Final Brief **Oral Argument Not Yet Scheduled**

Nos. 14-1232 and 14-1303

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DESIGN TECHNOLOGY GROUP, LLC d/b/a BETTIE PAGE CLOTHING and DTG CALIFORNIA MANAGEMENT LLC, d/b/a BETTIE PAGE CLOTHING

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

VANESSA MORRIS

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici: Design Technology Group LLC, d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing ("the Company") was the respondent before the Board and is the petitioner/cross-respondent before the Court. Employee Vanessa Morris was the charging party before the Board. The Board's General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on the Company's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on October 31, 2014, and reported at 361 NLRB No. 79. That decision incorporates by reference an earlier Board Decision and Order issued on April 19, 2013, and reported at 359 NLRB No. 96.

C. Related Cases: The ruling under review has previously been before the Ninth Circuit. On April 19, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against the Company, reported at 359 NLRB No. 96. The Company filed a petition for review in the Ninth Circuit, and the Board filed a cross-application for enforcement. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550,

holding that the recess appointments of Members Griffin and Block, who were appointed in January 2012, were not valid. The Board subsequently filed a motion to vacate and remand its decision, which the Ninth Circuit granted. Following the Ninth Circuit's remand, the Board issued the decision on review here, which incorporatees the earlier decision by reference.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Design Technology Group LLC, d/b/a Bettie Page Clothing and DTG California Management, LLC d/b/a Bettie Page Clothing ("the Company"), to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against the Company. In this unfair-labor-practice case, the Board found that the Company violated the National Labor Relations Act by discharging three clothing store employees for engaging in protected, concerted activity and by maintaining an unlawful wage and salary disclosure rule in its employee handbook.

The Board's Decision and Order issued on October 31, 2014, and is reported at 361 NLRB No. 79. That decision incorporates by reference an earlier Board Decision and Order issued on April 19, 2013, and reported at 359 NLRB No. 96.[1] The Board had subject matter jurisdiction over the proceeding below under 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

[1] In this final brief, "JA" references are to the joint appendix. "Br." refers to the Company's final brief, and "A Br." refers to the brief of amicus National Federation of Independent Business Small Business Legal Center. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement. *See* 29 U.S.C. § 160(e) and (f). The Company filed its petition for review on November 5, 2014. The Board filed its cross-application for enforcement on December 29, 2014. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of those portions of its Order remedying its uncontested finding that the Company violated Section 8(a)(1) of the Act by maintaining an unlawful rule in its employee handbook prohibiting employees from disclosing wage or compensation information.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by discharging store employees Thomas, Morris, and Johnson for engaging in concerted activity protected by Section 7 of the Act.

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutes.

STATEMENT OF THE CASE

This case involves the Company's discharge of store employees Holli Thomas, Vanessa Morris, and Brittany Johnson for engaging in concerted activity protected by the Act when they raised and discussed their complaints about personal safety. The case also involves a wage and salary nondisclosure rule the Company maintained in its employee handbook. Acting on an unfair-labor-practice charge filed by employee Morris, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by discharging the three employees and by maintaining an unlawful rule. (JA 24.) After a hearing, an administrative law judge found violations of Section 8(a)(1) as alleged. On review, the Board affirmed the judge's rulings, findings, and conclusions, as modified, and adopted his recommended order with some modification. (JA 20-21.) Below are summaries of the procedural history, the Board's findings of fact, and the Board's conclusions and order.

I. THE PROCEDURAL HISTORY

On April 19, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order against the Company, reported at 359 NLRB No. 96. The Company filed a petition for review in the Ninth Circuit, and the

Board filed a cross-application for enforcement. On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550, holding that the recess appointments of Members Griffin and Block, who were appointed in January 2012, were not valid. The Board subsequently filed a motion to vacate and remand its decision, which the Ninth Circuit granted.

On October 31, 2014, in view of the Supreme Court's decision in *Noel Canning*, the Board issued a new Decision and Order in which it "considered de novo the judge's decision and the record in light of the exceptions and briefs." (JA 34.) The Board "also considered the now-vacated Decision and Order, and . . . agree[d] with the rationale set forth therein." (JA 34.) Accordingly, the new Decision and Order affirmed the judge's rulings, findings, and conclusions, and adopted the judge's recommended Order, as modified by the Board in its April 19, 2013 Decision and Order, which it incorporated by reference. (JA 34.)

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations, Handbook, and San Francisco Store

The Company, owned by Jan Glaser and his wife, operates a number of retail clothing stores. (JA 25; JA 48-49.) Its employee handbook contains a rule entitled "Wage and Salary Disclosure," which states:

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

(JA 25; JA 410.)

On July 1, 2010, the Company opened a new store in San Francisco on Haight Street and hired Hayley Griffin as manager, Holli Thomas as assistant manager, and Vanessa Morris and Brittany Johnson, among others, as sales personnel. (JA 25; JA 49, 50, 101, 133.)

Thomas took her job as assistant manager seriously. On July 14, within two weeks of the store opening, she sent Glaser a letter outlining suggestions to make the store "the best it could possibly be." (JA 26; JA 429-31.) Morris was a valued employee, twice chosen employee of the month, including November, the month she was fired. (JA 26; JA 207, 221.)

B. Employees Are Troubled by Store Manager Griffin's Behavior Towards Them as well as her Failure to Respond to their Safety Concerns

As store manager, Griffin allowed employees to report to work late, caring only that the store opened on time. (JA31; JA 202.) Despite multiple employees frequently reporting to work late, few were disciplined for it. (JA 30-31; JA 147-49, 155-56, 194, 201-02.) Griffin also demonstrated favoritism in scheduling hours which presented a problem for employees. Events that did not sit well with the employees included Griffin's threat to cut employees' hours if they did not socialize with Griffin after work, and her threat, after ripping her dress while out

partying with employees, to reduce one employee's hours if she refused to repair the dress. (JA 26; JA 106, 109, 150, 192-93, 207-08, 224.)

After the Company instituted a new computer policy in October that restricted personal use to "minimal and incidental use" during breaks, Griffin allowed employees to continue using store computers. (JA 29; JA 383-87, JA 127, 160-62, 220.) Employees checked email, bus schedules, and bank accounts on the company computer in Griffin's office, and Griffin personally used the company computer for Facebook, online dating, and shopping. (JA 29; JA 126-27, 160, 162, 209, 218-20, 224-25, 226.)

Every month, Griffin held staff meetings with employees of the San Francisco store. Beginning in August, employees at the monthly staff meetings raised the issue of closing the store at 7:00 p.m. instead of 8:00 p.m. (JA 116-17, 151-52, 171-72, 195-96, 222-23.) Employees reported to Griffin that foot traffic during the evening hours had decreased with the end of the tourist season, and that they increasingly felt unsafe in the neighborhood at night because homeless people congregated on the sidewalk to watch the 1950's burlesque video playing on a television at the front of the store. They were also concerned because the store had no security guard, surveillance camera, or panic alarm. (JA 26; JA 116, 222-23, 225.) The employees' complaints went unresolved. (JA 26; JA 117, 151-52.)

C. After Having Their Personal Safety Concerns Ignored by Griffin, Employees Report Concerns About Griffin's Conduct to Her Supervisor

By September, the employees were fed up with Griffin's management style and abusive tactics. Thomas, on behalf of herself and others, began calling Carla Avila, the manager of the Las Vegas store and retail supervisor, to report Griffin's actions. (JA 26; JA 49-50, 136-37.) Five employees—including Thomas, Morris, and Johnson—detailed their grievances against Griffin in a letter to Avila. (JA 26; JA 102-03, 107-08, 137-39, 210-11, 432-35.) The letter explained that the "management situation in our store has become extremely unstable, unsafe, and unprofessional." (JA 26; JA 432-35.) The employees' concerns included the "stressful" and "hostile" work environment caused by what they saw as Griffin's intimidating and bullying behavior, including:

- injuring one employee physically and threatening to remove another from the work schedule;
- scheduling hours based on favoritism;
- taking merchandise without paying for it;
- taking excessive breaks and leaving early;
- keeping leftover display materials for personal use;
- excessive personal use of the Internet; and
- restricting employees from contacting the owners directly, contrary to company policy.

(JA 432-35.)

In response to this letter, Glaser and Avila traveled to San Francisco to interview the employees and Griffin. (JA 26; JA 80-81, 110-12, 140-41, 211.) Avila asked Thomas and another employee to keep a record of Griffin's actions and fax them to her. (JA 112, 212-13.) After the meetings with Avila and Glaser, employees failed to notice any positive change in Griffin's behavior. (JA 26; JA 112, 132, 187, 212.)

Griffin learned of the letter and confronted Thomas, asking whether she had written it. Because she was afraid, Thomas replied, untruthfully, that she had not. (JA 26; JA 113-14.) Later, Griffin asked another employee whether she knew who had written the letter. The employee was noncommittal because she "did not want anyone to get in trouble." (JA 214-15.) Griffin then stated that she suspected Thomas and Morris had sent the letter. (JA 26; JA 215.)

In November, Griffin traveled to San Diego to help open a new store. (JA 26; JA 132.) On November 4, while Griffin was away, Thomas spoke with Jan Hutto, technology and human resources consultant, about a computer issue. (JA 26; JA 50, 115.) During this conversation, Thomas and Hutto discussed the day's sales, and Thomas mentioned that the employees wanted to close the store one hour earlier. Thomas explained that foot traffic in the neighborhood had decreased with the end of the tourist season, and theirs was the only store open until 8:00

p.m. (JA 26; JA 115-16.) Hutto said management was unaware that other stores closed earlier, and she would raise the issue with Glaser. (JA 26; JA 116.) A few minutes later, Glaser called Thomas. (JA 26; JA 116.) Thomas again reported on sales. She then explained the employees' safety concerns, specifically that employees felt unsafe because theirs was the only store open until 8:00 p.m., Haight Street was "desolate" at that time except for homeless people, the store had no security system, and employees were occasionally harassed both inside and outside the store. (JA 26; JA 116-17.) Thomas did not tell Glaser that Griffin agreed the store should close early. (JA 26; JA 117, 153.) Glaser told Thomas that Griffin had never raised this issue with him, and he was unaware that other stores closed earlier. He then gave Thomas permission to begin closing the store at 7:00 p.m. (JA 26; JA 117.)

That night, Thomas closed the store at 7:00 p.m. (JA 26; JA 117.) As Thomas walked home, Griffin called her, upset, and asked why she was not at the store. (JA 26; JA 118.) Thomas explained that she had spoken with Glaser, and he agreed the store should close at 7:00 p.m. (JA 26; JA 118.) A few minutes later, Griffin again called Thomas. She said she had spoken with Glaser and, from then on, the store would close at 8:00 p.m. (JA 26; JA 118.)

D. Disappointed with Management's Response to their Safety Concerns, the Employees Discuss Their Concerns, in Person and on Facebook, and Peruse a California Workers' Rights Book

Later that evening, Thomas, Morris, and Johnson discussed this turn of events on Facebook[2]:

> **Holli Thomas** needs a new job. I'm physically and mentally sickened.
>
> **Vanessa Morris** It's pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I'm am unbelieveably stressed out and I can't believe NO ONE is doing anything about it! The way she treats us in NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS DONE!!...
>
> **Holli Thomas** bettie page would roll over in her grave
>
> **Vanessa Morris** She already is girl!
>
> **Holli Thomas** 800 miles away yet she's still continues to make our lives miserable. phenomenal!
>
> **Vanessa Morris** And no one's doing anything about it! Big surprise!
>
> **Brittany [Johnson]** "bettie page would roll over in her grave" Ive been thinking the same thing for quite some time
>
> **Vanessa Morris** hey dudes it's totally cool, tomorrow I'm bringing a California Worker's Rights book to work. My mom works for a law firm that specializes in labor laws and BOY will you be surprised by all the crap that's going on that's in violation 8) see you tomorrow!

[2] The Facebook conversation is reproduced here as it appears in the record, including typographical errors.

(JA 26-27; JA 370-75, JA 388-93.) Morris did take the California worker's rights book—which covered issues such as benefits, discrimination, the right to organize, safety, health, and sanitation—to work and put it in the break room where other employees looked through it, noticing that they were entitled to water and sufficient heat. (JA 27; JA 119, 154, 179, 197-98.)

The Facebook posts were quickly seen by management. An employee and friend of Griffin's saw the posts and told Griffin, who logged into the employee's Facebook account to view them herself. (JA 27; JA 229.) Griffin alerted Avila, and Avila sent copies of the Facebook posts to Hutto. (JA 27; JA 142, 229.) On November 6, Hutto emailed Glaser and included copies of some of the Facebook posts. (JA 27; JA 370-75.) In the email, Hutto pointed out that Morris "also stated that her mom picked up a California employment book and that we are doing all kinds of things wrong." (JA 27; JA 371.) Hutto wrote that "we need to take action right away" but she did not know if "[Griffin] is the right person to do it." (JA 27; JA 371.)

On November 5, Hutto received an email from a computer monitoring program the Company had recently implemented. (JA 28; JA 341-44.) The email showed that Morris sent resumes from the company computer. (JA 28; JA 341-44.) In October, the employees had signed a new computer use policy that allowed

"minimal and incidental" personal use of company computers. (JA 29; JA 383-87.)

E. The Company Fires Morris and Thomas, and Later Fires Johnson Because of Her Association with Morris and Thomas

On November 10 at Glaser's direction, Griffin fired Morris and Thomas. (JA 27-28; JA 55, 57.) With her was Ashley Cunningham, also known as Doris Mayday, who was flown in by the Company to assist Griffin with the discharges. (JA 27; JA 120-21.) Griffin told Morris and Thomas that "it's just not working out." (JA 27; JA 122.) Griffin told them they would be paid until 3:00 p.m. that day, that they should leave immediately, and that they would not be allowed on any company store premises in the future. (JA 27; JA 122.)

Johnson remained in the Company's employ for another month. During that time, Griffin noticed that Johnson received a text message from Thomas and told her that while "she couldn't tell [Johnson] who [she] could[] be friends with. . . she was tempted to put a gag order on [Johnson] to not be able to talk about work." (JA 30; JA 199.) On December 11, Griffin called Johnson a little after 12:00 p.m. asking why she was not at work. Johnson believed she was scheduled to work at 2:00 p.m. Griffin would sometimes change the schedule and forget to tell employees. (JA 30; JA 124, 157-58, 201.) When Johnson arrived, Griffin fired her. (JA 30; JA 394-97, JA 200.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and Schiffer) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by discharging employees Thomas, Morris, and Johnson for engaging in concerted activity protected by Section 7 of the Act, 29 U.S.C. § 157, and by maintaining an unlawful rule prohibiting employees from disclosing wage and salary information. (JA 34-35.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. Affirmatively, the Order directs the Company to offer reinstatement to Thomas, Morris, and Johnson and make them whole for any loss of earnings and benefits suffered, remove from the Company's files any reference to the unlawful discharges, and post a remedial notice at the San Francisco store. (JA 35, Appendix A.)

To remedy the unlawful rule, the Order requires the Company to revise or rescind the unlawful rule and advise employees in writing that it has done so and that the rule will no longer be enforced, to furnish all current employees with inserts for the current handbook that advise them that the unlawful rule has been

rescinded or provide the language of a lawful rule, or publish and distribute revised handbooks. Finally, because the unlawful disclosure rule was in employee handbooks company-wide, the Board ordered the Company to post a second remedial notice at other stores where the employee handbook containing the unlawful rule was used. (JA 35-36, Appendix B.)

SUMMARY OF ARGUMENT

Maintaining a rule that prohibits employees from discussing wages and compensation is an unfair labor practice. The Company's employee handbook concededly contained such a rule, which the Board accordingly found to be unlawful. Because the Company failed to challenge this finding in its opening brief, the Board is entitled to summary enforcement of those portions of its Order related to that violation.

Firing employees for engaging in protected, concerted activity is also an unfair labor practice. The Board found that the Company discharged three employees for their protected, concerted activity of presenting to management their concerns about working conditions and continuing those activities on Facebook. The Company in its opening brief largely seeks to sidestep that finding, instead arguing that the employees' activity was unprotected, or that they should not be entitled to reinstatement because they engaged in a conspiracy to be fired. The Board reasonably rejected the Company's conspiracy defense, finding it to be

"nonsensical." Not only is the Company's argument legally unfounded, it is based on discredited testimony—yet the Company fails to surmount this Court's high bar for overturning credibility resolutions. Thus, the Company provides no basis for reversing the Board's findings that the employees engaged in protected, concerted activity and did not seek to entrap the Company into firing them.

Further, the Board acted within its broad remedial power in rejecting the Company's argument that it should not be required to reinstate the unlawfully discharged employees because they did not get along with their immediate supervisor. In rare cases in which an employee exhibits extreme antagonism or disloyalty, the Board has refused to award reinstatement. In this case, however, the Company makes no claims of extreme antagonism or disloyalty and again relies on discredited testimony to argue that the employees wanted to be fired. In these circumstances, and applying the extremely limited standard of review applied to the Board's remedial choices, the Court should uphold the Board's reinstatement remedy.

Finally, there is no merit to the Company's challenges to the administrative law judge's handling of its subpoena. The Company never raised to the Board its claims that the judge improperly granted in part an untimely motion to quash the subpoena or that the General Counsel somehow acted improperly by failing to seek judicial enforcement of the Company's subpoena. The Company, moreover, is

simply incorrect when it argues that the employees refused to turn over relevant documents responsive to the subpoena. The judge allowed the Company to question employees about documents without engaging in a fishing expedition. Employee Morris testified that she provided all the relevant documents to the Company, and the Company failed to question employees Thomas and Johnson. In sum, the Company has provided no basis to disturb the Board's findings, and the Court should enforce the Board's Order in full.

STANDARD OF REVIEW

The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Under that standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Rather, the Board's factual findings may "be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary." *Steelworkers Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

The Court gives "considerable deference" to the Board's determination that an employee has engaged in protected, concerted activity. *Stephens Media, LLC v.*

NLRB, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005)). As the Supreme Court has held, the task of defining the scope of Section 7 activity "is for the Board to perform in the first instance as it considers the wide variety of cases that have come before it." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (citation omitted). As the task of assessing what is protected, concerted activity is "basically a factual inquiry," the Board's finding will be affirmed so long as it is supported by substantial evidence. *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir. 1981) (citation omitted); *accord PHT, Inc. v. NLRB*, 920 F.2d 71, 73 (D.C. Cir. 1990).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING THE UNCONTESTED FINDING THAT THE COMPANY MAINTAINED AN UNLAWFUL WAGE AND SALARY DISCLOSURE RULE

Before this Court, the Company has abandoned any challenge to the Board's finding (JA 20, 34 n.1) that it violated Section 8(a)(1) of the Act by maintaining an unlawful wage disclosure rule.[3] Under well-settled law, the Company's failure to contest this finding constitutes a waiver of any defense and warrants summary

[3] The Company briefly states (Br. 20) that it provided evidence that it had rescinded the unlawful rule. As the Board found (JA 25-26), the Company provided no evidence that it informed employees of the change. In any event, the Company must post at its stores the notices required by the Board's Order.

enforcement of those portions of the Board's Order remedying that violation. *See Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992). Moreover, by not raising the issue in its opening brief, the Company has abandoned the argument and may not raise it in the reply brief. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (requiring that all arguments be raised in opening brief "to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond"). Accordingly, the Court should grant summary enforcement of those portions of the Board's Order.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING EMPLOYEES THOMAS, MORRIS, AND JOHNSON BECAUSE OF THE EMPLOYEES' PROTECTED, CONCERTED ACTIVITY

The Board reasonably found, on the basis of the credited evidence, that the Company discharged employees Thomas, Morris, and Johnson for engaging in concerted activity protected by Section 7 of the Act, namely, presenting to management their concerns about working late in an unsafe neighborhood and continuing those discussions on Facebook. The Company, while purporting to challenge that finding, makes no argument that employees were not entitled to statutory protection in raising those concerns, nor does it dispute the Board's

finding that it discharged the employees for that activity. Rather, what the Company contends (Br. 24-39) is that the employees lost the protection of the Act by engaging in a conspiracy to entrap the Company into firing them. The Board reasonably rejected this claim, finding not only no credited evidence for the Company's conspiracy theory, but that the claim was "nonsensical" (JA 20-21), and otherwise unsupported by law. The Company's arguments provide no basis for reversing that conclusion, and the Board's unfair-labor-practice findings should be upheld.

A. Employees Engage in Protected, Concerted Activity Where, as Here, They Complain To Management About Working Conditions and Discuss Those Matters Among Themselves

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. As the Supreme Court has explained, that broad protection applies with particular force to unorganized employees who, having no collective-bargaining representative, must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 17 (1962).

The right to engage in concerted activity for mutual aid and protection is protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the

rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activity protected by Section 7 of the Act. *See Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993).

The Board's test for concerted activity is whether the activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984)), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Concerted activity includes employee comments that arise as a "logical outgrowth of concerns expressed by the employees collectively." *Five Star Transp., Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008). The Supreme Court has indicated that "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 and 567 n.17 (1978).

Typically, in assessing whether an employer has violated Section 8(a)(1) by discharging an employee for engaging in protected, concerted activity, the Board will focus on the critical inquiry of the employer's motivation for the discharge, using a test approved by the Supreme Court. *NLRB v. Transp. Mgmt. Corp.*, 462

U.S. 393, 397-98, 400-03 (1983) (approving a test first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)). Under that test, if substantial evidence supports the Board's finding that protected, concerted activity was a "motivating factor" in the employer's decision, the Board's conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the conclusion that the same action would have been taken even in the absence of the protected conduct. *Id*. at 395, 397-403; *accord Matson Terminals, Inc. v. NLRB*, 114 F.3d 300, 303-04 (D.C. Cir. 1997). If the Board reasonably concludes that the employer's non-discriminatory justification for its action is non-existent or pretextual, the defense fails. *Wright Line*, 251 NLRB at 1083-84.

Where, as here, the employer's reason for discharging employees is established on its admissions that protected activity played a part in the decision to discharge, no further analysis of motive is necessary. *See, e.g.*, *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), *enforced*, 63 F. App'x 524 (D.C. Cir. 2003); *accord Allied Aviation Fueling of Dallas LP*, 347 NLRB 248, 249 n.2 (2006), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007) (employer motive is not at issue when employer admits employee was discharged for activity the Board found was protected); *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 454 (7th Cir. 1989); *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980). As the courts have

explained, such an established admission serves to "eliminate any question" concerning the reason for discharge or "other causes suggested as the basis for the discharge." *L'Eggs Prods.*, 619 F.2d at 1343 (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958)).

B. The Company Unlawfully Discharged the Three Employees

Based on the foregoing principles, and the credited record evidence, the Board reasonably found (JA 20-21) that the Company violated Section 8(a)(1) of the Act by discharging Thomas and Morris for engaging in protected, concerted activity "when they presented the concerns of the employees about working late in an unsafe neighborhood to their supervisor and to the [Company]'s owner." (JA 20.) The Board also found that "their Facebook postings were a continuation of that effort." (JA 20.) The credited evidence further shows, as the Board found (JA 21), that the Company plainly "believed that Johnson was linked to Thomas and Morris and their protected activity," and the Company "targeted her [for discharge] because of those associations." (DO 2.) The Board, in making these findings, also reasonably relied on the Company's shifting and specious reasons for discharging the employees as evidence of pretext.

1. Employees Morris and Thomas engaged in protected, concerted activity

Here, as shown at pp. 7, 9-10, the employees were concerned for their personal safety because after the summer tourist season ended, they found

themselves working late in a deserted neighborhood at a store that had no security guard, surveillance camera, or panic alarm, and homeless people routinely congregated outside the store's front windows. The employees initially presented these concerns to store manager Griffin during monthly staff meetings, where they also asked that the store be closed one hour earlier at 7:00 p.m. to lessen the security risk. Then, on November 4, after Griffin had not resolved their concerns, Thomas raised the issue with human resources consultant Hutto and owner Glaser while Griffin was out of town. Glaser allowed Thomas to close early—until Griffin found out and swiftly reinstated the 8:00 p.m. closing time. That night, Thomas, Morris, and Johnson commiserated on Facebook, complaining about Griffin and upper management's refusal to act on their safety complaints and about Griffin's reversal of the earlier closing time. In addition, Morris stated that she believed the Company was in violation of state law and that she would bring a California worker's rights book to work the next day, which she did.

In complaining to management, and discussing among themselves, their concerns about their personal safety and the misconduct of store manager Griffin that was affecting their working conditions, the employees, including Thomas and Morris, were engaged in quintessential concerted activity. It has long been settled that concerted employee protests over unsafe conditions are protected under the Act. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) (finding

employee walkout to protest "bitter cold" to be protected, concerted activity); *NLRB v. Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (finding employee who questioned safety practices during a staff meeting to be engaged in protected, concerted activity); *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 641-42 (5th Cir. 1986) (finding employee protest over unsafe working conditions to be protected). And the same is true for protests over supervisory misconduct that affects working conditions. *See, e.g.*, *Trompler, Inc.*, 335 NLRB 478, 479 (2001), *enforced*, 338 F.3d 747 (7th Cir. 2003) (finding walkout protected where employees protested supervisor's conduct regarding employee harassment of another employee, an employee's drug problem, and the supervisor's own ability to do the work); *Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 766 (6th Cir. 1998) (finding employee protest over supervisor's "rude, belligerent and overbearing behavior" that "directly impacted the employees' jobs and their ability to perform them" to be protected).

Moreover, employee discussion of such workplace concerns, whether that discussion occurs around a water cooler or over Facebook is protected. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (finding that employees' discussion of an expected bonus was protected); *Three D, LLC*, 361 NLRB No. 31, 2014 WL 4182705, at *3, *petition for review filed*, No. 14-3284 (2d Cir. Sept. 8, 2014) (finding that employees were engaged in protected, concerted activity when they complained, on Facebook, about employer's mistakes in

calculating tax withholding); *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1253, *enforced sub nom. Nevada Serv. Employees Union, Local 1107, SEIU v. NLRB*, 358 F. App'x 783 (9th Cir. 2009) (finding employee comments about patient care posted on a union website to be protected). *Cf. Bland v. Roberts*, 730 F.3d 368, 387 (4th Cir. 2013) (by "liking" a candidate's Facebook page, Sheriff's office employee engaged in political speech protected under the First Amendment).

2. The Company discharged Morris and Thomas for engaging in protected, concerted activity

As the Board found, the General Counsel "easily" met his initial burden of showing that Morris and Thomas were fired for engaging in concerted, protected activity because of the Company's own admissions. (JA 30.) Specifically, as the administrative law judge noted in his assessment of owner Glaser's testimony, Glaser's account—that he fired Thomas for insubordination related to closing the store early because of safety concerns—"[s]tripped of its fabricated patina . . . amounted to an admission that he fired Thomas because she raised the concerns of the employees about safety and the store closing time." (JA 30.) Likewise, the Company's declarations to the unemployment insurance commission, described in more detail below, were admissions that it fired Morris because of her Facebook postings. (JA 30.) Further, the evidence showed that manager Hutto advised Glaser that "we need to take action right away" regarding the Facebook posts and Morris's statement that "her mom picked up a California employment book and

that we are doing all kinds of things wrong." (JA 27; JA 371.) As shown, such admissions serve to establish the reason for discharge. *L'Eggs Prods*, 619 F.2d at 1343, and cases cited at pp. 22-23.

As the administrative law judge found and the Board affirmed, the Company's "shifting and specious" explanations for discharging the three employees further supported the General Counsel's case. (JA 30.) For instance, Glaser testified that he fired Thomas for two instances of insubordination: name-calling and "unilaterally deciding to close the store while giving [Glaser] the impression she had [the] consent [of] the manager." (JA 28; JA 53-54.) Company counsel, however, proffered an additional reason—that Thomas decided to take off the week of Thanksgiving. (JA 28; JA 130-31.) And before the state unemployment insurance commission, Glaser had stated, in contradiction to his later testimony, that Thomas was fired for "not performing her duties as an assistant manager by working against her manager at all times and taking too many days off after being written up for it." (JA 28; JA 376-77.)

The Board rejected the Company's shifting explanations for Thomas's discharge as untrue, finding that the "name calling incident . . . did not occur[,] was not even mentioned as a reason for termination in the unemployment insurance claim[,] and had been tolerated in the past if it had occurred." (JA 28.) The Board further found that Thomas never suggested to Glaser that Griffin agreed to close

the store early and in fact "indicated that Griffin was passively resistant to that suggestion." (JA 28.) In addition, the judge rejected company counsel's additional explanation that Thomas decided to take Thanksgiving week off because Thomas was fired two weeks before Thanksgiving. (JA 28.)

The Board found that the Company's shifting explanations for firing Morris were similarly specious. At the hearing, Glaser began testifying by stating that he fired Morris for insubordination, which he said included eating on the sales floor, changing displays, and texting. (JA 29; JA 57.) But the "proximate cause" of her firing, Glaser testified, was Morris's use of company computers to send out her resume. (JA 29; JA 58.) Glaser also acknowledged that he provided different justifications for Morris's firing at an unemployment compensation hearing, including that he fired Morris for insubordination, defamation on public media, releasing confidential company information, tardiness, personal computer use, and discussing bringing the workers' rights book to work on Facebook. (JA 29; JA 63-64, 67-68, 69-71, 72-75, 378-82.) However, at the unfair-labor-practice hearing, Glaser testified that he told the unemployment insurance commission that he fired Morris for defamation because he was so angry about the Facebook postings. (JA 29; JA 76-77.)

The Board reasonably rejected Glaser's shifting explanations for the discharge of Morris, finding that his excuses, like those he provided for Thomas's

discharge, "morphed as needed based on the exigencies of the situation." (JA 29.) In drawing this conclusion, the Board noted (JA 29) that the Company's computer policy allowed minimal and incidental personal use of the computers (JA 383-87); that other employees, especially Griffin, used the computers for online dating, shopping, and Facebook (JA 127, 162, 191, 218-20); that Johnson and another employee used the computer to send out resumes but were not discharged (JA 59, 144, 331-40, 427); and that other employees, including Griffin, ate on the sales floor without being disciplined (JA 128, 159-60, 188-89, 204-06, 216-17, 239-40).

Accordingly, the Board rightly concluded (JA 20-21, 29) that, although the Company's "admissions alone easily satisfy the General Counsel's burden," *see L'Eggs Prods.*, 619 F.2d at 1343, and cases cited at pp. 22-23, and that "timing strengthens the case, inasmuch as the terminations came quickly on the heels of the protected activity by Thomas and Morris, "the shifting and specious reasons given by [the Company] for the terminations further strengthen the General Counsel's case." (JA 29.) *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (a "case of discriminatory motivation may be supported by consideration of the lack of any legitimate basis" for the actions or a "pretextual" reason) (citations omitted).

Once the General Counsel established that the employees' protected, concerted activity was a motivating factor in their discharges, it was up to the

Company to show that it would have fired them in the absence of that activity. The Company failed to make this showing. Having rejected the Company's "shifting and specious" reasons for the discharges, the Board found that the Company failed to meet its burden. (JA 30.) As shown above, it is well settled that if an employer's justification for its action is non-existent or pretextual, the defense fails.[4] *Wright Line*, 251 NLRB at 1083-84.

3. The Company unlawfully discharged employee Johnson

The Board found that the Company also violated Section 8(a)(1) of the Act by firing Brittany Johnson. (JA 21.) While Johnson was a minor participant in the Facebook exchanges that led the Company to fire Morris and Thomas, the credited evidence shows, as the Board found, that the Company plainly "believed that Johnson was linked to Thomas and Morris and their protected activity, and . . . that the [Company] targeted her [for discharge] because of those associations." (JA 21.) In so concluding, the Board relied on the credited evidence that Griffin told Johnson that although she could not tell Johnson with whom she could be friends,

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[4] In its recitation of the facts, the Company states (Br. 13) that Glaser had decided to terminate Morris and Thomas before he saw the November 4 Facebook posts. The Company, however, did not argue this point in the argument section of its brief. The Court has held an argument waived that consisted of a claim "alluded to . . . in the statement of facts." *AMSC Subsidiary Corp. v. F.C.C.*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000).

"she was tempted to put a gag order on [Johnson] to not be able to talk about work." (JA 21; JA 199.)

In addition, the Board found that its conclusion was "bolstered by the evidence showing that the [Company]'s explanation for the discharge of Johnson, her tardiness, does not withstand scrutiny." (JA 21.) As the Board found, "despite widespread tardiness among employees, the [Company] enforced its progressive disciplinary rule addressing 'habitual tardiness' sporadically and arbitrarily, at best." (JA 21; JA 123-25, 129, 143, 155-56, 194, 202-03.) Further, prior to its discharge of Johnson, the Company "had never discharged anyone at the store for such habitual lateness." (JA 21.) Accordingly, substantial evidence supports the Board's finding that the Company failed to establish that it would have discharged Johnson in the absence of her protected, concerted activity and her perceived connection to Thomas and Morris and their protected, concerted activity. (JA 21.)

C. The Board Reasonably Rejected the Company's Conspiracy Defense

The Company argues (Br. 35) that the Board "abandoned the longstanding precept that 'concerted protected activity' must be premised on an 'honest and reasonable belief' that the employee's conduct is for the purpose of mutual aid and protection," and claims (Br. 25) that here the employees had no "honest and reasonable belief" and were merely engaged in a sham, hoping to be fired. The

Board reasonably rejected that defense as contrary to law and the credited evidence.

Contrary to the Company's characterization of the employees' actions, the evidence shows that the employees engaged in protected, concerted activity for months before they were fired. Beginning in August (as shown at pp. 7-12), the employees raised their safety concerns with supervisor Griffin. In September, the employees sent a letter to Avila outlining concerns about Griffin that affected their terms and conditions of employment. That letter resulted in Avila and Glaser visiting the store to have personal meetings with staff. According to Glaser, the letter also resulted in discipline of Griffin. (JA 82-83.) In November, Thomas spoke with Hutto and Glaser about the employees' safety concerns and their desire to close the store early. The same month, Morris brought a worker's rights book to the store for employees to view. Concerted activity regarding safety and terms and conditions of employment hardly seem to justify the Company's repeated claims that the employees were merely interested in being fired.

Moreover, as it explained in rejecting this defense as "nonsensical," the Board cited cases (JA 21 n.4) to make it clear that the standard for determining protected, concerted activity is an *objective* standard, not a subjective one that would depend on an individual employee's personal beliefs or intentions. For instance, as the court explained long ago in *Dreis & Krump Manufacturing Co. v.*

NLRB, 544 F.2d 320 (7th Cir. 1976): "The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to . . . working conditions and hours, or other matters of 'mutual aid or protection' of employees." *Id.* at 328 n.10.

Similarly, in *Circle K Corp.*, 305 NLRB 932 (1991), *enforced mem.*, 989 F.2d 498 (6th Cir. 1993), the Board explained that "the standard under the Act is an objective one," and that employees "may act in a concerted fashion for a variety of reasons—some altruistic, some selfish," and that subjective intent was beside the point. *Id.* at 933. And in *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967), the court explained that, even if an employee were "acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights." *Id.* at 499. Simply put, the employees' "subjective characterization of [their] reason for engaging in conduct cannot be dispositive of the question whether [their] conduct is protected." *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 266-67 (9th Cir. 1995).

Accordingly, the Board stated—in a sentence that the Company points to with some alarm (Br. 28, 35)—that "even if the employees were acting in the hope that they would be discharged for their Facebook postings," which is not the case here, "the [Company] failed to establish that the employees' actions were not

protected by the Act." (JA 21.) Indeed, rather than even attempt to make that showing in its defense, the Company instead does not dispute that the employees engaged in actions that constitute classic Section 7 activity. As such, its claim that the Board here committed legal error (Br. 35) by departing from precedent is mistaken, as is the very foundation of its conspiracy argument.

None of the cases cited by the Company (Br. 25-27) to bolster its contention that the employees here engaged in a sham actually involve attempts to entrap an employer into an unfair labor practice. Instead, the cases stand for various propositions that demonstrate the breadth of Section 7 protections, including that an employee engages in protected, concerted activity when she invokes rights under a collective-bargaining agreement,[5] and that an employer cannot refuse to hire a bona fide applicant who meets all requirements simply because that applicant is a union organizer.[6] Another case cited by the Company has no relevance at all, apart from using the word "sham."[7]

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[5] For example, *City Disposal Systems, Inc. v. NLRB*, 465 U.S. 822 (1984), *Kingsbury, Inc*., 355 NLRB 1195 (2010), *Newark Morning Ledger*, 316 NLRB 1268 (1995), and *Hi-Tech Cable Corp*., 309 NLRB 3 (1992), all involve the Board's *Interboro* doctrine under which "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated." *City Disposal*, 465 U.S. at 840.

[6] Two of the cases cited by the Company, *H.B. Zachry Co*., 332 NLRB 1178 (2000), and *Lipsey, Inc*., 172 NLRB 1535 (1968), concern non-union employers

Not only is the Company's argument legally mistaken, it is also based in large part on discredited testimony. As evidence of its conspiracy theory, the Company relies (Br. 17) on Griffin's uncorroborated testimony that Thomas and Morris celebrated by hugging and giving each other high-fives after being discharged, in conjunction with the "So they've fallen into my crutches" Facebook conversation between Morris, her sister, and another friend on November 10, the day Morris and Thomas were fired.

The Company's claim (Br. 41) that the Board "dismissed without consideration" its conspiracy defense is patently false. (*See* JA 20-21, 27.) The Board specifically considered the Facebook post relied upon by the Company as well as Griffin's uncorroborated testimony and found they did not support its claim. (JA 27.) For instance, in assessing the credibility of the witnesses at the hearing, the administrative law judge found Griffin's testimony to be "exaggerated to say the least" and instead "created to fit neatly in with the Facebook posting" by Morris. (JA 27.) He further found that Morris "credibly explained" the Facebook

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who refused to hire union "salts" or organizers and whether those salts were bona bide applicants.

[7] *Iron Workers Local 433*, 277 NLRB 670, 673 (1985) involved Section 10(k) of the Act, 29 U.S.C. § 160(k), which requires the Board "to make an affirmative award of disputed work after considering various factors" if the parties do not reach a voluntary agreement. In that case, the Board found that a union threatened a job action "only as a sham to invoke the Board's authority to determine the dispute." *Iron Workers Local 433*, 277 NLRB at 675 n.6.

post. (JA 27.) Specifically, the statement "so they've fallen into my crutches" was a line from Morris's favorite episode of The Monkees television program and something Morris and her sister "repeated all the time to each other." (JA 27; JA 168.)

Moreover, based on inconsistencies in Griffin's testimony as well as her demeanor, the administrative law judge found her to be so unreliable that he "hesitate[d] to credit any of her testimony." (JA 28.) The judge further found that the testimony of both Griffin and company owner Glaser was "entirely unconvincing; it seemed they were prone to exaggerate, stretch the truth, and simply fabricate testimony to suit the situation." (JA 25.) For these reasons, the judge "decided generally not to credit their testimony unless it stands as an admission of a party opponent." (JA 25.)

Those credibility assessments, adopted by the Board on review, must stand because the Company has presented no basis for reversing them. As this Court has repeatedly explained, it will not reverse the Board's adoption of an administrative law judge's credibility determinations "unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)). The Company does not

point to any such extraordinary circumstance here, nor could it on the basis of this record.

Further, contrary to the Company suggestion (Br. 33), the Board did not find that the November 10 Facebook posts were "intended for the mutual aid and protection" of Morris and other employees, nor did it need to. These posts occurred *after* the employees were unlawfully fired and were not considered by the Board as evidence of protected, concerted activity that lead to their discharge. What the Board did consider were the November 4 Facebook posts between Morris, Thomas, and Johnson regarding the Company's lack of response to their safety concerns and its sudden reversal on the issue of closing the store early. (*See* p. 11.) That Facebook conversation, which concerned working conditions, constituted "classic concerted protected activity." (JA 20.) Accordingly, the Company's unfounded conspiracy defense was reasonably rejected by the Board and similarly should be rejected by the Court.

Like the Company, amicus National Federation of Independent Business Small Business Legal Center argues that the employees did not engage in protected, concerted activity, but rather intended to "trap" the Company. (A Br. 9.) Similarly, the amicus argues (A Br. 28), like the Company (Br. 36), that the Board's decision protects an employee's statements "simply because an employee complains about work on Facebook." But the Board has no such blanket rule.

Instead, the Board reviews each case involving employee speech independently—and sometimes finds that employee speech is not protected. *See Richmond Dist. Neighborhood Ctr.*, 361 NLRB No. 74, 2014 WL 5465462, at *1 (finding employees' Facebook conversation containing numerous instances of insubordination not to be protected); *World Color (USA) Corp.*, 360 NLRB No. 37, 2014 WL 559195, at *2, *remanded on other grounds*, 776 F.3d 17 (D.C. Cir. 2015) (declining to find that employee's Facebook posts constituted protected, concerted activity where the record did not show that posts concerned terms and conditions of employment or that other employees saw or responded to the posts).[8]

D. Contrary to the Company's Contention, the Board's Reinstatement Requirement Is the Appropriate Remedy

The Company argues (Br. 37) that it should not be required to reinstate Morris, Thomas, and Johnson because it "would create an impossible situation."

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[8] Moreover, the amicus's arguments (A Br. 24) that "the NLRB has taken on an increasingly aggressive role in scrutinizing employers who respond to their employees' online activity" cites to three memoranda issued by the office of the General Counsel. Those memoranda express the views of the General Counsel, not the Board. The General Counsel must "defend the decisions of the Board on review, regardless whether the Board adopted the view he expressed as a party before it." *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002). In addition to its policy arguments, the amicus makes a factual argument (A Br. 28-30) that employee Johnson was fired for tardiness rather than protected, concerted activity. But because the Company never makes this argument on its own behalf, the Court should decline to consider it. *See Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001) (Court does not "ordinarily" reach issues raised by amicus but not by parties).

In making this argument, the Company relies on isolated or insignificant events as well as discredited testimony in an attempt to show that employees should not be reinstated to jobs "they were intentionally trying to leave." (Br. 38.) It is well settled that the Board's remedial power "is a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). This Court reviews the Board's choice of remedy with "a high degree of deference" and will not "disturb the Board's order 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *St. Francis Fed'n of Nurses & Health Prof'ls. v. NLRB*, 729 F.2d 844, 849 (D.C. Cir. 1984) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). Because the Company has not shown that the Board's remedy is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Court should uphold it.

In rare instances, the Board and courts have "refused to enforce reinstatement orders where the employee involved had shown extreme disloyalty or antagonism toward the employer." *NLRB v. Retail Store Employees Union, Local 876 Retail Clerks Int'l Ass'n*, 570 F.2d 586, 594 (6th Cir. 1978) (collecting cases) (upholding reinstatement order where employee did not threaten officials or disrupt employer's work); *see, e.g., NLRB v. Mut. Maint. Serv. Co.*, 632 F.2d 33,

38 (7th Cir. 1980) (denying restatement to employee engaged in scheme to defraud federal government and employer of unemployment compensation benefits); *NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 461 (9th Cir. 1978) (denying reinstatement to incompetent employee in health care field because of danger to public health and safety); *NLRB v. Bin-Dicator Co.*, 356 F.2d 210 (6th Cir. 1966) (denying reinstatement where employee threatened to cause manager to "spend some time in a wheel chair," made threatening gestures at supervisors, and threatened to strike a foreman).

Unlike here, the employee who was denied reinstatement in *NLRB v. Apico Inns of California, Inc.*, 512 F.2d 1171 (1975), a case relied upon by the Company, made "derogatory and profane remarks" about a manager in the presence of employees and customers, made lewd remarks and gestures, forced another employee to quit due to his sexual advances, became intoxicated and involved in an altercation on the premises, and solicited an employee to engage in prostitution with a customer. *Id*. at 1173. In contrast, Morris, Thomas, and Johnson were not found to be "uncooperative and disruptive," *see id*. at 1175, as the employee had been in *Apico Inns*.[9] Further, none of the purposed "misconduct" cited by the Company here (Br. 37-39) is remotely similar to the circumstances in *Apico Inns*.

[9] Indeed, Thomas, it may be remembered, sent Glaser a letter outlining suggestions to make the store "the best it could possibly be," and Morris was twice

As an initial matter, not all of the "facts" relied on by the Company to argue that the employees should not be reinstated were found to be credible by the administrative law judge. As discussed above, the judge rejected the Company's claims that Morris and Thomas celebrated when they were fired. He further rejected the Company's claim that Johnson called Griffin a bitch in front of customers, finding Griffin's testimony to be "exaggerated to say the least." (JA 27, 31.) The judge also noted that Glaser tolerated another employee calling Griffin that same name in his presence. (JA 31.)

Moreover, not getting along with a supervisor hardly rises to the level of conduct that would deny employees the right to reinstatement to remedy their unlawful discharges. *See Retail Store Employees Union, Local 876*, 570 F.2d at 594 (ordering reinstatement despite "friction" between employee and supervisor). *Cf. NLRB v. Yazoo Valley Elec. Power Ass'n*, 405 F.2d 479, 481 (5th Cir. 1968) (ordering reinstatement where employee challenged supervisor to a fight). Nor would it effectuate the purposes of the Act to penalize employees fired for their protected, concerted activity because the Company continues to employ the supervisor whose actions they protested directly to management and among themselves on Facebook. *See Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977) (ordering reinstatement where "personality clash" between

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chosen employee of the month, including November, the month she was fired. (JA 26; JA 207, 221, 429-31.)

employee and supervisor existed but "conflicts between the two were fueled significantly" by employee's participation in protected activities). *Cf. Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 841 (9th Cir. 1981) (ordering reinstatement where teachers met with parents and handed out leaflets critical of employer's services and facilities).

Finally, contrary to the Company's suggestion (Br. 31), by sending out resumes, Morris did not "unequivocally intend[]to leave [the Company] and move to another job." A mere job search prior to an unlawful firing does not bar an employee from reinstatement. *Campbell Elec. Co., Inc.*, 340 NLRB 825, 826 (2003) (refusing to toll backpay and reinstatement for employee who did not have definitive plans to take another job before being fired).

E. The Employees Complied with the Subpoena; the Company's Arguments Otherwise Are Unsupported in the Record or Not Properly Before the Court

The Company makes a variety of claims (Br. 39-53) regarding the administrative law judge's subpoena rulings, including that the judge erred by partially revoking a subpoena. As an initial matter, before the Board, the Company did not argue that the judge improperly revoked or partially revoked the subpoena. Therefore, Section 10(e) of the Act prohibits the Court from considering such an argument. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66

(1982); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

In any event, the Board's rulings on subpoenas are reviewed for abuse of discretion. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000). Moreover, a party contending that a subpoena has been denied or revoked improperly must demonstrate that the denial resulted in prejudice. *Id*. at 1154. The Company failed to show that the judge abused his discretion or that any of his rulings resulted in prejudice. To the contrary, as described below, the judge properly limited the Company to relevant documents, and employees or their counsel stated on the record that all relevant documents had been provided.

The Company's subpoena, issued on January 17, 2012, requested that Morris, Thomas, and Johnson each provide:

- Printouts of all postings on Facebook since September 1, 2010;
- All documents, including email and text messages "constituting or evidencing any communication" between the employee and other specified employees of the Company, including supervisor Griffin, since September 1, 2010;
- Documents related to applications for unemployment insurance since December 1, 2009;
- Documents related to receipt of unemployment compensation since January 1, 2010;
- All cell phone bills since September 1, 2010.

(Amended motions to quash subpoenas.) In addition, the Company specifically requested that Thomas and Morris provide additional information. From Thomas, the Company demanded copies of documents "showing or reflecting [her] federal social security number"; copies of all W-9 forms she filled out since January 1, 2008, and documents "constituting or evidencing any application for employment" that she made since January 1, 2009. From Morris, the Company demanded documents showing any online posting regarding the Company on Yelp.com since January 1, 2010. (Amended motions to quash.)

At the hearing, the administrative law judge deferred ruling on the request for cell phone records and instructed the Company that they would have the opportunity to obtain documents related to unemployment compensation in any subsequent compliance proceeding. (JA 40-41.) Counsel for the employees averred that, because texts are routinely deleted, no employee had responsive texts going back to 2010. (JA 44-45.) Nor did employees have responsive emails. (JA 44-45.)

With respect to the production of Facebook posts, the administrative law judge stated that he would allow the Company to question witnesses. (JA 44.) But after Company counsel stated that he sought the Facebook posts to show that employees had used Facebook during work time in violation of company policy, the judge cautioned counsel against "fishing" in a "hope to uncover something via

subpoena that will disqualify the alleged discriminatees from employment." (JA 46.) Nonetheless, the judge permitted company counsel to ask Morris whether she had any Facebook posts responsive to the subpoena request that had not been previously provided to the Company. (JA 163-66.) Through those questions, the Company learned that Morris "gave them everything [she] had, evidence-wise, on [her] Facebook" related to the Company (JA 164), and the Company "had all of it" (JA 166). Copies of these Facebook posts were placed in evidence. (JA 370-75, 388-93.)

Thus, the Company's claim (Br. 42) that "the Employees admitted they refused to look for documents responsive to the subpoena" is incorrect. The Company fails to acknowledge that it did not question either Thomas or Johnson about their responses to the subpoena. Nor does it acknowledge that Morris testified she had not made any Facebook posts regarding the Company since her discharge and that the Company already had copies of all relevant Facebook posts.

The Company now states (Br. 41) that it sought Facebook posts in the hopes that they would provide evidence for its conspiracy theory. But absent any supporting evidence of a conspiracy, the Company's request amounted to a mere fishing expedition for such evidence, something that the Board properly does not allow. *See Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727, 732 (D.C. Cir. 1983) (contrasting subpoena requesting testimony from a specific witness about a

specific event to "more generalized 'fishing expeditions' for helpful evidence which have uniformly been rejected"); *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1253 (9th Cir. 1979) (disapproving of "fishing expedition" where party failed to offer specific evidence to support its claims).[10]

The Company (Br. 41) also seeks to blame the General Counsel for supporting the employees' motions to quash rather than "stand[ing] up for [the Company's] legitimate interests." Because the Company never made this argument to the Board, Section 10(e) of the Act prevents the Court from considering it. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002).

In sum, the Company's mere speculation that additional Facebook records would buttress its conspiracy theory falls far short of establishing that the administrative law judge abused his discretion. That is particularly true here where

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[10] Thus, this case is unlike *Ozark Auto. Distribs., Inc. v. NLRB*, No. 11-1320, slip op. 13 (D.C. Cir. Feb. 10, 2015), because there was no indication that the employees had information relevant to the subpoena that they had not already provided. Whereas here Morris testified that she had provided all relevant Facebook posts, the employees in *Ozark* refused to provide requested cell phone records, and one of those employees "gave untruthful testimony at the hearing" related to certain phone calls. *Ozark*, slip op. at 16. Thus, the Court found that the subpoenaed records were relevant to determining what occurred and to impeach the employee's testimony. *Id*. at 10, 16. That is not the case here.

the Company's extensive questioning of Morris about those records establish that she previously provided copies of all Facebook posts related to the Company.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's Order in full.

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May 2015

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DESIGN TECHNOLOGY GROUP, LLC d/b/a BETTIE PAGE CLOTHING and DTG CALIFORNIA MANAGEMENT LLC, d/b/a BETTIE PAGE	)	
Petitioner/Cross-Respondent	)	
v.	)	Nos. 14-1232, 14-1303
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 20-CA-35511
and	)	
VANESSA MORRIS	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,847 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 8th day of May, 2015

UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner	)	Board Case No. 20-CA-35511
and	)	
VANESSA MORRIS	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I certify that on May 8, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, D.C.
this 8th day of May, 2015

STATUTORY ADDENDUM

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National Labor Relations Act, 29 U.S.C. § 151, et seq.

1. NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) . . . .

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 10 of the Act, 29 U.S.C. 160, provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be

Section 10(e) of the Act, continued:

excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.