

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

GEORGIA AUTO PAWN,

RESPONDENT,

CASE NOS. 10-CA-132943

10-CA-142161

and

CYNTHIA JOHNSON, an Individual,

CHARGING PARTY.

**CHARGING PARTY'S EXCEPTION BRIEF TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

**Submitted by:  
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Charging Party, Cynthia Johnson respectfully submits this Brief in support of Charging Party's exception pursuant to the Rules and Regulations of the National Labor Relations Board ("The Board") to the decision of Administrative Law Judge ("the ALJ") William Nelson Cate issued on October 21, 2015 and the proceedings. In compliance with Section 102.46 argument, record, cites, and legal authority in support of this exception are contained herein.

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- 1. The Charging Party excepts to the ALJ's decision that Murillo and Smith were credible witnesses but discredited Johnson as a credible witness (ALJ p.12, line 1-46; ALJ p. 13, line 1-27)**

### **GROUND FOR EXCEPTION 1**

The ALJ erred by crediting the testimony of Regional Manager Smith and Area Manager Murillo and refusing to promulgate the circumstances for which Johnson's "mannerisms" did not equate. Johnson attended the hearing pro se, while Respondents were represented, and rehearsed, by counsel.

The ALJ stated in his decision:

Although I have not commented on every bit of testimony, nor resolved every possible credibility, I have considered all the testimony and made the necessary credibility resolutions, I am not unmindful that sometimes the resolution of credibility conflicts are difficult requiring the trial judge (or a jury) to rely upon sixth sense and/or instinct in arriving at a resolution of some conflicts leaving open the possibility, small or significant, that the determinations are erroneous. I have no doubt here, I do not need to rely on a sixth sense, or instinct in making the credibility resolutions I make. (ALJD p.12, Line 27) the basis of the ALJ's decision is dependent on mannerisms and behavior.

The ALJ erred in his finding that Johnson's testimony was not credible when she believed to be recording her conversation with Murillo and that she knew the law permitted her to do so. He stated that "Johnson's testimony that she told Murillo she had been reading the laws of Georgia and she was allowed to record their conversation was credibly denied by Murillo." "In fact, Johnson never actually recorded the

conversation."[JD. p.12 20-30]

Johnson testified that she was advised by other employees to protect herself by documenting her conversations with Murillo. [Tr.79; 4-13] Johnson attempted to document her conversation with Murillo by recording their conversation, just as she had protected herself by taking pictures, sending emails and keeping notes. Johnson believed that she was recording their conversation; however, she found out afterwards that the information had not been captured. [Tr.pg.76 6-8]

In addition, Johnson wrote an email to the company on June 30th; however, it was not sent. (Exhibit 1)Johnson thought it would be best to request a meeting with Don Hulse to discuss the matter in person. [Tr.Tr.pg.70 24-25 (pg.71 1-5)]Whereas, Johnson did write that Murillo had prohibited her from recording further conversations with other coworkers and supervisors to restrict her from documenting the incidents.

In fact, Under the Purpose and Reason for counseling section of the Employee Counseling form, Murillo wrote that "Johnson also informed the Area Manager that she was recording this conversation. Under section Job expectation and Desired Results section, Murillo wrote "The Company's telecommunication systems are to be used for business purposes only. Recording any conversations, in person or on the phone, will be strictly prohibited. This includes but is not limited to, conversations between coworkers, customers, or supervisors. She warned Johnson that any further incidents of not following the company policy will result in termination. (GC Exhibit 5)

In addition, Murillo testified that Johnson informed her that she was recording the

phone call. (Tr.p.110) She alleged that Johnson's recording was disrupting the workplace, that, she could have just called her instead (Tr.111 (21-24). However, the record does not show whether Johnson was speaking to her in a private area or if there were other employees around at the time. Any defense that Murillo's admonition to Johnson based on an honest belief that she had been disturbing other employees during working time is unavailing. It has been long held that a mistaken belief that an employee had engaged in misconduct is not a defense where the employee in fact engaged in protected 7 activity. *Burnup and Sims, Inc.* 379 NLRB 21, 23 (1964).

Section 8(a) (1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

Employees have a Sec. 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures or recordings. See Hawaii Tribune-Herald 356 NLRB No. 63 slip op. at 1 (Feb. 14, 2011) enforced sub nom *Stephens Media, LLC v NLRB* 677 F. 3d 1241 (D.C. (11, 2012) *White Oak Manor*, 353 NLRB 795-795 (2209) enforced mem. 452 F. Appx 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use of possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Similarly, In Lafayette Park Hotel, 326 NLRB 824, (1998), the Board explained that an employer may violate the Act through the mere maintenance of certain work

rules, even absent enforcement. The maintenance of a rule that would reasonably chilling effect on employees' Section 7 activity violates Section 8 (a) (1). Id. at 825. The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected conduct. Lutheran Heritage-Livonia, 343 NLRB 646, 646-47 (2204). First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. (1) Employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context. Id. at 646.

It is clear that the rule was promulgated in response to their conversation because there were no prior rules in place barring such recordings and it was not otherwise unlawful to do so in the state where the incident took place. The new policy does not specify if employees are prohibited from tape recording conversations during working time or non-working time; therefore, an employee would reasonable believe that tape recording is strictly prohibited anytime of the day. The policy also does not explain a legitimate business purpose nor does it expressly exclude recordings that are made in furtherance of protected activities; therefore, the rule would reasonably have a chilling effect on employees' Section 7 activity which violates Section 8 (a) (1). Moreover, the rule was promulgated in effort to restrain Johnson from documenting work related issues with her co-workers which is unlawful and a violation of Section 8(a) (1) of the Act.

**A. ALJ's Credibility Determination Are Unreasonable And Should Be Set Aside.**

An Administrative Law Judge's credibility determinations are owed deference only where they are supported by substantial evidence. See Eldeco, Inc. v NLRB, 132 F. 3d 1007, 1011 (4th Cir. 1997) (Citing Universal Camera Corp. v NLRB, 340 U.s. 474, 488-91 (1951)). The Board is not compelled to follow the Hearing Officer's conclusion where they are unreasonable, contradict other findings of fact, or unsupported by good reasons. See NLRB v McCullough Env'tl. Serves., Inc., 5 F. 3d 923, 928 (5th Cir. 1993); Stolte Inc., 273 NLRB 1316, 1321 (1984). "Where material contradicted evidence had been ignored,..or where the evidence has been disregarded or eliminated by the casual expedient of discrediting an employer's witnesses...the result is that the Trial Examiner's report...will not be accorded the presumption of correctness usually attributed to the trier of fact." NLRB v Huntington Hospital, Inc., 550 F. 2d 921. 924 (4th Cir. 1977) (quoting NLRB v United Brass Works, Inc., 287 F. 2d 689, 691 (4th Cir. 1961)).

The record is patent that ALJ's credibility determination were an abuse of his authority and should be overturned. Standard Dry Wall Prods, Inc., 91 NLRB 544, 544-45 (1950), enforced, 188 F. 2d 362 (3d Cir. 1951). He credited the two respondent witnesses based solely on what appears to be empathy, without giving considerations to their motives to lie, their contradictory affidavits, or their inconsistencies in their testimony. At the same time, he summarily discredited the testimony of Johnson based on his unsupported assumptions about the evidence and her unrehearsed mannerism.

He gave no consideration to the substantive testimony in context, see Ames Ready-Mix Concrete, Inc., 170 NLRB 1508, 1511, n.3 (1968), nor any of the relevant determination that are clearly set forth in Board precedents and the Guide for Hearing Officers in NLRB Representations and Section 10(K) Proceedings.

**B. The ALJ's Credibility Determination Must Be Disregarded For His Failure To Consider The Motives, Lies And Inconsistencies Of the Respondents Witnesses.**

The ALJ did not consider numerous instances where the Respondents witnesses gave testimony that differed substantially from their prior statements. The transcript of the cross-examination of both witnesses is replete with examples of their contradictory testimony. The ALJ's Recommendation does not consider their inconsistencies. It would get tedious to highlight, much less detail, the problems with the testimony of Murillo; but for instance, Under the Job Expectations and Desired Results section of the Employee Counseling form, Murillo alleged that Johnson's behavior led to low productivity and loss of customers; despite the fact, Murillo testified that "Johnson was a good employee and performed well." [Tr.p.36] and Murillo's supervisor Smith testified that "he wanted to keep Johnson as a good employee." (TR.pg.128 12-13))

ALJ Cate's stated in his Decision that "At this point, Murillo gave Johnson the Employee Counseling Form, described fully elsewhere, to read, and, if she had anything to say about it. Johnson responded she was not going to sign it and gave it back to Murillo. Johnson asked that her written response to the employee counseling form be accepted and submitted to the Company which it was".

Yet, under the employee to complete section of the form, Johnson circled No,

she did not feel her supervisor's expectation was reasonable. She also wrote "I do not agree with the findings", please refer to the letter given to Area Manager and she initialed "C.J". The evidence indicates the judge overlooked the lump of false allegations of misconduct in the mix.

The Recommendation does not contain a single explanation for why Murillo's testimony is not consistent with her written statements, and why this was irrelevant to his so called unbiased credibility determination. Instead, the ALJ credited this testimony in finding that Johnson was not credible.

**C. The ALJ's Findings Of Fact Were Not Supported By The Record.**

Throughout the Recommendation, ALJ Cate's made findings of fact that were not supported by the evidence, not fair inferences from the testimony or documents presented, or in direct conflict with the evidence presented. It is upon these erroneous factual findings that he based his conclusion that Johnson's protected concerted activities were not a motivating factor to her discipline and termination. There is no reason to give these findings deference. They ignored uncontradicted testimony, and are unreasonable in light of the evidence presented. *Hickman Harbor Sev. v NLRB* 739 F. 2d 214, 218-19 (6th Cir. 1984) (emphasis added); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). The record is full of findings of fact that are not supported by the record evidence, or based on assumptions that ALJ Cate's made.

A few of the more egregious examples follow.

**2. The Charging Party excepts to the ALJ's Decision to dismiss the discipline complaint.**

**GROUNDS FOR EXCEPTION 2**

The ALJ erred in finding that the disciplinary action Murillo took was not unlawfully motivated by Johnson's protected concerted activity. (JD, p.17, 20) The judge stated that, "Johnson's testimony that Murillo at that point told her she should not be discussing wages with anyone, not even Murillo, was credibly denied by Murillo." (JD 14, 30)

**D. The Company, through Area Manager Samantha Murillo, violated Section 8(a) (1) of the Act by prohibiting Johnson from discussing her wages with other employees.**

Area Manager Murillo admits that Johnson told her she had asked other employees about their raises. [Tr.pp. 111,119] Murillo admits that she then told Johnson that she was disrupting the workplace and that Johnson should have just called her instead of calling other employees. [Tr.p. 111] Murillo admits that she had no idea whether Johnson's discussions with other employees occurred during working time. [Tr. p. 120]

Section 7 of the Act guarantees employees right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees are engaged in protected concerted activities when the act in concert with other employees to improve their working conditions. Eastex, Inc., v NLRB, 437 U.S. 556 (1987). Generally speaking, a conversation constitutes concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of employees." Meyers Industries, 281 NLRB 882, 887 (1986) quoting Mushroom Transporation Co. v.NLRB, 330 F.2d 683, 685 (3d Cir. 1964). However, contemplation of group

action is not required in all circumstances. Specially, group action need not be contemplated to invoke the Act's protection when the discussion is about wages.

Wage discussions are inherently concerted because wages are of immediate concern to employees. Belle of Sioux City, L.P., 333 NLRB 98, 101 (2001), citing Eastex, Inc. v. NLRB at 569. The Board found that an employee who discovered her wage rate was engaged in protected activity even though the activity was not concerted. Taylor Made Transportation Services, Inc., 358 NLRB No. 53 (2012). "In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most critical element of employment.' are 'the grasp on which concerted activity feeds.' Parexel International, LLC, 356 NLRB No. 82, slip op. at 3 (2011), quoting Aroostook Ophthalmology Center, 317 NLRB 218, 220 (1995). See also, Triana Industries, 245 NLRB, 1258 (1979) (discussions of wages "is clearly concerted activity").

Any defense that Murillo's admonition to Johnson was based on an honest belief that she had been disturbing other employees during working time is unavailing. It has long been held that a mistaken belief that an employee had engaged in misconduct is not a defense where the employee was in fact engaged in protected 7 activity. Burnup and Sims, Inc., 379 NLRB 21, 23 (1964). Conversely, an employer's mistaken belief that an employee engaged in protected concerted is sufficient to establish employer knowledge. Alternative Energy Applications, Inc., 361 NLRB No. 139 (2014). When Murillo told Johnson that she should not be discussing here raised with other employees, she violated Section 8(a) (1) of the Act.

**E. The Company violated Section 8(a) (1) of the Act by disciplining Johnson for engaging in protected concerted activities.**

After her telephone call with Johnson, Murillo prepared the Employee Counseling Form that she eventually gave to Johnson on June 17. [Tr.113, GC Ex.6] Under the section titled Purpose and Reason for Counseling, it noted that Johnson "had spoken with a few other employees" about the decrease in the amount of her raise. Under the section titled Job Expectations and Desired Results, Murillo wrote "All employees are required to adhere to company policy for resolving issues by following the proper chain of command." She went on to state that Johnson's going outside the "chain of command" by contacting other employees "negatively impacted the morale of other employees." Under the authority cited above, Johnson engaged in protected activity. Clearly, the written discipline references this protected activity and directed Johnson to refrain for similar activity in the future. Like Murillo's verbal admonition, the written discipline issued to Johnson was also unlawful.

The ALJ wrote, it's understandable that Johnson was upset about her raise; however, I found that Johnson's comments were not just disrespectful but a willful rebuke and disregard for Murillo's authority. Yet, he wrote that Murillo's credited testimony established she and Area Manager Ben Raimondi met with Johnson at Johnson's work location on July 17 for the purpose of re-explaining the Johnson's raise and address how Johnson had spoken to Murillo in their earlier telephone conversation. {ALJD pg.15 line 20-25]The ALJ made it clear that at least part of the basis of Johnson's coaching stemmed from her criticism of her ("Respondents") failure to properly address the wage concerns.

Johnson first discussed the issue of her raise with branch manager Tameka Williams. [Tr.p.35] Johnson told Williams that the amount of her raise was lower than the one she received that previous year and, from her review of the handbook, she noticed that she was supposed to be receiving performance reviews. [Tr. p.36] When Johnson asked Williams why she had not been receiving annual reviews, Williams replied that she did not know. [Tr.p.36] Next, Johnson spoke to employees at some of the Company's other locations. [Tr.p.36] She told those employees that they were supposed to be receiving performance reviews and that was how their raises were determined. [Tr.p. 36] One employee told Johnson that her raise had been three percent and that she thought that was the highest amount that could be given. [Tr. pp36, 66] Johnson told her that employees could get up to 5 percent. Johnson also talked to branch managers "Frank", "Jerrod" and Quinesa Williams about performance reviews and how raises were determined but none of the managers could offer any future information. [Tr.p.37]

Johnson tried several times to reach Murillo. [Tr.p.38] They eventually spoke on June 9, 2014. [Tr.p.110] Johnson told Murillo that she had some questions about how the amount of her raise had been determined since it was substantially lower than the one she had received the previous year. [Tr.p.38] Murillo told her that she was a good employee and had performed well. [Tr. p.38]

Johnson continued to question Murillo about the decrease and employee evaluations. [Tr.pg.3812-25] Murillo became frustrated and told Johnson that she chose to move to that chose to move to that location. Johnson explained to Murillo that she

was moved because she made a complaint about safety." [Tr. pg. 39 1-5] Johnson explained to Murillo why she felt that the Mableton location had improved since her transfer. [Tr.10-15]Murillo accused her of having a sense of entitlement. Johnson told Murillo that she did not have a sense of entitlement and that she felt like protocol was not followed.'[Tr.pg.39 10-21] Johnson told Murillo that she had spoken to other employees about raises and performance evaluations that even the managers did not seem to know and that some employees didn't know it was possible to get a raise larger than three percent. [Tr.pp.39-40] Johnson did not reveal the names of anyone she had spoken to. [Tr. p.40] Murillo told Johnson that she was not supposed to be talking to anyone about wages. [Tr.p.40] Murillo told Johnson that she would be getting a write-up for insubordination. [Tr.p.40]

Johnson told Murillo that she was recording the conversation and that the law permitted her to do so. Murillo told her that she should not be recording the conversation. [Tr.pg.40 14-22] Murillo told Johnson she was not permitted to do so and that she would be coming to the office to write her up."[Tr.40 22-25] Johnson testified that "toward the end of the conversation, Murillo stated that she was getting off the phone and that Johnson could go back to doing her Sales job, like emphasizing on the sales job. Johnson said that "she felt like Murillo was trying to demean--just put me down or whatever." Johnson admits she then told Murillo that she needed to do her job and answer the phone. Murillo asked her, what do you mean?" Johnson stated she said "I mean, we have--we're trying to call you when we're doing sales, and you don't answer or anything like that. And then she was like, you know what, I'll be over there

next week." [Tr.41 1-11]. Although the conversation apparently became heated, Johnson did not use any profanity. [Tr.p.41]

Believing that she would only receive a warning for insubordination because of the tone of her conversation with Murillo, Johnson prepared a written response. [Tr.p.42, Gc Ex.4] On June 17, 2014, Murillo came to the store with another area manager, Ben Ramoundi. [Tr.pp.43, 81] When Murillo raised the subject of the previous week's conversation, Johnson said that she had not been disrespectful but that she simply wanted to understand how her raise had been determined. [Tr.p.44] After they pulled up figures on the computer and discussed them, Murillo gave her an "Employee Counseling Form." [Tr.p.44, GC Ex.5}

In fact, Under the Purpose and Reason for counseling section of the Employee Counseling Form, Murillo wrote that "On 06/09/2014 at 12:44pm, the Area Manager spoke with Sales Representative mentioned above, Cynthia Johnson. During the conversation the Sales Representative "*informed*" the Area Manager *that* she had spoken to other employees regarding her wages; she also "*informed*" the Area Manager that she was recording the conversation and she "*informed*" her that she should do her job and answer the phone". Under the Job Expectation and Desired Result section, Murillo stated "Employees are expected to speak to their supervisors with reasonable, respectful, and professional tone and attitude. Murillo warned Johnson that any further incidents of insubordination, not following company policy and company procedures will not be tolerated and will result in termination.[GC Exhibit 5] The wage discussions and

the recording is related if not much the same as disciplining Johnson for violation of the Respondent's insubordination policy. This is a general prohibition against and discipline for discussions with coworkers about terms and conditions of employment, which are clear violations of the Act."

Murillo referenced the Employee handbook for making her decision. Murillo wrote that Johnson could find the policy in the Employee handbook. She instructed Johnson to look for the handbook under the Employee Service Support located on the Company's computer system. Johnson looked under the classification section of the Employee handbook [Tr.p.34 19-25; p. 35 1-2] and the policy stated that, "the Company would inform you of your classification for your position. Then if you have any questions concerning your classification, hours, or compensation, you should contact your supervisor." (GC Exhibit 3) In addition, The Respondents Confidential information policy states that "All Company data, records and documents are strictly confidential. Disclosure and/or removal of such information is sufficient grounds for discipline, up to and including termination.

The Respondent also has a policy in the handbook that states, [e]mployees are not to participate in the spreading of malicious gossip or rumors, creating general discord, interfering with the work of another Employee(s), willfully restricting work output or encouraging others to do so." {GC Ex., 2, p. 2} Like the policy forbidding "disrespectful conduct" that the board found unlawful in University Medical Center, supra, the policy is overly broad with regard to the prohibition on "creating general

discord."

Despite Respondent's assertion, Johnson did not lose the protection of the Act by criticizing her employer. The record here established that Johnson's communication was not false, nor was it reckless or so disloyal as to remove her from the Act.

Although Johnson may have made an error in judgment by responding to Murillo's demeaning statements toward her. The purpose of their conversation was for Johnson to seek and provide mutual support to encourage the employer to address problems in the terms and conditions of employment, not to disparage its service or products or services or to undermine its reputation. The discussion clearly showed a labor dispute existed and her participation was not directed to the general public, customers or other employees nor was it in the presence of either of them; therefore, it did not have a negative effect on the employee morale nor did it affect the public or customers. The Company did not establish that the comments were made with knowledge of falsity or with reckless disregard for their truth or falsity. "In addition, Johnson had no prior reprimands or warnings regarding such conduct. Murillo does not accuse Johnson of using profane language, threats or refusing to follow direction. In fact, Johnson testified that she told Murillo during the meeting on June 17 that she was not being disrespectful to her and that she felt like Murillo was taking the conversation personal. (Tr.44 2-3)

Board law is clear that verbal counseling and warnings constitute disciplinary action sufficient to support a violation of Section 8 (a) (1) and/or (3) where they "are part of a disciplinary process in that they lay "a foundation for future disciplinary action

against [the employee]. " Promedica Health Systems, 343 NLRB 1351, 1351 (2007).

They also held that a documented coaching reflecting an employee's violation of important company policies, and his counseling therefor, can have an adverse consequence or on the employee's terms and conditions of employment and "may be a foundation for future disciplinary action." Trover Clinic, 280 NLRB 6, 16 (1986) (Board determined that oral reprimand served as the foundation for future disciplinary action). See also Funk Mfg., Co., 301 NLRB 1111 (1991), where a manager had given an employee who was observed distributing union literature while off duty in a non-work area entrance a "casual reminder" and told the employee a second offense would result in an "oral reprimand for the file," and the Board determined that the verbal warning fell within the company's formal disciplinary program.

The General Counsel of the NLRB issued a report addressing handbook policies under the NLRA. According to the Report, policies that prohibit employees from engaging in "disrespectful", "negative", "inappropriate", or "rude" conduct towards the company or management will be found unlawful absent further clarification. Further, because the NLRB had found that employee criticism of an employer will not lose NLRA protection because the criticism is false or defamatory, the Report states that a policy which prohibits only false statements will be considered unlawful by the NLRB.

The NLRB determined that an employer violated the NLRA by firing an employee for defying an "insubordination rule" set forth in the company's handbook after the employee posted disparaging comments about coworkers and managers on social

media. The policy were not clear enough to ensure employees were permitted to engage in conduct specifically protected under the NLRA.

Moreover, the Board, with court approval, has long recognized the right of employees to express disagreement with their employer's view during protected activity, as long as the conduct does not involve either "violent conduct, improper motive, or bad faith," or a "planned course of misconduct to disrupt the captive audience speeches in attempt to turn the meeting into a union forum. See F W. Woolworth, 251 NLRB 1111,1114 (1980).end. 655 F. 2d.151 (8th Cir.1991), cert. denied 455 U.S. 989 (1982), citing J.P. Stevens & Co., 219 NLRB 850 (1975), end. 574 F. 2d 792 (4th Cir. 1976); AMC Air Conditioning, 232 NLRB 283 (1977); Farah Manufacturing Company, Inc., 202 NLRB 666 (1973). No such misconduct is present in this case.

It is evident that Johnson's employee counseling was motivated by her protected concerted activity, Murillo, in writing, gave several reasons for disciplining (writing up) Johnson; however, at the hearing the Respondent shifted the sole reason for Johnson's discipline to "insubordinate". The Respondent was simply looking for any reason to justify Johnson's write up and termination.

**3. The Charging Party excepts to the ALJ's Decision to dismiss the termination complaint.**

**GROUND FOR EXCEPTION 3**

The ALJ erred in his finding that Johnson's protected concerted activity was not a motivating factor in her discharge and that it would have taken the same action in absent of Johnson's protected activity.

**F. The Company violated Section 8 (a) (1) of the Act by discharging Johnson in retaliation for her protected concerted activities.**

The Company contends that Johnson was discharged not because of her protected concerted activity but because of her behavior during her meeting with Smith. Employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect. However, employees are permitted "some leeway for impulsive behavior." NLRB v. Thor Power Tool, 351 F. 2d. 584, 586-587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964) (reference to supervisor as a "horse's ass" in the course of concerted activity, did not render activity unprotected). "[D]isputes over wages, hours, and working conditions are among the disputes more likely to engender ill feelings and strong responses." Consumers Power Co., 282 NLRB 130, 132 (1986).

In considering the boundaries of misconduct occurring in the context of concerted activity, the issue "is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for future service." Lana Blackwell Trucking, LLC, 342 NLRB 1059, 1064 (2004). The Board recognizes that this is a high standard: [T]he language of the shop is not the language of "polite society," and that tolerance of some deviation from that which might be the most desirable behavior is required." Dreis & Krump Mfg., 221 NLRB 309, 315 (1975), end. 544 F.2d 320, 329 (7th Cir. 1976). In deciding whether an employee loses the protection of the Act by opprobrious conduct, the Board balances four factors, as forth in Atlantic Steel Co., 245 NLRB 814,816-817(1979): (1) the place of the discussion;(2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4)

whether the outburst was, in any way, provoked by an employer's unfair labor practice."

Although their conversation may have become heated, there is no contention that Johnson said or did anything to Smith that would remove her from the protection of the Act under the authority set forth above. If Smith is to be believed, Johnson is not even alleged to have used any profanity at all until Smith had told her to "get out." see, e.g., Standford Hotel, 344 NLRB 558, 558-559 (2005) (employee loudly called general manager a "liar" and a "fucking son-of-a-bitch" during a discussion over whether the employee was eligible for inclusion in bargaining unit; in finding conduct protected, the Board noted that discussion occurred in a relatively secluded room and only one employee overheard the exchange, that the discussion concerned the employee's assertion of a fundamental right under the Act, and that the employer had provoked the employee by unlawfully threatening to discharge him).

Similarly, the Company may allege that Johnson would have been terminated even in the absence of any protected activity on her part. In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in Wright Line, 251 NLRB 1083 (1980), end. other grounds 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.s. 989 (1982). Under Wright Line, the General Counsel must demonstrate by a preponderance of evidence that the employee's conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies his initial burden by showing (1) the employee's protected activity (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets

his initial burden, the burden shifts to the employer to prove that it would have taken the adverse even absent the employee's protected activity. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. Roure Bertrand Dupont, Inc., 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual, either false or not actually relied on, the employer will fail by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. Metropolitan Transportation Services, 351 NLRB 657, 659 (2007).

The ALJ erred in finding that " Smith was credible when he testified that " he did not speak that day with his immediate supervisor, Don Hulse, about Smith's plans to visit with Johnson nor was he aware that Johnson had sent an email to Hulse that day, in fact, Smith was not aware of the email until the trial here." [ALJD p.18, 40] "The credible evidence establishes that Area Manager Smith came to Johnson's work location, unannounced, on July, 7 to talk to Johnson about getting along with her coworkers and supervisors. (JD, 20; 25)

### **Johnson's emails**

On or about December 9, 2013, the manager at the Fulton location Quinese Williams was robbed after Johnson left work. On December 11, Johnson sent an email to Smith's supervisor Don Hulse; however, she addressed it to the principal of the company Robert Reich. She wrote the email regarding the robbery at Fulton Industrial

and several of the Company's other locations. She explained that employees were not being told about other robberies in the area and she felt that the Fulton Industrial location in particular was unsafe because it was a high crime area. Johnson also told him that Murillo's continuous threats to fire employees in effort to meet sales goals were intimidating and hostile. Johnson stated that she had been warned by other employees not to speak out due to their fear of her possibly losing her job, however, she could no longer live in fear. He did not reply. (Joint exhibit. 1)

On December 18, Johnson sent a follow up email to Don Hulse and copied it to Terry Fields the Compliance Officer; however, she addressed it to the principal of Community Loans of America, Robert Reich. Johnson wrote that she had not heard back from the company and that she felt stressed due to working in an unsafe environment. Johnson requested that the Company inform her of their next course of action. Later that day, Smith was sent to the location to speak with her regarding the matter. In fact, Smith testified that he was notified that Johnson did not feel safe at the store so he went to speak with her. He alleged that Johnson was talking to customers about how she felt unsafe and that the company was not doing anything. (Tr.124; 13-19)

On December 19, Johnson sent a follow up email to Hulse. Johnson thanked him for sending Smith; however, she expressed that Smith did not properly address the safety concerns because he stated that "the executive office had to meet to discuss the matter". Johnson explained that although she loved her job, she was feeling overly

stressed due to working in an unsafe and hostile environment. She informed the Company that if the matter was not resolved within a reasonable time she would seek other alternatives.

On December 28, 2013, Johnson was subsequently transferred to the Mableton location. Johnson was told that she was being transferred to make her feel safe and so she could help grow the store. However, Smith alleged that Johnson was moved due to having interpersonal problems with her previous manager Quinesse Williams. Although the Respondent attempted to prove his allegation by showing personal notes from Williams's notebook it failed to demonstrate that Johnson was ever spoken to, warned or disciplined about the issue. In fact, Johnson and Williams stayed in close contact after her transfer and termination. Moreover, the Company failed to show there were any disciplinary actions taken against Johnson prior to June 17.

Johnson testified that the general practice of the Respondent was not to respond to her emails but instead send Smith. [Tr. pg.94; 1-13]The emails and Smith's testimony clearly establishes that the general practice of the Respondent was not to respond to Johnson's emails but instead notify and send Smith to speak with Johnson; therefore, Smith's credited testimony is uncorroborated and pretext.

Currently, the Board's view is that evidence of pretext can be considered in the first stage, and can even be the primary basis for finding unlawful motivation by the employer.

## **Audit**

On July 3, Murillo conducted a standard audit at the Mableton location. During the visit, Johnson and the store manager Tameka Williams received a coaching form outlining how a file should be put together and what the expectations were regarding the files. (Exhibit 9) Johnson was told by Murillo to make sure she finishes the folders and put them away before the end of the day. (Tr.51) Johnson wrote on the audit report that she was not aware of the policy but going forward she would make sure to put her folders up. Murillo testified that the counseling was not in a disciplinary nature and the conversation was not confidential at all. (Tr.120)

## **Request for meeting**

On the morning of July 7, 2014, Johnson sent an email to Don Hulse. She requested to have a one on one meeting with him regarding the Employee Counseling Form she received from Murillo on June 17. (GC Exhibit 8) Sometime after Johnson arrived at work Smith called to inform her that he would be coming to the office on Friday to speak with her regarding the matter. (Tr. 47, 25; 48 1-2) Johnson was adamant with Smith about meeting with Hulse as well because she felt like issues were not being properly addressed by management; therefore, he became upset because of it.[Tr.89; 21-22] Smith refused Johnson's request and he informed her that the chain of command stops with him then ended the conversation.(Tr.48 8-19) However, Smith denied the conversation occurred.

Smith alleged that Area Manager Ben Raimondi contacted him after he went to the store with Murillo on June 17, to issue Johnson the written counseling form about "insubordination". (Tr.125 (22-25)) Smith alleged that Raimondi told him that while he

was attending the meeting with Murillo and Johnson; Johnson became very "loud and belligerent." (Tr. 126) Smith alleged that discussion is what prompted him to come to the location on July 7(Tr.126 (7-18))." He stated that "he went to talk with Johnson in regards to the fact that he had gotten notice that she had been written up and that he wanted to make sure that, you know we could keep a good employee." (Tr. 128). However, Johnson's direct Area Manager Murillo testified that she does not recall discussing the matter with him. [Tr.pg.113 17-18]

In fact, Smith testified that he has quite a few stores and does not have time to swing by every store. He stated "I thought, you know, I'm going to swing by the store when I get a chance and actually speak with Johnson about getting along and working well with her fellow employees and supervisor. (Tr.128 (1-7)) However, Smith admits that he made no attempt to contact Johnson prior to her email. He stated that "the next time he had interaction with Johnson since her transfer in December was on July 7, 2014(Tr.125 (15-19)); (Tr.113) Moreover, Smith's testimony is about what Raimondi said happened during the meeting on June 17; his testimony is being offered to prove the truth about what is asserted-that he heard Johnson was "loud and belligerent" which is why he came is hearsay. Smith has no direct knowledge of the facts about the meeting, and the declarant, Raimondi, a non-party, is not on the stand to be cross-examined about the matter. (Guide for Hearing Officers in NLRB Representation and Section. 10(k) Hearsay (FRE 801-807)) In fact, the Counsel for the General Counsel objected to the hearsay testimony of Smith; however, the ALJ determined it was admissible. [TR.126 Line 2-16]

Pursuant to the Federal Rules of Evidence, "hearsay," defined as "a statement, other than one made by the declarant while testifying at the trial of hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801©, is not generally admissible in federal courts. See Fed. 4. Evid. 802. In fact, The Sixth Circuit has made it clear that, "The uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice." NLRB v Container Corporation of America, 649 F.2d 2013, 1216 (6th Cir. 1981).

The record establishes that Smith's testimony is pretext and the true reason Smith went that day was because he was notified that Johnson sent Hulse the email that morning requesting a meeting regarding the write up from Murillo.

The ALJ erred in crediting Smith's testimony that Johnson refused to discuss the file. (JD, 1910-20) and that Smith credibly testified he recognized the matter was at a stalemate and told Johnson if she chose not to talk about the file, and if she was not going to speak at all he thought she should leave. Johnson yelled, crossed her arms and refused to speak at all. (ALJD, p.19, 25)

Smith began their conversation by telling Johnson that Williams had informed him that she had just finished with a customer and went to lunch and that she intended to finish with the folder and put it away when she returned.[Tr. p.50 6-10]Smith asked Johnson if she knew the company policy regarding folders. Johnson told him that it was her understanding she was to complete the folders and put them away before the end of

the day.[Tr. p.50 13-16]However, Smith informed her that was inaccurate and that folders were to be completed and put up before leaving the office at any time.[Tr.p.50 16-18] Yet, the branch manager Williams was aware that Johnson was leaving the file until she returned and permitted her to do so; therefore, she had to believe as Johnson did that Murillo instructed them to put up their folders before leaving at the end of the day. In addition, the record does not show Williams was reprimanded for allowing Johnson to leave the file. Moreover, Smith admits he did not mention the audit report during his conversation with Johnson and he may have not known about the coaching before she was discharged. (Tr.142) However, the Respondents are now attempting to use the coaching as part of their defense.

Additionally, after the audit, Johnson took pictures of files on three different employees' desks to document that this was common amongst the employees. Two of the employees' desks were located in areas where customers would have easy access to the files because they were near the public restrooms. She also provided a picture of her previous manager Quince Williams sitting with files on her desk while Johnson visited her during lunch after she was terminated. (GC Exhibit 14) This establishes that this still remains a commonplace practice around the Company.

Johnson told Smith that she did not know about the policy but going forward she would do it. [Tr.5018-21] She then asked him if they were going to talk about her concerns and Smith responded No, that he had already read the write up and that he agreed with it. Johnson asked Smith if he had a copy with him so they can go over it

and Smith replied "No". Johnson asked him repeatedly if they could discuss the issue and Smith told her that he agreed with the write up and if she did not like it, get out. (TR.52 5-25)

In fact, Smith admits that he did not bring the write up (TR 128) and that his intention was not to talk about the write up rather his intentions were to talk with Johnson about getting along with others so that he can keep a good employee. (TR. 128)

Smith alleged that Johnson refused to discuss the file and that she became loud and belligerent during the course of her repeatedly asking him to speak about Hulse and Murillo. He state that "the conversation went stale so he asked her to leave. He said that "Johnson was asked if she needed anything and she replied, No, I got my "shit". (Tr.132; 1-16)) Whereas, the ALJ noted in his Decision that "the Company's witness Alexis Reiss testified in her pre-trial affidavit that "she did not recall Johnson saying anything to the effect she did not want to discuss a file, but did state it, "It sounded familiar Johnson saying that she did not want to discuss something or wanting to discuss something else, but I can't recall any specifics." (JD, pg. 11, 20-25) Yet, he credited Smith's testimony that Johnson refused to discuss the folder.

The ALJ stated that "Reiss, who overheard portions of Smith's and Johnson's exchange, heard Johnson yelling and curse." [ALJD p.19 (35)] Despite Reiss's admitted close proximity, she did not state one curse word that Johnson supposedly used toward Smith. Whereas, Johnson testified that she did not use any expletive

words. [Tr.pg.54 3-5] In fact, the record establishes that Murillo has never accused Johnson of using any expletives toward her during any of their encounters.

The ALJ also noted in his Decision that "Alex Reiss indicated that she is employed by Automotive Remarking, Inc., which is engaged in the business of selling reposed vehicles." Reiss stated in her affidavit that she worked at the Company's Mableton, Georgia location in an office separate from the Company's sale floor. Reiss described her duties as sending and receiving titles, working hand-in hand with auctions, mailing titles and other duties. Reiss is supervised by Paul Keel and not by any supervisors or managers of the Company. Reiss explained in her affidavit that the door to her office is "usually shut" and that in performing her duties she does not have access to the Company's (Georgia Auto Pawn's) customer files." {ALJD p.10, Line 35-45]

The Respondent attempted to show Reiss as a unbiased witness by separating Automotive Remarking, Inc. from being affiliated with Georgia Auto Pawn or Community Loan of America; however, they are all connected by the principal officers of Community Loan of America, Inc., Terry Fields and Robert Reich. In fact, Murillo and Smith are also both employed by Community Loans of America.

Smith and Murillo's duties include but is not limited to overseeing the daily operation of Georgia Auto Pawn and its employees. Once the vehicle reaches repossession status Smith and Murillo instructs the employees at Georgia Auto Pawn to inventory the cars and send all paper work to Automotive Remarking. The manager of

Automotive Remarketing Keel's and Reiss's responsible is to work hand and hand with the auctions to resale the vehicles.

A google search of Automotive Remarketing, Inc. gives 8601 Dunwoody Place, Suite 406, Atlanta, Georgia as the Business address for the Company which is the same address listed for Community Loans of America. In fact, the Better Business Bureau was able to connect either the principal officers of Community Loan of America, Inc., Terry Fields and Robert Reich, or the firms corporate address 8601 Dunwoody Place, Suite 406, Atlanta, Georgia to Georgia Auto Pawn and 18 other title pawns and/or payday loan companies in 20 different states. Additionally, the BBB was able to show that Resale Auto, Inc., Automotive Remarketing, Inc., and 12 other firms were associated with the same principal officers at the same address.

The ALJ should have called into question Reiss's presence of Smith and Johnson's conversation, and properly found that if Reiss was present as the Respondent claimed, then she should have been able to describe the expletive word that she alleged Johnson used toward Smith. In addition, he should have question why Reiss's testimony does not substantiate Smith's testimony that Johnson refused to discuss the folder. Whereas, in part, it is consistent with Johnson's testimony that she did not refuse to follow his instructions going forward and that she repeatedly asked Smith if they could discuss her concerns and he refused. (Tr.p.52 6-25)) Moreover, the ALJ failure to question Reiss's ability to recall certain parts of their conversation and her picking and choosing what parts to recall, in particular, Johnson's statements to Smith is troubling and questionable in itself.

Although their conversation may have become heated, there is no contention that Johnson said or did anything to Smith that would remove her from the protection of the Act. If Smith is to be believed, Johnson is not even alleged to have used any profanity at all until after Smith had told her to “get out”.

It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected activity is coercive, because it conveys to employees that support of their union or engaging in other protected concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved. *Delmas Conley d/b/a Conley Trucking*, 2007 WL 324557, at\* 18 (quoting *McDaniel Ford, Inc.*, 322 NLRB 956,956 n.1, 962 (1997)).

The Respondent does not allege that Johnson was instructed to lower her voice and/or she refused to do so; however, the refusal to lower voice during protected concerted activity, is not insubordinate, and the conduct is protected. *Farah Manufacturing Company, Inc.* 202 NLRB 666 (1973)

On July 7, 2014, at approximately 6:27pm, Johnson sent an email to Hulse regarding her termination. She thanked the company for giving her the opportunity to work for the company. Johnson stated the purpose of the email was because she felt it was best to have a one on one meeting with Hulse regarding the write up; however, Smith refused to allow her the opportunity to do so. Johnson expressed how disappointed she was that Smith had completed an investigation without allowing her the chance to talk about her concerns. She pleaded with the Company to grant her the

opportunity to speak with someone in upper management; however, she did not get a response. (GC Exhibit 10)

On July 8, Johnson sent an email stating that she did not get a separation notice and that the law requires the employer to provide the employee with a notice within 3 days of the date that it occurred. Johnson's separation notice verifies that it was completed and released by Smith on July 8. The separation notice alleged that Johnson was "insubordinate"-failure to follow direction which is a misconduct and will exclude an employee from receiving unemployment; however, the Respondents made no attempt to contest her unemployment claim. (GC Exhibit 11)

The Board makes it very clear that a wide variety of foul, vulgar, and otherwise offensive language remains protected speech and does to lose its protection under the Act when the language is used in the context of concerted activity.

In the case of Hoot Winc, LLC and Ontario, Administrative Law Judge William Nelson Cate's of the NLRB recently found that a Hooters employee who cursed at her co-worker during an employee bikini contest was wrongfully terminated by her employer because of her protected activity. The rejected Hooter's reason for dismissal, which was for, in part, cursing at her co-worker, and found instead that the termination was for engaging in protected concerted activity about the allegedly rigged bikini contest. He concluded that the employer had failed to conduct a thorough investigation before firing Hanson, and also by its shifting reasons for her termination. The Board also found Hooter's employee handbook rules prohibiting behavior, such as insubordination to

managers and disrespect to guests, were unlawful.

Similarly, in a case sent back to the Board from the U.S. Court of Appeals for the Ninth Circuit, Plaza Auto Center, Inc., the Board confirmed its original finding that an employer violated the Act when it fired an employee who cursed out his employer in a meeting about his pay. During the meeting with his employer, the employee called his manager a "f\*\*\*ing crook", and an "a\*\*hole" and also told the owner of the company that he was "stupid" and that nobody liked him. In addition, the angry employee shoved his chair aside and told his employer that if the company fired him, they would regret it. The Board held that it considers the four factors in its Atlantic Steel Co. decision when deciding whether an employee's behavior is so egregious as to lose the protection of the Act. (1) the place of discussion(2)the subject matter of the discussion(3)the nature of the employee's outburst(4)whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Returning to the Hooters case, the ALJ also found that the employee handbook contained unlawful rules. The ALJ found that Hooter's employee handbook rules prohibiting the following violated the Act:

- Discussing tips with fellow employees
- Insubordination toward managers and lack of respect toward fellow employees or guests declared "overly broad" because it did not define "insubordination," "lack of respect," or cooperation. –all of which the ALJ found to be "subjective" terms that could have a chilling effect on employees in the exercise of protected concerted activity.

- Rule prohibiting insubordination toward managers and lack of respect toward fellow employees or guest was also unlawful because it did not have a sufficient limiting clause, such as limiting the rule to behavior or conduct that does not support the “company’s goals or objectives,” and, therefore, could chill protected activity.

**The Company may allege that Johnson would have been terminated even in the absence of any protected activity on her part. In determining whether an employee’s discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980). Enfd. On other grounds 662 F. 2d. 899 (1<sup>st</sup>. Cir.1981), Cert denied 455 U.S. 989 (1982).** Under *Wright Line*, the General Counsel must demonstrate by a preponderance of evidence that the employee’s protected conduct was a motivating factor in an employer’s adverse action. The General Counsel satisfies his initial burden by showing (1) the employee’s protected activity; (2) the employer’s knowledge of that activity; and (3) the employer’s animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee’s protected activity. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Roure Bertrand Dupont, Inc*, 271 NLRB 443 (1984). If the employer’s proffered reasons are pretextual, either false or not actually relied on, the employer will fail by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657,659 (2007). After upholding the Wright Line Standard, the Supreme Court affirmed the

Board's finding that Transportation Management had violated Section 8(a)(3) in firing the discriminate, Mr. Santillo. Significantly, The Supreme Court relied on evidence of pretext in reaching this conclusion.

Specifically, the employer asserted that it had terminated Mr. Santillo for leaving the ignition keys in his bus and for taking unauthorized breaks. Although Mr. Santillo had in fact done these things, the Court agreed with the Board that the record demonstrated that these were not the true reasons for his discharge. The evidence of pretext in this case was similar to that in Wright Line itself: the record showed that the employer had never before disciplined any employee for the "commonplace" kinds of actions taken by Mr. Santillo, and that the employer had departed from its usual practice of issuing warnings before disciplining employees. The Court concluded that these types of "evidence of pretext" were substantial evidence" in support of the Board's conclusion that the employer violated Section 8(a)(3).

Analysis of Johnson's discharge is governed by Wright Line. The Respondent used "refusal to discuss folder" as a pretext for discharging Johnson because of her protected activities. The pretextual nature of the Respondent's claim that it fired Johnson for refusing to discuss the folder prevents the Respondent from asserting a Wright Line affirmative defense because it is unable to assert any other basis for the termination. The Respondent's claim of failure to follow instructions was a thinly-veiled pretext for dispatching an employee for their protected activity.

The record and evidence clearly establishes that Johnson would not have been discharged had the employer not considered her efforts to protest against the unlawful counseling. At least two of the transgressions that purportedly would have in any event

prompted Johnson's discharge were commonplace, and yet no transgressor had ever before received any kind of discipline. Moreover, the employer departed from its usual practice in dealing with rules infractions; Indeed, not only did the Respondent not warn Johnson that her actions would result in being subject to discipline, Smith had never expressed disapproval of her conduct. In addition, Smith, the person who discharged Johnson, was obviously upset with Johnson engaging in such protected activity. It is thus clear that the facts illustrates that Johnson would not have been fired if the employer had not had an animus was "supported by the substantial evidence and the record considered as a whole.

It is clear that Johnson was terminated, not because of her behavior or because of how she performed her duties, but because she continued to protest the unlawful discipline that the Company had issued to her.

### **CONCLUSION**

For the reasons set forth in this brief the Charging Party, Cynthia Johnson, respectfully requests that the Board modify the ALJ's findings of fact, conclusions of law, recommended remedy and Order accordingly.

Dated this 14th day of December, 2015.

Respectfully submitted by:

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**CERTIFICATE OF SERVICE**

FILED ELECTRONICALLY DECEMBER 14, 2015

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Under penalty of perjury, I declare that the forgoing is true to the best of my information, knowledge and belief.

*Cynthia Johnson*

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Cynthia Johnson

