

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGIONS 13 AND 20

TERRAPRISE HOLDINGS, INC. D/B/A  
GLOBAL RECRUITERS OF WINFIELD

and

CASE 13-CA-108187

MATTHEW SCHMIDT, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:



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## I. INTRODUCTION

In the instant case, Administrative Law Judge Geoffrey Carter<sup>1</sup> properly concluded in his decision that the General Counsel established a *prima facie* case sufficient to support the inference that Matthew Schmidt's protected concerted activities were a "motivating factor" in Respondent's decision to terminate him on April 17, 2013. ALJD p. 26, line 39 to p. 27, line 6 and 29, line 33 to p. 30, line 8. More specifically, the ALJ properly concluded that Schmidt engaged in protected concerted activities: (1) on December 18, 2012, when he and co-worker, Samantha Chellberg, provided affidavits in support of the contested unemployment compensation claim of a recently terminated employee named John Lucas; and (2) on January 29, 2013, when he and Chellberg testified on Lucas' behalf at an unemployment hearing. ALJD p. 26, lines 41-44 and p. 29, line 36 to p. 30, line 1. The ALJ likewise properly concluded that Respondent had knowledge of Schmidt's protected conduct due to the fact that its Owner and President, Michael Agnew, was provided a copy of both of his employees' affidavits on December 19, and was present during their testimony the following month. ALJD p. 26, line 44 to p. 27, line 2 and p. 30, lines 1-3. Despite correctly finding that the General Counsel established that Matthew Schmidt's protected concerted activities were a "motivating factor" in Respondent's decision to discharge him, the ALJ erroneously concluded that Respondent would have discharged Schmidt even in the absence of Schmidt's protected activities and recommended that the General Counsel's complaint be dismissed. ALJD p. 31, lines 15 – 17. In so concluding, the ALJ impermissibly discounted substantial evidence of animus that was un rebutted by Respondent and served to further strengthen General Counsel's showing that, in

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<sup>1</sup> Hereinafter the National Labor Relations Act will be referred to as the "Act"; the National Labor Relations Board as the "Board"; the Administrative Law Judge as the "ALJ"; citations to the ALJ's decision will be referred to as "ALJD \_\_"; the General Counsel's Exhibits as "GC \_\_"; Respondent's Exhibits as "R\_\_"; and citations to the transcript are hereinafter referred to as "Tr. \_\_".

fact, Respondent unlawfully discharged Schmidt because he engaged in protected concerted conduct.

More specifically, the ALJ erroneously concluded that Respondent did not exhibit animus, upon receipt of Schmidt and Chellberg's affidavits on December 19, despite the fact that undisputed record testimony established that Agnew responded to his receipt of those affidavits by slamming his fist down on his desk, violently pushing his chair back, and then throwing open several doors as he stormed out of the office in the presence of all his employees. ALJD p. 27, lines 8-20 and p. 30, fn. 36; Tr. 48. The ALJ also erroneously concluded that Respondent did not exhibit animus, on February 11, 2013, when Schmidt attempted to talk to Agnew about how he felt punished for testifying in Lucas's unemployment case. ALJD p. 27, lines 22-31 and p. 30, fn. 36. In fact, it is undisputed that Agnew responded to Schmidt, in an aggressive tone: "let's talk about my feelings. How do you think it felt when you used the [\$4,000] bonus I gave you against me, in the [unemployment] hearing? How do you think that made me feel?" ALJD p. 14, line 32 to p. 15, line 4; Tr. 67. In the same way, the ALJ failed to appreciate clear evidence of Respondent's animus during Schmidt's termination meeting on April 17. Here, the unrebutted and credited testimony showed that Agnew admitted to Schmidt that Schmidt was being terminated, in part, because Agnew did not think they could "get past what had happened." ALJD p. 30, fn. 36. Contrary to the ALJ's conclusion, this statement was nothing more than a thinly veiled reference to Schmidt's protected conduct – and the real reason for his termination. These additional instances of animus further supported the General Counsel's *prima facie* case.

Further, the ALJ erroneously concluded that Respondent did not violate Section 8(a)(1) of the Act by: (1) changing and limiting Schmidt's work assignments and opportunities in retaliation for his protected conduct; and (2) interfering with other employees' Section 7 rights

when it instructed them to not share work related information with Schmidt or otherwise communicate with him. ALJD p. 28, line 24 to p. 29, line 24. These independent violations of the Act would have provided further evidence that Respondent harbored animus towards Schmidt for engaging in protected conduct and were part and parcel of Respondent's scheme to fabricate a basis for discharging Schmidt in retaliation for his engaging in protected concerted activities.

Finally, the ALJ erroneously concluded that Respondent would have terminated Schmidt, even in the absence of his protected concerted activities, for poor performance, attitude, and attendance. ALJD p. 30, line 10 to p. 31, line 17. In reaching this decision, the ALJ disregarded the pretextual nature of Respondent's asserted justifications for discharging Schmidt by failing to recognize that Respondent: (1) limited Schmidt's productivity through a series of unlawful adverse changes; (2) abruptly changed its attendance policy in an effort to justify its anticipated termination of Schmidt; (3) failed to follow its own written policy, by not providing Schmidt a written performance improvement plan and subsequent training, suggestions, and appropriate actions for improvement before his termination; and (4) provided shifting reasons for Schmidt's termination by asserting for the first time at the unfair labor practice hearing that Schmidt had a poor attitude . Equally problematic, the ALJ failed to accurately analyze how Respondent previously addressed performance and absenteeism issues when dealing with other employees who had not engaged in protected conduct. ALJD p. 23, lines 16-17 (and accompanying table) and p. 24, lines 7-8 (and accompanying table). This, in turn, resulted in the ALJ incorrectly concluding that because Schmidt was not subject to disparate treatment, his discharge was not a violation of the Act. ALJD p. 31, fn. 39.

Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the General Counsel files this Brief in Support of Exceptions to the ALJ's decision. The General Counsel respectfully requests that the Board reverse the portions of the ALJ's decision excepted to herein, and order an appropriate remedy for the unlawful termination of Schmidt and the other 8(a) (1) violations alleged in the Complaint.

## **II. ARGUMENT IN SUPPORT OF EXCEPTIONS**

### **A. The ALJ Erred by Failing to Find Additional Evidence of Animus in the Record, Including Independent 8(a)(1) Violations, to Further Support General Counsel's Prima Facie Case. (Exceptions 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, and 24)**

#### **1. Owner Michael Agnew "Blows Up" after Learning of Matthew Schmidt and Samantha Chellberg's Affidavits on December 19, 2012. (Exceptions 2, 3, 10, 11, 13, and 15)**

Contrary to the ALJ's conclusion, there is strong evidence that Respondent harbored animus towards Schmidt's protected concerted activity from the time Owner Michael Agnew first learned of it. Schmidt testified without contradiction that, on the morning of December 19, immediately upon receiving the affidavits that Samantha Chellberg and he had provided to John Lucas' attorney, Agnew flew into a fit of rage.<sup>6</sup> Tr. 48. In the presence of his employees, Agnew slammed his fist down on his desk, violently pushed his chair back, and then threw open several doors as he stormed out of the office for a few hours. ALJD p. 10, lines 14-17 and p. 27, lines 10-11; Tr. 48. Not surprisingly, Agnew's threatening behavior upset his employees, but especially Schmidt and Chellberg who immediately realized the cause of this hostility was the affidavits that they had provided the previous day. Tr. 48-49. In fact, Chellberg was so upset that she actually broke down in tears. Tr. 49. If there was any doubt as to the reason for Agnew's hostility, it was quickly answered later that day when he inadvertently sent a chat

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<sup>6</sup> At the trial, Respondent did not make any effort to rebut Schmidt's damning testimony about how Agnew had reacted with such open hostility upon receipt of the affidavits.

message to Schmidt acknowledging the fact that both affidavits severely undermined his fabricated defense in the Lucas unemployment case (i.e. the claim that Lucas had voluntarily quit his job and, in the alternative, had engaged in misconduct). ALJD p. 10, lines 19-21 and p. 27, lines 12-14; Tr. 49-51. When Schmidt sent a reply message inquiring as to whether the message was meant for him, Agnew asked Schmidt to meet with him in the conference room. ALJD p. 10, lines 21-23; Tr. 52.

Inside the conference room, Schmidt warily asked Agnew if the substance of the chat message (i.e. the affidavits) was the reason he was so upset that morning. Tr. 52. Agnew replied that he was angry and needed to walk out of the office in order to calm down. Tr. 52. Schmidt then stated that the employees in the office felt threatened by Agnew's actions and some were even in tears. Tr. 52-53. In an effort to avoid another similar incident, Schmidt also explained to Agnew that he did not want to get involved in Lucas' unemployment case, but had to give an affidavit and it simply stated the truth about what he knew. ALJD p. 10, lines 25-27; Tr. 53. When Agnew denied that he had terminated Lucas, Schmidt reminded him of the admissions he had made during their earlier conversations. ALJD p. 10, lines 27-28; Tr. 53-54. But Agnew continued to argue that he had not terminated Lucas. ALJD p. 10, lines 28-29; Tr. 54. The meeting ultimately ended with Agnew giving Schmidt a cryptic warning that while it was possible for them to grow stronger from this, Schmidt's protected conduct might also result in the two of them being pulled apart and having to part ways.<sup>7</sup> Tr. 53-55, 182.

While all of the above facts were uncontroverted, and credited by the ALJ, the ALJ curiously concluded that they did not demonstrate Respondent's animus because there was no evidence "that Agnew directed his outburst at Schmidt." ALJD p. 27, lines 11-12. This is

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<sup>7</sup> More specifically, Agnew stated that three things could happen: (1) we can grow from this; (2) we can let this pull us apart; or (3) we can part ways. ALJD p. 10, lines 30-32; Tr. 53-55, 182.

clearly erroneous as the evidence shows that Agnew's outburst was in direct response to his receipt of Schmidt and Chellberg's affidavits that morning and done in the presence of all his employees, including the two of them. The ALJ also ignored the fact that Agnew himself, only a few hours later, further linked these two events together by inadvertently sending a chat message to Schmidt acknowledging that the affidavits "hurt" Respondent's position in Lucas' unemployment case. Immediately thereafter, Agnew met with Schmidt and acknowledged that he was angry about the affidavits and warned him that they could result in the two of them being pulled apart and having to part ways. In this overall context, the ALJ was wrong to conclude that this statement "simply expressed the sentiment that while it was a difficult situation for Schmidt and Agnew to be on opposite sides of [Lucas'] case, Schmidt and Agnew could choose what course their working relationship would take going forward." ALJD p. 27, lines 15-20. Rather, this statement contains a poorly veiled threat that if Schmidt does not abandon the protected conduct that hurts Respondent's position in Lucas's unemployment case, it would be necessary for him to part ways with Respondent. Importantly, this exchange set the stage for Respondent's subsequent unlawful course of action which ultimately led to Schmidt's discharge.

**2. Beginning in about January 2013, Michael Agnew Abruptly Changes and Limits Matthew Schmidt's Work Assignments and Opportunities in Violation of Section 8(a)(1) of the Act. (Exceptions 4, 11, 12, 13, and 24)**

If the ALJ would have considered what occurred immediately after Agnew learned of Schmidt's protected conduct, he would also not have been so quick to dismiss the veiled warning Agnew gave to Schmidt on December 19, 2012. Thus, the evidence showed that when Schmidt refused to heed Agnew's warning by making it clear that he would continue to provide testimony in support of Lucas's unemployment case, Agnew decided that it would be necessary for them to "part ways." But Agnew was smart enough to realize that he would need to find a way to

undermine his top recruiter's performance and thereby fabricate a reason to terminate him that, on its face, might appear to be non-discriminatory.

About January 2013, Agnew implemented the first step of his unlawful plan by verbally informing Schmidt that he was no longer permitted to have direct contact with any clients except for Constellation Energy.<sup>8</sup> ALJD p. 11, lines 17-20; Tr. 58-59, 574-76; See also GC 23 (establishing that Schmidt's client contact was limited to Constellation Energy from January to April 2013, with the exception of three incidental calls to other clients – a significant drop from previous months) and R 44 (showing that Schmidt was no longer allowed to communicate directly by email with TVA). The only explanation that Agnew provided for this sudden change was his belief that it was too confusing for clients to have to talk to both of them. Tr. 59. However, this concocted reason does not withstand scrutiny as their "team approach" had served them well in the past as evidenced by the fact that: (1) Schmidt had just earned a "Peak Performer's" trip to the Bahamas for generating over \$400,000 in annual sales; and (2) Schmidt had contributed greatly to Agnew being named Billing Manager of the Year in 2012. Tr. 60. In addition, neither Agnew nor any client had ever previously expressed any concern about doing business in this manner. Tr. 60.

In concluding that this adverse change was not evidence of animus or a violation of Section 8(a)(1) of the Act, the ALJ found that Schmidt continued to receive job orders for all four of Respondent's nuclear clients and that his calls, submittals and placements to those clients matched or exceeded his figures from Fall 2012. ALJD p. 11, lines 20-24. However, there is no

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<sup>8</sup> The ALJ did not make any explicit finding as to when Agnew informed Schmidt that he was no longer permitted to have direct contact with any clients except for Constellation Energy. To the extent that he relied on R 36 to apparently conclude that Respondent limited Schmidt's direct contact with clients in October 2012 (as opposed to January 2013) he was mistaken. ALJD p. 11, lines 16-20 and fn. 13. Indeed, at the trial, the ALJ was very clear that R 36 was being admitted solely for the non-hearsay purpose of establishing Agnew's state of mind and motivation for subsequent actions taken. ALJD p. 7, fn. 10. Thus, Schmidt's testimony that the change to his assignment occurred in January stands uncontradicted, and provides the correct date that the adverse change was implemented by Respondent.

support in the record for the ALJ's finding that Schmidt continued to receive job orders for all four nuclear clients. In fact, as the ALJ acknowledged 70 of the 73 calls that Schmidt made to nuclear clients in 2013 were to Constellation Energy. ALJD p. 11, lines 23-25. And the fact that Schmidt was able to maintain the same number of calls, submittals and placements as before merely shows that he continued to perform his job to this best of his ability notwithstanding this unlawful change. In any event, there can be no doubt that this calculated and retaliatory move made it much more difficult for Schmidt to place his candidates with the nuclear clients he had worked so hard to build strong working relationships with during the past two years. GC 23; Tr. 61. No longer could Schmidt "sell" his candidates to three of the four nuclear power plants as he had done in the past. GC 23; Tr. 61 This, in turn, meant that his candidates (whose strengths, weaknesses, and desires he knew intimately) were less likely to be granted an interview by those power plants and consequently they had no realistic chance of being successfully placed in a vacant job. Tr. 61.

Not content to merely take away Schmidt's clients, Agnew at the same time began to assign power plant jobs to another employee named Omar Cheboub for the first time. ALJD p. 12, lines 5-8; GC 19 (p. 1), R 10; Tr. 62-63. While the ALJ recognized this fact, he declined to credit Schmidt's testimony that Agnew wanted to push him out so he also divided the nuclear work in such a manner that Cheboub was given the better and higher-paying job orders (which resulted in larger commissions) whereas Schmidt was now given the lower-paying job orders. Tr. 62-64, 102-03. However, the ALJ did not consider the fact that documentary evidence proved this to be the case as well since GC 19 showed that Cheboub's assigned job orders had an average salary of \$224,063, whereas R 59 showed that Schmidt's assigned job orders had an

average salary of only \$149,549 (and between January and April 17, 2013, Schmidt's highest job order salary was a mere \$174,000).

**3. During a Meeting on February 11, 2013, Michael Agnew Reveals His Still Simmering Anger at Matthew Schmidt for Having Testified on John Lucas's Behalf at the Unemployment Hearing. (Exceptions 10, 11, 13, and 15)**

Contrary to the ALJ's conclusion, on February 11, Agnew responded with more open hostility when Schmidt finally mustered the courage to speak to him about the ongoing retaliation he was being subjected to for providing testimony in Lucas' unemployment case. Schmidt testified, without contradiction, that he met with Agnew alone in the conference room on this date and stated he felt he was now being given lower level jobs and that other employees were getting the better jobs. ALJD p. 14, lines 28-30 and p. 27, lines 22-24; Tr. 66. When Schmidt stated that he felt he was being punished for testifying in Lucas's unemployment case, Agnew curtly replied, "I'm not here to talk about your feelings." ALJD p. 14, lines ; 30-31; Tr. 66. Agnew then proceeded to list a number of low level jobs Schmidt was currently working on and reiterated that these were the jobs he was going to work on. Tr. 66-67. Faced with this hostile response, Schmidt was understandably hesitant to further discuss his feelings. Tr. 67. However, Agnew harbored so much animus, that he ultimately betrayed his own feelings on the matter by bluntly stating to Schmidt, in an aggressive tone, "let's talk about my feelings. How do you think it felt when you used the [\$4,000] bonus I gave you against me, in the [Lucas unemployment] hearing? How do you think that made me feel?" ALJD p.14 , line 32 to p. 15, line 4; Tr. 67. To further demean Schmidt for having testified at Lucas' unemployment hearing, Agnew ended the meeting by slipping a \$20 bill to Schmidt and telling him, in a hostile tone, to go get lunch at a local restaurant and think of how Schmidt had made Agnew feel. ALJD p. 15, lines 6-7; Tr. 67-68.

Although all of the above facts were once again uncontroverted, and accordingly credited by the ALJ, the ALJ erroneously concluded that they did not demonstrate Respondent's animus. To the contrary, the ALJ improperly blamed Schmidt for raising the adverse changes he was being subjected to and "invit[ing] Agnew to engage on the issue." ALJD p. 27, lines 22-25. Following this flawed logic, the ALJ then inexplicably concluded that "Agnew obliged by essentially telling Schmidt that [Lucas'] case left everyone involved with bruised feelings." ALJD p. 27, lines 25-31. However, Agnew's unambiguous words to Schmidt did not essentially tell Schmidt that *everyone* had bruised feelings. Rather, they powerfully conveyed the clear message that Agnew suffered hurt feelings toward Schmidt over his perceived ingratitude for testifying against Respondent after receiving a bonus. As such, they provided more than ample evidence that Respondent still harbored animus towards Schmidt's protected conduct weeks after Lucas' unemployment hearing.

**4. Following the February 11, 2013 Meeting, Michael Agnew Continues to Change and Limit Matthew Schmidt's Work Assignments and Opportunities in Violation of Section 8(a)(1) of the Act. (Exceptions 9, 11, 12, 13, and 24)**

The ALJ likewise erred by failing to find that, over the next couple of months, Agnew continued to target Schmidt in a blatant attempt to get rid of him for having the temerity to engage in protected concerted activities. Recognizing that it would be difficult to terminate Schmidt for poor work performance when he had been actually outperforming the owner of the company,<sup>9</sup> Agnew began to take away even more work opportunities from Schmidt by reassigning nuclear jobs to David Dulay – whose work had previously been limited to recruiting on the manufacturing side of the business. ALJD p. 17, lines 1-2; Tr. 239-40, 243-44. In the same vein, Agnew promoted Dave Daum to the position of part-time Project Coordinator and

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<sup>9</sup> Between mid-December and their February 11 meeting, Schmidt had two job placements to Agnew's one. GC 14.

had him work on nuclear jobs despite the fact that he had no experience recruiting in that field.

ALJD p. 17, lines 1-2; GC 19 (p. 2); Tr. 63-64.

But Agnew was not simply content to take away Schmidt's job opportunities by reassigning his previous work to three other employees with no nuclear experience. To further limit Schmidt's work opportunities, around the same time, Agnew began to actively conceal nuclear job orders from Schmidt by no longer following his established practice of entering jobs on the nuclear jobs spreadsheet and meeting with Schmidt to discuss them.<sup>10</sup> Tr. 64, 70-71. Gone were the days when the two of them would jointly devise a "game plan" to determine where they could go to start sourcing candidates and which candidates they might already have in mind for the job.<sup>11</sup> Tr. 64, 70, 224. Agnew now instead assigned Schmidt specific job orders (that tended to be low-paying and/or stale) to work on. Tr. 225. If Schmidt so much as suggested one of his candidates for another job order that had not been assigned to him, Agnew would quickly reprimand him for doing so. Tr. 225.

In assessing whether these or any of Respondent's other adverse changes to Schmidt's working conditions were unlawful, the ALJ erroneously concluded that none of these adverse changes could have been retaliatory since Agnew had concerns about Schmidt prior to him engaging in protected conduct in December 2012 and January 2013. ALJD p. 28, lines 12-16. However, the question the ALJ failed to consider and address was why Agnew waited three to

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<sup>10</sup>In concluding that Respondent did not unlawfully conceal nuclear job orders from Schmidt, the ALJ simply considered one aspect of this allegation. More specifically, the ALJ focused exclusively on one instance where Daum was assigned a job involving a licensing manager for Tennessee Valley Authority. Tr. 70-71. Schmidt testified without contradiction that he learned of this job directly from Daum, but he searched and was unable to find it listed on the nuclear jobs spreadsheet maintained by Agnew. Tr. 70-72. As a result, Schmidt had to go to Respondent's internal database (CAPS) to confirm the existence of this job that had been concealed from him. ALJD p.17, lines 18-21; Tr. 72. However, the ALJ ignored the General Counsel's argument that Respondent also concealed job orders from Schmidt when Agnew abruptly ended his established practice of meeting with Schmidt to discuss every job order received and then jointly devising a "game plan" to fill that order. Tr. 36-37, 64, 224.

<sup>11</sup>As previously noted, Agnew and Schmidt's "team approach" when working on all nuclear job orders had been very successful as evidenced by the fact that the former was named Billing Manager of the Year in 2012 and the latter was named a "Peak Performer" for generating over \$400,000 in annual sales.

five months to implement these adverse changes (between January and March 2013) if he was so concerned about Schmidt in October 2012. The answer can be found in the proximity in time between Schmidt's protected conduct, providing testimony in his friend's unemployment case, and the almost immediate implementation of the changes thereafter. Indeed, as the ALJ reluctantly acknowledged, the adverse changes occurred on the heels of Schmidt's protected conduct. ALJD p. 27, lines 3-6. Thus, it was only after Schmidt provided testimony in support of Lucas's unemployment claim – which Agnew equated with “disloyalty” as he made clear during their meeting on February 11 – that Respondent was able to confirm that he could no longer be trusted and should consequently be retaliated against in all of the various forms discussed herein.

**5. In February and March 2013, Michael Agnew Interferes With Employees' Section 7 Rights in Violation of Section 8(a)(1) of the Act by Instructing Them Not to Share Work-Related Information With Matthew Schmidt or Otherwise Communicate With Him. (Exceptions 5, 11, 13, and 24)**

In his decision, the ALJ further erred by concluding that Respondent did not unlawfully interfere with other employees' Section 7 rights when it instructed them to not share work related information with Schmidt or otherwise communicate with him. According to David Dulay's credited testimony, in February and March 2013, Agnew pulled him into the conference room on several occasions and instructed him to not talk to Schmidt “about anything on [Dulay's] desk or any jobs that [he was] working on.” ALJD p. 17, lines 10-12; Tr. 245. However, the ALJ erroneously concluded that Agnew simply limited Dulay from discussing “work projects” with Schmidt and not from a variety of other matters such as working conditions or terms and conditions of employment. ALJD p. 29, lines 12-16. The ALJ was wrong as a matter of fact and law since Dulay was repeatedly told not to discuss “anything on his desk” and even employee

discussions concerning assignments of work are protected under the Act. *The Loft*, 277 NLRB 1444, 1461 (1986); *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1041 (1991); and *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976). This is especially true here since Schmidt believed that Agnew was hiding job orders from him and assigning him lower paying jobs in retaliation for his protected conduct.

In the same vein, the ALJ erred by concluding that Respondent did not interfere with employees' Section 7 rights by instructing them not communicate with Schmidt. Dulay and Schmidt's credited testimony established that, on one occasion when they were talking to one another at work, Agnew made a cutting motion on his neck which conveyed the message to Dulay that he should not communicate with Schmidt. ALJD p. 17, lines 12-14; Tr. 86-87, 245-46. Not surprisingly, Dulay immediately ceased talking to Schmidt so as not to incur Agnew's wrath. Tr. 87, 246-47. In the ALJ's view, Agnew's hand gesture was simply a reminder to Dulay that he should not speak to Schmidt about "work assignments." ALJD p. 29, lines 17-20. But again the ALJ's conclusion was completely unfounded as there is no evidence that Agnew overheard the substance of their conversation so his only motivation was to prohibit Dulay from talking about anything with Schmidt. However, even if the hand gesture was intended to convey to Dulay that he should not speak to Schmidt about work assignments, as discussed above, the message would still violate the Act. Significantly, not only are both of these situations independently violative of Section 8(a)(1), but they should also properly be considered in evaluating Respondent's overall unlawful scheme to discharge Schmidt in retaliation for his protected concerted activities. The ALJ erred in his failure to do so.

**6. On March 27, 2013, Michael Agnew Surreptitiously Revokes Matthew Schmidt's Remote Computer Login Privileges and then Rebuffs Schmidt's Heartfelt Effort to "Mend Fences" During a Meeting on April 10, 2013. (Exceptions 6, 11, 12, 13, 15, and 24)**

The final error that the ALJ made with respect to evidence of Respondent's animus and adverse changes to Schmidt's employment involves facts that are not in dispute. On March 27, Agnew admittedly took the unprecedented step of revoking Schmidt's remote computer login privileges so that he would not be able to perform his job when outside the office.<sup>12</sup> ALJD p. 18, lines 18-19; GC 8 (p. 1); Tr. 73-77, 83-84, 280-81. No advance warning was given to Schmidt of this adverse change which only served to further limit his productivity. Tr. 84.

While the "writing was on the wall" by early April, Schmidt nevertheless made one final effort to end the ongoing retaliation by meeting with Agnew. Tr. 77-84. Thinking that turning the other cheek might be the best way to approach his employer, Schmidt began this meeting by telling Agnew, in a heartfelt manner, that through a lot of prayer he had come to the realization that he needed to apologize for testifying against him in Lucas' unemployment case if they were ever going to get past it. ALJD p. 19, lines 27-29; Tr. 78. Schmidt also reiterated, as he had initially done at their meeting on December 19, 2012, that he had not provided testimony to hurt Agnew, but because he and his co-worker felt it was the right thing to do and to protect themselves from similar treatment. ALJD p. 19, lines 26-27; Tr. 78-79. However, rather than accepting Schmidt's olive branch, Agnew proceeded to reprimand Schmidt for not focusing his recruitment efforts exclusively to nuclear power plants when working on several engineering jobs for his sole remaining client, Constellation Energy. GC 20-21; Tr. 81-82.

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<sup>12</sup> In a poorly conceived effort to conceal the retaliatory nature of this action, Agnew requested that Abigail Fischer's remote computer login privileges be revoked at the same time. ALJD p. 18, fn. 26; GC 8 (p. 1). However, Fischer was merely a high school age student who was working for Respondent as a part-time research assistant and had no need for remote computer login privileges Tr. 281-82. Indeed, Respondent's own business records show she had never once logged into the computer network remotely. ALJD p. 18, fn. 26; GC 9; Tr. 293.

At the conclusion of the meeting, Agnew also refused to restore Schmidt's remote login privileges and falsely accused him of not utilizing them on a regular basis. ALJD p. 18, lines 26-28; Tr. 83-84, 285. Even a cursory examination of Respondent's business records shows that this was not true, as the ALJ correctly found. ALJD p. 18, fn. 26; GC 9; Tr. 290-91. Schmidt regularly logged onto the computer network remotely to perform his job duties, unlike many other employees whose remote login privileges were not revoked on March 27. GC 9; Tr. 290-91.

Despite this overwhelming evidence, the ALJ offered a conflicting conclusion about its impact on the merits of this case. On the one hand, he properly concluded that the General Counsel had established that Respondent harbored animus because "Agnew gave partly dubious reasons at trial when he tried to explain why Respondent initially decided to remove Schmidt's (and essentially, only Schmidt's) remote access privileges." ALJD p. 30, lines 3-6. On the other hand, the ALJ appeared to contradict himself by speculating that Agnew gave these "dubious reasons" to avoid telling Schmidt that he was planning on terminating him in the near future. ALJD p. 18, fn. 26. If the ALJ's speculation is correct, this means that, after Schmidt was placed on Performance Improvement Plan, Respondent decided to terminate him for arriving to work a little late on one single day.<sup>13</sup> In any event, Respondent failed to provide any explanation as to why other employees had their remote login privileges revoked as well two weeks later – if they were simply going to have their privileges restored, a few days later, immediately after Schmidt's termination. GC 8 (pp. 2-4), and 10; Tr. 84-85, 247-48, 282-287, 297-98.

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<sup>13</sup> The pretextual reasons that Respondent gave for Schmidt's termination will be discussed in the next section of this brief.

Accordingly, the ALJ erred as a matter of fact and law by discounting substantial evidence of animus, and 8(a)(1) conduct by Respondent in finding that Schmidt would have been discharged even absent his protected concerted activities.

**B. The ALJ Erred by Concluding that Respondent Demonstrated that it Would Have Terminated Matthew Schmidt Even in the Absence of his Protected Concerted Activities. (Exceptions 1, 7, 8, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24)**

At his hastily called termination meeting on April 17, 2013, Agnew informed Schmidt that he was being terminated because of his performance and attendance. At the trial, Agnew asserted that Schmidt was also terminated because of his poor attitude. But contrary to the ALJ's erroneous conclusion, Respondent basically conceded at trial that Schmidt's protected concerted activities were a "motivating factor" in the decision to terminate him when it failed to rebut Schmidt's testimony that Agnew admitted during the termination meeting that it was necessary to "part ways" because he did not think they could "get past what had happened." While the ALJ concluded that this statement was ambiguous, it was really nothing more than a thinly veiled reference to Schmidt's protected conduct – and the real reason for his termination.<sup>14</sup> ALJD p. 30, fn. 36. Indeed, Agnew's words were strikingly similar to those previously spoken by Schmidt, at their April 10 meeting, when the latter stated he felt he needed to apologize for his protected conduct so they could get past it (i.e. his testimony in Lucas's unemployment case).

In assessing Respondent's true motive for terminating Schmidt, the ALJ also failed to appropriately consider the pretextual and disparate nature of Respondent's rationale for discharging Schmidt. Specifically and contrary to the ALJ, the record overwhelmingly

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<sup>14</sup> The fact that Respondent failed to also terminate Samantha Chellberg does not detract from the fact that Agnew harbored strong animus towards Schmidt for engaging in protected concerted activities and that those activities were the motivating factor that led to his termination. This is especially true here since she was admittedly the most knowledgeable employee with respect to Respondent's proprietary computer software (CAPS) – the single most important and indispensable tool for its recruiters to perform their job function. Tr. 530-31, 543. In contrast to Chellberg's irreplaceable knowledge and work duties, Agnew recognized that he could simply take over Schmidt's recruiting work and/or reassign it to another recruiter as he ultimately did.

demonstrated Respondent's: (1) calculated and deliberate attempt to undermine Schmidt's productivity in the various ways already discussed; (2) attempt to conceal the fact that it changed its attendance policy on March 1, 2013 – a policy which Schmidt had previously been told did not apply to him – and its disingenuous assertion that Schmidt had violated that policy when his absences had actually been pre-approved; (3) failure to follow its own written policy, by not providing Schmidt a written performance improvement plan and subsequent training, suggestions, and appropriate actions for improvement before his termination; and (4) weak attempt to show that Schmidt had a poor attitude. Equally problematic, the ALJ failed to accurately analyze how Respondent had previously addressed performance and absenteeism issues when dealing with other employees who had not engaged in protected conduct. This, in turn, resulted in the ALJ incorrectly concluding that Schmidt was not subject to disparate treatment.

**1. The ALJ Erred by Failing to Find that Respondent's Assertion that it Terminated Matthew Schmidt Due to His Work Performance Was a Pretextual Reason. (Exceptions 1, 8, 11, 14, 17, 18, 22, 23, and 24)**

As already discussed in great detail, the evidence establishes that Respondent retaliated against Schmidt for concertedly providing an affidavit, dated December 18, 2012, in support of Lucas's unemployment claim and further testifying on his behalf at an unemployment hearing on January 29, 2013. Contrary to the ALJ's erroneous conclusion, the evidence shows that Respondent retaliated against Schmidt for engaging in this protected conduct by no longer permitting him to have direct contact with any clients except for Constellation Energy. It further retaliated against Schmidt by reassigning recruiting work involving nuclear power plants to other employees for the first time. If that were not enough, Agnew further punished Schmidt by dividing the work so that Schmidt would be forced to work on lower paying and/or stale job

orders that were tough to fill. To ensure that Schmidt did not have the opportunity to place his candidates in the higher paying jobs that were easier to fill, Agnew also abandoned their past practice of discussing new job orders that came into the office and then taking a “team approach” to fill those jobs. In the same vein, Agnew actively concealed new job orders from Schmidt by no longer entering them on a nuclear jobs spreadsheet. In fact, Agnew was so intent on alienating Schmidt for having engaged in protected concerted activities that he unlawfully instructed other employees not to discuss anything work related with Schmidt or to even communicate with him at work. Three weeks before Schmidt’s termination, Agnew continued to undermine Schmidt’s productivity by surreptitiously revoking his remote computer login privileges so that he would not be able to perform his job when outside the office. While these retaliatory actions constituted separate violations of Section 8(a)(1) of the Act, it is important to understand that they were also a means to an end – a way for Respondent to try to rid itself of Schmidt.

As a result of all of these retaliatory actions, it is not surprising that Schmidt’s sales revenues (and his corresponding commissions) significantly decreased between January and April 2013. While Respondent argued that Schmidt’s low sales numbers were due to his willful failure to call nuclear clients in 2013,<sup>15</sup> the ALJ correctly found that Schmidt’s calls, submittals and placements to clients actually matched or exceeded his figures from Fall 2012. ALJD p. 11, lines 23-25. The ALJ, nevertheless, concluded that Respondent was justified in terminating Schmidt for poor performance since his sales numbers in Fall 2012 were significantly lower than what they had been in Summer 2012. ALJD p. 30, lines 15-20. In doing so, the ALJ ignored his own finding of fact that Schmidt’s calls, submittals and placements increased significantly, in

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<sup>15</sup> As a threshold matter, it should be noted that Schmidt’s call volume had never been an issue prior to his protected concerted activities. For example, in January and April 2012, Schmidt was not reprimanded or disciplined for only making a total of eight calls and three calls, respectively. GC 23.

May, June, and July 2012, from historic norms due to the fact that Agnew was out of the office for much of that time as a result of a family member's declining health (and ultimate death). ALJD p. 4, lines 15-20. The ALJ likewise ignored Schmidt's un rebutted testimony that his sales numbers were lower in Fall 2012 because the fourth quarter was always a very slow time of the year for Respondent's business. Tr. 185. And obviously, by January 2013, Respondent had begun to subject Schmidt to unlawful impediments which made it difficult for him to match the artificially inflated three month sales figures he attained in Summer 2012.

In addition, Respondent's business records do not support its assertion that Schmidt was terminated due to poor work performance. To the contrary, these records show that between mid-December 2012 and March 10, 2013, Schmidt had two job placements to Agnew's one.<sup>16</sup> GC 14; Tr. 314-16. This despite the fact that Agnew was more experienced, more educated, now exercised complete discretion in assigning job orders, and was permitted to have contact with all four of Respondent's nuclear clients. Tr. 515. Significantly, Schmidt also matched the amount billed by both Cheboub and Dulay during this same time period (with Daum billing nothing at all during the first four months of 2013). GC 13, R 64; Tr. 311-13.

Equally problematic for Respondent is the fact that it had never once terminated an employee for poor work performance prior to Schmidt on April 17, 2013. At trial during 611(c) examination, Respondent clearly recognized that this evidence of disparate treatment would be crippling to its *Wright Line* defense so Agnew tried to fabricate such a termination. He initially misrepresented to the court that employee Robin Filipiak had been terminated for poor work performance on some unknown date. Tr. 317-19. But when the General Counsel pointed out that there was no documentation to substantiate such a termination, Agnew quickly back-peddled

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<sup>16</sup> If one extends the period to Schmidt's termination date of April 17, he still amazingly placed only one less candidate than Agnew. GC 14; Tr. 314-16.

and was forced to admit that she had in fact voluntarily quit her job. Tr. 321, 522. In the same way, Agnew attempted to create the appearance that employee Jessica Jantolak was terminated for poor work performance. Tr. 317. After being pressed by General Counsel, Agnew likewise conceded that she had in fact not been terminated for that reason.<sup>17</sup> Tr. 318. Incredibly, during Respondent's case-in-chief, Agnew continued to try to deceive the court by baldly asserting that employee Elaine Castro was terminated for poor work performance. Tr. 458. However Respondent's own records show that she voluntarily quit her job on July 1, 2011.<sup>18</sup> GC 22. Accordingly, the ALJ erred by concluding that Respondent lawfully terminated Schmidt for poor work performance since it was a pretextual reason that does not withstand scrutiny.

**2. The ALJ Erred by Failing to Find that Respondent's Assertion that it Terminated Matthew Schmidt Due to His Poor Attendance Was a Pretextual Reason. (Exceptions 7, 11, 17, 18, 19, 20, 21, 22, 23, and 24)**

Due to the fact that Respondent recognized that it could not establish that it would have terminated Schmidt for poor work performance even in the absence of his protected conduct, it also argued that the termination was due to his poor attendance. At the outset, Respondent attempted to create the appearance that its attendance policy provided that "if your absence from work becomes repeated and/or excessive, you will be terminated or placed on a Performance Improvement Plan." (emphasis supplied) R 20; Tr. 175-76. Indeed, an email sent to employees, on March 1, 2013, purported to quote this portion of the attendance policy directly from Respondent's Employee Handbook and even highlighted it in bold. ALJD p. 15, lines 26-36; R 20. However, during the General Counsel's 611(c) examination, Agnew was forced to reluctantly admit that the version of the Employee Handbook then in effect, dated December

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<sup>17</sup> Agnew instead insisted that she was terminated for poor attendance which will be discussed in the next section.

<sup>18</sup> Notwithstanding Respondent's business records and Agnew's admission that Filipak and Castro had voluntarily quit their jobs, the ALJ erroneously relied on these two individuals to support his finding that Respondent "was willing to take action to address performance issues when necessary." ALJD p. 24, lines 7-8 and accompanying table.

2011, did not state “you will be terminated” for repeated and/or excessive absences. GC 12; Tr. 298-305. Rather, it simply stated that employees would be placed on a Performance Improvement Plan.<sup>19</sup> GC 12. Although the ALJ recognized that Respondent abruptly changed its attendance policy a mere month after Schmidt’s protected conduct,<sup>20</sup> he summarily dismissed this additional evidence of pretext by stating that it was not “probative.” ALJD p. 31, fn. 38.

In the same manner, the ALJ glossed over the fact that the Employee Handbook was admittedly never provided to Schmidt prior to his termination. ALJD p. 3, fn. 3; Tr. 96, 149-50, 203, 490-91. Even more troubling, the ALJ completely ignored Schmidt’s uncontradicted testimony that Agnew instead met with his top two performers in 2012, John Lucas and Schmidt, and gave them the following directive:

You guys do a very good job. You guys make a lot of money. And if you need time off, and you want time off, I’ll give it to you. I don’t care. But if you go past your ten days of vacation time, I’ll deduct it out of your paycheck and just give it back to you in a bonus at the end of the year. You guys do well. You guys take off whatever time you need.<sup>21</sup>

Tr. 96-97, 194-95. The ALJ likewise ignored Schmidt’s uncontradicted testimony that Agnew told them, “if you come in late, or if you miss some work, just stay late. I don’t care.” Tr. 97.

This special treatment that Schmidt was afforded changed only after he concertedly testified in support of Lucas’s unemployment claim on January 29, 2013.<sup>22</sup> On March 15, Agnew met with Schmidt and for the first time ever stated that his attendance was an issue. ALJD p. 17, lines 25-28; Tr. 196. Agnew even went so far as to place Schmidt on Performance Improvement Plan due to the fact that he had a number of allegedly unexcused absences. ALJD

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<sup>19</sup> The earlier version of the Employee Handbook, dated November 2010, likewise simply provided that employees would be placed on a Performance Improvement Plan for repeated and/or excessive absences. Tr. 306.

<sup>20</sup> This fact was even noted in an internal company email. ALJD p. 16, lines 20-22; GC 11.

<sup>21</sup> Consistent with this directive, Respondent’s business records show that the vacation and sick time that Schmidt took in 2012 exceeded what he was entitled to by more than one week. R 50. .

<sup>22</sup> The fact that other employees may have been held to a stricter standard when it came to attendance is irrelevant since it is undisputed that Schmidt was given special treatment due to the fact that he was a top performer for Respondent.

p. 17, lines 28-30; Tr. 160-62, 198. But interestingly enough, Schmidt was never provided any written Performance Improvement Plan as required by Respondent's own policy. Tr. 198.

ALJD p. 17, lines 28-29. Nor was he afforded any training, suggestions, and appropriate actions for improvement as required by the policy. And he certainly was not informed that he would be terminated for simply reporting to work late one or two times – as both Agnew and Schmidt had always understood that reporting late was not an issue as long as Schmidt made up the time. Tr. 199. Incredibly however, in the ALJ's mistaken view, all of these irregularities did "not cast doubt on the validity of the performance improvement plan." ALJD p. 31, fn. 38.

Understandably, the Performance Improvement Plan came as a complete shock to Schmidt because the work days he had missed prior to March 15 were nearly all approved in advance by Agnew.<sup>23</sup> ALJD p.17 , lines 33-35; Tr. 98, 196-99, 218. During the General Counsel's rebuttal case, Schmidt went through R 50 (which showed vacation and sick time he took during this period) day-by-day and credibly explained the reason he missed time on each day and the fact that Agnew approved in advance the absences on all but two occasions.<sup>24</sup> Tr. 578-84. On those latter two dates (February 4 and 27), Schmidt missed work due to unexpected car problems and an emergency tooth extraction.<sup>25</sup> It also bears noting that half of Schmidt's total absences were necessary and fully supported by Agnew so that he could get his passport in order to go the Bahamas work trip that he had earned (January 25 and 28, February 14, and March 1). R 50; Tr. 210, 449-50, 577-82, 584. In fact, after the General Counsel's elicited this compelling testimony from Schmidt, Respondent appeared to abandon its argument that these

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<sup>23</sup> Granted, on some occasions, Schmidt did not provide two weeks advance notice. However, Agnew obviously could have denied any of those requests for that reason (or any other reason) and yet choose to approve them. Tr. 197-98.

<sup>24</sup> R 50 also noted that Schmidt reported to work late on February 13, but this had never been an issue before as already discussed. Tr. 97-98. Nor was it disputed that Schmidt later made up this time. Tr. 100, 219.

<sup>25</sup> Neither Agnew nor Schmidt had any recollection of the absence on February 4. Tr. 445, 581-82. And Agnew admitted that he did not have a problem with Schmidt missing work due to his tooth extraction. Tr. 448.

were not pre-approved absences. Respondent's counsel instead curiously argued with Schmidt that given that the absences were approved in advance, it showed that Agnew did not harbor animus toward him for having engaged in protected conduct. Tr. 592-94.

Despite the evidence in the record, the ALJ inexplicably concluded that Respondent lawfully terminated Schmidt due, in part, to his alleged poor attendance. To try to understand this flawed decision, one must consider whether Schmidt missed numerous work days after he was placed on an unwritten "Performance Improvement Plan" on March 15 or if had he been a "no-call, no-show" for three or more consecutive days after that date. The answer, of course, is a resounding "no." The record shows that Schmidt simply reported a little late to work on March 27 and April 16. ALJD p. 31, lines 8-9; R 50. Significantly, the reason Schmidt was late on those occasions was because he was having difficulty sleeping at night due to the stress caused by Agnew's repeated and unfounded retaliatory actions. Tr. 99-100. But regardless of the reason that Schmidt was a little late and ignoring the fact that Schmidt made up the missed time on both dates in accordance with his long-standing and authorized practice, the fact remains this had never been an issue prior to his protected concerted activities. Tr. 99-100. Indeed, apart from Schmidt's un rebutted testimony that Agnew did not care what time he (and Lucas) arrived to work, the record reveals that no employee had ever been so much as disciplined for arriving to work late. This was made abundantly clear at trial, when Respondent attempted to cover up that fact by introducing two self-serving emails sent to David Dulay after Schmidt's termination. R 30 and 31. Not surprisingly, no such email had ever been sent to Dulay or any other employee prior to Schmidt's termination. Tr. 263-64.

Contrary to the ALJ's erroneous conclusion, the record also reveals that Schmidt was subjected to disparate treatment in comparison to other employees with absenteeism issues. For

example, employee Bill McGuane missed work without prior approval between December 19, 2012, and January 2, 2013. GC 18; Tr. 331-32. In fact, after Friday December 21, he was a “no-call, no-show” despite Agnew’s efforts to contact him. GC 18. However, McGuane was never terminated due to these numerous unexcused absences and instead just quit sometime in January 2013. GC 18; Tr. 332-33. A second employee, Jessica Jantolak, was likewise permitted to continue working for an extended period of time despite serious attendance issues. GC 15-17; Tr. 323-31. In March 2011, she missed five entire days and a portion of two other days for various reasons. GC 16; Tr. 326-27. In April 2011, her attendance did not improve and she again missed all or part of seven additional days. GC 16; Tr. 327-28. The following month, in May 2011, she missed 11 more days and was actually out of the office from May 19 to June 1 due to health reasons. GC 16; Tr. 328-29. It was only after Jantolak had missed a total of 25 work days in those three months and with her now unable to work due to her serious health condition, that her employment finally came to an end. GC 15-17; Tr. 329. But even then she was given the option of resigning and told that she would be considered for rehire in the future. GC 15, 17; Tr. 329-31. In addition, a third employee, Heather Mirtl, was not terminated despite the fact that she had an issue with tardiness in 2008 and a poor attendance record in January 2009. GC 42-43. Out of 16 working days that month, she only reported to work on time 10 days and was absent an additional five days. GC 43. In her case, Respondent handled the tardiness issue by allowing her to report to work later rather than terminate her as was done with Schmidt. GC 43. In view of Respondent’s longstanding tolerance of other employees’ attendance issues, its disparate treatment of Schmidt further highlights the pretextual nature of his discharge. Thus, the ALJ erred by concluding that Respondent lawfully terminated Schmidt for poor attendance since Respondent’s pretextual reason does not withstand scrutiny.

**3. The ALJ Erred by Failing to Find that Respondent's Assertion that it Terminated Matthew Schmidt Due to His Poor Attitude Was a Pretextual Reason. (Exceptions 11, 17, 18, 22, 23, and 24)**

As already mentioned, Respondent at the trial argued that Schmidt was also terminated because of his poor attitude despite the fact that it was not a proffered reason at his termination meeting.<sup>26</sup> Because this was clearly a post hoc rationalization, it was the weakest of Respondent's purported reasons for terminating Schmidt. In his decision, the ALJ nevertheless accepted Agnew's assertion that the attitude of Schmidt and other employees became less positive after John Lucas was fired on September 24. ALJD p. 5, lines 22-25; Tr. 367-68. The ALJ did so despite the fact that Agnew also lavished praise on Schmidt because "I have not to this date found someone to work like Matt, alongside of me, in my desk. I would love to have someone like Matt placing people in my nuclear space, but I don't." Tr. 370. In trying to make sense of this apparently contradictory testimony, the ALJ failed to consider the most logical explanation: that Agnew viewed Schmidt as the good employee that he actually was (especially when unlawful obstacles were not placed in his way). But Agnew also had a dim view of Schmidt's concerted decision to provide testimony in support of Lucas's unemployment claim after the latter was terminated. In Agnew's own words at trial, this protected conduct forced him "to divert time to John Lucas's case and that was frustrating." Tr. 501.

In mid-October 2012, as Respondent's employees were beginning to choose sides in Lucas' unemployment case, Agnew viewed an innocuous statement made to his 12 year old daughter by Schmidt "as a major concern." Tr. 368-69. The statement made was simply that

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<sup>26</sup> The Board has held that when an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005); and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997). Shifting and inconsistent justifications for an adverse personnel action often provide a basis for concluding that such actions were discriminatory, *Pacific Design Center*, 339 NLRB 415 (2003). See also *Wright Line*, 251 NLRB 1083, 1089 (1980).

Schmidt could not wait until 5:00 p.m. on that particular work day. ALJD p. 7, lines 17-21; Tr. 368-69. In that same time period, Schmidt was also perceived to have exhibited a negative attitude by candidly telling Agnew that he did not think a potential hire would be a good fit for the office. R 36. But as Agnew acknowledged, he wanted Schmidt's opinion about this individual and he (Schmidt) "humbly apologized" when his feedback was taken the wrong way. R 36. Not surprisingly, Respondent never disciplined Schmidt at any time for these isolated statements and it certainly did not communicate to him that it was a basis for terminating him six months later. Tr. 499-500. However, the ALJ relied on these "offhand remarks" to conclude that Schmidt was lawfully terminated for having a poor attitude. ALJD p. 30, lines 33-34.

In an attempt to bolster this erroneous conclusion, the ALJ also cited Schmidt's "ongoing problems with absenteeism" as further evidence of a poor attitude. But the purported problems with Schmidt's attendance have already been shown to have no basis in fact. In addition, the ALJ was wrong to conclude that two incidents occurring months apart were further evidence of Schmidt's poor attitude. The first one occurred, in early January 2013, after Bill McGuane voluntarily quit following two weeks of unexcused absences. ALJD p. 12, lines 19-22; Tr. 576. McGuane had previously asked Schmidt to forward a candidate's name to Constellation Energy since Schmidt was the direct contact for that client. Tr. 576. Schmidt did so, but then McGuane abruptly quit his job. Tr. 576. As a result, Schmidt finished checking the candidate's references and worked to get him an interview with Constellation Energy. Tr. 576-77. But Agnew later became upset because he believed that all of McGuane's former candidates should go to him. ALJD p. 12, line 22; Tr. 577. Agnew even went so far as to accuse Schmidt of trying to take his candidate – even though Constellation Energy was Schmidt's client and he had done all the work to try to get the candidate placed. Tr. 576-77. The second incident, occurred on about April 3,

2013, when Agnew met with Schmidt and David Daum to discuss a plan to contact candidates for an electrical engineering position at Constellation Energy. ALJD p. 20, lines 15-17. The credited testimony was that Agnew instructed Schmidt to limit his candidate search to individuals employed at nuclear power plants. ALJD p. 20, lines 17-21. However, even assuming this to be the case, Schmidt testified that he understood Agnew to be limiting his search to nuclear power plants and nuclear service groups (A&E/OEMs) so he prepared a calling plan within those parameters. ALJD p. 19, lines 35-38; Tr. 80-82. On April 10, immediately after Schmidt met with Agnew in an effort to mend fences by apologizing for testifying in Lucas' unemployment case, Agnew admonished Schmidt for devising a call plan that included the nuclear service groups. ALJD p. 19, lines 32-35; GC 20-21; Tr. 80-82. In response, Schmidt apologized for the misunderstanding and agreed not to call any of those individuals. ALJD p. 20, lines 25-39; GC 21; Tr. 83. Neither of these isolated incidents supports the ALJ's conclusion that Schmidt had a "poor attitude" and at most show a misunderstanding between him and Agnew on two occasions between October 2012 and April 17, 2013.

Finally, it should be noted that despite the lack of any credible evidence that Schmidt had a poor attitude (Tr. 509) or that any disciplinary action was ever taken against him for that reason, Agnew testified that he ultimately made the decision to terminate Schmidt on that basis in late March or early April 2013. The outlandish behavior that purportedly cost Schmidt his job was jokingly telling the owner's 19 year old son, Robert Agnew, that he (Robert) was lucky he only had to work one hour on a particular day. Tr. 462-63, 590-92. But as Schmidt testified on rebuttal, he had a very friendly relationship with Robert and the two of them were constantly joking back and forth. Tr. 591-92. Not surprisingly, Respondent did not even attempt to argue

that any employee had ever been disciplined, let alone terminated, for allegedly having a poor attitude.

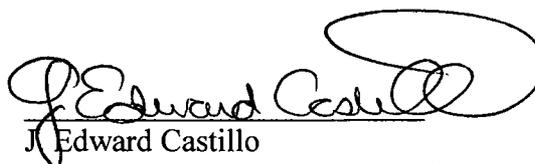
Therefore, the ALJ erred by concluding that Respondent lawfully terminated Schmidt for having a poor attitude since it was a pretextual reason that does not withstand scrutiny.

### **III. CONCLUSION**

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board find merit to its Exceptions to the Decision of the Administrative Law Judge and conclude that Respondent violated Section 8(a)(1) of the Act by: (1) changing and limiting Matthew Schmidt's work assignments and opportunities in retaliation for his protected conduct; (2) interfering with other employees' Section 7 rights when it instructed them to not share work-related information with Schmidt or otherwise communicate with him; and (3) terminating Schmidt in retaliation for his protected conduct. The General Counsel further requests that the Board provide an appropriate remedy for all of these violations of the Act.

Dated at Chicago, Illinois, this 9th day of April 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Counsel for the General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge have been served this 9th day of April 2014, in the manner indicated, upon the following parties of record.

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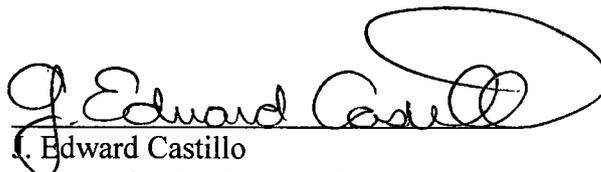
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