UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

QUICKEN LOANS INC.,	)	
Respondent,	)	
and	)	Case 28-CA-146517
AUSTIN LAFF,	)	
An Individual.	)	

QUICKEN LOANS INC.'S REPLY BRIEF IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Charles I. Cohen
Daniel P. Bordoni
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004-2541
Telephone: (202) 739-3000
Facsimile: (202) 739-3001
Counsel for Quicken Loans Inc.

Dated: June 14, 2016

I. INTRODUCTION

Pursuant to Section 102.46(h) of the National Labor Relation Board ("Board")'s Rules and Regulations, Quicken Loans ("QL" or "Respondent") submits this Reply Brief in response to the General Counsel ("GC")'s Answering Brief. Despite the GC's sweeping—and unsupported—rhetoric, the record reflects that the ALJ committed fatal errors in his analysis, which require his decision to be overturned in its entirety: (1) a legal finding of protected concerted activity was required for virtually all theories advanced by the GC; (2) the GC rested without proving this vital element of his case; and (3) to plug this "evidentiary hole," the ALJ improperly drew an adverse inference against QL for the GC's decision to forgo obtaining the necessary testimony, which essentially shifted the burden to QL to refute an unestablished prima facie case. This is contrary to Board law, and must be overturned.[1]

II. ARGUMENT[2]

---

[1] To the extent not discussed below, QL relies on arguments asserted in its Brief in Support of Exceptions to the Administrative Law Judge's Decision ("QLB"). Notably, the Answering Brief begins with the meritless assertion that QL's exceptions do not comply with the Board's regulations. Not so. QL's brief fully complies with Section 102.46(b)(1). QL's exceptions cite to the ALJ's decision, and its brief in support of exceptions addresses each exception. This format is sufficient to fulfill the requirements of 102.46(b)(1). *See Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (the requirements of Section 102.46(b) of the Board's rules can be fulfilled in either the exceptions or the brief); *Special Touch Home Health Care Services, Inc.*, 349 NLRB 759, 759-60 (2007) (explaining that where a party opts to file a brief in support of exceptions, all argument, which includes the facts that assertedly establish the exception, must be confined to the brief); *see also UPS Supply Chain Solutions, Inc.*, 2016 WL 1106880 (Mar. 22, 2016). Notably, Counsel for the GC himself has excepted to an ALJ decision, formatting his exceptions and brief in support of exceptions exactly as QL formatted its exceptions and brief. *See Desert Springs Hospital Medical Center*, 28-CA-127971, https://www.nlrb.gov/case/28-CA-127971.

[2] Several of QL's arguments remain unopposed. Because the GC did not, and cannot, challenge those contentions, the Board should grant QL's exceptions on the basis of the arguments made in its brief in support thereof. (*See, e.g.*, QLB at 22-23 (the record does not support that being dropped into a "pipeline" refers to a method of routing calls to mortgage bankers); QLB 24-25 (Woods' complaint related to a customer request, not something QL had control over); QLB at 13 (the ALJ erred by substituting the adverse inference regarding Woods'

The starting point for the analysis of this entire case—and indeed the flaw in all the GC's theories—is the fact that Woods and Laff were not engaged in any protected concerted activity on February 11, 2015. There is no credible record evidence that supports a finding of protected concerted activity.

A. The GC Failed to Rebut QL's Contention that the ALJ Erred in Finding Woods' Restroom Statements Were Protected Concerted Activity.

The GC does not—and cannot—cite to any record evidence demonstrating that Woods' profanity-laced outburst, and Laff's simple reply, were related to terms and conditions of employment or addressed in a concerted manner. The GC entirely ignores the crux of Woods' rant: that he was frustrated about the request of a customer. In an effort to overcome a complete dearth of evidence that Woods sought mutual aid and protection, the GC makes sweeping statements out of whole cloth that lack factual and legal support. First, the GC contends that "the topic of the [restroom] conversation is *undisputed*," but provides absolutely no support for this assertion except to repeat—no less than five times throughout the Answering Brief—that the subject of Woods' outburst was "how client calls are fielded by mortgage bankers," or "whose responsibility is to field calls from clients." In no instance did the GC cite to **any** evidence supporting this contention. The GC's mere repetition of the ALJ's inaccurate conclusion does not make it true, and certainly does not make it "undisputed."

Next, the GC relies on the uncredited statement of Luis Santacruz for the proposition that Laff and Woods were discussing shared work complaints. But, Santacruz's statement directly contradicts Laff's credited testimony that sets forth the entirety of the discussion. The GC cannot both adopt the ALJ's fact determinations but then rely on a discredited statement. Further, the

---

testimony for affirmative evidence); QLB at 17 (the ALJ found an "evidentiary hole" in the record without the testimony of Woods); QLB at 34-42 (the challenged "rules" reflected the legitimate business interests of a company within the financial services industry).

GC's concession of ignorance concerning how the "pipeline" works, GCB at 6, concedes there is no support for his theory that the "pipeline" is a QL-controlled method of call routing. Finally, the GC claims Woods' complaint about a client call "wasting his time" was really a concerted complaint about wages. But the Act requires a more direct connection to terms and conditions of employment;[3] otherwise, every employee's comment about a workday distraction amounts to concerted activity.

The GC further argues Laff's own testimony about why Woods' outburst "was a common concern" demonstrates concerted activity. However, as the GC correctly points out, an objective test determines whether a communication is concerted activity. GCB at 6. Objectively, Laff's response that he "understood why" Woods was frustrated suggests only that Laff *comprehended* the source of Woods' frustration, not that he *shared* his frustration from the same circumstances, or that he *experienced* the same circumstances at all. Thus, the GC's reliance on what Laff meant, or what he understood Woods' comments to mean, has no bearing on whether the conversation was protected concerted activity. GCB at 12. Only what Woods' words objectively mean is relevant, and they are clearly an individual insulting gripe.

B. The ALJ Erred in Concluding that the GC's Failure to Secure Testimony From an Alleged Discriminatee Warranted an Adverse Inference *Against QL*.

Both parties agree that an ALJ may apply an adverse inference to a question of fact, based on a party's failure to call a witness who both (1) may reasonably be assumed to be favorably disposed to the party and (2) could reasonably be expected to corroborate its version of

[3] *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978); *Tradesmen Int'l, Inc.v. NLRB*, 275 F.3d 1127, 1141 (D.C. Cir. 2002) (noting that "an essential element before section 7's protections attach is a nexus between one's allegedly protected activity and 'employees' interests as employees'") (quoting *Eastex*, 437 U.S. at 567).

events. QLB at 13;[4] GCB at 8-9. Thus, the GC must concede that the ALJ erred by drawing an adverse inference against QL for failing to call ***an alleged discriminatee as a witness***. QLB at 15-16. According to the record—and the GC's assertions—Woods was disciplined for the very conversation at issue in this case. QLB at 16. It is downright bizarre to assume that Woods, an interested party and alleged discriminatee, would be favorably disposed to QL, either on the basis that he is a current employee,[5] or because he received a less severe punishment than Laff.[6] QLB at 15-16. The GC fails to cite **any** authority where an adverse inference has been drawn against an employer for failing to call a witness who is necessary for the GC's prima facie case.[7] Further, the GC incorrectly concludes that Woods' failure to cooperate in the GC's investigation demonstrates that Woods is "favorably disposed" to QL. GCB at 10. This assertion is unsupported by fact or law, as there are a myriad of reasons why Woods could have declined to participate in the GC's investigation.[8]

---

[4] While the Answering Brief refers to QL's "version of events" as if QL relies on an independent set of facts, the Exceptions Brief completely assumes the validity of Laff's version of events, as it is the credited version.

[5] The GC mistakenly asserts that the Board recognizes that current employees have an interest in giving testimony favorable to their employer. However, a review of the cases cited in the GCB demonstrates that the GC has simply conflated the law—while these cases show that testimony *against* an employer is generally viewed as more credible because it is against an employee's pecuniary interest, the GC's cases do *not* support the conclusion that the Board *presumes employees will provide favorable testimony* for their employers.

[6] The GC also appears to suggest that QL did not call Woods to testify out of fear he would provide bad testimony, and that this itself indicates that Woods is "favorably disposed" to QL. *See* GCB at 11-12. However, a witness cannot be "favorably disposed" simply because he is not called; otherwise, prong (1) of the test is a nullity. Indeed, Woods was not called by QL because he was not a necessary witness, as the GC had not yet met its burden of proof.

[7] While the GCB claims that an adverse inference "may" be applied where an employer calls a "weaker" witness when a "stronger" one is available, this hypothetical is unavailing, as nothing within the ALJ's decision suggests that this was the basis for his adverse inference. *See* GCB at 13. Further, the case cited for this proposition—like the others—involves the missing testimony of a ***rebuttal*** witness, not one necessary the GC's prima facie case. *Jennie-O Foods*, 301 NLRB 305 (1991).

[8] The Answering Brief baldly asserts that because "Woods' whereabouts was within

C. As the GC Concedes that an Adverse Inference Can Only Be Applied to Factual Questions, the ALJ Clearly Erred by Using an Adverse Inference to Satisfy a Missing Legal Element of the GC's Prima Facie Case.

Contrary to the GC's assertion, the ALJ did ***not*** find that the GC had established its prima facie case. ALJD at 9-11. Instead, the ALJ noted that there was an "evidentiary hole" in the GC's case, as Woods' testimony was necessary to conclude that his restroom rant constituted protected concerted activity. ALJD at 10. Despite this, the GC simply ***chose to rest its case without proving this necessary element***. GCB at 14.[9] To circumvent this, the ALJ improperly relied on an adverse inference to reach the ***legal conclusion*** that Woods and Laff were engaged in ***protected*** concerted activity. However, as the GC concedes, adverse inferences may only be applied to ***questions of fact***. GCB at 9. Thus, the ALJ erred by exceeding this permissible application of an adverse inference.

Because Woods' testimony was necessary to establish the GC's prima facie case, it was the GC's responsibility—not QL's—to secure Woods' testimony. The Board and the courts have expressly rejected an ALJ's use of an adverse inference against a respondent to establish facts on which the General Counsel has the burden of proof. QLB at 18. *Desert Springs Hospital Center* is entirely inapposite, as the judge there held "the General Counsel did not need to rely on the [witness's] testimony to establish a prima facie case," nor did the Board agree with the ALJ's *Wright Line* analysis to which the judge's adverse inference applied.[10]

Quicken Loans' knowledge" he was an "agent" of QL, as "[t]here can be little doubt that if Quicken Loans wanted Woods to testify, it could have served him with a subpoena and he would have testified at the hearing." GCB at 9. This is unsupported by fact, law, or the GC's own experience, as—contrary to the GC's assertion—the GC was clearly aware of Woods' whereabouts, served him with a subpoena, and Woods did not testify.

[9] As admitted in the Answering Brief, "the General Counsel determined that the record evidence presented at trial was sufficient to establish violations of the Act as amended and ***chose not to seek enforcement of Woods' subpoena***. . . ." (GCB at 14) (emphasis added).

[10] 363 NLRB No. 185 (2016) at 1 n.4, 7, 15. Here, the GC misleadingly asserts that the

By faulting QL for not calling a witness necessary for the GC's case, the ALJ effectively shifted the burden of proof to QL. QLB at 19. The GC's denial of this burden-shifting is disingenuous; the GC indeed concedes that the ALJ only concluded that Woods and Laff engaged in concerted protected activity after "applying the adverse inference rule." GCB at 8, 12. Woods' failure to appear should only have led to an adverse inference against the party that needed his testimony to prove its case—the GC. QLB at 20.

D. The GC Fails to Rebut QL's Arguments that the ALJ Erred in Deciding that Glomski Created an Impression of Surveillance in the Public Restroom.

In supporting the ALJ's decision that Glomski created the impression of surveillance in the restroom, the GC acknowledges the fact that the "openness" of the conversation is a "relevant fact," but then entirely discounts its relevance. GCB at 38. There can be no surveillance of employee protected activity if it is engaged in openly.[11] The record shows the conversation was conducted in a publicly-accessible restroom where anyone—including management—could hear it. The GC simply ignores the cases showing that individuals have no reasonable expectation of privacy in public restrooms. Moreover, there can be no unlawful surveillance where a supervisor's presence is not out of the ordinary.[12] Here, the GC's suggestion that QL was "peering over" Laff's "shoulder" is preposterous. No one was "peering" or hiding in wait to

---

Board "approved an ALJ's finding of an adverse inference against the employer," when the ALJ himself concluded that the adverse inference was not necessary, and the Board decision rejected the ALJ's entire salient analysis. *Compare* GCB at 9 *and* 363 NLRB No. 185 (2016). Notably, the adverse inference had no bearing on the ALJ's final ruling, as the charging party's own testimony "le[ft] no doubt" regarding the substance of the conversation at issue. 363 NLRB No. 185, slip op. at 8.

[11] *See, e.g., Sunshine Piping, Inc.*, 350 NLRB 1186, 1194 (2007) (manager's statement that he knew about eighty percent of the shop had signed authorization cards was not unlawful impression of surveillance where the employees' card solicitation activities were conducted openly on the employer's premises).

[12] *See, e.g., Aladdin Gaming, LLC*, 345 NLRB No. 41 (2005); *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006).

surreptitiously listen to this conversation. When a person happens to be using a restroom stall, he or she is obviously not "monitoring" anything, especially a conversation that was impossible to anticipate.

Glomski's statement that he heard about the incident from "someone he trusted" does not create the impression of surveillance. Laff knew the conversation took place in a public area where it could be overheard by anyone. Moreover, the GC makes no attempt to explain how such a statement coerced or restrained employees from engaging in protected activity. Without such a showing, there can be no unlawful impression of surveillance.[13]

E. The GC Failed To Show QL Violated Any Prong of the *Lutheran Heritage* Test.

While the GC continues to assert that the "rules" in Mendez's email were in violation of the Act, the GC fails to address the issues raised in QL's Exceptions Brief. QL reiterates that the GC failed to prove that Laff and Woods engaged in protected concerted activity, and thus any "rules" within Mendez's email could not have violated prong 2 and 3 of the *Lutheran Heritage* test.[14] Additionally, the GC does not refute, and therefore must concede, the following regarding Mendez's email:

1) the email was merely a forward and reiteration of an email sent by Dwyer on February 3, ***prior*** to any alleged concerted activity by Laff and Woods, QLB at 9-10, 34-37;

2) Laff and Woods were disciplined for violating the ISMs, not pursuant to any "rules" in Mendez's email, QLB at 34 n.12;

3) that QL has legitimate business justifications for the purported "rules," and that a reasonable employee in the financial services industry would not interpret Mendez's email as prohibiting protected Section 7 Activity, QLB at 34-37;

---

[13] *See Greater Omaha Packing Co., Inc. v. NLRB*, 790 F.3d 816, 822 (8th Cir. June 22, 2015).

[14] Without any protected concerted activity, there can also be no violation of the *Double Eagle* rule. *See* QLB at 33.

Mendez's email reiterated QL's request that mortgage bankers not discuss their incentive or commission pay where they could be overheard by clients or potential clients. QLB at 34-37. The GC concedes that "[a] mortgage banker's commission has an obvious impact on the pay her or she receives," GCB at 5, thus recognizing the rule's connection to commissions, and thus to client relations. Considering QL's legitimate interests and the interpretation of a reasonable employee in the client-centered financial industry, Mendez's email cannot be interpreted to contain any "rules" violating the Act.

F. The GC Failed To Show That The "Rules" in Laff's Separation Document Violate the Act.

The separation document reminds individuals (1) that QL's obligation to protect its confidential customer information continues beyond any single employee's term of employment, and (2) of their own commitments not to compete with or raid QL's clients or employees. As with all such documents, this must be properly analyzed in context. Like all financial institutions, QL is subject to scores of state and federal statutory and regulatory mandates, particularly concerning consumer financial privacy.[15] While employees are trained on—and are thus well aware of—what must be kept confidential pursuant to regulations, the separation document serves as a reminder that the duty to safeguard customer information continues even after one's employment ends.[16] Moreover, when viewed in context, it is clear that the "rule" regarding "***contacting or soliciting***" employees or clients is aimed at prohibiting raiding, not restricting

---

[15] Most notably, the Gramm-Leach-Bliley Act requires financial institutions to implement appropriate safeguards as part of their "affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those consumers' nonpublic personal information." *See* 15 U.S.C. § 6801; 16 CFR 313.1; 16 CFR 314.1.

[16] Again, as stated in QL's Exceptions Brief, because an employee is no longer employed by QL, there is no reasonable concern by the former employee that he or she would be disciplined or otherwise experience an adverse employment action were he or she to engage in protected activity.

Section 7 rights.[17]

G. The GC Failed To Show QL Violated the Act By Disciplining Laff or Woods.

Initially, as established above, the GC failed to meet his burden in establishing that Laff and Woods engaged in protected concerted activity in the first place. *Supra* Section II.C. Moreover, the GC repeatedly and misleadingly states that Laff was terminated solely for his use of profanity. QL's investigation into the bathroom discussion, and its decision to discharge Laff, were *not* triggered by the mere use of profanity, but by Laff's ***demeaning a client and the client's requests, as obviously underscored by the use of profanity directed at the client request***. Thus, the GC's citation to evidence in the record showing that profanity was tolerated in other contexts is immaterial to the core issue in this case—whether QL had a practice of tolerating its employees profanely disparaging clients and client requests. Because the record evidence shows the answer is no, the Board should recognize that Laff's statement was never protected, and regardless, Laff was terminated for client relations misconduct, and not the simple use of profanity. For these two reasons alone, the ALJ failed in finding that the GC established a prima facie case. Further, the GC's bald assertions that improper motive can be inferred by QL's alleged commission of unfair labor practices "in prior cases," disparate treatment, shifting defenses, and failure to investigate, are completely unsupported by the record.[18]

The GC also mistakenly contends that QL improperly relies on *Fresenius USA Manufacturing, Inc.*,[19] to claim that Laff was lawfully terminated for lying during the

---

[17] Again, employees have no Section 7 right to raid a former employer's clients and/or employees. QLB at 39-41.

[18] Instead, the record demonstrates that Woods and Laff were disciplined for violating QL's "ISMs" guidelines. *See* QLB 33-34; GCX 3 and 9. Similarly, the GC's alternate theory of animus—that QL's prompt investigation of what it considered a serious violation somehow signals "improper motive"—is completely unsupported by fact, law, or common sense.

[19] 362 NLRB slip op. at 1 (2015).

investigation.[20] To the contrary, *Fresenius* is directly on point. First, the fact that the misconduct at issue—here, denigrating clients using vulgar language—does not violate state or federal law, does not make it permissible in the workplace. Second, the GC sets forth a step-by-step definition of "full and fair investigation," and claims that it is required by *Fresenius.* Yet, even the employer in *Fresenius* did not even follow all of the GC's prescriptions. In addition, although the GC erroneously states that the QL did not take statements from other employees during the investigation, GCB at 24, QL took a statement from Santacruz and talked to Mendez about the situation. Finally, the GC's assertion that the bathroom conversation "did not interfere with Quicken Loans' ability to effectively operate its business" is entirely irrelevant and completely unrelated to the Board's analysis in *Fresenius*. GCB at 25.

III. CONCLUSION

For the foregoing reasons, Quicken Loans respectfully urges the Board to find merit to its Exceptions to the Administrative Law Judge's decision, and to dismiss the Complaint in its entirety.

Date: June 14, 2016

Respectfully submitted,

By: 

Charles I. Cohen
Daniel P. Bordoni
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
Telephone: (202) 739-3000
Counsel for Respondent Quicken Loans Inc.

[20] The GC cites to "Cf. 362 NLRB slip op. at 3" at GCB fn. 104 in support of its statement that "there is no record evidence that Quicken Loans discharged other employees for dishonesty or imposed similar discipline for similar violations in the past." The citation does not support this statement or in any way relate to the issuance of similar discipline in any case, including *Fresenius*.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2016, true and correct copies of Quicken Loans Inc.'s Reply Brief in Further Support of Its Exceptions to the Administrative Law Judge's Decision filed with the Board on June 14, 2016, has been served upon the following by electronic mail:

Fernando J. Anzaldua, Esq., Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099
E-mail: fernando.anzaldua@nlrb.gov
Counsel for the General Counsel

Cornele A. Overstreet
National Labor Relations Board, Region 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099
E-mail: Cornele.overstreet@nlrb.gov
Regional Director

Austin Laff
8021 East Osborn Road
Scottsdale, AZ 85251-4876
E-mail: austinhlaff576@gmail.com
Charging Party

Kirsten B. White

Dated: June 14, 2016