

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**ANDRONACO, INC., d/b/a ANDRONACO  
INDUSTRIES,**

**Respondent**

**Case 07-CA-160286**

**and**

**LINDSEY JOHNSTON, an Individual**

**Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S  
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**<sup>1</sup>

One of the core tenets of Section 7 is the right of employees to share and discuss information that relates to their working conditions, specifically information related to wages. The Act is intended to protect not only employees who directly engage in such protected concerted activity, but also those employees who associate with those employees. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014). The record evidence in the present case shows that the Respondent did just that – retaliated against the Charging Party Lindsey Johnston because she was known to associate and share information with former employee Nate Barrett, who had himself shared wage information with other employees.

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<sup>1</sup> On September 18, 2015, Lindsey Johnston (“Charging Party”) filed the instant charge alleging that Andronaco, Inc. d/b/a Andronaco Industries (“Respondent”) violated the National Labor Relations Act (“the Act”) by terminating her based on its belief that she had engaged in protected concerted activities and by maintaining several rules in its handbook that would reasonably be construed to prohibit employees from engaging in Section 7 activity. On November 24, 2015, after an investigation, the Regional Director for Region Seven issued a Complaint and Notice of hearing, alleging that the Respondent violated Section 8(a)(1) of the Act by interrogating the Charging Party about her associations with other employees, equating her association with other employees as disloyalty, terminated her for its belief that she was engaged in protected concerted activities and by maintaining overly broad work rules for its employees. A hearing was held by Administrative Law Judge (“ALJ”) Sharon Steckler on March 3, 2016.

The record clearly showed that the Respondent engaged in a protracted and aggressive campaign against its former employee Nate Barrett after it discovered that he had revealed the wage rate of supervisor Kaila Hicks to another employee on May 28, 2015.<sup>2</sup> The campaign began on that same day, when Barrett was confronted by a cadre of supervisors and repeatedly interrogated not only about his own wage-related conversations, but the wage-related conversations and activities of other employees. Even after Barrett provided the information that the Respondent sought, it threatened him with future legal action and prohibited him from engaging in wage-related discussions in the future.

Not surprisingly Barrett sought employment elsewhere, but even then the Respondent continued in its efforts to retaliate against him and to restrain him from revealing the wage information to any other employees. The Respondent continued to contact Barrett at his new employer, interrogating him about the protected concerted activities of other employees and demanding that he sign an affidavit revealing the details of his protected activity and the activities of other people.

After Barrett steadfastly refused to provide the Respondent with evidence about his and other employees' wage discussions throughout June and July, the Respondent withheld his final paycheck and eventually sued him for revealing wage information on August 7. The suit also included a request for an injunction to prevent Barrett from discussing the wage information in the future.

At this point, it became clear to the Respondent that Barrett was not going to bend to its will voluntarily. The Respondent then escalated its campaign by targeting two of its employees whom it knew continued to associate with Barrett. On August 11, it learned that employee Robert Zurita was aware of the lawsuit against Barrett and expressed his disapproval of the way the Respondent was treating Barrett. Not waiting for him to share that information with other employees, the Respondent terminated Zurita on August 12.

On that same day, knowing that Barrett and Johnston had been friends in the past, the Respondent interrogated Johnston about her association with Barrett and whether she knew about

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<sup>2</sup> All dates are 2015 unless otherwise indicated.

the lawsuit. When she answered in the affirmative, she too was terminated on August 14 for “disloyalty.”

The record evidence establishes that the association with Barrett, the knowledge of the lawsuit and the fear that Johnston would share either the wage information or even the course of events regarding Barrett with any other employees were the sole and deciding factor in her termination. While the Respondent alleges that Johnston was terminated for having personal visitors and working on personal business during work time, the record is replete with evidence that the Respondent’s given reasons for discharging Johnston were pretextual. Such evidence includes: 1) the fact that it admitted in its own internal documentation that the reason for the discharge was her association with Barrett, 2) its failure to issue any contemporaneous discipline to Johnston for any of the alleged misconduct throughout her employment, 3) its failure to investigate the matter that led to her termination, 4) the timing of the discharge in relation to the lawsuit, the discharge of Robert Zurita and the Respondent’s interrogation of Johnston; and 5) its reasons are unsupported by the facts. *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 (2014); *Lucky Cab Company*, 360 NLRB No. 43 (2014).

Because the substantial weight of the credible evidence shows that the Respondent made coercive statements to Johnston, that the Respondent’s proffered reasons for Johnston’s discharge were false, and that the real reason for her discharge was the fact that she continued to associate with Barrett, the Respondent violated Section 8(a)(1) of the Act.

The Respondent also maintains a handbook that is distributed to all its employees that contains policies governing employee dress code, solicitation and distribution, confidentiality and internet and email usage. Because these policies are ambiguous, they would lead a reasonable employee to believe that the prohibitions contained within them would include activities that are protected under Section 7 of the Act. Because the policies are overly broad, the Respondent violated 8(a)(1) by maintaining such policies and disseminating them to its employees even in the absence of enforcement.

## II. FACTS<sup>3</sup>

The Respondent employs about 150 employees in its Grand Rapids, Michigan facility and is a manufacturer of specialty systems for the pharmaceutical, chemical, steel, wastewater and energy markets. (T. 131, GC1(c)(2)) All the employees in both the plant and the office setting are issued an employee handbook upon hire that contains policies, guidelines and rules that regulate the employment of those individuals. (T. 28, T. 76, GC 2) While the contents of those policies will be discussed more *infra*, the handbook includes policies regarding the disclosure of confidential information, solicitation and distribution, dress code and employee internet and email use.

### A. Nate Barrett

Nate Barrett was hired by the Respondent in 2011 as a press operator and continued to work in that capacity until he was transferred to the office in 2014 to perform work as a graphic designer in the Information Technology department. (T. 28) He was supervised by Information Technology (IT) Manager Rick Vining and was in regular contact with other office personnel, including Charging Party Johnston. (T. 39, T. 79-80) While Barrett worked in the office, he continued to have contact with employees in the plant from time to time, particularly with his personal friend Robert Zurita, who was hired on Barrett's recommendation in 2012 as a press operator. (T. 33, T. 66)

At some point in 2014, Barrett spoke with another IT employee named Kyle Eadie. In the course of their discussion, Eadie revealed to Barrett that he had accidentally accessed information that revealed that Executive Assistant Kaila Hicks<sup>4</sup> earned fifty-dollars per hour. (T. 29) While Barrett did not share the information with other employees at that time, he assumed that Eadie had, based on the fact that he heard similar rumors from other employees. (T. 29)

In May 2015, Barrett decided to seek other employment and shared his plans with supervisor Vining. During this conversation Barrett mentioned that he heard that certain employees made fifty dollars per hour, and Vining confirmed that fact. Vining indicated that if

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<sup>3</sup> References to the transcript will be noted as (T. Page number), exhibits for the General Counsel as (GC Number), and exhibits for the Respondent as (Respondent Number.) All dates are 2015 unless otherwise noted.

<sup>4</sup> Hicks got married after the events in question but before the hearing. As such, much of the evidence and documentation refer to her as "Kaila Schweda." For the sake of accuracy, she is referenced here as "Kaila Hicks." Similarly, Johnston, who was married on July 31, 2015, is referred to in some documents as "Lindsey Ball."

Barrett stayed employed with the Respondent, he had the potential to earn a similar wage. (T. 30) Despite the possibility of the wage increase, Barrett decided to accept another offer and turned in his two week notice in mid-May 2015. He set his last day of employment for May 29. (GC 3)

On May 28, Barrett had a brief conversation with production employee Scott Cascaden. (T. 33) During that conversation, the two employees discussed how they had heard rumors about the wages of other employees, and Cascaden indicated that he hoped he would make more money as well. (T.33, GC7) During this conversation, Barrett shared with Cascaden the rumor about how much money Hicks earned. (T. 58, GC 7) Cascaden asked Barrett to obtain and provide him with documentary evidence regarding employees' wages and Barrett indicated that he did not have such information. (T. 60) After the conversation, Cascaden reported to his supervisor Tony Hinerman that Barrett shared wage information, and Hinerman reported the conversation to President Ron Andronaco. (T. 186)

Andronaco admitted on the record that he was "extremely concerned" about the disclosure of the information and that he felt the need to confront Barrett directly. (T. 179) The afternoon of May 28, Barrett was called into Andronaco's office by Vining. Upon entering the office, Barrett was confronted not only with Andronaco and Vining, but also the Plant Manager Colin Cruttenden and Executive Assistant Hicks. (T. 34) Upon entering the room, Andronaco immediately asked Barrett when he had accessed the company's records. (T.35) When Barrett indicated that he did not access any records, Andronaco asked Barrett who else he had spoken to regarding the wage information and whether Barrett had kept any records of that information. (T.35-36) Barrett denied that he had such information and volunteered that he heard the information directly from former employee Kyle Eadie. (T. 51, T.188) Andronaco then asked Barrett whether he had attended a social gathering with other employees in the preceding weeks, who was at that gathering and whether the wage information was discussed at that gathering. (T.36, T. 59) Andronaco informed Barrett that the Respondent would take legal action against him if it learned he had obtained the wage information himself instead of learning about it from Kyle Eadie as he claimed. (T. 35) At that point Cruttenden instructed Barrett to sit at his desk and refrain from speaking to anyone the following day. (T. 36)

Feeling uncomfortable about the tenor of the meeting, Barrett used a vacation day and did not report to work on what would have been his last day, May 29. (T. 37) Instead, he began

working at his new position. However, almost immediately, Barrett was contacted by Vining by telephone, email and text message. Vining again interrogated him about the previous social gathering and whether wages were discussed. (T. 37, T. 182 -183) Vining then indicated that the Respondent was seeking an affidavit from Barrett, memorializing all that he had told them in the May 28 meeting about the wage information. Barrett indicated that he was not interested in cooperating and asked Vining to leave him alone. (T. 37) Vining continued to attempt to contact Barrett throughout June and July.

A few weeks after Barrett resigned, he had still not received his last paycheck and discussed the matter briefly with Johnston. (T. 39, T. 53) Johnston recommended to Barrett that he contact Hicks and request that his check be sent to him. (T. 82) On July 21, almost two months after his last day working for the Respondent, Barrett emailed Hicks, with a copy to Johnston, and asked to have the paycheck mailed to his home address. (GC 4) Hicks initially responded that she would not send him his check and that he would have to pick it up in person. In response, Barrett invoked the state of Michigan Department of Labor regulations that mandated that he be sent his last paycheck by mail. Hicks responded by specifically mentioning that the Respondent believed that Barrett had disclosed "privileged salary information" and that the Respondent could sue him on that basis. She again demanded that he pick up his paycheck in person. (GC4)

Realizing that the Respondent was not going to leave him alone or give him his paycheck, Barrett filed charges both with the state of Michigan Department of Labor and the National Labor Relations Board on July 21 and July 22, respectively. (GC 5, GC 6)

Instead of receiving his paycheck, Barrett was served with a lawsuit filed by the Respondent on August 7, ostensibly for breach of the Confidentiality and Non-Compete Agreement that he signed when he became a graphic designer. (GC 7). In the complaint, the Respondent specifically alleged that Barrett violated the agreement by "disclosing wage and salary information to the employees of Andronaco Industries." (GC 7, page 3) In seeking injunctive relief, the Respondent also alleged that the wage information, "when disclosed to other employees" would irreparably harm the company by harming "employee goodwill." (GC 7, page 4, Item 16 -20) As a remedy, the Respondent sought an injunction "restraining and enjoining the Defendant from disclosing salary and wage information of Andronaco Industries'

employees.” The Respondent’s pleadings repeatedly reference his possession of and disclosure of wage and salary information and do not indicate that Barrett had any other type of information that could be considered confidential.

Barrett shared the fact that the Respondent was suing him with both Zurita and Johnston shortly after the suit was filed. (Tr. 58. T. 67, T. 84) On the following Tuesday, August 11, Zurita, who was still working for the Respondent, asked his supervisor Tony Hinerman why the Respondent was suing Barrett. (T. 67) For unknown reasons, this prompted Hinerman to contact Andronaco directly and report Zurita’s statements. (T. 172) Shortly thereafter, Andronaco and Hinerman took Zurita aside and explained that the Respondent had legitimate reasons for suing Barrett. (T. 68, T. 172-173) Zurita repeatedly expressed that he was uncertain if he could continue to work for a company that sued his friend, who he was certain had engaged in no misconduct. (T. 68, T. 172) Utilizing what would become a common refrain, Andronaco informed Zurita that he would have to choose between his loyalty to his friend and his loyalty to the company that “signed his paychecks.” (T. 68) Zurita indicated that he would have to consider his options and did so as he continued to work the remainder of that day as well as the following day. (T. 69)

At the end of the next day, August 12, Zurita was called into the office by Hinerman and the Human Resources Director Cheryl Sarver. While Zurita admits that he expressed some ambivalence about continuing to work for a company that was suing his friend, he had not expressed a desire to quit. (T. 68, 72, 74) At that meeting, Zurita was handed a paper indicating the things he needed to know as he was leaving the company and was terminated. (T. 70, 73)

After being confronted with Zurita’s vocal disapproval of the Respondent’s actions toward Barrett, the evidence indicates that the Respondent realized it had one more loose end who could not only challenge the Respondent on its actions toward Barrett, but could also potentially share that information and the wage information with other employees. As such, on August 12, Vining approached Johnston directly at her workstation. Vining knelt down and specifically asked Johnston if she still spoke to Barrett. When Johnston indicated that she did, he then asked her if she knew what was going on with “[Barrett] and the company.” (T. 89) While Johnston indicated to Vining that she did not wish to discuss the matter at work, she knew that it

was related to Barrett's wage discussions and that Barrett had been "in trouble" for discussing wages with other employees. (T. 89, T. 109) <sup>5</sup>

The very next day, Barrett filed two charges with the NLRB: one regarding the filing of the lawsuit, which sought to enjoin him from discussing wages, and another alleging that Zurita was terminated in retaliation for his association with Barrett who had engaged in protected concerted activities. (GC 8)

On August 14, after hearing of the imminent passing of her grandfather, Johnston sought approval to leave for the remainder of the day. After her request, she was called into Hicks' office with Human Resources Director Cheryl Sarver. (T. 87) Hicks informed Johnston that the Respondent was aware that Johnston had been talking to Barrett and as a result, the Respondent could not trust that her loyalty was with the company, and she was terminated. (T. 87) Johnston responded that she told Vining that she didn't want to discuss Barrett at work, but her protestations did nothing to alter the Respondent's decision to discharge her. <sup>6</sup> (T. 87)

On August 18, Hicks submitted her "Notes on Termination" of Johnston to Sarver and Vining. (GC 11) In the notes, Hicks reiterated that Johnston was terminated because she was still in contact with Barrett, that she was "acting as an advocate" for Barrett, and that she appeared to maintain loyalty toward him. (GC 11) No other reasons were given for her termination in that document.

On August 21, Barrett reached a settlement with the Respondent whereby he withdrew his NLRB charges, and the Respondent withdrew its lawsuit. Barrett received his final paycheck, but was required to provide the Respondent with an affidavit indicating where he heard the wage information and with whom he had shared such information. (GC 9)

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<sup>5</sup> GC 11 shows that Hicks believed that there was a prior discussion between Vining and Johnston where Johnston indicated that she wanted to quit. None of the witnesses testified that such a conversation took place. Furthermore, the conversation was unlikely to have taken place since Hicks dated the conversation as August 7, the date that the lawsuit was filed. It is unlikely that Johnston would know about the lawsuit before Barrett learned of it. Regardless, even assuming the conversation did happen, it further supports a finding that Johnston was targeted and terminated for her association with Barrett, the lawsuit, and the underlying wage discussions.

<sup>6</sup> The record indicates that Zurita challenged Andronaco about the lawsuit on August 11, Vining interrogated Johnston during the day on August 12 and terminated Zurita at the end of the day on August 12.

## **B. Johnston's Work Performance**

Johnston began working for the Respondent in 2012 as the receptionist. During Johnston's approximately two years of employment, she experienced some family and health related issues that resulted in several absences from work. (T. 137, R5) Those issues, while noted in her 2015 performance evaluations, were mostly excused due to an arrangement the Respondent reached with Hicks regarding her need for extra leave from the company. (T. 137, R 5) Other than a verbal discussion about a missed day of work on July 8 where Hicks mentioned that the absence was not her "last straw," Johnston received no discipline for absenteeism. (T. 111, T. 159, R 1) In fact, as late as the end of July 2015, a few short weeks before her termination, she was allowed by the Respondent time to go on a honeymoon without accumulating any attendance points. In making those arrangements, the Respondent expressed an interest in helping Johnston maintain positive attendance points so she could obtain an attendance bonus at the end of the year. (T. 83)

In the spring of 2015, Johnston considered finding other employment and posted her resume on a job seeking website. When Andronaco saw that her resume was posted on such a website, he called her into his office directly. He asked her what the Respondent could do to make her stay with the company, and she stated that she wanted a raise. Andronaco immediately agreed and instructed Hicks to approve and implement a dollar fifty cent per hour raise for Johnston the same day. (T. 76, T. 77, GC 10)

The evidence also shows that Johnston had a few instances where she failed to properly punch in or out. (R 6, T. 142) The failure to punch out correctly provided the basis for her one and only disciplinary warning, which was issued to her on June 5. (R 2, T.157)

Johnston did not dispute the record evidence that showed that she received two non-work related visitors on July 17 and July 23. (T. 104, T. 143) Both Hicks and Cruttenden felt that the visits lasted longer than was appropriate and spoke to her about the matter. (T. 128, R 3) Hicks reiterated to Johnston that personal visits should last "no longer than five minutes," but issued no discipline to Johnston. (R 3)

After her wedding on July 31, on her own time, Johnston drafted a complaint letter to the company that supplied her bridesmaid dresses. (T. 105, R 4, R 7) She forwarded the letter by

email to her mother for review and editing. (T. 106) On August 12, Johnston’s mother emailed the letter back to Johnston while she was at work.<sup>7</sup> (T. 106) Johnston downloaded the letter to her work computer and worked on it periodically throughout the work day. (T.106)<sup>8</sup>

While Hicks stated that she witnessed Johnston working on something that didn’t “look work related,” she admitted that she was unaware of content of the letter was until after Johnston was terminated. (T. 160) She also testified that while she witnessed Johnston working on the document several times throughout the day, she did not speak to Johnston about the letter or inquire as to its contents. (T. 147-148)

### **III. ARGUMENT**

#### **A. Vining Coercively Interrogated Johnston When He Inquired About Her Contact with Barrett, Violating Section 8(a)(1)**

There is no dispute that Vining questioned Johnston on August 12 both about her contact with Barrett and her knowledge of the company’s lawsuit against him. While the Respondent called Vining as a witness, he did not deny the statements. Since Vining did not specifically deny the statement attributed to him, and he clearly had direct knowledge of the alleged unlawful interrogation as alleged in the complaint, an adverse inference must be drawn. *Global Contact Services*, 2015 WL 1939736 (N.L.R.B.), *Boatel Alaska, Inc.*, 236 NLRB 1458 (1978).

The Board assesses the legality of interrogation allegations under the “totality-of-the-circumstances” test outlined in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). In assessing the circumstances, the Board generally examines five factors: 1) The background, including whether there is a history of employer hostility; 2) the nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual

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<sup>7</sup> Johnston testified that she was uncertain as to whether her mother emailed the letter to her at her work email or her personal email. As there was no record of the correspondence in her work email, the email in question most likely was sent to her personal email address. (R 11)

<sup>8</sup> Vining’s testimony related to certain technical aspects of the August 12 letter, but none of his testimony disputed Johnston’s version of events. He admitted that the document was not sent to Johnston’s work address, that it could have been downloaded from an email, and that it could have been opened on her desktop throughout the day and worked on periodically. His testimony did not contradict Johnston and did not establish that Johnston had been continuously working on the letter for four straight hours, as suggested by the Respondent at the hearing. (T. 218-221) Furthermore, while the Respondent went to great lengths to obtain this information the day of the hearing, there is no evidence that it underwent such a rigorous review at any time before Johnston was terminated. (T. 204, R 8 – R11)

employees; 3) the identity of the questioner; 4) the place and method of the interrogation; and 5) the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935 (2000) citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

While the so-called *Bourne* factors are helpful in assessing whether a statement constitutes an unlawful interrogation under Section 8(a)(1), it is not necessary to mechanically apply them to each circumstance. The final analysis is to determine whether the circumstances surrounding the questioning would reasonably tend to coerce the employee so that she would feel restrained from exercising her Section 7 rights. *Westwood Health Care Center*, supra at 940 (2000).

In assessing the current circumstance under the *Bourne* factors, it is clear that Vining's interrogation of Johnston violated Section 8(a)(1). The Respondent had a recent history of hostility toward employees' exercise of their Section 7 rights, as evidenced by its behavior toward Barrett. That history, which was known to Johnston, provided the backdrop of the questioning on August 12. Vining, who was not Johnston's supervisor, approached her directly, asked her two discrete questions that were not related to her working relationship or to any topic other than the lawsuit regarding Barrett, and then, without further comment, went directly into Andronaco's office.

The nature and tenor of the questioning was so out-of-the-ordinary to Johnston that she immediately recalled the questioning after she was told by Hicks that her actions constituted disloyalty as she was being terminated on August 14. See, *Westwood Health Care Center*, supra at 940 (2000) ("A question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone.")

The evidence shows that Vining's interrogation, in light of all the surrounding circumstances, was likely to coerce Johnston in the exercise of her Section 7 activities, and thus violated Section 8(a)(1) of the Act.

**B. The Respondent's Equation of Johnston's Association with Barrett as Disloyalty to the Respondent is Coercive and Violates Section 8(a)(1)**

Hicks' statement to Johnston on August 14 that it was aware of her contact with Barrett and that the Respondent could not trust her loyalty to the company was coercive and a violation

of Section 8(a)(1). The Board has held that an Employer's equation of [protected concerted activity] with disloyalty is coercive and unlawful. *Sea Breeze Health Care Center, Inc.*, 331 NLRB 1131 (2000), *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996).

The disloyalty statement was made not only during Johnston's discharge, but also was the stated basis for the discharge. The statement was made to Johnston after the Respondent confirmed its suspicions that she not only spoke to Barrett, but also that she knew of its campaign against him and attempted to "advocate" for him with the Respondent. There is no doubt that the statement was made with retaliatory intent and that a reasonable employee would be reluctant to support another employee or engage in any similar protected activity in the future.

Because the Respondent equated Johnston's association with an employee whom it knew was engaged in protected concerted activities with disloyalty to the Respondent, it attempted to coerce her in the exercise of her own Section 7 rights, and as such, violated Section 8(a)(1).

C. **The Respondent Violated Section 8(a)(1) by Discharging Johnston in Retaliation for Her Association with Barrett and his Protected Concerted Activities**

1. ***The Evidence Establishes That Barrett Engaged in Protected Concerted Activity and that the Respondent Associated Johnston with that Activity***

The evidence conclusively establishes that Barrett, both by the fact that he disclosed wages to Cascaden on May 28 and by his inclusion of Johnston in his attempt to get his paycheck on July 21, was engaged in protected concerted activity. The Board has long held that discussions regarding employees' wages are central to their rights under Section 7 and any attempt to limit such discussions is a violation of Section 8(a)(1). *The Continental Group, Inc.*, 357 NLRB No. 39 (2011)(a *Noel Canning* case); *Flex Frac Logistics, Inc.*, 360 NLRB No. 120 (2014). As such, any employee who discloses wage information to other employees is engaged in "conduct implicating Section 7 concerns." *Taylor Made Transportation Services, Inc.*, 358 NLRB No. 53 (2012). Barrett's disclosure of Hicks' wage rate to Cascaden, particularly when the discussion was generally about the hope for increased wage rates for production employees, constitutes conduct implicating Section 7 concerns. The disclosure and discussion of the wage rates, even in the absence of an inducement of group activity, are "inherently concerted." *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 1 (2014); *International*

*Business Machines Corp.*, 265 NLRB 683 (1982)(mere act of sharing wage information protected).

Barrett's wage discussion with Cascaden is also concerted when analyzed under the standard set forth in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). After Barrett disclosed Hicks' wage rate, Cascaden expressed a hope that he, too, would earn higher wages in the future. The discussion about wages and the expression of a desire that those wages would improve, even absent an express goal of group activity, suggest a goal of group action. See, *Salon/Spa at Boro*, 356 NLRB No. 69 (2011)(object of group action need not be expressed and can be based on reasonable inference). The guarantees of Section 7 "extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization," and "discussions about wages are necessary to further that goal." *Whittaker Corporation*, 289 NLRB 933 (1988), citing *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951).

Furthermore, even if Barrett's disclosure of the wage information is not protected concerted activity under *Meyers II*, the evidence establishes that the Respondent *believed* that he was disseminating wage information to employees with the intent toward group action, as evidenced by the actions it took against him after May 28. "An employer clearly violates the Act by [discriminating against] an employee whom the employer mistakenly believes has engaged in union activity." *Salisbury Hotel, Inc.*, 283 NLRB 685, 686 (1987)

Barrett also engaged in protected concerted activity when he enlisted Johnston as a witness in his attempt to obtain his final paycheck. While his attempts to obtain his check did not directly implicate the working conditions or concerns of other employees, the Board has found that "mutual aid and protection" is satisfied where a single employee appeals for help from other employees, even if the other employees have no stake in the outcome. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014) The employee who is solicited to bear witness for the acting employee has an interest in helping the individual because "the next time it could be one of them." *Id.*, slip op. at 8 (2014)(employee's attempts to obtain witness statements for individual harassment claim considered protected concerted activity).

The Respondent cannot deny that it was well aware of Barrett's protected concerted activities or that it believed him to have engaged in such activities. There is also no dispute that the Respondent knew that Johnston was in contact and generally aware of Barrett's dispute with the Respondent, particularly after it interrogated her on the matter on August 12. The record establishes that the Respondent believed that Johnston was attempting to gather information for Barrett to defend the lawsuit filed against him and was "advocating" for him with the Respondent. (GC 11)

**2. *The Record Evidence Establishes that the Association with Barrett was the Sole Reason for Johnston's Discharge***

The evidence shows that Johnston was terminated directly for her association with Barrett and his protected activity. The current facts are largely analogous to those in *Parexel International, LLC*, 356 NLRB No. 82 (2011). In that case, the Employer discovered that an employee was discussing the wage rate of employees. The Employer was "sufficiently concerned" when it heard about the individual's statements that it called her into a meeting and "expressed concerns about two questions – what was discussed and whether what was discussed was shared with someone else." *Id.*, slip op. at 6 (2011). The Employer then discharged the employee before she had a chance to "stir[] up" any further discussions on the matter. *Id.* The Board determined that the Employer had attempted to nip the wage discussions in the bud by terminating the employee before she had a chance to share the wage information with other employees and, in so doing, violated Section 8(a)(1). *Id.*, slip op at 5 (2011).

The main distinction between *Parexel* and the current case is merely one of degree. There is no dispute that the Respondent knew that Barrett had revealed Hicks's wages to another employee on May 28. Much like in *Parexel*, the Respondent immediately called a meeting with Barrett, where it attempted to discern what he told Cascaden, where he learned the information and whether such wage information had been discussed or shared by other employees. The Respondent in this case went even further than the Employer in *Parexel* by threatening Barrett with legal action and prohibiting him from speaking to other employees on his last day.

While the Respondent did not need to fire Barrett due to the fact that he had already resigned, it was able to utilize the nip-in-the-bud strategy to target other employees who were associated with Barrett. The Board has long held that "the discharge of an employee who is not

known to have engaged in [protected concerted] activity, but who has a close relationship with a known [employee engaged in protected concerted activity] may give rise to an inference of discrimination.” *Amptech, Inc.*, 342 NLRB 1131, 1133 (2004), citing *Martech MDI*, 331 NLRB 487, 488 (2000). In the present case, Johnston was both a “pawn in an unlawful design” to retaliate against Barrett for his past actions and a potential source of future protected concerted activity. *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984); *Parexel*, supra.

The Respondent’s ardent and somewhat paranoid concern regarding the disclosure of wage information to employees is not only shown by its conduct toward Barrett in June and July, but also expressly outlined in the pleadings filed in support of its request for an injunction on August 7. When it became apparent that its attempts to silence Barrett about the wage information were not bearing fruit, it turned its attentions to the friends of Barrett that remained employed with the Respondent. The Respondent sought to ensure, by whatever means necessary, that the wage information was not further disseminated. The length to which the Respondent was willing to go to preemptively silence further dissemination of the wage information is evidenced by the actions it took during the week of August 10.

The Respondent wasted no time in nipping the potential dissemination of the wage information in the bud. After it discovered on August 11 that employee Zurita knew and disapproved of the Respondent’s actions toward Barrett, it terminated him. Then the Respondent sought out Johnston to gauge her contact with and support for Barrett the same day that it terminated Zurita. Based on Johnston’s failure to deny her continued contact with Barrett as well as her refusal to distance herself from him, the Respondent believed that it could not rely on her discretion or silence regarding the wage information or the circumstances surrounding the lawsuit. As a result of that belief, the Respondent terminated Johnston.

The Respondent’s motivation in regard to Johnston was made clear to Johnston during her termination on August 14. Hicks informed Johnston that the reason for her discharge was her disloyalty to the Respondent and that sentiment is corroborated both by Hicks’s testimony and her own notes regarding Johnston’s discharge. (GC 11)

The record demonstrates that the Respondent engaged in a months-long battle attempting to silence its former employee Barrett from disclosing any wage information that he may have

had. The record further demonstrates that when it became apparent, based on its coercive interrogation, that Johnston knew of the lawsuit and did not express lock-step solidarity with the Respondent's aims, she was immediately terminated. Her termination, like that of the individual in *Parexel*, was an attempt by the Respondent to preemptively strike any chance that Johnston had to share her knowledge of wage information or, more specifically, to "stir up" any trouble among other employees regarding the facts underlying Barrett's lawsuit.

### **3. The Record Evidence Establishes a Prima Facie Case Under Wright Line**

While the evidence shows that Johnston was terminated for a single reason -- her association with Barrett -- the discharge is also unlawful when analyzed under *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), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As discussed *supra*, the record conclusively establishes that Barrett was engaged in protected concerted activity and that the Respondent knew of that activity. The record evidence also shows that the Respondent was well aware of Johnston's association with Barrett and his protected concerted activity.

The current record contains numerous statements, actions and documents that reflect the Respondent's animus toward Barrett's protected concerted activity and toward those employees who knew about the activity. Evidence of employer animus toward protected concerted activity is inferred from the record as a whole, and can be based on circumstantial evidence. *Murtis Taylor Human Services Systems*, 360 NLRB No. 66 (2014)

As an initial matter, animus is shown by the Respondent's independent Section 8(a)(1) violations. *Sunrise Health Care Corp.*, 334 NLRB 903, 906 (2001). The Respondent's unlawful interrogation of Johnston was clearly an attempt to ferret out the level of her association with Barrett, and its equation of her association with him with disloyalty to the Respondent illustrates its underlying animus toward Barrett's activities and all who associated with them. See, *Mesker Door, Inc.* 357 NLRB No. 59 (2011), *Electro-Wire Truck & Industrial Products Group*, 305 NLRB 1015, 1024 (1994)(interrogation regarding union activity evidence of animus).

Animus is also shown by the timing of the discharge not only in relation to the unlawful statements, but as the culmination of a continuous effort on the part of the Respondent to retaliate against Barrett for his wage disclosure in May. *Nichols Aluminum, LLC*, 361 NLRB No. 22 (2014), *Murtis Taylor Human Services Systems*, supra. Specifically, a mere three days elapsed between the Respondent finding out that Barrett had shared the existence of the lawsuit with Zurita and Johnston and the Respondent terminating both of them.

The most obvious evidence of animus is the entire course of retribution that was exacted upon Barrett after his resignation from the Respondent, which as discussed *supra*, included threats, interrogations, withheld wages and the filing of a lawsuit. Furthermore, the contents of the lawsuit itself do much to illustrate the Respondent's animus and unlawful intent. The suit specifically sought not only to punish Barrett for the conversations regarding wage and benefit information that he already had, but also to enjoin him from engaging in protected concerted activities *in the future*. While the Respondent attempted to argue that its primary concern was "other" confidential information, the lawsuit makes no mention of such other information. Wage, salary and benefit information are cited again and again as the confidential information that was divulged, and the Respondent specifically cites the effect on other employees as a reason an injunction is necessary. There is no dispute that the Respondent harbored significant and continued animus toward Barrett, specifically based on his disclosure of wage information on May 28. This significant animus was effectively transferred to Johnston after the Respondent's attempts to retaliate and silence Barrett failed.

As such, the evidence establishes a *prima facie* case that the Respondent discharged Johnston for discriminatory reasons. It knew that she was associated with Barrett, who it knew to have engaged in protected concerted activity, and expressed significant animus toward Barrett's activities and those who associated with him.

**4. *Because the Respondent's Reasons for Johnston's Discharge Were Pretextual, It Did Not Rebut the General Counsel's Prima Facie Case***

Despite the overwhelming evidence showing that Johnston was terminated for no reason other than her continued association with Barrett, the Respondent attempted to present evidence that Johnston was terminated for legitimate, non-discriminatory reasons. *Wright Line*, supra. Since the evidence conclusively establishes a *prima facie* case, Respondent then must show that

it would have taken the same action even absent employees' protected activity. *Donaldson Bros. Ready Mix Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing it had a legitimate reason, it must demonstrate that it would have taken the same action in absence of the protected conduct. *Alternative Energy Applications*, *supra*, citing *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011). If, as in the present case, the reasons are pretextual, either false or not actually relied on, the employer fails by definition to show it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The Respondent attempted to sustain its burden by arguing that it would have terminated Johnston, even if she had not associated with Barrett, because of her failure to properly punch in and out, her personal visitors in July, and finally her decision to work on personal business during work time on August 12. The record evidence does not support a finding that any of the Respondent's proffered reasons were the real basis for Johnston's discharge.

The Respondent presented evidence, and Johnston did not deny, that she had some attendance issues in 2014 and 2015. However, the evidence also shows that the Respondent did not issue a single disciplinary action against Johnston for attendance issues. (T. 113) In fact, the Respondent admits that it "made arrangements" to accommodate Johnston's need for leave and even allowed her to take a honeymoon in August after using all of her paid time off. (T. 138, T. 83) While there is an indication that she was counseled about missing a day of work on July 8, the record of that discussion clearly indicates that the absence was *not* the "last straw" for the Respondent. (R 1)

Furthermore, the Respondent offered extensive testimony regarding Johnston's personal visitors on July 17 and 23, but the record again fails to show that the Respondent issued any discipline for either incident. While Hicks did discuss the visitors with Johnston, the notes from the discussion show that the Respondent merely counseled Johnston to keep her visits limited. There was no notation or reflection that the infraction was serious, cumulative or putting Johnston on the precipice of termination. (R 3) The failure of the Respondent to contemporaneously and consistently discipline an employee when the alleged misconduct occurred supports a finding that the incidents are "false or exaggerated" and that the

Respondent's reasons for the discharge are pretext. *Metro West Ambulance Service, Inc.*, 360 NLRB No. 124 (2014).

Further, the Respondent's assertion that Johnston's work on a personal letter during work time on August 12 was the last straw strains credulity. As an initial matter, the evidence does not show that the Respondent even knew that the letter in question was personal in nature either on August 12 or as of the date of her discharge. Despite her testimony that the document on Johnston's screen did "not appear to be work related," Hicks admitted that she had no knowledge of what the letter contained until after Johnston was already terminated. (T. 147, T. 160) Furthermore, while the Respondent went to great pains to identify the source of the document, the time the document was open on Johnston's desktop, and how many modifications were made to the document on the day of the hearing, there is no evidence that the Respondent did such an investigation on the day that it suspected Johnston was working on such a letter<sup>9</sup> Hicks never asked her. (T. 147, T. 204) The Respondent's failure to investigate the matter at the time it occurred, particularly given that it intended to terminate her for the alleged misconduct, is evidence that the Respondent's asserted reasons are pretextual. *Id.*, slip op. at 38 (2014).

Lastly and most significantly, the Respondent clearly stated the reason for its discharge of Johnston in its internal August 18 notes. (GC 11). In that document, Hicks does not mention attendance, time clock issues, personal visitors or a personal letter. Instead, Hicks wrote two paragraphs regarding her belief that Johnston not only had spoken with Barrett, but also was siding with him in his dispute with the Respondent. The notes specifically state that she was terminated because of her "involvement with this matter," i.e., her actions and statements related to Barrett's lawsuit. These notes are partially corroborated by Hicks, who could not remember if she mentioned disloyalty to Johnston when she was being terminated, but did admit that Johnston's "gossip" regarding Barrett was one of the reasons for her discharge. See, generally, *Lauras Technical Institute*, 360 NLRB No. 133 (2014)(termination of employee for "gossiping" that included protected activity unlawful).

The Respondent's defense, when examined, supports a finding that the proffered reasons were pretextual. The Respondent had long tolerated whatever shortcomings Johnston had, and

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<sup>9</sup> As stated in footnote 8, Respondent's evidence did not contradict Johnston's testimony.

there is no evidence to suggest that the Respondent was contemplating her discharge before it discovered her continued association with Barrett. The Respondent failed to discipline her for any of the things it alleges are the basis of her termination and failed to do even a cursory investigation into the letter on August 12. Furthermore, the Respondent's own documents show that none of these other reasons was ever cited by the Respondent in its own correspondence regarding Johnston's termination. Only one reason was discussed and relied on for Johnston's termination, and that is her association with Barrett. (GC 11)

Because the Respondent's evidence failed to show that it would have terminated Johnston had she not associated with Barrett and his wage discussions, its defense fails. The record evidence establishes that the Respondent terminated Johnston for her association with Barrett and to prevent her from sharing the wage or lawsuit information with any employees. As such, her termination violates Section 8(a)(1) of the Act.

**D. The Respondent Violated Section 8(a)(1) by Maintaining Overly Broad Rules in Its Employee Handbook**

The Respondent's Employee Handbook, which was in effect and distributed to employees from 2015 to the present, contains several rules and policies which are overly broad in that they would reasonably be construed to prohibit the Section 7 activities of employees. The Respondent's policies governing the disclosure of confidential information, solicitation and distribution, and employee dress code are all overly broad under the framework set forth under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Respondent's Internet and E-Mail policy is unlawful both because it is overly broad under *Lutheran Heritage Village-Livonia*, *supra*, and also under the Board's decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

The appropriate inquiry, when determining whether a rule violates Section 8(a)(1), is whether it reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd. mem.* 202 F.3d 52 (D.C. Cir. 1999). While the policies at issue do not specifically restrict employee Section 7 rights, nor were they promulgated in response to Section 7 activity, they are unlawful because a reasonable employee would construe the rules to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, *supra*.

While the rules must be considered in context, any rules that are ambiguous as to their application to Section 7 activity and contain no language that would clarify to employees that the rules do not restrict Section 7 rights are unlawful. *University Medical Center*, 355 NLRB 1318, 1320 (2001), *enf. denied in rel. part*, 335 F.3d 1079 (D.C. Cir. 2003).

Here, the rules in question fail to define the area of permissible conduct in a manner that is clear to employees, and thus are overly broad. An employee should not have to decide at his own peril what information is not lawfully subject to such prohibitions. *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). The ambiguity of the rules must be resolved against the drafter of the rules, in this case, the Respondent. *Lafayette Park Hotel*, supra at 828 citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992). The intent of the promulgator of such a rule is irrelevant and the maintenance of an overly broad rule is a violation even in the absence of enforcement. *Id.*

### ***1. The Respondent's Confidentiality Policy Is Overly Broad***

Section IV(A) of the Employee Handbook outlines twelve specific types of conduct that subject employees to immediate discharge. Included in those types of conduct is the “disclosure of Confidential Company Information.” (GC 2) There is no other reference in the handbook to what information is considered confidential, what is considered “company information” or whether there are any types of company information that would *not* be subject to discharge.

While the Board has long held that rules must be considered in context, there is no context for the Respondent's confidentiality rule beyond its placement among the dischargeable offenses. A reasonable employee, in reading the rule, would not know whether information related to wages, working conditions or disciplinary action, would be considered “confidential company information.” This rule leaves the employees the task of determining what is permissible and to speculate what kind of information disclosure may trigger their discharge. *Flex Frac Logistics LLC*, 358 NLRB No. 127 (2012) *affd.* in relevant part, 746 F.3d 205 (5<sup>th</sup> Cir. 2014). Furthermore, there is nothing in the policy that provides any context. Because the rule's prohibition reasonably encompasses information that relates to employees' Section 7 activities, it is overly broad. *Lily Transportation Corporation*, 362 NLRB No. 54 (2015), *Direct TV*, 359 NLRB No. 54 (2013).

In addition to being generally overly broad, this particular prohibition has further potential impact in that it relates to the circumstances surrounding the Respondent's treatment of Barrett after he left employment with the Respondent. Cascaden, who reported the wage conversation between himself and Barrett to the Respondent, was solicited by the Respondent to provide testimony in support of its lawsuit against Barrett for the disclosure of "confidential information." At that juncture, Cascaden knew only that Barrett had discussed, and potentially disclosed, the wage rate of various managers. The Respondent then solicited his cooperation in suing the employee who shared that wage information. Surely the message that Cascaden would take from that course of events is that the Respondent considers wage information to be confidential company information, and that it would retaliate against any employee who disclosed such information. The subsequent termination of Johnston and Zurita would only confirm that logical conclusion.

Because the rule is overly broad and particularly because the Respondent engaged in a series of retaliatory behaviors based on its belief that employees had disclosed wage information, this prohibition is clearly unlawful and a violation of Section 8(a)(1) of the Act.

## ***2. The Respondent's Solicitation and Distribution Prohibitions are Overly Broad***

Section IV(B) of the Respondent's handbook states that "No employee solicitation of any kind is permitted in working areas of the company. In addition, the distribution of any and all non-company literature is prohibited." (GC 2)

This policy is presumptively invalid in that it does not communicate to employees that they are allowed to engage in such solicitation during non-work time. *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962), *Target Corporation*, 359 NLRB No. 103 (2013). The Respondent presented no evidence to rebut that presumption.

The distribution portion of the rule is similarly unlawful. Any rule that bans the distribution of literature that is not limited to working time and working areas is presumptively unlawful. *Stoddard Quick Mfg. Co.*, supra. The Respondent's distribution rule bans all non-company distribution, presumably at all times and in all areas. To the extent that the silence regarding the times and areas creates ambiguity, such ambiguity "must be construed against the respondent-employer as the promulgator of the rule." *DirectTV*, 359 NLRB No. 54, slip op.

2 (2013). Because the Respondent’s no-solicitation rule fails to allow employees to discuss Section 7 activities on their own time, or to distribute protected literature in nonwork areas on their own time, this policy violates Section 8(a)(1) of the Act.

### **3. The Respondent’s Dress Code Policy is Overly Broad**

Section V(H) states that “clothing with words, slogans and/or pictures that may be offensive to other employees or guests of the company may not be worn.” (GC 2)

A prohibition on message clothing or union insignia is presumptively invalid, and in order to overcome the presumption, the Respondent must show that there are special circumstances that require such a prohibition. *Boch Imports, Inc.*, 362 NLRB No. 83(2015); *Kendall Co.*, 267 NLRB 963 (1983).

The Respondent presented no evidence of any kind that the prohibition was necessary or that it served any specific or legitimate purpose to ensure safety, production, discipline or public image. As the rule broadly prohibits the wearing of message clothing, and the Respondent failed to rebut the presumption that the prohibition is unlawful, it violates Section 8(a)(1). *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25 (2011); *Titus Electric Contracting, Inc.*, 355 NLRB 1357 (2010).

Furthermore, while the current rule does not explicitly ban union or Section 7 insignia or lettering, the vague and broad nature of the prohibition does little to inform the employees as to what types of apparel are allowed and what types of apparel are banned. Employees’ Section 7 activities are often the source of contention among the employees and can often serve as the basis of employee disputes. The Act protects employees’ rights to engage in workplace discussions with their co-workers about unions, working conditions and management, including “intemperate, abusive and inaccurate statements.” *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus an employer prohibition on negative or inappropriate discussions without further clarification would cause a reasonable employee to read the rule as prohibiting Section 7 activity. *Hills & Dales General Hospital*, 360 NLRB No. 70, (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014); *Community Hospitals of Central California*, 335 NLRB No .87, slip op at 4 (2001)(rule prohibiting disrespectful conduct toward others overly broad based, *inter alia*, because it included no limiting language to clarify ambiguity or narrow scope); *First*

*Transit*, 360 NLRB No. 72 (2014). As discussed, *supra*, such ambiguity unlawfully puts the onus on employees to determine whether their Section 7 activity is prohibited or allowed under the Respondent's rule.

The Respondent provided no evidence that would mitigate the reasonable assumption that union and protected content apparel would be included in Respondent's dress code prohibition and, as such, it is overly broad and a violation of Section 8(a)(1) of the Act.

**4. *The Respondent's Internet and E-Mail Policy is Overly Broad Under the Board's Decision in Purple Communications, Inc., 361 NLRB No. 126 (2014)***

The Employer has maintained an Internet and E-Mail policy that violates Section 8(a)(1) because it unlawfully limits employee use of its information systems during non-work time. Section V(K) of the Respondent's handbook provides that employees may use its internet and email systems, but that such use was limited in the following ways:

1. Internet use is strictly limited to business during business hours. The company will allow you to use the internet when you are not on company time (before or after work or on your lunch period). However, you are prohibited from visiting sites which are offensive about political beliefs.
2. Email use is strictly limited to business use and should always be written in a professional manner. The company will allow you (sic) personal use of the email system for brief communications between work and your home or in the case of personal emergencies. You are strictly prohibited from creating or distributing any offensive or disruptive messages, including messages containing offensive comments about political beliefs.
3. Reporting: If you should receive any emails with any of the above content, you should report the matter to your supervisor immediately. You should also write the alleged act immediately (within 24 hours) and give a copy to the company President.

In *Purple Communications, Inc., supra*, the Board concluded that when an Employer gives employees access to its email system, it must presumptively permit the employees to use the email system for statutorily protected communications during nonworking time. The Employer can rebut the presumption by showing that special circumstances make its restrictions necessary to maintain production and discipline. Such special circumstances must be more than a mere assertion of an interest that could theoretically support a restriction. The party contending that the circumstances justify a restriction must demonstrate a connection between its interests and

the extent that those interests are not similarly affected by employee email use that the employer has authorized. *Id.*, slip op. at 14 (2014).

It is clear by the language of the rule that employees are allowed use of the Respondent's internet and email systems during non-work time. It is also clear that the employees are limited in the use of those systems, even on their own time, based on the content of the site or email message. The Respondent made no claim nor presented any evidence to show that it possessed any special circumstances that would require the limitation on the employee use of its information technology during non-work time. As such, it failed to rebut the presumption that the restrictions are unlawful and its maintenance of the policy violates Section 8(a)(1), *Id.*

Furthermore, the policy is overly broad because it would reasonably chill employees' use of the email system to discuss Section 7 activity. *UPMC*, 362 NLRB No. 191 (2015). There is no indication in the policy as to what constitutes offensive or disruptive content or what might be considered to be a politically offensive email message. As stated *supra*, Section 7 activity often engenders disagreement and discussion that could be considered by some employees to be disruptive or politically offensive. In *UPMC, supra*, the Board determined that a similar rule prohibiting "disruptive" and "offensive" content to be unlawful:

These terms ["may be disruptive," "offensive," and "harmful to morale"] – and there are no illustrations or guidance provided that would assist an employee in interpreting them – sweep broadly and ambiguously. It is clear that these terms would reasonably be understood to include a spectrum of communications about unions, and indeed, criticism of Respondent's working conditions, while permitting widespread nonwork use of the email system for an array of other subjects. *Id.*, slip op at 10 (2015).

The Respondent's email policy further limits the employees in the use of the system to contact any party other than their own home. In addition to impacting employees' solicitation rights with each other, this limitation necessarily prohibits employees from contacting union personnel, other employees or NLRB personnel in regard to their rights under the Act. Again, such a vague proscription that a reasonable employee would construe as including Section 7 activity is overly broad and a violation of Section 8(a)(1).

Lastly, the requirement that employees report the potential Section 7 activities of other employees is unlawful. The idea that employees are spying on each other and monitoring the type of communications they have with one another would clearly chill employees in the

exercise of their Section 7 rights. *Id.*, slip. op at 4 (2015), citing *Dunes Hotel*, 284 NLRB 871, 878 (1987).

The Respondent provided no evidence or arguments to rebut the presumption that such restrictions presumptively violate Section 8(a)(1). Furthermore, the type of content prohibited, and the requirement that employees report each other's activities would reasonably tend to chill the Section 7 activities of Respondent's employees. As such, the policy violates Section 8(a)(1) of the Act.

**IV. The Respondent's Motion to Dismiss Paragraphs 7 and 8 of the Complaint Is Without Merit and Should Be Denied**

At the hearing, the Respondent made a motion to dismiss paragraphs 7 and 8 of the Complaint because the allegations were not explicitly alleged in the original charge filed by the Charging Party on September 18, 2015. (GC1) The charge specifically alleges that the Respondent violated Section 8(a)(1) by discharging Johnston based on its belief that she engaged in protected concerted activity and to discourage employees from engaging in protected concerted activities and by maintaining overly broad rules that restricted the Section 7 rights of employees. (GC1(a))

The Complaint alleges that the Respondent interrogated the Charging Party on August 11 about her protected concerted activities and sympathies and three days later on August 14, accused the Charging Party of disloyalty because of her protected concerted activities. (GC 1) The complaint allegations are part of a progression of events that led to the Charging Party's unlawful discharge which was specifically alleged in the charge. The alleged unlawful statements serve as evidence that is necessary to support the General Counsel's *prima facie* case and, particularly in regard to the statement of disloyalty, serve as part of the *res gestae* of the Respondent's unlawful termination. The record evidence shows that the allegations clearly are closely related to the allegations in the charge, and as such, the Respondent's motion to dismiss these two allegations must be denied. *The Carney Hospital*, 350 NLRB 627 (2007); *Nickels Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.* 290 NLRB 1115 (1998).

The General Counsel's complaint is not restricted to the precise allegations of a charge. "Once jurisdiction is invoked, the Board must be left free to make full inquiry under its broad

investigatory power in order properly to discharge the duty of protecting public rights. There can be no justification for confining such an inquiry to the precise particularizations of a charge.” *Boardwalk Motors*, 327 NLRB 784 (1999), citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959).

If there is a timely charge, as there is in the present case, the complaint may allege any matter sufficiently related to or growing out of the charged conduct. *Vista Del Sol Health Services, Inc.*, 363 NLRB No. 135 (2016), citing *NLRB v. Fant Milling Co.*, *supra*. In determining whether allegations are sufficiently related, the Board assesses: (1) whether the allegations involve the same legal theory as the allegations in a timely charge; (2) if the allegations arise from the same factual situation or sequence of events as the allegations in a timely charge; and (3) whether the defenses raised to the allegation may be similar. *The Nickels Bakery of Indiana*, *supra*.

Both the interrogation and the equation of protected concerted activity with disloyalty involve the same legal theory as the allegation that the Respondent terminated Johnston in retaliation for her protected concerted activity. The legal theory underlying all of the allegations is that the Respondent violated Section 8(a)(1) by engaging in a campaign of retaliatory conduct against first Barrett, and then those associated with him. This unlawful motivation is the basis both for the statements and for the ultimate discharge of Johnston, which was specifically alleged in the charge. All of the events relate to the Respondent’s desire to preemptively strike employee discussions about wages under *Parexel*, *supra*. As such, the legal theory for all three allegations is the same. Thus the allegations meet the first criteria under *Nickels Bakery*, *supra*. See generally, *Trim Corporation of America, Inc.*, 349 NLRB 608 (2007), *Boardwalk Motors*, *supra* at 785 (1999)(allegations closely related when involving the same theory and sections of the Act.)

Furthermore, there is no dispute that the Section 8(a)(1) statements and the discharge of Johnston arise out of the same progression of events. “Where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, the Board will find that the second prong of test has been satisfied.” *The Carney Hospital*, *supra* at 630 (2007)(footnotes and internal quotations deleted). As stated *supra*, the interrogation and

unlawful statement took place as part of the Respondent's unlawful termination of Johnston. The statements were both made to Johnston in close proximity to her termination and were part of the entire course of events that the Respondent chose to undertake after it found out Barrett had shared wage information. See, *SKC Electric, Inc.*, 350 NLRB 857 (2007).

Lastly, the Respondent's defenses to both the charge and the complaint allegations are largely reciprocal. To defend against the Section 8(a)(1) statements, the Respondent merely had to have the named individuals deny that such statements were made or provide context that would render those statements lawful. While the Respondent called these witnesses to testify, it failed to ask them about the alleged statements. The Respondent had every opportunity to fully litigate the matter and present its own defense on these allegations, and failed to do so. Furthermore, the statements provide evidence of animus and pretext and denying those allegations is necessary to support the Respondent's defense that it terminated Johnston for lawful reason.

Because the alleged Section 8(a)(1) statements involve the same legal theory and arise out of the same progression of events as the allegations contained in the original charge and because the denial of the statements is necessary for the Respondent to carry its burden under *Wright Line*, the allegations meet all the criteria set forth in *Nickels Bakery* and its progeny, supra. As such, the Respondent's motion to dismiss paragraphs 7 and 8 of the Complaint must be denied.

## V. CONCLUSION

The manifest weight of the record evidence establishes that the Respondent violated Section 8(a)(1) of the Act by: (1) interrogating Johnston about her association with the protected concerted activities of Barrett; (2) equating Johnston's association with Barrett and his protected concerted activities with disloyalty; (3) terminating Johnston based solely on her association with Barrett; and (4) maintaining numerous ambiguous employee handbook rules that would reasonably be construed by employees as prohibiting otherwise legitimate Section 7 activity.

As such, Counsel for the General Counsel requests that the Administrative Law Judge find that the Respondent violated Section 8(a)(1) and order such relief as may be deemed appropriate and as set forth below.

VI. **PROPOSED REMEDY**

- As a remedy for the Respondent's unfair labor practices, it is prayed that the Respondent be ordered to:

1. Cease and desist from engaging in the conduct described in paragraphs 7 through 11 of the Complaint and Notice of hearing issued on November 24, 2015, or in any like or related manner restraining, coercing or interfering with employees' exercise of their Section 7 rights.

2. Take the following affirmative action:

(a) Offer the Charging Party immediate and full reinstatement to her former position of employment, or, if the position no longer exists, to a substantially equivalent position of employment without prejudice to seniority or other rights and privileges previously enjoyed.

(b) Remove from its files and records all references to her termination and advise her in writing that the Respondent has done so, and that the Respondent will not hold said actions against her in the future.

(c) Make whole the Charging Party for all losses of earnings and benefits suffered by reason of the discrimination against her by the payment of back pay with interest computed in accordance with Board policy.

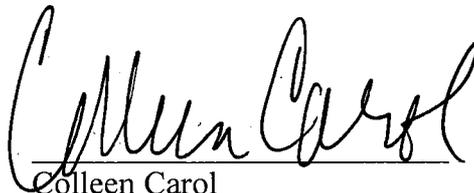
(d) Reimburse the Charging Party for all search for work and work-related expenses regardless of whether she received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period, and any other consequential damages she may have suffered.

(e) Rescind the overly broad Employee Handbook rules that relate to disclosure of confidential information, solicitation and distribution, internet and email use, and dress code policy and notify the employees that the Respondent has done so.

(f) Post appropriate notices (proposed Notice to Employees set forth below) and disseminate, on the first day of notice posting as sought herein, a copy of the notice in electronic fashion on the same intranet site and in the same manner by which the Respondent disseminates information to its employees;

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices proven herein.

Respectfully submitted this 7<sup>th</sup> day of April, 2016,



Colleen Carol

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PROPOSED NOTICE TO EMPLOYEES:

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative 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** do anything to prevent you from exercising the above rights.

**YOU HAVE THE RIGHT** to discuss wages with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

**WE WILL NOT** discipline or discharge you because you discuss wages or other terms and conditions of employment with other employees, or associate with employees whom we believe have done so.

**WE WILL NOT** equate the exercise of your right to discuss wages or other terms and conditions of employment with other employees, or associate with employees whom we believe have done so, with disloyalty toward the Company.

**WE WILL NOT** ask you about your protected Sec. 7 activities with other employees.

**WE WILL NOT** maintain or enforce, and **WE WILL** rescind, our rules that overbroadly prohibit:

- disclosure of “confidential Company information;”
- solicitation in work areas;
- distribution of non-company literature;
- clothing “with words, slogans and/or pictures that may be offensive to other employees;”
- employees on non-work time from visiting internet sites or sending emails that are “offensive” about political beliefs.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** rescind any discipline that was issued to any employees pursuant to the unlawful rules set forth above and make whole any employees for any wages and benefits they lost as a result of any unlawful enforcement.

**WE WILL** reinstate Lindsey Johnston to her job without loss of seniority or any other rights and privileges.

**WE WILL** remove from our files and records all references to the discharge of Lindsey Johnston, and notify her in writing that this has been done and that her discharge will not be used against her in any way.

**WE WILL** make whole Lindsey Johnston for the wages and other benefits she lost because we discharged her and reimburse her for all search-for-work and work related expenses she incurred as a result of her discharge regardless of whether she received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period, and any other consequential damages she may have suffered.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**ANDRONACO, INC., d/b/a ANDRONACO  
INDUSTRIES,**

**Respondent**

**Case 07-CA-160286**

**and**

**LINDSEY JOHNSTON, an Individual**

**Charging Party**

Certificate of Service

The undersigned affirms that on April 7, 2016, the Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge was filed with the Division of Judges through the Board's e-filing system and copies were served on the following individuals by electronic mail to the addresses set forth below:

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Handwritten scribbles or marks, possibly initials or a signature, located in the lower-left quadrant of the page.