course of the summer performing the waterproofing job. The Charging Party Pelfrey began work with the initial employee crew during the week ending June 16. Robert Ritter and Rockey May, both of whom worked until the last day of the project, September 7, also started that week. Pelfrey worked until September 6. William Noel worked the last two weeks in June. Jonathan Colley worked from the week ending June 23, until the week ending August 25. Jeremy Volkmar began work the week of June 23, but was terminated the week ending July 28. Dan Blanchfield worked only a few days the week ending July 14. Kerry Briggs worked part time from mid-July to mid-August. Brent LaCourse began working the last week in July. He worked as Pelfrey's partner and was terminated along with Pelfrey on September 6. LaCourse, like Pelfrey, was an experienced tradesman, having completed the Local 3 Bricklayers apprenticeship program for 4 years, and then working as a journeyman for 4 more years. Pelfrey had also completed this program and had worked as a union bricklayer for 10–12 years.

The university project was subject to prevailing wage regulations. Prior to bidding for the job, Hall talked to a representative of the State of Ohio Bureau of Wage and Hour office to discuss which wage specification should be used to comply with prevailing wage requirements. After discussing the nature of the work, the State agent recommended that a Laborers 2 rate be paid for the work. Hall considered the issue and decided to pay Laborers 3 rate, which is a higher rate of pay than Laborers 2, approximately $35 an hour. In the middle of the project, in July, Hensley, who was in charge of payroll for Edifice, received a call from the university prevailing wage coordinator, Laurie Sarnes, who told her that the prevailing wage rate for the Laborers classification had increased. This required an adjustment in base pay to $36.13, which was retroactively applied.

Pelfrey learned about the job from a friend, Rockey May. May and Pelfrey had worked together on jobs in the past. May, who first worked for Edifice in the spring of 2012, told Pelfrey that the job would pay prevailing wages at masonry rates, which were approximately $44 an hour. May testified that he had been told this by John Miller, the general superintendent for Edifice, who is also May's first cousin. But this did not turn out to be true. Pelfrey contacted Miller and was told to report for work the following Monday.[2] Within the first day or so on the job Pelfrey found out that he was earning $35 and not $44 per hour.

The job supervisor for Edifice at the university project was Kyle Leeth. Pelfrey's tenure at Edifice was notable both for his conflict with Leeth, and also for the series of merit pay increases Pelfrey received, each suggested and recommended by Leeth, as a result of Pelfrey's highly productive caulking work.

Caulking requires the most skill of all the tasks in the waterproofing job. Edifice management recognized and agreed that Pelfrey was the best and most productive caulker on the crew, a view that Pelfrey shared. Not only did Leeth and Hall readily agree that Pelfrey was the most productive and skilled caulker on the job, they rewarded his skills and productivity. Leeth successfully recommended Pelfrey to Hall for three merit raises during the course of the summer based on Pelfrey's caulking work. These were discretionary raises, not every employee received one, and no one received as many as Pelfrey. As a result of these raises, Pelfrey was the highest-paid nonsupervisory employee on the job.[3]

Notwithstanding Leeth's willingness to reward Pelfrey's skills with merit wage increases, there were tensions between the two. According to Pelfrey's coworker Rockey May, Pelfrey was "upset" with Leeth, and "just really didn't like Kyle." For his part, Leeth testified that it was a challenge working with Pelfrey. With regard to Pelfrey, Leeth had to "put up with his mouth" and the "bitching and complaining and whining." Leeth said he "overlooked [it[because he was a good caulker and he was productive."

Early in the summer, approximately June 13, Pelfrey walked off the job. He testified that Leeth was "treating me like a kid that I didn't know anything." Leeth called Pelfrey repeatedly on the phone and when he got through told Pelfrey that "he was having a bad day" and asked Pelfrey to return to work, which Pelfrey did.

Later, 2 or 3 weeks into the job, Leeth sent Pelfrey home near the end of the day for what Leeth characterized as "[s]creaming and yelling about movement of a rig." According to Leeth, he asked Pelfrey to "hang the rig on an inside corner and [I] left and when I come back it was hanging on the outside corner" an improper rigging procedure in Leeth's view. He sent Pelfrey home. Pelfrey testified that he was "fired"—not sent home for the day—for challenging what he viewed as the improper waterproofing process being used at the site, and telling "one of the guys that I felt that [Leeth] wasn't doing this right" and that "Kyle didn't know what he was doing on this job." Pelfrey returned to work the next day after calling Leeth and telling him that he would do the work the way Leeth wanted it done.

May testified that Pelfrey "thought we were doing everything wrong" on the job and complained about the way the work was assigned, primarily the order in which the waterproofing steps were done. Pelfrey testified that in his view,

[2] Pelfrey could not recall the name of the superintendent he spoke with. Based on the full record evidence I conclude that it was John Miller. Pelfrey also testified that he spoke to Hall about working at Edifice, but his recollection of the hiring conversations was vague, and Hall denied ever talking to Pelfrey until September 2012. I credit Hall.

[3] According to Edifice records entered into evidence (GC Exh. 4) (and after revision of Laborer III rates) Pelfrey earned $36.13 an hour for his first week of employment (week ending 6/16/12); $37 an hour for the week ending 6/23/12 and $39.21 through the week ending 7/21/12. He received a wage increase that brought his hourly rate to $40.13 that included the week ending 7/28/12. This remained his rate for the remainder of the project, until he was laid off on September 6.

seconded by the testimony of coworker LaCourse, that the building was waterproofed improperly. According to Pelfrey and LaCourse, after putting in new caulk and they would wash the building immediately, before the caulk dried, a process that could damage the new caulk. Both Pelfrey and LaCourse were experienced caulkers and both testified that they had never performed work in this manner in the past.

Leeth contradicted Pelfrey and LaCourse's testimony. He testified that he never gave any improper instructions or directives on the process for the waterproofing, and never had employees "cut corners."

According to Leeth, Pelfrey complained about following safety procedures that took time to comply with. Leeth credibly testified (in testimony that was not contradicted by Pelfrey) that Pelfrey complained that Leeth was "running the job in the hole" by requiring employees to go through extensive safety procedures up to OSHA standards, "he complained about it all the time."

Leeth testified that whenever Pelfrey got a raise he would tell other employees and, according to Leeth, would tell employees: "threaten to quit and you'll get a raise." LaCourse testified that Pelfrey complained to him that they were earning laborers scale instead of bricklayers scale. In his testimony, Pelfrey denied telling other employees that they should threaten to quit in order to get a raise, but recalls that Kyle accused him of it. Hensley, Edifice's office manager and payroll manager (among other duties) testified that Pelfrey would let "other people know on the job site what he was making and ultimately we had one of our workers that had been with us before quit because of this." As a result of these concerns, Hensley handwrote on Pelfrey's July 2 pay stub:

> Please keep your pay rate to yourself.
>
> Thanks,
> Mandy

Hensley testified that she wrote the note

> because Kyle told me that Pelfrey was causing issues on the job site telling people that, walk off and they will give you a raise, just tell them you're not going to work anymore. Wanted to keep atmosphere of calm on the job. We already had one employee quit over it. Talking about the pay was causing problems, so wanted him to stop talking about it.

Pelfrey testified that when Leeth handed him the July 2 check he orally told him that he should not be discussing his pay. In addition, although at first he could not recall any further discussions like this, Pelfrey then recalled that sometime after the July 2 check incident, Leeth again told him not to say anything more about his pay. Leeth denied telling Pelfrey this, and testified that he only learned about Hensley's note to Pelfrey when Pelfrey returned to work talking about it.

At various times in the summer, Pelfrey appealed to Leeth to find work for him on subsequent Edifice projects after completion of the university job. Pelfrey told Leeth he needed about 6 more weeks of work so that he would have enough credits to qualify for unemployment insurance. Sometime in the last weeks of the job,[4] before Pelfrey was let go from the job on September 6, Leeth approached Pelfrey and informed him that he would, or was likely to have, 6 to 8 additional weeks of work for Pelfrey on a subsequent job. He did not say where the job would be, and according to Pelfrey, said it could be anywhere, but asked if Pelfrey would mind traveling to Columbus, Ohio, to work. In a position statement submitted to the Region as part of the investigation of this case, Edifice stated that Leeth told Pelfrey he had additional work for him on the "mistaken premise that Edifice had acquired a contract for the Midland Building in Columbus, Ohio." According to Hall, that job would have been a major job requiring a number of employees. Hall testified that it "was a large project and we thought it was going to go and didn't, in fact, go at all."

Pelfrey said he would go wherever needed. Pelfrey testified that Leeth said that it would be a week or 2 after the conclusion of the current job before the next job started. During this conversation, LaCourse, who was Pelfrey's partner after he began working for Edifice in mid-July, asked if there would also be work for him. Leeth told him no. Leeth testified that he told LaCourse there would not be work for him, because "Brent LaCourse was not productive. He did good work but it was not productive."

As is typical for projects of this sort, Edifice retained fewer workers as the job neared completion. As Leeth explained, "once you get the equipment and materials off there, there's nothing for everybody to do." Pelfrey and LaCourse were let go on September 6. The remaining two nonsupervisory employees, Ritter and May, finished their work on the project September 7. LaCourse testified that this made sense, because "people get laid off at different times" as a job finishes up. "[E]very company . . . ha[s] their guys that have been working with or for them . . . longer. . . . So they're going to keep" those guys. In this case, LaCourse agreed that "the other guys, the other two that were there . . . they [have] worked longer than I have." LaCourse compared it to seniority rules that operate in the union context.

Just after his layoff, Pelfrey took the opportunity to call Hall. Pelfrey testified that the call was made "like two days before the job ended."[5] Pelfrey testified that he asked Hall "if I was going anywhere else" and mentioned that Leeth had suggested there might be additional work for him. According to Pelfrey, Hall told him "no there is no more work for you."

> Hall denied saying it that way. Hall testified that the
> First and only conversation I ever had with Mr. Pelfrey was after he was laid off he called the office. He asked me, he thanked me for having, giving him the work.
> Said that if we had anymore work he'd be glad to, you know, he'd be happy to work for us. I said I appreciated him for his

[4] Pelfrey testified that the conversation occurred about 2 to 3 weeks before the job ended. LaCourse, who was present for this conversation, testified that it occurred within a week or two before the job ended.

[5] In other testimony, Pelfrey stated that he did not know when the job ended, but that the call was made near the time of his termination from the job. Hall testified that the call came after Pelfrey was laid off. I find no material dispute here: the call was made within a few days of Pelfrey's September 6 release from the job.

efforts on the project. Told him if we had—we didn't have any other work at this time but I'd let him know.[6]

Pelfrey's post-termination contacts with the Institute of Fair Contracting

Shortly after their work for Edifice ended, Pelfrey talked several times on the phone with Laurie Haupricht, of the "Ohio Institute of Fair Contracting."[7] The record is unclear but based on record descriptions that appear to be an arm of the trade and craft unions concerned, as the name suggests, with enforcement of prevailing wage laws. Pelfrey, along with LaCourse, went to Haupricht's office and discussed with Haupricht the nature of the work performed and the laborers rate they received. According to Pelfrey, they told Haupricht "That we felt that we did not get paid what we were supposed to be getting paid and she said that she would see what she could do about that."

On about September 13, a week after finishing work with the Edifice job, Pelfrey wrote a letter to the University of Toledo's prevailing wage coordinator, Laurie Sarnes, complaining that Edifice had failed to pay prevailing wages at the proper classification rate. Pelfrey's letter stated:

> My name is Mike Pelfrey and I worked tor Edif[i]ce Restoration Contractors, Inc. at the University of Toledo-Medical College from June 11, 2012, until September 6, 2012.
>
> During my time of employment on this project I performed the duties of bricklayer, including but not limited to: removal and replacement of caulk joints, repairing cracks In the walls, water proofing the exterior and power washing the building. These are clearly the duties of a bricklayer and not that of a laborer.
>
> It is my understanding that this project was to be paid prevailing wages. I was paid the wages of a laborer and when I questioned the pay rate I was given a $2.00 per hour raise the first and then a few weeks later I received another $2.00 per hour raise. On one of the paystubs a note was written by their payroll clerk "to please keep your pay to yourself". I am sending that paystub along with this letter.
>
> I hope that this letter helps you in your efforts to hold this contractor accountable to pay the proper rates for this project.
>
> Sincerely,
>
> Mike Pelfrey

Although the record is somewhat unclear, it appears that this letter sparked an investigation by the State Wage and Hour division about whether the correct rates had been paid on the university job. Sarnes contacted Hall and, according to Hall, said that "we were paying the wrong rates." In his testimony, Hall recounted his conversation with Sarnes. He told her,

> well, you know, we're paying the rates that we were told to pay, I talked to the Board, I told her who I talked to. . . I didn't even know that, as I'm finding out now, there was an investigation going on or a case filed or something with Mr. Horvath, cause I was told that he was the person that I talked to at Wage an Hour.
>
> We had several conversations with him. He said it ought to be this. I said well it could be this, why can't it be that.
>
> It end up decision, his decision was that we pay . . . Painters rates on everything, all the work except cutting out and caulking the cracks in the concrete, which was masons work.

As a result of a reevaluation of the appropriate prevailing wage classification, Edifice paid a total of approximately $6600 in backpay to employees who worked on the project. By letter dated October 19, Hall sent checks to each employee, and stating in the letter:

> EDIFICE RESTORATION has written and enclosed this check for you. The check is the result of the Owner and the Ohio Bureau of Wage and Hour decision to change the prevailing wage classification for the U. of T. Medical Center Waterproofing Project after the project was completed.
>
> Group II Laborers rate was what we were originally told would be the rate for this project. The decision was made by our Company to pay the Group II Laborers rate, which is more than the Group II rate, just to be certain our prevailing wage commit[ment] was achieved.
>
> We went through the weekly certified payroll reports for the project and applied the revised rates for Painter and Bricklayer to your hours as applicable.
>
> Thank you for effort on this project!

Pelfrey agreed that he never "threatened" Edifice or any of its managers that he would be going to authorities regarding the prevailing wage. At the hearing, Edifice managers denied any knowledge that Pelfrey had been involved in going to prevailing wage authorities. Thus, Hensley, when asked: "Isn't it true that you had to end up paying these rates as a result of Mr. Pelfrey going to speak to the Prevailing Wage Department," replied, "I have no idea if Mr. Pelfrey spoke to the Prevailing Wage Department or not." Hall was asked whether Edifice ended up paying the revised rates because of "Mr. Pelfrey and

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[6] I do not believe the discrepancy between Hall and Pelfrey's versions of this call is material. The General Counsel's suggestion is that Hall's comments, as testified to by Pelfrey, indicate a commitment, evinced as of the end of the job, never to rehire Pelfrey. Hall's version of the conversation is obviously more hopeful about future work. However, I read less into Hall's comments, even as reported by Pelfrey. Nevertheless, I credit Hall's account over Pelfrey's. I found Hall to be a first rate witness. His testimony was always straightforward, appeared candid at every point. He answered questions directly, without a hint of artifice or guile, regardless of the questioner. Pelfrey was not a bad witness. But he needed to be led repeatedly, and that sometimes changed his answers. He was vague in much of his testimony, including his description of his post-termination actions, matters central to the case, and confused at times about whom he had spoken with on certain occasions. Between the two, as to the contents of this conversation I credit Hall's account. Again, I do not believe it makes any difference to the outcome of this matter.

[7] Pelfrey identified the woman he spoke with as Laurie Sarnes, but I believe he was confused. Sarnes worked for the university. Pelfrey wrote her, as discussed below. But the Laurie that he met with at the Ohio Institute of Fair Contracting was Laurie Haupricht. Pelfrey consistently referred to Laurie Sarnes, when it is clear, from the overall record that he was referring to Laurie Haupricht.

others' involvement with the . . . Prevailing Wage coordinator." He answered:

> "I don't know. Apparently it did. – I never knew until today that he actually went—I didn't know . . . there was even an investigation going on. I wasn't even told that."

Hall testified that he dealt only with Sarnes and with a man named Horvath from the Ohio Wage and Hour bureau. In short, there is no evidence that Edifice knew that Pelfrey was involved in the prevailing wage reevaluation.

Pelfrey's complaints to the university about the quality of Edifice's work

In addition to writing Sarnes at the university about the prevailing wage issue, Haupricht encouraged Pelfrey to contact the university with his complaints about the quality of the work performed by Edifice on the university job. Pelfrey testified that he contacted someone at the university named Mike—later identified in the record as Mike Herd. Herd worked for the university and oversaw the contractors working on the building. He was the main university official with whom contractors performing work for the university interact. During the project Herd held biweekly meetings with Hall and with the architect hired for the project.

Pelfrey, along with LaCourse, called Herd from Haupricht's office, with Haupricht, Pelfrey, and Lacourse, on a speaker phone. According to Pelfrey, he told Herd:

> That we were washing the building right after we got done caulking the building, that there's probably holes in the thing. I said that we did not try to put holes in the caulk or anything, tried to stay off of the perimeters, all that stuff, but there was, you still, you can't control that, it happens. . . .
>
> what I told him was they, I felt that we did this wrong. We did put holes in his caulk. We were told that we should take and put our finger in it to smear over the hole that we put in it if we was water blasting.

Pelfrey agreed that based on his experience this would "qualify as shoddy work." LaCourse testified that Pelfrey told Herd that "stuff could fail or will fail" although in later testimony he said he was not "a hundred percent" sure that the word "fail" was used. LaCourse did testify that it was stated to Herd that the work "would not hold up like it would hold up if you did it the right way."

Pelfrey testified that Herd "was concerned" by Pelfrey's allegations. Subsequently, Herd attempted to contact Pelfrey a couple of times, and left Pelfrey voicemails indicating that he wanted the architect to talk with Pelfrey. Pelfrey did not call him back because, according to Pelfrey, "I wasn't getting paid for it."

Pelfrey estimated that the conversation with Herd occurred 3 to 4 weeks after the Edifice job ended. However, as with the letter to Sarnes, Pelfrey tended to overstate time periods (see also Pelfrey's estimation as to when LaCourse came to work as partner). Hall testified that he received a call from Herd about the matter "within a week after the job, I think was completed" and later suggested it may have been 2 weeks. In any event, the architect for the project, performed an inspection of the job on or about September 24, and by that time he had heard that someone had complained to the university that the work on the project had been done improperly.

As referenced, Herd contacted Hall about Pelfrey's allegations. Perhaps in an effort to shield Pelfrey's identity, or for reasons unknown (Herd did not testify), Herd told Hall a slightly different version of the story. Herd told Hall that an Edifice employee had come to the university's facilities center and spoke to someone in that office and "told them," in Hall's recounting, "that we were doing a bad job on the project, shoddy workmanship." Hall disputed the allegations with Herd and tried to get Herd to tell him who had made the allegations. Herd told Hall that he did not know and "he couldn't even find out from the people at the service center, who they spoke to."

Although Herd would not tell them, Edifice officials quickly learned that it was Pelfrey who had gone to the university with complaints about the workmanship on the job. There is some conflicting testimony on this score but Rockey May appears to have been the source of this information.

Hall testified that Rocky May, Pelfrey's friend and co-employee who had been retained by Edifice to work on subsequent jobs, told him that it was Pelfrey who had gone to the university with the complaints.

Leeth testified that he learned about Pelfrey's allegations (and Pelfrey's involvement) from Hensley.

Hensley testified that she learned it from May. Hensley said that May said that "Pelfrey had told him he was the one that went to the University."

However, May testified that he told Leeth about Pelfrey speaking to the university. According to May, when he heard that someone had made a complaint to the university, "I told them . . . I bet you it was Mike [Pelfrey] and I called Mike right away and he told me he did." May testified that he then called Leeth and told him that it was Pelfrey. May could not recall whether or not he also told Hensley. He denied telling Hall.

In any event, the record is clear and I find, that by the third week of September, Edifice officials learned that Pelfrey had spoken with university officials and alleged that the work performed by Edifice was substandard and done wrong. Edifice officials also knew that the allegations had gained the attention of the university official in charge of working with the contractors.

Edifice's failure to rehire Pelfrey

Pelfrey has not been hired to work on any Edifice jobs since the university project. According to Hall, "we have what we call our core group of guys that we keep with us as long . . . as we have any work at all . . . . When we get a large project we look to the people we've hired before and see if they're available." According to Hall, Pelfrey was not a core employee, having worked for Edifice for the first time on the university project. LaCourse seconded this view (at least as to himself), explaining that he would have expected to be called back only "[o]nce [Edifice's] normal guys have been called back. . . . [E]very company's got guys that have been there . . . they got their main guys."

In September and October, the jobs Edifice worked on after completion of the university project were smaller jobs that did

not call on Edifice to reach beyond employees with more "seniority" with Edifice than Pelfrey. Consistent with this, on September 10–20, Edifice used only one nonsupervisory employee, Robert Ritter on a Toledo municipal government caulking project where Leeth was the supervisor. On a project at the Skye Cinema in Wauseon, Ohio, that began September 26, and was completed October 9, and supervised by Ritter, Edifice used two nonsupervisory employees, Ritter and May. Edifice used two nonsupervisory employees—neither of whom had worked on the university project, but both of whom had previously worked for Edifice on John Miller's crew—for a job that began October 22, and was completed November 14.

The next large job that Edifice undertook was a project in Columbus, Ohio, on the State Teachers Retirement System building. This job began October 29. This job was of the size and scope that Edifice would have reached beyond its "core" employees, and considered Pelfrey.

However, Hall testified that he made the decision not to recall Pelfrey because "I heard of the allegations that he had made to the University of Toledo." Leeth agreed, advising Hall "that Pelfrey not be used again by Edifice" because of the accusations Pelfrey had made about the quality of Edifice's work. As discussed, Edifice officials learned in September that Pelfrey had made these allegations.

Analysis

There are two distinct issues for resolution. First, the government alleges in the complaint that Edifice violated Section 8(a)(1) of the Act by directing Pelfrey, through the note on his pay stub, not to discuss his pay rate. The complaint also alleges that Leeth instructed Pelfrey to keep the note to himself, and that on another occasion told Pelfrey not to discuss his wages.

Second, the government alleges in the complaint that Edifice violated Section 8(a)(1) of the Act by discharging Pelfrey on or about September 6, in retaliation for his activity during the course of the job of discussing his pay with other employees, as well as prevailing wages and pay raises. I consider both contentions below.

I. THE DIRECTIVES THAT PELFREY "KEEP HIS PAY RATE TO HIMSELF"

It is well-settled, beyond cavil, that employees' discussion of wages and pay issues is protected and concerted activity under the Act. Indeed, it is "inherently concerted." *Hoodview Vending Co.*, 359 NLRB 355, 357 (2012). "This is because wages are a vital term and condition of employment, and the grist on which concerted activity feeds; discussions of wages are often preliminary to organizing or other action for mutual aid or protection." Id. (internal quotations omitted). Accordingly, instructing an employee not to discuss pay issues is a violation of the Act. *Triana Industries*, 245 NLRB 1258, 1258 (1979) (unlawful to tell employees "[n]ot to go around asking the other employees how much they were making, because some of them were making more than others."); *Coosa Valley Convalescent Center*, 224 NLRB 1288, 1289 (1976). Further, it does not matter whether the directive is embodied in a "rule the breach of which would imply sanctions." *Triana*, supra. The same challenge to the Act is presented. *Triana,* supra (overruling ALJ who found directive not to discuss other employees' pay lawful because it did not rise to the level of a "rule").

Notably, in considering the lawfulness of such statements, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. sub nom. 134 F.3d 1307 (7th Cir. 1998). Rather, the Board "applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), quoting *Miller Electric Pump & Plumbing*, supra at 824 (internal quotations omitted).

In this case the violation is essentially admitted. Hensley (an admitted agent of the Respondent pursuant to Section 2(13) of the Act) instructed Pelfrey, in writing, to "keep your pay rate to yourself." The fact that the note was written on his pay stub attached and handed out with his paycheck—whether or not intended as such by Hensley—provides an added coercive element that would tend to inhibit the protected activity of a reasonable employee. Wage increases were granted to Pelfrey. They could have been taken away. A reasonable employee would attach significance to the method of delivery of this unlawful directive.

> Hensley testified that she wrote the note because she
>
> [w]anted to keep atmosphere of calm on the job. We already had one employee quit over it. Talking about the pay was causing problems, so wanted him to stop talking about it.

Hensley's motive is irrelevant, but it is worth noting that permitting employees to puncture an "atmosphere of calm" enforced through wage secrecy is precisely the reason the Act protects from interference Pelfrey's right to discuss his wages with others. It is a "problem" employers must be prepared to live with and far from providing a legitimate business justification for the directive, the desire for "calm on the job" is an objective that quickly conflicts with some of the Act's most basic premises, when calm is enforced through an interference with employee rights.

I find that the directive to Pelfrey to keep his pay rate to himself was violative of Section 8(a)(1) of the Act.[8]

PELFREY'S SEPTEMBER 6 TERMINATION

The complaint alleges that Edifice discharged Pelfrey on September 6, in retaliation for his protected activity of discussing wage rates, pay raises, and prevailing wage classifications. Edifice disputes this, and argues that its motive for the discharge of Pelfrey on September 6, was the winding up of the university job. In other words, a normal "layoff," standard in the industry as the job for which he was hired was completed. Edifice's position is that as of that time, it intended to rehire

[8] The complaint alleges two additional pay-related comments: an allegation (¶5(C) that on or about June 17, Leeth instructed Pelfrey not to discuss his wages with other employees, and an allegation that on or about July 2, Leeth instructed Pelfrey to keep Hensley's note to himself ¶5(C). Pelfrey offered testimony of comments by Leeth regarding pay secrecy. Leeth denied it. Given my findings, I decline to reach the similar allegations alleged in ¶¶5(A) and (C) of the complaint. Such findings would be cumulative and would not materially affect the remedy.

Pelfrey for future appropriate work. The General Counsel contends that the September 6 discharge was permanent and unlawfully motivated.

The Supreme Court approved analysis in 8(a)(1) or 8(a)(3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399 (1983) (approving *Wright Line* analysis).

In *Wright Line* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* standards, the General Counsel meets his initial burden by showing "(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action." *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994) (internal quotations omitted)).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Willamette Industries*, 341 NLRB 560, 563 (2004).

In this case, the General Counsel advances the theory that Edifice discharged Pelfrey on September 6, in retaliation for his prevailing wage and pay complaints. Clearly the first two prongs of *Wright Line* are met: Pelfrey engaged in protected activity when he complained about the wage rates and when he discussed his wages with employees. Edifice knew of it, and unlawfully asked him to stop talking about his pay. But the third prong of *Wright Line* is problematic for the General Counsel's case.

The job ended on September 7. Pelfrey, along with LaCourse, were let go September 6. By all evidence, it is a normal part of these construction jobs that people are let go as the work declines. By all evidence, it was entirely routine and expected that certain employees who were not "core" employees of Edifice would be let go before longer term employees. LaCourse, for his part, thought it made sense that the two remaining employees, May and Ritter, remained on the job after he and Pelfrey. Ritter had worked for Edifice for several years, and May had worked at least a few months (and a few jobs) before Pelfrey or LaCourse had ever arrived on the scene.

Notably, as Pelfrey agreed and understood, Leeth's suggestion that there would an additional 6 to 8 weeks of work for Pelfrey (so that Pelfrey could qualify for unemployment insurance payments) anticipated that there would be a gap in employment. In other words, the termination from the university job and a gap of employment was always anticipated, and was not a change in expectations for Pelfrey. The termination on September 6 did not constitute action by the employer that can be ascribed to Pelfrey's protected activity. Indeed, the evidence suggests it was an anticipated not an adverse employment action.

The General Counsel correctly argues that the employer demonstrated animus to protected employee conduct by telling Pelfrey to keep his pay rate to himself. I have found that directive to be unlawful. But animus must be considered in light of the record as a whole. Throughout the summer, the employer did not terminate Pelfrey, but continued to provide him with not one but three discretionary merit wage increases, making him the highest paid nonsupervisory employee on the job. The General Counsel speculates (GC Br. at 9) that the merit wage increases awarded Pelfrey were designed to "assuage" and ultimately "silence" Pelfrey and when that did not work, "[a]s a last recourse" Edifice moved to terminate Pelfrey. However, the wage increases were not conditioned in any way on Pelfrey keeping his pay to himself. Rather, Edifice continued to provide these pay increases to Pelfrey even after unlawfully telling him to keep his pay to himself. It continued to reward Pelfrey while he continued to engage in his protected conduct of discussing, complaining about, and telling other employees about the pay disparities, as Pelfrey viewed them. In other words, Edifice did not respond to Pelfrey's protected activity by punishing him—but by continuing to reward him for his work productivity. In terms of an expression of animus, terminating Pelfrey at the end of the job makes no sense.

The nub of the General Counsel's case, however, is not simply that Pelfrey was terminated by Edifice on September 6, but that it was a permanent termination with intent, for unlawful motive, not to rehire Pelfrey for future jobs. The evidence does not support this.

First of all, there is no direct evidence that Edifice determined, as of September 6, that it would not rehire Pelfrey for future work. The General Counsel cites to Pelfrey's call to Hall, made just days after the layoff, but this does not show an intent not to recall Pelfrey to future work. I have credited Hall's version of the conversation over Pelfrey's, according to which the conversation consisted of Pelfrey thanking Hall for the university project work and telling Hall that if there was any more work "he'd be happy to work" for Edifice. Hall told Pelfrey, "I appreciated him for his efforts on the project. Told him . . . we didn't have any other work at this time but I'd let him know." But even Pelfrey's discredited version of the conversation is not particularly probative to show an intent not to recall Pelfrey. According to Pelfrey, he asked Hall "if I was going anywhere else." According to Pelfrey, Hall told him "no there is no more work for you." And that was accurate. At that time there was no more work for Pelfrey. That is why he was let go on September 6. As noted, Pelfrey always understood that Leeth's offer of future work anticipated a break after the university job. Thus, even Pelfrey's discredited account of the conversation does not supply evidence that Edifice had already determined not to rehire him for future projects.

Second, no circumstantial evidence supports the claim that as

of September 6 (or within a few days thereof) Edifice had determined not to rehire Pelfrey for future work. It was only 2 or 3 weeks before his September 6 termination, at a time when Pelfrey's protected conduct was well known to Edifice, that Leeth told Pelfrey that there likely was future work for Pelfrey in the weeks or months after the university job was completed. There is no rationale for the contention that the employer would permanently terminate Pelfrey, only a few weeks later, in retaliation for protected activity it already knew about at the time it told Pelfrey that future work was in the offing. There is nothing in the evidence, much less in the character of Pelfrey's protected activity that could account for such a change of heart on behalf of the Respondent during this time period.

Instead, the evidence supports the Respondent's contention that it decided not to rehire Pelfrey only later in September, when it learned that after his termination he had alleged to the university that the work on the medical building was poorly and inadequately performed.

I find that this was the reason that Edifice refused to rehire Pelfrey. First of all, this was the reason credibly testified to by Hall and Leeth. Moreover, the timing is consistent with Edifice's decision not to recall Pelfrey. Pelfrey's allegations were lodged, and Edifice learned of them and of Pelfrey's involvement, weeks prior to the commencement of the first subsequent "major" project undertaken by Edifice—the State Teachers Retirement System Building project—for which Edifice needed to reach out beyond "core" employees and recall an employee like Pelfrey.

Moreover, as noted, by all evidence, in the summer, before these allegations were made, and notwithstanding Pelfrey's protected activity and his complaints about the workmanship and working procedures on the job, Pelfrey continued to receive merit pay raises and Leeth indicated that he would be rehired for future jobs. As discussed above, there is no evidence that as of his termination, or within a few days when Hall and Pelfrey spoke, that Edifice had decided not to rehire Pelfrey. The only conduct by Pelfrey after the university project—o*ther than the allegations of poor work quality*—that could have arguably prompted Edifice not to rehire him was Pelfrey's letter to Sarnes and instigation of an investigation that resulted in a recalculation of the prevailing wage and Edifice having to payback pay to the employees. But there is no evidence—at all—that Edifice knew that Pelfrey played any role at all in this matter. At the hearing, Edifice witnesses denied knowing of Pelfrey's involvement, and Hall suggested that he learned of it for the first time at the hearing. While Pelfrey's post termination effort to change the prevailing wage rate was surely protected activity, a claim that the Respondent retaliated against him for it is undercut by the Respondent's lack of knowledge of Pelfrey's responsibility for the investigation.

The only conduct by Pelfrey that the Respondent knew about that would change the Respondent's mind about rehiring Pelfrey was his allegation to the university about the quality of the work performed by Edifice.

In sum, I find that the General Counsel has failed to prove that the Respondent was motivated to permanently terminate Pelfrey on September 6, by Pelfrey's protected activity. I find that there is no evidence that as of September 6, Edifice did not intend to rehire Pelfrey. However, I find, in accordance with the Respondent's defense, that Edifice decided not to rehire Pelfrey subsequently because of his allegations that Edifice's work on the university project was of poor quality.

Finally, I note that Pelfrey's attack on Edifice's quality is not alleged in the complaint to be protected activity. (Indeed, the essence of the General Counsel and Charging Party's arguments is that Pelfrey's attack on quality as a motive for failing to rehire Pelfrey is a pretext.) I add, however, that were it necessary to decide the issue, I would find that Pelfrey's criticism to the university about the quality of Edifice's work was not protected activity. Nothing in Pelfrey's contact with Herd at the university related to any labor practice of the company, or referred to his dispute over wage rates, his hope for future work, safety, or anything other than the allegedly substandard quality of the work. There was no appeal to the university for sympathy or support for his or the employees' demands. Even assuming, arguendo, that the ultimate purpose of Pelfrey's attack on the quality of Edifice's work was to put pressure on Edifice for better pay or working conditions, the failure to disclose that to Herd and to draw that linkage to employee terms and conditions of employment, renders his attack on the quality of Edifice's work unprotected by the Act. *NLRB v. Local Union No. 1229 IBEW (Jefferson Standard)*, 346 U.S. 464, 476–477 (1953) (while employee rally attacking quality of employer's radio station had an "ultimate and undisclosed purpose or motive" to put pressure on the employer in their labor dispute, the lack of "discernible relation to that controversy" rendered the employees' actions unprotected. The "attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. . . . The attack asked for no public sympathy or support."). Similarly, in *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000), the Board, applying and quoting *Jefferson Standard*, held that a maintenance employee for a golf course who was engaged in publicizing the employees' dispute with the employer, engaged in conduct beyond the scope of the Act's protections when he distributed a March 5 handbill that "made no reference to the labor controversy or collective bargaining" and was a "disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 330 NLRB at 1241 (quoting *Jefferson Standard*) (internal quotations omitted).[9]

[9] The Board in *Mountain Shadow*, supra at 1241, also noted that:

> like the *Jefferson Standard* handbill, although its ultimate purpose—to put pressure on the Respondent with respect to negotiations with the Union—was lawful, 'That purpose . . . was undisclosed.' [*Jefferson Standard*] *at* 472]. . . In contrast to other materials distributed by [the employee] to enlist public support for the maintenance workers, the March 5 flyer did not mention the problems the employees' union was having negotiating with the Respondent . . . Rather, the matters addressed in the flyer related solely to the impact of the company's capital investment and other business practices on the quality of the service provided to customers. . . . There was no indication that the maintenance issue was being raised as part of an effort to enlist public or governmental sympathy or support for the maintenance employees' collective bargaining efforts. In the words of the Supreme Court, the flyer was "not part of an appeal for support in the pending dispute" but

I stress that nothing in my discussion should be construed as condemning (or condoning) Pelfrey's actions in complaining to the university about the quality of Edifice's work. In other words, I do not go as far as the Supreme Court in *Jefferson Standard*, and do not reach the issue of whether Pelfrey's conduct in this circumstance constituted "just cause" for discharge under Section 10(c) of the Act. Indeed, putting the best face on it, and assuming the truth of the allegations lodged by Pelfrey against Edifice, there may be, and perhaps should be, some sort of "whistleblower" protection in State or Federal law that protects an employee who complains about the "shoddy" work performed by his or her employer. But that is beyond the purview of the National Labor Relations Act, which does not protect such conduct when it is unrelated, as it is here, to a labor dispute, even one broadly defined.

I note that the General Counsel does not directly argue on brief that it was unlawful to refuse to rehire Pelfrey due to his attack on the quality of Edifice's work. Further, it is unclear whether the General Counsel is advancing the contention on brief that Pelfrey's attack on the quality of Edifice's work is protected activity. To the extent that argument is being made, I reject it, for the reasons stated. In this regard, the General Counsel cites numerous cases in which the Board found employees' criticisms of employer product or quality to be protected, but always in cases where the quality or product criticisms were linked conflated with complaints about employee terms and conditions of employment.[10] Such cases, and the many cases cited by the General Counsel in which the issue is whether employee activity is maliciously untrue or otherwise so opprobrious as to lose the protection of the Act, are inapposite. The threshold issue in those cases is always that the activity at issue is expressly related to a labor dispute or to a protected subject of wages and working conditions, even if nonlabor issues were part of the appeal.[11]

Here, I do not reach issues regarding the tone, reckless disregard for truth, or malicious falseness of Pelfrey's statements to Herd. The problem here is the lack of relationship of his complaints to the Herd at the university about the quality of Edifice's work to employee terms and conditions of employment.

The General Counsel does clearly argue on brief the related, but less relevant claim, that the conduct is not sufficient to warrant loss of the Act's protections, while arguing that it does not constitute the motive for the refusal to rehire Pelfrey. To be clear, I agree that if Pelfrey's protected activity was the motive for the Respondent's refusal to rehire him, Pelfrey's attacks on Edifice quality would not cause him to lose the protection of the Act generally. But Pelfrey's protected activity was not the motive for the failure to rehire him—the attack on Edifice quality was, and that attack was not protected activity.

In sum, I find that the Respondent was motivated not to rehire Pelfrey because it learned that he contacted the university after his termination and alleged that Edifice performed inferior work. This motive for Edifice's refusal to hire Pelfrey is not alleged in the complaint to be a violation of the Act, but were it so alleged, I would reject the allegation.

CONCLUSIONS OF LAW

1. The Respondent Edifice Restoration Contractors, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated the Act on or about July 2, 2012, by directing Charging Party Mike R. Pelfrey not to discuss his pay rate with other employees.

3. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent shall further be ordered to refrain from any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in all Respondent's facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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. In the

rather was a "separable attack purporting to be made in the interest of the public rather than in that of the employees." Id. at 477.

The fact that Jensen circulated the flyer at a time when he was otherwise actively engaged in protected activities under the Act is no more pertinent here than it was in Jefferson Standard.

[10] See, e.g., *Mitchell Manuals, Inc.,* 280 NLRB 230, 231 (1986) (reversing ALJ finding that letter to chairman of employer's parent was unprotected: "Although the employees' message is couched in terms of criticism of Respondent's operations, the thrust of the letter is the employees' proposal for increasing the professionalism of their jobs. Paragraphs 4, 5, and 6 directly concern the working conditions of the employees and specifically address typical employee concerns such as wages, education, and training. Thus, in the later paragraphs, the employees essentially tie the asserted defects in the labor research to what they contend is the Respondent's poor treatment of collision department employees. Moreover, contrary to the judge, the letter does refer to a key issue raised at the August employee meetings, i.e., wages"); *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 ("Contrary to the Administrative Law Judge's characterization, Paluszek's criticism of Respondent was not a personal attack unrelated to his protest of Respondent's labor practices. Even the opening phrase of the paragraph containing the statements that the Administrative Law Judge found disloyal indicates that Paluszek's criticism of Respondent's operations originated with, and was made in the context of, his complaint with respect to his fellow employee, Brown. Paluszek's reference to the general deterioration in the quality of Respondent's operations merely supported his specific contention in the opening paragraphs of the letter that Respondent's discharge of a valuable employee because of his union activities had irresponsibly undermined Respondent's program").

[11] See, e.g., *Allied Aviation Service Co.*, 248 NLRB 229, 231 (1980) (having found that the letters related to the ongoing labor disputes, the remaining issue is whether the letters can properly be viewed as . . . disparagement"), enfd. without opinion 636 F.2d 1210 (3d Cir. 1980).

event that, during the pendency of these proceedings the Respondent has gone out of business or closed a 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 July 2, 2012. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 8 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent Edifice Restoration Contractors, Inc., Holland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing any employee not to discuss his or her pay rate.

(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 which is necessary to effectuate thepurposes of the Act

(a) Within 14 days after service by the Region, post at its Holland, Ohio facility the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 8, 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 the 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 Respondents 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 any 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 July 2, 2012.

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

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] 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."