

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**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 BRIEF IN RESPONSE
TO RESPONDENT’S EXCEPTIONS AND BRIEF IN SUPPORT OF
CROSS-EXCEPTION¹**

I. Introduction²

On April 20, 2016, Administrative Law Judge (“Judge”) Sharon Levinson Steckler issued her decision on the above case, correctly finding that Respondent violated Section 8(a)(1) of the Act by: 1) equating the Charging Party Lindsey Johnston’s (“Johnston”) association with a fellow employee’s protected concerted activity as disloyalty to the company; and 2) discharging Johnston because she engaged in, and Respondent believed that she engaged in protected concerted activity.

On May 18, 2016, Respondent filed twenty-one exceptions to the judge’s decision, challenging virtually all of her factual findings and legal conclusions regarding Johnston’s discharge. The substantial record evidence fully supports the judge’s factual findings and her

¹ As no exceptions were filed regarding the Administrative Law Judge’s findings and conclusions regarding Respondent’s unlawful handbook provisions in paragraph 11 of GC 1(c), those findings should be automatically adopted. (ALJD 3 – 8); NLRB Rules and Regulations Section 102.48(a).

² For the sake of brevity, the Administrative Law Judge Sharon Levinson Steckler will be referred to as “judge,” with references to the judge’s decision as “ALJD page#” Respondent Andronaco Inc. d/b/a Andronaco Industries will be referred to as Respondent and the Charging Party Lindsey Johnston will be referred to as “Johnston.” References to the transcript will be referenced by page, as “Tr. Page number,” Counsel for the General Counsel Exhibits as “GC Number” and Respondent Exhibits as “RNumber” When referencing Respondent’s Exceptions, they will be referenced by number. All dates are 2015 unless otherwise specified.

legal conclusions were proper based on relevant case law. As such, Respondent's exceptions should all be denied and the judge's recommended factual findings and legal conclusions be adopted.

II. Respondent's Exceptions Are Without Merit and Should be Denied

A. The Judge Properly Determined that Respondent's 8(a)(1) Statements Regarding Employee Disloyalty Were Properly Included in the Complaint and Violated 8(a)(1)(Exceptions 6 and 7)

Respondent excepts to the judge's determination that Executive Assistant Kaila Schweda informed Johnston that her association with former employee Nate Barrett (Barrett) was perceived as disloyalty to Respondent. (ALJD 14) Furthermore, Respondent repeats the argument it made at the hearing that the statement of disloyalty allegation was not properly included in the General Counsel's Complaint. (GC 1(c)) The judge's findings on both matters are free from error and supported by the record.

In order to overturn a judge's credibility determination, Respondent must show that the clear preponderance of all the relevant evidence shows that the resolutions are incorrect.

Standard Dry Wall Products, 91 NLRB 544 (1950). The judge is responsible for observing the demeanor of witnesses, weighing the respective evidence, considering the established and admitted facts and inherent probabilities in making inference and credibility determinations.

Double D Construction Group, Inc. 339 NLRB 303 (2003).

In the present case, the manifest weight of the record evidence supported the judge's decision to credit Johnston's testimony regarding the disloyalty statement. As an initial matter, it should be noted that Schweda's testimony corroborated Johnston's account to a large degree.

(ALJD 16) To the extent the testimony differed, the judge examined the related and contemporaneous evidence, including the statements made by Schweda in GC 11. (ALJD 2, fn.2) The contents of that document not only support Johnston's version of events, but directly undercut the Respondent's denials.

The judge's credibility determinations were sound and based on the substantial weight of the record evidence. Respondent failed to show by a clear preponderance of the evidence that the determinations were incorrect and as such, the judge's credibility determinations should be sustained.

Having found that the statement was made, the judge relied on relevant case law to determine that an equation of protected concerted activity with disloyalty to the company was a violation of 8(a)(1). (ALJD 16) *Sea Breeze Health Care Center, Inc.* 331 NLRB 1131 (2000), *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996). Respondent offered no basis of law or fact that would render the statement lawful or negate the coercive effect of the statement. As such, Exception 7 must be denied.

Furthermore, in Exception 6, Respondent repeats the argument made at the hearing that the statement of disloyalty was not specifically cited in the original charge and was and thus not appropriately included in the complaint. As correctly determined by the judge, an allegation is properly included so long as it is closely “related to and arise[s] out of the same situation as the conduct alleged to be unlawful in the charge.” *Nickels Bakery of Indiana*, 296 NLRB 927 (1989). (ALJD 15) Because the statement was made in the course of Johnston’s unlawful termination and relates directly to the motivation underlying that unlawful termination, it is clearly encompassed within the allegations in the charge. *Id.*; *The Carney Hospital*, 350 NLRB 627 (2007); *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959)(“Once jurisdiction is invoked, the Board must be left free to make full inquiry. There can be no justification for confining such an inquire to the precise particularizations of a charge.”) As the allegation is closely related to the charge allegations and was fully litigated at the hearing, Respondent’s Exception 6 should be denied.

B. Barrett Was an Employee Within the Meaning of Section 2(3) of the Act (Exception 12)

Both the record evidence and legal precedent support the judge’s finding that Barrett was an employee under Section 2(3) of the Act. (ALJD 19) The Board has consistently found, as cited by the judge, that “employee” includes “members of the working class generally,” including “former employees of a particular employer.” *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op at 4 (2013), citing *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

The record showed that Barrett, after being employed directly by Respondent until May 28, went on to work for another employer throughout the relevant time period. (Tr. 28; Tr. 37) There was no evidence presented by Respondent to show that Barrett was a supervisor, an

independent contractor or otherwise in a classification that would exempt him from the protection of the Act.³ As such, Respondent's Exception 12 must be denied.

C. The Record Supports the Finding That Nate Barrett was Engaged in Protected Concerted Activity (Exceptions 2, 4, 9)

The record contains overwhelming evidence that Barrett engaged in protected concerted activity on multiple occasions during the summer. As an initial matter, Barrett's uncontested and credited testimony establishes that he learned the wage rates of several employees and managers in 2014 and shared that information with another employee during a casual conversation on May 28. (ALJD 9; Tr. 33)⁴ During this conversation, Barrett and the other employee discussed their own wage rate and that of Schweda. (ALJD 9; Tr. 58) Barrett's testimony regarding the conversation and the fact that it focused solely on wages was undisputed. (ALJD 9)

The judge correctly found, based on Board precedent, 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). (ALJD 18) *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 Schweda's wage rate to another employee, 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." (ALJD 18) *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 another employee is also concerted when analyzed under the standard set forth in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). After Barrett disclosed Schweda's wage rate, the other employee expressed a hope that he, too, would earn

³ If Respondent intended to make such a showing, it failed to sustain its burden. See, *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

⁴ Respondent repeats its argument, properly rejected by the judge, that Barrett's characterization of his discussion with another employee about wages as "water cooler talk" as opposed to protected concerted activity. (ALJD 9, fn.7) As correctly noted by the judge, she is not bound by Barrett's characterization.

higher wages in the future. (Tr. 33) 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 express 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).

It is also undisputed that Barrett spoke with Johnston both about the fact that he did not receive his final paycheck on July 20, and also about the fact that the Respondent was suing him for disclosing wage information on August 7. (ALJD 8; ALJD 10) The credited record testimony shows that Barrett had not only disclosed the existence of the lawsuit with Johnston, but that she was aware, based on her conversation with him, that he was “in trouble” for discussing wages. (ALJD 10; Tr. 109) Such evidence supports the judge’s ultimate finding that the discussions between Barrett and Johnston involved commiseration regarding the actions of Respondent toward Barrett in retaliation against his protected concerted activity, specifically the discussion of wages. (ALJD 20) As stated supra, such discussions are “inherently concerted” even in the absence of an overt call to action by either of the employees. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995); *Fresh and Easy Neighborhood Market*, 361 NLRB No. 12 (2004).

Most importantly, the evidence conclusively established that despite the actual nature of Barrett’s conversations with other employees, Respondent clearly believed that he was engaging in protected concerted activity – more specifically, disclosing the wage rates of employees to other employees. (ALJD 19 – 20) Respondent’s assertion that it was not concerned with Barrett’s disclosure of wages, but with the disclosure of other confidential information has no basis in the record. (ALJD 19)

The undisputed evidence shows that after his discussion with another employee on May 28, Barrett was immediately called into a meeting with Respondent President Ron Andronaco and three other managers. (ALJD 9) Even after Barrett told the managers that he had learned the wage information from another and not due to access to Respondent’s confidential files, Andronaco continued to interrogate him about where he learned the wage information and with

whom he shared it. (ALJD 9; Tr. 34-36) Andronaco specifically asked Barrett whether he had disclosed the wage information to other employees, whether other employees had discussed the wage rates at a social gathering and if Barrett knew the identity of those individual employees. (Tr. 35-36)

Even after Barrett left his employment with Respondent on May 29, he was repeatedly contacted by Respondent in June and asked again about whether other employees knew about or had discussed wages. (ALJD 9; Tr. 37; Tr. 182) There is no record evidence to show or indicate that Respondent's representatives ever asked Barrett about other types of information other than wages.

On July 21, after Barrett tried unsuccessfully to have his final paycheck sent to him (almost two months after he left his position with Respondent), he was told by Schweda in an email that Respondent believed that he had disclosed "confidential *wage information*" and as such, it was entitled to take legal action against him. (ALJD 9; GC5) There was, as with the previous conversations, no mention of a concern over any other type of information.

It is Respondent's August 7 lawsuit against Barrett and its request for injunctive relief that conclusively establishes that Respondent believed that Barrett had discussed wages and could continue to do so in the future. (GC 7) In its complaint against Barrett, Respondent specifically alleged that Barrett violated Respondent's confidentiality agreement by "disclosing wage and salary information to the employees of Andronaco Industries." (GC 7, page 3) In seeking injunctive relief, 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, Items 16 -20) As a remedy, Respondent sought an injunction "restraining and enjoining the Defendant from disclosing salary and wage information of Andronaco Industries' employees." (GC 7) Respondent's pleadings repeatedly reference his possession of and disclosure of wage and salary information and do not indicate that Barrett had revealed or discussed any other type of information.

Respondent's suit against Barrett specifically sought not only to punish him 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*. (GC7) While 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 Respondent specifically cited the effect on other employees as a reason an injunction was necessary.

The manifest weight of the record evidence establishes that Barrett was engaged in protected concerted activity and that Respondent believed that he had done so by disclosing and discussing wages and the lawsuit with other employees. Respondent has provided no basis upon which to find the judge's findings in error, and as such, Exceptions 2, 4 and 9 must be denied.

D. The Record Supports the Finding that Johnston Engaged in Protected Concerted Activity and Respondent Believed that she was Engaged in Protected Concerted Activity (Exceptions 10, 11, 13)

Respondent further excepts to the judge's finding that Respondent associated Johnston with Barrett's protected concerted, primarily because she did not specifically discuss wages with Barrett on May 28. The law, however, does not require a mechanical application of what constitutes protected concerted activity. In fact, the Board has found that adverse action taken against employees based on the Employer's mistaken belief that she was engaged in protected concerted activity violates 8(a)(1) the same as if the employee had actually engaged in the activity. *Salisbury Hotel, Inc.*, 283 NLRB 685, 686 (1987) ("An employer clearly violates the Act by [discriminating against] an employee whom the employer mistakenly believes has engaged in [protected] activity.") The judge correctly determined, based on undisputed evidence, that Respondent believed that Johnston was assisting and advocating for Barrett in reference to the lawsuit, which was based entirely upon his disclosure of wage information. (ALJD 17; ALJD 19)

The evidence establishes that Respondent perceived Johnston to be inexorably entwined with Barrett's protected concerted activity. That perception is conclusively demonstrated in the language of Schweda's August 18 notes regarding Johnston's termination. (GC 11) In those notes, Schweda 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. (ALJD 11; GC 11) There is no basis on the record to challenge the judge's finding that Respondent believed that Johnston was acting in concert with Barrett regarding his lawsuit. As such, Exceptions, 10, 11 and 13 must be denied.

E. The Record was Replete with Evidence of Animus (Exception 14)

The judge's determination that Respondent harbored animus toward Barrett and Johnston's protected concerted activities is supported by the record. (ALJD 21) 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).

While there are numerous examples of animus in the record, animus may be demonstrated solely by the commission of Section 8(a)(1) violations. *Greyston Bakery*, 327 NLRB 433 (1999) As referenced *supra*, Schweda associated Johnston's continued association with Barrett as disloyalty to Respondent. The record also shows that while not alleged, Respondent made similar statements to former employee Robert Zurita. See, *Robert F. Kennedy Center* 332 NLRB 1536 (2000)(Employer's statement that she felt betrayed by protected activity sufficient as the sole basis for finding animus).

In the present case the judge had multiple wells from which to draw a conclusion that Respondent had animus toward the protected activity of Barrett and Johnston. Animus can be shown by the timing of the adverse action in relation to the protected activity as well as by Respondent's shifting defenses for a discharge. *Nichols Aluminum, LLC*, 361 NLRB No. 22 (2014)(timing evidence of animus); *Lucky Cab Company*, 360 NLRB NO. 43 slip op. at 4 (2014)(shifting defenses evidence of animus).

The judge appropriately noted that Johnston was terminated within a week of Respondent determining that she had contact with Barrett and knowledge of the lawsuit. (ALJD 20– 21) Furthermore, her termination was undertaken within a few days of Respondent confronting employee and known Barrett associate Robert Zurita about *his* knowledge of the lawsuit and his relative loyalty to the company. (Tr. 68)

Similarly, at the time of the termination, Schweda directly informed Johnston that she was being terminated for disloyalty and gossiping, which is corroborated by her internal notes four days later. (GC 11) In neither the meeting where Johnston was terminated nor in her notes did Schweda mention any performance based reasons for the termination decision. Only at the hearing did Respondent argue that there were other reasons that were unrelated to Johnston's activities with Barrett. Based on the Respondent's shifting defenses, the judge appropriately inferred unlawful animus. (ALJD 21)

Moreover, Respondent's entire course of conduct toward Barrett is evidence of Respondent's animus toward employees who engaged in protected concerted activity. In slightly over than two months, Respondent interrogated Barrett, harassed him at his new job, withheld his final paycheck, threatened him with legal action and finally filed legal action against him solely because he had discussed wages with another employee. (ALJD 9) Respondent's intentions toward employees who engaged in such activity were crystal clear. Johnston's fate was sealed the moment Respondent suspected that she was in league with Barrett. The record evidence clearly supports the judge's determination that Respondent harbored animus toward the protected concerted activities of employees. (ALJD 21) As such, Exception 14 must be denied.

F. The Judge Correctly Determined that Respondent's Proffered Reasons for Johnston's Discharge Were Pretextual (Exceptions 3, 5, 15 – 18)

1. The Evidence Showed that Johnston's Perceived Protected Concerted Activity Was the Only Basis for Her Discharge

The record contains substantial evidence that the proffered reasons for Johnston's discharge were pretexts. As noted above, Respondent specifically stated that Johnston's association with Barrett was the motivation for discharging her in its August 18 notes. (GC 11). The record also contains other circumstantial evidence to support the judge's finding that GC 11 accurately reflected Respondent's true motive. Moreover, the Respondent failed to present evidence to show that Johnston would have been terminated irrespective of her association with Barrett and her protected concerted activity.

The facts of the present case 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. It was "sufficiently concerned" when it heard about the wage discussions that it called the employee 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 Respondent knew that Barrett had revealed wage information to another employee on May 28. (ALJD 9) Much like in *Parexel*, Respondent immediately called a meeting with Barrett, where it attempted to discern the nature of the wage disclosure and the extent of the dissemination of such information to other employees. (ALJD 9) Respondent here went even further than the Employer in *Parexel* by taking legal action against Barrett for engaging in such activity. (ALJD 9)

Record evidence shows that Respondent, much like the Employer in *Parexel*, attempted to nip any further wage discussions in the bud by terminating those employees that were associated with, and, in its view, attempting to assist Barrett in his defense against Respondent. 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.

2. Record Evidence Fails to Support Respondent's *Wright Line* Defense

While the record shows that Johnston was terminated based on a single motive – her association with Barrett's protected concerted activity, the judge analyzed the case under *Wright Line*, 251 NLRB 1083 (1980). The judge correctly determined, as discussed supra, that the record demonstrated the existence of a prima facie case. ALJD 21(20). The record further demonstrates that Respondent failed to show that it would have taken the same action in absence of the protected conduct. See, *Alternative Energy Applications*, supra, citing *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011).

In support of its ultimately unsuccessful *Wright Line* defense, Respondent argues 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 Respondent's proffered reasons were the real basis for Johnston's discharge. (ALJD 21)

Respondent presented evidence, and Johnston did not deny, that she had some attendance issues in 2014 and 2015. However, the evidence also shows that Respondent did not issue a single disciplinary action against Johnston for attendance issues. (T. 113) In fact, 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 Respondent. (R1)

Furthermore, Respondent offered extensive testimony regarding Johnston's personal visitors on July 17 and 23, but the record again fails to show that Respondent issued any discipline for either incident. While Hicks did discuss the visitors with Johnston, the notes from the discussion show that 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. (ALJD 22; R3) The failure of 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 Respondent's reasons for the discharge are pretext. *Metro West Ambulance Service, Inc.*, 360 NLRB No. 124 (2014).

Respondent's reliance on the fact that Johnston was terminated for drafting a letter on work time is unsupported by the evidence. The evidence does not show that Respondent even knew that the letter in question was personal in nature either on August 12 or as of the date of her discharge. (ALJD 22) Despite her testimony that the word document on Johnston's screen did "not appear to be work related," Schweda admitted that she had no knowledge of what the letter contained until after Johnston was already terminated. (ALJD 22; T. 147; T. 160) Furthermore, while 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 Respondent did such an investigation on the day that it suspected Johnston was working on such a letter (ALJD 22) Schweda never asked Johnston a single question about the letter. (T. 147; T. 204) 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 Respondent's asserted reasons are pretextual. *Id.*, slip op. at 38 (2014).

Lastly and most significantly as found by the judge, Respondent clearly stated the reason for its discharge of Johnston in its internal August 18 notes, as described *supra*. (ALJD 21; GC 11) In that document, Schweda did not mention attendance, time clock issues, personal visitors or a personal letter. Instead, Schweda wrote two paragraphs regarding her belief that Johnston not only had spoken with Barrett, but also was siding with him in his dispute with 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 Schweda herself, 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).⁵

The record supports the judge's finding that Respondent's reasons for discharging Johnston were pretextual. Respondent had long tolerated whatever shortcomings Johnston had, and there is no evidence to suggest that her discharge was imminent before it discovered her continued association with Barrett. (ALJD 21) Respondent's Exceptions 5 and 15-18 must be denied.

G. The Judge Correctly Determined that Johnston's Termination was Sufficiently Alleged in the Complaint (Exceptions 1 and 8)

Respondent excepts to the judge's decision based on its theory that the judge's ultimate finding was based on a theory not alleged in the Complaint. Because the judge determined that Johnston was terminated in violation of 8(a)(1), as specifically pleaded, the exceptions are without merit and should be denied.

The original charge alleges that Respondent, on August 14, discharged Johnston "because of [her] association with former employee Nate Barrett and the Employer's belief that he and

⁵ Respondent's Exception 5 challenges the judge's determination that Andronaco himself was informed and part of the decision to terminate Johnston. Because Schweda was an admitted 2(13) supervisor and 2(11) agent of Respondent, Andronaco's personal involvement in the decision to terminate Johnston is irrelevant to the final determination that her discharge was based on an unlawful motivation. Furthermore, the judge's conclusions in this regard are fully supported by the record evidence and Exception 5 should be denied.

other employees engaged in protected concerted activity for mutual aid and protection. ”
GC1(a). The Complaint pleads that Johnston as discharged in violation of 8(a)(1). (GC1(c))
Nothing more is required under notice pleading.

The Board, like the federal courts, has adopted a system of notice pleading that only requires that a complaint “shall contain. .a clear concise description of the act which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed.”
29 C.F.R. Sec. 102.15(b). There is no requirement that the General Counsel describe the evidence that will be offered to prove the unfair labor practice. ***Smith Industrial Maintenance Corporation d/b/a Quanta***, 355 NLRB 1312 (2010).

The nature of Johnston’s activity, or, as in this case the nature of her association with the activities of others, are factual matters to be determined by the trier of fact – in this case the judge. There is no requirement that evidence regarding facts or circumstances surrounding Johnston’s discharge be specifically included in the Complaint. ***Id.*** The Board merely requires that Respondent have “fair warning” of what it is alleged to have done and the jeopardy it is placed in by the actions and positions of the parties. ***International Brotherhood of Pottery and Allied Workers (Homer Laughlin China, Inc.)*** 217 NLRB 25 (1975).⁶

Here, the evidence showed and the judge found that Johnston engaged in protected concerted activities when she spoke to Barrett about the lawsuit in early August. (ALJD 19) The judge further found that Respondent believed that Johnston had engaged in and was engaging in protected concerted activity by assisting Barrett in his defense against the lawsuit filed by Respondent. (ALJD 19) The judge determined that, based on the record evidence, that perceived assistance was the motivating factor for Johnston’s discharge. (ALJD 22) The judge did not consider or make her determination based on any alternative or additional theory. She based her analysis and findings squarely on the extant and relevant case law setting forth the analytical framework for 8(a)(1) discharge cases.

To the extent that the judge’s findings that Respondent terminated Johnston based on its belief that she engaged in protected concerted activity could somehow be interpreted as alleging an additional theory, the judge’s conclusions are still proper and should be adopted. The Board

⁶ Furthermore, as stated supra, Respondent knew exactly the nature of the allegations by the specific language of the original charge. GC1(a)

has consistently held that the Board may find and remedy a violation even in the absence of a specified allegation if the issue in question is closely related to the subject matter and has been fully litigated. *Enloe Medical Center*, 348 NLRB 991 (2006).

In the present case, Respondent's unlawful termination of Johnston was more than closely related, it was the basis of the Complaint. Almost the entirety of the evidence, testimony and rulings related directly to the circumstances surrounding Johnston's discharge. The precise nature of Johnston's activity and association with Barrett were not only "closely related" to the allegation that Johnston was terminated in violation of 8(a)(1), they were the entire basis for the litigation.

Furthermore, despite Respondent's arguments to the contrary, the matter was fully litigated. Respondent called five witnesses, entered detailed evidence into the record and had every opportunity to present any contradictory testimony or evidence to support its theory that Johnston was not terminated in violation of 8(a)(1). The judge considered and weighed that evidence before properly concluding that those defenses were inadequate in light of the totality of the record evidence. There is simply no basis for Respondent's Exceptions 1 and 8 and they must be denied.

H. Because the Judge's Findings were Correct Based on the Record Evidence, the Remedy Is Also Correct (Exceptions 19 – 21)⁷

Because the judge's factual findings were based on substantial record evidence and because her legal conclusions were grounded in extant and controlling legal precedent, her conclusions of law and recommended remedies are appropriate. *F.W. Woolworth Co.*, 90 NLRB 289 (195), **New Horizons for the Retarded**, 283 NLRB 1173 (1987), **Kentucky River Medical Center**, 356 NLRB 6 (2010) and **Don Chavas**, supra, *AdvoServ of New Jersey, Inc.* 363 NLRB No. 143 (2016). Respondent's exceptions 19-21 should be denied.

III. The Administrative Law Judge Erred by Not Awarding Out of Pocket Expenses to the Charging Party Irrespective of Interim Earnings (Cross-Exception 1)

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to

⁷ The General Counsel's Cross-Exception seeks merely to add to the judge's otherwise appropriate remedy, as explained more fully below.

maintain working for Respondent. *Deena Artware*, 112 NLRB 371, 374 (1955); *Crosset Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment⁸; the cost of tools or uniforms required by an interim employer⁹; room and board when seeking employment and/or working away from home¹⁰; contractually required union dues and/or initiation fees, if not previously required while working for Respondent¹¹; and/or the cost of moving if required to assume interim employment.¹²

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatee's gross interim earnings. See, *Texas Utilities Co.*, 109 NLRB 936, 939, fn. 3 (1954) (“We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to Respondent.”); see also, *North Slope Mechanical*, 286 NLRB 633, 641, fn. 19 (1987). Thus, under current Board law, a discriminatee who incurs expenses while searching for interim employment but is ultimately unsuccessful in securing such employment is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work¹³, but who through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award, the “primary focus clearly must be on making employees whole.” *Jackson Hospital Corporation*, 356 NLRB

⁸ *D.L. Baker, Inc.* 351 NLRB 515, 537 (2007).

⁹ *Cibao Meat Products & Local 169, Union of Needle Trades, Industrial & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

¹⁰ *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

¹¹ *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

¹² *Coronet Foods, Inc.* 322 NLRB 837 (1997).

¹³ *Midwestern Personnel Services, Inc.*, 346 NLRB 624, 625 (2006) (“To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.”)

No. 8, slip op. at 3 (2010). This means the remedy should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also, *Pressroom Cleaners*, 361 NLRB No. 57 slip op. at 2 (2014)(quoting *Phelps Dodge*, supra). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminate that would not have been expended but for the employer’s unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer’s unlawful actions – i.e., those employees who, despite searching for employment following the employer’s violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission of the United States Department of Labor. See, Enforcement Guidance: Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991, Decision No. 915.002 at 5 *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898, *aff’d Georgia Power Co. v. U.S. Dept’s of Labor*, 52 Fed.Appx. 490 (Table)(11th Cir. 2002).

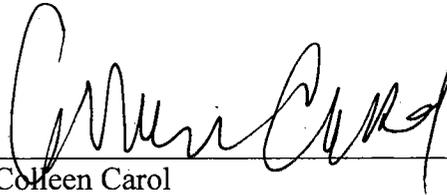
In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, “the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. ” *Don Chavas d/b/a Tortillas Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work related expenses will be charged to Respondent regardless of whether the discriminatee received interim earnings during the period.¹⁴ These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See, *Jackson Hospital Corporation*, 356 NLRB No. 8, slip op. at 1 (2010)(interest is to be compounded daily in backpay cases).

¹⁴ Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expense and fund contributions. *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 (1953).

IV. Conclusion

The record evidence supports the judge's factual findings and legal conclusions. As such, all Respondent's exceptions should be denied. In addition to affirming the judge's appropriate findings and conclusions, the Board should grant the General Counsel's cross-exception and order that Johnston be awarded search-for-work and work-related expenses even if such expenses exceed interim earnings.

Respectfully submitted this 30th day of June 2016.

A handwritten signature in black ink, appearing to read "Colleen Carol", written over a horizontal line.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

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

Respondent

Case 07-CA-160286

and

LINDSEY JOHNSTON, an Individual

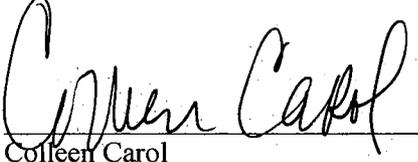
Charging Party

CERTIFICATE OF SERVICE

The undersigned affirms that on June 30, 2015, the Counsel for the General Counsel's Brief in Support of Cross-Exceptions and Brief in Response to Respondent's Exceptions was filed with the Executive Secretary of the National Labor Relations Board through the Board's e-filing system and copies were served on the following individuals by the electronic mail addresses set forth below:

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