Ozburn-Hessey Logistics, LLC *and* United Steelworkers Union. Cases 26–CA–070471, 26–CA–077572, and 26–CA–080141

August 26, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND MCFERRAN

On April 26, 2013, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that the Respondent violated Section 8(a)(4), (3), and (1) of the Act when it suspended employee Renal Dotson, and Section 8(a)(3) and (1) when it issued employee Keith Hughes a final written warning and discharged Hughes and employees Deshonte Johnson and Kimberly Pratcher.[3] We adopt the judge's findings, for the reasons she states, that Dotson's suspension and Johnson's termination were unlawful.[4] For the reasons set forth below, however, we reverse and dismiss the allegations involving Pratcher and Hughes.

Facts

1. *Kimberly Pratcher.* For many years, the Respondent accommodated employees who wished to adjust their work schedules so they could work second jobs or attend classes. In August or September 2011, Regional Vice President of Operations Karen White concluded that scheduling adequate staffing "had become a nightmare" because so many employees were seeking work-schedule adjustments. Consequently, she decided to end the Respondent's practice of granting these accommodations.[5]

Around the same time, employee Kimberly Pratcher, who was pursuing a nursing degree, requested a schedule change so that she could attend classes. For several years, Pratcher had sought and received a schedule change at the start of each semester to accommodate her classes. This time, however, as a result of White's change of policy, the Respondent denied her request. Pratcher's supervisor, Nevatta Teague, offered Pratcher a transfer to a position on second shift. Pratcher declined the offer. She testified that moving to second shift would not have helped her because she had a night class one day a week and she would have still needed her schedule adjusted on second shift to attend that class.

Pratcher began to arrive late to work or leave early to attend class. Each time she did so, she received attendance "points." On September 21, 2011, Pratcher arrived at work late, and Teague gave her a written attendance notice stating that she had previously accumulated 13 points, which subjected Pratcher to termination under the Respondent's attendance policy. Pratcher asked Teague if she was "fired now." After speaking with Human Resources, Teague informed Pratcher that she was not discharged because Teague had not followed the Respondent's progressive discipline procedures. Teague gave Pratcher a second written warning notice dated September 21. On September 22, Teague gave Pratcher a final written warning stating that she had 16 attendance points, including 3 points for her late arrival and early departure the previous day. Pratcher told Teague that she had to leave early for class again that day and would amass even more points. Pratcher asked Teague what was the point of her coming back to work if she was going to get

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall amend the judge's Conclusions of Law and Remedy and substitute a new Order and notice consistent with our findings here and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

[3] There are no exceptions to the judge's findings that the discharge of employees Darrington Edwards and Udenise Martin did not violate the Act.

[4] In dissenting from the judge's finding that Johnson's discharge for an alleged safety violation was unlawful, our colleague makes an argument that the Respondent does not make in exceptions and is therefore not properly before the Board for consideration. See, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (Board member's dissenting argument not made by excepting party itself is not procedurally before the Board). Indeed, while the Respondent does except to the judge's finding that the General Counsel met the initial burden of proof under *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), it makes no specific argument at all in support of this exception. Its arguments on brief contest the judge's finding that the Respondent did not meet its rebuttal burden under *Wright Line* of proving that it would have discharged Johnson for jumping over a conveyor belt even in the absence of his union activity. In this respect, we agree with the judge that the credited evidence shows that at the time of Johnson's discharge, the Respondent had no specific rule against crossing conveyor belts and no history of treating this conduct as a serious safety violation in spite of the fact that employees *and* supervisors had been observed engaging in this conduct. Further, we agree with the judge that the other safety violations for which employees had been discharged prior to Johnson's discharge were not comparable.

[5] The decision to stop adjusting work schedules was not alleged to violate the Act, and the judge found nothing "suspect" about that decision.

a discharge notice for the added points. Teague agreed, consulted Human Resources, and returned with a termination notice stating that Pratcher had 19 points, adding 3 points for September 22.

Pratcher supported the Union, but not openly. She once told Teague that she planned to vote for the Union, but she testified that Teague was the only person who knew how she felt about the Union. In May 2011, Pratcher witnessed an exchange between Director of Operations Phil Smith and employee Carolyn Jones, who was passing out union flyers, and between Smith and employee Linda Cotton, who was walking with Pratcher from an employee meeting to their work area. Smith told Jones she had better not conduct union business on worktime, and he told Cotton the same thing. Jones replied that she was on break. Later, Smith asked Pratcher for a statement concerning what she had witnessed. Pratcher told Smith that she did not want to get involved, she just wanted to remain neutral, and she had only heard what Smith said, not what Jones or Cotton said. Nonetheless, Pratcher prepared a written statement at Smith's behest. Pratcher wrote that she had not heard what Jones said to Cotton and that Jones had not said anything to her (Pratcher). Pratcher also wrote that she wanted to remain neutral and that she felt she had been pressured into writing the statement. Before she gave the statement to Smith, Pratcher reiterated to Smith that she wanted to remain neutral. Smith said that he understood, Pratcher handed him the statement, and Pratcher testified that Smith looked upset when he read it. When Teague gave Pratcher the "13 points" notice on September 21, Pratcher added a comment to the notice in which she claimed that the Respondent was unwilling to accommodate her class schedule because she supported the Union. "In support of this claim," she added, "all this changed when Phil Smith asked me to make a statement regarding what happened between himself and Carolyn Jones back in May of this year."

2. *Keith Hughes*. Keith Hughes was an open and vocal union supporter. He wore union shirts and buttons at work and distributed authorization cards and union flyers to other employees. Hughes also testified for the General Counsel in unfair labor practice proceedings against the Respondent.

Prior to August 2011, Hughes had amassed several disciplinary actions in his personnel file. On August 25, 2011, Hughes received a final written warning for making verbal threats. On October 10, 2011, he received another final written warning and a 4-day suspension for replying in a hostile and otherwise inappropriate manner to a work-related inquiry from a supervisor. The judge found the written warnings and the 4-day suspension were lawful, and there are no exceptions to those findings. The judge also observed that Hughes "did not have a good working relationship with his supervisors and managers."

Throughout his employment with the Respondent, Hughes worked a second job at Federal Express. Hughes' starting time at Federal Express was 12:15 a.m. Although Hughes' second job generally did not conflict with his work schedule with the Respondent, the Respondent occasionally required Hughes (and other employees) to work a 12-hour shift ending at 12:45 a.m. For many years, and pursuant to its practice of adjusting employees' work schedules, the Respondent allowed Hughes to leave early from 12-hour shifts so he could report on time to his second job. As discussed above, however, the Respondent decided to eliminate such work-schedule accommodations in August or September 2011. In February 2012, the Respondent became aware that Hughes and two other employees (Malcolm Boyd and Ora McFadden) were continuing to leave early from 12-hour shifts to report on time for second jobs. On March 5, 2012, all three employees were told in a meeting with management that they would no longer be allowed to leave early. Hughes asked on that and later occasions if he could transfer to the first shift in order to avoid a scheduling conflict, but was told he could not. Hughes testified that a few days before the March 5 meeting, Operations Manager Robert Gray had told him there were open positions on first shift. White's testimony also confirmed that one of the options offered to employees who were affected by the change of policy in scheduling was the transfer to a different shift.

On April 9, 2012, a day when Hughes was required to work a 12-hour shift, he clocked out at 9:46 p.m. On April 10, Hughes received a final written warning for a total of 13 attendance points, with a handwritten note stating that if there were any additional attendance issues before April 27, his employment would be terminated. On April 25, Hughes was again required to work a 12-hour shift, but clocked out at 10:04 p.m. He received a notice of termination for a total of 16 attendance points the following day.

Analysis

The General Counsel contends that Pratcher was discharged, and Hughes was issued a final warning on April 10, 2012, and subsequently discharged, because of their union activities and sentiments. The Respondent contends that it took the disputed actions because Pratcher and Hughes accumulated points for attendance infractions warranting the disputed actions under the Respondent's attendance policy. In dual-motive cases such as this one, the Board applies the analysis set forth in

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To prove a violation under *Wright Line*, the General Counsel must make a showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089.[6] If the General Counsel makes this initial showing, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id.[7]

Even assuming that the General Counsel met his initial *Wright Line* burden with respect to Pratcher, we find that the Respondent sustained its *Wright Line* defense burden by showing that it would have discharged her even in the absence of her prounion sentiments. The Respondent followed its progressive discipline policy, and Pratcher's 19 points were more than enough to warrant discharge under the attendance policy.

In finding that the Respondent did not sustain its *Wright Line* defense burden regarding Pratcher's discharge, the judge relied on evidence that other employees amassed more attendance points than Pratcher before being discharged. This ignores the fact that Pratcher was on course to amass more points than any of the comparables cited by the judge in very short order. Pratcher made it clear that she would continue to arrive late and leave early to attend classes. She could not avoid being charged with more points each work day. Pratcher herself acknowledged the situation, telling her supervisor there was no good reason for her to stay on just to accumulate more points. Accordingly, we find that the Respondent met its *Wright Line* defense burden, and we dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging Pratcher.

We reach the same conclusion regarding the final warning and discharge of Keith Hughes. That is, assuming the General Counsel met his burden of proving that Hughes' union activity was a motivating factor in his April 10, 2012 final warning and his subsequent discharge, we find that the Respondent demonstrated it would have issued Hughes the final warning and discharged him even in the absence of his union activities. It is undisputed that Hughes accumulated attendance points warranting both the final warning and discharge. And, like Pratcher, Hughes was on course to continue amassing attendance points. Hughes incurred the points that resulted in his final warning and discharge following the Respondent's decision to stop granting requests to adjust work schedules.

In finding that the Respondent did not sustain its *Wright Line* defense, the judge relied solely on evidence that the Respondent offered other employees transfers to different shifts in order to accommodate their personal schedules but denied Hughes' request to transfer to the first shift—a transfer that would have removed the conflict between Hughes' work schedules for the Respondent and for Federal Express.[8] We agree with the Respondent, however, that neither this theory of violation nor any evidence supporting it was pled or adequately litigated. The complaint alleged that the Respondent violated Section 8(a)(3) and (1) by issuing Hughes written warnings and by discharging him. The complaint did not allege, however, that Hughes was unlawfully denied a transfer; nor did it allege any of the facts related to such a denial. Moreover, at the hearing, the General Counsel did not advance the theory that the denial of a transfer was relevant to Hughes' warnings or discharge. Rather, the General Counsel relied on the Respondent's decision to stop granting to any employees the arrival and departure adjustments it had formerly permitted—a management decision the judge found "reasonable" and not

[6] For the reasons stated above in fn. 4, Member Johnson does not address the issue of the General Counsel's initial *Wright Line* burden for Johnson's discharge. He notes that the outcome of all other discharge allegations discussed here turn on the Respondent's proof in meeting its *Wright Line* rebuttal burden. While not essential to the analysis of any issues presented here, he notes that he adheres to the views expressed in *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53 fn. 2 (2013), concerning the *Wright Line* initial burden. Those views are consistent with the language of *Wright Line* itself, as well as *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012), and the recently decided *Nichols Aluminum, LLC v. NLRB*, --- F.3d ----, 2015 WL 4760303 (8th Cir. 2015), denying enforcement of 361 NLRB 216 (2014).

[7] Member McFerran notes that, contrary to the suggestions of the judge and Member Miscimarra, proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action. See, e.g., *Libertyville Toyota*, 360 NLRB 1298, 1302 fn. 10 (2014); *Encino Hospital Medical Center*, 360 NLRB 3, 5 fn. 6 (2014); *The TM Group, Inc.*, 357 NLRB 1186 fn. 2 (2011); *Mesker Door, Inc.*, 357 NLRB 591 fn. 5 (2011). In addition, although not necessary to this decision, Member McFerran would find from the Respondent's established history of demonstrating its unlawful animus that the General Counsel has met his initial *Wright Line* burden in this case with respect to both Pratcher and Hughes, as well as Johnson. See *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011), enfd. mem. 605 Fed. Appx. 1 (D.C. Cir. 2015) (*Ozburn I*); *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011), enfd. 2015 WL 3369821, —Fed. Appx.—(D.C. Cir. 2015) (*Ozburn II*); *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014) (incorporating by reference 359 NLRB 1025 (2013)) (*Ozburn III*).

[8] The judge also noted that Hughes was not allowed to use personal leave time as he requested on the last occasion he left work early, the day before his discharge.

"suspect."[9] Accordingly, although the Respondent cross-examined Hughes on his testimony that a shift transfer was available for him, the Respondent was not put on notice of any theory that its denial of Hughes' transfer request constituted affirmative evidence of unlawful animus, or that that denial was relevant to its burden of showing that Hughes would have been discharged regardless of his union activity. The Respondent therefore had no reason to believe it had to present additional evidence to refute Hughes' testimony that Gray told Hughes positions were open on first shift—or, if first-shift positions were in fact open, to establish that Hughes would have been denied a transfer in any event regardless of his union activities. On this ground, as a matter of due process, the theory on which the judge relied must be rejected. "'To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case.'" *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)). This notice must be provided in the complaint or on a timely basis in the course of litigation. Because the Respondent was given no reason to believe that the 8(a)(3) allegations concerning Hughes' final warning and subsequent discharge would hinge on its denial of his transfer request until after the record was closed, the requirements of due process were not met here.

Accordingly, for the reasons stated above, we reverse the judge's findings that the Respondent violated Section 8(a)(3) and (1) by issuing Hughes a final warning on April 10, 2012, and by subsequently discharging Hughes, and we dismiss those allegations.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3:

"3. By terminating Deshonte Johnson, the Respondent violated Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by suspending employee Renal Dotson and Section 8(a)(3) and (1) by terminating employee Deshonte Johnson, we adopt the remedies the judge ordered for those unfair labor practices. Additionally, we have decided to issue a broad order requiring the Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.[10] A broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). In *Ozburn I*, *II*, and *III*, the Board found that the Respondent violated Section 8(a)(1) in numerous and varying ways,[11] and Section 8(a)(3) and (1) by denying an employee overtime opportunities and by warning, suspending, and discharging employees because of their union activities. And in the instant case, we have found that the Respondent violated Section 8(a)(3) and (1) by discharging one employee and Section 8(a)(4), (3), and (1) by suspending a second employee. Although the absence of any independent 8(a)(1) violations from this case is a positive development, the Respondent has violated the Act gravely, repeatedly, and in a wide variety of ways. Under the standard set forth in *Hickmott Foods*, supra, we find a broad order warranted here.[12]

We shall also order, as in *Ozburn III*, that the Board's notice be read aloud to employees during working time by Regional Vice President of Operations Karen White and Director of Operations Phil Smith (or, if either or both of them no longer hold those positions, by their replacements) in the presence of a Board agent or, at the

[9] In his opening statement, counsel for the General Counsel stated: "Respondent . . . discharged employee Keith Hughes on April 26th, 2012 after previously issuing him a written warning for attendance issues *based on its refusal to allow schedule adjustments for school or second jobs after it allowed those schedule adjustments for years.*" The General Counsel did not contend that any other form of disparate treatment of Hughes was material before filing his posthearing brief to the judge.

[10] The judge did not recommend such a remedy, and neither the General Counsel nor the Union requested it. It is well settled, however, that the Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies and that it may exercise this authority in the absence of a party's request or exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

[11] In *Ozburn I*, the Board found that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees, soliciting an employee to persuade another employee to abandon her support of the Union, telling an employee she would not work overtime because of her union activities, and threatening an employee with unspecified reprisals if the employee engaged in protected activity. In *Ozburn II*, the Board found that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees, threatening employees with loss of benefits if they selected the Union, telling employees who supported the Union that they should find another job, confiscating prounion literature, threatening employees with job loss if they participated in a strike, threatening employees that selecting a union would be futile, contacting the police to have union agents removed from public property, and ordering offsite employees engaged in distributing union literature to leave the premises. In *Ozburn III*, the Board found that the Respondent violated Sec. 8(a)(1) by threatening employees with discipline and other unspecified reprisals if they engaged in union activities, coercively interrogating employees, engaging in surveillance of union activities, creating the impression that union activities were under surveillance, confiscating union materials from employee break areas, and telling union supporters to resign.

[12] The Board also issued a broad order in *Ozburn III*.

Respondent's option, by a Board agent in the presence of the regional vice president of operations and the director of operations. We find this remedy warranted by the serious and widespread nature of the Respondent's unfair labor practices in *Ozburn I, II*, and *III* and the fact that the Respondent has committed additional violations of the Act. See, e.g., *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

Additionally, we shall order the Respondent to compensate employees Dotson and Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a/ Tortillas Don Chavas*, 361 NLRB 101 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC, Brentwood, Tennessee, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against its employees for their activities in support of the United Steelworkers Union or any other labor organization.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Deshonte Johnson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Renal Dotson and Deshonte Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Renal Dotson and Deshonte Johnson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension of Renal Dotson and unlawful discharge of Deshonte Johnson, and within 3 days thereafter, notify them in writing that this has been done and that their suspension and discharge will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee facilities copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2011.

(g) Within 14 days after service by the Region, hold a meeting or meetings at the Memphis facilities, during working hours, which will be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the unit employees by the Regional Vice President of Operations Karen White and Director of Operations Phil Smith (or, if either or both of them no longer holds those positions, by their replacements) in the presence of a Board agent, or, at the Respondent's option, by a Board agent in the presence of those officials.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues in all respects except one. Unlike them, I would find that the General Counsel failed to prove that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Deshonte Johnson for jumping over a conveyor belt. To prove that Respondent violated Section 8(a)(3) in this regard, the General Counsel must show that animus against union activity was a *motivating factor* in Johnson's discharge. I believe the General Counsel failed to make this showing.

This issue involves several principles that control our evaluation of discharges alleged to result from antiunion discrimination in violation of Section 8(a)(3). Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The two prerequisites in Section 8(a)(3), which must both be proven by a "preponderance" of the evidence,[1] are (i) "discrimination" with (ii) the intention "to encourage or discourage" union membership. As the Supreme Court stated in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967): "The statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation normally turns on whether the discriminatory conduct *was motivated by an antiunion purpose*" (emphasis added).

Our inquiry becomes more complicated when the employer might have dual motives (also sometimes called "mixed motives"), one lawful and the other unlawful. Under the Board's decision in *Wright Line*,[2] the General Counsel has the initial burden to make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*."[3] If the General Counsel satisfies this initial burden, the Respondent must then "demonstrate that the same action would have taken place even in the absence of the protected conduct."[4]

The Board's role is to ensure that employees are protected from antiunion discrimination, especially when it causes the termination of their employment, while recognizing that the Act does not make it unlawful whenever an employer treats employees differently from one another. As the Supreme Court stated in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42–43 (1954):

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. *Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed*.

(Emphasis added.)

In this case, the General Counsel has proven several aspects of his initial prima facie case under *Wright Line*. However, in my view, ultimately it is not enough to establish that union considerations were a "motivating factor" in the decision to discharge Johnson.[5]

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[1] Sec. 10(c).

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] 251 NLRB at 1089 (emphasis added). As I have previously observed, generalized antiunion animus does not satisfy the initial *Wright Line* burden without evidence that the particular challenged employment action was motivated by antiunion animus. See, e.g., *Starbucks Coffee Co.*, 360 NLRB 1168, 1173 fn. 1 (2014) (Member Miscimarra, concurring). The Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line*, 251 NLRB at 1089.

[4] *Wright Line*, 251 NLRB at 1089; see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] My colleagues contend that my dissent regarding Johnson's discharge, in which I find that the General Counsel failed to satisfy his burden to prove unlawful motivation under *Wright Line*, improperly addresses an issue not properly before the Board, and they rely on the fact that the brief supporting Respondent's exceptions contained no argument on this point. I respectfully disagree that this precludes the Board from evaluating whether the General Counsel has sustained his burden of proof here under *Wright Line*. As the majority acknowledges, although the Respondent did not address this issue in its brief, the exceptions filed by Respondent *did* challenge the judge's finding that the General Counsel established a *Wright Line* prima facie case. Nor is there any question that Respondent challenges the conclusion that Johnson's discharge violated Sec. 8(a)(3), and this alleged violation turns on whether there is adequate proof of unlawful motivation. The Board *may* disregard an unargued exception, but it is not *required* to do so. See Board's Rules and Regulations Sec. 102.46(b)(2). Here, in finding that the General Counsel met his burden of proof under *Wright Line*, the judge merely referred to "the record evidence," without *any* explanation. I believe this warrants evaluating the sufficiency of the evidence regarding unlawful motivation and whether the General Counsel satisfied his burden of proof, and these determinations are permissible under Sec. 102.46(b)(2). See *Grand Canyon University*, 362 NLRB No. 13, slip op. at 3 fn. 1 (2015), where I indicated that unargued exceptions might be appropriately addressed by the Board in certain circumstances. Cf. *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

There is no question that Johnson engaged in union activity. As the judge found, Johnson frequently wore a prounion shirt, and he displayed prounion stickers on his shirt almost every day. The openness of Johnson's union activity obviously permits a reasonable inference to be drawn that Respondent knew Johnson was prounion. And there is no shortage of evidence that Respondent harbors generalized antiunion animus—not just in this case, based on the unlawful suspension of employee Dotson, but also in prior cases, in which the Board found that Respondent interfered in multiple ways with the exercise of Section 7 rights and discriminated against several employees because of their union activities.[6] See *Stark Electric, Inc.*, 327 NLRB 518, 518 fn. 1 (1999) (relying in part on violations found in prior case to find antiunion animus in subsequent case involving same employer).

However, union activity, employer knowledge of that activity, and generalized antiunion animus are not necessarily sufficient to establish the General Counsel's initial *Wright Line* case. Again, in *Wright Line*, the Board stated that the General Counsel must, as an initial matter, make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. Generalized antiunion animus does not satisfy the General Counsel's initial *Wright Line* burden absent evidence that the challenged adverse action—here, Johnson's discharge—was motivated by antiunion animus.

Other than a broad reference to "the record evidence described above," the judge's decision provides no explanation whatsoever of her finding that the General Counsel met his burden of proof under *Wright Line* regarding Johnson's discharge. And after reviewing the record evidence, I do not believe the General Counsel established the necessary link or nexus between Johnson's union activity and his discharge.

The judge's decision recites evidence that Respondent was inconsistent in its treatment of employees who, like Johnson, jumped over a conveyor belt. In some instances, employees crossed the conveyor belt and were witnessed doing so by a supervisor, and nothing happened to them at all. In others, employees observed jumping over the conveyor belt were told by Respondent's operations manager that this was not allowable behavior, but they were not disciplined. And a supervisor testified that he issued a verbal warning to an employee he witnessed jumping over the conveyor belt. This evidence shows that other employees were treated more leniently than Johnson. However, the record contains no evidence regarding the union sentiments of these employees.

What the General Counsel had to show, and what is missing from the record, is evidence that other conveyor-belt jumpers were treated more leniently than Johnson *based on union considerations*. There is no evidence concerning the union activities or sympathies of employees who jumped the conveyor line and suffered lesser consequences than Johnson. If all of these other employees, like Johnson, were open union supporters, one cannot infer an antiunion motivation for Johnson's discharge based on their more lenient treatment. Nor is there evidence that these employees were known to be antiunion, which might warrant an inference that antiunion considerations motivated Respondent to discharge the prounion Johnson. There must be something more to transform inconsistent treatment into evidence that links Johnson's discharge for jumping the conveyor belt *to his union activity*. Under Board case law, this "something more" would be evidence that employees who were treated more leniently for committing the same safety violation did *not* engage in union activity or were *anti*-union. See *Watkins Engineering & Constructors*, 333 NLRB 818, 819 (2001) (inclusion of nonunion applicants on list of qualified applicants and exclusion of qualified union applicants from list is evidence that antiunion animus motivated exclusion of union applicants from hiring process).

There is no such evidence here. For all we know, employees treated more leniently than Johnson for jumping the conveyor belt might have supported the Union the same as Johnson. To meet his burden under *Wright Line*, the General Counsel had to show that was *not* the case. Otherwise, there is simply insufficient evidence from which to draw a reasonable inference that Johnson was treated more harshly than others *because of his union activities*.

Accordingly, I would find the General Counsel did not meet his initial *Wright Line* burden to prove that antiunion animus motivated Johnson's discharge. In this regard only, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[6] See *Ozburn-Hessey Logistics, LLC*, 357 1632 (2011), enfd. mem. 605 Fed. Appx. 1 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011), enfd. 2015 WL 3369821 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014).

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for activities in support of the United Steelworkers Union or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Deshonte Johnson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Renal Dotson and Deshonte Johnson whole for any loss of earnings and other benefits they have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Renal Dotson and Deshonte Johnson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful suspension of Renal Dotson and unlawful discharge of Deshonte Johnson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their suspension and discharge will not be used against them in any way.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at www.nlrb.gov/case/26-CA-070471 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

William T. Hearne, Esq. and *Linda M. Mohns, Esq.*, for the General Counsel.

Ben H. Bodzy, Esq., of Nashville, Tennessee, and *Stephen D. Goodwin, Esq.*, of Memphis, Tennessee, for the Respondent.

Benjamin Brandon, of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Memphis, Tennessee, on October 29, 30, and 31, as well as on November 1, 2, and 30, 2012. The United Steelworkers Union (the Union) filed the charge in Case 26–CA–070471 on December 9, 2011, and amended the charge January 17 and April 2, 2012. The Union filed the charge in Case 26–CA–077572 on March 27 and amended the charge on April 5 and 17, 2012. The charge in Case 26–CA–080141 was filed by the Union on May 2, 2012.[1] The Acting[2] General Counsel issued the consolidated complaint on July 13, 2012.

The complaint alleges that during the period between August 24, 2011, and April 26, 2012, Ozburn-Hessey Logistics, LLC (Respondent) unlawfully disciplined employees Darrington Edwards, Keith Hughes, Kimberly Pratcher, Deshonte Johnson, Renal Dotson, and Undenise Martin.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

I. FINDINGS OF FACT

Respondent, a Tennessee limited liability company, with an office located in Brentwood, Tennessee, and a place of business located in Memphis, Tennessee, has been engaged in the business of transportation, warehousing, and logistics services for other employers. During the 12-month period ending June 30, 2012, Respondent, in conducting its business operations, performed services valued in excess of $50,000 for other employers located outside the State of Tennessee and received at its

[1] All dates are in 2011, unless otherwise indicated.

[2] For purposes of brevity, the Acting General Counsel is referenced herein as General Counsel.

[3] The complaint initially alleged that Respondent unlawfully suspended and discharged Latoya Cox. This allegation was withdrawn at hearing.

Memphis, Tennessee facilities goods valued in excess of $50,000 directly from points located outside the State of Tennessee. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operation

Respondent is a provider of third party logistics services. It provides warehousing and fulfillment services for different companies that outsource these functions. Respondent maintains four warehouses in Memphis, Tennessee. Respondent's employees are grouped into "accounts" depending on the customer for whom the service is provided. For each customer, Respondent is contractually obligated to ship out a particular number of items each day. The Memphis, Tennessee operation is overseen by Regional Vice President Karen White and Director of Operations Phil Smith. Prior to October 7, 2011, the human resources department was under the direction of Regional Human Resources Manager Evangelia Young (Young). This position was held by Karen Kousbroek (Kousbroek) from October 7, 2011, until January 1, 2012. Sara Wright began working with Respondent in February 2011 as a human resources generalist. In May 2012, she was promoted to human resources manager for the Memphis facility. Since January 1, 2012, Shannon Miles (Miles) has functioned as both senior employee relations manager and senior human resources manager for the South Region. Miles maintains an office at Respondent's corporate headquarters in Brentwood, Tennessee.

B. Background

Prior to the hearing in the instant matter, three other hearings were conducted in connection with prior charges filed by the Union against Respondent and two representation elections were conducted. The interaction between the Union and Respondent began in May 2009 when the Union began an organizing campaign at Respondent's three facilities. On September 25, 2009, the Union filed a petition to represent Respondent's employees and an election was ultimately held on March 16, 2010. A majority of votes were not cast for the Union and the Union subsequently filed objections to the results of the election.

On January 27, 2010, Region 26 of the National Labor Relations Board issued a complaint against Respondent alleging that Respondent had engaged in various acts in violation of Sections 8(a)(1) and 8(a)(3) of the Act.[4] In February and March 2010, Administrative Law Judge (ALJ) George Carson conducted a hearing concerning these allegations. On May 20, 2010, ALJ Carson issued his decision, finding that Respondent engaged in various acts in violation of Section 8(a)(1) of the Act. ALJ Carson also found that Respondent unlawfully suspended one employee and unlawfully terminated two other employees. One of the employees found to be unlawfully terminated is Renal Dotson; an alleged discriminatee in the current case. On December 9, 2011, the Board upheld ALJ Carson's decision.[5]

On December 27, 2010, ALJ John West issued a decision,[6] finding that Respondent engaged in violations of Section 8(a)(1) through its statements to employees and also violated Section 8(a)(3) by unlawfully terminating one employee and refusing to allow another employee to work overtime. ALJ West also sustained the Union's objections to the March 16, 2010 election and ordered a rerun election. On July 1, 2011, the Board approved the Union's request to withdraw its petition in the outstanding representation case. The Board otherwise affirmed ALJ West's decision on November 30, 2011.[7]

On August 18, 2010, the Regional Director for Region 26 of the Board filed a petition for a temporary injunction against Respondent based on the unlawful conduct found by ALJ's Carson and West. The injunction was granted by United States District Judge Samuel H. Mays Jr. on April 5, 2011. With respect to the employees who were the subject of the ALJ decisions, Judge Mays ordered reinstatement[8] and the temporary expungement of discipline records. Judge Mays' order also included a cease-and-desist order prohibiting further unlawful conduct.

On June 14, 2011, the Union filed a petition seeking to represent Respondent's employees and an election was held on July 27, 2011. The Union won the election by a single vote. There were 14 challenged ballots; 6 challenges by the Union and 4 challenges by Respondent. On August 3, 2011, both the Union and the Respondent filed objections to Respondent's conduct during the period between the first election and the second election.

The third hearing that preceded this current matter was held in October and November 2011 and was conducted by ALJ Robert Ringler. This hearing involved the discharge of one employee and the discipline of another employee. The hearing also involved various allegations of 8(a)(1) conduct, as well as, the union's objections to the July 2011 election. Judge Ringler ordered the reinstatement of the discharged employee and the expungement of discipline for the discharged employee and the employee who had been disciplined. Based on Judge Ringler's findings with respect to the alleged 8(a)(1) conduct, Judge Ringler also found merit to 9 of the union's 19 objections. Judge Ringler did not find merit to Respondent's objections. He found that six of the challenged voters were eligible to vote and recommended that their challenged ballots be opened and counted. He also found that in the event that the union did not win the election, a third election should be held. As of the date of this decision, the Board has not ruled on ALJ Ringler's 2012 decision.

[4] The underlying charges were Cases 26–CA–023497, 26–CA–023539, and 26–CA–023576.

[5] *Ozburn-Hessey Logistics*, 357 NLRB 1632 (2011).

[6] The decision was based on the charges filed in Cases 26–CA–023675 and 26–CA–023734.

[7] 357 NLRB 1456.

[8] The order also directed Respondent to allow the employee who had previously been denied the opportunity to work overtime to resume working overtime when work was available.

C. Issues and Prevailing Legal Authority

The instant case involves separate discipline issued to six employees.[9] The circumstance for each employee's discipline is independent and unrelated to the discipline for other alleged discriminatees. The General Counsel alleges that each of these employees were disciplined because of their union activities and sentiments and/or because they testified in an unfair labor practice hearing. Because the Respondent's motive is an integral factor in determining the lawfulness of the discipline issued to each of these employees, it is necessary to use what has come to be known as a *Wright Line* analysis.[10] The *Wright Line* analysis is based on the legal principle that an employer's motivation must be established as a precondition to finding an 8(a)(3) or an 8(a)(4) violation. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, above at 1089.

Under *Wright Line*, the General Counsel must establish certain elements by a preponderance of the evidence. The General Counsel must show the existence of activity protected by the Act and that the Respondent was aware that the employee had engaged in such protected activity. In addition to showing that the employee in question suffered an adverse employment action, there must be some link or nexus between the employees' protected activity and the adverse employment action.[11] *Tracker Marine, L.L.C.*, 337 NLRB 644, 646 (2002). This nexus, however, must rest on something more than speculation and conjecture. *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 839 (2006). Although direct evidence of unlawful motivation is seldom available, it may be established by circumstantial evidence; permitting an inference to be drawn therefrom. *Abbey Transportation Service*, 284 NLRB 698, 701 (1987).

Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services*, 346 NLRB 1099 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

One need only to read through the history of prior litigation detailed above to see that Respondent has not viewed the Union's presence favorably. I don't believe that Respondent would dispute the fact that it has resisted the Union's efforts to organize its employees. In analyzing the Respondent's discipline of these six employees, I am also mindful of the fact that an employer's resistance to its employees' organizing efforts does not, of itself, establish the illegality of its actions toward these employees. If an employee provides an employer with a sufficient basis for discipline by engaging in conduct that would, in any event, result in discipline, the employer's welcoming the opportunity does not render the action unlawful. *Avondale Industries*, 329 NLRB 1064 (1999); *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

All of the alleged discriminatees were either known by Respondent to be outspoken union supporters or known to have otherwise engaged in some protected activity. For the reasons that I have discussed below in addressing each alleged discriminatee, I find that the General Counsel has met the initial burden imposed by *Wright Line* for the alleged discriminatees with the exception of Darrington Edwards and Undenise Martin. With respect to its discipline of Darrington Edwards, Undenise Martin, and two incidents of discipline for Keith Hughes, I find that Respondent met its burden in demonstrating that it would have issued the discipline in the absence of these employees' protected activity. I do not find that Respondent has met its burden to show that it would have suspended Renal Dotson or that it would have terminated Deshonte Johnson, Kimberly Pratcher, and Keith Hughes in the absence of their protected activity.

D. Renal Dotson's Discipline

Renal Dotson began working for Respondent in March 2009. He worked as a lift truck operator in what was termed the Fiskar's department during his entire employment with Respondent. As referenced above, he was a named discriminatee in the case heard by ALJ Carson and he was reinstated at Respondent's facility in April 2011 pursuant to ALJ Carson's decision and order. After his reinstatement, Dotson testified for the General Counsel in the hearing that was held from October 31 to November 4, 2011.

1. Dotson's union activity

Respondent does not dispute that Dotson was a known union adherent. The General Counsel submitted into evidence an August 2009 email written by Regional Human Resources Manager Young in which she described Dotson as one of the disruptive individuals working hand in hand with the crew that was trying to drive a union into Respondent's Memphis facility. In an August 2009 memo describing Dotson's termination, as well as the discipline of other employees, Young identifies the Fiskars' department as the hot spot for union organization. She noted that since the initiation of the union activity at the facility Dotson had become very aggressive and had acted completely insubordinate to the account's operation manager and the su-

[9] The consolidated complaint also alleged that Respondent unlawfully suspended and terminated Latoya Cox. The General Counsel withdrew these allegations at hearing.

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[11] In more recent decisions, the Board has observed that Board cases typically do not include the fourth element as an independent element. *Praxair Distribution, Inc.*, 357 NLRB 1048 fn. 2 (2011); *Wal-Mart Stores*, 352 NLRB 815 fn. 5 (2008) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407 fn. 2 (2008)).

pervisor. HR managers and the operations manager had spoken to Dotson and advised him that the continuation of this behavior would lead to his termination.

2. The events that led to Dotson's 2011 suspension

a. The November 14, 2011 preshift meeting

In November 2011, it was the practice for the Fiskars' department supervisor to conduct a meeting with employees at the start of the shift beginning at 8 a.m. On November 14, 2011, Director of Operations Phil Smith (Smith) attended the meeting with Fiskars Supervisor Greg Harvey. Smith's purpose for attending the meeting was to announce to the employees that Senior Manager Leroy Heath was no longer with Respondent and that until the position was filled Smith would serve as the operations manager for the account. During the meeting, employees stood in a semicircle facing Harvey and Smith. Dotson estimated that the employees were approximately 3 to 16 feet away from Harvey and Smith. Harvey began the meeting with work instructions and assignments for the day. When he concluded his announcements, he turned the meeting over to Smith. Smith recalled that when he began speaking, Dotson turned his back to Smith. Both Dotson and Smith testified that Dotson was taking notes during the meeting. Dotson contends that he was using a box on one of the racks in an aisle as a base for his notebook.

Dotson and Smith's recall of their interaction during the meeting varies. Smith testified that when he noticed that Dotson was turned away from him, he said, "Renal. . . . Will you please turn back and face me while I am addressing the group." Smith recalls that while Dotson briefly turned to face him, he again turned away from Smith. Smith testified that he again told Dotson, "Renal . . . You need to turn around and face forward while I am speaking to the group. You need to pay attention." Smith recalled the Dotson again turned to face him briefly and then turned away again when Smith resumed speaking. As Smith again addressed Dotson stating, "Renal," Dotson looked over his shoulder and said, "That's Mr. Dotson to you." Smith told him "No, it is Renal. You need to turn and face forward while I'm speaking to you." Smith testified that when Dotson replied that he did not have to turn around to look at Smith, Smith told him to go to human resources while the meeting concluded.

Dotson does not dispute that during the meeting he was facing away from Smith and Harvey while he was taking notes and he testified that it was necessary for him to look over his left shoulder to look at Harvey and Smith. Dotson testified that Smith called out to him three times during the meeting. Dotson asserted that each time Smith simply called out "Dotson" without saying anything else and each time Dotson turned his head to the left to look at Smith. Dotson recalled that when Smith called out his name a third time, Dotson turned around and threw up his hands. He described the gesture as conveying, "what you want?" He contends, however, that he did not say anything in response to Smith. He recalls that Smith simply told him to go to human resources (HR.)

b. Dotson's conduct in human resources

Smith stopped the meeting and telephoned Senior Human Resources Manager Karen Kousbroek to let her know that he was sending Dotson to HR for a meeting. On his way to HR, Dotson walked through the breakroom and took his cell phone from his locker. While still in the breakroom, Dotson telephoned Union Organizer Ben Brandon. He continued talking with Brandon as he entered the area outside Kousbroek's office. Dotson continued his conversation with Brandon while he was seated outside Kousbroek's office. Dotson recalled that while he was on the phone Kousbroek came out of her office and told him "get off the phone." He contends that he stayed on the phone for approximately 10 more seconds and only long enough to tell Brandon that he had to get off the call. Dotson testified that Kousbroek told him only once to "get off the phone." Dotson recalled that he simply sat in HR for another 3 or 4 minutes before Smith and Harvey entered HR and went into Kousbroek's office.

Regional Vice President of Operations Karen White's office is located four offices away from the HR office. When she is seated at her desk, she faces the area where Dotson was sitting outside the HR office. White recalled that she looked up from her computer when she heard Dotson speaking loudly on his cell phone. White was looking at Dotson when Kousbroek came out of her office to speak with Dotson. White heard Kousbroek tell Dotson that he was on the clock and he needed to turn off his phone. White testified that Dotson continued talking and Kousbroek again stated that he was on company time and he needed to turn off his phone. White estimated that after 2 or 3 minutes Dotson laid his phone in his lap. Near that same time, she saw Harvey and Smith come into the HR area. HR coordinator Megan Ferrone testified that she observed Dotson enter the HR area talking loudly on his phone. She testified that she heard Kousbroek tell him to turn off his cell phone.

When Harvey and Smith arrived in the HR area, they went into Kousbroek's office and told her what had occurred in the work area. When Dotson was called into Kousbroek's office, Smith, Harvey, Dotson, and Kousbroek seated themselves at a round table. Smith and Kousbroek were seated directly across from each other. When Dotson denied that anything occurred during the employee meeting, Kousbroek asked Smith to detail the events of the meeting. During the time that Smith spoke, Dotson turned in his chair away from Smith and faced Kousbroek. At the end of the meeting, Kousbroek told Dotson that because he was insubordinate, he would be suspended for 2 days.

When Dotson left Kousbroek's office, he went back down the hall and into the break area. White recalled that about 20 seconds later Dotson came back into the HR area speaking loudly on his cell phone. He stopped in the hallway and told Kousbroek that he needed his paperwork. Kousbroek told him that there was no paperwork and that he should simply come back to work the following Wednesday. Continuing his telephone call, Dotson stated, "It's all good. We'll just file another charge."

3. Conclusion concerning the lawfulness of Dotson's suspension

Respondent asserts that Dotson was suspended for 2 days because he deliberately disregarded the instructions of management twice in one morning. Smith testified that Kousbroek made the decision to suspend Dotson while he was in the office and without consulting with Smith or any other manager.

There is no dispute that Respondent was aware of Dotson's union and protected activity. Dotson was a named discriminatee in Case 26–CA–023497 where ALJ Carson found his discharge to be unlawful. Respondent was required to reinstate Dotson pursuant to the order of the United States District Court. Thus, the first two elements of the *Wright Line* analysis are fully met inasmuch as Respondent was well aware of Dotson's protected activity. As early as August 2009, Regional HR Manager Young described Dotson as a "real disruptive individual" who was "working hand in hand with the crew that is trying to drive a union into OHL[12] Memphis." Clearly there was early animus toward Dotson and such animus could only grow stronger after his discharge was found unlawful by ALJ Carson and his reinstatement was ordered by the District Court Judge. Thus, the General Counsel has clearly met his burden under the initial prong of the *Wright Line* analysis.

Respondent asserts that there is no evidence that any employee has ever been insubordinate twice within an hour and has not been suspended. Respondent maintains that Dotson was insubordinate with two different managers in two separate incidents within the first hour of the workday and that the suspension was an appropriate sanction for his blatant insubordination. Dotson's suspension notice cites Dotson's behavior in the pre-shift meeting as turning his back on Smith, refusing to pay attention, and disrupting the meeting by his actions. The notice further notes that Dotson continued to talk on his cell phone in the office after he had been told to turn off his cell phone.

Certainly an employee's insubordination is a behavior that may arguably justify an employee's discipline. Respondent's evidence concerning Dotson's alleged insubordination, however, includes conflicting accounts. It is undisputed that Dotson took his notebook to the meeting and took notes during both Harvey's comments and Smith's comments to the group. There is no evidence that Harvey raised any issues or made any comments to Dotson for taking notes during his comments to the employees. Dotson denies that he assumed a different position when Smith spoke to the employees. He testified that he was taking notes while Smith spoke, just as he had been doing during Harvey's remarks to the employees. Smith testified that as Harvey and he spoke the employees were standing in a semicircle around them. Smith asserts that when he began to speak, Dotson turned a quarter-turn away from him. Supervisor Harvey would have been the most likely person who could have corroborated Smith. Neither Harvey nor any of the employees present were presented as witnesses to corroborate Smith's testimony. The discipline notice to Dotson notes that other than turning his back to Smith, Dotson refused to pay attention to Smith and disrupted the meeting. Smith's testimony, however, reflects that the disruption in the meeting came when Smith repeatedly stopped his presentation to the employees to call out to Dotson. There was no evidence that Dotson made any comments during the meeting other than to respond to Smith when he continued to call Dotson's name. Thus, the "insubordination" relied on by Respondent was Dotson's nonverbal action in writing in his notebook with his body turned a quarter turn from his earlier position during Harvey's comments.

Dotson did not deny that he obtained his cell phone on the way to the HR office and that he telephoned Union Organizer Ben Brandon as he walked into the area outside Kousbroek's office. Dotson admits that Kousbroek told him to get off the phone. He testified that he did so as soon as he explained to Brandon that he had to end the call. Rather than presenting Kousbroek as a witness to testify about her conversation with Dotson, Respondent presented Regional Vice President White and HR Coordinator Megan Ferrone, who gave differing descriptions of what occurred between Dotson and Kousbroek. At the time of the incident, White was working at her computer in her office. White observed Dotson sitting in a chair at the end of a hallway; an area that is four offices further down the hallway from her office. White asserts that she heard Kousbroek ask Dotson twice to turn off his cell phone. HR Coordinator Ferrone testified that when Kousbroek told Dotson to turn off his phone, he quit talking and he told her that the cell phone was off. Ferrone recalled that at that point, Kousbroek called Dotson into the office.

Counsel for the General Counsel submits that Respondent did not present evidence to show that employees who engaged in conduct similar to Dotson had been suspended or even disciplined, especially where, as in the instant case, Dotson had no prior related discipline. Respondent submits that it previously suspended Tiffany Robinson for 3 days for refusing to drive to another facility to report to work as instructed. Counsel for the General Counsel submitted evidence to show that some employees used their cell phones in the warehouse work area after they had already been warned for doing so. While the employees received warnings, they were not suspended for their violation of the cell phone policy. Counsel for the Respondent asserts in brief that while Respondent has issued discipline to employees for violating the Company's policy on cell phone use, no comparison can be made to those disciplinary actions because Dotson was suspended for insubordination; not for using his cell phone when he should not have been using it. Counsel for the General Counsel submitted into evidence employee performance reports related to Respondent's discipline of employees for improper conduct. In January 2006, employee Ashley B. was given only a verbal warning for her conduct during a team meeting. This employee is alleged to have used profanity in a negative tone toward management. In September 2006, employee Marquita J. was given a final warning. She is reported to have acted rudely when given work instructions. She was reported to be overly aggressive in tone and she continued to talk after being instructed to hold any and all comments until after the preshift meeting. Later in the day, the same employee became angry when her supervisor asked her to return to her work area. When the employee was asked to go into the office, the employee refused stating "Hell No" and she added that she would see the supervisor after her first break.

[12] OHL refers to Ozburn-Hessey Logistics, LLC.

Although these employees' behavior was not characterized as insubordination in their disciplinary notices, it is apparent that other employees have not only been disruptive in meetings, but clearly defiant, rude, and noncompliant, and yet were not suspended.

Overall, I do not find that Respondent has met its burden in demonstrating that it would have suspended Dotson in the absence of his union and protected activity. As evidenced by his parting words when he left Kousbroek's office, Dotson has demonstrated an attitude of invincibility based on his prior reinstatement. I have no doubt that the working relationship between Dotson and Smith is less than amiable and that Dotson has openly displayed his disdain for Smith. Nevertheless, while Dotson's body language may have demonstrated a lack of deference for Smith and his demeanor may have been surly, the evidence does not support that Respondent would have suspended him in the absence of his prior protected activity. Accordingly, I find that Dotson was unlawfully suspended on November 14, 2011.

E. The Discipline Issued to Darrington Edwards

1. Background

Respondent suspended Darrington Edwards (Edwards) on August 24, 2011, and later terminated her employment on March 28, 2012. The General Counsel alleges that Respondent violated the Act by issuing both disciplines and asserts that she was disciplined only because of her union support and activity. Respondent contends that Edwards was a miserable employee who was constantly negative and complaining, starting rumors, and cursing her coworkers. Respondent submits that Edwards' discipline resulted only from her own conduct.

Edwards began working for Respondent in 2001. At the time of her August 2011 suspension, Edwards worked in the ALSAC department. At the time of her discharge, she worked in the Waterpik department. Edwards was employed with Respondent during the campaign periods for both elections. She testified that she wore prounion shirts usually once a week and that she also wore prounion buttons and pins every day on the lanyard holding her employee badge. Edwards testified that on the day of the July 2011 election, approximately 10 or 11 of the 12 employees in the ALSAC account department and "basically" the "whole" Easton-Bell account department wore pro-Respondent shirts while she did not.

2. Edwards' suspension

a. Edward's interaction with other employees

Michelle Blaine (Blaine) was employed at Respondent's facility for almost 2 years. She left her employment with Respondent on November 24, 2011. Blaine trained Edwards when Edwards transferred into the ALSAC department. I take judicial notice that the American Lebanese Syrian Associated Charities (ALSAC) is the exclusive fund-raising organization of St. Jude Children's Hospital. Blaine testified that Edwards made her life at Respondent's facility a "living hell." Blaine explained that because her daughter was a patient at St. Jude the ALSAC orders for St. Jude had a lot of meaning to her personally and she had taken her job in ALSAC especially seriously. Blaine proved herself in handling the large number of ALSAC orders and she was usually assigned to handle the high volume and last minute orders. Blaine testified that Edwards told other employees that Blaine was getting all the orders because she was the supervisor's and the lead's pick or favorite employee. Edwards told employees that Blaine was "fucking" the department lead in order to get a higher promotion in the job. Blaine testified that Edwards not only made these kinds of comments to others, but she also made them at times when Blaine could easily overhear her. Blaine recalled that she went into the bathroom several times to cry and to keep herself from responding to Edwards. Blaine testified that Edwards not only used profanity toward her, but she also used profanity toward her supervisors and others. On July 21, 2011, Blaine provided a 10-page statement to management outlining her concerns about Edwards. On this same day, Blaine asked if she could transfer to another department to get away from Edwards. On August 23, 2011, Blaine gave management two additional statements concerning Edwards. In one of the statements Blaine stated that she didn't want to cause Edwards to be fired, she simply wanted Edwards to leave her alone. Blaine stated, "I just need her to leave me alone, please, that's all I want." In a statement written on August 31, 2011, Blaine wrote about how stressful her job had become dealing with Edwards and her feeling that she was ready to resign. She ended the statement by stating, "How can one person be so mean."

Lauren Keele worked with Edwards in the ALSAC department on a daily basis. She described Edwards as "horrible to work with" and exhibiting a negative and unpleasant attitude. Keele recalled that Edwards cursed her and others in the department and her favorite phrase was "shit, damn, fuck." Numerous times Keele overheard Edwards talking about Blaine and their lead and telling employees that Blaine was "fucking Robert." In a meeting with Senior Employee Relations Manager Shannon Miles, Keele reported that Edwards made her feel uncomfortable. Keele related that Edwards became easily angered and used profanity toward other employees. She told Miles that Edwards talked negatively about supervisors and other employees.

b. Management's investigation

Miles testified that she met with Blaine on July 21, 2011, to discuss Blaine's concerns about Edwards. Blaine reported to Miles that Edwards had harassed and cursed her and had made comments about her to other employees that caused her to feel uncomfortable at work. Miles recalled that Blaine cried throughout the entire meeting. Miles followed up the meeting by speaking with Edwards' supervisor and manager, as well as other witnesses identified by Blaine. Keele also reported to Miles that Edwards used profanity, pitted employees against each other, and seemed to always try to stir up trouble. Rose Greer confirmed to Miles that Edwards was very negative and said things to her coworkers to upset them. Miles met with Manager Jim Windisch and Supervisor Jay Walker who both confirmed that they had spoken with Edwards about the issues raised by Blaine and Keele.

On August 17, 2011, Miles met with Edwards concerning the employees' complaints. Edwards testified that during the meet-

ing Miles told her that employees complained that she was obnoxious and used a lot of profanity; including calling other employees bitches. Miles told her that employees did not want to work with her. Miles recalled that she told Edwards that employees complained that she was negative and wouldn't leave them alone. She told Edwards that employees were especially concerned because she cursed them and spread rumors about their personal lives. Edwards essentially denied that she had engaged in such conduct, however, she acknowledged that she believed that other employees were treated "special." She also admitted that she used the phrase "shit, damn, fuck" but asserted that it was simply a joke.

When Miles had spoken with Edwards' manager and supervisor, they confirmed that this conduct had been going on for some time and that they had multiple conversations with her about these issues. They reported that when confronted with these issues, Edwards had always said that she would stop or she would deny that she had engaged in the behavior. When Miles asked them why they had not disciplined Edwards, they told her that HR had not approved it. After speaking with Edwards, and based on the nature of the comments that she made to the other employees, Miles decided to give Edwards a final warning. Edwards received the warning on August 18, 2011.

During the following weeks, Miles received additional complaints from employees about Edwards. Because of separate incidents involving Edwards, Blaine spoke with Miles twice on August 23, 2011, to share additional concerns. Keele observed Edwards leaving the office area screaming and yelling. Keele shared with Miles that she overheard Edwards yelling, "They can't get me out of here. I don't need a bandwagon. Do you hear me? They got to do better than that." Keele was not certain, but Edwards may have said "Lauren, y'all got to do better," but she was not sure. Miles also met with Easton-Bell account lead Michael Jamison who said that Edwards told him that a few employees in ALSAC were trying to get her fired and they had gone to HR telling lies about her. Laverne Harris also gave Miles a statement on August 24, 2013, concerning Edwards 'comments to employees in the breakroom. Harris recalled that Edwards described another employee as a "f-ing white bitch" who told lies on her to HR.

On August 24, 2011, Miles, Supervisor Walker, and Manager Windisch met with Edwards. Edwards denied that she told anyone that employees in ALSAC were trying to get her fired and she denied making any statements about the employees. When Miles asked Edwards why other employees would make up such comments, Edwards replied that they were simply jealous of her. After meeting with Edwards and talking with the other employees, Miles decided that further discipline was needed. Miles testified that she decided that a suspension might help Edwards to see the seriousness of the situation and that hopefully she would stop doing what she had done.

3. Edwards' termination

a. The March 12, 2012 incident

After Edwards returned to work from her suspension, she was transferred to the Waterpik department where she remained until her discharge. Respondent submits that she was transferred in order to give her a fresh start with different employees. On Wednesday, March 12, 2012, Edwards was assigned to the "blast station" where she was working near fellow employee Seth "Rocky" Gibson. A blast station is an area in which packages are scanned, given shipping labels, and placed on pallets for shipment to customers. The area in which Edwards was working had two aisles of blasting stations with the stations on each aisle near each other. On March 21, 2012, Edwards recalled working at a blast station and Gibson was working at the blasting station immediately next to her. There were three radios blaring, and they were all on different stations. Gibson testified that all of the radios were turned to high volume and he was beginning to get a headache. He asked Edwards to turn her radio down. Edwards replied, "Fuck you." Although she added the words "I'll do me and you do you," he didn't understand what the random sounding words meant. He confirmed that her first response "fuck you" was pretty clear, however. Gibson told her that all he wanted was for her to turn her radio down. Gibson testified that he was also having a bad day and he decided not to respond or say anything explosive. Employee Cobra Watkins testified that she was sitting at a desk next to the blasting stations and overheard the conversation between Edwards and Gibson. Watkins testified that she heard Edwards curse Gibson and call him a "white mother fucker." Edwards recalled that Gibson asked her to turn down her music and that he was tired of listening to the music. She testified that she told him that if he were so tired of listening to the music he could just "lay out and kick." She denied that she cursed him.

b. The March 23, 2012 incident

On Mach 23, Gibson was working in an area other than the blasting station. Using his pallet jack, he picked up a pallet to finish an order that he was filling. Before he could do so, however, he was stopped by the department manager and supervisor and informed that the pallet that he intended to use was for a different order. They directed him to a different pallet so that he would not interfere with the inventory. As he did so, he observed Edwards as she was starting to make the same mistake and pick up the wrong pallet. He recalled that he went over to her and told her to be careful not to grab the wrong pallet because the supervisors had just cautioned him about making the same mistake. He testified that she looked him "dead in the eye" and said 'If I wanted your fucking help, I would have asked you for it." To which Gibson responded "What the fuck did I do?" Gibson recalled that Edwards responded, "Don't play dumb with me. You know exactly what you done." Fellow employee Tara Neal was nearby and intervened, telling them both to be quiet.

In describing her interaction with Gibson on March 23, 2012, Edwards recalled that there had been an earlier discussion with Gibson before the incident with the pallets. Edwards testified that she had been working with Tara Neal and they were having problems getting a product scanned. When Gibson came by their work area and saw that they were having problems scanning the product, he told them what they needed to do. Edwards testified that she asked Gibson "Are you trying to tell me what to do?" Edwards recalled that when he said "I'm just trying to help you people," she told him that she didn't need his

help. Edwards contends that he responded, "Well, fuck you then." Edwards testified that the conversation ended when she told him to get away and she left the aisle.

c. Management's response to the Alert Line call

Respondent maintains an 800 telephone number for employees to anonymously report any serious issues or anything that they might not feel comfortable taking personally to HR. The line is known as the Alert Line and information on accessing the number is posted throughout Respondent's facility. The calls initially go to the director of field services and then are sent out to field operations for investigation. On March 22, 2012, an Alert Line call reported that employees Darrington Edwards, Tara Neal, Anthony Stewart, Eric Collins, and Carol Sorrell used vulgarity in the workplace. The complaint was forwarded to Regional HR Manager Sara Wright to investigate. Wright went to the Waterpik department on March 23, 2012, to talk with the employees who had been named in the call. Wright told them that there had been a complaint and reminded them that professional language is to be used in the work place at all times. She also told the five employees that she planned to speak with all of the employees in the Waterpik department to advise them of the same policy.

During Edwards' conversation with Wright, Edwards told Wright that Gibson had used the words "you people" when talking with her earlier and she believed that it was a racist comment. It was the end of the day when Wright finished speaking with Edwards and it was Wright's intention to return to the Waterpik department on Monday, March 26, to continue the investigation. On March 24, however, another Alert Line call was received. The caller complained that Edwards had confronted Gibson using profanity and offensive racial comments. On March 26, Wright met with all of the employees in the Waterpik department. She reminded them that everyone is expected to use professional language in the workplace and she told employees that they should notify management if anyone said anything to them that is inappropriate. Following the meeting, Wright met with not only Edwards and Gibson, but also Cobra Watkins, Jill McNeal, Mashaundra Savage, Eric Collins, Carol Sorell, Tara Neal, and Pat Nash.

Neal confirmed that she had been present on March 23 when Gibson had offered advice on scanning the product. Neal recalled that Edwards told Gibson that he could not tell her how to do her job because she knew how to do her job. Gibson had told her that he was not trying to tell her about her job, he was trying to help her. Neal recalled telling them both to be quiet and she asked Edwards not to say anything else.

When Wright spoke with the employees about what they may have heard concerning the radio incident, the employees had varying recall of the words that were used but essentially confirmed Edwards' use of profanity. Jill McNeal recalled that when Gibson asked Edwards to turn down the radio, Edwards told him that she didn't care about him or give a damn about what he thought and she told Gibson to "go fuck" himself. Mashaundra Savage recalled hearing Edwards tell Gibson, "Fuck you. Don't bring your ass over here." Cobra Watkins overheard Edwards say "Fuck you. Don't worry about me mother fucker." According to Eric Collins, Edwards said, "Take your ass home if you don't like it." Collins also recalled that Edwards called Gibson a "stupid motherfucker." McNeal and Savage confirmed that they did not hear Gibson curse in response to Edwards' statements. Carol Sorrels could not remember what Edwards and Gibson said to each other and Pat Nash denied seeing or hearing any of the conversation.

d. Respondent's decision to terminate Edwards

Wright testified that she had determined that there was not sufficient evidence to show that Edwards cursed Gibson in the aisle incident of March 23 because there were no witnesses to support Gibson's claim. Based on her interviews with witnesses, she determined, however, that there was sufficient evidence to show that Edwards cursed Gibson and acted unprofessionally during the radio incident on March 21. Her investigation confirmed that there were witnesses that corroborated Gibson's version of what occurred with the radios. Wright testified that she made the decision to terminate Edwards. She explained that she did so because Edwards had previously been placed on a final warning and given a suspension for disruptive behavior in the workplace and inappropriate language. Because there were witnesses who corroborated that she had again engaged in the same conduct, Wright determined that termination was appropriate.

e. Conclusions concerning the lawfulness of Edwards' discipline

There is no evidence that disputes Edwards' assertion that she openly expressed her support for the Union. Crediting her testimony that she routinely and openly wore the union buttons and shirts, Respondent would certainly have known that she supported the Union. Thus, the first part of the *Wright Line* analysis is met. There is no evidence of direct animus toward Edwards because of her union support and there is no clear nexus from Edwards' union activity and the discipline issued to her. Thus, the evidence does not support a finding that animus because of Edwards' union activity was a substantial or motivating factor in the decision to suspend her or discharge her. Assuming for the sake of argument, however, that the General Counsel had established a prima facie case that Wright's discipline was motivated by her union activity, the overwhelming evidence supports a finding that Respondent would have suspended and terminated Edwards in the absence of any union activity.

With respect to Edwards' suspension, I find that the credible evidence supports that Respondent issued the discipline because of her disruptive behavior and not because she engaged in any protected activity. Counsel for the General Counsel contends that the complaints made by Blaine and Keele against Edwards were petty and minor issues within the context of their work and that they both overreacted to Edwards and grossly exaggerated their claims against her. I find no merit to this argument. Both individuals credibly testified in great detail concerning their difficulties in working with Edwards. Even though Blaine had not worked with Edwards for almost a year, she nevertheless became tearful and distraught as she relived her work experiences with Edwards in giving her sworn testimony. She credibly described how Edwards had tormented her

day after day. It is reasonable that if she demonstrated this same level of distress when she spoke with Miles and the other managers, Miles had reason to conclude that Edwards was a disruption on the work floor. In Blaine's 10-page summary given to Respondent, she urgently requested a transfer away from Edwards and begged that Edwards would leave her alone. At the time of her testimony, Blaine no longer worked for Respondent and had no reason to fabricate her testimony to ingratiate herself to Respondent. I credit Blaine's testimony in its entirety and the record reflects that she made Respondent aware of Edwards' continuing disruptive behavior. I also found Keele's testimony to be equally convincing. She told management that Edwards made her uncomfortable and described in detail Edwards' behavior. Keele reported that Edwards screamed at her and cursed her. She also described for Miles how Edwards pitted employees against each other and told negative things about her fellow employees.

It is apparent that Edwards did not easily accept the written warning that she received. In response to the warning, she launched a campaign that included cursing fellow employees and accusing them of trying to get her fired. Her continued disruptive behavior resulted in her suspension. Counsel for the General Counsel contends that Edwards was thus suspended because she raised complaints about fellow employees and her discipline and thus she engaged in protected activity. While an employer cannot lawfully prohibit employees from discussing their terms and conditions of employment with other employees, there is not a blanket protection that allows an employee to engage in accusations and attacks on fellow employees in response to the employee's discipline. In essence, counsel for the General Counsel asserts that Respondent disciplined Edwards because she talked about her discipline and thus disciplined her for protected activity. Having considered the record as a whole, I don't find that Edwards' behavior constituted protected activity. The record reflects that Edwards was not disciplined because she protested her discipline or because she talked with other employees about the discipline that she received. The behavior that triggered the additional discipline was the verbal attacks and criticism of her fellow employees and the continuation of the behavior for which she had received the initial warning. Thus, I don't find that she was suspended or discharged because she engaged in protected activity.

Regional HR Manager Wright testified that Edwards had already received a final warning and a suspension for disruptive behavior in the workplace and inappropriate language. Wright testified that after talking with witnesses and investigating the situation she determined that Edwards had again engaged in the same behavior with respect to her interaction with Gibson on March 21, 2013. Counsel for the General Counsel asserts that Respondent has treated similar incidents between employees in the Waterpik account in a more lenient manner. I find these incidents distinguishable from the circumstances involving Edwards. In May 2011, Wright investigated a reported argument between employees Seth Gibson and Anthony Stewart. Witnesses to the incident confirmed that the two employees "play around all the time," and the witnesses did not hear the employees curse each other. When Wright spoke with the employees, they confirmed that the matter was resolved and that everything was fine between the two of them. The employees were cautioned to watch what they said to each other and that if the issue arose again there would be discipline.

General Counsel also contends that in another instance employee Stewart was insubordinate to his supervisors, Ward and Farmer, concerning his assignment to work mandatory overtime. General Counsel relies on the testimony of employees Edwards and employee Helen Herron. Although Herron testified that she overheard arguing and cursing between Supervisor Ward and Stewart, she could not recall any curse words that Stewart used. Edwards testified that Stewart said, "What the fuck you mean I can't go home. It is some bullshit fool." Ward testified that when he told Stewart that he needed to work overtime Stewart had been upset because he needed to have notice to get someone to take care of his son. Ward recalled that Stewart had said something like "What the fuck is going on." Ward took Stewart in to talk with Operations Manager Quinn Farmer. Farmer calmed Stewart down and the matter was resolved. Ward testified that although Stewart cursed during their conversation he had not seen the curse words as directed at him. Finally, General Counsel relies on the testimony of employee Glenora Whitley who testified that on one occasion she reported to Supervisor Ward that when she complained to Seth Gibson that he had cut her off with the forklift he had responded, "You don't tell me what the fuck I can do." She recalled that Ward told her that he would speak with Gibson and she was not questioned further by Ward. Based on the testimony of employee and supervisory witnesses, it is apparent that words such as "fuck" are used in the workplace. It is very likely that the word was used as alleged in the examples above. These situations, however, appear to be isolated instances when employees used a curse word or words in the presence of other employees and even supervisors in disagreements or in responding to circumstances. The situations are distinguishable, however, from the sustained verbal attacks and profanity attributed to Edwards against her fellow employees that disrupted the workplace as described above. Thus, I do not find that Respondent tolerated more serious misconduct by other employees or that Respondent disciplined Edwards because of her support for the Union. I also note that Respondent gave Gibson a verbal warning in relation to his conversation with Edwards on March 23. Accordingly, I do not find that Respondent unlawfully suspended Edwards on August 24, 2011, or unlawfully terminated Edwards on March 28, 2012, as alleged.

F. The Discharge of Deshonte Johnson

Deshonte Johnson was employed by Respondent from September 2009 until October 6, 2011. During his employment, Johnson was an operator on the second shift in the Hewlett-Packard (HP) department. He was supervised by Operations Supervisor Kila Walker and Operations Manager Darnell Flowers. First Shift Operations Supervisor David Maxey was also present for the first part of Johnson's shift.

1. Issues

Respondent asserts that Deshonte Johnson was terminated from his employment because he hurdled over a moving conveyor belt and violated Respondent's safety policy. Johnson does not dispute that he hopped over the moving belt, but he

asserts that he did so to retrieve a box that had fallen off the line. Johnson testified that he, other employees, and supervisors regularly crossed the conveyor line while performing their job duties and that he has done so without incident during his entire employment with Respondent.

2. Johnson's union activities

Johnson testified that during his employment he wore a prounion shirt twice a week and prounion stickers on his shirt almost every day. He also testified that he raised the Union in a meeting in September 2011 with Operations Supervisor Wilson and Shift Operations Jim Cousino. The September meeting involved his receiving a written warning. Johnson did not agree with the warning and announced to the supervisors that he would take his concerns to HR. If he did not get any satisfaction, he would go the "Labor Board" or to his union representative.

3. The October 5, 2011 incident

The packages or product in the HP department are moved from the storage racks to the packing and shipping area by a motorized conveyor belt. In October 2011, the conveyor belt was set up with a few areas where employees can cross from one side of the conveyor belt to the other of the belt. These designated areas were the points where the belt was elevated sufficiently for the employees to pass underneath or where there were designated lift gates.

Approximately 30 minutes after Johnson began his shift on October 5, he observed a box fall from the conveyor belt on the opposite side of the belt from where he was working. In order to recover the box and return it to the belt, Johnson sat on the line and swung his legs over the line to get to the other side. He recovered the box and returned it to the conveyor belt. Before he could return to work, Supervisor David Maxey called Johnson over to where he was standing with Supervisor Darnell Flowers. Maxey testified that he told Johnson that what he had done was a serious safety violation. Johnson recalls that he told Maxey that he didn't know that it was a safety violation and that he had been doing it for the last 2 years. In his email to HR documenting the incident, Maxey stated when he told Johnson the action was a serious safety violation, Johnson had responded that he knew and that he would not do it again. During Maxey's testimony, however, Maxey testified that Johnson told him that he had not known that it was a violation. Maxey told him that he didn't want to see him doing that again. Maxey recalled that Johnson said that he would not do it again.

Flowers did not see Johnson cross over the conveyor belt. He recalled that he and Maxey walked toward Johnson who was standing near the line. Flowers overheard Maxey tell Johnson that jumping over the conveyor belt was a safety violation. Flowers testified that Johnson acknowledged it and said that he wouldn't do it again.

On October 6, 2011, Respondent terminated Johnson. Former HR Manager Evangelia Young testified that he was terminated for jumping over the conveyor belt and engaging in a serious safety violation. She added that this was a serious safety violation because his conduct was willful and not just a matter of losing focus on his safety practices.

4. Conclusions concerning the lawfulness of Johnson's discharge

Johnson testified that during his employment he often crossed the conveyor line for job related reasons and that he saw other employees and supervisors, including Jay Walker, Kila Wilson, and Jim Cousino, cross the conveyor line on a daily basis. Employee Keith Hughes testified that he has also crossed the conveyor line in the course of his job and that he has done so in the presence of Kila Wilson without incident. Hughes also testified that he has observed Supervisors Kila Wilson and Jay Walker cross the conveyor line as well.

Johnson testified that when Supervisor Maxey questioned him about crossing the conveyor line he did not deny doing so and told Maxey that he didn't know that it was a safety violation. He told Maxey that he had been doing this same thing for the past 2 years. On direct examination, Maxey testified that when he spoke with Johnson, Johnson acknowledged that he knew that it was a safety violation and stated that he would not do it again. On cross-examination and again on redirect examination, Maxey testified that Johnson told him that he didn't know that crossing the line was a safety violation. Later in his testimony, Maxey again testified that Johnson admitted that he knew that it was a safety violation.

Johnson testified that while he was employed at the facility he was never aware of any written rules concerning the conveyor line and that he was never present in any training sessions concerning the conveyor line. Respondent contends that Johnson reluctantly admitted on cross-examination that employees must apply common sense in determining what constitutes a safety violation. Furthermore, Respondent asserts that just because Respondent did not have a flashing neon sign beside the conveyor belt that says "don't jump over" does not mean that Johnson's conduct was permissible under Respondent's safety policies.

Employee Keith Hughes testified that Respondent first conducted conveyor line safety training in February 2012, months after Johnson's discharge. Maxey testified that he had conducted safety line training concerning the conveyor belt sometime in the period of September and October 2011, however, he could not recall the dates of the training or whether Johnson was present in the training session. Although Maxey testified that sign-in sheets are kept for all safety training, Respondent produced no sign-in sheets for conveyor safety training prior to February 2012.

Respondent asserts that it has discharged nine other employees for safety violations since 2008 and six discharges were within a year of Johnson's termination. Seven of the discharges involved the following infractions; (1) an employee's termination in 2010 for standing on a forklift operated by another employee; two employees' termination in 2011 for repeatedly slamming on the breaks and turning the steering wheel of their forklifts to make "donuts" in the warehouse area; (3) an employee's termination in 2008 for striking a support column, causing severe damage, and failing to report the incident immediately; (4) an employee's termination in 2009 for engaging in horseplay by pulling down a dock door while another employee was trying to exit on a forklift; (5) an employee's May 2011 termination for smoking a cigarette while operating a

propane forklift; and (6) an employee's May 2011 termination for sleeping on a running forklift. The remaining three discharges cited by Respondent involved one incident in January 2012. An employee was discharged for photographing another employee as she lay face down or what is known to the employees as a "planking" position on the conveyor belt. The second employee was discharged for posting the planking photographs on Facebook. The third individual disciplined was the employees' supervisor who witnessed the incident, but failed to address the conduct with the employees or to report the incident to management. Furthermore, the supervisor was discharged because he withheld information during the internal investigation. I note that the three discharges concerning the employees' planking and the Facebook posting occurred after Johnson's discharge and there is no evidence that any employees were discharged prior to Johnson for safety violations relating to the conveyor belt. Almost a year following Johnson's discharge, an employee was terminated for sitting on the conveyor belt after being warned not to do so.

Although Johnson was terminated for climbing over the conveyor, the record reflects that other employees have engaged in the same conduct without discharge or even discipline. Supervisor Jeremiah Walker testified that prior to Johnson's discharge he observed an employee jumping over the conveyor belt. Walker issued a verbal warning to the employee. Operations Manager Cousino testified that he has observed employees jump over the conveyor line. When he saw this occurrence, he immediately spoke with the employee and told them that it was not allowable behavior. He did not testify that he disciplined the employees for having done so.

Based on the record evidence described above, I find that the General Counsel has met the initial burden required under *Wright Line*. I do not find that Respondent has demonstrated that it would have terminated Johnson in the absence of his union activity. There is no evidence that Johnson was trained in conveyor safety prior to this incident or even that any employees were trained in conveyor safety prior to February 2012. Furthermore, while Respondent may have terminated employees for safety violations prior to terminating Johnson, the conduct in issue was not similar to that of Johnson's and was arguably more egregious. Finally, the record reflects that management has been aware of employees engaging in the same conduct as Johnson and yet the employees were either verbally warned or not warned at all. Even the employee that was discharged for a conveyor belt safety infraction was discharged after Johnson's discharge and had already been warned once for sitting on the conveyor belt prior to her discharge. Accordingly, I find that Deshonte Johnson was terminated in violation of 8(a)(3) of the Act.

G. The Termination of Undenise Martin

1. Background

Undenise Martin (Martin) worked for Respondent from October 25, 2007, to December 7, 2011. At the time of her discharge, Martin worked as a customer service representative and she was supervised by Greg Harvey. In December 2011, Director of Operations Phil Smith was also serving as acting manager over the Fiskars' department in which Martin worked as a customer service representative. Respondent asserts that Martin was discharged because she violated Respondent's conduct guideline regarding failure to cooperate in a company investigation. Counsel for the General Counsel argues that the reasons asserted for Martin's discharge are pretextual and that Martin was actually terminated because of her union activity and in retaliation for her participation in a Board hearing.

2. Martin's union and protected activities

Martin testified that she while she was employed by Respondent she participated in the union campaign by wearing union shirts twice a month and a union button every other week. During the unfair labor practice trial in November 2011, Martin was called by the General Counsel in its case-in-chief and then again as a rebuttal witness by the General Counsel. The unfair labor practice hearing occurred approximately a month prior to her discharge.

3. The background incident

The circumstances that ultimately led to Martin's discharge involved Respondent's employee LaToya Cox and temporary employee Terry Johnson. On November 30, 2011, an argument developed between these two individuals concerning whether Johnson would provide work assistance to Cox. Employee Leslie Freeman not only overheard the argument, but she also attempted to intervene and separate the employees before their supervisor arrived. Freeman testified that as Cox left the area she told Johnson that she would have somebody waiting on him "at the front." Freeman not only told Supervisor Harvey what she overheard, but she also gave a statement to Senior HR Manager Karen Kousbroek concerning the incident between Cox and Johnson. Freeman also testified that she received a call on her cell phone from an unidentified caller. The female caller briefly warned her that she did not see anything and did not hear anything before disconnecting. Freeman went back to Kousbroek and reported what the caller had said to her.

4. Martin's description of her involvement with Cox and Johnson

Martin did not witness the altercation between Johnson and Cox. She asserts that she first learned of it from Freeman and from Supervisor Harvey. Martin testified that after she returned from lunch on November 30 she spoke with Johnson near the timeclock. She described Johnson as upset. She testified that he told her that Cox had been suspended and he didn't understand why. She recalled that he even asserted that perhaps he should go home as well. Martin contends that she told him that he should stay and go back to work. Martin testified that during a second conversation that afternoon Johnson asked for her telephone number. Martin denied that she obtained Johnson's telephone number at that time.

Martin testified that later that evening, Johnson called her and left a message for her while her phone was turned off. When she returned his telephone call, Johnson told her that he was concerned because he didn't want Cox to think that he had done anything to cause her suspension and he asked for Cox's number. Martin asserts that she contacted Cox first to find out if she could give the number to Johnson. After speaking with Cox, Martin called Johnson and gave him Cox's number. Mar-

tin testified that not only did she not speak again with Cox after giving Johnson Cox's number; she did not speak again with Cox at any time during that same evening. As discussed later in this section, Martin's telephone records do not support her testimony.

Martin testified that Johnson called her again on December 2 to tell her that he had heard that Cox had been terminated. Because she was tired, she told him that she would call him back the next day. Martin recalls that when she telephoned Johnson on December 3 Cox was with her. Martin set the call on the speakerphone function of her cell phone in order that Cox could overhear Johnson. Martin asserts that Johnson again discussed Cox's termination and she denied that Johnson said anything during the call about Cox's threat to him. Martin testified that she telephoned Johnson twice the following day. She asserts that the first time she accidentally pressed his number on the touch screen of her phone and the second time she telephoned him to explain that she had mistakenly telephoned him. When Martin gave an affidavit to the Board prior to the hearing, Martin acknowledged that when she spoke with Johnson on December 4, he told her that he felt strange about her telephone call the previous day and that he felt that Martin had tried to get information out of him and to set him up.

5. Respondent's evidence concerning Martin's contacts with Johnson and Cox

The records for the phone in Martin's work area document three telephone calls from Cox's cell phone to the work phone on November 30, 2011. Freeman testified that she also has occasion to use that same phone as her desk was next to desk where the phone was located. She recalled after the incident between Cox and Johnson, she answered this phone "a couple of times." Each time that she answered, the caller hung up and the caller ID function reflected "private number." Freeman testified that possibly later in the day on November 30, Martin answered the phone and spoke in such a way that Freeman could not hear the conversation. During the investigation of Martin's involvement in the incident between Cox and Johnson, Regional HR Manager Sara Wright spoke with Freeman, as well as, Tarlicia Thomas, who worked in the area near Martin. Thomas told Wright that she was present when Martin received a telephone call in which Martin identified Cox as the caller. Thomas told Wright that she overheard Martin comment, "You want me to get whose number? Terry's (Johnson's) number?" Freeman also testified that after the incident between Cox and Johnson, she overheard a conversation between Johnson and Martin. Freeman recalled that Martin asked Johnson for his telephone number. Although she did not overhear his response, she later asked Johnson if he were giving out his number and he denied it. Later, however, Freeman observed Johnson giving Martin a piece of paper.

Prior to November 30, 2011, Martin had never had any telephone contact with Johnson. Her telephone records include three telephone calls reflecting Johnson's number on November 30. Two of the three calls were shown to be incoming calls. Although Martin testified that she only spoke with Cox twice on November 30, her telephone records reflect that there were a total of 15 calls to and from Cox. One conversation with Cox occurred after Martin spoke with Johnson and lasted as long as 47 minutes and a later conversation lasted another 20 minutes.

Martin testified that when Johnson telephoned her on December 2, she told him that she was too tired to talk and that she would call him the next day. Martin's telephone records reflect that she initially telephoned Johnson on December 2, and when he later telephoned her the conversation lasted for 12 minutes. Martin's telephone records also document four telephone calls involving Johnson's telephone on December 3, 2011. The first call was shown to be a 2-minute call from Martin's phone to Johnson's phone at 10:22 a.m. Two 1-minute telephone calls were made from Martin's phone to Johnson's phone at 1:54 p.m. and 1:56 p.m. When Johnson apparently returned Martin's call at 1:58 p.m., the conversation lasted for 37 minutes. The telephone records corroborate Martin's testimony that two calls were made to Johnson on December 4, 2011. Approximately an hour after the last conversation with Johnson, Martin received a telephone call from Cox and the call lasted for 53 minutes.

Regional HR Manager Sara Wright testified that on Monday, December 5, 2011, Johnson came to her to report that he had received threatening phone calls on Saturday and Sunday. Wright described Johnson as distraught and frightened. Wright took photos of the phone registry of his recent calls showing the calls received from Martin. Johnson described the telephone calls from Martin on Saturday and Sunday as very threatening. Wright recorded Johnson's statement that he suspected that Cox was with Martin when she talked with him as the call appeared to be on a speakerphone. Johnson reported to Wright that repeatedly during the conversation, Martin told him that he needed to give a statement to HR denying that Cox had threatened him. Johnson told Wright that Martin called him again on Sunday morning; however, he had not answered the call. Johnson reported that later in the morning he had a missed call from a blocked number. Then later he received a call from that same blocked number. He did not recognize the voice to be either Cox or Martin. The unidentified woman told him that he needed to give a statement or he better watch his back.

6. Martin's response to the investigation

On December 5, Martin was called to HR to speak with Kousbroek, Wright, and Harvey. Kousbroek asked Martin for her telephone number and Martin provided it. Kousbroek asked if she had telephoned Johnson. Martin told her that she had spoken with Johnson after he had telephoned her. She also acknowledged that Johnson had given her his number on the previous Thursday. Martin testified that Kousbroek told her that Johnson reported that she had threatened him. Kousbroek asked if she had spoken with Johnson about Cox and if she had asked him about changing his statement about Cox. Martin testified that she told Kousbroek that she had not spoken with Johnson about Cox and she had not asked him to change his statement. Martin recalls that she was then told that she was suspended. The next day Wright contacted Martin and asked her to come back to Respondent's facility for an additional meeting. When Martin reported back to the facility, Wright and Kousbroek met with her and gave her a questionnaire to complete. In completing the questionnaire, Martin stated that

she spoke with Johnson a total of four times and she did so because he called her. The previous day she had told Kousbroek, Wright, and Harvey that she had called him because he had called her and that she had only spoken with him twice. She admitted on cross-examination that her telephone conversations with Johnson on December 3 and 4 were as a result of her calling him. When asked in the questionnaire how she obtained Johnson's phone number, she stated that he had given it to her. When she spoke with Kousbroek, Wright, and Harvey on December 5, she had told them that Johnson had given her his number on Thursday morning and he had telephoned her on Wednesday when he was upset. In her written responses to the questionnaire, she stated that she had never had conversations with Johnson previously and during her telephone conversations with him they had discussed family, church, and work. Martin admitted in her testimony that her statement in the questionnaire was false because she spoke with Johnson about Cox.

Respondent asserts that at the conclusion of the investigation it was apparent that Martin had misled them in the investigation about the number of telephone calls she had with Johnson. Wright testified that she observed Johnson to be distraught and upset and he appeared frightened by the threatening phone calls. Wright took photographs of the call records for both Johnson's phone and Martin's phone. Respondent factored in the threat that was made to Freeman as well. Respondent also relied on information from Tarlicia Thomas confirming that Cox had asked Martin to obtain Johnson's cell phone number. Respondent contends that the overall evidence indicated that Martin had not been truthful during the investigation and Respondent had reason to believe that Martin was involved in the threat to Johnson.

7. Conclusions concerning the lawfulness of Martin's discharge

Counsel for the General Counsel submits that Martin's discharge is suspect because it occurred approximately a month after she testified in an unfair labor practice hearing. Respondent, however, contends that after Martin demonstrated her support for the Union she was in fact promoted to the position of customer service representative. During the hearing in November 2011, Martin testified in the General Counsel's case-in-chief concerning comments made by Director of Operations Smith in preshift meetings. Martin was also recalled as a rebuttal witness in the same hearing to testify concerning an alleged violation of the sequestration order, as well as, an allegation of sexual harassment by a supervisor. Although the judge limited Martin's testimony to the allegation of the violation of the sequestration order, the General Counsel was allowed to make an offer of proof concerning the allegation of sexual harassment. The supervisor in question was terminated on November 4, 2011, after he refused to answer questions during an investigation by Respondent into the allegations related to Martin's testimony. Respondent argues that if Respondent harbored any animus toward Martin it would have protected the supervisor and not terminated the supervisor as a result of Martin's testimony.

Respondent's employee handbook includes a listing of conduct for which disciplinary action will be taken. The handbook provides that "Failure to cooperate with an internal investigation, including a failure to be forthright, open or truthful; withholding information or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring with another to do so" is grounds for discipline up to and including termination. Based on the statements given by Johnson, Freeman, and Thomas, as well as what appeared to be inconsistent information provided by Martin, Respondent determined that Martin had mislead Respondent in its investigation of the threats against Johnson. As Respondent points out, Martin admitted in her testimony that she gave false information to Respondent. Although Respondent did not have all of Martin's telephone records at the time of her discharge, the records further support Respondent's conclusions concerning Martin's interference in the investigation. Furthermore, the telephone records contradict her testimony as well. Overall, I did not find Martin's testimony to be credible with respect to her involvement with Cox and Johnson.

Counsel for the General Counsel asserts that Respondent did not present sufficient evidence that it has discharged employees for similar violations in the past. There is, however, no evidence that any employee engaged in similar conduct prior to Martin's discharge and not discharged. As discussed earlier in this decision, Supervisor Wilson was found to have engaged in similar conduct and was terminated.

Thus, on the basis of the total record evidence, I don't find sufficient evidence of animus to show that Respondent terminated Martin because of her union activity or because she was a witness in an unfair labor practice hearing. Nevertheless, even if there was sufficient evidence of animus, I find that Respondent has established that it would have terminated Martin in the absence of any protected activity.

H. The Discharge of Kimberly Pratcher

Kimberly Pratcher (Pratcher) worked for Respondent from September 2000 to September 22, 2011. At the time of her discharge, Pratcher worked as a customer service representative on first shift. Her usual work hours were 7:30 a.m. to 4:15 p.m. Her immediate supervisor was Nevatta Teague.

1. Pratcher's union activity

Pratcher worked at Respondent's facility during both of the union campaigns. She did not wear any union buttons, pins, or anything else to openly display any support for the Union. She recalled that during a casual conversation with Teague she mentioned that she planned to vote for the Union. Teague told her, "You cannot let Karen White hear you say that." As a result of Teague' warning, Pratcher did not do anything to let management know how she felt about the Union. She testified that Teague was the only person who knew how she felt. Teague denied that she ever told Pratcher that she should not let White know that she planned to vote for the Union.

2. Pratcher's involvement in the investigation of Carolyn Jones

Based on the Union's June 14, 2011 petition, the second election was held at Respondent's facility on July 27, 2011. On

May 26, 2011, and prior to the filing of the petition, employee Carolyn Jones passed out union fliers by the timeclock during her lunchtime. Pratcher testified that as she walked near to Jones she overheard Director of Operations Smith yell out to Jones that she had better not conduct union business on worktime. Jones responded that she was on break. Pratcher also heard Smith make the same statement to Linda Cotton; another employee who was accompanying Pratcher as they proceeded to their work area from an employee meeting. Pratcher recalled that she told Jones that she was not on break and she didn't want Jones to say anything to her. Pratcher testified that she had not wanted anything to do with Jones at that point. Jones was discharged on June 14, 2011, and her discharge was found to be a violation of Section 8(a)(3) of the Act by ALJ Ringler in his May 15, 2012 decision.

Later in the workday Cotton came to Pratcher and told her that she could probably expect Smith to ask her for a statement of what occurred with Jones as he had already asked her for a statement. Sometime later Smith met with Pratcher. She recalled that before he had a chance to ask her for the statement she told him that she did not want to get involved; she just wanted to remain neutral. She told him that she had not heard what Jones or Cotton said. She had only heard his statement to Jones and Cotton warning them that they had better not conduct union business on the clock. Pratcher testified that because of his comments, she felt pressured to give a statement and she did so. In her written statement, Pratcher confirmed that she had not heard what Jones said to Cotton. She had heard Smith ask Cotton if she was on the clock. She included in the statement that Jones had not said anything to her and that she told Jones that she was on the clock. Pratcher added that she had told Smith that she did not want to make a statement and that she wanted to remain neutral. She added that she felt that she had been pressured into writing the statement. Before she gave the written statement to Smith, she again told him that she wanted to remain neutral. Smith acknowledged that he understood. Pratcher testified that when Smith read the statement, he looked upset. He simply responded, "Okay, thanks."

Although Pratcher was presented as a witness to testify about this conversation during the October 2011 unfair labor practice hearing in 26–CA–024057, Pratcher had already been discharged. Pratcher did not indicate that there were any other conversations with Smith or any other manager about the May 26, 2011 incident prior to her discharge in September 2011.

3. Background of Pratcher's work schedule

Beginning in the fall semester of 2005, Pratcher began college courses to obtain her bachelor's degree in nursing. Between 2005 and 2010, Pratcher attended courses at Southwest Community College. In 2010, Pratcher was accepted as a student at the Baptist College of Health Sciences. Pratcher testified that while she was employed at Respondent's facility, she tried to take her nursing classes in the evenings or on weekends. There were occasions, however, when the classes that she needed were only offered during the usual workday. When Pratcher knew that she was going to have a conflict between her work schedule and her school schedule, she would meet with Teague before the semester started. Teague would adjust Pratcher's work schedule in order for Pratcher to attend the day classes that she needed. Pratcher and Teague would sit down together and work out her work schedule to make sure that Pratcher could work at least 30 hours per week and maintain her status as a full-time employee. It was Pratcher's practice to draft the work schedule and submit it to Teague. It was Pratcher's understanding that Teague would then send the schedule to Regional Vice President of Operations Karen White for approval.

After receiving approval from Teague and White, Pratcher's work schedule changed each semester to coordinate with her class schedule. These changes involved modifications in Pratcher's arrival time, as well as, her departure time. Pratcher testified that as long as she worked the hours in her adjusted schedule, she did not receive attendance points on the days she left work early or arrived late because of her school schedule. Employees are disciplined for their attendance when they accumulate increments of four points. While the accumulation of 13 points is grounds for termination, Respondent's progressive discipline policy provides that discipline must progress through each step of the process that requires a first written warning, second written warning, and final written warning before an employee is terminated for attendance.

4. Respondent's change in adjusted work schedules

White confirmed that when she first became Regional vice president of operations for the Memphis facility 4 or 5 years before her testimony, there was no policy prohibiting employees from working adjusted work schedules to accommodate for attending school or other reasons. White was aware that accommodations were being made to allow employees to work modified schedules and she acknowledged that prior to 2011, she had approved the adjusted work schedule for Pratcher.

White recalled that it seemed that more and more employees were asking for alternate work schedules to attend school and for other reasons. She explained that the practice had "gotten out of hand" and from an administration standpoint it was becoming a nightmare trying to make sure that there was sufficient coverage for employees who were leaving early or coming in late. White made the decision to change the practice and notified her supervisors and managers in staff meetings in August or September 2011. She identified for the record a number of employees who thereafter asked for a schedule accommodation and who were denied the alternate schedules. There was no general announcement to all the employees. White's plan was for her supervisors to meet with individual employees who might be affected by this change in practice. The employees were to be given a week to 2 weeks to work out their scheduling conflicts and they would be given the option of moving to another shift if necessary.

In early August, Smith was in the process of lining up coverage for a customer service representative who was on a leave of absence for medical reasons. In his email contact with Teague, he learned that Pratcher had cut back to 30 hours in order to attend school. He passed along the information to White. White responded on August 9, 2011, by telling him that she thought that they were no longer allowing part-time schedules and she suggested that HR needed to be involved. Senior Em-

ployee Relations Manager Shannon Miles received a copy of the email response. On the same day, Miles left a telephone message for Teague and sent an email to Sara Wright asking if she were aware of Pratcher's part-time schedule.

Wright testified that when she came to Respondent's facility in February 2011, she was not aware that schedule accommodations were allowed. She later found out, that some employees had been allowed to have schedule accommodations. After Miles brought the accommodation issue with Pratcher to her attention in August 2011, Miles checked previous records. She discovered emails from the previous year in which Pratcher's adjusted schedule had been approved by White.

5. Pratcher's work schedule for September 2011

As Pratcher's fall classes were to begin on September 7, 2011, she prepared her adjusted work schedule and emailed it to Teague in August. A few days after doing so, Teague came back to her nearly in tears and told her that her adjusted schedule had not been approved. Teague told her that it had not been White who had denied the schedule adjustment; it had been a new person in the corporate office in Nashville. A few days later Pratcher spoke again with Teague about her schedule. Teague told her that while her position required her to work 40 hours, she had the option of transferring to second shift to work as an operator in the warehouse. Pratcher also testified that Teague made the comment that "they" denied the adjusted schedule because of "all the union stuff going on there." Pratcher did not identify who "they" were or if Teague explained what she meant by the comment. Teague denied that she made such a statement to Pratcher.

A few days later, Teague spoke again with Pratcher and asked her what she had decided to do about taking the second-shift position. Pratcher testified that she didn't want to transfer to the second-shift position because she still had a night class each week. She was also reluctant to transfer because she had never worked in the warehouse before and she knew that the warehouse would be hot in the summer and cold in the winter.

6. Pratcher's attendance

Once Pratcher's classes started on September 7, 2011, Pratcher attended classes and adjusted her work schedule accordingly. This involved her reporting late to work or leaving early in order to make her scheduled classes. On September 9, 2011, Pratcher reported to work after attending a class. Teague gave her an employee attendance notice showing that she was receiving a first written warning for her attendance. The document reflected that this was based on eight combined attendance points for attendance infractions on October 4, 2010, February 10, March 24, May 13, August 25–29, and September 2, 2011.

While Pratcher was at work on September 13, 2011, she received notice that her brother had been shot and was in critical condition in the hospital. She left work early to go to the hospital. Pratcher's brother died and she took bereavement leave from September 14–16, 2011.

On September 21, 2011, Pratcher reported to work late. When she arrived, Teague gave her another employee attendance notice. Although the form indicated that Pratcher had a total of 13 combined attendance points, there was no disciplinary action noted. Pratcher asked Teague "So am I fired now?" Teague stated that while she could not terminate her, Pratcher, was at a level where she could be terminated. Teague said that she would have to check with Wright first. Pratcher told Teague that she wanted to add her comments as to why she felt that she was receiving the discipline and Teague agreed. Pratcher recalled that she went to Teague's computer and typed in her comments on the attendance notice. Pratcher added the following comments:

> I incurred this accumulation[s] of points because OHL was unwilling to accommodate to my schedule for college because I now support the Union. In support of this claim, all this changed when Phil Smith asked me to make a statement regarding what happened between himself and Carolyn Jones back in May of this year. In conclusion, thanks for the opportunity to serve your company for the eleven[s] years I have been here.

Wright recalled that when Teague spoke with her about the attendance notice that she had just given to Pratcher, Wright explained that Pratcher could not be terminated and that she had to be given a second written warning. Later in the day on September 21, Teague came back to Pratcher and told her that she was not terminated because Teague had not followed the proper steps to terminate Pratcher. Teague testified that she prepared a second employee attendance notice for Pratcher on September 21. The notice reflected that Pratcher was receiving a second written notice for the 13 combined attendance points. The warning was based on two attendance points given for September 12, 2011, and three attendance points given for September 13, 2011. Teague testified that she presented the notice to Pratcher and she observed Pratcher sign the notice. Pratcher testified that although the signature on the document looks like her signature, she did not recall receiving it.

On September 22, 2011 Teague gave Pratcher an employee attendance notice reflecting that Pratcher was receiving a final written warning. The document reflected that Pratcher had a total of 16 combined attendance points and 4 points were specifically given for September 21, 2011. Pratcher did not question the warning with Teague. She recalled that she had arrived late on September 21. Pratcher added a handwritten comment with the same wording that she had originally added to the initial warning given to her on September 21. Pratcher recalled that after receiving the attendance notice, she told Teague that she was going to have to leave early that day because she had a class and that was going to add more points for her. Pratcher recalled that she commented to Teague that since she was going to incur more points, "what's the point of me having to come back?" Teague agreed and said that she was going to speak with Wright. When Teague returned, she had a termination notice showing a combined number of 19 attendance points and designating 3 attendance points for September 22. Pratcher's hand-written comments are shown on the comments section of the notice. Pratcher testified that she had come in that day at 7:30 a.m. and she worked for 1 or 2 hours.

Wright testified that she spoke twice with Teague on September 22, about Pratcher's attendance. The first time she directed Teague to give Pratcher the final written warning notice.

The second conversation occurred when Teague reported that Pratcher planned to leave and Teague asked if she could go ahead and terminate Pratcher so that she would not have to come back just to be fired. Wright testified that she told Teague that she could not terminate Pratcher before Pratcher actually accumulated the attendance points.

Pratcher testified that after receiving the termination notice, she did not report back to work the following day. On September 27, 2011, Pratcher filed a claim for unemployment benefits with the State of Tennessee. After a hearing before an unemployment appeals hearing officer, Pratcher was granted unemployment benefits. Respondent was represented by Wright during the unemployment appeals hearing and Respondent took the position that Pratcher's employment was terminated because she failed to call in or report to work after September 22. Wright testified that the first time that she became aware that Pratcher received a termination notice on September 22 was during the unemployment hearing. Wright testified that prior to the unemployment hearing, she was of the impression that Pratcher had simply quit her employment.

7. Conclusions concerning the Lawfulness of Pratcher's termination

Despite Pratcher's attempts to remain neutral during the union campaign, she found herself embroiled in it when Smith asked her to write the statement about the Carolyn Jones' incident. Although she did not testify in an unfair labor practice hearing about her interaction with Smith before her termination, her comments in the statement would have likely engendered Respondent's displeasure with her. Thus, I find that the General Counsel has met the requisite burden in establishing a prima facie case of discrimination under *Wright Line*. Respondent asserts that Pratcher made a conscious decision to violate Respondent's attendance policy; and as a result she is no longer an employee of Respondent. Respondent contends that Pratcher's attendance points resulted from the elimination of a schedule accommodation. While it is undisputed that Pratcher's absences triggered attendance points, I find that Respondent has not met its burden under *Wright Line*. Respondent has not only failed to show that it would have terminated Pratcher in the absence of her protected activity; Respondent has failed to show that there was a legitimate basis for her termination under the circumstances in which it was administered.

The record reflects that Pratcher received her notice of termination prior to her absence that would have triggered additional attendance points. While the termination appears to have resulted from a communication gap between Wright and Teague, the September 22, 2011 termination notice to Pratcher was not supported by Pratcher's existing attendance points. Wright took the position at Pratcher's unemployment hearing that Pratcher had quit her employment with Respondent. Wright testified that she had not been aware that Pratcher was given a termination notice on September 22. Furthermore, even if Pratcher had already accumulated enough attendance points for her termination on September 22, 2011, the record evidence reflects that other employees accumulated attendance points far in excess of Pratcher before they were terminated. Pratcher's termination notice documents that her termination was based on an accumulation of 19 combined points. The General Counsel introduced evidence to show that employee M. Davis was issued a second written warning in July 2011 at 15 points, was issued a final written warning in September 2011 at 23 points, and was not discharged until he reached 27 points in October 2011. Employee A. Faulkner was terminated in September 2009 for attendance, but only after he accumulated 29 combined points. Employee J. Shaw was terminated for an attendance violation in January 2009 after he accumulated 34.5 attendance points. Respondent's records also reflect that employee P. Shipp was given a second written warning at 19 points and she was not discharged until she reached 24 points in November 2011. Respondent's records also document that employee T. Rhodes receiver her first attendance warning at 27 points, a final written warning at 29.5 points, an additional final warning at 34 points, and was finally discharged at 33 points. In June 2011, employee K. Watson was given a first written warning after she accumulated 29 attendance points. On July 5, 2011, she was given a final written warning when she accumulated a total of 46 attendance points. She was not discharged until she failed to call in or to show up for work for over a week. Finally, Respondent's records document that employee Q. Blade received a second written warning in May 2011 for 17 points and a final written warning in June 2011 for 22 points before being discharged in July 2011 for 23 accumulated attendance points.

Accordingly, I find that Respondent has not demonstrated that it would have terminated Pratcher in the absence of her protected activity and I find that Respondent unlawfully terminated Pratcher on September 22, 2011.

Personnel Actions Involving Keith Hughes

Keith Hughes worked for Respondent from November 2004 to April 26, 2012. At the time of his discharge, he was working on the HP account on the mid-shift; the shift that runs from 12 p.m. to 8:45 a.m. He was supervised by department Supervisors David Maxey, Stacey Deal, Darnell Flowers, and Manager Robert Gray.

1. Hughes' union and protected activity

Hughes testified that he wore union shirts and buttons at work and that he passed out union authorization cards and fliers to employees on their breaktime. He also testified as a witness for the General Counsel in the November 2011 hearing (Case 26–CA–024057) concerning threats and alleged unlawful statements by Phil Smith.

2. Hughes' August 25, 2011 final warning

Dawn Barnhill worked in the HP department in July 2011. She testified that on July 19, 2011, she passed by the work area where Hughes was preparing to load a truck. She was wearing a shirt with lettering on both the front and back of the shirt. On the front of the shirt were the words "I can speak for myself." On the back of the shirt were the words "No means no." She recalled that as she passed Hughes, he commented that he had heard that she had purchased a shirt. She responded "What difference does it make with you anyway?" Barnhill testified that Hughes gave her an "ugly" look and told her 'If I see you wearing that shirt, I'm going to rip that shirt off of you." Barn-

hill went to Supervisor David Maxey's office and reported that Hughes had threatened her. While in Maxey's office, she prepared a statement confirming the threat. At Maxey's direction, she took the statement to HR and met with Young and Miles. As Barnhill described the interaction with Hughes, Miles took notes. Barnhill reviewed the notes and signed them as well. In talking with Young and Miles, Barnhill explained that she and other employees had planned to wear the same shirt the following Thursday, however, she was afraid to do so. She went on to explain that she was afraid to do so because she believed that Hughes might rip it off as he had threatened. Miles testified that when Barnhill spoke with her she was visibly upset and shaking. Miles instructed Barnhill not to work alone in any area and to stay around other people. Miles told Maxey to make sure that Barnhill did not work by herself and to keep her near the front and near the office where the supervisors worked.

Hughes testified that he did not recall having any specific interactions with employees that were out of the ordinary on July 19. He denied making any threats to Barnhill. On July 20, 2011, Miles met with Hughes in an office in the HP building. Phil Smith, Supervisor Revo Thompson, and Senior Operations Manager Leroy Heath attended the meeting. Miles told Hughes that there had been a complaint that he had threatened someone and she was conducting an investigation. Hughes testified that he told Miles that he had no idea what she was talking about. Neither Miles nor Hughes testified that Miles gave him any specific information about the alleged threat. Although Hughes asked her repeatedly who had complained about him, Miles did not identify the individual who had made the alleged threat. Miles asked Hughes not to be disruptive or to threaten anyone on the work floor until she could investigate. Hughes recalled that she told him not to conduct his own investigation. He told her that he had no investigation to conduct because he had not done anything.

Miles recalled talking with Hughes again the next day. As she was leaving the facility in the evening and walking to her car in the parking lot, she heard someone calling her name. She turned to see Hughes standing in the doorway of a building. He asked if he could speak with her. She returned to the facility. Revo Thompson arranged for her to have an office to meet with Hughes and he also accompanied her into the meeting with Hughes. Once inside the office, Hughes told her "I thought that you were going to do an investigation and then get back with me." Miles explained that it had only been 24 hours and that she would talk with him, but not then. Miles described Hughes as upset as he paced the floor. He continued to ask who had made accusations against him. When Miles tried to tell him that she would talk with him and get his side of the story, he continued to talk over her. He argued that there was no side of the story because he didn't do anything or threaten anyone. At one point in the meeting, Thompson had to stop Hughes and tell him to stop talking over Miles so that she could say something. Then Miles told Hughes that she would conduct the investigation and she would talk with any of his witnesses. Hughes asserted that there were no witnesses because he didn't do anything. Finally, Hughes contended "This is a witch hunt." He added that people were lying on him and out to get him just as people had been out to get and to kill Jesus. Miles recalled that the managers were pretty stunned at that point and Hughes' last comment ended the conversation.

Miles did not immediately start the investigation because she wanted to wait until after the election. She returned to her Nashville office for 2 weeks before returning to Memphis to begin the investigation. Miles testified that she had not wanted to cause more issues. She explained that Hughes was very vocal about his support for the Union and tensions were quite high at the facility. She said that she didn't want anyone to think that she was out to get him and she didn't want to stir things up right before the election.

When Miles resumed the investigation, she could not find any witnesses who observed the incident between Barnhill and Hughes and there were no video cameras in the area where the incident was alleged to have occurred. On August 25, 2011, Miles held another meeting with Hughes accompanied by Smith and Heath. Miles told Hughes that he had been accused of threatening to rip off someone's shirt. Hughes asserted that this accusation was a lie and that he had never threatened anyone in his life. Hughes recalled that he asked Miles why he would threaten to rip off a T-shirt from someone. Miles recalled that he added that if someone wants to wear one of the shirts that OHL (Respondent) gives them, it is their right to do so. Miles asked him how he knew that it was a T-shirt because she had never said that it was a T-shirt and she asked him why he thought it was an OHL shirt.

Hughes testified that at this point in his meeting with Miles, he began to talk about author Rico Machiavelli and the book Forty-Eight Laws of Powers.[13] Miles asked him what he meant by bringing up the 48 rules. Hughes told her that people don't like change and he stood for change. Miles recalled that he said something about the need to have change to overcome oppression and then he just seemed to ramble in his comments.

Hughes continued to ask Miles who had accused him of the threat. She told him, "If you didn't threaten anybody, it doesn't matter who said it because then you could go out and confront them and make the situation worse." Hughes recalled that Miles accused him of being angry. Hughes denied being angry and told her, "See, I've got a smile on my face. I'm really calm." Hughes recalled that Miles told him that someone can have a smile and still be angry. Hughes told Miles, "I don't get mad; I get even." Miles recalled that as he made the statement, he leaned forward toward her. Smith recalled that as Hughes made the comment, he changed position in his chair and looked Miles directly in the eye. When Miles told him that statement sounded liked a threat, Hughes responded that it was not a threat; it was just the truth.

Following the meeting, Miles made the decision to give Hughes a final written warning. She testified that she did so because of his threat to Barnhill and also his threat to her. She testified that Hughes already had several disciplinary actions on

[13] I take judicial note that "The 48 Laws of Powers" is a book written in 1998 by Robert Greene. It has been described as a distillation of 3000 years of power, drawing on the lives of strategists and historical figures and intended to show people how to gain power, to preserve power, and to defend themselves against power manipulators. Wikipedia 2013.

file and she could have terminated him. Because he was so vocal for the Union, she knew that he would file an unfair labor charge if she fired him. She thought that it would avoid another unfair labor practice hearing if she gave him only a final warning rather than terminating him. She said that she didn't want Hughes to think that she was persecuting him.

3. October 10, 2011 final warning and suspension

On October 4, 2011, Hughes was assigned to load trucks in the HP account dock area. Hughes' job was to pull boxes from the conveyor line and place them on the line to be moved to the trucks. Supervisor Maxey received a report from fellow Supervisor Eric Diaz concerning a complaint about Hughes. A Spanish speaking employee reported to Diaz that Hughes was sitting in the truck and not pulling his weight with loading the truck. Maxey assumed the complaint was made to Diaz because he is bilingual and it may have been easier for the employee to communicate this information to Diaz.

After speaking with Diaz, Maxey went to Hughes' work area. Maxey testified that he began the conversation by asking Hughes if everything was okay. Maxey could not recall Hughes exact words; however, his best recollection of the comment was, "You guys just don't have a clue." Maxey testified that he told Hughes that it had been reported that he was not pulling his weight. He added that he could get another employee to help but first he needed to make sure that everything was okay. Maxey recalled that Hughes responded, "You guys are treating me just like you did Jesus." When Maxey asked what he meant by "you people," Hughes responded, "You Gentiles and Romans, you're trying to kill me like Jesus." Because Hughes was becoming increasingly louder, Maxey took Hughes into the office.

Hughes' description of the initial conversation with Hughes was similar to Maxey's description. Hughes recalled that Hughes told him that he had heard that he was not carrying his weight. Hughes recalled that he had told Maxey that the employees in that area were really busy and could use some help. Hughes recalled that he demanded to know who had complained about him and that they needed to "get to the bottom" of the complaint. Hughes testified that he told Maxey, "You know how it is David. They lied on Jesus."

Maxey took Hughes into Department Manager Jim Cousino's office. Both Maxey and Cousino testified that when Hughes sat down in the office, he turned his back to Maxey. When Maxey attempted to question Hughes about why someone would have reported that he was not carrying his weight, Hughes became increasingly agitated. Maxey described Hughes as moving his arms around and becoming more excited. Hughes again brought up Jesus in response to Maxey's questions. Cousino testified that Hughes told the supervisors, "This is a bunch of crap." Hughes testified that when Maxey told him to explain to Cousino what he had said in the work area, he told them that he had nothing to say because he had not done anything. Hughes recalled that he told Cousino, "He came out on the floor and embarrassed me and harassed me in front of my coworkers and told me to come and sit in here. And you told me that I wasn't Jesus." Hughes acknowledged that he then began to look away from Maxey. Hughes recalled that Maxey asked him, "You're not going to look at me? You are going to sit there with your head turned and you're not going to look at me?" Hughes testified that he again told Maxey that he had insulted him, harassed him, and intimidated him on the floor for no reason. Hughes recalled that when he finally looked toward Maxey, he raised his arms to shoulder level.

Maxey testified that because he could see that things were getting out of hand, he didn't want Hughes to return to the work floor and disrupt the warehouse. He told Hughes to punch out. As Hughes started out the office door, he told the supervisors "I'll see you in court."

Later on the same day, Maxey sent an email Gloria Thompson, Sara Wright, Shannon Miles, and Evangelia Young in HR. Miles testified that she also reviewed witness statements from those involved. Miles recalled that Maxey, Cousino, and Karen White recommended that Hughes be terminated. Miles explained that she knew that if he were terminated, he would file an unfair labor practice charge and the company would be right back in a hearing as they are now. Rather than terminating Hughes, she prepared a final written warning and sent it to the Memphis facility to be issued to Hughes. The warning that was given to Hughes on October 10, 2011, described his offense as:

On Monday, October 3, Keith spoke inappropriately and hostilely to a supervisor, and this conduct was witnesses by a manager. During this incident, he turned his back on his supervisor who was trying to speak with him, and he threw his arms into the air.

Counsel for the General Counsel argues that even though the warning is worded as a final written warning, Hughes was not paid for the work that he missed from October 4–7, thus resulting in a 4-day suspension in addition to the warning.

4. Hughes' final warning and discharge

When Hughes was first employed with Respondent in 2004 he was also working for Federal Express. He has, in fact, been employed with Federal Express for 17 years. His work hours at Federal Express usually ran from 11:30 p.m. to 3:30 a.m. His hours with Federal Express have also run from 12:15 p.m. to 4 a.m. Because Hughes initially worked second shift at Respondent's facility, his hours for Respondent ran from 2 until 10:30 p.m. In 2010, Hughes was transferred from second shift to mid-shift at Respondent's facility. On this shift, Hughes initially worked from 11 a.m. to 7:45 p.m. On occasion, Hughes worked as long as 9 to 10 hours. Even when he did so, he was still able to get to his second job at Federal Express without any difficulty. Hughes testified, however, that throughout his entire employment, he was allowed to leave his shift early on nights when employees were required to work mandatory 12-hour shifts. He asserted that he had been given this schedule accommodation on both the second shift and the midshift and he had never been assessed attendance points for the nights when he had to leave early to attend his Federal Express job.

Hughes testified that in early 2012, Senior Operations Manager Robert Gray told him that in order for employees to receive night differential pay, he had to move back the start time for midshift to 12 p.m. His midshift hours were then changed from 12 p.m. to 8:45 p.m. Gray was a relatively new manager

and had not been employed with Respondent before October 17, 2011, when he took the position of Senior Operations Manager for the HP account. Gray testified that on the evening of February 27, 2012, there was a new supervisor working alone in the department. As Gray walked through the department, he saw Hughes working. He asked Hughes if he was aware that he was supposed to be working 10 hours that night. Hughes told Gray that he was not supposed to work 10 hours as he had a special arrangement. Not knowing what Hughes meant, Gray told him okay but he would have to check on it.

Gray testified that he checked first with Supervisors David Maxey and David Spates, as well as the leads in HP. None of the individuals knew about Hughes' arrangement. On February 28, Gray sent an email to Gloria Thompson in HR. He told Thompson that when he had spoken with Hughes the day before, Hughes had insisted that he had a special arrangement to leave work at 9:45 p.m. to go to his job at Federal Express. He asked if HR had any documentation of the arrangement and he asked Thompson to review Hughes' file. He also suggested that employees Ora McFadden and Malcolm Boyd, who also work at Federal Express, would have the same terms as Hughes. Thompson forwarded the email to Sara Wright and asked if she would check Hughes' file. When Wright checked Hughes' file, she did not find any documentation of the special accommodation.

Miles testified that the email chain started by Gray on February 28 was the first time that she learned that Hughes had been leaving work early. When Miles began to look into the matter, she also learned that there were other employees who had second jobs. Miles directed Sara Wright to meet with those individuals to explain that they could no longer be accommodated to leave work early for their second job. Wright and Gray met with individually with Hughes, Ora McFadden, and Malcolm Boyd as Miles directed.

Both Wright and Gray testified that Hughes was upset when they met with him on March 5, 2012, to tell him that he could not leave his scheduled work shift early to go to his second job. Hughes maintained that he had been allowed to do so in the past. Wright testified that she told Hughes that if they accommodated his schedule, they would have to do it for everyone else. Wright and Gray told him that he would be given a two-week grace period to make the necessary arrangements. Hughes testified that when he spoke with Gray and Wright, he asked if he could move to a position on the first shift because that would not conflict with his Federal Express job. Hughes recalled that Wright told him that he could not do so because there were no positions available. Hughes asserted that he had heard Gray comment a few days earlier that there were jobs on the first shift. Hughes did not indicate in his testimony whether Gray responded. He testified, however, that Wright had continued to tell him that there were no jobs available for him to transfer into on the first shift. In their testimony, neither Wright nor Gray addressed or rebutted Hughes testimony that he asked for a transfer to the first shift and was told by Wright that he would not be allowed to do so.

The day after meeting with Gray and Wright, Hughes sent an email to Andrew Tidwell, the person that Hughes believed to be the corporate head of HR. In the email Hughes contended that he had been allowed to leave work early for the last 7 years to begin his work with Federal Express and he had been told that he would no longer be allowed to do so. Hughes told Tidwell that he had a meeting with his manager at Federal Express to discuss the situation. He also asked Tidwell if he could have a letter from Respondent to give to his manager at Federal Express confirming that Respondent would no longer allow him to leave early to begin his job at Federal Express at 11:30 p.m. Tidwell responded that he was traveling and did not know enough about the situation that Hughes had described to comment. Tidwell provided his office telephone number and offered to speak with anyone at Federal Express if he needed to do so. On March 7, 2012, Hughes again emailed Tidwell. He told Tidwell that he had spoken with his Federal Express manager and Federal Express had agreed to change his starting time to 12:15 p.m. Hughes explained that even with this change, he was concerned that he might continue to be in a position in which he could not stay for a full 12-hour shift. He added that if this situation resulted in his termination, he was asking that his paperwork be given to him with a full detail of the reason for the termination.

5. Hughes attendance points

On December 27, 2011, Hughes was given a second written warning for his attendance. The attendance notice showed that Hughes had a combined total of eight points for absences and tardiness covering the period between March 11 and December 26, 2011. On April 3, 2012, Hughes was given a second written warning for 10 combined attendance points. The points were given for absences and tardiness between April 27, 2011, and January 9, 2012. The notice contained a handwritten note stating that the next step progression for 12 points would be a final written warning.

On April 9, Hughes was scheduled for a 12-hour shift starting at 12 p.m. Hughes clocked out at 9:46 p.m. On April 10, 2012, Hughes received an employee attendance notice confirming a final written warning. The warning was given for a total of 13 combined attendance points including 3 points that were given to Hughes on April 9, 2012, for leaving early. The notice contained hand-written notes stating that if there were any attendance issues prior to April 27, 2012, he would be terminated. On April 11, 2012, Hughes again emailed Tidwell. Hughes reiterated his circumstances with his requirement to be at Federal Express at 12:15 and the difficulty in doing so when he was needed for a 12-hour shift. Hughes stated in the email that he had asked for a change in his shift and been told that a shift change was not possible. Hughes also explained that even though Gray had told him that everyone was to be treated equally, he was aware of other employees who had accumulated 30 attendance points and were still employed. Hughes asserted that he believed that he was being forced into termination and that it was in retaliation for his support for the Union. Hughes appealed to Tidwell to investigate Respondent's motives and to abide by Respondent's mission statement.

On April 25, Hughes and the other HP account employees were informed that they would be required to work a mandatory 12-hour shift. Hughes went to Gray and asked if he could be allowed to leave work early for his Federal Express job. Gray

denied his request. Hughes also spoke with his supervisor Darnell Flowers and asked if he could use personal time (PTO) to allow him to leave early for his Fed Ex job and Flowers denied his request. Flowers also told him that if he left before 12:45 that evening he would get three additional attendance points. On April 26, 2012, Hughes received his notice of termination based on a total of 16 combined attendance points.

6. Conclusions concerning the lawfulness of Hughes' discipline

Three separate disciplinary actions are in issue with respect to Hughes. Clearly, Hughes engaged in union activity that was known to Respondent. Miles, in fact, testified that in two instances she gave Hughes a lesser discipline simply because of his vocal support for the Union and her concern that he would file unfair labor practice charges. There is no dispute that Hughes was well known as a union supporter. On the basis of the record evidence, there is a logical nexus between his discipline and Respondent's animus toward Hughes. The overall evidence supports a finding that the General Counsel has met its initial burden under *Wright Line* with respect to all three disciplinary actions.

a Hughes' warning of August 25

Hughes received the third written warning on August 25, 2011, because of his threats to fellow employee Barnhill and to Senior Employee Relations Manager Miles. Miles testified that even if Hughes was not disciplined for the threat to Barnhill, he would have been disciplined for his threat to her. Hughes does not deny that in his meeting with Miles on August 25, he told her "I don't get mad, I get even."

General Counsel argues that Hughes' admitted threat must be viewed in the entire context of the meeting. General Counsel submits that Hughes was provoked because Miles questioned him about the alleged threat to his coworker without telling him who had accused him. Counsel for the General Counsel describes Miles' conduct as "goading" Hughes and thus Hughes was justifiably provoked. Counsel for the General Counsel also asserts that even an inappropriate comment by an employee, when provoked, does not justify discipline.

The General Counsel's attempts to put a positive spin on Hughes' statement arguing that what he meant by his comment was that he was going to defend himself against false accusations and file an unfair labor practice charge. This was not, however, what he said. Hughes did not testify that he clarified his statement by explaining what he would do to get even. I credit Miles and Smith's testimony in their description of Hughes' behavior during this meeting. I do not doubt that Hughes changed position in his chair, leaned forward, and looking directly at Miles told her that he did not get mad, he got even. While Miles questioned him about comments that he may have made to another employee, I do not find that she goaded him or provoked him as the General Counsel asserts. In giving his testimony about the meeting with Miles and Smith, Hughes was articulate and appeared quite self-confident. Having observed his demeanor, I am doubtful that he would have been anything other than calm and controlled. Accordingly, I find that Respondent has met its burden in demonstrating that it would have disciplined Hughes on August 25, 2011, in the absence of his union activity.

b. Hughes October 10, 2011 warning

Hughes received his fourth final warning for his behavior toward Maxey on October 4, 2011. Counsel for the General Counsel asserts that even though Miles credited Supervisors Maxey and Cousino about Hughes' behavior during the meeting, these supervisors differed in their testimony about the incident. While both supervisors recalled that Hughes turned away from Maxey, they had different recall as whether Hughes was sitting or standing for the majority of the meeting. Hughes admitted, however, that he refused to look at Maxey and he only turned to look at Maxey long enough to accuse him of harassment and intimidation. Cousino testified that Hughes kept turning the conversation away from the subject at hand. Finally, Hughes stood up quickly, threw his hands in the air, and proclaimed "This is a bunch of crap."

Counsel for the General Counsel submits that even assuming that Hughes was upset and engaged in the conduct ascribed to him, Hughes was provoked into doing so. The General Counsel argues that Hughes did not threaten Maxey verbally or physically, and did not make any grossly profane or vulgar comments to him and thus his conduct did not justify discipline. I agree that Hughes is not alleged to have engaged in gross or outrageous conduct or that he used profanity or made threats to Maxey. I do not, however, find merit to the General Counsel's argument that Hughes was provoked. Hughes testified that Maxey embarrassed him by accusing him of not doing his work in front of his coworkers. Even though Maxey may have done so and then proceeded to question Hughes concerning his work, such conduct is not tantamount to provocation that would justify Hughes' behavior. The credible record evidence demonstrates that Hughes' behavior was such that Respondent had a valid basis for its discipline. Respondent has demonstrated that it would have disciplined him in the absence of his union activity.

c. Hughes' discharge

Hughes was given a final warning on April 10, 2012, and later discharged on April 26, 2011, because of his accumulation of attendance points. Just as with Pratcher, Hughes accumulated the extra points because of absences resulting from a change in his previously adjusted schedule. Respondent argues that in 2011, it made an effort to eliminate all schedule accommodations for its employees at the Memphis facility. Respondent asserts that it did so because the schedule accommodation to allow employees to attend school or work other jobs had become an administrative burden for staffing purposes. Respondent further argues that the change in practice was implemented gradually and without making a companywide announcement. Counsel for the General Counsel argues, however, that even though Respondent asserts that it implemented this policy in 2011, it was not applied to Hughes until March 2012.

Respondent did not present any evidence that Hughes was made aware of this change in policy prior to March 2012. Although Supervisor Robert Gray testified that he first learned on February 27, 2012, that Hughes was occasionally leaving work

early to go to another job, Respondent does not deny that Hughes had been allowed to do so.

Karen White testified that in August to September 2011, she began eliminating the practice of allowing employees to have special accommodations in their required shifts. She testified that she told her managers in her meetings with them of this decision. She also asked her managers to determine how many employees would be affected by this change in practice. She explained that the plan was for the managers and supervisors to sit down individually with the affected employees to inform them of the new policy. In the one-on-one meetings, the supervisors would discuss the options that would be available to the affected employees. She testified that one of the options offered to employees would be the transfer to a different shift. White's testimony is consistent with Pratcher's testimony. Pratcher testified that when Teague informed her that she no longer had the schedule adjustment accommodation, Teague suggested that she might move to second shift in the warehouse. Pratcher declined because she had evening classes that would not allow her to work second shift.

After Hughes was informed on March 5, 2012, that he would no longer be allowed to leave early from his 12-hour shifts, he asked to be allowed to transfer to the first shift to eliminate any need for him to leave before the end of his shift in order to work the second job. Hughes testified that he specifically asked Wright if he could move to the first shift and she told him that he could not do so. Although Wright testified at length about her discussions with Hughes prior to his termination, she did not deny that Hughes asked to move to first shift or that she had refused him as he asserts. In an email to Andrew Tidwell on April 11, 2012, Hughes mentioned that he had requested a change in his shift, but had been denied the earlier shift.

Hughes testified that when he asked Wright for if he could move to first shift, he told her that only a few days earlier, Gray had told him that there were positions open on the first shift. Hughes also testified that during a meeting with employees on April 26, 2012, Gray again mentioned that there were variable positions on first shift and he explained that employees would have to apply for the positions. Although Gray confirmed that he gave Hughes a 2-week grace period to work out a solution, Gray did not deny that he had told Hughes that there were positions open on the first shift.

Counsel for the General Counsel questions the coincidence in Respondent's implementing the change in its attendance policy after the July 2011 election. This change is not, however, alleged as an independent violation and there is nothing in the record to indicate that it was unlawfully implemented. It is reasonable that it became an administrative headache to keep the facility adequately staffed when employees were coming late and leaving early to attend school and other jobs. Thus, I don't find anything suspect in the change in practice that White implemented after the July 2011 election.

Despite the fact that Hughes was warned and then terminated under an otherwise valid attendance policy application, I do not find that Respondent has demonstrated that it would have terminated him in the absence of his union activity. Based on the testimony of the various supervisors, as well as the testimony of Hughes, it is apparent that Hughes did not have a good working relationship with his supervisors and managers. As evidenced by the other two disciplines issued to him in August and October 2011, Hughes' behavior was sometimes erratic, disruptive, and viewed as threatening by managers and other employees. Accordingly, I would expect that his accumulation of attendance points would have been a welcome result of the change in accommodating schedules. Although Respondent asserts that it treated Hughes just as it treated other employees in implementing this change in accommodating schedules, the evidence reflects that it did not. Hughes credibly testified that when he first learned that he could no longer leave before the end of his scheduled shift, he asked to move to first shift and he was denied the opportunity. His doing so is further evidenced in his written email to Tidwell. Although Wright testified, she did not rebut Hughes' assertion. Although Gray testified, he did not rebut Hughes' assertion that he had talked about the jobs open on first shift. Respondent did not rebut Pratcher's testimony that she was encouraged to move to second shift when she was told that her schedule would no longer be adjusted. By denying Hughes the opportunity to change shifts, Respondent guaranteed that Hughes would have to accumulate attendance points and thus provide Respondent with a reason to terminate him. Flowers testified that Hughes came to him on the day before his termination and told him that he would not be able to work a 12-hour shift. Flowers did not rebut Hughes' testimony that Hughes asked to take PTO or personal time off in order to avoid accumulating attendance points. Accordingly, having found that Respondent has not shown that it would have terminated Hughes in the absence of his protected activity, I find that Respondent unlawfully issued Hughes a warning on April 10, 2012, and unlawfully terminated him on April 26, 2012.

CONCLUSIONS OF LAW

1. The Respondent, Ozburn-Hessey Logistics, LLC, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The United Steel Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating Kimberly Pratcher, Deshonte Johnson, and Keith Hughes, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Renal Dotson, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

5. Respondent did not in any other manner violate the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged employees Kimberly Pratcher, Deshonte Johnson, and Keith Hughes, and having discriminatorily suspended Renal Dotson, must offer reinstatement to Kimberly Pratcher, Deshonte Johnson, and Keith Hughes and make these employees and Renal Dotson whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest, at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), com-

pounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]