

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

**Terraprise Holdings, Inc.'s Answering Brief To Exceptions  
To The Decisions Of The Administrative Law Judge**

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## Introduction

Through late summer 2012, Matthew Schmidt (“Schmidt”) was an outstanding employee for Michael Agnew’s (“Agnew”) small family business, Terraprise Holdings, Inc. (“Terraprise”). Schmidt made regular placements, got paid well, and never once overslept. (Tr. 99-100) This all came to an abrupt halt in September 2012.

In late September 2012, Schmidt’s roommate, friend, and driver John Lucas (“Lucas”), stole thousands of critically important records that were the goldmine in Agnew’s business. Lucas immediately set himself up as a competing business armed with these confidential business records. (Tr. 360-365; Respondent’s Exhibit 62)

After Lucas left, Schmidt’s performance came to an abrupt halt. He literally went three months without making a single placement and began to have such a dangerous attitude that Agnew would wake up in the middle of the night to seek guidance about what to do about this problem in his very small business. (Tr. 358-359; Tr. 150)

As Agnew wrote to a trusted advisor at 2:40 a.m. in the middle of October, concerning Schmidt: **“[y]ou know the rule: the first time you think of firing someone, it is time to do it.”** (Tr. 368-370-375; Exhibit 36) By November, things had not improved, and Agnew sought more outside advice from his advisors about what to do with Schmidt. (Tr. 377-378; Respondent’s 48)

All this occurred *prior* to Schmidt’s testimony.

In December 2012 and January 2013, Schmidt *and another employee*--Samantha Chellberg (“Chellberg”)--testified similarly in an unemployment hearing. (Tr. 383-384)

After the testimony, Schmidt's performance continued downhill. An outside consultant described Schmidt as having a "pissy" attitude and being a "cancer" who needed to be removed from the office. Schmidt was missing work for bad reasons (DUI issues, court dates, etc.), he had an awful attitude, and he had been caught lying to Agnew. (Tr. 358-369; 411-414 Tr. 150)

Just days after Schmidt's testimony--in early February--Agnew made an important decision. Far from making a decision to force Schmidt out of his Company, Agnew decided that he was going to do everything in his power to work with Schmidt to turn him back into the producing employee he once knew could perform well. As Agnew put it in an email to another outside consultant, he was going to make Schmidt "my man"; *i.e.*, work close with him to get him back on track. (Tr. 414; Respondent's Exhibit 35) In other words, after the testimony, Agnew rejected his consultant's advice to fire Schmidt.

After Schmidt provided his testimony, Agnew's effort to make Schmidt his "man" was painstakingly obvious, *i.e.*, emails like "I wanted to congratulate you for the first placement of the year. This reflects what I see as a good start to the year", providing Schmidt with first dibs in assignments, and introducing Schmidt to Agnew's colleagues on a joint trip in the Bahamas for the purpose of providing Schmidt mentorship to get back on track. (Tr. 390-422; Respondent's Exhibit 16)

Unfortunately, you can lead a horse to water but you cannot make him drink. Through 2013, Schmidt's performance continued to plummet: his placements were nowhere near what they had been in the past, he was missing work regularly, and he had an attitude demonstrating that he did not want to work. By mid-March, Agnew and Schmidt had a "come-to-Jesus" meeting about his performance and attendance problems. (Tr. 161-163) Schmidt was placed on a

performance improvement plan and understood he would be fired if he did not improve. Less than two weeks later, however, Schmidt missed more work because he was “running late”. (Tr. 166-167) While this behavior had just been discussed, and termination was appropriate, Agnew provided Schmidt yet *another* chance. Schmidt’s behavior, however, continued to show gross insubordination, *i.e.*, not making calls, lying, and not doing what he should have been when he actually showed up to work. Then, on April 16, 2013, Schmidt came in late again. As Schmidt predicted, Agnew fired him. (Tr. 439-461; Respondent’s Exhibit 50)

Samantha Chellberg (the other employee who provided testimony) is still employed at Terraprise, her role has expanded, and she is earning more money. (Tr. 486)

**The Board Should Not Disturb The ALJ’s Factual Findings:** Despite the ALJ’s careful consideration of the Record, the witnesses’ credibility, and the law, the Exceptions essentially seek a retrial of each and every issue that was tried. Virtually every Exception is based upon disputed issues of fact, weighing of the evidence, and assessing the credibility of witnesses. Any interference of the ALJ’s findings would be subject to “critical scrutiny”. *See NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924 (9th Cir. 1980)(“credibility resolutions of the ALJ are entitled to specific weight, and findings of the Board that are contrary to those credibility resolutions will be subjected to particularly critical scrutiny.”). Board precedent establishes that an ALJ’s credibility determinations are entitled to a high degree of deference. They cannot be overruled absent proof that they are an extreme departure from the record evidence and cannot rationally be supported in any way. *Standard Drywall Products, Inc.* 91NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3rd Cir. 1951). Absent extraordinary circumstances, it is not appropriate to substitute a view of credibility for that of the ALJ or weigh the credibility of

one witness against another and search for contradictory inferences. *Id.*; see also *USF Red Star*, 230 F.3d 102 (4<sup>th</sup> Cir. 2000); *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998).

### **Response To Exceptions**

#### **I. The Exceptions Each Largely Ignore That Schmidt's Problems Arose Months Before His Testimony; When Misconduct Occurs Prior To Protected Activity, It "Rarely If Ever Constitutes" Animus.**

Schmidt started 2012 out very well, making 11 placements from January through September 2012 and he had never slept late resulting in missing work. (Tr. 99-100). This all changed in September 2012 when Schmidt's roommate stole records from Terraprise. As described below, Schmidt's performance and attitude abruptly changed and Agnew considered terminating him--all before he testified.

"Where...an employee's discharge purportedly stems from a series of disciplinary incidents or warnings that predate the employee's union activities, the timing of that discharge rarely if ever constitutes substantial evidence of [animus]." *Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 505-06 (7th Cir. 2003); see also *NLRB v. Newman-Green, Inc.*, 401 F.2d 1, 3-4 (7th Cir.1968) (holding that no substantial evidence supported the Board's finding of anti-union animus where the employee had been disciplined prior); *NLRB v. W.E. Carlson Corp.*, 346 NLRB 43 (2006) (reversing ALJ and pointing out problems arose before protected activity).

Schmidt's roommate was John Lucas; he also his good friend. Lucas would drive Schmidt to work due to Schmidt's DUI's. (Tr. 38, 369, 536-538) September 24, 2012 was Lucas' last day. In the days prior to his departure, Lucas had printed out thousands of pages containing Agnew's contact lists. (Tr. 360-361) In other words, he had stolen the "goldmine".

See also, Respondent's Exhibit 62 showing that Lucas had printed out 5,067 records on September 20, 2012. (Tr. 365; Respondent's Exhibit 62)

Agnew retained legal counsel to get the records back. (Tr. 362-363) Immediately after leaving Agnew's company--and armed with Agnew's critical data in his possession--Lucas began competing against Agnew by advertising himself as a recruiter. (Tr. 363) The following month (in October 2012), and as a result of Lucas stealing Agnew's business records, litigation was filed in the Circuit Court of DuPage County, Illinois against Lucas. Lucas had also sued Agnew. (Tr. 547-548) Schmidt was aware Lucas was being accused of printout thousands of records. (Tr. 139; 140)

Starting after Lucas' testimony, Schmidt went approximately 3 months without making a single placement. (Tr. 358-359; Tr. 150) During September/October 2012, Schmidt's Call Time (a key component of performance) decreased. (Tr. 366) Schmidt's attitude changed dramatically to "suspicion and negativity." (Tr. 367-368) His attitude was reduced energy level, less attendance, less engagement, and less positive and less teaming. (Tr. 367-368) Schmidt's attitude and decreased call time had a dramatic impact on his performance.

ALJ Carter found that "in October 2012, Agnew was concerned about Schmidt's performance, and was suspicious that Schmidt would leave the company to run a recruiting business with J.L. Agnew". Agnew believed he needed to make changes "in October 2012, months before Agnew learned that Schmidt would be a witness in J.L.'s unemployment benefits case." (Order, p. 5)

***The Middle Of The Night Red Flag Email:*** On October 17, 2012, Agnew work up at 2:40 a.m. "with a red flag of concern" about Schmidt and wrote an email (Respondent's Exhibit

36) to two of his trusted business advisors. (Tr. 368-370-375) Agnew referenced “Total Replacement Strategy”. (Exhibit 36, fifth paragraph; Tr. 375) Agnew was bothered after Schmidt had made a comment to Agnew’s 12-year-old daughter that led him to believe that Schmidt did not want to be at work. (Tr. 368-369)

Agnew explained his concern about Schmidt joining in John Lucas’ illegal conduct: “I am concerned that Matt, Johnny’s former roommate and his friend, could bide his time to join Johnny when Johnny gets started---which I assume he will do.” (Exhibit 36, fifth paragraph) Agnew commented that Schmidt’s “calling behavior is unproductive and he is clearly in a slump. Our suspicion of one another is high”. (Exhibit 36, seventh paragraph) He described Schmidt as having “nothing” in the way of productivity “no interviews and [Schmidt] is lethargic and negative” and Agnew had to “check him on his negativity” after Schmidt had publically made an inappropriate comment (Exhibit 36, seventh paragraph) Agnew went on to state, perhaps fortuitously:

**You know the rule: the first time you think of firing someone, it is time to do it. Not sure if this is that time, but I am going to give some behavioral observations and will look forward to your assessment. (Man, I wish I was sleeping instead of worrying about this!)** (Exhibit 36, sixth paragraph)

Schmidt’s excuse for his lack of productivity at this time (before any testimony had been given) was that Agnew had asked him not to have client contact. (Exhibit 36, seventh paragraph: Schmidt’s “reasoning for not being as productive was that he stated that I asked him not to connect with the hiring managers of our clients.”) In other words, and as Agnew testified, prior to December 2012, Schmidt was complaining about not being allowed to talk to clients. (Tr. 371-372)

Agnew continued to be concerned about Schmidt's performance and the resulting impact on the business that he had invested his family's savings to start because Schmidt's attitude and Call Time were problematic. (Tr. 377-378) On November 27, 2012, Agnew sent an email to another of his advisors regarding "Working Hard" and stated:

**Here is my situation: My tenured floor person is [Schmidt]. Matt, Mike, Dakota, and Samantha all see we have a work ethic problem. I need your advice and support to get out of this rut and move to a new level of energy. Help!**

**...[ Schmidt] is not a high energy, high work ethic guy. With Johnny's departure, we both went into a period of suspicion and funk and challenge."**  
(Respondent's Exhibit 48)

As such, the evidence demonstrates (and the ALJ found) that Schmidt's problems and Agnew's concerns pre-dated any protected activities.

## **II. The Exceptions Ignore That Samantha Chellberg Remains Employed and is Paid More.**

Glaringly absent (with the exception of a footnote) from the Exceptions is a substantive discussion of Samantha Chellberg. She was not fired or otherwise impacted by her testimony adverse to Agnew. That another employee who engaged in similar activity did not suffer any adverse action alone supports the ALJ's findings on all issues. *See, Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 506-07 (7th Cir. 2003)(in reversing the NLRB's finding, the Court stated that "the Board failed to select and discuss the evidence that would have shown that Sears treated at least one similarly-situated employee differently").

On December 19, 2012, Agnew received an affidavit from Schmidt *and* Chellberg. (Tr. 383-384) The affidavits were substantially similar and both stated that they were asserting their rights under the National Labor Relations Act. (Tr. 384) Chellberg testified that Agnew had

fired Lucas (Tr. 400) which would have made him eligible for unemployment compensation. This was contrary to Agnew's version of what had occurred. (Tr. 400) Terraprise still employs Chellberg, her role has expanded, and her pay has increased. (Tr. 486)

### **III. The Exceptions Ignore That The ALJ Was Entitled To Reject Schmidt's Testimony Because He Lied.**

The Exceptions assert that the ALJ failed to properly credit Schmidt's testimony. There was good reason that the ALJ credited Agnew's testimony over that of Schmidt. Agnew has been married over 32 years, has 4 children, and has worked with charities such as Habitat for Humanity (helping to build homes after Katrina and in Guatemala, Aman, Jordan, and others) and works with Feed My Starving Children to help end hunger. (Tr. 335-336) CP has spent time in jail, has "child support issues", and has had two DUIs. (Tr. 153, 571, 577) More to the point, however, is that CP's testimony in this case was deliberately evasive and not credible; for example:

- (a) Saying that he had "doubt" about whether a routine email was sent to him (when it was clear from the exhibit that he was shown that it was, Respondent's Exhibit 12) in an effort to be obstructionist in cross examination. (Tr. 128)
- (b) His testimony changed from page to page of the transcript. For example, CP admits that Agnew told him to tell the truth during the unemployment hearing (Tr. 141, Lines 3-6) and then contradicts himself a few lines later. (Compare Q. "**Mike Agnew during a meeting...he told you he expected you to tell the truth, correct? A. Yes** (Tr. 141) with Q **And [Agnew] told you he expected you to tell the truth, right? A "...I don't believe that was stated to me...."**) (Tr. 142)

- (c) CP contradicted his own testimony, for example, admitting that it was uncomfortable at work due to the dispute between Lucas and Agnew after the records were stolen and then changing his answer. (Compare Tr. 139 Lines 3-4, 10-12 with Tr. 140 Lines 7-9)
- (d) Claiming on one hand that Agnew was trying to build a case against him to justify a termination, yet the documents he was creating were positive of him--and he did not put the negative criticisms in writing. (Tr. 185)
- (e) Claiming that Agnew was a mean bully who was trying to force him out; yet he was selectively “understanding” and “supportive” when CP needed him to miss extensive work for bad reasons i.e., when he missed work, including on February 4, 13, 14, 22, and 27. (Tr. 225-226; 579-581; 592-593)

In short, the ALJ properly considered the divergent views of what occurred. Based upon consideration of the evidence, Schmidt’s fabricated case was rejected. As set forth in greater detail below, the ALJ’s decision was well supported by the evidence and should not be disturbed. *See NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924 (9th Cir. 1980)(“credibility resolutions of the ALJ are entitled to specific weight, and findings of the Board that are contrary to those credibility resolutions will be subjected to particularly critical scrutiny.”).

**IV. The ALJ Did Not Err In Failing To Find Animus In The Record (Including With Regard To the Affidavits) The Evidence Demonstrated Agnew Went Out Of His Way To Work With And Support Schmidt.** (Exceptions 2, 3, 4, 5, 6, 9, 10, 11, 13, 15 and 16)

The exceptions claim that ALJ Carter was wrong with regard to the *factual determination* (which is entitled to substantial deference) of whether animus existed. ALJ Carter, in fact, considered and analyzed the evidence and he found (Order, p. 27):

I am not persuaded by other evidence that the General Counsel presented to demonstrate animus. First, I do not find that Agnew engaged in conduct on

December 19, 2012, that demonstrated animus. The evidentiary record establishes that after Agnew received Schmidt's and S.C.'s affidavits on December 19, Agnew stormed out of the office. There is no evidence, however, that Agnew directed his outburst at Schmidt. Later in the day, when Agnew and Schmidt spoke about J.L.'s case (after Agnew had acknowledged in an email chat that Schmidt's and S.C.'s affidavits hurt Respondent in the unemployment benefits case against J.L.), Agnew commented that "a couple of things can happen from this: we can let this pull us apart; we can grow from this; or we can part ways." (FOF, Section II(G).) I do not find that comment to be evidence of animus – instead, in context, Agnew's remarks simply expressed the sentiment that while it was a difficult situation for Schmidt and Agnew to be on opposite sides of J.L.'s case, Schmidt and Agnew could choose what course their working relationship would take going forward.

Second, I do not find that Agnew's remarks to Schmidt on February 11, 2013, demonstrate animus. In that conversation, Schmidt was the one who asserted that Agnew was punishing him for testifying in J.L.'s case by assigning "better" job orders to other employees. Through that assertion, Schmidt invited Agnew to engage on the issue, and Agnew obliged by essentially telling Schmidt that J.L.'s case left everyone involved with bruised feelings. (FOF, Section II(J)(2).) Given those facts, the General Counsel did not show that Agnew's February 11 remarks demonstrated discriminatory animus – instead, Agnew's remarks indicate that Agnew was frustrated with Schmidt because he believed Schmidt was focused only on how he (Schmidt) felt after testifying in J.L.'s case, without regard to how the case may have affected others who were involved.

The Exceptions improperly examine each finding in isolation (i.e., receipt of the affidavits on December 19) without regard to the other evidence in the record. Such a limited inquiry is patently improper. In *N.L.R.B. v. Consol. Diesel Elec. Co., Div. of Condec Corp.*, 469 F.2d 1016 (4th Cir. 1972) the NLRB's findings were rejected and enforcement denied with respect to a finding of animus that was based on a personnel manager who told employees that the company "did not want a union in the plant and that it would do everything legally in its power to keep a union out of the plant" and another supervisor made remarks critical of unionization. Despite these comments, the Court of Appeals found that it was required to "scrutinize the whole record". *Id.* at 1021. In considering *all the evidence*, the NLRB's finding

was rejected and enforcement denied. Here is the Record as a whole in this regard with regard to animus:

(a) Schmidt admitted<sup>1</sup>, that in the days immediately after the testimony Agnew was “understanding and supportive” of him when he had to miss work for less-than stellar reasons. (*i.e.*, getting car calibrated for DUIs, child support problems, court dates, etc.) (Tr. 579-581; 592-593) If Agnew had animus, it would have been easy for him to fire Schmidt at that point.

(b) After Schmidt’s testimony, Agnew consulted with Jeff Carmean who is a top consultant in the recruiting industry about the various employees in the office. He had very negative comments regarding Schmidt, including that he was “pissy” and had a bad attitude. (Tr. 411-412) The consultant analogized Matt to a “cancer” that was bad for the office and recommended to Agnew that Schmidt be fired. (Tr. 413-414) Agnew, however, decided to try to make things work with Schmidt. As Agnew put it in his email, he was going to “Make [Schmidt] my man.” (Tr. 414) This meant to that Agnew that he was going to try to continue to communicate positive messages to him, help him make placements, give him orders, but not shy away from standards. (Tr. 414; Respondent’s Exhibit 35) If Agnew had an animus against Schmidt, why would he reject his consultant’s advice and want to make Schmidt his “man”?

(c) Approximately two weeks after Schmidt submitted his affidavit, on January 3, 2013, Agnew sent Schmidt a personal note (along with his financial numbers) and stated “**all my best for a great 2013, Mike.**” (Tr. 386-389; Respondent’s Exhibit 38) A few days later, on January 8, 2013, Agnew sent an email to Schmidt with “**Excited**” in the Subject line and that

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<sup>1</sup> Albeit, this testimony was provided in a self-servingly and false effort to justify his frequent missed days. Agnew had not given prior approval. (Tr. 443-444)

encouraged him with regard to a candidate. (Tr. 390; Respondent's Exhibit 9) If Agnew had an animus against Schmidt, why would he wish him a great year and say he was excited?

(d) The following week, on January 14, 2013, Agnew submitted assignments to his team. Contrary to Schmidt's allegation that he was assigned lower jobs, the email states specifically that Schmidt's "**are at a higher level**". (Tr. 393; Respondent's Exhibit 10; Tr. 105) Agnew provided Schmidt the higher-level jobs because those were ones that would result in him being paid "more money". (Tr. 393) Why would Agnew provide higher-level jobs (i.e., more money) to someone had had an animus against?

(e) While Schmidt claims that he was provided poor candidates, on January 14, 2013 (again shortly after submitting his affidavit), Agnew sent Schmidt an email (Respondent's Exhibit 11) that undermines this position. Agnew sent Schmidt the email "to give [him] a shot at the best candidates"; Agnew was essentially saying "go pick anybody you want from the database and go call them." Indeed, Exhibit 11 demonstrates that Schmidt was provided the "first shot" of high-level opportunities ("Managers/Supervisors") (Tr. 395-396; Exhibit 11) Why would Agnew provide the "first shot" to someone he had an animus against?

(f) While Schmidt claims that Agnew began trying to build a case against him to force him out after the testimony the evidence is that *Agnew actually was putting in writing positive things about Schmidt to encourage him*. For example, on February 6, 2013, approximately one week after the unemployment hearing, Agnew sent an encouragement email to Schmidt stating (Tr. 402; Respondent's Exhibit 16):

**"I wanted to congratulate you for the first placement of the year. This reflects what I see as a good start to the year."**

Emails like this, within days of testimony, are not consistent with an animus or an effort to build a record for termination; to the contrary it shows support.

(g) On February 26, 2013, Agnew sent Schmidt an email encouraging him to call a person for a position with INPO, one of his major clients. Not only is he providing him with this responsibility, but he is doing it in a friendly way by utilizing a smiley face in the Subject line. (Tr. 422-423; Respondent's Exhibit 19) Use of a smiley face and seeking assistance for a major client are not consistent with animus.

(h) Schmidt had the opportunity to make submittals when Agnew would provide him with job orders to fill. Schmidt *admits that he had twice as many submittals for the last 4 months of his employment (i.e., after he gave testimony) than for the 4 months before he gave the testimony.* (Tr. 595; 430-431; Respondent's Exhibits 60, 61) Why would Agnew provide Schmidt with twice as many opportunities if he had an animus?

(i) When Schmidt asked for assistance in placements, Agnew supported him in providing it. February 19, 2013, just weeks after his testimony, Agnew emailed "You asked and hrrrrrrrrrrreeeee it is." (Tr. 433; Respondent's Exhibit 18) Despite Schmidt's counsel's argument that this phrase was used like in the horror moving The Shining, it was intended as a "positive" (not animus) effort to cooperate and provide more data to help Schmidt make a placement. (Tr. 433-435)

(j) *The Peak Performers Trip:* Agnew took Schmidt to Atlantis in the Bahamas. Agnew, through its franchisor, offers a "peak performers" trip. The trip is paid for by Agnew and coordinated by the franchisor. There is a rule that to be eligible to attend a trip, the employee must be employed at the time of the conference so that if Schmidt had been fired, he

would not have been eligible to attend. (Tr. 415-416) Schmidt was officially told that he had received the trip in January 2013 *after* he gave his affidavit testimony. (Tr. 594-595) Agnew took Schmidt along with Agnew’s family on the trip. (Tr. 117) Agnew hoped that the trip would be positive for Schmidt. (Tr. 417) When there, he introduced Schmidt to the big wigs in their industry, they had dinner together, they went on a two hour jet skiing adventure together, and they hung out at the beach. (Tr. 417, 420) The jet skiing adventure was not a part of the trip, Agnew paid for this out of his own pocket. (Tr. 420) Contrary to forcing Schmidt out of his company, Agnew introduced him to the top search consultants in the country so that he could form a bond with them. In an effort to motivate Schmidt, Agnew asked a consultant, to connect with Schmidt. This consultant is a “phenomenal trainer” of how to recruit and a “great motivator”. (Tr. 419-421) Why would Agnew be introducing Schmidt to the top people in his industry if his goal was to force him out of his Company and if had an animus against him?

While Schmidt claimed that he did almost nothing with Agnew on the trip (to make it sound like this was part of Agnew’s plan to force him out—or to demonstrate animus), the pictures they took of each other (Respondent’s Exhibits 56-58) show two people having fun together--not animus:





Finally, it was clear at the hearing that Schmidt was trying to fabricate animus and that Agnew had none. For example, Agnew and Mr. Dulay (Schmidt's friend and witness) both testified that Agnew told "all" employees in a meeting that they should give truthful testimony. (Tr. 253) Schmidt, on the other hand, first admitted that Agnew told him to tell the truth and then switched his testimony:

**Q. And when you talked to Mike Agnew during a meeting, he called you in, right? And he told you he expected you to tell the truth, correct?**

**A. Yes (Tr. 141)**

*Compare with*

**Q And [Agnew] told you he expected you to tell the truth, right?**

MR. CASTILLO: Objection, mischaracterizes that testimony.

HEARING OFFICER CARTER: That's a question. Overruled.

**A I don't believe that was stated to me, but I think it was -- I don't recall ever having a conversation with Mr. Agnew where he said, You need to tell the truth in this hearing. (Tr. 142)**

As the foregoing events demonstrate, Agnew had no animus against Schmidt and Schmidt was in fact trying to fabricate evidence. Even if, however, it is demonstrated that Agnew was upset about the affidavits on the day he received them, it certainly did not impact Schmidt's employment. To the contrary--and as ALJ Carter found--Agnew had no interest in dwelling on the past and was trying to improve his relationship with Schmidt. If anything, Schmidt was

receiving preferential treatment with regard to assignments and other benefits as Agnew was working to help him.

**V. Agnew Did Not Modify Work Assignments Or Opportunities As A Result Of Schmidt's Testimony.** (Exceptions 4, 11, 12, 13, and 24)

Beginning on page 6, the Exceptions assert that Agnew reassigned work in an effort to build a case against Schmidt so that he could be eventually fire him. Common sense undermines this argument. Agnew was complimenting Schmidt in writing which is the exact opposite of what would be done if Agnew was trying to “fabricate” a reason for termination. If Agnew wanted to fire Schmidt he had ample reason to do so as explained in the previous section: his consultant characterized him as a “cancer” that needed to be removed/fired, he was missing work for poor reasons and he had an attitude.

ALJ Carter found that “[a]lthough Schmidt believed that he was being cut off from working with the three other nuclear clients (Energy Northwest, INPO and TVA), he still received job orders for those clients”. He further pointed out that “Schmidt’s calls, submittals and placements to nuclear desk clients in early 2013 matched or exceeded his figures from fall 2012 even though the majority of Schmidt’s client calls in 2013 (70 out of 73 client calls) were to Constellation Energy”. (Order, p. 11)

Consistent with Agnew’s ongoing support in trying to rehabilitate Schmidt, ALJ Carter further found that when assignments were made Schmidt’s were “at a higher level”. (Order, p. 12) To the extent that changes were made, ALJ Carter found they were in the works prior to the time that Schmidt engaged in any protected activities. “Agnew’s belief that he should address the problems by making changes to the nuclear desk, were therefore on the table in October 2012, months before Agnew learned that Schmidt would be a witness in J.L.’s unemployment

benefits case...he did not make those changes based on Schmidt's protected activities, but rather made the changes based on concerns that he (Agnew) had about Schmidt before Schmidt engaged in protected activity." (Order, p. 28)

Schmidt's claim that he was given "lower jobs on the totem pole" (Tr. 62) was undermined by his own admission. Schmidt himself defined a "significant placement" as one where the placed employee earned \$85,000. (Tr.150; GC Ex. 14)<sup>2</sup> By Schmidt's own definition of a "significant placement", every single submittal he made that had a "job salary" identified was "significant". (See Respondent's Exhibit 59)<sup>3</sup> Many were for salaries that were significantly more (i.e. \$427,500; \$160,000; \$174,000).

Schmidt asserted that after his testimony, he was restricted to working with only Constellation. To begin with, Constellation is one of the largest clients in the entire Company and had supported Schmidt's good placements in the start of 2012. (Tr. 118) Indeed *Schmidt made nearly twice as many non-Constellation submittals in the 4 months after he provided his affidavit than in the 4 months prior*. While Schmidt only made 5 submittals from nuclear utilities other than Constellation in the 4 months prior to his affidavit testimony, he made 9 submittals to nuclear utilities outside of Constellation in his final 4 months of employment. (Respondent's Exhibit 59) Submitting candidates is contact with the client resulting in placements for Terraprise and commissions for Schmidt if placed.

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<sup>2</sup> As set forth on GC Exhibit 14, Schmidt's December 2012 placement had an \$85,000 salary. Schmidt later testified that such a placement was "average for me, higher for the other recruiters". (Tr. 204; 150)

<sup>3</sup> Some of the submittals were for salaries that were not identified. However, the *current* compensation they were making at their current job for those candidates being submitted by Schmidt were also high. (See W2 column on Respondent's Exhibit 59) All were \$80,000 or higher.

Schmidt never disputed that prior to his testimony, he complained regularly about being denied the opportunity to have direct client contact. As memorialized in an October 17, 2012 email (Exhibit 36, seventh paragraph): Schmidt's "reasoning for not being as productive was that he stated that I asked him not to connect with the hiring managers of our clients." The Exceptions claim asserts in a footnote that the only evidence relating to pre-testimony complaints about having limited client contact was in Exhibit 56. This is false; at Tr. 371-372 Agnew testified briefly about Schmidt's pre-testimony complaints.

Schmidt had very little substantive client contact prior to his testimony with the exception of when Agnew had lost his step-father and Agnew was repeatedly out of the office. (Tr. 437; 478) For example, in September 2012, Schmidt had only 12 calls to key clients, including Constellation. (Tr. 479)

Indeed, Schmidt's claim that he had extensive and substantive client contact with INPO, Energy Northwest and TVA prior to his testimony is undermined by an analysis of his telephone calls. Here are the statistics of Schmidt's pre-testimony telephone calls with these clients:

- ***Only one call lasted over 3 minutes***; on November 2, 2012 there was a 4.53 minute call.
- ***The average length of these telephone calls was less than 1 minute***; with only a handful lasting over 1 minute.

For the period of October through December 2012, Schmidt only had one 1 call with TVA, 7 calls with Energy Northwest, and 20 calls with INPO. (General Counsel Exhibit 23—Calls Made and Received by Schmidt) As set forth on Exhibit 63, these were very short calls--*many a matter of seconds*. The date and length of the calls for TVA, Energy Northwest, and

INPO during October through December 2012 follow:<sup>4</sup>

**TVA:** Dec. 19, 2012 (.35) (See Exhibit 63 at p. 17)

**INPO:** Oct. 30 (.18), Oct. 31 (1.02), Nov. 13 (.18), Nov. 14 (.15), Nov. 15 (.27), Nov. 26 (2.88), Dec. 5 (.15), Dec. 5 (.13), Dec. 7 (1.25), Nov. 2 (.53), Nov. 13 (.62), Nov. 14 (.10), Nov. 15 (.07), Nov. 16 (1.20), Dec. 3 (1.25), Dec. 4 (.08), Dec. 5 (.15) (Exhibit 63 at p. 23) Nov. 2 (4.53), Nov. 2 (2.57), Nov. 29 (2.37) (Exhibit 63, p. 27)

**Energy Northwest:** Oct. 8 (.98), Nov. 2 (.88), Nov. 14 (.22), Nov. 14 (1.10), Nov. 15 (1.92), Nov. 29 (1.08), Nov. 30 (1.72) (Exhibit 63 at p. 34)

By contrast, *the longest call that that Schmidt had in months with one of these clients came on February 5, 2013--*just days after he had given his testimony and after he was allegedly prohibited from having client contact. On February 5, 2013 Schmidt had a call that lasted **40.55 minutes** with Energy Northwest. (Exhibit 63, at p. 4) His post-testimony calls to INPO were also longer than any he had made in the months prior to his testimony. For example, his February 11, 2013 call with INPO was 12.8 minutes (Exhibit 63, at p. 2)

Also, when considering Constellation, Schmidt had his *highest ever* calls to key clients (including Constellation) in February 2013 with 29 immediately following his testimony. (Tr. 479) Schmidt's claim that there was a prohibition on his client contact is further undermined by the fact that he admits that even after he was allegedly told not to contact them he continued to contact these clients. (Tr. 595) He was also instructed in January 2013, shortly after he gave testimony, that he should have direct contact with Client TVA. (Tr. 425; Exhibit 44) Furthermore, on April 9, 2013, when asked for 10 things Schmidt believed would help him make

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<sup>4</sup> This information is derived from Exhibit 63. To make the references easier, the page number of the Exhibit 63 is referenced herein. The page numbers, however, do not appear on Exhibit 63 itself. Thus, for example, the first reference is to the 17<sup>th</sup> page of Exhibit 63. The duration of the calls follows the date in parentheses. Thus, for example, the first call occurred on December 19, 2012 to TVA and it lasted 35 seconds.

more placements, he said nothing about not being allowed client contact. (Tr. 169-170; Respondent's 24) As such, there is no basis for the Exceptions.

**VI. The Evidence Supported the ALJ's Findings About The February 11, 2013 Meeting.** (Exceptions 10, 11, 13, and 15)

Again, the Exceptions improperly attempt to consider the isolated conversation of February 11, 2013 out of context from the Record as a whole. It is a clear error to do this. *See, Healthcare Employees Union, Local 399, v. N.L.R.B.*, 463 F.3d 909, 918 (9th Cir. 2006)(there must be a "review of the whole record"). Terraprise incorporates by reference its prior responses. Based upon the whole record, the ALJ properly found no animus:

"I do not find that Agnew's remarks to Schmidt on February 11, 2013, demonstrate animus. In that conversation, Schmidt was the one who asserted that Agnew was punishing him for testifying in J.L.'s case by assigning 'better job orders to other employees. Through that assertion, Schmidt invited Agnew to engage on the issue, and Agnew obliged by essentially telling Schmidt that J.L.'s case left everyone involved with bruised feelings. (FOF, Section II(J)(2).) Given those facts, the General Counsel did not show that Agnew's February 11 remarks demonstrated discriminatory animus – instead, Agnew's remarks indicate that Agnew was frustrated with Schmidt because he believed Schmidt was focused only on how he (Schmidt) felt after testifying in J.L.'s case, without regard to how the case may have affected others who were involved." (Order, p. 27)

ALJ Carter found, for example, that "[n]otwithstanding the February 11 confrontation, in the following weeks Agnew and Schmidt resumed normal communications. For example, Agnew sent Schmidt information about the upcoming peak performers' trip, and also provided Schmidt with information to assist Schmidt with two pending job orders." He further did not credit Schmidt testimony regarding the events surrounding this time period. "Schmidt was also a bit too eager (after a leading question that drew an objection that I sustained) to assert that Agnew became more rude when responding to work related questions after December 18, 2012, the day that Schmidt gave his affidavit in J.L.'s IDES case. (Tr. 191.)" (Order, f/n 24)

Whether the February 11 discussion is considered in isolation, or with the record as a whole as it should be, there is not a basis to disturb the ALJ's findings. In isolation, Agnew providing Schmidt \$20 to purchase lunch certainly could be seen as a token of good faith; indeed, most people are appreciative of a free lunch. In context of all the evidence, an animus finding could not possibly stand. For example, Schmidt testified that during this same time frame of the February 11 conversation Agnew was "understanding and supportive" of him when he had to miss work for bad reasons. (Tr. 579-581; 592-593) Three days before the conversation, on February 8, 2011, Agnew considered the advice of an outside consultant that Schmidt was "pissy" and a "cancer" that was bad for the office (Tr. 411-414) and still decided he was going to work closely with Schmidt to try to improve his performance. (Tr. 414) Agnew demonstrated at the hearing that he was encouraging Schmidt during this time. For example, the week before, on February 6, 2013 (approximately one week after the unemployment hearing) Agnew sent an encouragement email to Schmidt stating (Tr. 402; Respondent's Exhibit 16): **"I wanted to congratulate you for the first placement of the year. This reflects what I see as a good start to the year."** Eight days after the meeting, on February 19, 2013, when Schmidt asked for assistance in placements, Agnew supported him in providing it in a friendly fashion: "You asked and herrrrrrrrrrreeee it is." (Tr. 433; Respondent's Exhibit 18) The evidence of Agnew's support during this period of time is detailed in response to the prior Exceptions and demonstrates that there was no animus.

Finally, even if there was a finding of animus, the Exceptions fail to demonstrate how this had any impact on any of Agnew's decision-making. The Record is replete with Agnew going out of his way to help Schmidt and the ALJ made extensive findings that no adverse

conduct was taken against Schmidt as a result of his protected activities. As such, the Exceptions are without any merit.

**VII. Agnew Did Not 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 Exceptions assert on pages 10 through 12 that Agnew violated the Act by changing Schmidt's work assignments and restricting his opportunities after a February 11, 2013 meeting. To begin with, the ALJ found many of the alleged "changes" simply did not happen. As to those that did occur, the ALJ found they were in the works *prior* to the any protected activity or did not otherwise violate the Act. The ALJ explained:

I also note that the General Counsel did not prove that certain alleged changes actually occurred. For example, although Schmidt claimed that Agnew was giving him work assignments that were lower level or difficult to fill, the evidentiary record does not support that allegation. In fact, when making a round of assignments to O.C. and Schmidt on January 14, 2013, Agnew emphasized that Schmidt's assignments were at a "higher level" to reassure Schmidt that he was not being marginalized on the nuclear desk. (FOF, Section II(H)(2).) Similarly, although Schmidt believed that Agnew "hid" a job order from him by not including it on a list of jobs, the evidentiary record does not show that Agnew intentionally omitted the job order from the list, or that the omission was intended to harm Schmidt. To the contrary, the job order was duly listed in Respondent's computer database (where Schmidt found it), and in any event, there is no evidence that Schmidt was entitled to be informed about job order assignments to other employees (such as this one, which Agnew assigned to D.Da.). (FOF, Section II(M).)" (Order, f/n 34)

As to the changes that were made, the ALJ next found that they were not as a result of protected activity:

I turn to the question of whether Respondent demonstrated, by a preponderance of the evidence, that it would have made changes to the nuclear desk (and by extension, changes to Schmidt's work assignments and opportunities) even in the absence of Schmidt's protected concerted activities. I find that Respondent carried its burden on this issue. The evidentiary record shows that in October 2012, Agnew was concerned about Schmidt's performance, and was suspicious that Schmidt would leave the company to run a

recruiting business with J.L. Agnew also noted that there was some confusion at that time about whether he told Schmidt to limit his direct client contact calls to Constellation Energy. All of those issues, as well as Agnew's belief that he should address the problems by making changes to the nuclear desk, were therefore on the table in October 2012, months before Agnew learned that Schmidt would be a witness in J.L.'s unemployment benefits case. Thus, when Agnew proceeded to make changes to the nuclear desk (by assigning O.C., and later Dulay and D.Da. to work on nuclear desk projects, and by having Schmidt focus his client contact on Constellation Energy), he did not make those changes based on Schmidt's protected activities, but rather made the changes based on concerns that he (Agnew) had about Schmidt before Schmidt engaged in protected activity. Accordingly, I find that Respondent would have changed Schmidt's work assignments and opportunities even in the absence of Schmidt's protected activities... (Order, p. 28).

The Exceptions assert that Schmidt was out-performing Angew. This is inaccurate. (Respondent's Exhibit 64; Tr. 426-428) While Agnew does placements, he also runs the business. Even with running the business, he had far more placements than Schmidt. For example, Agnew had 15 placements since the time that Lucas left through Schmidt's termination (in addition to all his other responsibilities). (Respondent's Exhibit 64) During this time period, Schmidt had a staggeringly low two placements. (General Counsel Exhibit 13) His sales should have increased dramatically as Agnew had to cover for Lucas and therefore Schmidt had more job orders to fill. (Tr. 436)

Next, it was claimed that work was reassigned to persons with no experience in the nuclear utilities for the first time. This is also false. As to having people with no experience assist: Schmidt himself was allowed to work in this area with no prior experience--prior to Agnew giving him a chance in a professional environment he worked as a bartender and had been out of work because of two DUIs for which he spent time in jail. (Tr. 355; 570-571) Furthermore, this is not the first time someone else assisted on the nuclear utilities. For example Ryan Lang recruited in the nuclear utilities prior to Schmidt's testimony. (Tr. 430; Respondent's Exhibit 60)

The only evidence of submittals relating to the nuclear utilities after Schmidt testimony was by Omar Cheboub and David Daum. *Combined, they submitted candidates for only four positions.* (Tr. 518-519; GC Exhibit 19) Moreover, David Dulay testified that he was asked to work on the nuclear desk, *as well as manufacturing, and oil and gas.* (Tr. 243-244; 250) David Dulay was also given jobs of another recruiter--Georgian Callaway. (Tr. 251) He also was assigned the metals industry. (Tr. 252) All of this new work was given the work to keep him busy. (Tr. 251)

The Exception asserts Agnew was concealing work from Schmidt and providing him poor opportunities. The ALJ found there was not such a restriction. (Order p. 11-13). The ALJ further found while Schmidt asserted jobs were being hidden, the “evidentiary record does not show that Agnew intentionally omitted the job order from the list, or that the omission was intended to harm Schmidt. To the contrary, the job order was duly listed in Respondent’s computer database (where Schmidt found it) and in any event, there is no evidence Schmidt was entitled to be informed about the job order assignments to other employees.” (Order, f/n 34). Agnew was in fact showering Schmidt with lucrative opportunities and letting him have the pick of the litter in terms of job assignments. As explained above, all of Schmidt’s placement opportunities after his testimony were “significant” by his own standard and he *in fact, made nearly twice as many non-Constellation submittals in the 4 months after he provided his affidavit than in the 4 months prior.* (Respondent’s Exhibit 59) The Record is overwhelming that Agnew was supporting Schmidt by sending him information (Tr. 433; Respondent’s Exhibit 18), encouraging him to participate with important clients (Tr. 422-423; Respondent’s Exhibit 19) and by allowing Schmidt to double his overall submittals during his last 4 months of work after

his testimony. (Tr. 595; 430-431; Respondent’s Exhibits 60, 61) As detailed in response to the prior Exceptions (which are incorporated herein) Agnew was not restricting Schmidt.

The Exception asserts that the delay in terminating Schmidt from the time Agnew first thought of it until after the testimony is evidence that it was unlawfully motivated. To the contrary it shows, Agnew was trying to rehabilitate Schmidt and supports the ALJ’s findings. *See, Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 505 (7th Cir. 2003) (in overturning the Board’s decision, the Court noted that the employer did not terminate the employee until “more than four months after his protected activities had ended. There is thus a significant lapse in time between [employees] protected activities and his discharge.”); *Cf. NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir.1988) (asking rhetorically, “[i]f Stor-Rite acted with retaliatory intent, then why did it delay the full impact of its retaliation until months” after the protected conduct?). As such, there is not basis for the Exceptions.

**VIII. Agnew did Not Violate the Act by Improperly Instructing Employees Not to Share Work-Related Information or Otherwise Communicate With Schmidt.** (Exceptions 5, 11, 13, and 24)

The Exceptions (pp 12-13) assert that Agnew improperly instructed employees not to share work related information with Schmidt in violation of the Act. The ALJ found that the “General Counsel’s arguments fall short because the evidentiary record does not show that Respondent made statements or engaged in conduct that had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.” (Order p. 28) He found that “[t]o the contrary, the evidentiary record shows that Respondent included Schmidt and treated him the same as other employees and as he had been treated before his testimony.” *Id.* He further found that:

Based on Dulay's testimony, Agnew's instruction not to speak to Schmidt was quite narrow, insofar as Agnew only told Dulay to refrain from speaking with Schmidt about Dulay's work projects. Dulay therefore remained free to speak to Schmidt about a variety of other matters, including a wide range of topics that would be protected by the Act (such as working conditions or terms and conditions of employment). The hand gesture that Agnew made to Dulay must be viewed in this context – essentially, as a reminder to Dulay that he should not speak to Schmidt about his (Dulay's) work assignments, and not (as the General Counsel alleges) as some larger directive to refrain from communicating to Schmidt altogether. Since Agnew's directives to Dulay regarding speaking to Schmidt were specific, narrow and not related to matters that implicate Section 7 rights, I do not find that Agnew's directives had a reasonable tendency to interfere with, restrain or coerce employees in exercising their rights under the Act...

As detailed in the response to the prior Exceptions, the Record is overwhelming that Agnew was providing extensive work-related information to Schmidt and helping him to succeed which is the exact opposite of restricting his communications in an effort to force him out. Dulay testified that the only time there was a limit placed on information being provided to Schmidt was when Agnew was afraid that Schmidt “was going to share that information [the company's leads] with John Lucas” (*i.e.*, the person with whom Agnew was in litigation for stealing company business records and who was competing against Agnew). (Tr. 249-250) Agnew testified, without any evidence offered to the contrary, that he never told anyone to not share information with Schmidt if it was something Schmidt was working on. (Tr. 469-471; Q.“Was there ever a time where you told anybody not to share information with Matt that pertained to work that Matt was working on? A. No.”)

That Schmidt would even seek information about placements in the industry that John Lucas was competing demonstrates Schmidt was likely helping his roommate-- he had absolutely no legitimate need for this information. *Schmidt had never made a placement during the entire time that he worked with Agnew outside the nuclear utilities.* (Tr. 356-357) It is of course commonplace in the work industry to limit information to certain employees to protect trade secrets. In fact, one of the factors that courts look at in examining whether a company took

reasonable measures to protect a trade secret is whether there was limited access to persons on a need-to-know basis.

Finally, Schmidt's claim that he was kept out of meetings was not credible and contradicted by his own witness Dulay. It was "routine that one recruiter or another might not be in a meeting if the work doesn't pertain to them"; Agnew described this as "efficiency 101". (Tr. 470; 680) Dulay testified that if Schmidt and Agnew were in a meeting, Dulay would not be invited to those meetings. (Tr. 262) Schmidt failed to identify even one specific meeting he missed. He was unable to give even an estimate about how often he missed meetings. When asked if he went "to the vast majority" he simply said "its hard to say". (Tr. 136) As such, the Exceptions are without merit.

**IX. Agnew Did Not Improperly Revoke Schmidt's Remote Computer Login Privileges or Rebuffs His Effort to "Mend Fences".** (Exceptions 6, 11, 12, 13, 15, and 24)

The ALJ found that on March 27, 2013 Agnew made the decision that Schmidt should be terminated after he was late (once again) due to oversleeping. The Exceptions claim that the ALJ's decision relating to Schmidt's removal from remote access and his efforts to make up with Agnew were wrong. The exceptions entirely fail to address that this was done because Agnew had made the decision to fire Schmidt and feared his "goldmine" (*i.e.* customer lists) would be stolen again. Indeed, the ALJ found that the removing Schmidt's access privileges was because "Agnew feared that Schmidt would take information from Respondent's database, leave the company, and join former employee J.L. in running their own recruiting business." (Order, pp. 18-19) The ALJ found that with regard to the false statement of non-use "Agnew merely used that explanation (of non-use) to avoid telling Schmidt the truth – that Agnew planned to fire Schmidt in the near future." (Order, f/n 26)

Having recently experienced data theft through Agnew's roommate, Agnew certainly was justified in not giving someone a "heads up" to allow them to plot competitive misconduct. (Tr. 463) As explained above, this was not a minor concern because Agnew was then in litigation over the data theft and had found himself waking up in the middle of the night over his distrust of Schmidt. (Tr. 368 Exhibit 30) As such, removal of remote access was not for animus--it was for protection.

Finally, with regard to Schmidt's insincere olive branch, it was irrelevant because Agnew was planning on firing him. Schmidt had recently had the "come-to-Jesus meeting" and even a performance improvement plan. (Tr. 160-163) It was also clear that Schmidt did not want to be at work by virtue of his comments. Moreover, the olive branch certainly was not sincere as the evidence showed that shortly after this Schmidt was emailing himself company records to build evidence against Agnew, was disobeying basic requirements of his job, he continued to be late, he acted angry, and was lying. (Tr. 168; 356-357; 471-473; 489; 464-466 General Counsel Exhibits 20-21; Respondent's Exhibit 50) There is no merit to the Exceptions.

**X. Agnew Would Have Terminated Schmidt Even in the Absence of his Alleged Activities Due to Deficient Work Performance, Attendance and Attitude.** (Exceptions 1, 7, 8, 11, 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24)

On pages 16 and 17, the Exceptions assert Schmidt would not have been fired if he had not testified. The argument should be disregarded to the extent that these are not citations to the Record. For example, despite making factual assertions, no citations to the Record exist from pages 16-18 in violation of Section 102.46(b)(1) which requires the precise citation of the page from the Record relied upon.

The Exceptions separately address work performance, attendance, and poor attitude. They, however, cannot be viewed in isolation because we must examine the record as a whole.

*N.L.R.B. v. Consol. Diesel Elec. Co., Div. of Condec Corp.*, 469 F.2d 1016 (4th Cir. 1972). The performance problems are inextricably linked. For example, when Schmidt was told not to be late--and still showed up late a few days later--that is attendance and poor attitude as it shows insubordination. If not in attendance, work performance naturally suffers. A poor attitude also leads to poor performance. As Agnew explained, "I've never had an employee at GRN, and probably not anywhere else, that had so many reasons to be fired." (Tr. 198, 484) As such, this section addresses all of Schmidt's misconduct together.

To begin with, Terraprise's burden was lower than usual because the initial showing of discrimination was so weak in this case; indeed, as explained earlier the ALJ found that many of the claimed changes simply did not occur. The ALJ referred to it as a "tenuous" showing (Order, p. 28). "The prima facie case and the affirmative defense available under *Wright Line* are linked: the weaker the prima facie case, the easier it is for the employer to establish that it would have taken the adverse action regardless of the employee's protected activity." *Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 503 (7th Cir. 2003).

It also warrants repeating that the treatment of Chellberg (no discipline, increase in compensation, expanded role) above demonstrates that Schmidt's termination was for proper reasons. See *Sears, Roebuck & Co. v. NLRB* 349 F.3d 493 (7<sup>th</sup> Cir. 2003). She testified similarly to Schmidt and her salary was increased and is still employed. This also demonstrates that Schmidt's termination was based on his misconduct.

Even if Schmidt had been the only one to testify, there was ample evidence that he would have been fired based on his ongoing misconduct. The ALJ found on pages 30 and 31 that:

...Respondent demonstrated, by a preponderance of the evidence, that it would have terminated Schmidt even in the absence of Schmidt's protected concerted activities. Agnew explained that he decided to terminate Schmidt because of poor performance,

poor attendance, and poor attitude. The evidentiary record supports each of those explanations.

On the issue of performance, there is no dispute that Schmidt initially performed quite well as a recruiter, as he made several placements in early and mid-2012 and laid the foundation for earning recognition as a “peak performer.” However, Schmidt was not able to sustain such a high level of performance, as his placement numbers declined despite being the primary person on the nuclear desk in fall 2012 when Agnew had to direct some of his attention to the manufacturing desk due to J.L.’s departure from the company. Not surprisingly, Agnew became concerned in fall 2012 (before learning of Schmidt’s protected activities) that Schmidt was in a slump, and began contemplating bringing corporate personnel in to work with Schmidt, and assigning other employees to the nuclear desk. (FOF, Section II(C), (D)(3), (F).) Schmidt continued to have mediocre placement results in 2013, such that his production was matched by O.C. (who was brand new to the nuclear desk). (FOF, Section II(Q)(3).)

Turning to Respondent’s concerns about Schmidt’s attitude, the evidentiary record shows that in early fall 2012 (shortly after J.L. left the company), Agnew formed the impression that Schmidt developed a negative attitude, and that Schmidt’s poor attitude was affecting Schmidt’s energy level and efforts with teamwork. Schmidt agreed that things were uncomfortable in the office after J.L. departed. (FOF, Section II(D)(3), (F).) In the months that followed, various incidents reinforced Agnew’s perception of Schmidt’s attitude, including (but not limited to): Schmidt’s ongoing problems with absenteeism; offhand remarks that Schmidt made that suggested he was not happy being at the office; and incidents where Schmidt handled candidates and job orders in a manner that made Agnew believe Schmidt was insubordinate and looking out for his own interests. (FOF, Section II(H)(2), (K), (N), (O)(1), (O)(3).)

And, starting in fall 2012, Agnew became concerned about Schmidt’s attendance and daily readiness for work, prompting Agnew to raise those concerns in a November 2012 meeting with Schmidt. As he had done with other employees in the past, Agnew initially tolerated Schmidt missing work in 2013 (and simply charged Schmidt vacation time for the hours/days of work that he missed). However, by March 2013, Agnew deemed it necessary to remind all employees of Respondent’s attendance policy, and also decided to notify Schmidt that he would be placed on a performance improvement plan because of his poor attendance (and poor performance). Despite that warning, Schmidt overslept and arrived late to work on two additional occasions (March 27 and April 16) before Respondent terminated him. (FOF, Section 10 II(F), H(4), (J)(3), (K), (N), (O)(1), (P).)

In sum, Respondent proffered ample support for its decision to terminate Schmidt for poor performance, attitude and attendance, and also demonstrated that it was concerned about those issues before it learned that Schmidt engaged in protected concerted activity.

I therefore find that Respondent carried its burden of showing that it would have terminated Schmidt even in the absence of Schmidt's protected activities...

**A. Facts Relating to Schmidt's Misconduct.**

The evidence ignored by the Exceptions shows a sufficient basis for the ALJ's finding:

(a) The first day of the work year, January 3, a lot of things were going on and Schmidt was not there and there was not notice ahead of time. (Tr. 439; Respondent's Exhibit 50) Schmidt had to get his car calibrated due to his second DUI (Tr. 571), an event that should not have been a surprise to Schmidt. (Tr. 579-582; 592-593) Schmidt's DUI related court dates were well known to him two years earlier when he had been sentenced to jail. (Tr. 570-571)

(b) The following day, on January 4, 2013, Schmidt tried to improperly sandbag a candidate, which hurt Terraprise, another search consultant, the client, and the candidate. (Tr. 442) While this was a serious matter that occurred just a few weeks after Schmidt submitted an affidavit, he was not fired for it, but Agnew did speak to him. (Tr. 443-444)

(c) On January 25, 2013, Schmidt came into the office late based upon a court date (which he did not go to due to the weather). This time was not preapproved. (Tr. 443; Respondent's Exhibit 50)

(d) A few days later, on January 28, 2013, Schmidt came in at 2:43 p.m. after having another court event. (Tr. 444, Exhibit 50) When Schmidt called Agnew after learning he was in court, there were dogs barking the background and it was clear that he was not in court and Agnew believed that he was being lied to. (Tr. 444) Amazingly, after arriving at 2:43 p.m., Schmidt left early that day! (Tr. 445)

(e) On February 4th, 2013, Schmidt had 8 hours off for “car issues”. Schmidt did not come into the office despite living 15-20 minutes away and having access to public transportation. (Tr. 445-446)

(f) On February 13th, 2013, Schmidt was charged with 1.3 hours of vacation because he “overslept and arrived late.” (Tr. 446; 153; Respondent’s Exhibit 50)

(g) The next day, on February 14, 2013, Schmidt missed 6 hours of work and did not arrive until 3:00 p.m. due to another court proceeding. (Tr. 447)

(h) On February 22, 2013, Schmidt showed up a little late because of another court proceeding. (Tr. 448)

(i) On February 27, 2013, Schmidt was out for the day for a pulled tooth. (Tr. 448) By this point, Schmidt had no vacation time left and money was deducted from his paycheck. (Tr. 449)

(j) On March 1, 2013, Schmidt missed 7 hours of work to get his passport which had apparently been held up because of problems with child support. (Tr. 449).

(k) On March 15, 2013, there was what Agnew described as a “come-to-Jesus meeting” with Schmidt regarding his production and attendance deficiencies. Samantha Chellberg also attended. (Tr. 453-455) At this meeting, Schmidt was told that his numbers were not acceptable and he had to get more placements. In response, Schmidt made a “snippy remark”. (Tr. 456) Agnew told Schmidt that his leadership was critical and it was not happening. Agnew wanted to discuss how they could improve performance, despite being told by others to fire him. (Tr. 457)

(l) Schmidt admits that at this “come-to-Jesus meeting” meeting (or possibly another meeting around the same time) he had a sit down meeting where Agnew told him: (1) he has to be at work, (2) he has to be on time, (3) it is not acceptable to be late, (4) his attendance was not satisfactory and needed to improve, (5) that his performance needed to improve, and (6) that his numbers were not anywhere near where they had been before. (Tr. 160-161) At this point, Agnew did not fire Schmidt; instead, he put him on a performance improvement plan. (Tr. 161-163)

(m) A week and a half after the “come-to-Jesus” meeting where Schmidt attendance was discussed, on March 27, 2013, Schmidt showed up 1 hour late again because he was “running late”. (Tr. 461; Respondent’s Exhibit 50) Schmidt was sent an email that said:

**"In the conversation you had with Dr. Agnew, Dakota, and I last week, you were informed that your attendance had been unsatisfactory. This morning, you were an hour late, which isn't behavior we were expecting after the conversation we had."**  
(Respondent’s Exhibit 22)

Schmidt understood at this point that he could have been fired for being late and understood he was being given another chance. (Tr. 166-167) Schmidt admits that one of his fellow employees (at the request of Agnew) had to call him to wake him up and say “Hey, where are you?” and on another occasion texted him saying “Hey, wake up”. (Tr. 159)

(n) Around this same time (late March/Early April), Schmidt approached Agnew’s son and made a similar comment to the one he had made to Agnew’s daughter earlier that caused Agnew to wake up at 2:40 am with a “red flag”<sup>5</sup>.

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<sup>5</sup> While the Exceptions try to minimize this, it is clear that Agnew took comments to his family members seriously. As the ALJ found “I credit Agnew’s testimony that he viewed Robert’s report of Schmidt’s comments as further indication that Schmidt had a poor attitude about working for Respondent. Indeed, Agnew expressed concerns about similar remarks in October 2012, before Schmidt gave his affidavit and testified in J.L.’s unemployment benefits case.” (Order, f/n 25)

(o) On April 12, 2013, Schmidt had only 40 minutes of call time for the entire day. (Tr. 471) Agnew was “shocked” when he saw a call time this low for Schmidt since usual would be over two hours. (Tr. 471-472)

(p) The same day that Schmidt only had 40 minutes of call time, Schmidt emailed himself (i.e. to his personal email address) evidence that he could use in his eventual lawsuit against Agnew; Schmidt had also emailed himself documents two days earlier. (General Counsel Exhibits 20-21)

(q) At this same time, Schmidt committed a direct act of insubordination and lied about it. Specifically, Schmidt had been directed to work inside the nuclear utilities and he defied this and worked outside the utilities and he was angry about it. (Tr. 472-473) To make matters worse, Schmidt lied to Agnew and claimed that he was not given the directive that clearly had been given and was acting cagey. (Tr. 473; 489)

(r) On April 16, 2013, Schmidt admits that he then came in late again. He had been called by a fellow employee because he was not at the office when the day started. (Tr. 464-466; Respondent’s Exhibit 50; Tr. 168)

As a result of Schmidt’s poor performance, his attendance record, his poor attitude, and his damage to the demeanor of a small office, he was fired on April 16, 2013 after being late again. (Tr. 466-467) His providing of testimony had nothing to do with his termination; Schmidt would have been fired even if he had not given testimony. (Tr. 485)

**B. The Law Supports Agnew’s Decision to Terminate Schmidt.**

Terraprise easily met its burden in this case. Indeed, performance deficiencies in the weeks prior to a termination support a finding that an employer has met its burden. *See Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80 (2011)(“We agree that the Respondent has

shown by a preponderance of the evidence that it would have discharged... even in the absence of her protected activity [because] in the weeks leading up to ...discharge, she engaged in a number of actions—unrelated to any protected, concerted conduct—that significantly troubled both management”). In the weeks immediately prior to his termination Schmidt was embarked on a reckless path that he admitted provided Agnew proper grounds for termination.

It also is substantial that Schmidt’s termination occurred approximately four months after his affidavit was submitted and a quarter of a year after his testimony. Why would Agnew have waited so long to fire Schmidt if he wanted to fire Schmidt for his testimony? As an employee at will, Agnew had no obligation to keep giving Schmidt second chances. Similar periods of time between protected activity and termination undermined NLRB decisions. *See, Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 505 (7th Cir. 2003)(in overturning the Board’s decision, the Court noted that the employer did not terminate the employee until “more than four months after his protected activities had ended. There is thus a significant lapse in time between [employees] protected activities and his discharge.”); *Cf. NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir.1988) (asking rhetorically, “[i]f Stor-Rite acted with retaliatory intent, then why did it delay the full impact of its retaliation until months” after the protected conduct?).

The Exceptions assert that Agnew’s animus carried over to his termination decision. While this is disputed, even if it were true, Agnew still made a prior decision to terminate Schmidt. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, 329 NLRB 93 *supra*; *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). “[I]t is well established the Board

cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline.” *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171 fn. 6 (2000). (1979).

As such, even if animus existed, if Agnew’s decision to terminate was predominately motivated Schmidt’s work problems, the General Counsel has not met its burden. *See, Interbake Foods, LLC & Bakery, Confectionary, Tobacco Workers & Grain Millers Int’l Union (Bctgm), Local 68*, S 05-CA-033158, 2013 WL 4715677 (N.L.R.B. Div. of Judges Aug. 30, 2013)(“While the decision to discipline [employee] for this obvious workplace misconduct may have served to gratify the Employer’s animus against his union involvement, I have no difficulty in finding that the predominant motivation for the issuance of this written warning was the Employer’s legitimate desire to halt [employee’s] misuse of his own worktime and that of his coworkers.”); *Arlington Hotel Co.*, 278 NLRB 26, 26 (1986) (complaint dismissed where employee’s union activity was a reason for her discharge, but employer proved that it would have discharged her “in the absence of such protected activity”).<sup>6</sup>

In *NLRB v. W. E. Carlson Corporation And Millwrights*, 346 NLRB No. 43, 2006 WL 287409 (2006), the Board reversed the administrative law judge’s decision as to a finding as it related to a probation and termination decision but not with respect to denial of a wage increase.

There, the Board found “a compelling case that animus against its employees’ union activities

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<sup>6</sup>“...the Board has made it clear that the essence of a dual motive analysis is to permit the possibility that an employer harbored unlawful animus and still demonstrated that it would have discharged the employee regardless of that animus. *Arlington Hotel Co.*, 278 NLRB 26, 26 (1986) (complaint dismissed where employee’s union activity was a reason for her discharge, but employer proved that it would have discharged her “in the absence of such protected activity”). Furthermore, the Board has acknowledged that “[a]n employer has the right to determine when discipline is warranted and in what form . . . . The Board’s role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts.” *Cast-Matic Corp.*, 350 NLRB 1349, 1358-1359 (2007). Put more plainly, the Board has cited with approval language from the Fifth Circuit explaining that it “has no authority to sit in judgment on managerial decisions” including whether such decisions were “reasonable or unreasonable, too harsh or too lenient.” *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 444-445 (5th Cir. 1978), cited in *Neptco, Inc.*, 346 NLRB 18, 20, fn. 16 (2005).”

was a motivating factor in the denial of [employee's] wage increase.” *Id.* at 433. Nevertheless, it reversed the judge’s decision finding probation and discharge were actionable. Specifically, the Board relied upon the fact that the employee had work issues prior to engaging in the protected activity. However, the employee continued to have performance problems, including absenteeism, which warranted the termination. The judge found the activity actionable because the employee was placed on probation within 2 weeks of providing information and was discharged 1 day after the employer had received notice of an unfair labor practice. *Id.* at 435. In reversing, the Board found that the employer “had a serious conversation” with the employee regarding his performance problems and the employee continued to have the problems after the meeting. *Id.* at 436. The Board pointed out that the employee “admitted, however, that he was warned not to repeat previous mistakes, which included tardiness” and despite the employer being flexible about time in the past, the discharge was still not actionable. *Id.* at 436. In reversing the administrative law judge’s decision, the Board found that:

In sum, we recognize that the timing of [employee's] probation and discharge (shortly after the Respondent learned of his protected activities) raises doubts. However, given [employee's] history of work-related problems dating back many months, we find that the Respondent has shown that it would have placed him on probation and discharged him even in the absence of any union activity and regardless of his having furnished information to the Board. Accordingly, the Respondent did not violate Section 8(a)(3) or (4) by placing him on probation and discharging him, and those allegations will be dismissed.”

In *Gaylord Hospital and Jeanine Connelly*, 359 NLRB No. 143 (2013), the Board found that while the employer had violated Section 8(a)(1) of the National Labor Relations Act by issuing a written warning to an employee but not for suspending or discharging her. There, the Board found that a prima facie case had been established. However, despite its finding of a prima facie case, and a finding of an actual violation based on a warning, the Board found

conduct that occurred after the employee engaged in the protected and concerned activity, but prior to her termination was an intervening act that warranted termination. *Id.* at 23.

Terraprise has met its burden by presenting evidence that Schmidt's termination would still have occurred as the ALJ's decision was supported by ample evidence. The evidence showed that Agnew provided countless second, third, fourth and fifth chances to Schmidt. Agnew was not working to push Schmidt out, he was working to make him productive.

### **C. The Remaining Issues Raised in the Exceptions.**

The remaining arguments are for the most part unsupported by citations to the Record and should be therefore disregarded. The arguments are also very misleading.

Schmidt was not improperly restricted in his work. As demonstrated in the responses to the prior Exceptions which are incorporated herein, Schmidt had very little pre-testimony contact with clients other than Constellation Energy with the exception of when Agnew was unexpectedly out of the office. His claim that he was forbid from having such contact is undermined by the fact that he in fact had contact with them.

The argument that Agnew was somehow trying to make Schmidt fail is undermined by the repeated encouragement that was demonstrated at length in the Record. If Agnew was trying to "build a case" against him, why would he compliment him in writing when he did something positive? (i.e. "I wanted to congratulate you...good start to the year." Tr. 402)

Schmidt was not outperforming Agnew. Agnew had *15 placements* (in addition to running a business) as compared to Schdmit making *2 placements* in that time period. (Respondent's Exhibit 64; Tr. 427-428; General Counsel Exhibit 13) This was at a time when Schmidt was provided an "exponential amount of opportunity" that he failed to take advantage of

due to Lucas being gone (Tr. 429; 436) and it was in the largest area of the Company (Tr. 341). The Exception also provides misleading comparisons. For example Omar Cheboub worked on retainer fee as opposed to getting paid only on placements. (Tr. 340) Furthermore, there is no expectation of sales when employees start out new (as Cheboub did) because the sales cycle is such that they would not get a commission on sales for 90 days after they start. (Tr. 340-341) So, of course Cheboub would not have had sales during that time period.

Comparable employees do not support disparate treatment. The ALJ (Order p. 23-25) did a detailed analysis of how other employees were treated and found no disparate treatment. The use of other employees is flawed in this case for two reasons: First, Agnew testified that “I’ve never had an employee at GRN, and probably not anywhere else, that had so many reasons to be fired.” (Tr. 198) Second, it is difficult in this case to make a comparison to other employees because almost half of the full-time employees (which are very limited in number) are Agnew’s family; in fact, the entire Company was only about 6 years old at the time of Schmidt’s termination. (Tr. 556) In short, there simply was no other comparable employee identified that had a combination of poor attitude, lying, plummeting performance, attendance problems, and not wanting to be at work. (Tr. 484)

Even if other employees are considered, they show Schmidt was treated in a consistent manner. For example, Jessica Jantolak was largely missing work for unfortunate and uncontrollable events; namely sickness and care of her children. (GC Exhibit 16) Agnew, understandably, believes that there is a difference between an employee who misses work because of repeatedly oversleeping and one who misses because they had to go to the doctor or care for a child. (Tr. 352-353) And, even with her understandable reasons about missing work, and even though Agnew described her as “good” (Tr. 458), Jantolak was terminated for missing

work. As explained in an internal email Agnew wrote: “I discussed with Jessica that she was terminated (or had the choice to resign)...” (GC Exhibit 17) and it was agreed that the Company would stop paying her. (General Counsel Exhibit 15; Tr. 458) There was no evidence that Jantolak was lying, had a poor attitude, was missing work for bad reasons, had declining performance, or did not want to be at her job. Randall Flagg was terminated shortly after he started because he needed to take time off which was not acceptable to the company. (Tr. 457-458) Robin Filipiak was fired for performance. She was characterized as a “wonderful lady”, but not getting the particular job she was hired for done. As such, she was eventually fired. Notably, she was later rehired into a different position, thereby demonstrating that she had no similarities in terms of poor attitude, etc. that plagued Schmidt. (Tr. 458) Heather Mirtl had problems with absences and had a formal letter placed into her file along with other notes to file when she had a performance problem. (Tr. 552; Respondent’s Exhibit 42-43) The General Counsel never provided any evidence about what happened to her. There was no evidence of any non-attendance related performance. Elaine Castro was terminated for performance reasons--or given the choice to resign. She tendered a resignation letter, the tone of which showed a positive relationship. (Tr. 458; 520; General Counsel Exhibit 22)

The Exceptions assert Schmidt got special treatment for attendance based on a discussion with John Lucas. However, attendance was not an issue for Schmidt while Lucas was employed. Indeed, as stated above, Schmidt had never once overslept before Lucas stole the records. Agnew’s written policy (signed by Schmidt) and his practice was that employees had to be on time; it was strictly enforced. For example, the “Covenant” mandates what employees must do during various time periods throughout the date, including being at work on time. (*i.e.*, 8:00 a.m., at your desk ready for the day, planning time before 8:00 a.m.) (Tr. 344) Not only does the

Covenant mandate that employees show up on time, but this is Agnew's practice. For example, if someone is not at the office by 8:00 a.m., the door is locked so that the tardy employee cannot initially get into the office. While this is somewhat done in jest, the point being made is that on time arrival is critical. (Tr. 346) Even Schmidt's friend David Dulay (Tr. 143-144) confirmed Agnew is "strict" about attendance. (Tr. 253) David Dulay testified that from the time he started with Agnew's company (April/May 2012), he was expected to be on time--"[w]e had to be there before 8:00." (Tr.257) Agnew's "practice" according to Dulay, was that by 8:00 a.m. he be at his desk with a call plan ready to execute. (Tr. 257) Dulay acknowledged the 8:00 a.m. door locking ritual. (Tr. 255) Dulay in fact received email warnings about being at work *a few minutes late or at 7:59 a.m.* despite doing very well as a recruiter. (Tr. 255-260; Respondents Exhibits 30 and 31).

With regard to taking time off, Schmidt understood that Agnew "wanted me [Schmidt] to do it [requesting time off] by the books" and he was on notice that standard operating procedure "is that you give us notice at least 2 weeks in advance for any time off work (unless, of course, it is an emergency)." (Tr. 148-149; Respondent's Exhibit 51)

As such, even standing alone Schmidt's attendance problems justified termination. *Flagstaff Med. Ctr., Inc. v. N.L.R.B.*, 715 F.3d 928 (D.C. Cir. 2013)(substantial evidence did not existed for Board's finding where employee was only fired for attendance after engaging in protected activity-- despite the fact that she was not terminated for attendance problems prior to her protected activity).

## **CONCLUSION**

Based upon the forgoing, Terraprise Holding, Inc. respectfully requests that the complaint be dismissed.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of **Terraprise Holdings, Inc.'s Answering Brief To Exceptions To The Decisions Of The Administrative Law Judge** have been served this 13<sup>th</sup> day of April 2014 in the manner indicated, upon the following parties of record.

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