UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOBSON BEARING INTERNATIONAL, INC.

And **Case 14-CA-156114**

TERA LOPEZ, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. Overview

This case is before the National Labor Relations Board (Board) based on a Complaint alleging that Hobson Bearing International, Inc. (Respondent) violated Sections 8(a)(1) and (4) of the National Labor Relations Act (Act). By Decision dated August 19, 2016, Administrative Law Judge Christine E. Dibble concluded that Respondent violated the Act, as alleged in certain paragraphs of General Counsel's Complaint that issued on September 28, 2015. Following Judge Dibble's decision, on September 16, 2016, Respondent filed timely exceptions wherein it argues that Judge Dibble made several errors in reaching her findings. In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) respectfully files this answering brief, and for the following reasons, submits that Respondent's exceptions are without merit.

II. Respondent's Exceptions

Respondent's Exceptions to the Administrative Law Judge's Decision and its Supporting Brief raise the following areas of inquiry: (1) Whether Judge Dibble erred in finding that Respondent unlawfully interrogated Tera Lopez on July 8, 2015; (2) Whether Judge Dibble erred in finding that Lopez's termination was unlawful; (3) Whether Judge Dibble erred in finding that Lopez was not a supervisor under Section 2(11) of the Act; and (4) Whether Judge Dibble erred in failing to order Lopez's cell phone be produced for Respondent's "forensic examination." For the reasons addressed below, Respondent's exceptions are without merit.

A. Respondent Unlawfully Interrogated Lopez on July 8, 2015.

Respondent argues that Judge Dibble erred in finding that Respondent, by Gene Hobson, unlawfully interrogated Tera Lopez on July 8, 2015, in violation of Section 8(a)(1) of the Act because she failed to properly apply the test identified in *Rossmore House*, 269 NLRB 1176

(1984) and *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). For the reasons detailed below, Respondent's exception is without merit.

1. Facts

Between the dates of February 5, 2014, and July 6, 2015, Respondent maintained company policies that are identified in General Counsel Exhibit 3. (Tr. 25-26; GC 3).[1] General Counsel Exhibit 3 is a three-page document containing a variety of policies, including but not limited to policies addressing employee holidays, bereavement pay, tardiness, dress code, cell phone usage, etc. (GC 3). During the hearing, Respondent's President, Gene Hobson, confirmed that the policies identified within General Counsel Exhibit 3 applied to all of Respondent's full-time, part-time and temporary employees. (Tr. 25-26; GC 3, page 3). Hobson further testified that the policies identified within General Counsel Exhibit 3 were in effect until he distributed revised policies on July 6, 2015. (Tr. 26; GC 3; GC 4). On Monday, July 6, 2015, Hobson conducted a meeting with his employees in Respondent's conference room located on the second floor of Respondent's facility. (Tr. 27, 117, 188-190, 203-205). During this meeting, Hobson distributed two documents. (Tr. 117-119, 188-190, 203-205). The first document was a revised version of General Counsel Exhibit 3. (Tr. 28; GC 4). This document included policies that had been revised and policies that remained unchanged. One of the unchanged policies is found on the third page of General Counsel Exhibits 3 and 4 and is titled, "Pay." It reads as follows:

[1] References to the trial transcript will be denoted by "Tr" followed by the page number. References to the General Counsel's exhibits will be denoted by "GC" followed by the exhibit number. References to Respondent's exhibits will be denoted by "R" followed by the exhibit number. References to Respondent's Post Hearing Brief to the Administrative Law Judge will be denoted by "R ALJ Brief" followed by the applicable page number. Respondent's Brief in Support of its Exceptions will be denoted by "R Exceptions Brief" followed by the applicable page number. References to the Judge's Decision will be denoted by "ALJD" followed by the applicable page and line numbers.

> Pay: Will be distributed every Thursday. You should not expect your weekly pay check before 4:00 p.m. Employees should not discuss their pay with any other employee, as it is a sensitive issue. Bonuses will be issued based on merit or performance. If someone receives a bonus or pay increase and shares their information with another employee and it is brought to my attention, it will be automatic termination. Pay is set, based on performance, annual increases, or at management's decision. No one is to discuss this issue at any time, other than in my office during a review. If you want to discuss pay, you must ask for a private meeting with management. (GC 3, page 3; GC 4, page 3).

The second document Hobson distributed on July 6, 2015, was titled "Agreement of Restriction/Confidentiality." (Tr. 117-119, 188-190, 203-205; GC 5). The confidentiality agreement set overly broad restrictions on what employees could discuss with each other and with third parties.[2] (GC 5).

During this meeting, Hobson told employees that they were required to execute both documents and return them to the company. (Tr. 31, 119, 121, 190, 205). Following the meeting, several employees including Tera Lopez, Gary "Mike" McBride, and Shelley Wishon met to discuss the documents. (Tr. 122-124, 190-191, 205-207). The employees talked about various concerns they had over changes made to company policies including bereavement pay, dress code, and cell phone usage. (Tr. 122-124, 190-191, 205-207). The employees also discussed the broad scope of the confidentiality agreement and they questioned the legality of Respondent's prohibition against employees discussing their pay. (Tr. 122-124, 190-191, 205-207). In this setting, Lopez communicated to the group that she would research the questions that had been raised by the employees. (Tr.124, 191, 206-207).

On Tuesday, July 7, 2015, Lopez called the National Labor Relations Board and questioned whether Respondent's policy prohibiting employees from discussing their pay was

[2] In her decision, Judge Dibble found Respondent's "Pay" provision and Confidentiality Agreement to be violative of Section 8(a)(1) of the Act. Respondent's "Pay" provision is unlawful on its face because it explicitly restricts employees' Section 7 rights to discuss wages and/or salary information. Respondent's Confidentiality Agreement is overbroad and as written, would chill employees in the exercise of their Section 7 rights. (ALJD 15-17). Respondent did not file any exceptions to these findings.

legal. (Tr. 124-125). She also asked questions about the legality of Respondent's confidentiality agreement. (Tr. 125). When Lopez ended her call, her understanding was that both documents violated the law. (Tr. 125).

On Wednesday, July 8, 2015, Lopez met with Gene Hobson in a one-on-one meeting in Respondent's conference room. (Tr. 125-126). The meeting started with Lopez and Hobson discussing forecasting regarding the quantity of product Respondent anticipated its customers will purchase in the upcoming months. (Tr. 126-127). After discussing forecasting for some time, Lopez and Hobson broke for lunch and reconvened around 3:30 p.m. (Tr. 126). For approximately fifteen minutes, they concluded their discussions concerning inventory. (Tr. 126; GC 12; GC 13).[3] During the course of the following 80 plus minutes, Lopez raised a number of concerns with Hobson. Although some of the concerns raised by Lopez were individual in nature, Lopez addressed the concerns that had been raised by her co-workers when they met following Hobson's distribution of Respondent's revised company policies and confidentiality agreement on July 6, 2015. Lopez questioned Hobson about the revisions he had made to several policies including bereavement pay, sick leave, vacation leave, and dress code. (Tr. 127-128, 149-150). Lopez also brought to Hobson's attention that his rule prohibiting employees from discussing their pay violated federal laws. (Tr. 145; GC 12; GC 13). When Hobson communicated to Lopez that employees are not allowed to discuss their pay, Lopez presented him with a document she printed off of the internet noting that such a prohibition was against the law. (Tr. 129-130; GC 6). Lopez additionally communicated to Hobson that she had contacted the Board. (Tr. 127, 145; GC 12; GC 13). When Hobson learned that Lopez had contacted the Board, he questioned the purpose of her doing so. (Tr. 146; GC 12; GC 13).

[3] Lopez recorded the meeting with her cell phone. (Tr. 130-136). Lopez's recording is identified as General Counsel Exhibit 12. A transcript of the recording is identified as General Counsel Exhibit 13.

Lopez advised that she contacted the Board to question the legality of his rule prohibiting employees from discussing their pay. In their discussions concerning this topic, Lopez also informed Hobson that his confidentiality agreement was equally violative of the law. Hobson then questioned Lopez as to whether she had contacted the Board about his confidentiality agreement as well and questioned her about the Board's position on the agreement. (Tr. 146; GC 12; GC 13). Lopez confirmed that the Board deemed it to be unlawful. The rest of the 80 plus minute conversation constitutes a mixture of individual and group concerns expressed by Lopez. Even though a number of topics were discussed between the two, one response from Hobson remained constant – his disdain for the fact that Lopez had (1) been talking about her terms and conditions of employment with others and (2) contacted the Board. As noted by the Judge, the record confirmed that Hobson sought to dig deeper into Lopez's protected activity by seeking additional details. With respect to Lopez's discussions with her coworkers regarding their terms and conditions of employment, the following exchange occurred:

> Hobson: I'm not discouraging you from doing it. I want you to do it but I don't want you to be discussing it with other employees.
>
> Lopez: So, do you want me to go, "hey…"
>
> Hobson: Are you discussing it with other employees?
>
> Lopez: "Hey, he's violating the law"
>
> Hobson: Did you talk to me only about that or did you bring it up to other employees?"

(GC 12, part 1, 14:15; GC 13, part 1, p. 9; ALJD 20:24-34).

With respect to Lopez contacting the Board to discuss the lawfulness of Respondent's policies, Hobson questioned the content of Lopez's communications as follows:

> Lopez: I'll tell you this. I have called the Labor Board and I have called the

EEOC and I have great grounds.

Hobson: mmhmm.

Lopez: and I have plenty of stuff.

Hobson: mmhmm

Lopez: Do I want to do that to you? No. I've worked here for three years.

Hobson: You called the Labor Board on us?

Lopez: I love everyone I work for.

Hobson: You called the Labor Board on us?

Lopez: Yes I did.

Hobson: Okay, what did you report on, on the Labor Board?

Lopez: I just asked a question. Is this legal?

(GC 12, part 1, 19:56; GC 13, part 1, p. 14; ALJD 20:39-46, 21:1-13)

2. Argument

In determining whether Hobson's questioning of Lopez violated the Act, Judge Dibble correctly applied *Rossmore House* and *Bourne*, supra. In doing so, she properly assessed the factors identified in those cases to determine whether Hobson's questioning of Lopez violated the Act. (ALJD 21:15-46). In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992), citing *Rossmore House*, 269 NLRB 1176 (1984) and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). As the Judge wrote, the Board will look at factors including whether the employer has a history of hostility of discrimination concerning employee rights; the nature of the information sought; the identity and

organizational level of the questioner; the place and method of the interrogation; and the truthfulness of the reply. (ALJD 21:15-21). See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Grand Canyon Education, Inc*., 359 NLRB No. 164, slip op. at 2-3 (2013), citing *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Contrary to Respondent's exceptions, a balancing of these factors supports Judge Dibble's finding that Hobson's questioning of Lopez was violative of the Act. First, Hobson holds the highest position for Respondent and his questioning of Lopez occurred privately in a second floor conference room, a substantial distance from the nearest witness and steps away from Hobson's office. As Judge Dibble found, Hobson's actions during his July 8, 2015 meeting with Lopez were not isolated. His coercive statements and actions directed towards his employees' Section 7 activity were varied and numerous from June 2015 through July 13, 2015. Additionally, the information sought by Hobson strikes at the heart of Section 7 activity: employees' discussions of their wages.

Similar to Hobson's questioning Lopez regarding whether she had discussed these concerns with her fellow employees, Hobson's questioning of Lopez regarding the content of her discussions with the Board was equally violative of Section 8(a)(1) of the Act. The same totality of the circumstances factors described above weigh in favor of Judge Dibble's finding that Hobson's questioning of Lopez would reasonably tend to interfere with, restrain, or coerce her exercise of her Section 7 rights. "It is well established that an employee has the right to seek access to the Board's processes and that any interrogation of an employee concerning his having engaged in this protected conduct is a violation of Section 8(a)(1) of the Act." *Sea-Land Service*, 280 NLRB 720, 729 (1986), citing *Buffalo Neighborhood Housing Services*, 267 NLRB 514, 522 (1983) and *Steinerfilm, Inc*., 255 NLRB 769, 778 (1981).

For the reasons identified above, Respondent's exception is without merit because the evidence set forth at hearing supported Judge Dibble's finding that on July 8, 2015, Gene Hobson unlawfully interrogated Tera Lopez about her protected, concerted activities.

B. Respondent Unlawfully Terminated Lopez

Respondent argues that Judge Dibble erred in finding that Respondent's termination of Tera Lopez on July 13, 2015, was motivated by activity protected by the Act. For the reasons detailed below, Respondent's exception is without merit.

1. Facts

The timeline concerning what occurred in the days leading up to Tera Lopez's termination is straight forward. On July 6, 2015, Gene Hobson distributed revised company policies and a confidentiality agreement in an employee meeting. (Tr. 27, 117, 188-190, 203-205). Following the meeting, several employees, including Tera Lopez, met to discuss some of the changes that had been made and the legality of whether Respondent could in fact prohibit employees from discussing their pay or require that they adhere to such a broadly worded confidentiality agreement. (Tr. 122-124, 190-191, 205-207). On July 7, 2015, Lopez contacted the Board to discuss these matters. (Tr. 124-125). On July 8, 2015, Lopez met with Hobson in the second floor conference room just outside of Hobson's office. (Tr. 125-126). The meeting started with Hobson and Lopez briefly discussing inventory forecasting. However, over the course of the following 65-70 minutes, Lopez engaged in protected, concerted activity by raising group concerns regarding employees' terms and conditions of employment, changes made to company policies, and the legality of Respondent's policies. Lopez also placed Hobson on notice that she had contacted the Board about these issues. As can clearly be ascertained from General Counsel's Exhibits 12 and 13, Hobson took Lopez's actions as a

threat and he reciprocated with coercive responses and questioning.

A constant that is present throughout Hobson's meeting with Lopez was his transparent disdain for her protected conduct. This was apparent based on Hobson's conduct during their meeting and his actions in the days following. As Judge Dibble found, during this meeting, Hobson engaged in misconduct that independently violated the Act. Hobson's misconduct included (1) unlawful interrogation of Lopez about her protected concerted activity; (2) unlawful interrogation of Lopez about her protected contact with the Board; and (3) unlawfully prohibiting Lopez from discussing her terms and conditions of employment with other employees. (ALJD 19:29-47, 20:1-47, 21:1-47, 30:35-39).[4]

On July 9, 2015, Hobson called employee Shelley Wishon to his office and he questioned Wishon as to whether she was aware that it was illegal to prohibit employees from discussing their pay. (Tr. 208). Wishon responded that she believed that it was illegal to prevent employees from discussing their pay, "because how else would you know if you were being paid fairly if you weren't able to discuss it amongst yourselves." (Tr. 208). Hobson accessed the policy on his computer and told Wishon that he was going to remove that aspect of the policy. He then instructed Wishon to go downstairs and retrieve the policy from the printer. (Tr. 208). Upon Wishon's return to his office, Hobson told Wishon that he was going to have Respondent's employees re-sign the policy. (Tr. 208-209). However, that never occurred. Instead, later that day, Hobson visited his attorney. Upon his return to Respondent's facility, Hobson announced to all who were present that what Lopez had brought up to him the previous day was not the law. (Tr. 210-211). Hobson announced that Lopez was wrong in that the laws she had brought to his attention only applied to federal employees. (Tr. 210-211). Hobson declared that all of

[4] Respondent did not file exceptions to Judge Dibble's finding that Hobson unlawfully prohibited Lopez from discussing her terms and conditions of employment with other employees.

Respondent's employees were required to sign and return the documents that had been distributed on July 6, 2015. (Tr. 210-211).[5]

On Friday, July 10, 2015, Lopez did not work on this date. Although Lopez followed standard practice in notifying Shelley Wishon the previous night that she would be absent, this was insufficient for Hobson. Her absence that morning was immediately noticed by Hobson upon his arrival to the facility Friday morning. As soon as Hobson entered the main door, he asked Wishon about Lopez's whereabouts. (Tr. 212). Wishon informed Hobson that Lopez was ill and would not be at work that day. (Tr. 212). Hobson declared that Lopez had failed to give him notice of her absence and therefore she was deemed to be a "no-call/no-show." (Tr. 212). Hobson walked to his office and returned with a written discipline for Lopez. (Tr. 213). When Hobson placed the write-up in front of Wishon and instructed her to sign the document, she contested his instruction and repeated that Lopez had notified Wishon that she would be absent. (Tr. 213). Hobson told Wishon that he did not care and Wishon could write whatever she wanted on the discipline, but Hobson insisted on issuing Lopez discipline. (Tr. 213). Reluctantly, Wishon followed Hobson's orders. However, she also wrote that Lopez had provided advanced notification that she would be absent. (Tr. 213).

On Monday, July 13, 2015, as soon as Lopez arrived to work, she was greeted by Gene Hobson in the lobby. Within a matter of seconds, Hobson informed Lopez that she was terminated. (Tr. 112, 156). Later that day, Hobson met with Mike McBride in Respondent's conference room. During this meeting, Hobson informed McBride of the decision to terminate Lopez. (Tr. 194-196). Hobson reiterated to McBride that Lopez was not correct with respect to

[5] Judge Dibble found Hobson's declaration to employees on July 9, 2015 to be an independent violation because he prohibited employees from discussing their wages and other terms and conditions of employment and required them to sign unlawful company policies and confidentiality agreement. (ALJD 25:12-14). Respondent did not file exceptions to this ruling.

her doubts regarding Respondent's policies. Hobson told McBride that Respondent's attorney had advised him that such laws only applied to federal employees. (Tr. 196). Hobson further informed McBride that laws permitting employees the right to discuss their wages did not apply to Respondent's employees and Hobson could terminate his employees if they did so. (Tr. 196).[6]

Later that afternoon, Hobson approached McBride in his work area. (Tr. 197). Hobson told McBride that he had talked to his attorney and with respect to the meeting Hobson held with McBride earlier that day, Hobson instructed McBride not to discuss the content of that meeting with anyone. (Tr. 197). When McBride asked if he was permitted to discuss the matter with his wife, Hobson prohibited him from doing so. (Tr. 197).[7]

2. Argument

As Judge Dibble noted in her decision, the burdens of proof in this case fall under the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel must first prove by a preponderance of the evidence that Lopez's conduct was a motivating factor in Respondent's decision to terminate her employment. *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004). In order to do so, the General Counsel must show (1) that the employee conduct was protected and concerted; (2) the employer knew or believed that the employee engaged in the protected conduct; and (3) the employer harbored animus against the employee's protected activity. Id. Once the General Counsel establishes a prima facie case of discriminatory conduct through these factors, it has met its burden of persuasion that the protected activity was a motivating factor in the

[6] Judge Dibble found Hobson's statements to be separate violations of Section 8(a)(1) of the Act by prohibiting employees from discussing their wages and other terms and conditions of employment and threatening employees with termination if they did so. Respondent did not file exceptions to these findings.
[7] Judge Dibble found Hobson's restriction to be violative of Section 8(a)(1) of the Act because he sought to restrict McBride's Section 7 rights. Respondent did not file exceptions to this finding.

employer's conduct. The burden then shifts to the Respondent to show that it would have taken the same action in the absence of the employee's protected activity. Respondent cannot simply present a legitimate reason for its decision, but it must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *W.F. Bolin Co*., 311 NLRB 1118, 1119 (1993). As detailed below, the record supports Judge Dibble's finding that the General Counsel met his burden and Respondent failed to do the same.

a. Lopez engaged in protected concerted activity

Section 7 of the Act protects employees' rights "to engage in ... concerted activities for [their]... mutual aid or protection. An employer violates the Act if it takes an adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Meyers Industries (Meyers II), 281 NLRB 882 (1986*). In order for employee conduct to fall within the protection of Section 7, it must be both concerted and engaged in for the purpose of "mutual aid or protection." *Holling Press*, Inc., 343 NLRB 301, 302 (2004). To be "concerted," an employee's actions must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. The Board's definition has also presented an inclusive interpretation of concerted activity that covers individual activities that "seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887. A individual conversation may constitute concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce, or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

Concerted activity can include concerns expressed by an individual that are the logical outgrowth of concerns expressed by the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992). Even in the absence of an express announcement about the object of a single employee's activity, the Board may infer from the circumstances whether or not the activity was concerted. *Whittaker Corp*., 289 NLRB 993, 993-994 (1988).

Although Lopez's meeting with Hobson on July 8, 2015, involved elements of individual concerns and complaints, the topics that raised the greatest objections from Hobson concerned Lopez's concerns regarding Hobson's unlawful policy prohibiting employees from discussing their pay, Lopez's objections regarding Hobson's unlawful confidentiality agreement, and Lopez contacting the Board. *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1 (Aug. 22, 2014)(employees have a Section 7 right to communicate with each other and with the public in order to act together to improve their terms and conditions); *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (Aug. 26, 2011)(employees' right to discuss terms and conditions of employment among themselves); *LWD, Inc*., 309 NLRB 214 (1992)(unlawful rule prohibiting employees from discussing their pay with any employee of the company other than a supervisor or plant manager); *Triana Industries*, 245 NLRB 1258 (1979)(Section 7 "encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment"; *Bigg's Foods*, 347 NLRB 425 (2006)(Rule prohibiting employees from discussing their own or fellow employees' salaries with anyone outside the company violative); *General Services, Inc.*, 229 NLRB 940 (1977)(The purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who initiate unfair labor practice charges or assist the Board in proceedings under the Act); *Sea-Land Service Co.*, Inc., 280 NLRB 720 (1986)(employee unlawfully discharged after

calling the employer's office and requesting the Board's telephone number).

The record supports Judge Dibble's finding that Tera Lopez was engaged in protected concerted activity on July 8, 2015, when she questioned Gene Hobson on matters concerning employees' terms and conditions of employment, the legality of Respondent's policies, and through her admission that she contacted the Board to discuss these matters.

b. Respondent was aware of Lopez's protected activity

As the Judge found, Respondent was clearly aware of Lopez's protected activity. Respondent's knowledge that Lopez contacted the Board to discuss the legality of Respondent's policies is not disputed. (GC 12; GC 13). Additionally, Respondent's knowledge of the concerted nature of Lopez's concerns is supported by the record. Lopez addressed a number of concerns with Hobson during her meeting on July 8, 2015, including (1) changes to a number of company policies that applied to all employees; (2) the legality of Respondent's policy prohibiting all employees from discussing their pay; and (3) the legality of Respondent's confidentiality agreement that applied to all employees. Although Lopez also raised issues during this meeting that were individual in nature, the evidence showed that Hobson was aware that many of the topics raised during the meeting were concerns that extended beyond Lopez. For example, one of the topics raised by Lopez during her meeting with Hobson was his change to the employee dress code policy. (GC 12; GC 13, part 2, p. 17-19). Hobson admitted in his testimony that when he distributed General Counsel Exhibit 4 to employees on July 6, 2015, he recalled their being concerns raised by the group over the change to the dress code. (Tr. 277). Hobson's understanding that Lopez was raising concerns that extended beyond her own is further evident in Hobson's questioning of Shelley Wishon the following day. Wishon testified that Hobson called her to his office and questioned her about whether she thought it was illegal

to prevent employees from discussing their wages. (Tr. 208). Hobson's understanding that the concerns raised by Lopez during their meeting extended to his other employees is further evident by his actions on July 9, 2015, upon his return to Respondent's facility after visiting his attorney. Lopez and Wishon each testified that Hobson declared to everyone within ear shot that the laws Lopez brought to his attention only applied to federal employees; they did not apply to Respondent's employees; and everyone was required to execute the documents. (Tr. 153, 210-211). If Hobson was under the belief that the concerns raised by Lopez were limited as an individual complaint, he would have brought that to her attention in private as an individual. Furthermore, Hobson displayed evidence of his knowledge that employees beyond Lopez had questions about their ability to discuss their pay when he communicated his reasons for terminating Lopez to Mike McBride. In his conversation with McBride on July 13, 2015, he told McBride that Lopez was wrong about the law in that only federal employees are permitted to discuss their wages and if Respondent's employees did so, they would be terminated. (Tr. 195-196). This is clear evidence that Hobson was aware of the group concern that existed regarding this topic.

Additionally, the very topics that were raised by Lopez during her meeting with Hobson fall under the "inherently concerted" category due to the nature of the issues discussed. The Board has held that employee discussions involving certain vital employment terms are inherently concerted, and thus protected even when no group action is contemplated. Employee discussions of wages is one example. See *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992)(employee discussions of wages are inherently concerted). The record overwhelmingly supports Judge Dibble's conclusion that Respondent was aware of Lopez's protected activity.

c. Lopez's termination was based on discriminatory animus

An employer's discriminatory motive may be established through several means, including: (1) the timing of the adverse action in relationship to the employee's protected activity; (2) other unfair labor practices, statements and actions showing the employer's discriminatory motivation; and (3) evidence demonstrating that the employer's proffered explanation for the adverse action is pretextual. *Wright Line*, 251 NLRB 1083, 1089 (1980). Each of these factors was established during the hearing. The record contains numerous examples of Hobson's personal animus that he held toward Lopez as a result of her protected conduct. These examples were set forth in the testimony of several witnesses, documentary evidence, and Lopez's recording of her July 8, 2015 meeting with Hobson.

First, Hobson's response to learning of Lopez's protected activity on July 8, 2015, included numerous coercive questions and prohibitions directed toward Lopez. (GC 12; GC 13). During his meeting with Lopez, Hobson unlawfully (1) interrogated Lopez about her protected conversations with her co-workers; (2) interrogated Lopez about her protected communications with Board agents; and (3) prohibited Lopez from discussing her terms and conditions of employment with others. Yet, Hobson did not stop there. As the Judge found, Hobson committed additional independent violations of the Act when he subsequently reiterated to employees that they were prohibited from discussing their wages and other terms and conditions of employment on July 9 and July 13, 2015. (Tr. 153, 197, 211; ALJD 24:37-46, 27:14-30). Hobson echoed the substantive content of Respondent's Pay Provision when he told Mike McBride that because the laws raised by Lopez only applied to federal employees, Respondent had the right to terminate any employee who discussed their wages. (Tr. 196; ALJD 25:18-46). The Judge found each of these responses to be violations of the Act and each

independent violation constitutes evidence of animus. See, e.g., *Sunrise Health Care Corp*., 334 NLRB 903 (2001)(Independent 8(a)(1) violations constitute evidence of animus).

Furthermore, the timing of Respondent's termination of Lopez is indicative of the animus Hobson held. Animus can be inferred from circumstantial evidence such as timing and disparate treatment. *Tubular Corp. of America*, 337 NLRB 99 (2001). Hobson learned of Lopez's protected activity late in the day on July 8, 2015. The very next day, he contacted his attorney. As Hobson testified to in his sworn Board affidavit on August 17, 2015, and signed on August 18, 2015, Hobson contacted his attorney twice on July 9, 2015. (Tr. 62-63). He first contacted his attorney to discuss the legality of Respondent's provision prohibiting employees from discussing their pay and Respondent's confidentiality agreement. (Tr. 62-63). Hobson admitted that later that day, for the first time, he contacted his attorney concerning terminating Lopez's employment. (Tr. 63, 83). Corroborative testimony by Tera Lopez and Shelley Wishon establish that on the same day, in response to the guidance provided by his attorney, whether ill-advised or misunderstood, Hobson communicated to his employees that the laws Tera Lopez referenced the day before were only applicable to federal employees, did not apply to Respondent's employees, and they were required to execute the documents in question. (Tr. 153, 211). Lopez was subsequently absent from work on Friday, July 10, 2015, and on Monday, July 13, 2015, Hobson made sure he was present in the lobby so that he could fire Lopez the very second she walked in the door. The timing of Lopez's termination in relationship to her protected activity was immediate and evidence of Hobson's animus.

Shelley Wishon provided additional evidence that showed Hobson harbored animus toward Lopez by detailing Hobson's burning desire to issue Lopez discipline for being a "no-call/no-show" on July 10, 2015, even though Wishon made it clear to Hobson that Lopez had

provided the appropriate notification of her expected absence. Hobson did not care and indicated as much to Wishon. Furthermore, even though he was on notice that Lopez had provided notification of her absence, Hobson sent a text to Evan Tanner stating that Lopez did not show up to work, that she did not call Hobson **OR ANYONE ELSE**, and he was uncertain if she would be coming back. (Tr. 109). Wishon credibly testified that she put Hobson on notice of Lopez's excused absence, yet Hobson was practically blinded by his newly found desire to rid himself of Lopez. Hobson denies Wishon's version of what occurred following his arrival to the facility on that date. Unlike Hobson, Wishon had no reason to distort the truth. The Board has long recognized that the testimony of current employees is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979), citing, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co, Inc.*, 193 NLRB 47, 48 (1971).

As described above in detail, the evidence of animus in this case is substantial and supportive of the Judge's decision that the General Counsel met his *Wright Line* burden.

d. Respondent failed to meet its burden

Judge Dibble concluded that Respondent failed to establish that it would have terminated Lopez absent her protected concerted activity, noting that Respondent's proffered reasons for terminating Lopez were pretextual. (ALJD 31:34-35). The record supports Judge Dibble's conclusion. The only evidence to support Respondent's assertion that it made the decision to terminate Lopez prior to her protected activity falls within the testimony of Gene Hobson. Hobson's testimony is not only self-serving, it's contrary to a significant amount of evidence set forth at hearing that shows Respondent had not made a decision concerning Lopez's future until

after she engaged in protected conduct. A review of the record makes this abundantly clear. Several times during the hearing, Hobson testified that he made the decision to terminate Lopez because she was insubordinate, failed to follow his instruction, and because she made an error by providing company information to a customer that she should not have provided. As the Judge found, Respondent provided no written documentation to support Hobson's self-serving assertions.

For all of Lopez's alleged negative attributes that Hobson alleged to be the root cause to his decision to end Lopez's employment, there is no evidence in the record of their existence. Hobson confirmed that Respondent provided the Region with Lopez's personnel file during its investigation of this matter. (Tr. 75). Hobson admitted that there was no discipline contained within her personnel file. (Tr. 75). In fact, there is no indication of any negative aspects of Lopez's employment within her file other than a vague reference in her 2014 appraisal. (Tr. 159-160; GC 14). Under "Areas of Improvement," the only negative line that exists reads, "Do not bring up personal complaints or problems in front of other Employees." (Tr. 159-160; GC 14, p. 3). Lopez provided testimony concerning the details of this comment and its origin. Lopez testified that when she received her evaluation in March 2014, Hobson went through it with her and he specifically addressed his directive not to bring up personal complaints or problems in front of other employees. (Tr. 159-160). Lopez recalled that Hobson "did not like the fact that I was friends or talking to other employees. He did not want me to talk to the other employees. He did not want me to complain or point anything out to other employees. We were not supposed to talk about anything." (Tr. 160). Lopez further testified that Hobson did not want his employees "talking about business, because he said that it stirs up drama and he didn't want us…like I said, he wouldn't let us go to lunch together." (Tr. 160). The only

negative aspect of Lopez's personnel file is simply another example of Hobson seeking to limit his employees' rights. The notation, as described by Lopez, is nothing more than an admonishment by an owner who sees no value in Section 7 activity and Respondent provided no evidence to contradict Lopez's testimony on this subject.

As noted by the Judge, the record lacks any evidence to support Respondent's defense. With respect to Respondent's argument that Lopez had a history of being insubordinate, the Judge astutely noted why she was not persuaded:

> "As previously found, however, the record is devoid of evidence that Respondent disciplined Lopez for or documented those or any other instances of her alleged insubordination. Likewise, there is no evidence that Hobson mentioned to Lopez that he felt some of her actions towards him were disrespectful and insubordinate until their meeting on July 8, when she began to complain about the company policies and the (confidentiality agreement)." (ALJD 32:34-38).

The Judge reached the same conclusion with respect to Respondent's argument that Lopez was terminated because of her work performance:

> "Equally as weak as the charge of insubordination, is Respondent's argument that an alleged decline in Lopez' job performance was a factor in the decision to terminate her. Again, there is no evidence documenting a decline in her performance. Moreover, in his meeting with her on July 8, Hobson reminded Lopez that he had 'not once written her up.' (GC Exh. 13, Part 3, p. 3). The lone performance appraisal record makes mention of only one area that needed improvement, the admonishment that Lopez 'not bring up personal complaints or problems in front of other Employees.' (Tr. 159-160; GC Exh. 14)" (ALJD 32:40-46).

Respondent further argues that Lopez was terminated because she sent confidential company information to one of Respondent's suppliers. Judge Dibble properly failed to credit Hobson on this point. (ALJD 33:1-3). During the July 8, 2015 meeting with Lopez, Hobson can be heard telling Lopez that he believed she sent the information without malicious intent, assuring her that he believed her motives were innocent. (GC 12; GC 13). Judge Dibble similarly failed to credit Hobson when he testified that another reason for Lopez's termination

was when she disregarded his instruction not to send weekly status reports to a customer. (Tr. 260). As Judge Dibble noted, there is no evidence that Hobson ever counseled or disciplined Lopez for the incident, making it highly unlikely that it served as a basis for her eventual termination. (ALJD 33:9-13). Judge Dibble's credibility resolutions are significantly supported by the record and it is well settled that the Board attaches great weight to an administrative law judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951).

Additionally, and contrary to Respondent's assertions, the record is filled with evidence in support of Judge Dibble's conclusion that Hobson did not make the decision to terminate Lopez until she engaged in protected activity on July 8, 2015. (ALJD 33:38-47, 34:1-10). For example, General Counsel Exhibit 7 constitutes a text exchange between Gene Hobson and Michael Norman, an individual Hobson was recruiting. (Tr. 76-77; GC 7). The text exchange occurred on May 24, 2015, and within the exchange, Hobson notified Norman that he "*may* fire Tera soon." (GC 7)(emphasis added). Hobson was clear within this communication that he remained undecided as to Lopez's future.

Hobson's indecision is further supported by Hobson himself. During the Region's investigation of this case, Hobson provided Lopez's personnel file. Within Lopez's file were a number of leave requests she had made, including a leave request dated July 8, 2015, seeking leave for July 24 and 27, 2015. (Tr. 84-85; GC 8). Lopez submitted this leave request prior to her meeting with Hobson at the end of the day on July 8, and it was approved by Hobson. (Tr. 84-85; GC 8). The fact that Hobson had approved leave for Lopez on dates that extended into late July 2015, speaks loudly to his thought process at the time as Hobson approved the leave prior to his meeting with Lopez at the end of the day. This fact came to Hobson's attention

during the Region's investigation because as part of Respondent's position statement, Hobson included a typed note explaining why he approved a leave request if the decision had already been made to determinate Lopez. (Tr. 84-85; GC 9). In his note, Hobson wrote (sic),

> "Although signing this vacation request in all my things to sign, such as checks, etc. At the time I figured it was not a big deal to sign a future request, cause (sic) I knew in my mind, that Tera was *probably* not going to be here on those dates anyhow." (emphasis added). (GC 9).

Even in his explanation to the Region, Hobson admitted that he had not made up his mind as to Lopez's future - on the very day that Lopez would later engage in protected conduct. Hobson also provided contrary testimony in the sworn affidavit he provided to OSHA in response to an OSHA claim that had been filed by Lopez. (Tr. 79-83). Within Hobson's sworn affidavit, he declared, "I then began discussions with Evan Tanner in early June of 2015 to hire him, to absorb most of Ms. Lopez' job responsibilities, with *the intent of firing her or demoting her with a reduction in pay*. Those discussions led to his hiring on June 24th with a start-date of July 10th." (emphasis added)(Tr. 80). This is another example, after the fact, of Hobson explaining that he had not made a decision.

Hobson was not alone in contradicting his testimony on this subject. Evan Tanner was just as successful in doing so. When Hobson could not meet Michael Norman's financial terms, he turned his attention to his second choice, Evan Tanner. (Tr. 77-78). The record indicates that Hobson first made contact with Tanner about the possibility of coming to work with Respondent in April 2015. (Tr. 98). Hobson and Tanner had a subsequent conversation two or three weeks later. (Tr. 99). Tanner testified that at that time, Hobson communicated that he intended to hire Tanner to put into Lopez's position and "she would be possibly moving to a lesser position." (Tr. 99). Tanner confirmed that Hobson was not sure what he was going to do with Lopez. (Tr. 100). Hobson and Tanner eventually scheduled a face to face meeting that

occurred the first week of June 2015. Tanner confirmed that during this meeting, Hobson remained uncertain as to Lopez's future. (Tr. 101). Tanner recalled Hobson telling him that Tanner's hire could cause an issue with Lopez and she may decide to leave on her own. (Tr. 102-103). Tanner further confirmed that Hobson took issue with Lopez "stirring things up with other employees." (Tr. 101). Specifically, Tanner recalled Hobson complaining that Lopez was part of a small group of employees including Mike McBride and Shelley Wishon. (Tr. 101-102). Hobson did not like that the named employees would be talking together when they should be working. (Tr. 101). It took a few weeks for the proper paperwork to be put together. Hobson and Tanner met again during the last week of June 2015. (Tr. 103). At the hearing, Tanner initially testified that it was during this meeting that Hobson informed Tanner that he would be replacing Lopez and she would be let go. (Tr. 103). Tanner's testimony in this regard was not credited. As detailed during the hearing and on the record, Tanner provided sworn testimony to the Region during its investigation. The date of his signed affidavit was August 17, 2015, which is substantially closer in time to the events that unfolded prior to Lopez's termination. (Tr. 104). Tanner read his August 17, 2015 testimony into the record as to what took place the last week of June 2015, and it read,

> "The discussions at that time, we were more of uncertainty about Tera and what would take place now that I was coming into HBI. I can't recall fully if Gene discussed whether he had talked to Tera about me coming in, or what her role would be subsequently." (Tr. 105).

Furthermore, Tanner confirmed on the stand that within his Board affidavit, the earliest date he provided that indicates he was told by Hobson that Lopez would be terminated was July 10, 2015. (Tr. 111-112). Tanner's new found recollection on the stand contradicted his testimony from his August 17, 2015 Board affidavit and was clearly provided in Respondent's self-serving attempt to support its assertion that its termination decision pre-dated Lopez's

protected conduct. Judge Dibble correctly credited Tanner's testimony set forth in his Board affidavit in lieu of his self-serving modified recollection. (ALJD 34:1-4).

Lastly, Respondent called Michael Norman to the stand in an effort to provide support to its claim concerning when it made the decision to terminate Lopez. However, in doing so, Norman's testimony did nothing but further support the General Counsel's position. Norman testified that on May 21, 2015, Hobson interviewed him for an operations manager position. (Tr. 230-231). Norman testified that during that meeting, Hobson stated the following:

> "He mentioned that he -- Ms. Lopez, he introduced me before earlier that day was currently in the role, had the responsibility, I'll say, of doing some of the things and that she was going to be demoted. He wanted me to be aware that there may be some friction when that happened, and he wasn't sure whether she would stay or exactly what the situation was going to be whenever that took place." (Tr. 231)

Contrary to Respondent's position, Norman further confirmed that at no time did Hobson communicate to him that there had been any changes made in Hobson's plan for Lopez:

Blanchard:	Okay. And did he indicate whether there'd been any change with regard to his plans for Ms. Lopez?
Norman:	No, he did not. (Tr. 232).

Respondent's counsel circled back to the same inquiry later in his questioning of Norman. However, Norman's understanding that Hobson was going to terminate Lopez was solely taken from the May 24, 2015 text exchange between the two men where Hobson wrote that he "may fire Tera soon." (Tr. 233, 234; GC 7). The testimony from Hobson, Tanner and Norman paired with General Counsel Exhibits 7, 8, and 9 is overwhelmingly consistent – there is no evidence in the record to support Respondent's claim that it had made the decision to terminate Lopez prior to her protected conduct on July 8, 2015, other than Hobson's self-serving testimony.

Respondent may have been considering some type of change for Lopez or Respondent

might have looked to see whether Tanner and Lopez could coincide as a team. However, the fact remains that Respondent cannot show that a decision concerning any alteration of Lopez's terms and conditions of employment had been made prior to her protected conduct. In his testimony to the Region during its investigation, Evan Tanner consistently testified that Hobson was unsure what would take place with Lopez and the first time Hobson communicated to him that the decision to terminate Lopez had been made was AFTER her protected conduct on July 8, 2015. What the record definitively shows is that the decision to terminate Lopez's employment did not take place until after the end of her shift on July 8, 2015. See *Sportsman's Service Center*, 317 NLRB 195 (1995). *Sportsman's Service Center* involved the termination of an employee following the employee's telephone call to the Board's Baltimore office. The employee in that case was far from exemplary and the ALJ acknowledged that prior to the employee's protected conduct, she was "perilously close to being fired for lawful reasons." However, the ALJ found, and the Board affirmed, that the employer failed to prove that it would have fired the employee on the date that it did absent her call to the Board. Respondent has the same burden in this case and it failed to meet it. The instant case is similar to *Sportsman's Service Center* in that Respondent failed to prove that it would have fired Lopez absent her protected activity. Contrary to that case, Respondent provided no evidence to support the conclusion that Lopez was "far from exemplary." She possessed no written discipline in personnel file and in early July 2015, Respondent had presented Lopez with a summer bonus. The evidence is overwhelming. Respondent has no defense to the conclusion that the triggering event for Lopez's termination was her protected conduct on July 8, 2015.

For the reasons set forth above, Judge Dibble's finding that Respondent terminated Lopez for reasons violative of the Act is supported by the record and Respondent's exception is

without merit.

C. Lopez Was Not a Supervisor or Manager Under the Act.

Respondent argues that Judge Dibble erred in failing to find that Lopez was a supervisor under Section 2(11) of the Act. For the reasons identified below, Respondent's exceptions are without merit.

Section 2(11) of the Act defines "supervisor" as any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. This statutory language establishes three requirements, all of which must be satisfied to warrant a finding of supervisory status: (1) the individual must have authority to take one of the specific actions listed in Section 2(11) or to effectively recommend such action; (2) the individual must exercise this authority in the interest of the employer; and (3) the exercise of this authority must not be of a merely routine or clerical nature, but instead requires the use of independent judgment. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573–574 (1994).

With respect to Lopez's ability to hire, Gene Hobson provided convoluted testimony concerning Lopez's authority to hire "work parties." When questioned by the Judge as to what that constituted a "work party," Hobson explained, "She would organize, Your Honor, work parties and events and actions, everything from inventory actions to rework to inspection." (Tr. 269-271). When asked about it later, Hobson answered, "A work party is a working organization of several individuals and transferees from other areas. The warehouse comes – or

the office people all get together, they all do a work function. They work together as a team to get something done." (Tr. 280). Hobson testified that Lopez had the authority to hire temporary employees who would temporarily serve on these "work parties" to complete special projects. (Tr. 280-281). General Counsel Exhibit 2 consists of a list of names and titles of all employees Respondent employed as of July 13, 2015. (Tr. 23; GC 2). When pressed as to who the individual would be in charge of hiring the employees identified in General Counsel Exhibit 2 as full-time or part-time employees employed by Respondent as of July 13, 2015, Hobson confirmed that he would have the final say. (Tr. 270-271). When questioned directly, Hobson could not recall the last employee Lopez allegedly hired, even though Respondent employs less than ten employees, several of whom are part-time or temporary workers. (Tr. 283; GC 2).

With respect to Lopez's alleged authority to terminate employees, Hobson provided the names of Manny Maturino, Rick Halverson, Tracy Greenwood, Shawn McBride, and Scott Eastman. (Tr. 288-289). Hobson testified that Maturino last worked for the company in early 2014, Halverson in 2013, Greenwood in 2014, McBride in 2014, and Eastman in 2015. (Tr. 288-289). Contrary to Hobson, Lopez provided details concerning the decisions to end the employment of each of the named individuals above, none of which she personally made. Lopez credibly testified that she was directed by Hobson to terminate Manny Maturino and Rick Halverson. (Tr. 309). Lopez further testified that she was not involved in the decision to terminate Tracy Greenwood or Scott Eastman because those decisions and acts were made solely by Hobson. (Tr. 309). Additionally, Lopez testified that Shawn McBride was not terminated; he voluntarily left the company to take another job. (Tr. 309). Assuming arguendo that Lopez was somehow involved in the decision making process for any of the terminations identified above, Lopez credibly testified that as of December 2014, Hobson removed several of

her job duties from her plate. (Tr. 307-308). Lopez testified that Hobson told her at that time that he was "stepping back into the company" and "he wanted to take more control of the company." (Tr. 308). Lopez recalled losing any authority to hire, fire, participate in employee evaluations, or access company financial information through QuickBooks. (Tr. 307-308). Hobson confirmed in his testimony that he had removed certain job duties from Lopez's authority. (Tr. 285).

The only example Hobson could provide of Lopez's involvement in the evaluation of employees came in the form of Amber Morgan. (Tr. 271-272). However, Hobson failed to provide any context or details as to what was involved in Lopez's evaluation of Morgan, how that evaluation was used, or when it allegedly occurred. Coupled with the fact that Lopez credibly testified that any evaluation duties were removed from her in December 2014, the record fails to establish any such duties as of July 13, 2015.

Respondent also points to Lopez's alleged involvement in "training" employees. (Tr. 272-273). Hobson provided the following generalized testimony:

Blanchard:	Did she have any responsibilities with regard to training of employees?
Hobson:	Yes.
Blanchard:	What were her responsibilities with regard to training?
Hobson:	Anybody she brought in to organize work, she would train them, she would teach them how to gage, she would show them how to run a machine, or she would get the quality guy to work with them. She had worked with how to do seal replacement and that type thing.
Judge Dibble:	All right, so was she responsible for the training of the front office manager, the administrative specialist, the quality control person, or the warehouse manager?

Hobson: She worked daily with training and working with the front manager, yes.

Judge Dibble: In what way?

Hobson: Giving her advice on - she came to her daily constantly on advice, she was in her office every day, making recommendations, showing her, directing her. It was obvious she was the boss."

As ALJ Keltner W. Locke noted: "Possessing the authority to train employees does not satisfy any of the requirements set forth in Section 2(11) of the Act." *Center for Economic Progress and Chicago Newspaper Guild Local 34071, TNG/CWA*, 2007 WL 2726192, (N.L.R.B. Div. of Judges), September 13, 2007, Case 13-CA-43610. Furthermore, Respondent's evidence concerning Lopez's training authority constitutes mere conclusory and generalized statements about her duties and lack dates, specificity, details, and frequency to establish any responsibilities that would be deemed managerial in nature.

Next, Respondent moved on to whether Lopez had the authority to discipline employees. Hobson testified as follows:

Blanchard: What duties or responsibilities did she have with regard to reprimanding or disciplining any of the other employees?

Hobson: She would talk with them and then if she had any kind of issue, but we are so small, we hardly had any issue. So she would come to me on any big thing.

Blanchard: With regard to any oral warnings, did she have authority to give oral warnings to employees?

Hobson: Yes, of course.

Blanchard: Were the written disciplines done through you?

Hobson: Written disciplines mostly done through me, but she did give – she was encouraged to do written reports and she did one on Mr. Johnny Choate, wrote him up. I encouraged her to -- (Tr. 273-274).

The record also did not establish any evidence that Lopez disciplined employees. In response to Hobson's self-serving assertions, Lopez provided testimony and identified exhibits that contradicted Hobson's statements concerning Lopez's involvement with employee discipline. Lopez testified that the decision to issue Johnny Choate discipline came at the direction of Hobson. (Tr. 310). Lopez identified General Counsel Exhibits 20 and 21 as text exchanges between Hobson and Lopez wherein Hobson gave Lopez specific instructions concerning Choate. GC Exhibit 20 contains a March 28, 2014 text from Hobson to Lopez wherein Hobson gave explicit instructions to Lopez concerning Choate's discipline and what language it should contain. (Tr. 311; GC 20). GC Exhibit 21 contains a June 23, 2014 text from Hobson to Lopez wherein Hobson instructed Lopez as to the work Choate will perform that day and further noted that Hobson made the decision to suspend Choate for one week with no pay. (Tr. 311-312; GC 21). Hobson's testimony concerning Lopez's discipline authority was embellished, as established through Lopez's rebuttal testimony and exhibits.

Hobson further testified that Lopez's job duties included control over forecasting of inventory and scheduling. Hobson testified that he rarely reviewed Lopez's reports other than the last couple of months of her employment when Hobson reviewed them with her periodically. (Tr. 276). Again, Hobson provided self-serving testimony without providing any supporting documentation. Lopez, on the other hand, provided credible testimony that her forecasting (1) simply required that she keep two months of inventory in stock pursuant to guidelines that had been established by Hobson and (2) had to be approved by Hobson. (Tr. 313-314). Lopez identified General Counsel's Exhibits 24, 27 and 28. General Counsel 24 is a text exchange between Hobson and Lopez from September 15, 2014, wherein Hobson told Lopez that he wanted to review her forecast before it was sent out. (Tr. 314-315; GC 24).

Lopez further testified that General Counsel Exhibit 27 included an email wherein she sent a forecast spreadsheet to Hobson for review and General Counsel Exhibit 28 is a copy of the same spreadsheet with Hobson's notes Lopez would use to revise her numbers. (Tr. 315-316; GC 27; GC 28). The evidence clearly supports Lopez's testimony that her forecasting job duties occurred within set parameters and required the approval of Gene Hobson.

Hobson further testified that in her position with the company, Lopez's job duties included unilateral discretion in the revision of company policies. (Tr. 275-276). Hobson testified that Lopez revised his company policies in 2014, and he further provided the following conclusory testimony:

> "She also did all types of policies. She did quality control things. She did policies for duty drawback, she supervised duty drawback. She was – she had a lot of areas of concern. She had a lot of operation and managerial and supervisor responsibilities." (Tr. 276).

Furthermore, in the General Counsel's Complaint, Paragraph 6(a), it is alleged that on July 8, 2015, Lopez concertedly complained to Respondent regarding wages, hours and working conditions of Respondent's employees and raised concerns regarding Respondent's wage and confidentiality rules. (GC 1(I)). Respondent denied this paragraph in its Answer and asserted that Lopez "wrote the rules." (GC 1(k). On the stand, Hobson was asked to list the rules that Lopez allegedly has written. (Tr. 53-57). When pressed, Hobson could only testify that Lopez revised the existing dress code policy. (Tr. 56-57). On rebuttal, Lopez provided testimony in response to Hobson's assertions that she had anything to do with the creation or revision of company policies. (Tr. 305-306). While on the stand, Lopez compared the company policies she was presented by Respondent on November 26, 2012 (General Counsel Exhibit 18) and February 11, 2014 (General Counsel Exhibit 3). (Tr. 305-306; GC 3; GC 18). Lopez testified that to the extent there are any changes that were made between the two documents, they were

made as a result of Hobson providing Lopez with instructions as to what changes should be made. (Tr. 306-307). After Lopez made Hobson's suggested changes, he approved them. (Tr. 306-307).

In support of its exceptions, Respondent additionally argues that Judge Dibble failed to properly weigh the testimony offered by Gene Hobson's daughter, Halle Hobson, and warehouse employee Monty Greenwood. Contrary to Respondent's assertions, the Judge properly weighed these witnesses' testimony and properly concluded that they consisted of nothing but generalized conclusory statements without support. (ALJD 36:8-17). Neither witness provided details beyond general descriptions of their interactions with Lopez. The following is an example of the level of detail provided by Halle Hobson:

> Blanchard: What types of direction or supervision would you receive from Ms. Lopez?
>
> Hobson: Anything that I needed with duty drawback, like if I needed my paperwork supervised, if I needed to leave early, I would ask her. She would check over all my paperwork for duty drawback before I sent it in. (Tr. 297).

Monty Greenwood provided similar general assertions without supporting details.

> Blanchard: What types of directions, instructions, or orders did you take from her?
>
> Greenwood: Just general helping in the warehouse, my days off for my sick days, and just overseeing the pulling and shipping of the orders.
>
> Blanchard: When Gene Hobson wasn't there, who was in charge of the business?
>
> Greenwood: Tera Lopez. (Tr. 300-301).

Their testimony equals the conclusionary statements made by Gene Hobson. For example, Hobson provided the following explanation of Lopez's job duties and responsibilities:

> "She was a supervisor and manager for the company. In my absence, she was fully engaged with all employees while there. I was there approximately 10% to 20% of the time at the business and I was away most of the time. She was to organize work parties,

> seal replacements, grease exchanges, quality controls, gaging, inspection. She worked with quality. She was clearly the boss, clearly the supervisor. She knows she was the supervisor. Every time I left the building, Ms. Lopez was in charge, and she reported to me." (Tr. 267).

As the Judge noted in her decision, the Board has held that mere inferences or conclusionary statements without detailed, specific evidence are insufficient to establish supervisory authority. (ALJD 36: 13-17, citing *Sears, Roebuck & Co*., 304 NLRB 193 (1991); *Securitas Critical Infrastructure Services, Inc. v. NLRB*, 817 F.3d 1074 (2016)). The evidence is clear that the record supports Judge Dibble's conclusion that Lopez was not a supervisor or manager under the Act. Furthermore, even in the event that Lopez would have been found to be a supervisor or manager under the Act, Respondent's decision to terminate her remained violative of Section 8(a)(1).[8] The Board will find a violation of Section 8(a)(1) of the Act when an employer's termination of a supervisor interferes with employees' Section 7 rights. See *Parker-Robb*, 262 NLRB 402 (1982). The Board will find that a termination interferes with Section 7 rights where a termination was in response to a supervisor's attempts to interfere with an employer's unlawful conduct. Id. In the instant matter, that is exactly what Lopez attempted to do during her meeting with Hobson on July 8, 2015. Lopez sought to notify Hobson of his unlawful company policy and confidentiality agreement and put a stop to them. Hobson's reaction to Lopez addressing the legal realities of his company policies was to put an end to her employment.

Furthermore, the Board has found that it is violative of Sections 8(a)(1) and (4) of the Act for an employer to terminate a supervisor or manager because the individual attempts to access the Board's processes.[9] See *Hi-Craft Clothing Co*., 251 NLRB 1310 (1980). In *Hi-Craft*, the Board agreed with the ALJ's decision that the employer violated the Act by terminating a

[8] Complaint paragraphs 6(b) and 6(e).
[9] Complaint paragraphs 7(a) and 7(c).

supervisor for asserting that he intended to go to the Board for assistance in his bonus dispute. The Board noted, "Therefore, an employer must refrain from discriminating against an individual for indicating an intent to go to the Board since it is the Board's function, and not the employer's, to decide whether the individual is covered by the Act and his claim has merit." Id. at fn 2. As explained by the ALJ in *TLC Health Network*, 2014 WL 5388197 (October 23, 2014):

> "Supervisors are not protected by the Act because, pursuant to Section 2(3) of the Act, they are specifically excluded from the definition of "employee." However, the Board has held that supervisors are protected "when invoking or seeking to invoke the Board's processes." *SNE Enterprises*, 347 NLRB 472, 497 (2006) citing *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980); *General Services, Inc*., 229 NLRB 940 (1977). In *Hi-Craft Clothing Co.*, above, the admitted supervisor, unhappy at not receiving a bonus that he believed had been promised to him, advised his manager that he was "going to the Labor Board." When he repeated his intention to go to the Board, he was fired. The Board affirmed the administrative law judge's finding that the discharge violated Section 8(a)(4) of the Act, agreeing with the General Counsel's argument that there is a strong public policy favoring the free and unimpeded access to the Board's processes and, therefore, supervisors should also be protected when invoking, or seeking to invoke, the Board's processes. See also *Metro Networks*, 336 NLRB 63, 66 (2001)."

The record fully supports Judge Dibble's conclusion that Tera Lopez did not constitute a supervisor or manager under the Act. Contrary to Respondent's position, as an employee, supervisor or manager under the Act, Hobson's decision to end Lopez's employment was violative of the Act.

D. Production of Lopez's Cell Phone Was Not Required

Respondent argues in its exceptions that it was prejudiced by Judge Dibble's failure to order production of Tera Lopez's cell phone for forensic review. For the reasons identified below, Respondent's exception is without merit.

Tera Lopez used her cell phone to record the July 8, 2015 meeting she had with Gene Hobson. (Tr. 131-132). The recording and corresponding transcript is found in General

Counsel Exhibits 12 and 13. During the hearing, Judge Dibble properly accepted both exhibits into evidence. The Board has historically held that tape recordings of manager statements, whether secured though surreptitious means or not, are admissible as substantive evidence in NLRB cases. *Williamhouse of California, Inc.*, 317 NLRB 699, 699 fn. 1 (1995); *A & A Insulation Services*, Inc., 344 NLRB 322, 325 (2005) citing *Parts Depot, Inc.*, 332 NLRB 670, 679 (2000). The Board has also consistently deemed corresponding transcripts made from the recording to be admissible as substantive evidence. See *Toering Electric Company*, 351 NLRB 225, 253 fn. 7 (2007); *Sproule Construction Company*, 350 NLRB 774, 784 fn. 4 (2007). Respondent argues that it was prejudiced because it was not provided access to Lopez's cell phone so that it "could test the validity of the transcript GCX-13." (R Exceptions Brief at 9). Respondent's argument lacks support. During the hearing, Respondent initially objected to the admission of General Counsel Exhibits 12 and 13. After doing so, Respondent requested permission to forensically examine Lopez's cell phone. (Tr. 185). The Judge ordered Respondent to provide case law to support its request. (Tr. 185). Later in the hearing, Respondent withdrew its objection to the admissibility of the recording set forth in General Counsel Exhibit 12. (Tr. 225; GC 12). As detailed in the record, Respondent's attorney David Riesenmy stated, "We agree that the tape is fully admissible, or the recording, so the electronic recording is." (Tr. 225). Respondent confirmed this position in its post-hearing brief to Judge Dibble. Under "IV Admissibility of Evidence," Respondent wrote as follows:

> "With regard to GCX-12, Respondent withdraws the objection to the admissibility of the recording herein and states that it is the best evidence of what transpired at the meeting of July 8, 2015, between Lopez and Hobson, as to the portion of the meeting that was actually recorded and not deleted, as opposed to Ms. Lopez's recollection of what was discussed in her live testimony." (R ALJ Brief at 16)

In the same section of its post-hearing brief, Respondent cites to *H&M International*

Transportation, Inc. and *UFCW Local 312*, 2014 WL 2194514, Cases 22-CA-089596, 22-CA-095095, and 22-CB-106127 (May 23, 2014). Respondent's citation does not support its argument that judicial error occurred. In those cases, the General Counsel requested special permission to appeal the presiding administrative law judge's order that a witness produce his cell phone's memory card. Although the Board denied the appeal, it noted that it agreed with the judge and the General Counsel that under Board law, the employee's testimony was likely sufficient to authenticate the recording in question for admissibility purposes. The Board did not assert that such disclosure is mandatory. It simply found that the judge did not abuse her discretion in ordering production of the memory card. Board law in this area is clear and fails to support Respondent's position. See *Wellstream Corp*., 313 NLRB 698, 711 (1994); *East Belden Corp*., 239 NLRB 776 (1978). In *Wellstream Corp.*, the Board affirmed the judge's ruling that audio tapes had been properly authenticated where participants in the conversations testified that the recordings reflected the actual conversations and were accurate recordings of those meetings. 313 NLRB at 711. In *East Belden Corp*., the judge was "persuaded that the recording is an accurate representation" of a meeting, based on having listened to the tape himself, two employees' testimony identifying the speakers, no evidence that the tape was altered, and the respondent's failure to produce a witness to challenge the accuracy of the recording. 239 NLRB at 782. Here, Tera Lopez's testimony supports a finding that the recording is authentic under Board law. Lopez testified that she recorded her meeting with Hobson using her cell phone and she confirmed that General Counsel Exhibit 12 was an accurate recording of the meeting. (Tr. 131-136). There were only two participants in the meeting that occurred on July 8, 2015 – Tera Lopez and Gene Hobson. Respondent had the opportunity to cross examine Lopez with respect to the meeting and recording. Respondent also had the opportunity to address the accuracy of

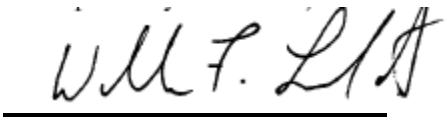
the recording through Hobson. Under existing Board law, Respondent has failed to provide any evidence to support its claim that it has been prejudiced or that Judge Dibble erred in anyway with the admissibility of Lopez's recording or her ultimate denial of Respondent's request to examine Lopez's cell phone. For these reasons, Respondent's exception should be denied.

III. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent's exceptions are without merit and that Judge Dibble's findings that Respondent violated Sections 8(a)(1) and (4) of the Act, as alleged, are supported by the record. The General Counsel requests that the Board affirm Judge Dibble's recommended order.

Dated: October 14, 2016

Respectfully Submitted,



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