

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

MATRIX EQUITIES, INC.

Respondent,

and

Case 29-CA-168345

BRIAN BURNS, an individual

Charging Party.

**RESPONDENT'S BRIEF IN RESPONSE TO THE GENERAL COUNSEL'S  
EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS**

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## I. INTRODUCTION

Respondent Matrix Equities, Inc. (“Respondent”) submits this brief in opposition to General Counsel’s appeal from the July 12, 2016 Decision (“Decision”)<sup>1</sup> issued by Administrative Law Judge Raymond P. Green (“ALJ”). The General Counsel argues that the AJL made errors of fact and law in recommending that the complaint of the Charging Party Brian Burns (“Burns”) be dismissed. Respondent opposes any allegations of error and urges the Board to find the following:

- A. The ALJ properly determined that Respondent’s discharge of Burns was not a preemptive strike to prevent him from engaging in protected activity (Exceptions 9, and 15);**
- B. Burns was not an employee within the meaning of the Act (Exceptions 6, 7, 8, 10, 11, 12, 13, and 14); and**
- C. Burns’ motive was relevant to the determination of the analysis under the Act (Exception 3, 4, and 5)**

For the reasons set forth below, these findings are well-established in the record evidence and are supported by the Board’s precedent and policies.<sup>2</sup>

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## II. PROCEDURAL HISTORY

On January 25, 2016, Burns filed an unfair labor practice charge against Respondent in Case No. 29-CA-168345, alleging, *inter alia*, he had been unlawfully discharged in retaliation for engaging in concerted, protected activities. On March 25, 2016, the Regional Director for

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<sup>1</sup> Reference to the official record of the hearing are abbreviated as follows: “R Ex.” denotes Respondent’s Exhibits, “GC Ex.” Denotes General Counsel Exhibits. Citations to the transcript and Administrative Law Judge’s Decision appear “Tr.” and “ALJD,” respectively, with numbers specifying the particular page(s) cited within.

<sup>2</sup> Respondent’s brief does not respond to General Counsel’s Exception 2 and Respondent agrees that the date of termination of Burns’ employment was August 25, 2016.

Region 29 issued and served a Complaint and Notice of Hearing (the “Complaint”) based on the aforementioned charge. The Complaint alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) (29 U.S.C. § 158 et seq.), by discharging Burns because he engaged in protected activities and to discourage employees from engaging in concerted activities. On April 6, 2016, Respondent filed an answer denying all allegations. The case was heard before the ALJ on June 7, 2016. The ALJ issued his decision in the matter on July 12, 2016 recommending dismissal of the Complaint.

### III. FACTUAL BACKGROUND

Burns was employed by Respondent from August 7, 2015 to August 25, 2015. Respondent placed a job offer on the internet in order to find a replacement for its then human resource specialist.<sup>3</sup> Tr.45:14-22. The position required specific human resource qualifications for the needs of Respondent. *Id.* Burns’ resume and subsequent interview demonstrated the educations and skills Respondent sought to fill the position. Burns had extensive education in human resource management and compliance law and Respondent was pleased to hire Burns. *Id.* After two (2) days of training on Respondent’s payroll system, Burns began reporting to Kathryn Puma (Ms. Puma”), Respondent’s supervisor, on a daily basis. Tr. 48.

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Burn’s duties included, *inter alia*, entering payroll data into Matrix payroll system operated by ADP, auditing employee files to ensure that proper paperwork was maintained by Matrix and reviewing the Matrix’s files and procedures to ensure compliance with local, state and federal labor laws. Tr. 12, 47-48; R 2. Ms. Puma and Burns would meet every morning to review work, goals and objectives for Burns and Respondent. Tr. 48.

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<sup>3</sup> Respondent’s Brief does not respond to General Counsel’s Exception 1 and Respondent reaffirms that the Respondent’s had and still has a two-person human resource department.

During the week of August 17, 2015, Burns brought his criminal conviction to the attention of Ms. Puma. Tr. 18; R Ex. 10. Burns was charged with Grand Larceny-3<sup>rd</sup> Degree and was convicted of Petit Larceny, Misdemeanor-Class A. *Id.* Burns spent 3 years on probation with alcohol/narcotic conditions and restitution. *Id.* The information regarding Burns' criminal record was in his employment file and was disclosed to his predecessor, Joseph Farrugio, prior to the commencement of Burns' employment. Tr. 51-52. Ms. Puma expressed dismay that she did not know this information previously and stated that she would not have hired Burns if she was aware of the criminal conviction. Tr. 18-19. Ms. Puma was concerned that Burns had access to personal and confidential information of every employee of Respondent and its affiliates, including dates of birth, social security numbers, addresses, and names of relatives. Tr. 52.

Additionally, during his brief tenure, Burns' job performance was sub-par. Tr. 49. Ms. Puma found that Burns was not completing his tasks in a timely manner. *Id.* Ms. Puma considered issuing a performance improvement plan to Burns but he had not been employed for a long-enough period of time to develop and implement such a plan. Tr. 50.

Burns admitted that he did not discuss organizing a union with any co-workers, nor did he discuss the conditions of his employment with any of his co-workers. Tr. 24. At no time did Burns ever complain to Ms. Puma that he was concerned about issues in Respondent's work-environment, notwithstanding that compliance with workplace rules and regulations was part of his overall job duties. Tr. 23-27.

At home, on his personal time, away from the office and during the evening of August 24, 2015, Burns drafted a statement regarding his work-environment and emailed the statement to his work-email address. Tr. 14:4. On the morning of August 25, 2015, Burns sent the statement via a forwarding-email to Ms. Puma (the "Statement"). Tr. 20; R Ex. 26-29; GC Ex. 2.

Burns went into Ms. Puma's office, as he did every morning, and asked Ms. Puma if she had read his email. Tr. 20 and 50. Ms. Puma had not read the email or the Statement but printed the Statement and read it in front of Burns. Tr. 20. Ms. Puma asked Burns if he was submitting his resignation and Burns said that he was not. Tr. 21. Ms. Puma asked why Burns would want to continue working at Respondent if the conditions of employment were as dire as he described in his Statement. Tr. 21. Burns responded by stating, "no comment." *Id.* Ms. Puma then informed Burns that he was not a team player and that this was his last day of employment with Respondent. Tr. 51. Ms. Puma instructed Burns to punch out and exit the premises. Tr. 21.

Ms. Puma was infuriated with Burns. Tr. 51 and 54. Ms. Puma considered Burns' Statement and its presentation to her as a betrayal and attack on Respondent. Tr. 54. Burns was hired to assist Respondent with human resource functions, to identify issues of non-compliance and then to help rectify them. Tr. 53-54. Burns never complained about any work-place related issues with Ms. Puma or any of his co-workers while employed by Respondent. Tr. 24. 39.

Rather, Burns compiled a long list of complaints which he threatened to present to outside agencies without making any attempt to address, analyze and work towards correction, if necessary, with Ms. Puma or any other of Respondent's personnel. Tr. 36-37; R 1 at p. 17-19; GC 2. When presented with Burns' Statement, Respondent did not investigate whether Burns had spoken with other employees and summarily dismissed Burns for insubordination and disloyalty. Tr. 21:14-25.

In the Statement, Burns states that he only thought about contacting the NLRB "to organize and eventually hope to form a union." GC Ex. 2. There is no evidence Burns took any steps in furtherance of such thoughts, shared his thoughts about contacting the NLRB with any co-worker or Ms. Puma, or raised any complaint about workplace issues at any time prior to the

date he was terminated, notwithstanding that he was hired as a human resources assistant tasked with, *inter alia*, assisting Respondent with workplace compliance issues. GC Ex. 2; Tr. at p. 12, 24-26, 45, 47-48; R Ex. 1 at p. 13.

Burns' employment with Respondent was terminated for being a disloyal employee who did not meet the stated objective of his job. Tr. 53 and 60.

**IV. GENERAL COUNSEL'S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE DENIED**

**A. The ALJ properly determined that Respondent's discharge of Burns was not a preemptive strike to prevent him from engaging in protected activity (Exceptions 9 and 15)**

General Counsel excepts to the ALJ's determination that Burns' discharge was lawful and was not a preemptive strike. ALJD 15-16. Furthermore, General Counsel argues that the ALJ misstated the facts and holding of *Parexel International LLC, 356 NLRB 516 (2001)*. ALJD 22-27. However, as set forth below, the ALJ properly applied the holding of *Parexel* and weighed the credibility of the witnesses and afforded proper weight to the evidence presented by both sides.

*Parexel* requires a determination that Respondent intended to violate the Act by discharging Burns to prevent him, and possibly other employees, from engaging in protected, concerted activity. *Parexel* states, "what is critical in those cases is not what the employee did, but rather the employer's intention to suppress protected concerted activity." (Id. at 4). This determination is fact intensive and required the ALJ to weigh the credibility of witnesses presented in the instant case.

In order to overturn the ALJ's credibility determination, General Counsel must establish that the clear preponderance of all the relevant evidence shows that the resolutions are incorrect. *Standard Dry Wall Products, 91 NLRB 544 (1950)*. The ALJ is responsible for observing the

demeanor of witnesses, weighting the respective evidence, considering the established and admitted facts and inherent probabilities in making inferences and credibility determinations. *Double D Construction Group, Inc. 339 NLRB 303 (2003)*.

In *Parexel*, the charging party's supervisors became aware of her conversations with fellow employees regarding wages and her future intention to discuss the matter with other employees. Once aware of these conversations, the employer summoned the charging party to a meeting to determine the scope of her discussions and then discharged her six days later. The Board then found that employer's intention, through its actions, was solely to quell and stop protected, concerted activity before it could mushroom. *Parexel, 356 NLRB 516 at 4*. This connection between the employer's intention and the subsequent discharge is the core of the preemptive strike theory.

Here, the record is devoid of any evidence that Burns' discharge was a pre-emptive strike to prevent concerted protected activity in its workplace. Burns was never interrogated by Ms. Puma (or anyone else from Respondent) about his alleged intentions to form a union. Respondent was unaware that Burns' was reviewing employee files for alleged violations of law as he drafted the Statement in the privacy of his own home. Instead, Respondent was blindsided with a premeditated and threatening letter and immediately dismissed Burns for insubordination, without determining whether he had spoken with co-workers about the issues raised within the Statement. As correctly determined by the ALJ, Burns was discharged because of his disloyalty and insubordination. Nothing in the record suggests Respondent had any intention to prevent Burns from engaging in a protected activity. Similarly, nothing in the record, save the references in the Statement, suggests Burns actually engaged in any protected concerted activity.

Respondent was never aware of his concerns until he ambushed his supervisor and was dismissed as a result. Accordingly, Exception 15 must be denied.

A general application of *Parexel* to the case at bar would be contrary to the goal of the Act as interpreted by the Board. The ALJ did not misstate or misconstrue the facts within *Parexel* as applied to the instant case. Rather, the ALJ was instructed by the importance of the Employer's underlying intention motivating the discharge. ALJD 22-27. As such, the ALJ properly distinguished between the desire and motive of the employer within *Parexel* and the Respondent herein. As such, Exception 9 must be denied.

**B. Burns was not an employee within the meaning of the Act (Exceptions 1, 6, 7, 8, 10, 11, 12, 13, and 14)**

The ALJ did not err in determining that Burns was exempt from protection under the Act because of his status. The Board defines managerial employees as “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employers’ established policy.” *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). Burns has multiple, graduate level degrees including his ongoing PH.D. studies in human resources. (ALJD 2:50-3:10). He was hired as a managerial level employee (TR. 45:16-21), was tasked with formulating and effectuating Respondent’s policies (TR. 46:13-21), and Burns’ had the discretion to act independently within the responsibilities given to him by Respondent. Tr. 47:19-21. His brief tenure was the result of his own acts of insubordination and disloyalty and does not undercut the facts adduced in the record establishing his status as a managerial employee. The ALJ correctly identified and categorized Burns’ expertise and knowledge in the field of human resources and his required responsibilities with Matrix.

Burns was hired as Respondent's human resource ("HR") specialist. Burns advertised himself, both within his resume and during his interview, as being highly qualified within all areas of human resource and specifically within compliance law and policies. R Ex. 2 at p. 17-19; Tr. 13. It is undisputed that Burns was hired because of his high level of expertise and knowledge within the field, evidenced by his Bachelor of Science in Business Management and Economics with concentration in Human Resource Management, two Masters Degrees in General and Functional Human Recourse Management, and his continued studies towards a Doctorate in Human Resource Management. TR. 45:16-21; ALJD 2:50-3:10. When asked if his job entailed going through employee files to determine compliance issues, Burns replied, "well, course, I was a human resource professional." Tr. 26:13.

The ALJ's determination that Burns was aligned with management and not entitled to the Act's protections was correct based upon the record evidence including Burns' own testimony. Burns' position, as stated above, required the precise skill of compliance law to formulate and augment Respondent's human resource policies. The ALJ's analysis of Burns position and status was not erroneous. As such, Exception 13 and 14 must be denied.

It is undisputed that Burns was well aware of the duties and responsibilities that his position implicitly entailed. Burns was specifically hired to help discover and address workplace issues. His duty was to act in the best interest for the company and represent the human resource needs of Respondent. Tr. 47:23-25. The ALJ's determination of Burns' job responsibilities is heavily supported by the record. Tr. 53-54. As such, Exception 6, 7, 8 and 10 must be denied.

The ALJ correctly recognized that Burns' position and his assigned duties were to address and remedy potential company liabilities and not "to surprise his employer by first initiating, on

his own initiative, legal actions against his own company.” ALJD 7. As such, Exception 11 and 12 must be denied.

**C. Burns’ motive was relevant to the determination of the analysis under the Act (Exception 3, 4, and 5)**

The General Counsel also excepts to the ALJ’s determination that Burns’ motive and deliberation behind his actions should be taken into account. The ALJ’s credibility of the witnesses were based upon his own determination, his own questioning and the supporting evidence, which was extensive. The protections provided for in the Act, themselves, were created to address the ill-intent and malicious driven actions of employers within the workplace. Thus to hold intention of both the employer and employee irrelevant would be incorrect, contrary to law and counterproductive.

Burns admits to working on his own initiatives and goals within his testimony. He admits that he never spoke to any other employee about his concerns, nor did any employee ever speak to him about any issues. Tr. 29:15-21. He reviewed employee files at work but wrote about the deficiencies he found therein at home on his personal time. He then used those deficiencies against his employer even though he was tasked with correcting any such deficiencies. The record clearly establishes that the ALJ’s credibility determination was not erroneous and in no way speculative. Under these circumstances, the ALJ’s findings based upon the record should be affirmed. *See, Supra, Standard Dry Wall Products, 91 NLRB 544 (1950)*. As such, Exception 3, 4, and 5 must be denied.

**V. REMEDY**

The General Counsel argues for remedies of search-for-work expenses and consequential damages in a general manner and without specific application to the case at bar. Burns’ discharge was lawful and in no way pre-textual as set forth above. To award damages or any

other traditional Board remedy to Burns would only encourage disloyal and faithless activity within the workplace under the guise of protected, concerted activity. The dismissal that was recommended by the ALJ should be affirmed and therefore damages are inapplicable.

## VI. CONCLUSION

The record evidence supports the ALJ's factual findings and legal conclusions. As such, all General Counsel's exceptions should be denied. The evidence adduced at the hearing is overwhelming that the Burns was a disloyal managerial employee not concerned with his employer's best interests. The Respondent never formulated any intention or motive to terminate Burns for engaging in protected concerted activity required to find a violation of the Act, nor did Burns engage in an activity for which he should be afforded protection for under the Act. For the foregoing reasons, it is respectfully requested that the Board affirm the ALJ's Decision and dismiss this case.

Respectfully submitted this 22<sup>nd</sup> day of August 2016.



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BRIAN BURNS, an individual  
Charging Party.

I, Sharon Cryan, being duly sworn, deposes and says: that I am over the age of eighteen (18) years, I am not a party to this action and that I reside in Suffolk County, New York; that on August 23, 2016, the undersigned served the within *Respondent's Brief in Response to the General Counsel's Exceptions and Brief in Support of Exceptions* upon the General Counsel and the Charging Party at their addresses set forth below:

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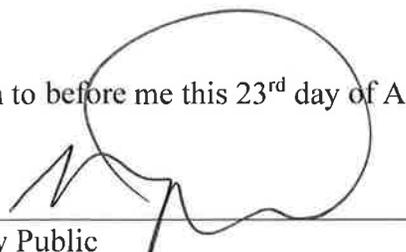
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Via email and First Class Mail by placing a true copy thereof in an official depository under the exclusive care and custody of the United States Postal Service, in a postage paid envelop.

  
SHARON CRYAN

Sworn to before me this 23<sup>rd</sup> day of August, 2016

  
\_\_\_\_\_  
Notary Public

GERARD J MCCREIGHT  
Notary Public, State of New York  
No. 02MC6073792  
Qualified in Suffolk County  
Commission Expires April 29, 2010

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***AMENDED AFFIDAVIT OF SERVICE***

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