ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1316
[Consolidated with No. 16-1367]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

KING SOOPERS, INC.,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE NO. 27-CA-129598

JOINT APPENDIX

VOLUME 2 OF 2
(APP. 646 – APP. 1292)

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OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 27

In the Matter of:

KING SOOPERS INC., Case No. 27-CA-129598

and

WENDY GEASLIN, AN INDIVIDUAL,

GENERAL COUNSEL EXHIBITS

Place: Denver, Colorado

Dates: August 12, 2015

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
27-CA-129598	5-29-14

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer KING SOOPERS, Inc.		b. Tel. No. (303)778-3258 c. Cell No.
d. Address (street, city, state ZIP code) 65 Tejon St, Denver, CO 80223-1221	e. Employer Representative Stephanie Bouknight	f. Fax No. (303)778-2040 g. e-Mail h. Dispute Location (City and State) , Denver, Colorado
i. Type of Establishment (factory, nursing home, hotel) Retail Grocery Store	j. Principal Product or Service Groceries	k. Number of workers at dispute location 50+

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

On about May 9, 2014, the above-named employer by its store manager suspended Wendy Geaslin for asserting a contractual right.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)

Wendy Geaslin

4a. Address (street and number, city, state, and ZIP code) 1044 Downing Street, Apartment 804, Denver, CO 80218	4b. Tel. No. 720-297-7002 4c. Cell No. 4d. Fax No. 4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**		Tel. No. 720-297-7002
By: Wendy L Geaslin (signature of representative or person making charge) Address:	Wendy Geaslin Print Name and Title Date:	Office, if any, Cell No. Fax No. e-Mail my3Sons.wg@gmail.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. 1-1061045581

GENERAL COUNSEL'S EXHIBIT NO. 1(a)

RECEIVED
MAY 29 2014
NLRB Region 27

GC1-a

EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____

CASE NO. 27-CA-128598 CASE NAME: King

NO. OF PAGES: 2 DATE: 6/11/15 REPORTER: KA

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249

Download
NLRB
Mobile App

May 30, 2014

STEPHANIE BOUKNIGHT
King Soopers
65 Tejon St
Denver, CO 80223-1221

Re: King Soopers, Inc.
Case 27-CA-129598

Dear Ms. BOUKNIGHT:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (303)844-0059. If this Board agent is not available, you may contact Deputy Regional Attorney LETICIA PENA whose telephone number is (303)844-6629.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent.

GENERAL COUNSEL'S EXHIBIT NO. 1(b)

Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Wanda Pate Jones

WANDA PATE JONES
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

6C 1-b
EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____
CASE NO. 27-CA 129598 CASE NAME: King
NO. OF PAGES 6 DATE: 8/11/15 REPORTER: KA

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249

May 30, 2014

Wendy Geaslin
1044 Downing Street
Apt. #804
Denver, CO 80218

Re: King Soopers, Inc.
Case 27-CA-129598

Dear Ms. Geaslin:

The charge that you filed in this case on May 29, 2014 has been docketed as case number 27-CA-129598. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (303)844-0059. If the Board agent is not available, you may contact Deputy Regional Attorney LETICIA PENA whose telephone number is (303)844-6629.

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If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. Because we seek to resolve labor disputes promptly, you should be ready to promptly present your affidavit(s) and other evidence. If you have not yet scheduled a date and time for the Board agent to take your affidavit, please contact the Board agent to schedule the affidavit(s). If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed without investigation.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

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We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

Wanda Pate Jones

WANDA PATE JONES
Regional Director

Revised 3/21/2011

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
King Soopers, Inc.	27-CA-129598

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed)*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box)*. [ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services *(Check the largest amount)*: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date:		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
27-CA-129598	5-29-14

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a Name of Employer KING SOOPERS, Inc.		b. Tel. No. (303)778-3258 c. Cell No
d Address (street, city, state ZIP code) 65 Tejon St, Denver, CO 80223-1221	e. Employer Representative Stephanie Bouknight	f Fax No. (303)778-2040 g e-Mail h. Dispute Location (City and State) , Denver, Colorado
i. Type of Establishment (factory, nursing home, hotel) Retail Grocery Store	j. Principal Product or Service Groceries	k. Number of workers at dispute location 50+

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

On about May 9, 2014, the above-named employer by its store manager suspended Wendy Geaslin for asserting a contractual right.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)

Wendy Geaslin

4a. Address (street and number, city, state, and ZIP code) 1044 Downing Street, Apartment 804, Denver, CO 80218	4b Tel. No 720-297-7002 4c. Cell No. 4d. Fax No. 4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6 DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**	Tel. No 720-297-7002
By: Wendy L Geaslin (signature of representative or person making charge)	Wendy Geaslin Print Name and Title	Office, if any, Cell No.
Address:	Date:	Fax No. e-Mail my3Sons.usa@gmail.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes. 1-1061045581

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC. Charged Party and **WENDY GEASLIN** Charging Party	**Case 27-CA-129598**

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on May 30, 2014, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

STEPHANIE BOUKNIGHT
King Soopers
65 Tejon St
Denver, CO 80223-1221

May 30, 2014
Date

Monika Kurschen, Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(c)

6C1-L

EXHIBIT NO._____ RECEIVED ✓ REJECTED_____

CASE NO. 27-CA 129598 CASE NAME: King

NO. OF PAGES 2 DATE: 8/11/15 REPORTER: KA

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

1st Amended CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
27-CA-129598	8-18-14

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer KINGS SOOPERS, INC.		b. Tel. No. (303)778-3258 c. Cell No.
d. Address (street, city, state ZIP code) 65 Tejon St, Denver, CO 80223-1221	e. Employer Representative STEPHANIE BOUKNIGHT	f. Fax No. (303)778-2040 g. e-Mail stephanie.bouknight@kingsoopers.com h. Dispute Location (City and State) Denver, CO
i. Type of Establishment (factory, nursing home, hotel) Retail grocery store	j. Principal Product or Service Groceries	k. Number of workers at dispute location 100+

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Since about March 2014 the Employer has interfered with, restrained, and coerced its employees by interrogating Wendy Geaslin about her communications with the Union.

On May 9, 2014 the Employer discriminated against employee Wendy Geaslin by suspending her for asserting a contractual right in order to discourage union activities.

On May 21, 2014 the Employer discharged Wendy Geaslin for asserting contractual rights and for her protected concerted activities during a grievance meeting.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
Wendy Geaslin

4a. Address (street and number, city, state, and ZIP code) 4323 Excursion Dr. Colorado Springs, CO 80911	4b. Tel. No. (719)553-8268 4c. Cell No. 4d. Fax No. 4e. e-Mail my3sons.wg@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**	Tel. No. (719)553-8268
By: Wendy Geaslin (signature of representative or person making charge) Address: 4323 Excursion Dr. Colorado Springs, CO 80911	Wendy Geaslin Print Name and Title Date: 8-12-2014
	Office, if any, Cell No. Fax No. e-Mail my3sons.wg@gmail.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

GENERAL COUNSEL'S EXHIBIT NO. 1(d)

RECEIVED
AUG 18 2014
NLRB Region 27

6L1-d
EXHIBIT NO. _____ RECEIVED: _____ REJECTED _____
CASE NO. 27-CA-129598 CASE NAME: King
NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KH

UNITED ST ES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249

Download
NLRB
Mobile App

August 19, 2014

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221

Re: King Soopers, Inc.
Case 27-CA-129598

Dear Ms. Bouknight:

Enclosed is a copy of the first amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (303)844-0059. If the agent is not available, you may contact Deputy Regional Attorney LETICIA PENA whose telephone number is (303)844-6629.

Presentation of Your Evidence: As you know, we seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations in the first amended charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Wanda Pate Jones

WANDA PATE JONES
Regional Director

Enclosure: Copy of first amended charge

GENERAL COUNSEL'S EXHIBIT NO. 1(e)

GC-1e

EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____

CASE NO. 27-CA 129598 CASE NAME: Veing

NO. OF PAGES: 5 DATE: 8/11/15 REPORTER: KJ

UNITED ST ES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249

Download
NLRB
Mobile App

August 19, 2014

Wendy Geaslin
4323 Excursion Dr
Colorado Springs, CO 80911

Re: King Soopers, Inc.
Case 27-CA-129598

Dear Ms. Geaslin:

We have docketed the first amended charge that you filed in this case.

Investigator: This charge is being investigated by Field Attorney ISABEL C. SAVELAND whose telephone number is (303)844-0059. If the agent is not available, you may contact Deputy Regional Attorney LETICIA PENA whose telephone number is (303)844-6629.

Presentation of Your Evidence: As the party who filed the charge in this case, it is your responsibility to meet with the Board agent to provide a sworn affidavit, or provide other witnesses to provide sworn affidavits, and to provide relevant documents within your possession. If you have additional evidence regarding the allegations in the first amended charge and you have not yet scheduled a date and time for the Board agent to obtain that evidence, please contact the Board agent to arrange to present that evidence. If you fail to cooperate in promptly presenting your evidence, your charge may be dismissed.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Wanda Pate Jones

WANDA PATE JONES
Regional Director

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

1st Amended CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
27-CA-129598	8-18-14

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer KINGS SOOPERS, INC.		b. Tel. No. (303)778-3258 c. Cell No
d. Address (street, city, state ZIP code) 65 Tejon St, Denver, CO 80223-1221	e. Employer Representative STEPHANIE BOUKNIGHT	f. Fax No (303)778-2040 g. e-Mail stephanie.bouknight@kingsoopers.com h. Dispute Location (City and State) Denver, CO
i. Type of Establishment (factory, nursing home, hotel) Retail grocery store	j. Principal Product or Service Groceries	k. Number of workers at dispute location 100+

l. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act

2. Basis of the Charge (*set forth a clear and concise statement of the facts constituting the alleged unfair labor practices*)

Since about March 2014 the Employer has interfered with, restrained, and coerced its employees by interrogating Wendy Geaslin about her communications with the Union.

On May 9, 2014 the Employer discriminated against employee Wendy Geaslin by suspending her for asserting a contractual right in order to discourage union activities.

On May 21, 2014 the Employer discharged Wendy Geaslin for asserting contractual rights and for her protected concerted activities during a grievance meeting.

3. Full name of party filing charge (*if labor organization, give full name, including local name and number*)
Wendy Geaslin

4a. Address (street and number, city, state, and ZIP code) 4323 Excursion Dr. Colorado Springs, CO 80911	4b. Tel. No. (719)553-8268 4c. Cell No 4d. Fax No. 4e. e-Mail my3sons.wg@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (*to be filled in when charge is filed by a labor organization*)

6. DECLARATION **I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.**	Tel. No. (719)553-8268
By Wendy Geaslin (signature of representative or person making charge)	Wendy Geaslin Print Name and Title	Office, if any, Cell No.
Address: 4323 Excursion Dr. Colorado Springs, CO 80911	Date: 8-12-2014	Fax No e-Mail my3sons.wg@gmail.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary, however, failure to supply the information will cause the NLRB to decline to invoke its processes.

RECEIVED
AUG 1 8 2014
NLRB Region 27

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KINGS SOOPERS, INC. Charged Party and **WENDY GEASLIN** Charging Party	**Case 27-CA-129598**

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 19, 2014, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221

August 19, 2014
Date

Monika Kurschen, Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(f)

EXHIBIT NO. GC-1f RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Wendy Geaslin, an Individual (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that KING SOOPERS, INC. (Respondent) has violated the Act as described below.

1.

(a) The charge in this proceeding was filed by the Charging Party on May 29, 2014, and a copy was served on Respondent by First-Class Mail on May 30, 2014.

GENERAL COUNSEL'S EXHIBIT NO. 1(g)

EXHIBIT NO. 6C-16 RECEIVED ✓ REJECTED

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 1 DATE: 4/11/15 REPORTER: KA

(b) The first amended charge in this proceeding was filed by the Charging Party on August 18, 2014, and a copy was served on Respondent by First-Class Mail on August 19, 2014.

2.

(a) At all material times, Respondent has been a Kansas corporation with multiple facilities and places of business in Colorado, including a facility located at 1331 Speer Blvd., Denver, Colorado 80204 (Respondent's Store #001), where it is engaged in the business of operating retail grocery stores.

(b) In conducting its operations during the calendar year ending December 31, 2013, Respondent derived gross revenues in excess of $500,000.

(c) During the calendar year ending December 31, 2013, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at its Colorado facilities goods valued in excess of $5,000 directly from points outside the State of Colorado.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3.

At all material times, the United Food and Commercial Workers Union, Local 7 (Union), has been a labor organization within the meaning of Section 2(5) of the Act.

4.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Theresa Pelo	–	Store Manager
Lisa Pazarella	–	Assistant Store Manager
Ken Aragon	–	Human Resources Manager
Ruxandra Barbos	–	Manager

5.

(a) At all material times, Respondent and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Respondent at Respondent's stores located in Denver, Colorado, including Respondent's Store #001.

(b) About May 9, 2014, the Charging Party, an employee working in Respondent's Store #001 at her designated assignment in the Starbucks, claimed the right to take a lunch break and questioned whether her assignment included bagging groceries.

(c) The claim of the Charging Party described above in paragraph 5(b) relates to the collective-bargaining agreement described above in paragraph 5(a).

(d) About May 9, 2014, Respondent suspended the Charging Party.

(e) Respondent engaged in the conduct described above in paragraph 5(d) because the Charging Party engaged in the activity described above in paragraph 5(b), and to discourage employees from engaging in these or other concerted activities.

6.

(a) About May 14, 2014 Respondent, by Theresa Pelo, suspended the Charging Party.

(b) About May 21, 2014 Respondent, by Theresa Pelo, discharged the Charging Party.

(c) Respondent engaged in the conduct described above in paragraphs (a) and (b) because the Charging Party assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

7.

By the conduct described above in paragraphs 5(d), 6(a) and (b), Respondent has been discriminating in regard to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 14, 2014, or postmarked on or before November 13, 2014**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the

other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on Wednesday, January 21, 2015, starting at 9:00 a.m., at Hearing Room, National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, Colorado 80294, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Denver, Colorado this 31st day of October, 2014.

Wanda P. Jones

WANDA PATE JONES
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on , I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

STEPHANIE BOUKNIGHT KING SOOPERS 65 TEJON ST DENVER, CO 80223-1221	**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**
WENDY GEASLIN 4323 EXCURSION DR COLORADO SPRINGS, CO 80911	**CERTIFIED MAIL**

Date

Georgette Maldonado, Designated Agent of NLRB
Name

/s/Georgette Maldonado
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(h)

GC-1h

EXHIBIT NO._____ RECEIVED ✓ REJECTED_____

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES 2 DATE: 8/11/15 REPORTER: KH

ERRATUM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on October 31, 2014, I served the above-entitled document(s) by **certified or regular mail,** as noted below, upon the following persons, addressed to them at the following addresses:

STEPHANIE BOUKNIGHT
KING SOOPERS
65 TEJON ST
DENVER, CO 80223-1221

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

WENDY GEASLIN
4323 EXCURSION DR
COLORADO SPRINGS, CO 80911

CERTIFIED MAIL

October 31, 2014
Date

Georgette Maldonado, Designated Agent of NLRB
Name

/s/Georgette Maldonado
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(i)

EXHIBIT NO. GC-1i RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER:

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

ERRATUM

On October 31, 2014, a Complaint and Notice of Hearing issued in the above case. An undated service sheet was attached to the Complaint and Notice of Hearing. Attached hereto is a corrected dated copy of the service sheet. Please substitute the undated service sheet with the attached corrected dated copy of the service sheet.

Dated at Denver, Colorado, this 4th day of November, 2014.

Wanda Pate Jones

WANDA PATE JONES
REGIONAL
DIRECTOR
NATIONAL LABOR RELATIONS
BOARD REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Attachment

GENERAL COUNSEL'S EXHIBIT NO. 1 (j)

EXHIBIT NO. 66-15 RECEIVED ✓ REJECTED

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

ANSWER TO COMPLAINT AND NOTICE OF HEARING

King Soopers, Inc. ("King Soopers" or "Respondent") by and through its attorneys at Sherman & Howard L.L.C. and pursuant to Section 102.21 of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby Answers and otherwise responds to the Complaint and Notice of Hearing ("Complaint") as follows:

1.

(a) Respondent admits the allegations set forth in Paragraph 1(a) of the Complaint.

(b) Respondent admits the allegations set forth in Paragraph 1(b) of the Complaint.

2.

(a) Respondent admits it is engaged in the business of operating retail grocery stores and that it has multiple facilities and places of business in Colorado, including the facility located at 1331 Speer Blvd., Denver, Colorado, 80204, but denies that Respondent has been a Kansas corporation.

(b) Respondent admits the allegations set forth in Paragraph 2(b) of the Complaint.

(c) Respondent admits the allegations set forth in Paragraph 2(c) of the Complaint.

GENERAL COUNSEL'S EXHIBIT NO. 1 (k)

(d) Respondent admits the allegations set forth in Paragraph 2(d) of the Complaint.

3.

Respondent admits the allegations set forth in Paragraph 3 of the Complaint. Respondent denies UFCW Local 7 is a party in interest or a proper party to this matter.

4.

Respondent admits the individuals set forth in Paragraph 4 of the Complaint held the positions set forth opposite their respective names. Respondent admits Pelo, Pazarella, and Barbos are supervisors or agents of Respondent. Respondent denies Aragon is a supervisor within the meaning of Section 2(11) of the Act or an agent of Respondent within the meaning of Section 2(13) of the Act.

5.

(a) Respondent admits it and UFCW Local 7 have maintained, at all material times, a collective bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Respondent at Respondent's stores located in Denver, Colorado, including Respondent's Store No. 001. Respondent denies the remaining allegations in Paragraph 5(a).

(b) Respondent denies the allegations set forth in Paragraph 5(b) of the Complaint.

(c) Respondent denies the allegations set forth in Paragraph 5(c) of the Complaint. Respondent affirmatively states that Charging Party's allegations are subject to the grievance process under the applicable collective bargaining agreement and that UFCW Local 7 withdrew its grievance regarding this matter as having no merit.

(d) Respondent admits the allegations set forth in Paragraph 5(d) of the Complaint.

(e) Respondent denies the allegations set forth in Paragraph 5(e) of the Complaint.

GC-1K

EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____

CASE NO. 24-CR 129598 CASE NAME: King

NO. OF PAGES: 6 DATE: 8/11/15 REPORTER: [illegible]

6.

(a) Respondent admits Charging Party was suspended on or about May 15, 2014 pending an investigation. Respondent denies the remaining allegations in Paragraph 6(a).

(b) Respondent admits Charging party was discharged for her repeated misconduct. Respondent denies the remaining allegations in Paragraph 6(b).

(c) Respondent denies the allegations set forth in Paragraph 6(c) of the Complaint.

7.

Respondent denies the allegations set forth in Paragraph 7 of the Complaint.

8.

Respondent denies the allegations set forth in Paragraph 8 of the Complaint.

9.

Respondent denies all allegations not specifically admitted herein.

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

Respondent's actions were taken for legitimate, non-discriminatory reasons.

THIRD SEPARATE DEFENSE

Respondent had a good faith basis to believe Charging Party engaged in misconduct.

FOURTH SEPARATE DEFENSE

This matter and its resolution should be deferred to the grievance and arbitration process under the applicable collective bargaining agreement.

FIFTH SEPARATE DEFENSE

This matter is barred by the doctrine of collateral estoppel.

SIXTH SEPARATE DEFENSE

Respondent would have taken the same actions against the Charging Party in the absence of any alleged union activities and/or concerted activities.

SEVENTH SEPARATE DEFENSE

The Complaint is barred by the doctrine of waiver.

EIGHTH SEPARATE DEFENSE

Charging Party's behavior caused her to lose the protections of the National Labor Relations Act.

NINTH SEPARATE DEFENSE

Charging Party's conduct was neither protected nor concerted under the National Labor Relations Act.

Respectfully submitted this 25th day of November, 2014.

Raymond M. Deeny
SHERMAN & HOWARD L.L.C.
90 South Cascade, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440

Attorneys for Respondent

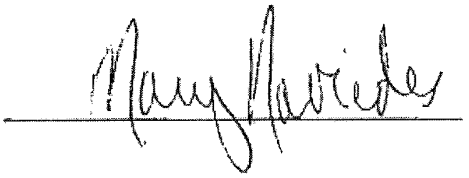
CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2014, a true and correct copy of the foregoing **ANSWER TO COMPLAINT AND NOTICE OF HEARING** was filed addressed to the following:

Wanda Pate Jones (E-File)
Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Isabel Saveland (Via Email)
Field Attorney
National Labor Relations Board, Region 27
600 17th St., 7th Floor North Tower
Denver, CO 80202

Wendy Geaslin (via U.S. Mail)
4323 Excursion Dr.
Colorado Springs, CO 80911-3643



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

MOTION TO RESCHEDULE HEARING

King Soopers, Inc. ("King Soopers" or "Respondent") by and through its attorneys at Sherman & Howard L.L.C. and pursuant to Sections 102.16 and 102.24(a) of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby files this Motion to Reschedule Hearing and, in support thereof, states as follows:

1. This matter is currently set for a one-day hearing on Wednesday, January 21, 2015.

2. On January 8, 2015, the parties had a pre-trial conference call with ALJ Montemayor in this matter. During that conference call, Board Field Attorney Isabel Saveland suggested that this matter would require more than one day to complete. The parties discussed scheduling a second day of hearing for Thursday, January 22, 2015 and undersigned counsel indicated he was available on that date.

3. Unfortunately, however, undersigned counsel misspoke during the telephone conference and he is, in fact, not available for hearing on January 22, 2015. Undersigned counsel currently has a mandatory conciliation with the Colorado Civil Rights Division that

GENERAL COUNSEL'S EXHIBIT NO. 1(l)

cannot be rescheduled. Immediately upon realizing his unavailability, undersigned counsel emailed the parties to inform them of his mistake.

4. Because undersigned counsel is unavailable for hearing on January 22, 2015, and two days will be necessary to complete the hearing, King Soopers moves to reschedule the hearing.

5. King Soopers has attempted to reschedule the hearing with cooperation from Ms. Saveland, but the alternative dates Ms. Saveland has provided do not work for all participants. King Soopers would like to reschedule this matter as promptly as possible.

Respectfully submitted this 8th day of January, 2015.

Raymond M. Deeny
SHERMAN & HOWARD L.L.C.
90 South Cascade, Suite 1500
Colorado Springs, CO 80903
Telephone (719) 475-2440
rdeeny@shermanhoward.com

Attorneys for Respondent

GC-12
EXHIBIT NO. ✓ REJECTED
27-CA
CASE NO. 129598 CASE NAME King
NO. OF PAGES 3 DATE 8/11/15 REPORTER KA

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2014, a true and correct copy of the foregoing **MOTION TO RESCHEDULE HEARING** was electronically filed with the Board and the Division of Judges and emailed to the following:

Administrative Law Judge Montemayor
NLRB Division of Judges San Francisco

Wanda Pate Jones (E-File)
Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Isabel Saveland (Via Email)
Field Attorney
National Labor Relations Board, Region 27
600 17th St., 7th Floor North Tower
Denver, CO 80202

Wendy Geaslin (via U.S. Mail)
4323 Excursion Dr.
Colorado Springs, CO 80911-3643

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

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

ORDER TO SHOW CAUSE

All parties are hereby advised to show cause no later than noon, **Tuesday, January 13, 2015,** to file a response as to why Respondent Counsel's motion to reschedule hearing should not be granted.

SO ORDERED.

Date: January 9, 2015, San Francisco, California.

Associate Chief
Administrative Law Judge

Served by facsimile upon the following:

For the General Counsel:
Isabel C Saveland, Esq.
NLRB- Region 27
Fax: 303-844-6249

For the Respondent:
Raymond M. Deeny, Esq.
Sherman & Howard, LLC
Fax: 719-635-4576

GENERAL COUNSEL'S EXHIBIT NO. 1(m)

** JOB STATUS REPORT ** AS OF JAN 09 2015 0:15 PAGE. 01

NLRB-SAN FRANCISCO

JOB #711

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	1/09	10:12	913038446249	EC--S	00' 08"	001	OK
002		10:13	917196354576	G3--S	01' 07"	001	OK

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

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

ORDER TO SHOW CAUSE

All parties are hereby advised to show cause no later than noon, **Tuesday, January 13, 2015**, to file a response as to why Respondent Counsel's motion to reschedule hearing should not be granted.

SO ORDERED.

Date: January 9, 2015, San Francisco, California.

Associate Chief
Administrative Law Judge

Served by facsimile upon the following:

For the General Counsel:
Isabel C Saveland, Esq.
NLRB- Region 27
Fax: 303-844-6249

For the Respondent:
Raymond M. Deeny, Esq.
Sherman & Howard, LLC
Fax: 719-635-4576

EXHIBIT NO. GC-1M RECEIVED ✓ REJECTED
CASE NO. 27-CA-129598 CASE NAME: King
NO. OF PAGES: 2 DATE: 8/11/15 REPORTER:

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

RESPONSE TO ORDER TO SHOW CAUSE and GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO RESCHEDULE HEARING

COMES NOW, Isabel C. Saveland, Counsel for the General Counsel, and submits this Opposition to Respondent's Motion to Reschedule Hearing. Counsel for the General Counsel requests that Respondent's Motion to Reschedule Hearing be denied for the following reasons:

1.

On October 31, 2014, a Complaint and Notice of Hearing (Complaint) issued in the above-captioned case. The Complaint alleges that Respondent King Soopers Inc., (Respondent) has committed a number of unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act). The trial in this case was set to commence on January 21, 2015.

GENERAL COUNSEL'S EXHIBIT NO. 1(m)

EXHIBIT NO. 26-IN RECEIVED ✓ REJECTED

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 5 DATE: 6/12/15 REPORTER: KS

2.

On January 8, 2015 Respondent filed a Motion to Reschedule Hearing in this matter from January 21, 2015 citing that Respondent's attorney is unavailable for a second day of hearing. Respondent does not suggest alternative dates of availability. Respondent's Motion incorrectly states that the hearing was originally set for a "one-day hearing." The text of the Notice of Hearing from October 31, 2014 reads, "Please take notice that on Wednesday, January 21, 2015 starting at 9:00am....and *on consecutive days thereafter until concluded,* a hearing will be conducted..." (emphasis added).

3.

On January 8, 2015, during the pre-trial conference call with Judge Montemayor, Counsel for the General Counsel represented that the General Counsel's case would last less than one day including any cross examination by Respondent. Respondent's counsel indicated that he would need additional time to put on his own witnesses. Thus, the parties agreed that the trial would last at least two days.

4.

Shortly after the above-mentioned conference call, Respondent informed Counsel for the General Counsel that he was unavailable for hearing on January 22, 2015. Counsel for the General Counsel stated that she could not agree to a lengthy postponement. Respondent's counsel suggested he was available for a two-day trial the week of January 26th and Counsel for the General Counsel stated that she would not object to such a short postponement. However, the Court's docket was unable to accommodate the compromise on such short notice.

5.

On January 9, 2015, Associate Chief Administrative Law Judge Gerald M. Etchingham issued an Order to Show Cause advising the parties to show cause no later than noon, Tuesday, January 13, 2015, as to why Respondent's January 8 Motion should not be granted.

6.

Respondent has failed to establish in its January 8 Motion that there is good cause for the hearing date to be rescheduled. As discussed above, Respondent had notice on October 31, 2014 that the hearing in this matter would take place on January 21, 2015. However, Respondent did not file its initial Motion to Reschedule Hearing until January 8, 2014, over two months after the issuance of the complaint. Counsel for the General Counsel asserts that the above-captioned case is likely to succeed on the merits at hearing. This charge concerns Respondent's suspension and discharge of the Charging Party in May of 2014. Thus, back pay is accruing and despite diligent efforts, the Charging Party has been unable to procure employment since she was discharged by Respondent. As a result of her inability to secure employment she is facing serious financial hardship and had to move to Colorado Springs, CO to live with a family member since she cannot afford to pay for a place to live.

7.

As stated above, the Complaint alleges the unlawful suspension and discharge of the Charging Party by Respondent. The matters set for hearing are straightforward factual matters and do not present any novel or complex legal issues. Further, the

Respondent failed to state his availability for a postponement; accordingly, it is reasonable for the Judge to deny the Respondent's Motion. **Franks Flower Express**, 219 NLRB 149, 149–150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976) (not unreasonable to deny when trial neither complicated or lengthy); **Wittek Industries**, 313 NLRB 579, 579 (1993) (not unreasonable to deny when, in part, no alternative trial date proposed).

CONCLUSION

Based upon the foregoing, Counsel for the General Counsel requests that Respondent's January 8 Motion to Reschedule Hearing be denied. Counsel for the General Counsel recognizes that another case is set for hearing on January 21, 2015; however, that case is in the process of settlement. Accordingly, if Your Honor is inclined to grant the Respondent's Motion to Reschedule Hearing, Counsel for the General Counsel requests that the hearing be rescheduled as promptly as possible.

Respectfully submitted this 13h day of January 2015.

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board, Region 27
Byron Rogers Federal Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Cases 27--CA-129598**

WENDY GEASLIN, AN INDIVIDUAL

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO ORDER TO SHOW CAUSE AND OPPOSITION TO MOTION TO RESCHEDULE HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **January 13, 2015,** I served the above-entitled document(s) by **first class mail** and **email** upon the following persons, addressed to them at the following addresses:

Honorable Gerald Ethchingham
Chief Judge
Administrative Law Judge
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103-1779

E-FILED at: www.nlrb.gov with the Division of Judges

Email

Raymond M. Deeny, Attorney
Sherman & Howard, LLC
90 S Cascade Ave
STE 1500
Colorado Springs, CO 80903-1639
rdeeny@shermanhoward.com

Email

STEPHANIE BOUKNIGHT
King Soopers
65 Tejon St
Denver, CO 80223-1221
stephanie.bouknight@kingsoopers.com

Wendy Geaslin
4323 Excursion Dr
Colorado Springs, CO 80911

First Class Mail

GENERAL COUNSEL'S EXHIBIT NO. 1 (o)

EXHIBIT NO. GC-10 RECEIVED ✓ REJECTED

CASE NO. 22-CA-129598 CASE NAME: King

NO. OF PAGES: 3 DATE: 8/11/15 REPORTER: KA

January 15, 2015

Date

Isabel C. Saveland, Counsel for the General Counsel

Name

Signature

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KING SOOPERS, INC.

and

Case 27-CA-129598

WENDY GEASLIN, an Individual

ORDER DENYING RESPONDENT'S MOTION TO RESCHEDULE 1/21/15 HEARING

In May 2014, the first charge in this matter was filed by the Charging Party. The complaint in this case issued in October 31, 2014 noticing a hearing in Denver, Colorado, commencing on January 21, 2015, and continuing on consecutive days thereafter until concluded. The Complaint alleges that Respondent King Soopers Inc., (Respondent) has committed a number of unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act).

On January 8, 2015, less than 2 weeks before the hearing in this case, Respondent filed a Motion to Reschedule Hearing (Motion) seeking to postpone trial to a subsequent date uncertain because Respondent's counsel was mistaken about his being available for a second day of hearing on January 22, 2015 as represented to the parties and ALJ in this case on January 8, 2015 in a telephone status conference. Respondent's counsel says that he cannot attend a second day of hearing on January 22, 2015 because he apparently "has a mandatory conciliation with the Colorado Civil Rights Division that cannot be rescheduled." The Motion does not disclose how long this conflicting matter is estimated to take, whether Respondent's counsel is available on Friday, January 23, 2015 to finish this hearing, nor does the Motion put forth any future dates that work for Respondent's counsel.

On January 9, 2015, I issued an Order to Show Cause (OSC) giving the parties until noon, January 13, 2015, to file any opposition to the Motion.

On January 13, 2015, before noon, General Counsel (GC) filed its opposition to the Motion (GC Opposition) which argues that the Motion should be denied for failure to show good cause as: (1) Respondent's Motion incorrectly states that the hearing was originally set for a "one-day hearing" but the text of the Notice of Hearing from October 31, 2014 reads, "Please take notice that on Wednesday, January 21, 2015 starting at 9:00am....and *on consecutive days thereafter until concluded*, a hearing will be conducted..." (emphasis added); (2) This charge concerns Respondent's suspension and discharge of the Charging Party in May of 2014 and thus, back pay is accruing and despite diligent efforts, the Charging Party has been unable to procure employment since she was discharged by Respondent and as a result of her inability to secure employment she is facing serious financial hardship and had to move to Colorado Springs, CO to live with a family member since she cannot afford to pay for a place to live; and (3) the matters set for hearing are straightforward factual matters and do not present any novel or

GENERAL COUNSEL'S EXHIBIT NO. 1 (P)

EXHIBIT NO. GC-18 RECEIVED ✓ REJECTED

CASE NO. 22-CA-129598 CASE NAME: King

NO. OF PAGES: 4 DATE 8/9/15 REPORTER: KJ

complex legal issues and the Respondent failed to state his availability for a postponement; accordingly, it is reasonable for the Judge to deny the Respondent's Motion. *Franks Flower Express*, 219 NLRB 149, 149-150 (1975), *enfd. mem.* 529 F.2d 520 (5th Cir. 1976) (not unreasonable to deny when trial neither complicated or lengthy); *Wittek Industries*, 313 NLRB 579, 579 (1993) (not unreasonable to deny when, in part, no alternative trial date proposed).

Having fully considered the Motion, I find that relying on the cases cited by the General Counsel, good cause has not been shown to grant Respondent's Motion under the current circumstances. In addition, I find that the Motion is untimely filed as the January 21, 2015 trial date has been in effect more than 2 months before the Motion was filed less than 2 weeks before hearing. Had the Motion been filed in November or early December of last year, I may have been able to move it to the week of January 26 which week is fully booked and currently unavailable. I further find that the Motion is improperly indefinite as to how long the conflicting conciliation matter will last and as to what future dates Respondent's counsel is available. The Motion is also denied because as pointed out by the GC above, the Notice of Hearing issued on 10/31/14 specifically provides that trial in this case begins on Wednesday, January 21, 2015, and continues "on consecutive days thereafter until concluded." The hearing in this matter has had a 2-day estimate since it was placed on my docket and Respondent's counsel has had ample time to re-arrange his schedule to attend the 2-day hearing in this garden variety non-complex discharge matter. Moreover, the charge in this case has existed for over 7 months and Respondent's counsel has had more than 2 and one-half months to arrange his schedule to attend the hearing in this case. As a result, the Respondent's Motion to Reschedule Hearing is **DENIED**. The hearing in this case shall go forward as scheduled on January 21, 2015 as previously noticed, and on consecutive days thereafter until concluded.

Dated: January 15, 2015

Gerald M. Etchingham,
Associate Chief
Administrative Law Judge

Served by facsimile upon the following:

For the General Counsel:
Isabel C Saveland, Esq.
NLRB- Region 27
Fax: 303-844-6249

For the Respondent:
Raymond M. Deeny, Esq.
Sherman & Howard, LLC
Fax: 719-635-4576

** TOTAL PAGE.02 **

NATIONAL LABOR
RELATIONS BOARD
REGION 27

2015 JAN 15 PM 12: 32

DENVER, CO 80294

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

ORDER POSTPONING HEARING

A Complaint and Notice of Hearing in this case issued on October 31, 2014. The hearing in this matter was set to begin on January 21, 2015. Due to an unforeseen medical emergency, a witness is unavailable to testify at the hearing.

IT IS HEREBY ORDERED that the Hearing in this matter, be, and it hereby is, postponed pending the availability of all parties to this matter and the Court's docket.

Dated at Denver, Colorado this 20th day of January, 2015.

Wanda P. Jones

(SEAL)

WANDA P. JONES
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294

GENERAL COUNSEL'S EXHIBIT NO. 1(g)

6C-19

EXHIBIT NO._____ RECEIVED ✓ REJECTED_____

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER POSTPONING HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 20, 2015, I served the above-entitled document(s) by **first class mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221

Raymond M. Deeny , Attorney
Sherman & Howard, LLC
90 S Cascade Ave
STE 1500
Colorado Springs, CO 80903-1639

Jonathon Watson , Attorney
Sherman & Howard LLC
633 17th St Ste 3000
Denver, CO 80202

Wendy Geaslin
4323 Excursion Dr
Colorado Springs, CO 80911

1/20/15
Date

CARLOS PALAFOX,
Designated Agent of NLRB
Name

/s/ CARLOS PALAFOX
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(n)

GC-15

EXHIBIT NO._____ RECEIVED ✓ REJECTED_____

CASE NO. 77-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/14/15 REPORTER: KD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Case 27-CA-129598

Wendy Geaslin, an Individual

ORDER RESCHEDULING HEARING

A Complaint and Notice of Hearing in issued in Case 27-CA-129598 on October 31, 2014. The hearing in this matter was scheduled for January 21, 2015. On January 20, 2015, the hearing was postponed due to the unavailability of a witness.

IT IS HEREBY ORDERED THAT on Tuesday, August 11, 2015 at 9:00 a.m., and on consecutive days thereafter until concluded, a hearing will be conducted in Denver, Colorado at the National Labor Relations Board, Region 27, Hearing Room, 13th Floor, Suite 13-103, Byron Rogers Federal Building, 1961 Stout Street, Denver, Colorado 80294 before an administrative law judge of the National Labor Relations Board.

Dated at Denver, Colorado this 20th day of May, 2015.

(SEAL)

/s/ Kelly A. Selvidge
KELLY A. SELVIDGE
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294

GENERAL COUNSEL'S EXHIBIT NO. 1(s)

EXHIBIT NO. 6C-15 RECEIVED ✓ REJECTED

CASE NO. 27-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER RESCHEDULING HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **May 20, 2015,** I served the above-entitled document(s) by **first class mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221

Raymond M. Deeny , Attorney
Sherman & Howard, LLC
90 S Cascade Ave
STE 1500
Colorado Springs, CO 80903-1639

Jonathon Watson , Attorney
Sherman & Howard LLC
300 12th Street, S.W.
Washington, DC 20407

Wendy Geaslin
1255 Ogden Street
Apt 106
Denver, CO 80218

May 20, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(t)

EXHIBIT NO. 6C-1+ RECEIVED ✓ REJECTED

CASE NO. 27-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/4/15 REPORTER: KA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

ORDER DENYING MOTION TO RECHEDULE HEARING

---

1. A Complaint and Notice of Hearing in this case issued on October 31, 2014. On January 20, 2015, the hearing in this matter was postponed due to the unavailability of a witness.

2. On May 8, 2015, Respondent requested that the hearing in this matter be set for August 11, 2015. On May 11, 2015, Counsel for the General Counsel asked Respondent's counsel if he would agree to an earlier hearing date in June or July. Respondent's counsel stated that he was unavailable for a hearing on any other date than August 11, 2015.

3. On May 20, 2015, an Order Rescheduling Hearing issued setting the hearing In this matter to commence on August 11, 2015 to accommodate Respondent counsel's schedule.

4. On May 29, 2015, Respondent filed a Motion to Reschedule Hearing requesting that the hearing be rescheduled from August 11, 2015 to July 20, 21, or 22, 2015 due to the unavailability of a witness.

GENERAL COUNSEL'S EXHIBIT NO. 1 (ii)

5. Counsel for the General Counsel was previously scheduled to be on leave and out of the country the week of July 20, 2015.

6. On June 3, 2015, Respondent's counsel informed Counsel for the General Counsel that Respondent is unavailable for a hearing on any other date in June, July or during the first week of August.

7. As discussed above, on May 20, 2015, an Order Rescheduling Hearing issued setting the hearing in this matter to commence on August 11, 2015 to accommodate Respondent's schedule and at its request. In these circumstances, where Respondent agreed to schedule the hearing on August 11, 2015, I find that it has not shown good cause for granting its request to reschedule the hearing. Furthermore, the rescheduling of this unfair labor practice proceeding would unnecessarily delay the issuance of a decision by an Administrative Law Judge.

IT IS HEREBY ORDERED, pursuant to Section 102.16(b) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, that Respondent's Motion to Reschedule Hearing in this matter, be denied.

Dated at Denver, Colorado this 4th day of June, 2015.

(SEAL)

LETICIA PEÑA
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294

EXHIBIT NO. GC-1a RECEIVED ✓ REJECTED

CASE NO. 22-CA-129598 CASE NAME: King

NO. OF PAGES: 3 DATE: 8/11/15 REPORTER: KA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER DENYING MOTION TO RESCHEDULE HEARING

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **June 4, 2015,** I served the above-entitled document(s) by **first class mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221

Raymond M. Deeny , Attorney
Sherman & Howard, LLC
90 S Cascade Ave
Ste 1500
Colorado Springs, CO 80903-1639

Jonathon Watson , Attorney
Sherman & Howard LLC
3600 Briarpark Drive
Houston, TX 77042

Wendy Geaslin
1255 Ogden Street
Apt 106
Denver, CO 80218

June 4, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen

GENERAL COUNSEL'S EXHIBIT NO. 1(v)

6C-1V

EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____

CASE NO. 22-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

PETITION TO REVOKE SUBPOENA DUCES TECUM

King Soopers, Inc. ("King Soopers" or "Respondent") by and through its attorneys at Sherman & Howard L.L.C. and pursuant to Sections 102.31 and 102.66 of the Rules and Regulations of the National Labor Relations Board ("Board"), hereby petitions to revoke the General Counsel's Subpoena Duces Tecum, No. B-1-NBCVLN ("Subpoena," attached hereto as Exhibit A) and as grounds therefor, states as follows:

GENERAL OBJECTIONS

A. Respondent objects to the Subpoena insofar as it seeks information that is subject to the attorney-client and work product privileges. These privileges are recognized by the Board to the same extent they apply in practice under the Federal Rules of Civil Procedure. *See, e.g., NLRB Division of Judges Bench Book* § 8-420 (August 2010); *see also Patrick Cudahy, Inc.*, 288 NLRB 968, 969-971 (1988).

B. Respondent objects to the Subpoena insofar as it requests material that does not relate to any matter under consideration in the investigation. *See NLRB Division of Judges Bench Book* § 8-230 (August, 2010); *see also* Board's Rules and Regulations, Section 102.31(b);

GENERAL COUNSEL'S EXHIBIT NO. 1 (w-)

Beverly Health and Rehab. Servs., Inc., 332 NLRB 347, 369 (2000); *Brink's Inc.*, 281 NLRB 468, 468-469 (1986). A subpoena may be revoked on relevancy grounds if not limited to materials clearly pertinent to the case. *Champ Corp.*, 291 NLRB 803 (1988).

C. Respondent objects to the Subpoena insofar as it is overbroad and overly burdensome. *See Clinton Food 4 Less*, 288 NLRB 597, 618-619 (1988); *Brinks, Inc.*, 281 NLRB 468 (1986).

D. Respondent objects to the Subpoena insofar as it is so vague that a reasonable response cannot be framed. *See Gray v. Faulkner*, 148 F.R.D. 220 (N.D. Ind. 1992); Rule 102.31(b) (subpoena may be revoked for any reason sufficient in law).

E. Respondent objects to the Subpoena insofar as it is unreasonably cumulative and duplicative. The Board looks to the Federal Rules of Civil Procedure for guidance with respect to revoking a subpoena. *Brinks Inc.*, 281 NLRB 468, 468–469 (1986).

> Regarding the general scope of discovery, Federal Rules of Civil Procedure 26(b), inter alia, permits discovery of matters "not privileged"; "relevant to the subject matter involved in the pending action"; *but not "unreasonably cumulative or duplicative, or . . . obtainable from some other source that is more convenient, less burdensome, or less expensive."*

Id. at 469 (quoting Fed. R. Civ. P. 26(b) (emphasis added)).

F. Respondent objects to the Subpoena insofar as it seeks the production of documents that do not exist.

SPECIFIC GROUNDS FOR REVOCATION (BY PARAGRAPH)

1. Copies of all collective bargaining agreements, concerning Respondent's Employees' terms and conditions of employment, in effect between Respondent and UFCW Local 7 since January 1, 2014 until the present.

EXHIBIT NO. 6C-1W RECEIVED ✓ REJECTED
CASE NO. 27-CA-129598 CASE NAME: King
NO. OF PAGES: 6 DATE: 8/6/15 REPORTER: KH

SPRINGS/1515761.1

Respondent objects to Request 1 as overbroad and irrelevant. The allegations in the Complaint relate to an incident that occurred while Geaslin was employed by King Soopers in the Starbucks at Store No. 1. Comp., Exhibit B, para. 4(b). The terms and conditions of Geaslin's employment, therefore, were governed by the Meat Agreement between UFCW Local 7 and King Soopers. Thus, not all "all collective bargaining agreements" are relevant to this matter. Subject to, and without waiving these objections, responsive documents, to the extent they exist, will be provided at the commencement of the hearing.

2. Copies of all appendices, attachments, memoranda of agreement, letters of agreement or any other documents adding terms to or modifying terms of any collective bargaining agreements, concerning the Respondent's Employees' terms and conditions of employment, between Respondent and UFCW Local 7 since January 1, 2014 until the present.

Respondent objects to Request 2 as overbroad and irrelevant. Like with the collective bargaining agreements discussed above in Paragraph No. 1, not "all appendices, attachments, memoranda of agreement, letters of agreement or any other documents adding terms to or modifying terms of any collective bargaining agreement[]" are relevant to this matter. Subject to, and without waiving these objections, responsive documents, to the extent they exist, will be provided at the commencement of the hearing.

3. Copies of personnel pamphlets, handbooks, policies, rules, regulations, posted notices, and other documents referring to any disciplinary policy in effect for Respondent's Employees, during the period from January 1, 2014 through the present date.

Respondent objects to Request 3 as overbroad and irrelevant. The allegations in the Complaint concerning Geaslin's employment relate to the time period from May 9, 2014 through May 21, 2014. Comp., Exhibit B, paras. 5-6. Indeed, there are no allegations whatsoever concerning conduct occurring after May 21, 2014. Thus, all of the requested information involving either the time period prior to the relevant allegations in the Complaint or after

Geaslin's employment ended are irrelevant to the instant case. The Request is also overbroad and irrelevant as it requests pamphlets, handbooks, policies, rules, regulations, posted notices, and other documents of "any disciplinary policy." All disciplinary policies are not relevant to the instant case. Only those at issue to the allegations in the Complaint are relevant. Subject to, and without waiving these objections, responsive documents, to the extent they exist, will be provided at the commencement of the hearing.

4. Complete personnel file and records maintained by Respondent and/or any of its managers and supervisors including, but not limited to, copies of all verbal and written warnings, coachings, final warnings, suspensions, and all other forms of discipline, performance improvement plans, letters, notes, records of conversations, minutes of meetings, memoranda, evaluations, and documents regarding job performance, for Wendy Geaslin.

Respondent objects to Request 4 as vague, overbroad and irrelevant. Respondent cannot discern what is meant by "records" as "records" are distinguished from "personnel files." Moreover, the request for the "complete" personnel file and "complete" "records" is overbroad and irrelevant, as not all documents within the personnel file and any other alleged "records" are relevant to the allegations in the instant Complaint. For example, tax related documents, benefits-related documents, and medical documents are not relevant and should not have to be produced. The Counsel for the General Counsel's request for documents other than those related to the allegations in the Complaint is overbroad, burdensome, and designed to harass Respondent.

Respondent also objects to this Request insofar as it seeks materials protected by the attorney-client privilege and the attorney work product privilege. The request encompasses any "personnel" "records" including copies of "letters, notes, records of conversations, minutes of meetings, memoranda, evaluations, and documents regarding job performance" which may include any documents in the possession of Respondent's supervisors, managers, agents, or

attorneys related to Geaslin, which were created in anticipation of litigation and/or at the request of counsel for Respondent. Subject to, and without waiving these objections, responsive and non-privileged documents, to the extent they exist, will be provided at the commencement of the hearing.

5. Copies of documents, records, emails, letters, memoranda, notes of conversations, minutes of meeting, and any other materials related to Respondent's decision to terminate Wendy Geaslin.

Respondent objects to Request 5 insofar as it seeks information that is protected by the attorney-client privilege and attorney work product. Counsel for the General Counsel has defined "Respondent" to include "its partners, officers, directors, employees, agents, and attorneys." Exhibit A, p. 1. Because Respondent is defined to include its attorneys, the Request includes all information that is subject to the attorney-client and work product privileges. These documents will not be produced. Subject to, and without waiving these objections, responsive and non-privileged documents, to the extent they exist, will be provided at the commencement of the hearing.

WHEREFORE, Respondent requests that the Subpoena be revoked to the extent addressed herein.

Respectfully submitted this 14th day of July, 2015.

/s/ Raymond M. Deeny
Raymond M. Deeny
SHERMAN & HOWARD L.L.C.
90 South Cascade, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440
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SHERMAN & HOWARD L.L.C.
633 17th St., Suite 3000

Denver, CO 80202
(303) 299-8286
jwatson@shermanhoward.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the14th day of July, 2015, a true and correct copy of the foregoing **PETITION TO REVOKE SUBPOENA DUCES TECUM** was filed addressed to the following:

Kelly Selvidge (E-File)
Acting Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Isabel Saveland (Via Email)
Counsel for the General Counsel
National Labor Relations Board, Region 27
600 17th St., 7th Floor North Tower
Denver, CO 80202

Wendy Geaslin (via U.S. Mail)
4323 Excursion Dr.
Colorado Springs, CO 80911-3643

/s/ Cheryl D. Witt, Legal Secretary

FORM NLRB-31

Exhibit A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Keeper of the Records, King Soopers, Inc., 65 Tejon Street, Denver, CO 80223

As requested by Isabel C. Saveland, Counsel for the General Counsel

whose address is 1961 Stout Street, Suite 13-103 (Street) Denver (City) CO (State) 80294 (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board

at NLRB Hearing Room 13th Floor, 1961 Stout St, Suite 13-103

in the City of Denver, CO

on Tuesday, August 11, 2015 at 9:00 AM or any adjourned or rescheduled date to testify in King Soopers, Inc. 27-CA-129598 (Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT A

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-NBCVLN

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at ,

this 13thday of July 2015

Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

GENERAL COUNSEL'S EXHIBIT NO. 1 (x)

Case 27-CA-129598

B-1-NBCVLN

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

- ☐ by person
- ☐ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at

(Check method used.)

_____

_____

_____

on the named person on

_____

(Month, day, and year)

_____

(Name of person making service)

_____

(Official title, if any)

CERTIFICATION OF SERVICE

I certify that named person was in attendance as a witness at

_____

on

(Month, day or days, and year)

_____

(Name of person certifying)

_____

(Official title)

EXHIBIT NO. GC-1X RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME Kang

NO. OF PAGES 12 DATE: 8/4/15 REPORTER: KK

ATTACHMENT A

King Soopers, Inc.
27-CA-129598

The following definitions and instructions are to apply with respect to this subpoena:

A. All references to "Respondent" refer to King Soopers, Inc., and include its partners, officers, directors, employees, agents, and attorneys.

B. All references to "Respondent's Employees" refer to Respondent's employees working at Respondent's store located at 1331 Speer Blvd. in Denver, Colorado.

C. When used in this subpoena the word "document" or "documents" means all written, recorded, and graphic materials and all electronic data of every kind in the possession, custody, or control of the Respondent. The term "documents" includes electronic correspondence, drafts of documents, metadata, embedded, hidden and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems, and all duplicates of documents (whether or not identical) in the files of or in the files maintained on behalf of all directors, officers, managers, or other supervisory employees, duplicates of documents in all other files that are not identical duplicates of the originals, and duplicates of documents the originals of which are not in the possession, custody, or control of the Respondent. The term "documents" includes spreadsheets, as well as underlying cell formulae and other codes. The term "documents" also includes electronic mail messages and other documents and data stored in, or accessible through, computer or other information retrieval systems, such as personal computers, portable computers, workstations, minicomputers, personal data assistants, archival voice storage systems, group and collaborative tools, electronic messaging devices, portable or removable storage media, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of online or offline storage, whether on or off company premises.

D. The terms "concerning", "pertaining to", and "relating to" shall mean connected with, addressing, relating to, about, regarding, involving, discussing, describing, analyzing, and evaluating.

E. The words "each", "any", "every", and "all" shall include each of the other words.

F. The disjunctive "or" shall include the conjunctive "and"; and the conjunctive "and" shall include the disjunctive "or."

G. The singular of any term shall include the plural of that term, and the plural shall include the singular.

H. The present tense shall include the past tense and the past tense shall include the present tense.

I. The masculine shall include the feminine and the feminine shall include the masculine.

J. This subpoena is intended to cover all documents that are in Respondent's possession, custody or control, as well as those documents in the possession, custody or control of Respondent's present or former agents, attorneys, accountants, advisors, investigators, and any other persons or companies directly or indirectly employed by, or connected with Respondent.

K. Any copies of original documents that are different in any way from the original, whether by interlineations, receipt, stamp, notations, indication of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals.

L. Electronically stored information should be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. All spreadsheet and presentation files (e.g. Excel, PowerPoint) shall be produced in the unprocessed "as kept in the ordinary course of business" state (i.e., in native format). The file produced should maintain the integrity of all source, custodian, application, embedded and related file system metadata. Prior to any production of responsive data from a structured database (e.g., Oracle, SAP, SQL, MySQL, QuickBooks, etc.) or proprietary application (e.g., proprietary timekeeping, accounting, CRMs etc.), the producing party shall first provide the database dictionary and a list of all reports that can be generated from the structured database. The list of reports shall be provided in native Excel (.xls) format.

M. For any existing documents not produced in compliance with this subpoena, for any reason, identify and describe:

   a. The author;
   b. The recipient;
   c. The date of the original document;
   d. The subject matter of the document; and
   e. The reason for withholding the document.

N. For any requested documents that were at one time in existence or possession, but are no longer in existence or possession, identify and describe:

   a. The author;

b. The recipient;
c. The name of each person to whom the original or a copy was sent;
d. The date of the original document;
e. The subject matter of the document;
b. The request number to which it is responsive;
c. The date upon which it ceased to exist;
d. The circumstancos under which it ceased to exist; and
e. The identity of all persons having knowledge of the circumstances under which it ceased to exist.

O. In producing the documents required, please indicate the name of each person, agent and/or employee producing the demanded document, and the name of the custodian of each document.

P. Requested documents are to be produced in their entirety, without abbreviation, redaction or expurgation.

Q. All documents produced pursuant to this subpoena should be organized by the subpoena request paragraph that each document or set of documents is responsive to, and labels referring to that request paragraph should be affixed to each document or set of documents.

DOCUMENTS REQUESTED

1. Copies of all collective bargaining agreements, concerning Respondent's Employees' terms and conditions of employment, in effect between Respondent and UFCW Local 7 since January 1, 2014 until the present.

2. Copies of all appendices, attachments, memoranda of agreement, letters of agreement or any other documents adding terms to or modifying terms of any collective bargaining agreements, concerning the Respondent's Employees" terms and conditions of employment, between Respondent and UFCW Local 7 at since January 1, 2014 until the present.

3. Copies of personnel pamphlets, handbooks, policies, rules, regulations, posted notices, and other documents referring to any disciplinary policy in effect for Respondent's Employees, during the period from January 1, 2014 through the present date.

4. Complete personnel file and records maintained by Respondent and/or any of its managers and supervisors including, but not limited to, copies of all verbal and written warnings, coachings, final warnings, suspensions, and all other forms of

discipline, performance improvement plans, letters, notes, records of conversations, minutes of meetings, memoranda, evaluations, and documents regarding job performance, for Wendy Geaslin.

5. Copies of documents, records, emails, letters, memoranda, notes of conversations, minutes of meetings, and any other materials related to Respondent's decision to terminate Wendy Geaslin.

IN LIEU OF PROVIDING THE DOCUMENTS REQUESTED IN **PARAGRAPHS 1-5 ABOVE** IN PERSON, MAKE THE DOCUMENTS REQUESTED HEREIN AVAILABLE AT THE OFFICES OF THE NATIONAL LABOR RELATIONS BOARD, REGION 27, 1961 STOUT STREET, 13TH FLOOR SUITE 3, DENVER, COLORADO, TO AN AGENT OR AGENTS OF THE NATIONAL LABOR RELATIONS BOARD FOR HIS, HER OR THEIR INSPECTION, COPYING AND USE IN CONNECTION WITH THESE PROCEEDINGS **ON OR BEFORE August 11, 2015.**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

Exhibit B

KING SOOPERS, INC.

and Case 27-CA-129598

WENDY GEASLIN, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Wendy Geaslin, an Individual (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that KING SOOPERS, INC. (Respondent) has violated the Act as described below.

1.

(a) The charge in this proceeding was filed by the Charging Party on May 29, 2014, and a copy was served on Respondent by First-Class Mail on May 30, 2014.

GENERAL COUNSEL'S EXHIBIT NO. 1(y)

(b) The first amended charge in this proceeding was filed by the Charging Party on August 18, 2014, and a copy was served on Respondent by First-Class Mail on August 19, 2014.

2.

(a) At all material times, Respondent has been a Kansas corporation with multiple facilities and places of business in Colorado, including a facility located at 1331 Speer Blvd., Denver, Colorado 80204 (Respondent's Store #001), where it is engaged in the business of operating retail grocery stores.

(b) In conducting its operations during the calendar year ending December 31, 2013, Respondent derived gross revenues in excess of $500,000.

(c) During the calendar year ending December 31, 2013, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at its Colorado facilities goods valued in excess of $5,000 directly from points outside the State of Colorado.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3.

At all material times, the United Food and Commercial Workers Union, Local 7 (Union), has been a labor organization within the meaning of Section 2(5) of the Act.

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4.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Theresa Pelo	–	Store Manager
Lisa Pazarella	–	Assistant Store Manager
Ken Aragon	–	Human Resources Manager
Ruxandra Barbos	–	Manager

5.

(a) At all material times, Respondent and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Respondent at Respondent's stores located in Denver, Colorado, including Respondent's Store #001.

(b) About May 9, 2014, the Charging Party, an employee working in Respondent's Store #001 at her designated assignment in the Starbucks, claimed the right to take a lunch break and questioned whether her assignment included bagging groceries.

(c) The claim of the Charging Party described above in paragraph 5(b) relates to the collective-bargaining agreement described above in paragraph 5(a).

(d) About May 9, 2014, Respondent suspended the Charging Party.

(e) Respondent engaged in the conduct described above in paragraph 5(d) because the Charging Party engaged in the activity described above in paragraph 5(b), and to discourage employees from engaging in these or other concerted activities.

6.

(a) About May 14, 2014 Respondent, by Theresa Pelo, suspended the Charging Party.

(b) About May 21, 2014 Respondent, by Theresa Pelo, discharged the Charging Party.

(c) Respondent engaged in the conduct described above in paragraphs (a) and (b) because the Charging Party assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

7.

By the conduct described above in paragraphs 5(d), 6(a) and (b), Respondent has been discriminating in regard to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before November 14, 2014, or postmarked on or before November 13, 2014**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the

other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on Wednesday, January 21, 2015, starting at 9:00 a.m., at Hearing Room, National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, Colorado 80294, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Denver, Colorado this 31st day of October, 2014.

Wanda P. Jones

WANDA PATE JONES
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

KING SOOPERS, INC.

and Case No. 27-CA-129598

WENDY GEASLIN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO PETITION TO REVOKE SUBPOENA DUCES TECUM

Counsel for the General Counsel (General Counsel) hereby opposes the Petition to Revoke Subpoena Duces Tecum (Petition to Revoke), filed by King Soopers, Inc. (Respondent). As set forth below, the subpoena, *as modified herein*, seeks information relevant to the matter set for hearing and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the National Labor Relations Act (Act) and Section 102.31(b) of the Board's Rules and Regulations. In addition, Respondent has failed to establish any other legal basis for revoking the subpoena. The General Counsel respectfully requests that the Petition to Revoke be denied.

GENERAL COUNSEL'S EXHIBIT NO. 1(3)

I. BACKGROUND

The Regional Director for Region 27 issued a Complaint and Notice of Hearing in this matter on October 31, 2014. The Regional Director alleges, *inter alia*, that the Respondent has violated the Act by suspending and terminating employee Wendy Geaslin (Charging Party) because she engaged in protected and/or concerted activities. The Respondent filed its Answer to Complaint and Notice of Hearing (Answer) on November 25, 2014. The Respondent, in its Answer, denies that it suspended and terminated the Charging Party because of her concerted and/or protected activities.

On July 13, 2015, Counsel for the General Counsel served Subpoena Duces Tecum No. B-1-NBCVLN on the Respondent's Custodian of Records. (See Exhibit "A" – a copy of the Subpoena Duces Tecum). Respondent's Petition to Revoke was filed on July 14, 2015. (See Exhibit "B" – Respondent's Petition to Revoke).

II. MODIFICATIONS

Item 1 of the Subpoena Duces Tecum requests:

> Copies of all collective bargaining agreements, concerning Respondent's Employees' terms and conditions of employment, in effect between Respondent and UFCW Local 7 since January 1, 2014 until the present.

The Respondent objects to the production of this information as overbroad and irrelevant because the allegations in the Complaint only concerns the Charging Party, a former employee at Respondent's Store #1. Counsel for the General Counsel agrees to modify Item 1, to read:

> Copies of all collective bargaining agreements, concerning Respondent's Employees' terms and conditions of employment, in effect between Respondent and UFCW Local 7 since January 1, 2014 until June 1, 2014

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at *Respondent's Store #1* located at 1331 Speer Blvd. Denver, CO. (Emphasis added.)

Item 2 of the Subpoena Duces Tecum requests:

> Copies of all appendices, attachments, memoranda of agreement, letters of agreement or any other documents adding terms to or modifying terms of any collective bargaining agreements, concerning the Respondent's Employees" terms and conditions of employment, between Respondent and UFCW Local 7 since January 1, 2014 until the present.

The Respondent objects to the production of this information as overbroad and irrelevant because the allegations in the Complaint concern a former employee of Respondent's Store #1. Counsel for the General Counsel agrees to modify Item 2 to read:

> Copies of all appendices, attachments, memoranda of agreement, letters of agreement or any other documents adding terms to or modifying terms of any collective bargaining agreements, concerning the Respondent's Employees' terms and conditions of employment, between Respondent and UFCW Local 7 <u>at Respondent's Store #1</u> located at 1331 Speer Blvd, Denver, CO from January 1, 2014 <u>until June 1, 2015</u>. (Emphasis added.)

Item 3 of the Subpoena Duces Tecum requests:

> Copies of personnel pamphlets, handbooks, policies, rules, regulations, posted notices, and other documents referring to any disciplinary policy in effect for Respondent's Employees, during the period from January 1, 2014 through the present date.

The Respondent objects to the production of this information as overbroad and irrelevant because the Charging Party was suspended on May 9, 2014 and terminated on May 21, 2014. Counsel for the General Counsel agrees to modify Item 3 to read:

> Copies of personnel pamphlets, handbooks, policies, rules, regulations, posted notices, and other documents referring to any disciplinary policy in effect for Respondent's Employees, during the period from January 1, 2014 <u>through May 22, 2014</u>. (Emphasis added.)

Item 4 of the Subpoena Duces Tecum requests:

> Complete personnel file and records maintained by Respondent and/or any of its managers and supervisors including, but not limited to, copies of all verbal and written warnings, coachings, final warnings, suspensions, and all other forms of discipline, performance improvement plans, letters, notes, records of conversations, minutes of meetings, memoranda, evaluations, and documents regarding job performance, for Wendy Geaslin.

The Respondent objects to the production of this information as vague, overbroad, and irrelevant because Respondent cannot "discern what is meant by 'records' as 'records' are distinguished from 'personnel files.'" Respondent also objects that the request could cover documents protected by the work product and attorney client privileges. Counsel for the General Counsel agrees to modify Item 4 to read:

> Complete personnel file and records maintained by Respondent and/or any of its managers and supervisors including, but not limited to, copies of all verbal and written warnings, coachings, final warnings, suspensions, and all other forms of discipline, performance improvement plans, letters, notes, records of conversations, minutes of meetings, memoranda, evaluations, and documents regarding job performance, for Wendy Geaslin, <u>excluding tax documents, medical records, benefits related documents and any documents subject to attorney-client and work product privilege.</u> (Emphasis added.)

Item 5 of the Subpoena Duces Tecum requests:

> *Copies of documents, records, emails, letters, memoranda, notes of conversations, minutes of meetings, and any other materials related to Respondent's decision to terminate Wendy Geaslin.*

The Respondent objects to the production of this information because it may include documents protected by the attorney-client privilege and attorney work product. Counsel for the General Counsel agrees to modify Item 5 to read:

> Copies of documents, records, emails, letters, memoranda, notes of conversations, minutes of meetings, and any other materials related to Respondent's decision to terminate Wendy Geaslin, <u>excluding any documents subject to attorney client privilege and work product privilege</u>. (Emphasis added.)

III. THE BOARD'S SUBPOENA POWER IS BROAD AND WAS PROPERLY UTILIZED

Section 11(1) of the Act entitles the Board to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." NLRB v. American Medical Response, 438 F.3d 188 (2006)(quoting 29 U.S.C. § 161(1)). The Board's "power to subpoena is limited only by the requirement that the information sought must be relevant to the inquiry." NLRB v. Carolina Food Processsors, Inc., 81 F.3d 507, 511 (1996)(quoting Link v. NLRB, 330 F.2d 437, 440 (4th Cir. 1964)). The Board "need not even show probable cause to believe that the law has been violated." NLRB v. Frederick Cowan & Co., Inc., 522 F.2d 26, 28 (2d Cir. 1975). Evidence is relevant if it is not "plainly incompetent or irrelevant to any lawful purpose of the agency." Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). If the data requested by a Board subpoena relates to or touches the matter under investigation or in question, it must be enforced without preliminary inquiry to determine whether there is probable cause to believe that an asserted violation of law exists. Id.; Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

IV. THE DOCUMENTS REQUESTED ARE RELEVANT AND THE REQUEST IS REASONABLE

Respondent objects to the Subpoena Duces Tecum, on the grounds that the requests are overly broad, unduly burdensome, and seek irrelevant information. The primary issue is whether the documents are relevant. Since the documents are relevant, as set forth below, they must be produced. The broad subpoena powers granted to the Board in Section 11(1) of the Act only allows for revocation of the

subpoena on the basis of relevancy if the subpoena "does not relate to any matter under investigation, or any matter in question in such proceedings. . . ." 29 U.S.C. § 161(1). The Complaint alleges, *inter alia,* that Respondent suspended and terminated the Charging Party in violation of Section 8(a)(1) and (3) of the Act.

The General Counsel's theory is that the Charging Party was engaged in protected/concerted activities when she asked the Respondent's Store Manager whether she was entitled to a lunch break and whether bagging was one of her duties under the applicable collective-bargaining agreement. The General Counsel has alleged that the Respondent suspended the Charging Party for asking about her contractual rights and for her subsequent behavior during a grievance meeting. The Respondent in its answer denied that it unlawfully disciplined and terminated the Charging Party.

The General Counsel therefore is seeking documents to prove at trial whether the Charging Party had a reasonable basis to assert her contractual rights and to show that she was terminated for her behavior in a meeting with management and her union representative. The Subpoena Duces Tecum requests copies of Respondent's workplaces rules and policies, the applicable collective-bargaining agreement, as well as the personnel file for the Charging Party. This information is relevant and necessary to the General Counsel's case, since the Respondent could assert various reasons –not previously raised – for the termination of the Charging Party.

V. THE SUBPOENA DOES NOT SEEK PRIVILEGED DOCUMENTS

Counsel for the General Counsel's subpoena in no way demands exemption from well-established principles. Respondent filed its Petition to Revoke without consulting with Counsel for the General Counsel to clarify whether documents covered by the attorney-client privilege or work product privilege were requested. Counsel for the General Counsel would have stipulated that she was not seeking privileged documents if she had been contacted by Respondent's counsel. Nevertheless, the modifications herein make it abundantly clear that the General Counsel is not seeking such documents. The Board accepts the definition of attorney-client privilege as set forth in *US. v. United Shoe Machinery Corp.,* 89 F. Supp. 357, 358-359 (D. Mass 1950). *See, Patrick Cudahy, Inc.,* 288 NLRB 968, 969 n. 9 (1988). Under the *United Shoe Machinery* definition:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Accordingly, the attorney-client privilege prevents compelled disclosure of a document only if it constitutes a communication made in

confidence to an attorney by a client for the purpose of seeking or obtaining legal advice. *See Patrick Cudahy, supra,* at 969; *Sonat Marine,* 279 NLRB 100, 106 (1986).

Counsel for the General Counsel expects that the Respondent will withhold any responsive documents subject to the attorney-client privilege as observed by the Board. However, Counsel for the General Counsel also notes that the Supreme Court has held:

> The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. *Upjohn,* 449 U.S. at 395-396 *(quoting Philadelphia v. Westinghouse Elec. Corp.,* 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

The Board similarly has stated that "it is *communication* between attorney and client related to the giving of legal advice that is privileged—not simply documents that pass between them. Thus, nonprivileged documents--e.g., ordinary corporate records such as payroll and personnel records—cannot be swept within the privilege simply by being transmitted from client to attorney or vice versa." *Patrick Cudahy, supra* at 971 n. 13 (emphasis in original). Therefore, documents requested in Counsel for the General Counsel's subpoena cannot be shielded from disclosure under the attorney-client privilege if they were merely transmitted between the Respondent and its attorney.

The attorney work product doctrine, which is distinct from the attorney-client privilege, exists to protect disclosure of the lawyer's mental processes. *See Sonat Marine,* 279 NLRB at 106. The attorney work product doctrine extends only to documents prepared by or on behalf of an attorney for a client in anticipation of

litigation. *See Grand Jury Proceedings v. U.S.*, 156 F.3d 1038, 1042 (10th Cir. 1998); *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991). A party can prove that it created materials in anticipation of litigation only if it makes a substantial and significant showing that objective facts established that at the time it created the materials there was an identifiable resolve to litigate. *See, Coltec Industries, Inc. v. American Motorists Ins.*, 197 F.R.D. 368, 371 (N.D. Ill. 2000); *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (D. Cal. 1990). The "mere potential for litigation does not constitute a legitimate claim of confidentiality." *See Detroit Newspaper Agency*, 317 NLRB 1071, 1072-1073 (1995), citing *New England Telephone Co.*, 309 NLRB 196 (1992).

The plain language and terms of Counsel for the General Counsel's subpoena do not require (nor does it request) that Respondent produce any attorney work product under the definition accepted by the Board. Therefore, the Respondent has no grounds to request that the subpoena be revoked based on this privilege.

VI. THE SUBPOENA DOES NOT SEEK INFORMATION THAT IS NOT RELATED TO ANY MATTER UNDER CONSIDERATION AT HEARING

The broad subpoena powers granted to the Board in Section 11(1) of the Act only allows for revocation of the subpoena on the basis of relevancy if the subpoena "does not relate to any matter under investigation, or any matter in question in such proceedings. . . ." 29 U.S.C. § 161(1). In the subpoena, Counsel for the General Counsel seeks evidence regarding the suspension and termination of the Charging Party; this includes her terms and conditions of employment and personnel files including her disciplinary record(s). This evidence is relevant and material to the

Director's Complaint allegation that the Respondent suspended, disciplined, and terminated the Charging Party in retaliation for her Union and protected concerted activities.

VII. THE SUBPOENA IS NOT OVERBROAD, OPPRESSIVE AND OVERLY BURDENSOME

The subpoena seeks documents that are necessary for Counsel for the General Counsel to prove at trial that the Respondent unlawfully suspended the Charging Party and later terminated her in retaliation for her Union and protected concerted activities. Contrary to the Respondent's general and unsubstantiated assertion that the subpoena requests are overbroad, oppressive, and overly burdensome, the subpoena requests, as modified herein, are narrowly tailored to limit the scope of the documents sought. In addition, the mere volume of documents called for does not excuse compliance with the subpoena. Rather, there must be a showing that "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *NLRB v. American Medical Response,* 438 F.3d 188, 193 n.4 (2d Cir. 2006) (quoting *FTC v. Rockerfeller,* 591 F.2d 182, 190 (2d Cir. 1979)). See also *NLRB v. Carolina Food Processors*, supra, 81 F.3d at 513. The Respondent's mere assertion that the subpoena is overbroad, oppressive, and overly burdensome is insufficient to establish that compliance unduly disrupts or hinders its operations.

VIII. THE SUBPOENA IS NOT SO VAGUE THAT A REASONABLE RESPONSE CANNOT BE FRAMED

Contrary to the Respondent's general and unsubstantiated assertion that the subpoena requests are vague, Counsel for the General Counsel's subpoena requests as originally framed and as modified herein, are in fact narrowly tailored to the allegations in the charges. Specifically, Counsel for the General Counsel's subpoena requests documents related to the suspension, discipline, and termination of the Charging Party during the month of May 2014. Such specificity sufficiently limits the scope of the documents sought to those that are related to issues raised by the Complaint. As noted, and based on the authority cited immediately above, the mere volume of documents called for does not excuse compliance with the subpoena.

IX. THE SUBPOENA IS NOT UNREASONABLY CUMULATIVE AND DUPLICATIVE

All documents requested in the Subpoena Duces Tecum relate to Counsel for the General Counsel's burden of proof at trial and are central to proving that the Respondent has violated the Act by suspending and terminating the Charging Party in May 2014. The evidence sought is relevant and falls well within the guidelines set forth in Section 11(1) of the Act.

X. CONCLUSION

All documents requested in the Subpoena Duces Tecum, as modified herein, relate to the Regional Director's Complaint and Notice of Hearing and are central to proving the unlawful actions taken by the Respondent against the Charging Party. The

evidence sought is relevant and falls well within the guidelines set forth in Section 11(1) of the Act. Accordingly, the Respondent's Petition to Revoke the Subpoena Duces Tecum should be denied.

DATED AT Denver, Colorado this 16th day of July, 2015.

Respectfully submitted,

Isabel C. Saveland (LP)

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
1961 Stout Street, Suite 13-101
Denver, Colorado 80294
(303) 844-3551

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO PETITION TO REVOKE SUBPOENA DUCES TECUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 16, 2015,** I served the above-entitled document(s) by e-mail, and **first class mail** upon the following persons, addressed to them at the following addresses:

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
Solicitor@NLRB.gov
E-MAIL

StephaniE Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221
FIRST CLASS MAIL

Raymond M. Deeny , Attorney
Sherman & Howard, LLC
90 S Cascade Ave
Suite 1500
Colorado Springs, CO 80903-1639
FIRST CLASS MAIL

Jonathon Watson , Attorney
Sherman & Howard LLC
1 Robert Wood Johnson Place
New Brunswick, NJ 08901
FIRST CLASS MAIL

Wendy Geaslin
60 Broadway APT. 3
Denver, CO 80203-2790
FIRST CLASS MAIL

July 16, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. i (aa)

EXHIBIT NO. 6C-1aa RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

ORDER REFERRING PETITION TO REVOKE INVESTIGATIVE SUBPOENA DUCES TECUM

A Petition to Revoke Subpoena Duces Tecum No. B-1-NBCVLN having been filed with the Acting Regional Director FOR Region 27 on July 14, 2015 by counsel for the Respondent.

IT IS ORDERED, pursuant to Section 102.31(b) of the Board's Rules and Regulations, that the Petition is hereby referred to the San Francisco Division of Judges for ruling.

Dated: July 16, 2015

KELLY A. SELVIDGE
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

GENERAL COUNSEL'S EXHIBIT NO. 1(bb)

EXHIBIT NO. 6C-1bb RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: Kenny

NO. OF PAGES: 2 DATE: 3/11/15 REPORTER: KA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF Order Referring Petition to Revoke, Respondent's Petition to Revoke, and Counsel for the General Counsel's Opposition to Petition to Revoke Subpoena Duces Tecum

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 16, 2015,** I served the above-entitled document(s) by **E-File and E-mail** upon the following persons, addressed to them at the following addresses:

National Labor Relations Board
Executive Secretary
1015 Half Street SE
Washington, DC 20570
E-Filed

National Labor Relations Board
Division of Judges
901 Market, Suite 300
San Francisco, CA 94103
E-Filed

Raymond M. Deeny , Esq., Attorney
Sherman & Howard, LLC
90 S Cascade Ave
STE 1500
Colorado Springs, CO 80903-1639
rdceny@shermanhoward.com
E-Mail

GENERAL COUNSEL'S EXHIBIT NO. 1 (cc)

6L-1c ✓
EXHIBIT NO._____ RECEIVED_____ REJECTED_____
CASE NO. 27-CA 129598 CASE NAME: King
NO. OF PAGES: 3 DATE: 8/11/15 REPORTER: KJ

Jonathon Watson , Attorney
Sherman & Howard LLC
1 Robert Wood Johnson Place
New Brunswick, NJ 08901
jwatson@shermanhoward.com
E-Mail

July 16, 2015

Date

Monika Kurschen,
Designated Agent of NLRB

Name

/s/ Monika Kurschen

Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO PETITION TO REVOKE SUBPOENA DUCES TECUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **July 17, 2015,** I served the above-entitled document(s) by methods indicated below upon the following persons, addressed to them at the following addresses:

National Labor Relations Board
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E-Filed

National Labor Relations Board
Division of Judges
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E-Mail and First Class Mail

Raymond M. Deeny , Esq.
Sherman & Howard, LLC
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rdeeny@shermanhoward.com
E-Mail and First Class Mail

Stephanie Bouknight
King Soopers
65 Tejon Street
Denver, CO 80223-1221
First Class Mail

July 17, 2015
Date

Donna L. Brown,
Designated Agent of NLRB
Name

/s/ Donna L. Brown
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1 (dd)

EXHIBIT NO. GC-1dd RECEIVED ✓ REJECTED
CASE NO. 27-CA-129598 CASE NAME: King
NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

NOTICE OF INTENT TO AMEND COMPLAINT

PLEASE TAKE NOTICE that at the opening of the hearing on August 11, 2015, the undersigned Counsel for the General Counsel will move to amend the Complaint, in accordance with Section 102.17 of the Rules and Regulations of the National Labor Relations Board.

Counsel will move that the Complaint be amended by adding Paragraph 9 to read as follows:

9.

As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether

GENERAL COUNSEL'S EXHIBIT NO. 1(ee)

EXHIBIT NO. 6C lee RECEIVED ✓ REJECTED

CASE NO. 27-CA 129598 CASE NAME: King

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the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Denver, Colorado, this 6th day of August, 2015.

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
Byron Rodgers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER OF NOTICE OF INTENT TO AMEND COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 6, 2015,** I served the above-entitled document(s) by **e-mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221
e-mail
stephanie.bouknight@kingsoopers.com

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Jonathon Watson , Attorney
Sherman & Howard LLC
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e-mail
jwatson@shermanhoward.com

Wendy Geaslin
60 Broadway APT. 3
Denver, CO 80203-2790
e-mail
my3sons.wg@gmail.com

August 6, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1(ff)

EXHIBIT NO. GC-1ff RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: Veug

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and Case 27-CA-129598

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER OF NOTICE OF INTENT TO AMEND COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 6, 2015,** I served the above-entitled document(s) by **e-mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
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Raymond M. Deeny, Attorney
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rdeeny@shermanhoward.com

Jonathon Watson , Attorney
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Wendy Geaslin
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Denver, CO 80203-2790
e-mail
my3sons.wg@gmail.com
e-mail undeliverable mailed documents first class mail
on 8/6/15

August 6, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

GENERAL COUNSEL'S EXHIBIT NO. 1 (gg)

EXHIBIT NO. GC-199 RECEIVED ✓ REJECTED

CASE NO. 27-CA-129588 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Case 27-CA-129598

Wendy Geaslin, an Individual

PETITION TO REVOKE RESPONDENT'S SUBPOENA DUCES TECUM

Counsel for the General Counsel (General Counsel) pursuant to Sections 102.31 and 102.66 of the Rules and Regulations of the National Labor Relations Board (Board), petitions to revoke Subpoena Duces Tecum, No. B-1-NR3LWZ (Subpoena, attached as Exhibit A) issued by King Soopers, Inc. (Respondent) to Charging Party Wendy Weslin (Charging Party) on August 7, 2015, for the following reasons:

I. Background

The Regional Director for Region 27 issued a Complaint and Notice of Hearing (Complaint) in this matter on October 31, 2014. The Regional Director alleges, *inter alia*, that the Respondent has violated the National Labor Relations Act (Act) by suspending and terminating the Charging Party because she engaged in protected and/or concerted activities. The Respondent filed its answer to the Complaint on

GENERAL COUNSEL'S EXHIBIT NO. 1(hh)

EXHIBIT NO. GC-146 RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 7 DATE: 8/11/15 REPORTER: JCK

November 25, 2014. The Respondent, in its answer, denies that it suspended and terminated the Charging Party because of her concerted and/or protected activities.

On August 6, 2015 General Counsel filed a Notice of Intent to Amend Complaint (Exhibit B), notifying Respondent that she will move to amend the Complaint at hearing to request an enhanced remedy including search-for-work expenses as part of the make whole remedy being sought. As demonstrated in the Complaint and General Counsel's Notice of Intent to Amend Complaint, General Counsel is not seeking to litigate any compliance issues at the trial set for hearing on August 11, 2015. The Notice of Intent to Amend Complaint expressly notifies Respondent only of the enhanced remedy being sought. Thus, Respondent's Subpoena that issued on August 7, 2014 is premature as no compliance issues are before the Administrative Law Judge.

II. The Subpoena Seeks Documents That Do Not Relate to Any Matter Under Consideration at Hearing

The General Counsel objects to the Subpoena served on the Charging Party because it seeks documents that do not relate to any matters to be tried during the upcoming hearing, rather, it relates to compliance issues not presently before the Administrative Law Judge. Board's Rules and Regulations, Section 102.31(b); *See*, Heinrich Motoers, 166 NLRB 783, 785 (1967), Brinks Inc., 281 NLRB 468 (1986). The Complaint in this matter alleges that the Respondent violated the Act by suspending and terminating the Charging Party for engaging in protected concerted activities. As part of its request for relief, the General Counsel intends to request an enhanced make whole remedy. This enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent's actions

have wreaked havoc on an employee's livelihood. It is incumbent upon the General Counsel to plead this enhanced remedy so that the Respondent has a full opportunity to brief and argue the issue.

The documents that Respondent subpoenaed relate to the amount of backpay as well as any search-for-work expenses, if any, that they may be liable for should the General Counsel succeed at proving its case at hearing. The amount of backpay, including search-for-work expenses, is an issue that is not ripe at this point in the proceedings. The proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices.

The documents that the Respondent seeks to obtain from the Charging Party are irrelevant to whether such a remedy is proper; instead they seek information relevant only to establishing the amount of any such remedy. The amount owed by the Respondent should properly be relegated to any compliance proceedings. Roadway Express, 254 NLRB 668, fn.27 (1981). Instead, Respondent is seeking to litigate the amount of any money it owes to the Charging Party without any Order requiring such payment. When an Administrative Law Judge orders a make whole remedy including search-for-work expenses, the Region will calculate the amount owed by the Respondent to the Charging Party. If the Respondent is not satisfied and believes the amount is inaccurate, the Region will issue a compliance specification where the Respondent will have a full opportunity to challenge the Region's calculations. It is at that stage of the proceeding where Respondent's Subpoena would have arguable relevance. Indeed, the Board's Rules and Regulations provide the following:

10650.5 Disclosure of Factual Information Relevant to the Compilation

> It is Board policy to make available to the respondent, on request, and after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement. This policy does not apply where the respondent has refused to cooperate in the Region's backpay investigation.

III. Respondent's Four Requests Directly Relate to the Computation of Backpay and Do Not Relate to the Propriety of Any Remedy Ordered at Hearing

The specific items sought by the Respondent in its Subpoena, as well as General Counsel's arguments in support of the Petition to Revoke, are as follows:

1. *All documents of any nature, including a list, memorandum, notebook, journal, or records demonstrating the positions for which you have applied for employment since your termination from King Soopers.*

The documents sought by Respondent in item 1 of the Subpoena relate to mitigation of backpay and are designed to calculate the amount of backpay owed by the Respondent to the Charging Party. The requested information is only relevant to any future compliance investigation or proceedings.

2. *If you were unable to work or seek other employment since being terminated from King Soopers, provide all documents of any nature which relate in any manner to the reasons you were unable to seek other employment, including the reasons you were unable to seek other employment and for what duration you were unable to seek other employment.*

The documents sought by Respondent in item 2 of the Subpoena exceed the scope of the requested remedy and are irrelevant to the matters set for hearing. They are designed to calculate total backpay owed by the Respondent and are relevant only to a future compliance investigation or proceedings.

3. *If you were unfit to work or seek other employment since being terminated from King Soopers, provide all documents of any nature which relate in any manner to*

the reasons you were unfit to seek other employment, including the reasons)you were unfit to seek other employment and for what duration you were unfit to seek other employment.

As stated above, the documents sought by Respondent in item 3 of the Subpoena exceed the scope of the requested remedy and are irrelevant to the matters set for hearing. They are designed to calculate total backpay owed by the Respondent and are relevant only to future compliance investigation or proceedings.

4. *All documents of any nature that relate in any manner to your job search effort after your termination from King Soopers, including, but not limited to, correspondence, e-mail, phone messages, resumes, applications for employment, interview notes, job offers or offer letters, evaluations, any required testing for evaluation and the results of such testing, letters of recommendation, salary/wages, benefits, work search expenses incurred by you, and any other documentation regarding your attempts to obtain employment.*

The documents sought by Respondent in item 4 of the Subpoena relate to mitigation of backpay and are designed to calculate the amount of backpay owed by the Respondent to the Charging Party. The requested information is relevant only to any future compliance investigation or proceedings.

IV. Conclusion

All documents requested in Respondent's Subpoena Duces Tecum, are irrelevant to the Regional Director's Complaint and Notice of Hearing, including its request for an enhanced make whole remedy, and are irrelevant to the Respondent's defenses against the allegations that it violated the Act. Accordingly, the Respondent's Subpoena Duces Tecum should be revoked.

DATED AT Denver, Colorado this 10th day of August, 2015.

Respectfully submitted,

/s/ Isabel C. Saveland

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
1961 Stout Street, Suite 13-101
Denver, Colorado 80294
(303) 844-3551

EXHIBIT A

GENERAL COUNSEL'S EXHIBIT NO. 1(ii)

EXHIBIT NO. 6C-ii RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: Kung

NO. OF PAGES: 8 DATE: 8/11/15 REPORTER: KK

FORM NLRB-31

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To WENDY GEASLIN, 1255 Ogden Street, Apt. 106, Denver, CO 80218

As requested by Jonathon M. Watson, Esq., Sherman & Howard L.L.C.

whose address is 633 17th Street, Suite 3000, Denver, CO 80202
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge of the National Labor Relations Board

at NLRB Hearing Room 13th Floor, 1961 Stout St, Suite 13-103

in the City of Denver, CO

on Tuesday, August 11, 2015 at 9:00 AM or any adjourned

or rescheduled date to testify in King Soopers, Inc. 27-CA-129598
(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

SEE ATTACHMENT

If you do not intend to comply with the subpoena, within 5 days (excluding intermediate Saturdays, Sundays, and holidays) after the date the subpoena is received, you must petition in writing to revoke the subpoena. Unless filed through the Board's E-Filing system, the petition to revoke must be received on or before the official closing time of the receiving office on the last day for filing. If filed through the Board's E-Filing system, it may be filed up to 11:59 pm in the local time zone of the receiving office on the last day for filing. Prior to a hearing, the petition to revoke should be filed with the Regional Director; during a hearing, it should be filed with the Hearing Officer or Administrative Law Judge conducting the hearing. See Board's Rules and Regulations, 29 C.F.R Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings) and 29 C.F.R Section 102.111(a)(1) and 102.111(b)(3) (time computation). Failure to follow these rules may result in the loss of any ability to raise objections to the subpoena in court.

B-1-NR3LWZ

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is issued at Denver, CO this 7 day of August 2015

Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT to SUBPOENA DUCES TECUM

1. All documents of any nature, including a list, memorandum, notebook, journal, or records demonstrating the positions for which you have applied for employment since your termination from King Soopers.

2. If you were unable to work or seek other employment since being terminated from King Soopers, provide all documents of any nature which relate in any manner to the reasons you were unable to seek other employment, including the reason(s) you were unable to seek other employment and for what duration you were unable to seek other employment.

3. If you were unfit to work or seek other employment since being terminated from King Soopers, provide all documents of any nature which relate in any manner to the reasons you were unfit to seek other employment, including the reason(s) you were unfit to seek other employment and for what duration you were unfit to seek other employment.

4. All documents of any nature that relate in any manner to your job search efforts after your termination from King Soopers, including, but not limited to, correspondence, e-mail, phone messages, resumes, applications for employment, interview notes, job offers or offer letters, evaluations, any required testing for evaluation and the results of such testing, letters of recommendation, salary/wages, benefits, work search expenses incurred by you, and any other documentation regarding your attempts to obtain employment.

Process Service Request Form

In order to give us the best possible chance to complete service, please fill out the following information with as much detail as possible.

Service Information:

Service deadline: asap

Return of Service deadline: Click here to enter a date.

After hours attempts requested: yes ☒ no ☐

Are you including your own return or service form? yes ☒ no ☐

For updates, questions or authorizations:

Contact Person: Katherine 719-448-4046

Contact Phone No.: cell 719-339-3116

Document Information:

Court: Click here to enter text.

Court Address: Click here to enter text.

Plaintiff / Petitioner: Click here to enter text.

Vs:

Defendant / Respondent: Click here to enter text.

Case Number: Click here to enter text.

Attorney: Click here to enter text.

Attorney's ID Number: Click here to enter text.

Title(s) of Document(s) being served: Subpoena duces tecum

For service on a business entity:

Business Name: Click here to enter text.

Business Address: Click here to enter text.

Phone: Click here to enter text.

Name(s) of Owner(s) or Manager(s): Click here to enter text.

Operating Hours: Click here to enter text.

Registered Agent: Click here to enter text.

Registered Agent Address: Click here to enter text.

For service on an individual:

Legal Name (as appears on court documents): Wendy Geaslin

Alias or Nickname (that others may know person as): Click here to enter text.

Home Address: 1255 Ogden Street, Apt. 106, Denver, CO

Home / Mobile Phone: Click here to enter text.

Name(s) of Residing Relatives: Click here to enter text.

Place of Work or Business: Click here to enter text.

Work or Business Address: Click here to enter text.

Work Phone: Click here to enter text.

Name(s) of Supervisor or Co-workers: Click here to enter text.

Shift Days / Hours: Click here to enter text.

Alternate Location Individual May Be Found At: Click here to enter text.

Times Individual May Be Found There: Click here to enter text.

Description:

Age: Click here to enter text.

Sex: male ☐ female ☒

Race: Caucasian

Height: Click here to enter text.

Weight: Click here to enter text.

Hair Color: Click here to enter text. Style: Click here to enter text.

Facial Hair: yes ☐ no☐

Eye Color: Click here to enter text. Glasses: yes ☐ no☐

Photo Available: Click here to enter text.

Vehicle Description:

Make: Click here to enter text.

Model: Click here to enter text.

Year: Click here to enter text.

Color: Click here to enter text.

License Plate#: Click here to enter text. State: Click here to enter text.

Additional Notes:

Click here to enter text.

THE FACE OF THIS CHECK HA SECURITY VOID BACKGROUND PATTERN-DO T CASH IF THE WORD VOID IS VISIBLE

SHERMAN & HOWARD L.L.C.
PROFESSIONAL ACCOUNT/OPERATING
633 SEVENTEENTH STREET, SUITE 3000
DENVER, COLORADO 80202

Colorado Business Bank
1777 17TH STREET
DENVER, COLORADO 80202

23-320
1020

340298

PAY FORTY-SIX AND 00/100 DOLLARS

DATE 08/07/15

AMOUNT $*********46.00

TO THE ORDER OF
WENDY GEASLIN
1255 OGDEN STREET
APT. 10
DENVER, CO 80218

SHERMAN & HOWARD L.L.C.
VOID AFTER 90 DAYS

AUTHORIZED SIGNATURE

TWO SIGNATURES REQUIRED ON CHECKS OVER $25,000

AUTHORIZED SIGNATURE

⑈340298⑈ ⑆102003206⑆ 30 37584⑈

SHERMAN & HOWARD L.L.C.

340298

TOTAL OF CHECK: $46.00

INVOICE NO.	INVOICE AMOUNT	DESCRIPTION	P.O. NO.	VOUCHER NO.	AMOUNT PAID
080715	46.00	WITNESS/MILEAGE FEE FOR		245972	46.00
				TOTAL CHECK:	$46.00

EXHIBIT B

GENERAL COUNSEL'S EXHIBIT NO. 1(ii)

GC-133

EXHIBIT NO._____ RECEIVED_____ REJECTED_____

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 7 DATE: 8/11/15 REPORTER: KJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

NOTICE OF INTENT TO AMEND COMPLAINT

PLEASE TAKE NOTICE that at the opening of the hearing on August 11, 2015, the undersigned Counsel for the General Counsel will move to amend the Complaint, in accordance with Section 102.17 of the Rules and Regulations of the National Labor Relations Board.

Counsel will move that the Complaint be amended by adding Paragraph 9 to read as follows:

9.

As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether

the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Denver, Colorado, this 6th day of August, 2015.

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
Byron Rodgers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and Case 27-CA-129598

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER OF NOTICE OF INTENT TO AMEND COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 6, 2015,** I served the above-entitled document(s) by **e-mail** upon the following persons, addressed to them at the following addresses:

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221
e-mail
stephanie.bouknight@kingsoopers.com

Raymond M. Deeny, Attorney
Sherman & Howard, LLC
90 S Cascade Ave., Ste. 1500
Colorado Springs, CO 80903-1639
e-mail
rdeeny@shermanhoward.com

Jonathon Watson , Attorney
Sherman & Howard LLC
633 17th Street
Suite 3000
Denver, CO 80202
e-mail
jwatson@shermanhoward.com

Wendy Geaslin
60 Broadway APT. 3
Denver, CO 80203-2790
e-mail
my3sons.wg@gmail.com

August 6, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA DUCES TECUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 10, 2015,** I served the above-entitled document(s) by **E-File and E-Mail** upon the following persons, addressed to them at the following addresses:

National Labor Relations Board
Executive Secretary
1015 Half Street, SE
Washington, DC 20570
E-Filed

National Labor Relations Board
Division of Judges
891 Market Street, Suite 300
San Francisco, CA 94103-1779
E-Filed

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221
E-Mail
Stepanie.bouknight@kingsoopers.com

Raymond M. Deeny , Esq.
Sherman & Howard, LLC
90 S Cascade Ave, Ste 1500
Colorado Springs, CO 80903-1639
E-Mail
rdeeny@shermanhoward.com

Jonathon Watson , Attorney
Sherman & Howard LLC
633 17th Street, Suite 3000
Denver, CO 80202
E-Mail
jwatson@shermanhoward.com

Wendy Geaslin
60 Broadway APT. 3
Denver, CO 80203-2790
Personal Service

August 10, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF ORDER REFERRING PETITION TO REVOKE SUBPOENA DUCES TECUM

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 10, 2015,** I served the above-entitled document(s) by **E-File and E-mail and personal service** upon the following persons, addressed to them at the following addresses:

National Labor Relations Board
Executive Secretary
1015 Half Street SE
Washingto, DC 20570
E-Filed

National Labor Relations Board
Division of Judges
901 Market, Suite 300
San Francisco, CA 94103
E-Filed

Stephanie Bouknight
King Soopers
65 Tejon St
Denver, CO 80223-1221
E-Mail
stephanie.bouknight@kingsoopers.com

Raymond M. Deeny , Esq.
Sherman & Howard, LLC
90 S Cascade Ave, Ste, 1599
Colorado Springs, CO 80903-1639
E-Mail
rdeeny@shermanhoward.com

GENERAL COUNSEL'S EXHIBIT NO. 1(kk)

6C-1 KK

EXHIBIT NO._____ RECEIVED ✓ REJECTED_____

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 3 DATE: 8/11/15 REPORTER: KJ

Jonathon Watson . Attorney
Sherman & Howard LLC
633 17th Street
Suite 3000
Denver, CO 80202
E-Mail
jwatson@shermanhoward.com

Wendy Geaslin
60 Broadway Apt. 3
Denver, CO 80203-2790
Personal Service

August 10, 2015
Date

Monika Kurschen,
Designated Agent of NLRB
Name

/s/ Monika Kurschen
Signature

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

KING SOOPERS, INC.

CASE 27-CA-129598

General Counsel's Exhibits

1(a) Original Charge 27-CA-129598, filed May 29, 2014.

(b) Original Charge Letters of 27-CA-129598 issued May 30, 2014.

(c) Affidavit of Service of 1(a), dated May 30, 2014.

(d) Original First Amended Charge 27-CA-129598, Filed August 18, 2014.

(e) Original First Amended Charge Letters of 27-CA-129598 issued August 19, 2014.

(f) Affidavit of Service of 1(d), dated August 19, 2014.

(g) Complaint and Notice of Hearing issued October 31, 2014.

(h) Affidavit of Service of 1(g), dated October 31, 2014.

(i) Corrected Affidavit of Service of 1(g), dated October 3, 2014.

(j) Erratum for Affidavit of Service of 1(g), dated November 4, 2014.

(k) Respondent's Answer to Complaint and Notice Of Hearing received November 25, 2014.

(l) Motion to Reschedule Hearing Request received January 8, 2015.

(m) Order to Show Cause received January 9, 2015.

GENERAL COUNSEL'S EXHIBIT NO. 1(ll)

GC-1LL

EXHIBIT NO. _____ RECEIVED ✓ REJECTED _____

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 4 DATE: 8/4/15 REPORTER: KS

(n) Response to Order to Show Cause and General Counsel's Opposition to Respondent's Motion To Reschedule Hearing issued January 13, 2015.

(o) Affidavit of Service of 1(n) dated January 13, 2015.

(p) Order Denying Respondent's Motion to Reschedule January 21, 2015 Hearing received January 15, 2015.

(q) Order Postponing Hearing issued January 20, 2015.

(r) Affidavit of Service of 1(q) dated January 20, 2015.

(s) Order Rescheduling Hearing issued May 20, 2015.

(t) Affidavit of Service of 1(s) dated May 20, 2015.

(u) Order Denying Motion to Reschedule Hearing Issued May 20, 2015.

(v) Affidavit of Service of 1(u) dated May 20, 2015.

(w) Petition to Revoke Subpoena Duces Tecum by Raymond Deeny received July 14, 2015.

(x) Exhibit A - Subpoena Duces Tecum with Attachment A.

(y) Exhibit B – Complaint and Notice of Hearing.

(z) Counsel for the General Counsel's Opposition to Petition to Revoke Subpoena Duces Tecum issued July 16, 2015.

(aa) Affidavit of Service of 1(z) dated July 16, 2015.

(bb) Order Referring Petition to Revoke Investigative Subpoena Duces Tecum issued July 16, 2015.

(cc) Affidavit of Service of 1(bb) dated July 16, 2015.

(dd) Affidavit of Service of 1(bb) dated July 17, 2015, Re-issued documents.

(ee) Notice of Intent to Amend Complaint issued August 6, 2015.

(f f) Affidavit of Service of 1(ee) dated August 6, 2015.

(gg) Affidavit of Service of 1(ee) dated August 6, 2015.

(hh) Petition to Revoke Subpoena Duces Tecum by Counsel for the General Counsel issued August 10, 2015.

(i i) Exhibit A – Subpoena Duces Tecum with Attachment A.

(j j) Exhibit B -Subpoena Duces Tecum - Notice of Intent to Amend Complaint.

(kk) Affidavit of Service of 1(hh) dated August 10, 2015.

(l l) Index and Description of Formal Documents.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Cases 27-CA-129598

Wendy Geaslin, an Individual

Motion to Amend Complaint

COMES NOW, Isabel C. Saveland, Counsel for the General Counsel and respectfully moves to amend the Complaint, in accordance with Section 102.17 of the Rules and Regulations of the National Labor Relations Board as specified below.

(i) Add paragraph 9 to read as follows:

9.

As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

GC 2

GC-2

EXHIBIT NO. _____ RECEIVED _____ REJECTED _____

CASE NO. 22-CA-129598 CASE NAME: King

NO. OF PAGES: 3 DATE: 8/11/15 REPORTER: KF

Dated at Denver, Colorado, this11t[h] day of August, 2015.

Isabel C. Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
Byron Rodgers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 27

In the Matter of:

KING SOOPERS INC., Case No. 27-CA-129598

and

WENDY GEASLIN, AN INDIVIDUAL,

EMPLOYER EXHIBITS

Place: Denver, Colorado

Dates: August 12, 2015

OFFICIAL REPORTERS

AVTranz
E-Reporting and E-Transcription
845 North 3rd Avenue
Phoenix, AZ 85003
(602) 263-0885

KING Soopers
City Market

CITY MARKET / KING SOOPERS BEHAVIOR NOTICE

ASSOCIATE Wendy Graslin LOC 039 DEPT Deli SEC

EUID WG41228 DATE ACTION TAKEN May 23, 2011

Type of Infraction: (Please check as applicable)

- X Violation of Company Policy / Rule / Procedure
- ___ No Call, No Show
- ___ Excessive Absenteeism / Tardiness
- ___ Other (explain)
- ___ Misconduct
- ___ Safety Violation
- X Unsatisfactory Job Performance (UJP)
- ___ Dishonesty

Action to be taken (check one): Written Warning X 1 Day Suspension___ 3 Day Suspension___ 5 Day Suspension / Final Warning___

Dates of suspension___ to ___ Discharge___

THIS SECTION MUST BE COMPLETED. Detail below: 1) Unacceptable behavior 2) Dates and details of unacceptable behavior 3) Expected behavioral improvements 4) Consequences of future incidents of unacceptable behavior

On May 20, 2011 Wendy failed to take a lunch. I have addressed this issue with Wendy and she understands that taking a lunch is company policy. She also understands that any further problems in this area may result in further discipline up to and including termination.

SIGNATURE OF MANAGER: Cheryl Lewis DATE May 23, 2

SIGNATURE OF ASSOCIATE: Wendy Graslin DATE 5-23-11

(Associate's signature does not constitute agreement with this document)

WITNESS SIGNATURE: [illegible] DATE 5/23/11

(White copy to Associate file, yellow copy to Associate) Page 1 of 1

Z648204012473

RESPONDENT'S EX. 1
27-CA-129598

Respondent 0347

EXHIBIT NO. E-1 RECEIVED ✓ REJECTED

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES 2 DATE: 8/11/15 REPORTER: KJ

KING Soopers
City Market

CITY MARKET / KING SOOPERS BEHAVIOR NOTICE

ASSOCIATE Wendy Geaslin LOC 029 DEPT Deli SEC

EUID WG41228 DATE ACTION TAKEN 6-6-2011

Type of Infraction: (Please check as applicable)

- X Violation of Company Policy / Rule / Procedure
- No Call, No Show
- Excessive Absenteeism / Tardiness
- Other (explain)
- Misconduct
- Safety Violation
- X Unsatisfactory Job Performance (UJP)
- Dishonesty

Action to be taken (check one): Written Warning ___ 1 Day Suspension X 3 Day Suspension ___ 5 Day Suspension / Final Warning ___

Dates of suspension TBD to TBD

THIS SECTION MUST BE COMPLETED. Detail below: 1) Unacceptable behavior 2) Dates and details of unacceptable behavior 3) Expected behavioral improvements 4) Consequences of future incidents of unacceptable behavior

On Sunday May 22 2011 Wendy failed to take a lunch. I have addressed with Wendy that it is a state law for her to take a lunch and she understand that any further problems in this area may result in further disciplinary action up to and including termination.

SIGNATURE OF MANAGER: Cheryl Weis DATE: 6-6-2011

SIGNATURE OF ASSOCIATE: Wendy K Geaslin DATE: 6-6-2011

(Associate's signature does not constitute agreement with this document)

WITNESS SIGNATURE: _____ DATE: _____

(White copy to Associate file, yellow copy to Associate) Page 1 of 1

Z64620401 2473

RESPONDENT'S EX. 2

27-CA-129598

Respondent 0344

EXHIBIT NO. E-2 RECEIVED ✓ REJECTED

CASE NO. 22-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KS

To Whom it may Concern

I Feel the Manager of Store #1 Denver Co 1331 Speer Blvd is using he Managment to bully employes! and Kroger is Backing it. Becuse of my Discharge I have lost all of my Household belongings! Please stop this from happening to anyone else at this store Please look into it

Thank you
Wendy Geadlin

What she wrote (in yellow) is not what happened, I did say that if she wanted people to respect her she should give respect! not I was not, going to respect her because she didn't respect me

RESPONDENT'S EX. 3
27-CA-129598

EXHIBIT NO. E3 RECEIVED ✓ REJECTED

CASE NO. 22-CA 129568 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: Kf

GRIEVANCE REPORT FORM
A STEP 2 MEETING IS REQUESTED AS PER CONTRACT

No: 65230

CERTIFIED MAIL #:
Ms. Stephanie Bouknight
King Soopers, Inc.
65 Tejon St.
Denver CO 80223

T-25

FROM: United Food & Commercial Workers Union Local #7
7760 West 38th Avenue
Wheat Ridge, CO 80033-9982
(303) 425-0897 (800) 854-7054

14-0433

Business Representative	Date	EGC Date	EGC Case No
DANNY CRAINE	5/22/2014		

EMPLOYER: KING SOOPERS # 0001
1331 N SPEER BLVD DENVER, CO 80204 3035715566

FILED BY: WENDY GEASLIN 1255 OGDEN ST APT 106 DENVER, CO 80218-1937
7204480749 **SS#:** 523044479 **DOH:** 8/11/2009 **Pay Rate:** $14.67 **JC:** P 006CBCK

DISPUTE PROCEDURES
Article: 48
Section: ALL
Steps: 1,2,3
Contract: Meat

CONTRACT ARTICLES VIOLATED

Article: 1	**Section:** ALL	**Article:**	**Section:**
Article: 6	**Section:** ALL	**Article:**	**Section:**
Article: 44	**Section:** ALL	**Article:**	**Section:**

LOU:
...And Any Other Article As It May Be Applicable In This Grievance

Date of Occurrence: May 9, 2014 & May 21, 2014
Type of Grievance: Suspension/Termi

Complaint: Ms. Geaslin was suspended pending investigation on 5/9/14 and subsequently terminated on 5/21/14 without good or sufficient cause.

Remedy Requested: Reinstate Ms. Geaslin with back pay and remove this unjust discipline from her file and make her whole for any and all losses plus interest.

DENIED
Date: 8/26/14

...And Make all affected whole for losses, with No Recrimination or Discrimination For Filing This Grievance

For Employer: **Date Step 1 Held:** 5/21/2014
✓Theresa Pelo Liza Pazarella

For Union: **Timely:** Yes
Danny Craine Wendy Geaslin

For Employer: **Date Step 2 Held:** 8/26/14
Ken Aragon

For Union: **Timely:**
Lita Trujillo

RECEIVED
MAY 22 2014
LABOR RELATIONS

Settlement Accepted:

RESPONDENT'S EX. 4
27-CA-129598

Management Grievant and/or Union Date

EXHIBIT NO. E-4 RECEIVED ✓ REJECTED

CASE NO. 27-CA-129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KA

1/19/15 11:59:08 iSeries History: King Soopers/City Market-620KS

Emp#: WG41228 GEASLIN, WENDY K Badge:

Options: 1=View B=Brkdwn

Position: _____

Selected Period
From: 5/04/14
To: 5/10/14

Opt	Date	In	Out	Hours	Sch	Pcd	Ap	Labor Levels	Notes
_ SU	5/04/14	758A	158P U	6.00	8.00		0	001.ST.DELICOFFEE	
_ SU	5/04/14	229P	431P	2.00			0	001.ST.DELICOFFEE	1M
_ MO	5/05/14	555A E	1234P U	6.65	5.00		0	001.ST.DELICOFFEE	
_ MO	5/05/14	105P	120P L	.25			0	001.ST.DELICOFFEE	M
_ TH	5/08/14	1208P E	232P E	2.40	4.50		0	001.ST.DELICOFFEE	
_ TH	5/08/14	301P	551P E	2.80	4.50		0	001.ST.DELICOFFEE	M
_ FR	5/09/14	529A	1205P E	6.60	8.00		0	001.ST.DELICOFFEE	

Bottom

SUNRG 8.00 REG 18.70 NT050 .60

Total 26.70

F3=Exit F8=Adjust F9=Previous F10=Next F11=Charge
F12=Cancel F13=ROUNDED F14=Defaults F15=Punches F16=Audit

RESPONDENT'S
EX. 5
27-CA-129598

EXHIBIT NO. E5 RECEIVED _____ REJECTED _____

CASE NO. 27-CA-98 12959 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/11/15 REPORTER: KK

EXHIBIT EXCLUDED

Leading Case Number 27-CA-129598

Leading Case Name KING SOOPERS INC.

and

WENDY GEASLIN, AN INDIVIDUAL

Exhibit Number E6-9

Description NEVER DISCUSSED DURING HEARING

The above-referenced exhibit is not included herein for the following reason:

1. Exhibit Withdrawn _____

2. Exhibit Rejected _____

3. Exhibit Not Offered X

4. Other (Explain) _____

Exhibit retained by EMPLOYER

KEN IGLEHART
Court Reporter

UFCW 7
a VOICE for working America

Chartered by United Food & Commercial Workers International Union
UFCW Building, 7760 West 38th Avenue, Suite 400
Wheat Ridge, Colorado 80033-9982
Phone 303-425-0897 • Toll Free CO & WY 800-854-7054
Fax 303-424-2416 • http://www.ufcw7.org

KIM C. CORDOVA
President

KEVIN R. SCHNEIDER
Secretary-Treasurer

CERTIFIED MAIL NO. 7013 0600 0001 7379 0248

October 20, 2014

WENDY GEASLIN
4323 Excursion Dr.
Colorado Springs, CO 80911-3643

Re: Your Appeal Before the Executive Board
KING SOOPERS #0001 Suspension/Termination
Case No. 14-1563; Seq. No. 65230

Dear WENDY GEASLIN:

This shall serve to advise you the Executive Board has considered your request to have your grievance arbitrated. After review and deliberations, it was the decision of the Board to deny the same.

If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me.

Sincerely,

Kim C. Cordova
President, UFCW Local 7

KCC:glu/ufcw7
cc: Danny Craine
Stephanie Bouknight
Kevin Schneider

RESPONDENT'S
EX. 10
27-CA-129598

RECEIVED
OCT 21 2014
LABOR RELATIONS

EXHIBIT NO. E-10 RECEIVED ✓ REJECTED

CASE NO. 27-CA 129598 CASE NAME: King

NO. OF PAGES: 2 DATE: 8/12/15 REPORTER: KA

UFCW LOCAL 7
a VOICE for working America

Chartered by United Food & Commercial Workers International Union
UFCW Building, 7760 West 38th Avenue, Suite 400
Wheat Ridge, Colorado 80033-9982
Phone 303-425-0897 • Toll Free CO & WY 800-854-7054
Fax 303-424-2416 • http://www.ufcw7.org

KIM C. GORDOVA
President

KEVIN R. SCHNEIDER
Secretary-Treasurer

November 18, 2014

RECEIVED
NOV 19 2014
LABOR RELATIONS

Ms. Stephanie Bouknight
Labor Relations Manager
King Soopers, Inc.
65 Tejon Street
Denver, CO 80223

Dear Ms. Bouknight:

The Union has withdrawn the following grievance(s) on a non-precedent setting basis:

Issue	Case #	Seq #
One-Day	11-1396	49463
One day suspension	11-1440	49740
Five day suspension	11-1442	49746
Ten day suspension	12-0471	54461
Ten Day Suspension	13-1088	61019
Under scheduling	14-0342	63571
Suspension	14-0437	62403
Suspension	14-0439	62402
Suspension	14-0440	62401
Five day final	14-0646	64159
Termination	14-0762	64674
Termination	14-0873	64334
Suspension	14-0903	64844
Termination	14-1059	65013
Rate of pay	14-1073	62750
One day suspension	14-1076	64536
Constructive discharge	14-1079	65115
Three day suspension	14-1080	64824
Termination	14-1081	65110
Three day suspension	14-1085	65158
Termination	14-1091	64971
Termination	14-1111	65099
Additional hours	14-1117	64798
Termination	14-1177	65163
Rate of Pay	14-1180	62203

RESPONDENT'S
EX. 11
27-CA-129598

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		Rate of Pay	14-1181	62200
		Rate of Pay	14-1182	62184
		Rate of Pay	14-1183	62208
		Termination	14-1184	65173
		Three Day Suspension	14-1185	64905
		Demotion	14-1186	64906
		Constructive Demotion	14-1187	65030
		Hostile Work Environment	14-1188	65031
		Termination	14-1217	65187
		Three Day Suspension	14-1487	65464
0001	WENDY GEASLIN	Suspension / Termination	14-1563	65230
		Suspension/Termination	14-7	65324

If you have any questions regarding the foregoing, please contact me at 303.425.0897, extension 407.

Sincerely,

Patty Harrison

Patty Harrison
Executive Secretary
UFCW Local 7

cc: Kevin Schneider, Margie McGraw, Steve Brooke, Mark Trujillo, Janet Hobbs, Darla Rook, Leah Dowodzenka, Randy Blea, Ramon Zuniga, Dale Lee, Gwen Maynard, Danny Craine

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LABOR RELATIONS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

EMPLOYER'S POST-HEARING BRIEF

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STATEMENT OF THE CASE[1]

This case involves charges filed against King Soopers, Inc. ("King Soopers," "Employer," or "Respondent") by a former employee, Wendy Geaslin ("Geaslin" or "Charging Party"). On May 29, 2014, Geaslin filed an Unfair Labor Practice Charge ("Charge") and on August 18, 2014, Geaslin filed an Amended Charge ("Amended Charge"). On October 31, 2014, the Region issued a Complaint and Notice of Hearing. In the Complaint, Counsel for the General Counsel alleged King Soopers violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act") by suspending Geaslin on May 14, 2014 and terminating Geaslin's employment on May 21, 2014 because Geaslin "assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities." On August 6, 2015, Counsel for the General Counsel filed a Notice of Intent to Amend the Complaint. Specifically, Counsel for the General Counsel sought to amend the Complaint to add a paragraph regarding an enhanced remedy. King Soopers objected to this amendment because it was untimely and unwarranted by the facts.

The hearing was held in the Regional Office's Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294. The hearing commenced on August 11, 2015 and ended on August 12, 2015. During the hearing, Administrative Law Judge Amita Baman Tracy granted Counsel for the General Counsel's motion to amend the Complaint regarding the remedy. At the close of Counsel for the General Counsel's case-in-chief, Judge Tracy also granted, over King Soopers' objection, Counsel for the General Counsel's oral motion

[1] Citations in this Brief will be as follows: "Tr:__" to indicate the Hearing transcript's page and line numbers, respectively; "Jt. Ex." to indicate a Joint Exhibit; "Co. Ex." to indicate an Exhibit of Respondent; "G.C. Ex." to indicate an Exhibit of the General Counsel; and "Ex. 1(___)" to indicate an Exhibit from the Formal Documents.

to amend the Complaint and add an allegation that "sometime in or about March 2014, the Respondent, by Theresa Pelo, interrogated the Charging Party about her Union activity."

Counsel for the General Counsel called as witnesses: Charging Party, Wendy Geaslin and Danny Crain, a United Food and Commercial Workers International Union, Local 7 ("Union" or "UFCW") Director of Retail. King Soopers called the following witnesses: Angelica Eastburn,[2] a Coffee Lead, Lisa Panzarella,[3] a previous Store No. 1 Assistant Store Manager, Ruxandra Barbos, a Store No. 1 Assistant Store Manager, Theresa Pelo, the Store No. 1 Store Manager, and Stephanie Bouknight, the Manager of Labor Relations.

FACTUAL AND PROCEDURAL HISTORY

A. General Background.

King Soopers is the largest employer in Colorado. Tr. 24:19-22. Most of King Soopers' retail employees are represented by one of four unions. *Id.* The largest of those unions is UFCW. *Id.* King Soopers and the Union have a mature bargaining relationship and have had collective bargaining agreements for over forty years. Tr. 289:22-25; 290:1. UFCW is by far the most active of all of the unions in terms of its use of the grievance and arbitration process. Tr. 290:5-2-4. On average, the Union files 2,000 grievances a year and demands arbitration on approximately 60% of those grievances. Tr. 290:5-16. As part of its bargaining relationship and in exchange for the grievance and arbitration procedure, King Soopers and the Union have bargained for a no strike provision in the CBA, which states:

> During the life of this Agreement, there shall be no lockout, strike, picketing, boycotting, stoppage of work, anti-company publicity or other economic action of whatsoever nature, against the Company.

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[2] Eastburn is a member of the same bargaining unit as Geaslin. Tr. 215:24-25; 216:1-3.

[3] In the hearing transcript, Panzarella's name is incorrectly spelled as "Pandearella." Tr. 3.

Jt. Ex. 2, Article 44, Section 121.

In Store No. 1 and the Denver Metro Bargaining Unit, generally, there are two applicable collective bargaining agreements ("CBAs"); the Retail Clerks CBA and the Meat and Deli CBA. Tr. 152;10-14; Jt. Exs. 1 & 2. UFCW represents all employees in the Denver Metro Bargaining Unit. Tr. 25:5-6. King Soopers applies the same Policies and Procedures to all employees, regardless of whether they are represented by one of the four unions. Tr. 25:11-15. Every King Soopers employee is required to provide customer service, irrespective of his or her position at the store. Tr. 223:1-5. King Soopers refers to this initiative as "Customer First." Tr. 223:1-5.

Some King Soopers stores contain Starbucks. The people working at Starbucks are King Soopers' employees. Tr. 204:8-10. The employees working at Starbucks are subsumed within the Deli Department. *Id.* Charging Party, Wendy Geaslin, was employed by King Soopers as a Coffee Clerk, also referred to as a barista. Tr. 38:25; 39:1. Geaslin was represented by the Union. Tr. 39:2-7. Geaslin worked at Store No. 1. Tr. 37:2. Prior to working at Store No. 1, Geaslin worked at Store No. 29. Tr. 37:3-7. Store No. 29 is approximately three miles away from Store No. 1 and is within the same bargaining unit represented by UFCW. Tr. 83:5-15. Prior to her employment at King Soopers, Geaslin was employed as an Assistant Bakery Manager at Jamboree Foods. Tr. 129:24-25; 130:1-3. In that role, Geaslin disciplined and terminated employees for being insubordinate and failing to follow her work orders. *Id.*

B. Geaslin's May 9, 2014 Outburst.

May 9, 2014 was the Friday before Mother's Day. Tr. 228:6-10. Given the location of Store No. 1, the store is frequently busy on Fridays with customers processing paychecks and other entitlement program checks, and it is especially busy on Mother's Day weekend.

Tr. 271:7-13. On May 9, 2014, at approximately 12:00 p.m., Store No. 1 was overflowing with customers, especially in the front end near the check stands. Tr. 205:15-21; 245:24-25; 246:1-4.

In an effort to get customers through the check stands, the Store Manager, Theresa Pelo, who was also working in the front end, used the store intercom to call associates from other parts of the store, including the Bakery and Deli Departments. Tr. 246:22-25; 271:14-25; 272:1. Pelo regularly requests help from other departments when the check stands are overflowing with customers. Tr. 214:16-21; 247:13-15; 271:14-25; 272:1. Coffee Lead, Angelica Eastburn, Assistant Store Manager, Lisa Panzarella, and Assistant Store Manager, Ruxandra Barbos all testified that they have helped check out customers in Starbucks or sack groceries when the store is busy. Tr. 215:12-16; 222:9-17; 248:6-15. While asking for help, Pelo noticed Starbucks was not busy and she called over the intercom for a Starbucks clerk to help sack groceries. Tr. 215:17-23; 246:5-10; 271:25; 272:1-7. Pelo's request was general and she did not specifically ask that Geaslin help sack. Tr. 272:8-10.

Immediately following Pelo's request over the intercom, Pelo saw Geaslin remove her Starbucks apron and begin walking toward Pelo in the front end. Tr. 272:11-16. Pelo was standing in front of the U-Scans near the floral department. *Id.* When Geaslin approached Pelo, Pelo thanked her for coming to help sack. Tr. 207:25; 208:1; 246:22-25; 247:1; 272:17-20. In response, Geaslin told Pelo "no," and said she was going to lunch. Tr. 272:21-22. At that point, Geaslin had not clocked out for lunch and it was well beyond the middle of her shift, the time when employees must take lunch breaks. Tr. 87:4-10; 187:24-25; 288:1-7; Co. Ex. 5. Geaslin also loudly exclaimed, while on the sales floor and in front of customers, that she didn't have to sack because it was a violation of her contract. Tr. 208:2-3; 273:3-6. Customers could likely overhear her protesting Pelo's work order. Tr. 208:11-18. Pelo told Geaslin she would get her

lunch, she just needed to help sack for 5-10 minutes and that Geaslin needed to follow Pelo's instructions because she is Geaslin's supervisor. Tr. 272:22-25; 273:3-6. Pelo also reminded Geaslin that if she believed sacking violated the contract, she could file a grievance. Tr. 273:3-6.

In response, Geaslin stated that she was going to call "Matt," the Starbucks District Manager.[4] Tr. 273:7-10. About that time, Assistant Deli Manager, Angelica Eastburn approached Pelo and Geaslin. Tr. 205:25; 206:1-9. Eastburn heard Pelo tell Geaslin she needed to help sack and Geaslin responded that she was going to take lunch.[5] Tr. 207:19-21. Geaslin persisted in her refusal to heed Pelo's work order and at no point did she ever say she would sack or that she would follow Pelo's instructions. Tr. 219:18-25; 220:1-2; 247:12-19.

Because their discussion was getting heated, Pelo, Geaslin, and Eastburn went to the office to talk further. Tr. 274:12-15. When they got into the office, Geaslin continued to refuse Pelo's instruction and reiterated that she wasn't going to sack because it wasn't in her contract. Tr. 275:1-6. During the entire conversation, Geaslin raised her voice, was disrespectful toward Pelo, and refused Pelo's work order that Geaslin sack groceries. Tr. 212:12-25; 213:1-4; 275:1-6. Overall, Geaslin was disrespectful and insubordinate. Tr. 212:25; 213:1-4. Even Geaslin admitted she was agitated during the meeting. Tr. 64:21-23. Because Geaslin's behavior in the office became more inappropriate, she continued to be insubordinate, and she continued to argue with Pelo in a loud tone, Pelo suspended Geaslin pending an investigation. Tr. 214:5-7; 275:22-25; 276:1-5.

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[4] Starbucks management employees are not employed by King Soopers, are not located in King Soopers' stores, and the Starbucks District Manager was not Geaslin's supervisor.

[5] Barbos also walked by when Geaslin was refusing to sack groceries and heard Pelo thank Geaslin for coming to help sack and Geaslin respond, "no, I'm not." Tr. 146:22-25; 247:1.

Upon being suspended pending investigation, Geaslin exclaimed, "you can't hurt me." Tr. 276:10-13. Pelo responded that Geaslin's defiance was going to cost her a week's pay. Tr. 276:14-16. On the way out of the office, Geaslin continued to behave inappropriately and she yelled "waahhh, waahhh, waahhh" all the way down the hall. Tr. 213:16-18; 276:7-10. Other employees and management personnel were nearby and could hear Geaslin yelling and mocking Pelo, by making this crying sound. Tr. 213:19-25; 214:1.

Following the May 9, 2014 meeting, Pelo contacted her boss, the District Manager, and Stephanie Bouknight, the Manager of Labor Relations for their input. Tr. 277:1-6. At that point, Bouknight recommended Pelo terminate Geaslin. *Id.*; 292:8-17. Pelo wanted to give Geaslin another chance and, therefore, opted not to terminate Pelo at that time. Tr. 277:10-15.

C. May 14, 2014 Meeting.

On May 14, 2014, Pelo held a meeting with Geaslin and her Union Representative, Danny Craine.[6] Tr. 230:2-9. Also present were Assistant Store Managers Lisa Panzarella and Ruxandra Barbos. *Id.* The purpose of this meeting was to discuss the May 9, 2014 incident and for Pelo to stress with Geaslin the importance of following her instructions. Tr. 278:3-8. Pelo intended to give Geaslin a second chance for her behavior and had no intention of terminating or disciplining Geaslin at the May 14, 2014 meeting. Tr. 183:21-25; 184:1-2.

From the outset of the meeting Geaslin was agitated, disrespectful, and argumentative with Pelo. Tr. 230:18-24; 278:9-17. Geaslin began by rolling her eyes, making faces, and arguing with Pelo. Tr. 230:18-24; 231:3-24; 251:10-25; 252:1-21; 278:9-17. As the meeting went on and Geaslin became more upset, her behavior escalated and she began making threatening lunging gestures at Pelo with her hands clenched at her side. *Id.* Each time Geaslin

[6] Craine is currently the Union Director of Retail, but was a Union Representative during May 2014. Tr. 151:13-23.

lunged at Pelo, she bore her teeth, was red in the face, and her body was shaking. *Id.* Geaslin made these lunging gestures multiple times. Tr. 231:13-15; 252:22-25 Geaslin's lunging gestures were so aggressive that they caused Pelo to move back in her chair and retreat from Geaslin. Tr. 231:18-23; 278:20-25. Geaslin also continued to challenge Pelo's authority and told Pelo that she did not have to respect Pelo, but that Pelo needed to earn Geaslin's respect. Tr. 232:4-10; 278:5-12. Craine testified Geaslin was loud and aggressive during the May 14, 2014 meeting. Tr. 181:16-25. He also thought Geaslin was being argumentative. Tr. 182:25; 183:1-2. Panzarella interpreted Geaslin's faces to be a sign of anger and aggression. Tr. 133: 7-11. Pelo specifically asked Geaslin to stop making faces during the meeting. Tr. 233:12-15.; 279:1-4 284:7-11. Geaslin, however, persisted in her disrespectful and inappropriate conduct. Tr. 233:16-19.

Geaslin behaved so poorly and was so hostile toward Pelo that Craine had to pull her out of the room and tell her to calm down. Tr. 279:6-10. Even Craine stated that Geaslin's demeanor was not appropriate and it is why he took her out of the room during that meeting. Tr. 182:1-8; 183:6-8. When Geaslin and Craine returned, Craine stated Geaslin would be better. Tr. 254:8-10; 279:11-13. Pelo responded that because of Geaslin's behavior, she was not sure if she was better. Tr. 254:17-23; 279:14-17. Geaslin's behavior on May 14, 2014 caused both Panzarella and Barbos, as Assistant Store Managers, to be concerned for their ability to control Geaslin if Pelo were absent and they were required to supervise Geaslin. Tr. 234:11-19; 253:21-24.

At no point during the May 14, 2014 meeting did Geaslin express any remorse or contrition for her obstinate and insubordinate behavior on May 9, 2014. Tr. 183:3-5. Because of Geaslin's behavior on May 14, 2014, she was again suspended pending investigation until

May 21, 2014. Tr. 279:14-17. Following the May 14, 2014 meeting, Pelo again spoke with Bouknight from the Labor Relations Department and her District Manager regarding the appropriate discipline. Tr. 233:22-25; 234:1-6; 279:18-25; 280:1-13. It is customary practice at King Soopers for Store Managers to confer with their District Manager and the Labor Relations Department prior to issuing discipline. Tr. 234:1-10; 280:17-22. Those individuals recommended Pelo terminate Geaslin's employment. Tr. 280:23-25; 281:1.

D. May 21, 2014 Meeting and Geaslin's Termination.

After conferring with the Labor Relations Department and her District Managers and receiving their recommendation, Pelo decided to terminate Geaslin's employment because of her insubordinate, inappropriate, disrespectful, and opprobrious conduct on May 9 and 14, 2014. King Soopers regularly terminates employees who engage in the type of behavior Geaslin engaged on May 9 and 14, 2014. Tr. 219:1-17; 285:5-16. Craine testified that employees who engage in insubordination are terminated. Tr. 180:10-12. In fact, Craine expected Geaslin would be terminated during the May 14, 2014 meeting because of what *she* told him regarding her behavior on May 9, 2014. Tr. 180:4-7 (emphasis added). On May 21, 2014, Pelo met with Geaslin and Craine. Tr. 281:2-8. During that meeting, Pelo terminated Geaslin's employment. *Id.*

E. Geaslin's History Of Refusing Work Orders.

King Soopers regularly asks clerks working in Starbucks to help serve King Soopers' bakery samples. Tr. 224:3-6. On multiple occasions, Panzarella asked Geaslin to serve bakery samples while she was working at Starbucks. Tr. 224:12-19. As Panzarella described, Geaslin would help with samples for Starbucks, but she would argue and get angry when she was asked to cut samples for the bakery department. Tr. 224:20-23.

On one occasion in March 2014 – around Mardi Gras – Panzarella asked Geaslin to help sample King Cakes. Tr. 225:18-25; 226:1-2. Geaslin refused to do so and complained to Union Steward, Latrice Jackson, regarding Panzarella's request. Tr. 226:3-8. Geaslin complained that sampling the cakes violated the CBA. Tr. 226:4-10; 243:4-13. Panzarella and Jackson later discussed Geaslin's complaint. Tr. 226:11-17. Jackson told Geaslin she needed to cut the samples and had to follow management's instructions in the future. *Id.* Jackson never claimed Panzarella's request violated the CBA. Tr. 243:4-13.

Panzarella did not speak with Geaslin any further about the issue. Tr. 226:18-20. Panzarella informed Pelo of her discussion with Jackson and Geaslin's refusal to cut the samples. Tr. 269:19-24. Pelo never approached Geaslin or asked her about the incident. Tr. 270:9-15. As Pelo described, there was no reason to ask Geaslin about the incident because Panzarella and Jackson already spoke to her. *Id.* No grievance was ever filed alleging that Panzarella's directive violated the CBA or the Act. Tr. 226:23-25; 227:1-4. Craine also testified that there is nothing in the CBA that says baristas are only supposed to sample Starbucks products. Tr. 190:3-8. It is undisputed that no CBA between King Soopers and the Union prohibits Starbucks clerks from either cutting samples or bagging groceries. Tr. 186:22-25.

Geaslin also has a history of failing to take her lunch as required by the CBA and state law. It is undisputed that, pursuant to the CBA and Colorado State Law, employees are required to take a lunch and the lunch break should occur approximately mid-way through the employee's shift. Tr. 87:4-10; 187:24-25; 288:1-7. Geaslin refused to do so. While at Store No. 29, Geaslin received two previous write-ups, including one suspension, for not taking her lunch at the appropriate time. Co. Exs. 1 & 2. Geaslin was also warned that any future failure to take her

lunch at the appropriate time "may result in further discipline up to and including termination." Co. Ex. 1.

During the week of May 5, 2014 Geaslin continued to defy her supervisors' instructions and the requirements in the CBA to take her lunch in the middle of her shift. For example, on May 5, 2014, Geaslin arrived to work at 5:55 a.m. and clocked out for lunch at 12:34 p.m. Co. Ex. 5. Geaslin returned from lunch at 1:05 p.m. and left for the day only 15 minutes later, at 1:20 p.m. *Id.* Also, on May 9, 2014, the day of the incident, Geaslin arrived to work at 5:29 a.m. *Id.* She clocked out for the day at 12:05 p.m. *Id.* Thus, on May 9, 2014, Geaslin worked more than six and one half hours without taking a lunch. As Geaslin admitted, she could have been terminated for her failure to take a lunch at the appropriate time on May 9, 2014. Tr. 87:11-25; 88:1-5.

F. Geaslin's Version of Events.

At trial, Geaslin testified she began her shift on May 9, 2014 at 5:30 a.m. and was scheduled until 2 p.m. Tr. 47:19-25; 48:1. According to Geaslin, she was going to take her lunch at "almost 1:00 p.m." Tr. 48:2-7. Apparently, as Geaslin was getting ready to go to lunch, Starbucks "had gotten busy" and there was an announcement over the intercom that Pelo needed someone from Starbucks to help sack groceries. Tr. 48:8-15. According to Geaslin, Starbucks was busy but the front end of the store was not. Tr. 67:19-20. Geaslin testified that she was unaware of anyone from other departments, including meat, deli, and Starbucks, ever being asked to help sack groceries. Tr. 69:23-25; 1-2.

Geaslin claims that she took off her apron to go to lunch and as she stepped out of the Starbucks kiosk, she heard Pelo yell at her, "where do you think you're going?!" Tr. 48:20-23. Pelo was apparently standing behind the self-checkout kiosks, approximately 30-50 feet away

from Starbucks, when she was yelling at Geaslin. Tr. 49:5-9. In response to Pelo's alleged yelling, Geaslin approached Pelo,[7] put her hand on Pelo's shoulder, and calmly told her she was getting ready to take her lunch because she was supposed to leave at 2:00 p.m. Tr. 49:10-14. Geaslin said that she did not raise her voice. Tr. 111:24-25. Pelo allegedly continued yelling at Geaslin and stated that she would get her lunch, but she needed to sack groceries. Tr. 49:15-17. Geaslin claimed she replied to Pelo by asking, "technically, if that[8] was against my bargaining agreement with the Union?" Tr. 49:18-21. Geaslin admitted on cross examination that there is nothing in the CBA that prohibits her from sacking or cutting samples for the bakery. Tr. 70:16-25. Although Geaslin also admitted she was employed by King Soopers, and not Starbucks, Geaslin insisted her refusal to help other departments is supported by an unidentified "Starbucks agreement."[9] Tr. 71:1-11.

According to Geaslin, after Pelo again told her she needed to sack, Geaslin, "turned around to walk away and to go sack groceries and [she] had her hands raised and said, '[w]ell, all [she] was doing was asking about [her] lunch.'" Tr. 50:4-7. Geaslin went on to testify that although she was following Pelo's order and going to sack groceries, Pelo told her to "get back here. We need to talk." Tr. 50:8-10. Geaslin agreed that they needed to talk, but claims that she insisted they go to the office to do so. Tr. 50:-17. As they were leaving to go to the office, Pelo and Geaslin saw Angelica Eastburn, the Assistant Deli Manager, and Geaslin allegedly asked

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[7] As noted *infra*, *see* Argument § A, p. 18, this portion of Geaslin's testimony is inconsistent and disjointed, making it virtually impossible to determine exactly what she claims occurred on May 9, 2014.

[8] By "that," Geaslin was referring to sacking groceries and helping in the front end.

[9] Despite her steadfast claim that she was not required to help sack groceries, Geaslin admitted sacking groceries is consistent with King Soopers' Customer First initiative and King Soopers' values. Tr. 112:7-25.

Eastburn to go to the office with her and Pelo. Tr. 50:19-23. At that point, Pelo, Geaslin, and Eastburn all went to the office. Tr. 51:1-4.

Geaslin testified that when they were in the office, Pelo continued to yell at her and told Eastburn that Geaslin refused to sack groceries. Tr. 51:15-19; 52:8-9. Geaslin said that she responded to Pelo's comments in the office by saying Pelo's version "was not the truth" and that she tried to sack groceries, but Pelo called her back. Tr. 51:22-25; 52:1. Geaslin admitted she raised her voice at this point in the conversation. Tr. 52:5-7. Geaslin testified that Pelo then told her she was suspended for five days and needed to clock out. Tr. 52:10-12.

According to Geaslin, as she was walking out of the office, Pelo called her back and continued to reprimand her for not sacking groceries. Tr. 52:14-25; 53:1-3. Geaslin allegedly responded that she knew better than to refuse a supervisor's orders because "she was a manager of a store and [] had [previously] fired people for insubordination." Tr. 53:5-8. Geaslin also said that after Pelo continued to "hound" her regarding Geaslin's refusal to sack groceries, Geaslin told Eastburn that they needed someone to stand up for them because they barely have time to complete the Starbucks duties and they did not have time to help other departments. Tr. 53:9-16. Geaslin also testified that she suggested Pelo call the Starbucks District Manager so Pelo could understand what Starbucks expects from the Coffee Clerks. Tr. 53:24-25; 54:1-8.

At that point, Geaslin left the office and clocked out. Tr. 55:2-5. On her way out of the office, according to Geaslin, Pelo said it is "going to be five days without pay," to which Geaslin responded "oh wah." Tr. 55:6-10.[10] Geaslin denied ever saying on May 9, 2014 that Pelo "can't

[10] On direct examination, Geaslin claimed she only said "wah" one time and during the hearing, she did not elevate her voice while reenacting this statement. Tr. 55:6-10. On cross examination, however, Geaslin admitted that "there may have been another wah or two in there." Tr. 104:1-4. Geaslin denies she was saying it in disrespect and it was "not necessarily" meant to be like a baby crying, but that it "made [her] feel better." Tr. 104:5-12.

hurt [her]." Tr. 103:13-25. Geaslin stated she was "very emotional" during the May 9, 2014 meeting because "her job was on the line." Tr. 54:9-12. Throughout her testimony at trial, Geaslin denied that she ever refused to sack groceries on May 9, 2014. Tr. 54:23-24.

With regard to the May 14, 2014 meeting, Geaslin testified that Pelo continued to claim Geaslin refused to sack groceries, which made Geaslin make a "surprised look at [Craine]" that was intended to mean "'I can't believe you said that.'" Tr. 57:2-13. In response, Pelo commented that Geaslin was being disrespectful and making faces. Tr. 57:14-18. Both Craine and Geaslin allegedly told Pelo that it was not a face, it was "just an expression." Tr. 57:18-21. Geaslin also admitted she told Pelo that "'if [she] wanted people to respect [her], maybe [she] should try to respect them.'" Tr. 57:22-25. Geaslin claimed she and Craine left the room at one point in response to Pelo's request that they do so and comment that Geaslin was getting out of control. Tr. 58:3-7. When they went back into the office, Barbos allegedly joined the meeting. Tr. 58:19-23.[11]

According to Geaslin, at that point, Pelo said she was going to terminate Geaslin's employment. Tr. 59:1-2. Apparently, Craine responded that it was premature for termination and Pelo decided, instead, to call her manager. Tr. 59:5-14. After the telephone call, Pelo returned to the office and suspended Geaslin for another five days. Tr. 59:16-24. At trial, although she admitted she was upset during the May 14, 2014 meeting, Geaslin insisted she did not raise her voice or gesture at Pelo, Panzarella, or Barbos. Tr. 60:2-8. Immediately following her testimony, Geaslin chose to leave and not be present for the remainder of trial. Tr. 150:8-19.

[11] According to Geaslin, Barbos was not initially in the meeting. Tr. 56:18-19. All of the other witnesses, including Craine and Barbos, testified that Barbos was present for the entire meeting. Tr. 156:21-22; 249:25; 250:1-7.

G. The Collective Bargaining Agreement and Geaslin's Grievance.

The CBA specifically prohibits discrimination; it states,

> The Employer hereby agrees not to discriminate against any employee or discharge him because of membership in the Union and/or for upholding Union principles; and further, no employee who falls within the bargaining unit shall be discharged without good and sufficient cause.

Jt. Ex. 2, Article 40, Section 107. Thus, the CBA incorporates the protections of the Act and prohibits King Soopers from disciplining an employee who engages in activity protected by the Act.

In enforcement of this provision and protection of the rights guaranteed by the Act, the Union regularly files grievances alleging "collective concerted activity" and claiming King Soopers violated the CBA by disciplining an employee for engaging in behavior protected by the Act. Tr. 174:20-25; 175:1-2; 303:3-12. Several of these cases have proceeded to arbitration. Tr. 303:13-15. At no point in the grievance and arbitration process did anyone from the Union allege Geaslin was engaged in protected concerted activity and it did not file a grievance alleging Pelo's request that Geaslin help sack groceries on May 9, 2014 violated Article 40 or the Act. Tr. 302:15-18.

King Soopers and the Union have never arbitrated a case involving an allegation that a clerk working at Starbucks is not permitted to help out in the front end. Tr. 291:2-12. The CBA, in fact, does not prohibit work by employees across UFCW bargaining units and there are procedures for employees in one classification to temporarily work in another classification. Tr. 291:13-25; 292:1.

The retail and meat CBAs at Store No. 1 have the same grievance and arbitration procedure. Tr. 15-21. That process begins with a Step I meeting, which is a store level meeting between the store's Business Representative and the Store Manager. Tr. 152:22-25. If the

matter is not resolved during that meeting, then the grievance is reduced to writing and a Step II meeting is held. Tr. 153:1-2. At Step II meetings, King Soopers is usually represented by a member of the Labor Relations Department. *Id.* If a grievance is not resolved at the Step II meeting, then it is reviewed by the Union's Executive Grievance Committee, which determines whether it should arbitrate or drop the grievance. Tr. 153:3-7. If a grievance is dropped, then Union members have the right to appeal that decision to the full Union Executive Board. Tr. 153:8-12.

On May 22, 2014, the Union filed a grievance challenging Geaslin's termination. Co. Ex. 4. Therein, the Union alleged "Geaslin was suspended pending investigation on 5/9/14 and subsequently terminated on 5/21/14 without good or sufficient cause." *Id.* The Grievance neither alleged King Soopers violated the CBA by requiring Geaslin to work across jurisdictional lines nor that it violated the CBA by asking her to sack groceries. Tr. 176:24-25; 177:1; Co. Ex. 4. Geaslin's Grievance also did not allege a violation of the Act or that Geaslin engaged in protected and concerted activity. Tr. 175:3-8.

On May 21, 2014, Pelo and Craine met in Step I of the grievance process. Tr. 282:14-25; 283:1-10. During that discussion, Craine asked Pelo to give Geaslin another chance. Tr. 282:13-16. Pelo said she would not do so because she had already given Geaslin another chance by not terminating her employment on May 14, 2014. Tr. 282:15-25. On August 26, 2014, Labor Relations Specialist, Ken Aragon, and Union Business Agent, Lita Trujillo, met in Step II of the grievance process.[12] The parties were unable to resolve the Grievance at the Step II meeting.

[12] Craine attached Trujillo's notes to his affidavit to the Region. Although Counsel for the General Counsel had those notes in her possession at the hearing and they were referenced in Craine's affidavit, King Soopers was impermissibly not permitted to read these notes during the hearing. Tr. 169-171.

After completion of the steps in the grievance process, Geaslin's Grievance was withdrawn by the Union's Executive Grievance Committee. Tr. 173:3-5. Geaslin appealed that decision to the Executive Board, which is chaired by Union President, Kim Cordova. Tr. 173:6-12; Co Ex. 10. Approximately 12 members of the Executive Board considered Geaslin's Grievance and affirmed its withdrawal. Tr. 173:13-14; 174:1-16. According to Geaslin, the Union's Executive Board dismissed the Grievance because she should have helped sack the groceries and then filed a grievance. Tr. 134:17-22; 137:5-9. Thus, according to Geaslin, even the Union's Executive Board found that she failed to follow a work order and she was required to work now, and grieve later.

H. Geaslin's Unfair Labor Practice Charges.

On May 29, 2014, almost immediately after Geaslin's Grievance was filed, Geaslin filed a Charge with the Board. Ex. 1(a). Therein, Geaslin alleged, "[o]n or about May 9, 2014, the above-named employer by its store manager suspended Wendy Geaslin for asserting a contractual right." *Id.* On August 18, 2014, Geaslin filed an Amended Charge, which added two allegations and claimed, "[s]ince about March 2014 the Employer has interfered with, restrained, and coerced its employees by interrogating Wendy Geaslin about her communications with the Union. On May 21, 2014 the Employer discharged Wendy Geaslin for asserting contractual rights and for her protected concerted activities during a grievance meeting." Ex. 1(e). On June 27, 2014, King Soopers responded to the Charge. Tr. 298:1-6. In King Soopers' response, Bouknight specifically requested that the Charge be deferred to the grievance and arbitration procedure. Tr. 298:7-12.

On October 31, 2014, a Complaint was issued. Ex. 1(g). The Complaint alleged Geaslin was suspended on May 9, 2014 and May 14, 2014 and, ultimately, terminated on May 21, 2014 in retaliation for engaging in protected concerted activity. Ex. 1(g), paras. 6(a)-(c).

I. Counsel For The General Counsel's Amendments To The Complaint And King Soopers' Request For Information.

On August 6, 2015, two business days before the trial was scheduled to commence, Counsel for the General Counsel filed a Notice of Intent to Amend Complaint. Ex. 1(ee). Therein, Counsel for the General Counsel stated,

> Counsel will move that the Complaint be amended by adding Paragraph 9 to read as follows:
>
> 9.
>
> As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring <u>that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses,</u> or at all, during any given quarter, or during the overall backpay period.

Ex. 1(ee) (emphasis added). At trial, the only explanation provided by Counsel for the General Counsel for the late amendment is that it was an "oversight" and "wasn't pled originally." Tr. 9:23-25; 10:1-6. Counsel for the General Counsel was undoubtedly aware of her intent to seek this enhanced remedy since the Complaint was issued eight months prior. At trial, Judge Tracy granted the motion to amend and the Complaint was amended to add the new Paragraph 9 described above. Tr. 10:1-21.

Following receipt of Counsel for the General Counsel's Notice of Intent to Amend the Complaint, King Soopers immediately issued a subpoena to obtain information related to the new allegations. Ex. 1(ii). In the subpoena, King Soopers requested documents concerning to Geaslin's fitness for employment and attempts to find employment since being terminated by

King Soopers, as well as the expenses Geaslin incurred as a result of such job search efforts. *Id.* On August 10, 2015, Counsel for the General Counsel filed a Petition to Revoke the Subpoena. Ex. 1(hh). Therein, Counsel for the General Counsel argued an "enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent's actions have wreaked havoc on an employee's livelihood." *Id.* at pp. 2-3. Counsel for the General Counsel went on to state that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." *Id.* at p. 3. Judge Tracy granted the Petition to Revoke, holding that the requested items relate to Geaslin's incurred expenses and her efforts to find work. Tr. 17:23-25; 18:1-24. King Soopers did not receive any of the requested information and it was prohibited from asking Geaslin about her efforts to obtain employment.

After presenting her case-in-chief, Counsel for the General Counsel moved to amend the Complaint to add an allegation that "sometime in or about March 2014, the Respondent, by Theresa Pelo, interrogated the Charging Party about her Union activity." Tr. 195:13-16. At the time Counsel for the General Counsel made its oral motion, Geaslin had already left the hearing and was not available for cross examination on that point. Tr. 150:8-19. Judge Tracy granted Counsel for the General Counsel's oral motion to amend the Complaint and encouraged King Soopers to argue the suitability of such amendment in briefing. Tr. 197:6-24.

ARGUMENT

A. Geaslin Is Not Credible.

Geaslin is not credible and Judge Tracy should not credit her version of events. A credibility determination may rely on a variety of factors, including the context of the witnesses'

testimony, the witnesses' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Geaslin's testimony was self-serving, inconsistent, contradictory, impeachable, and irreconcilable with other witnesses' testimony, including that of her Union Representative, Craine.[13]

For example,[14] with regard to May 9, 2014, Geaslin initially claimed Pelo yelled at her across the front end of the store from 30-50 feet away. Tr. 49:5-9. On cross examination, however, Geaslin testified that Pelo approached her as Geaslin was leaving Starbucks to go on her lunch break. Tr. 109:23-25; 110:1. Then, at another point during cross examination, Geaslin said that she "walked up to [Pelo]." Tr. 113:15-9; 114:2-3. Not only is Geaslin's description internally inconsistent and contradictory, but it is not supported by the evidence. As Eastburn described, the conversation on the sales floor between Pelo and Geaslin occurred around floral and U-Scan, which is to the left when entering the front door. Tr. 210:11-23. Starbucks is located on the opposite side of the door and past the buggies. Tr. 210:2-10. If Pelo approached Geaslin while yelling at her, then the conversation would have occurred to the right of the entry doors, not the left.

Geaslin's testimony regarding how busy the store and Starbucks were on May 9, 2014 was also inconsistent to the point of being indecipherable. On direct examination, Geaslin claimed Starbucks "had gotten busy" when she heard Pelo's announcement over the intercom. Tr. 48:8-15. On cross examination, Pelo initially testified that Starbucks "is always busy."

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[13] Geaslin's testimony was also frequently unresponsive and, at one point, Judge Tracy interjected during cross examination to direct Geaslin to answer the questions. Tr. 118:14-20.

[14] The inconsistencies in Geaslin's testimony described herein are not exhaustive and are provided only as examples.

Tr. 106:11-14. Moments later, Geaslin said it was a good time for her to leave for lunch because "there were no customers." Tr. 107:6-7. Exactly one question later, Geaslin changed her testimony and said "[a]t the time, we had customers." Tr. 107:8-10. Similarly, on direct examination Geaslin said the front end of the store was not busy. Tr. 67:19-20. This testimony differs from Geaslin's statements during the Step II meeting and Craine's representations to the Union's Executive Grievance Committee where both said there was a major jam in business on May 9, 2014. Tr. 128:21-24; 172:2-25; 173:1-2. During the Step II meeting, Geaslin also admitted she understood the store was busy and Pelo would only have asked for her help because she needed it. Tr. 128:21-24.

Geaslin's testimony regarding how many customers were in the store was also contradicted by the testimony of Barbos and Eastburn. Eastburn specifically testified that the front end was very busy, and Starbucks was not. Tr. 215:17-23. Barbos testified that as she was leaving the store to attend a meeting that day, she saw that the check stands were very busy and there were not any customers waiting at Starbucks. Tr. 245:24-25; 246:1-2. Geaslin's description of how busy the store was is also illogical. If the front of the store were not busy, as Geaslin alleged at trial, Pelo would not have any need to request help sacking.

Geaslin claimed that during the May 14, 2014 meeting, Pelo asked Craine to take Geaslin into the hallway. Tr. 58:3-7. Craine, however, acknowledged that it was he, not Pelo, who decided "to take Wendy out for a break." Tr. 159:7-13. During their conversation in the breakroom, Craine had to tell Geaslin to "keep calm you know, don't raise her voice, give Theresa more respect . . . ." Tr. 159:19-22. Also with regard to the May 14, 2014 meeting, Geaslin insisted Pelo initially told her she was terminated, but retracted that statement when Craine told Pelo it was premature. Tr. 59:5-14. Craine, however, told no such story. As Craine

described, when he and Geaslin went back into the meeting, Pelo said she was going to leave Geaslin on suspension for misconduct. Tr. 159:25; 160:1-5.

Geaslin's testimony regarding her previous discipline was also inconsistent and demonstrably false. Geaslin testified she only received one written warning for not taking a lunch while at Store No. 29. Tr. 37:10-19; 82:1-8. Geaslin insisted that she was not suspended for that behavior. *Id.* Later, on cross examination, Geaslin admitted she received two write-ups but claimed she should have only received one. Tr. 86:1-3. When confronted with her two Behavior Notices, one of which showed she was suspended for failing to take her lunch, Geaslin contended there was a mistake and maintained she was not suspended in the face of documentary evidence proving otherwise. Tr. 86:4-14. Then, after insisting she was not suspended, on redirect examination, Geaslin recognized she was suspended, but never served the suspension. Tr. 141:23-25; 142:1-4.

Geaslin's testimony also should not be credited because her memory was faulty. For example, Geaslin's memory regarding the timing of the incident on May 9, 2014 was erroneous. Geaslin testified that she heard Pelo's request over the intercom and left Starbucks at 1:00 p.m. Tr. 107:11-13. Geaslin's timecard, however, shows that she clocked out at 12:05 p.m. Tr. 107:22-25; 108:1-9; Co. Ex. 5.[15] It is undisputed that Geaslin did not clock out until after engaging in the outburst on the sales floor, talking to Pelo and Eastburn in the office, and being sent home. Thus, Geaslin's memory of the timing of the May 9, 2014 incident is completely erroneous. Geaslin also testified that she could not remember who attended the Step II meeting on August 26, 2014. Tr. 127:2-6. In fact, she could not even remember if *she* attended the Step II meeting. Tr. 127:20-25; 128:1-2. Geaslin also could not even remember if the Union

[15] Based on Geaslin's recollection, her attempted lunch break was even more tardy.

filed a grievance on her behalf. Tr. 101:25; 102:1. Of course, a Grievance was filed on May 22, 2014. Co. Ex. 4.

With regard to Panzarella's March 2014 request that Geaslin help cut bakery samples, Geaslin testified that she complained to Latrice about being unable to complete her work in Starbucks and inefficiencies in finishing her work at Starbucks. Tr. 75:8-22. Geaslin's affidavit to the Board, however, made no such reference. When confronted with this inconsistency, Geaslin suggested Counsel for the General Counsel did not put it in her affidavit. Tr. 78:2-21. Unwilling to take any responsibility, Geaslin insisted she made that specific complaint. *Id.* With regard to the same incident, in her affidavit, Geaslin stated that when Pelo allegedly asked her about complaining to the Union, Geaslin said she was "blindsided and said no," meaning, she did not complain to the Union. Tr. 80:7-8. At trial, however, Geaslin testified she told Pelo, "yes," she did complain to the Union. Tr. 79:21-25;80:1-5. Geaslin was unable to explain this contradiction. Moreover, Pelo testified that the alleged conversation between her and Geaslin in March 2014 did not even happen. Tr. 270:9-15. It was Panzarella, not Pelo who directed Geaslin to sample King Cakes in March 2014. Tr. 225:18-25; 226:1-2. As Pelo noted, she did not have any reason to talk to Geaslin about her refusal to sample because both Panzarella and Jackson had done so. Tr. 270:9-15.

Geaslin claimed her affidavit was wrong a second time concerning whether she told Pelo she could not sack because she was going to lunch. In her affidavit, Geaslin stated that she told Pelo she "had to leave at two and needed to have [her] lunch." Tr. 115:14-21. On cross examination, however, Geaslin stated unequivocally that she did not tell Pelo she was going to lunch. Tr. 116:1-4. When confronted with this contradiction, Geaslin again stated that maybe the affidavit was taken down incorrectly. Tr. 116:5-13. On a third occasion, Geaslin claimed

there was a mistake in her affidavit because she was "misinformed" when she wrote in her affidavit that "Danny . . . would not be able to file a grievance on behalf, on [her] behalf until July." Tr. 126:3-20. Of course, as noted above, a Grievance was filed on Geaslin's behalf on May 22, 2014. *Id.*; Co. Ex. 4.

Geaslin was also unable to behave respectfully during trial. In fact, at one point, Geaslin began making faces at King Soopers' attorney, including pursing her face and holding her hands out to her side. Tr. 118:23-25; 119:1-9. Geaslin's inability to respect Deeny and face-making further support the conclusion that she engaged in the exact same conduct on May 14, 2014. Just like with the faces she made on May 14, 2014, Geaslin denied making any faces at trial. Tr. 120:4-14. Geaslin's denial that she made faces at Deeny during the hearing, despite the fact that Deeny called her out for doing so, is further evidence that Geaslin was untruthful regarding the faces she made during the May 14, 2014 meeting. Geaslin's inability to control herself during the trial weighs against giving her testimony any credence. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (holding that when assessing a witness' credibility, the Board must consider the way in which the witness answers the questions, including arrogance and defiance).

Ultimately, Geaslin's testimony should not be given any weight because it was self-serving, inconsistent, contradictory, impeachable, and irreconcilable with the other witnesses' testimony. *Gestamp South Carolina*, LLC, 357 NLRB No. 130, slip op. at 2 (December 8, 2011) (discrediting witness because his testimony on cross examination diverged from that on direct and because his testimony was contradicted by other witnesses); *Americare Convalescent Ctr.*, 280 NLRB 1206, 1210 (1986) (concluding that witnesses' self-serving statements are not to be accepted when contradicted by the record as a whole); *Grand Cent. P'ship*, 327 NLRB 966, 969 (1999) (discrediting former supervisor who was contradicted by the employer's other witness).

B. This Case Should Be Deferred To The CBA's Grievance And Arbitration Process.

As noted above, King Soopers and the Union have a long and mature collective bargaining relationship. UFCW files an average of 2,000 grievances per year and demands arbitration on approximately 60% of those grievances. The Union regularly files, pursues, and arbitrates grievances relating to whether King Soopers violated the CBA by disciplining employees for engaging in conduct protected by the Act. Simply stated, UFCW, of all unions, would be the first to pursue King Soopers' alleged violation of the Act if it did, indeed, violate the Act.

As outlined above, after filing the Grievance and pursuing the required steps of the grievance process, the Union concluded it could not prevail at arbitration and withdrew the Grievance. Tr. 173:3-5; 177:2-11. Geaslin subsequently appealed the withdrawal decision to the full Executive Board, which also affirmed the withdrawal. Tr. 173:13-14; 174:1-16. The Union was fully aware of Geaslin's Charge at the time of its withdrawal and considered the merits of Geaslin's allegations. Accordingly, Judge Tracy should defer to King Soopers and UFCW's grievance and arbitration process and not consider the merits of the Complaint.

That Geaslin and Counsel for the General Counsel ask Judge Tracy to decide the merits of the Complaint and ignore the grievance and arbitration procedures of the CBA is a ruse. To accept jurisdiction over the Charge would permit Geaslin to circumvent the requirements of the CBA's grievance and arbitration provisions. Indeed, in theory, the Union could perpetuate this tactic by simply filing a grievance *and* a charge of unfair labor practices on behalf of a disciplined employee, withdrawing the grievance, and asking the Board to seek a remedy for the employee. Such a tactic, however, entirely destroys the grievance and arbitration provisions of the CBA and undermines the Board's clear policy favoring deferral. Judge Tracy must not allow

Geaslin to use the Board's processes to curb the Company's bargained for rights under the CBA and should, therefore, defer to the Union's decision to withdraw her grievance.

This prosecution obliterates the Board's "pre-arbitral deferral" policy; namely, the deferral of charges of unfair labor practices to pre-arbitration grievance settlements. Where the parties have mutually resolved grievances under a collective bargaining agreement, the Board will defer to the settlement based on the strong federal policy favoring arbitration of labor disputes. *See Alpha Beta Co.*, 273 NLB 1546 (1985); *see also Hammontree v. NLRB*, 925 F.2d 1486 (1991). Under *Alpha Beta* and its progeny, the Board gives deference to grievance settlements where the grievance procedure and resolution are "fair and regular," all parties agree to be bound, the result reached is not "palpably wrong" under the Act, and the unfair labor practice issue was "considered" by the parties, which means the statutory and contractual issues are factually parallel. *Alpha Beta Co.*, 273 NLB 1546, 1547-48 (1985); *Plumbers & Pipe Fitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992).

Pre-arbitration withdrawal of a grievance, like grievance settlements, after the grievance is properly investigated, represents a consensual resolution of labor management disputes through the collective bargaining process. *See General Dynamics Corp.*, 271 NLRB 187 (1984) (deferring to the grievance and arbitration process when the employee pursued a grievance over two suspensions through four steps of the grievance process but withdrew the grievance "without prejudice" prior to arbitration). Where the Union withdraws the grievance after properly investigating the facts underlying the dispute, the grievance process has succeeded in resolving the grievance. Geaslin merely complains the grievance process was not favorable to her. Geaslin's dissatisfaction with the resolution of her Grievance is not a basis for the Board to

adjudicate her contract claims.[16] Moreover, "an employee's invocation of the contractual dispute resolution mechanism" is a factor that favors deferral." *NLRB v. Roswil, Inc.*, 55 F.3d 382, 388 (8th Cir. 1995) (finding the Board abused its discretion when it refused to defer to the grievance and arbitration process).

There is no reasonable contention the investigation and subsequent withdrawal of the grievance was not fair and regular, the result is palpably wrong under the Act, or the unfair labor practice issue was not considered by the parties. Nor could there be; Geaslin's Grievance advanced through the steps of the grievance procedure and was withdrawn by the Union upon a review of its merits. Then, Geaslin appealed that decision to the Union's Executive Board, which considered Geaslin's Grievance based on Craine's presentation. Moreover, the statutory and contractual issues are parallel and, when there is merit, the Union pursues grievances on both bases.[17]

The only pertinent dispute is whether Geaslin agreed to be bound by the Union's decision to withdraw her grievance. While Geaslin did not directly participate in the Union's decision to withdraw the grievance, she should be bound by its decision to do so because she was a bargained-for employee and empowered the Union to bind her to its decision, including its decision to waive her rights under the Act. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693 (1983) (The Court has explicitly recognized that, because the Union represents collective interests, it may waive certain rights under the Act of its members); *Hammontree v. NLRB*, 925 F.2d 1486

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[16] Of course, if Geaslin believes the Union breached its duty of fair representation, she is able to pursue duty of fair representation charge against the Union under the Act, 29 U.S.C. § 8(b)(1)(A), and in federal court. *See Vaca v. Sipes*, 386 U.S. 171 (1967). She has not done so.

[17] The Executive Board denied Geaslin's appeal on October 20, 2014. Co. Ex. 10. Thus, because the Charge was filed on May 29, 2014, and King Soopers' Position Statement was filed on June 27, 2014, the Union had a full opportunity to review the merits of Geaslin's statutory allegations during their Executive Grievance Board and Executive Board reviews.

(1991). Further, the Act "contemplates that individual rights may be waived by the [Union] so long as the [Union] does not breach its duty of good-faith representation." *Hammontree*, 925 F.2d at 1502. Consistent with the Board's deferral policy, the Board should defer to the Union's withdrawal of Geaslin's grievance.

C. Geaslin Did Not Engage In Protected And Concerted Activity.

The Complaint alleged Geaslin was suspended on May 9, 2014 and May 14, 2014 and, ultimately, terminated on May 21, 2014, because she engaged in protected concerted activity. Ex. 1(g), paras. 5(d) & (e), 6(a)-(c). As described in the Complaint, Geaslin's alleged protected and concerted activity occurred on May 9, 2014 and May 14, 2014. The Complaint should be dismissed because Geaslin did not engage in either protected or concerted activity on those dates.

i. Geaslin's behavior was not protected by the Act.

a. Geaslin lost the protection of the Act under Atlantic Steel.

Geaslin's behavior on May 9 and 14, 2014 was outrageous and opprobrious and, therefore, she lost protection of the Act. The Board considers the following four factors when determining whether an employee's conduct is so egregious as to lose the Act's protection: (1) the place of the incident; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Applying the *Atlantic Steel* factors here, Geaslin's behavior on May 9 and 14, 2014 caused her to lose the protections of the Act.

1. The place of the incident.

This first factor weighs heavily against protection of the Act. The first part of Geaslin's May 9, 2014 incident occurred on the sales floor and in the presence of customers. During that encounter, Geaslin raised her voice and repeatedly refused to follow Pelo's work order that Geaslin sack groceries. The sales floor at the time was overflowing with customers, especially

around the front end of the store, near the check stands, where Geaslin began yelling. Then, while in the office on May 9, 2014 and in the presence of fellow employee, Eastburn, Geaslin repeatedly refused Pelo's work order and continued to be insubordinate. Geaslin's outburst in the office occurred even after Pelo assured her that the CBA did not, in fact, permit such a refusal and that Geaslin could nevertheless file a grievance over the matter without recrimination.

Geaslin was also agitated, raised her voice, and was disrespectful toward Pelo. At the conclusion of that meeting, Geaslin yelled "waahhh, waahhh, waahhh," apparently imitating a baby's cry and mocking Pelo's authority, as she walked down the hall such that other employees could hear her inappropriate crying noises. Geaslin's insubordination occurred in the presence of Eastburn, a fellow bargaining unit member, which served to undermine Pelo's authority to enforce rules among unit employees. *See King Soopers, Inc. & Marie Butt, an Individual & United Food & Commercial Workers, Local Union 7*, 2001 WL 1598704 (N.L.R.B. Division of Judges) (May 18, 2001). Geaslin's behavior during the May 14, 2014 meeting also occurred in the presence of Geaslin's co-employees and managers, Panzarella and Barbos, who could only expect to suffer the same behavior and humiliation from Geaslin were they required to give her work orders in the future.

In *Marie Butt*, Administrative Law Judge Thomas Michael Patton considered whether a King Soopers employee lost the protection of the Act when she was involved in a confrontation on the sales floor and in the presence of customers and co-employees. While analyzing the *Atlantic Steel* factors, Judge Patton stated,

> First, as to the location of the incident, it is significant that Butt's conduct occurred in the area of the check-stands and in the presence of customers and working employees. It is reasonable to assume that customers and other employees would have heard the loud remarks made by Butt regarding alleged

> theft by another employee and possibly also the vulgar remarks she was believed to have made to Robar and Rosentrater. The Board emphasized in *Felix Industries* the presence or absence of other employees and the possible effect on discipline. The possible injury to an employer's business by creating a scene in the presence of customers in a selling area is also a relevant consideration. The place of the incident weighs against Butt. *See Piper Realty Co.*, 313 NLRB 1289 (1994).

Marie Butt, 2001 WL 1598704. Similarly, here, all of Geaslin's behavior either occurred on the sales floor in the presence of customers or in the presence of other employees. Consequently, the place of the incident factor weighs against the Act's protection.

2. The subject matter of the discussion.

The subject matter of the discussion factor also weighs against protection of the Act. On both May 9 and 14, 2014, the subject matter of the conversations were Geaslin's refusal to follow Pelo's work order. At no point was there any discussion about the substantive provisions of the CBA or how they apply to Geaslin's behavior. Nor did Geaslin inform Pelo why she believed the CBA barred Geaslin from sacking groceries. Counsel for the General Counsel cannot possibly maintain that the subject matter of Geaslin's outburst following her suspension – "waahhh, waahhh, waahhh" – was protected conduct. Furthermore, Pelo did not intend to discipline Geaslin during the May 14, 2014 meeting and, instead, wished to discuss the importance of Geaslin following Pelo's work orders. Geaslin turned the subject matter of that discussion from her insubordination into her failure to behave respectfully and her inappropriate and aggressive conduct. Therefore, the second factor weighs against protection of the Act.

3. The nature of the employee's conduct.

Geaslin's behavior on May 9 and 14, 2014 was highly inappropriate. On May 9, 2014, as noted above, Geaslin raised her voice on the sales floor and in front of customers, and stated she did not have to sack groceries. Geaslin was insubordinate during the entire conversation and at

no point did she say she would sack groceries or follow Pelo's instructions. Geaslin continued to engage in this behavior once they were in the office. Ultimately, because Geaslin was out of control and persisted in her refusal to sack groceries, Pelo suspended Geaslin pending investigation. As Geaslin walked out of the office, she yelled "waahhh, waahhh, waahhh" all the way down the hall.

During the May 14, 2014 meeting, Geaslin continued to be disrespectful and argumentative with Pelo. Not only did Geaslin roll her eyes and make faces at Pelo, but she began making threatening lunging gestures at Pelo with her hands clenched at her side. Each time Geaslin lunged at Pelo, her face was red, her body was shaking, and she bore her teeth at Pelo. Geaslin's lunging gestures were so aggressive that Pelo moved back in her chair and retreated from Geaslin. Geaslin also continued to challenge Pelo's authority and told Pelo that she did not have to respect Pelo, but that Pelo needed to earn Geaslin's respect. Moreover, Geaslin's demands for respect were entirely unprovoked by Pelo – Pelo did nothing but enforce the rules which had nothing to do with the CBA. Geaslin was so out of control on May 14, 2014, that Craine was forced to take her out of the meeting and calm her down. Geaslin's conduct on May 9 and 14, 2014 rises to the level of opprobrious and, therefore, she is not entitled to the protection of the Act. *See e.g., In Re Mead Corp.*, 331 NLRB 509, 515 (2000) (steward's "ad hominem attacks" beyond the bounds of protected activity).

Counsel for the General Counsel will likely argue Geaslin did not lose protection of the Act because she did not use profanity and she was not *actually* violent on May 9 or 14, 2014. This argument fails. An employee is not required to use profanity or actually become violent before losing protection of the Act. The Board has held insubordinate and disruptive behavior loses the protection of the Act, even absent violence or profanity.

In *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2013), the Board adopted the Administrative Law Judge's finding that two employees lost protection of the Act because their "Facebook exchange contain[ed] numerous statements advocating insubordination. Specifically, the employees, who worked as program and activities coordinators at a teen center, "referenced refusing to obtain permission as required by [the employer's] policies before organizing youth activities … disregarding specific school district rules … undermining leadership … [and] neglecting their duties." *Id.* (*citing DaimlerChrysler Corp.*, 344 NLRB 1324, 1325 (2005) (finding encouragement of slowdown unprotected); *Midwest Precision Castings Co.*, 244 NLRB 597, 598-599 (1979) (dismissing allegation where shop steward urged employee to slow down work); *see also Broyhill & Associates, Inc.*, 298 NLRB 707, 709-710 (1990) (no protection for employee who "expressed quite clearly over and over again … that he was not going to work the night schedule"). The Board specifically stated that it did not rely on the employees' use of profanity, or other disparaging characterizations of management, to find the employees' conduct was "so egregious as to take it outside the protection of the Act, or of such character as to render the employee[s] unfit for further service." *Richmond District*, 361 NLRB No. 74, fn 9.[18]

Moreover, King Soopers was not required to wait for Geaslin to actually become violent. The Board has repeatedly held that employers are "not obligated to wait for the employees to follow through on the misconduct they [advocate]." *Richmond*, 361 NLRB No. 74; *Broyhill*, 298

[18] Although *Richmond District* did not consider the *Atlantic Steel* factors, it found the employees lost the protections of the Act because of their specific plans to engage in insubordination. *Richmond*, 361 NLRB No. 74. Notably, the employees in *Richmond District* did not actually engage in insubordination, they only threatened insubordination through Facebook and while off-duty. The instant case presents an even stronger basis for Geaslin to lose the protection of the Act because she *actually* engaged in insubordination on May 9, 2014 and refused to sack groceries in the presence of customers and co-employees.

NLRB at 707-710. This is particularly true where Geaslin's aggressive gestures made Pelo fear for her personal safety, as Pelo was forced to distance herself from Geaslin's lunges. For obvious reasons, fear-inducing threats of workplace violence is a matter King Soopers takes very seriously. Geaslin's aggressive lunges at Pelo during the May 14, 2014 meeting, coupled with her insubordinate and argumentative behavior, are sufficient for Geaslin to lose protection of the Act.

4. Whether Geaslin's conduct was provoked by King Soopers' alleged unfair labor practice.

The final factor weighs heavily against protection under the Act. The alleged unfair labor practices did not occur until *after* Geaslin's inappropriate and opprobrious conduct on May 9 and 14, 2014 and it was unprovoked by any alleged unfair labor practice. As alleged in the Complaint, King Soopers purportedly violated the Act by suspending Geaslin on May 9 and 14, 2014 and terminating her employment on May 21, 2014. Ex. 1(g), paras. 5(d) & (e), 6(a)-(c). On both occasions, however, Geaslin's behavior was motivated by Pelo's request that Geaslin help sack groceries and Geaslin's refusal to do so. There is no allegation whatsoever in the Complaint that King Soopers violated the Act by Pelo's request that Geaslin sack groceries. Pelo was well within her rights to enforce legitimate work rules. Thus, Geaslin's conduct on May 9 and 14, 2014 was entirely unprovoked by any alleged unfair labor practice and was, instead, caused by her unwillingness to follow Pelo's lawful work order. This factor weighs against protection of the Act.

The balance of the four *Atlantic Steel* factors weigh heavily against the contention that Geaslin maintained the protection of the Act. Geaslin should have followed Pelo's instructions on May 9, 2014 to sack groceries and if she felt it violated the CBA then she could have filed a grievance. The Act, however, does not countenance Geaslin's self-help nor permit Geaslin to

engage in multiple tirades in the presence of customers and co-employees. Because Geaslin engaged in opprobrious and contemptuous conduct on May 9 and 14, 2014, she lost the protection of the Act.

During the trial, Counsel for the General Counsel specifically referred to several cases, apparently in support of her position. The cases referenced by Counsel for the General Counsel are easily distinguishable from the instant matter. One case cited by Counsel for the General Counsel was *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970). There, the Court stated, "[a]n employee may not act with impunity even though he is engaged in protected activity. His rights, derived from Section 7, must be balanced against the employer's right to maintain order in his business by punishing acts of insubordination." *Id.* at 730. The Court then found the employees lost the protections of the Act based only on their inappropriate language during the grievance meeting. *Id.* at 731. The employees in *Crown Central* were not aggressive or insubordinate during the meeting. In contrast, here, Geaslin not only argued with Pelo and maintained her insubordinate attitude, but she lunged at Pelo multiple times with her fists clinched at her side and became so out of control that Craine had to pull her out of the meeting. Thus, *Crown Central* does not apply.

Moreover, as the court stated, "[o]f central importance to [its] view of the case, is the nature of the protected activity involved." *Id.* The court went on to note that the employees' comments were made in the context of a grievance meeting and, therefore, the employees received additional latitude in their exchange of views. *Id.* Here, neither the May 9, 2014 nor the May 14, 2014 meetings can properly be described as "grievance meetings." *See Am. Fed'n of Gov't Employees, AFL-CIO, Local 3882 v. Fed. Labor Relations Auth.*, 865 F.2d 1283 (D.C. Cir. 1989) (finding that preliminary meeting between employee and supervisors to give employee a

chance to contest allegations of sexual harassment did not constitute a grievance meeting). Geaslin's initial misconduct occurred on the sales floor in the presence of customers and other employees – this setting does not sanction the additional latitude for "heated" disputes allowed in *Crown Central*.[19] Further, the May 9, 2014 meeting was an impromptu discussion that immediately followed Geaslin's refusal to follow Pelo's work order. The May 14, 2014 meeting preceded the filing of any grievance, Pelo had no intention of disciplining Geaslin during that meeting, and Geaslin was not actually disciplined during that meeting. Nor was either meeting part of the formal grievance process and the Grievance was not even filed until May 22, 2014. Thus, Geaslin's opprobrious behavior on May 9 and 14, 2014 did not occur during a "grievance meeting" and she is not entitled to any latitude.

Counsel for the General Counsel's citation to *Kingsbury, Inc.*, 355 NRLB 1195 (2010), is also unpersuasive. *Kingsbury* "is not a case about a discharge for opprobrious conduct." *Id.* at 21. Nor was the *Kingsbury* employee terminated because he was insubordinate. The *Kingsbury* employee was terminated because he told a non-bargaining unit employee to stop performing bargaining unit work and reported the problem to management. *Id.* at 11. The Board stated that the central issue in that case was "whether the protections of the Act are lost by an employee who spontaneously and impulsively intervenes to halt work that is unauthorized by management, promptly reports it to management, and seeks to have management intervene." *Id.* at 22. Indeed, the Board found that the employee's conduct looked "more like an endorsement of management's authority and control of the workplace, than a challenge to it." *Id.* at 23. Here,

[19] Indeed, Pelo was specifically inviting Geaslin to work now and grieve later.

Geaslin's objections to Pelo's work order are pure insubordination and cannot, in any way, be construed as an endorsement of management's authority.[20]

Ultimately, Geaslin's behavior on May 9 and 14, 2014 caused her to lose the protection of the Act. Judge Tracy should dismiss the Complaint.

b. Geaslin lost protection of the Act because she violated the CBA.

Geaslin's behavior on May 9, 2014 also lost the protection of the Act because she violated Article 44, Section 121 of the CBA, which prohibits employees from engaging in a "strike, picketing, boycotting, stoppage of work, anti-company publicity or other economic action of whatsoever nature, against the Company." Jt. Ex. 2, Article 44, Section 121 (emphasis added).

The Supreme Court has held that national labor policy "promote[s] industrial stabilization through the collective bargaining agreement," and that the "grievance machinery" is at "the very heart" of the policy. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 & 581 (1960); *see also Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 248 (1970) ("a no-strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration."). This labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). "In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted." *NLRB v. City Disposal*

[20] Counsel for the General Counsel also referred to *Interboro Contractors, Inc.*, 157 NLRB No. 110 (1966). *Interboro* is discussed below with regard to whether Geaslin's conduct was concerted.

Systems, Inc., 465 U.S. 822, 837 (1984); *Mathes, Curtis, Mfg. Co.*, 145 NLRB 473, 481 (1963) (noting that employees lose the protections of the Act if they violate a no strike clause).

On May 9, 2014, Geaslin refused Pelo's work order and rejected Pelo's requests that she help sack groceries. Geaslin's refusal to follow Pelo's work order and insubordination on May 9, 2014 is tantamount to economic action and self-help proscribed by the Act and the CBA. Geaslin was required to follow Pelo's work order and then file a grievance if she believed Pelo's directive violated the CBA. *See In Re Mead Corp.*, 331 NLRB 509, 513 (2000) (citing *Specialized Distribution Management*, 318 NLRB 158, (1995)) ("The usual and long-recognized rule is that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must 'obey now; grieve later.'"). Her failure to do so is inexcusable in light of her testimony that she had personally disciplined employees for insubordination and her Union Steward, Jackson's, specific admonition in March 2014 that Geaslin needed to follow her supervisors' instructions and then follow a grievance if she thought the instructions violated the CBA. Because Geaslin chose to engage in self-help and insubordination, rather than the process permitted under the CBA, Geaslin's conduct was not protected by the Act and King Soopers did not violate the Act by terminating her employment. *See Hayes Coal., Inc.*, 197 NLRB 1162, 1164 (1972) (holding that because the agreement was valid the strikers were obligated to follow the dispute procedure and the company's discharge of the employees did not violate the Act).

ii. <u>Geaslin did not engage in concerted activity for the purpose of mutual aid or protection</u>.

King Soopers also did not violate the Act by suspending and terminating Geaslin's employment because Geaslin did not engage in concerted activity for the purpose of mutual aid or protection. Geaslin's objections to sacking groceries were personal and were not made on

behalf of any other employees; she acted alone. Moreover, Geaslin did not invoke a contract right and, even if she did, she did not have a "honest and reasonable belief" she was asserting a contract right not to sack groceries.

a. Geaslin's objections were personal and individual.

Activity is concerted if it is "engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) *rev'd. sub nom Prill v. NLRB*, 775 F. 2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *affd. sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. Concerted activity does not include activities of a purely personal nature that do not envision group action. *See United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005).

Here, Geaslin's objection to sacking groceries was not "engaged in, with, or on the authority of other employees." *See Meyers I, supra.* At no point during the May 9 or 19, 2014 incidents did Geaslin say she was acting on behalf of any other employees. Tr. 275:7-11; 304:25; 305:1-3. Nor did she suggest or even intimate that other employees had the same objection. Nor could she; Barbos, Eastburn, and Panzarella all testified that employees regularly

help in the front end when necessary. Geaslin's objection to sacking groceries was purely her own personal protest. *Id.* Counsel for the General Counsel has not and cannot establish Geaslin was engaged in concerted activity.

As Judge Tracy stated in *Sb Tolleson Lodging, LLC d/b/a Best W. Tolleson-Phoenix Hotel & Latonya Bedonie, an Individual*, 2015 WL 1539767 (N.L.R.B. Division of Judges) (Apr. 7, 2015),

> I do not find that Bedonie engaged in concerted activity. The credited evidence does not show that any of Bedonie's conversations were concerted. In each conversation, Bedonie spoke of only her own "issues" with DeWitt, and did not mention any sort of group action or concern. At the trial, Bedonie failed to elaborate upon the "issues" she had regarding DeWitt except that she felt mistreated, picked on and felt unfairly treated. Bedonie testified to speaking with a few employees regarding her concerns about DeWitt's treatment of her; these "issues" she raised appeared to be limited to Bedonie's dislike of DeWitt's supervision of her.

Sb Tolleson Lodging, 2015 WL 1539767. Here, like in *Sb Tolleson Lodging*, the credited evidence demonstrates Geaslin spoke on May 9 and 14, 2014 only of her own objection to sacking groceries and did not mention any sort of group action or concern. Furthermore, there is absolutely no evidence any employees shared Geaslin's objection. *See Sb Tolleson Lodging*, 2015 WL 1539767 (considering the fact that there was no evidence other employees' shared charging party's concerns about her supervisor's supervision). Instead, all of the credible evidence shows that other employees regularly helped in the front end when the store was busy, regardless of whether they are Assistant Store Managers, Deli Clerks, Bakery Clerks, or Starbucks Clerks. Accordingly, Geaslin did not engage in concerted activity and the Complaint must be dismissed.

b. Geaslin's conduct was not concerted based on a theory that she was asserting a contract right.

Counsel for the General Counsel may argue Geaslin was asserting a contract right and, therefore, Judge Tracy should find she engaged in concerted activity. The Board's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agreement. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 841 (1984) (discussing *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966)). The employee's statement or action must be "based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement" and must be "reasonably directed toward the enforcement of a collectively bargained right." *Id.* at 837. The nature of the complaint must be "reasonably clear to the person to whom it is communicated, and . . . in fact[] refer to a reasonably perceived violation of the collective-bargaining agreement." *Id.* at 840.

The "reasonable" and "honest" belief requirements are "safeguards" which prevent the *Interboro* doctrine from being abused. *See In Re Chugach Mgmt. Servs., Inc.*, 2002 WL 31161655 (N.L.R.B. Division of Judges) (Sept. 24, 2002) (noting that an applicant cannot enjoy the protection of the *Interboro* doctrine by demanding he be paid the same wage rate as a previous employer had paid under a CBA because he would not have a reasonable and honest belief that his contractual rights were being violated). Geaslin did not invoke the protection of the CBA and, even if she did adequately invoke the CBA, Geaslin did not have a "honest and reasonable belief" she was asserting a contract right.

As a threshold matter, Geaslin did not invoke the protections of the CBA. According to Geaslin, in response to Pelo's request that she help sack groceries, Geaslin asked, "technically, if

that was against my bargaining agreement with the Union?"[21] Pelo accurately responded "no," but if Geaslin thought it were a violation, then she could file a grievance. Then, once in the office on May 9, 2014, Geaslin told Eastburn they needed someone to stand up for them because they barely have time to complete the Starbucks duties and they did not have time to help other departments. Geaslin's comment to Eastburn is similar to her complaint to Latrice in March 2014, which involved an issue of Starbucks clerks doing cake samples and not having enough time to complete job duties at Starbucks. Geaslin's question about whether she is permitted under the contract to sack is not the assertion of a contract right. Especially when, in response to Geaslin's question, Pelo told her that it does not violate the contract and, in any event, Geaslin was required to "work now and grieve later." In addition, Geaslin's complaint about not being able to complete her work duties has absolutely nothing to do with the CBA. Objections about inefficiencies at work cannot be construed as asserting a contract right. Therefore, Geaslin's *refusal* to perform a task requested by her manager was nothing more than insubordination – not the invocation of a bargained-for right.[22]

Counsel for the General Counsel may argue Geaslin invoked a contract right by her statement that she was not going to sack groceries because she was taking a lunch and her right to a lunch break is guaranteed by the CBA. This argument also fails. There is no dispute Geaslin was going to receive her lunch break. Both Geaslin and Pelo stated Geaslin just needed

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[21] Depending on which version of Geaslin's story is considered, it becomes even more clear that Geaslin did not invoke a contract right. On cross examination, Geaslin testified that she responded to Pelo's request by stating she "belong[s] to a different bargaining unit." Tr. 116:5-20. An employee's bald contention that she is in a different bargaining unit and omission of any reference to the contract cannot be construed as the assertion of a contract right.

[22] Also, in Geaslin's written statement created in May 2014, Geaslin claimed she was terminated because Pelo used her "management to bully employees!" Co. Ex. 3. Like Geaslin's other contentions, her allegation that Pelo was a "bully" has nothing to do with the CBA and cannot reasonably be construed as the invocation of a contract right.

to sack for a few minutes and then she could take lunch. Moreover, any construction of Geaslin's testimony to support an argument that she was asserting her right to lunch because she was concerned about receiving a lunch break is disingenuous. First, if she were so concerned with her lunch, then she would have taken it during the appropriate time to do so, not six and one half hours into her shift. Second, Geaslin has a history of failing to take a lunch break. *See* Co. Exs. 1 & 2. The fact is, Geaslin's claim on May 9, 2014 that she was going to lunch was a contrived way for her to refuse Pelo's work order. Counsel for the General Counsel's attempt to bootstrap Geaslin's insubordination into the assertion of a contract right must not be countenanced.

Geaslin's objections also were not "reasonably directed toward the enforcement of a collectively bargained right." *See City Disposal Sys.*, 465 U.S. at 837. In the run of cases, claimants found to have engaged in concerted activity by invoking a collective bargaining agreement have based their complaint on an actual provision in the agreement. *See, e.g.*, *City Disposal Sys.*, 465 U.S. at 839. Here, however, Geaslin has pointed to no provision in the CBA on which she purports to base her refusal to sack groceries. Geaslin cannot do so because there is nothing in the CBA to lend support to Geaslin's alleged belief that she was not required to sack groceries when instructed to do so by a manager. Because there is no collectively bargained right Geaslin was attempting to enforce, she could not have been asserting a contract right.

Even assuming, *arguendo*, Geaslin's refusal to sack groceries was anything other than insubordination, a conclusion unsupported by the law and facts, Geaslin was still not engaged in concerted activity because she did not have a "honest and reasonable belief" she was asserting a contract right. Indeed, just two months before she refused to sack groceries, Geaslin refused to sample King Cakes when asked by Panzarella. After refusing to perform the job, Geaslin

complained to Jackson that Panzarella's request violated the contract. In response to Geaslin's complaint, Jackson told Geaslin that Panzarella's request did not violate the contract and Geaslin was required to follow her supervisor's instructions. The Union did not file a grievance alleging Panzarella's work order violated the CBA. Because Geaslin was told just two months prior that helping other departments did not violate the contract and she was required to follow her supervisor's work orders, she could not have had a "honest and reasonable belief" she was asserting a contract right when she refused Pelo's request that she sack groceries.

Geaslin also knew she needed to follow Pelo's instructions based on her prior experience as an Assistant Bakery Manager at Jamboree Foods. As Geaslin admitted, in that role, she disciplined and terminated employees for being insubordinate and failing to follow her work orders. Accordingly, Geaslin's refusal to sack groceries on May 9, 2014 was nothing more than insubordination. Geaslin was not engaged in concerted activity.

Geaslin's refusal to sack groceries is similar to a driver's refusal to drive a truck in *ABF Freight Systems* because it lacked a good faith belief the refusal was justified. *See ABF Freight Sys.*, 271 NLRB 35, 36 (1984). In *ABF Freight Systems*, the claimant/driver had a history of refusing to drive trucks assigned to him. The truck assigned to him on the day of his discharge had been inspected and cleared by mechanics, yet he still refused to drive the truck. *Id.* The only basis for the driver's complaint was his opinion. *Id.* The Board concluded the driver did not possess a good faith belief that the truck presented a hazard to himself or others.

Similarly, here, Geaslin has a history of refusing to perform her supervisors' work orders. Geaslin was informed by Jackson, a Union Steward, and Panzarella in March 2014, and Pelo on May 9, 2014, that helping other departments did not violate the contract, yet she still refused to sack groceries on May 9, 2014. Geaslin gave no reason for her alleged belief that she was not

required to sack and it is entirely unsupported by any basis in the CBA. Stated differently, Geaslin did not provide *any evidence* whatsoever showing her opinion that she did not have to sack was "honest and reasonable." Geaslin's opinion, without any support, is not sufficient to meet the "reasonable and honest belief" requirement. *See ABF Freight Sys.*, 271 NLRB at 36 ("Obstructively raising petty and/or unfounded complaints" does not meet the "reasonable and honest" belief requirements). Geaslin was not engaged in protected or concerted activity and the Complaint must be dismissed.

D. Geaslin Was Not Terminated For Engaging In A Protected Activity.

Assuming, *arguendo*, Geaslin engaged in protected and concerted activity, King Soopers had a good faith belief she engaged in inappropriate behavior and Geaslin's termination was not motivated by her alleged protected and concerted activity. Under the standards set out in both *Wright Line*, 251 NLRB 1083 (1980) and *Burnup & Sims*, 379 U.S. 21 (1964), the Complaint must be dismissed.

The *Wright Line* causation standard applies "in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation." *Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004). "Under *Wright Line*, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity. *Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB 122, 127 (2009); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996) (under *Wright Line*, "the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of

persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.").

Counsel for the General Counsel cannot meet her burden under *Wright Line*. There is absolutely no evidence of anti-union animus here. Indeed, Counsel for the General Counsel did not present any evidence whatsoever that King Soopers has anti-union animus. King Soopers and UFCW have a long standing bargaining relationship and have had collective bargaining agreements for more than 40 years. Moreover, from the outset of this matter, King Soopers has encouraged the Board to defer to King Soopers and UFCW's grievance and arbitration machinery. In circumstances such as this, there can be no finding of anti-union animus.

Moreover, even if Counsel for the General Counsel could meet her burden to show anti-union animus, the Complaint still must be dismissed under *Wright Line* because King Soopers would have terminated Geaslin in the absence of the alleged protected concerted activity. All of the witnesses testified that King Soopers regularly terminates employees who are insubordinate, yell on the sales floor and in the presence of customers and co-workers, become aggressive and disrespectful with their managers, and refuse a work order. Even Geaslin's Union Representative, Craine, testified that he expected Geaslin would be terminated during the May 14, 2014 meeting because of what *she* told him regarding her behavior on May 9, 2014. Counsel for the General Counsel presented no evidence rebutting King Soopers' evidence that Geaslin was, like all other employees would be, terminated for engaging in inappropriate tirades and insubordination on May 9 and 14, 2014. Thus, Counsel for the General Counsel cannot meet its burden and the Complaint must be dismissed.

Burnup & Sims also precludes a finding that King Soopers violated the Act. Under *Burnup & Sims*, "[Section] 8(a)(1) is violated if it is shown that the discharged employee was at

the time engaged in a protected activity, that the employer knew it was such,[23] that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 379 U.S. at 23; *see also Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB 122, 124-25 (2009). "It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct." *Akal*, 354 NLRB at 124-25. The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *Id.* (citing *Marshall Engineered Products Co.*, 351 NLRB 767 (2007); *Pepsi-Cola Co.*, 330 NLRB 474, 475 fn. 7 (2000)).

Here, Geaslin was unquestionably engaged in misconduct on May 9, 2014 when she refused to sack groceries, and again on May 14, 2014, when she rolled her eyes, made snide and inappropriate remarks toward Pelo, and acted aggressively toward Pelo. Based on Geaslin's conduct, King Soopers undoubtedly had an honest belief that Geaslin engaged in misconduct. On the other hand, Counsel for the General Counsel cannot prove by a preponderance of the evidence that Geaslin did not, in fact, engage in misconduct. Its sole evidence on this point is Geaslin's unsupported denials that she did not act aggressively and did not refuse Pelo's work order. As described above, Geaslin is entirely incredible and her version of events cannot be given any weight. Accordingly, Counsel for the General Counsel cannot meet its burden under *Burnup & Sims* to show Geaslin did not, in fact, engage in misconduct. The Complaint must be dismissed.

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[23] As described, above, King Soopers also did not violate the Act because Geaslin was not engaged in protected activity and King Soopers did not know it was such.

E. Counsel for the General Counsel Cannot Maintain The Interrogation Claim.

After presenting her case-in-chief, Counsel for the General Counsel moved to amend the Complaint to add an allegation that "sometime in or about March 2014, the Respondent, by Theresa Pelo, interrogated the Charging Party about her Union activity." Tr. 195:13-16. The interrogation claim fails for multiple reasons. King Soopers was not given a full and fair opportunity to litigate the interrogation claim because it was not raised until after Geaslin left the trial. In addition, the substance of the interrogation claim has no merit. Judge Tracy must dismiss the interrogation claim.

i. Judge Tracy must reject Counsel for the General Counsel's request to amend the Complaint to add a substantive interrogation claim.

Board Rules and Regulations, Section 102.17, permits amendments to the Complaint only if they are "just." *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006). In determining whether an amendment to the complaint is "just," the Board evaluates three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Serv.*, 347 NLRB at 1171 (citing *Cab Associates*, 340 NLRB 1391, 1397 (2003)). All three of these factors dictate against permitting Counsel for the General Counsel to amend the Complaint to add an interrogation claim.

King Soopers did not have notice regarding Counsel for the General Counsel's intent to amend the Complaint or that it would be defending against allegations that it violated the Act by purportedly interrogating Geaslin in March 2014. The Complaint only pertains to alleged unfair labor practices occurring in May 2014. It does not have any allegations, factual or otherwise, relating to incidents allegedly occurring in March 2014. Moreover, the Complaint alleged King Soopers violated the act by suspending and terminating Geaslin. It does not mention an unlawful

interrogation in anyway. It was not until Counsel for the General Counsel's oral motion to amend that King Soopers had any notice whatsoever regarding the interrogation allegation. Prior to that point at trial, no variation of the word "interrogation" had even been used. Thus, King Soopers did not have notice regarding the interrogation claim.

Counsel for the General Counsel also did not offer any excuse to Judge Tracy, let alone a valid excuse, to explain the tardy motion to amend the Complaint. Facts underlying the interrogation claim were included in Geaslin's affidavit and this information was known to Counsel for the General Counsel since May 2014. Counsel for the General Counsel could have easily alleged the interrogation claim in the Complaint when it was filed in *October* 2014. Because there is no valid explanation for Counsel for the General Counsel's untimely motion to amend, it should be rejected.

Finally, the interrogation claim was not fully litigated. As described above, Counsel for the General Counsel did not seek to add the interrogation claim until after completing her case-in-chief. At that point, Geaslin had already left the trial venue, she was not recalled as a witness, and King Soopers had no opportunity to cross examine her on that issue.

Counsel for the General Counsel may argue King Soopers cross examined Geaslin regarding the March 2014 incident and, therefore, fully litigated the interrogation claim. This argument misstates the context of King Soopers' cross examination of Geaslin. Up until Counsel for the General Counsel's oral motion to amend the Complaint, the March 2014 incident was only referred to in the context of motivation and Pelo's alleged disapproval of employees challenging her authority. It was neither raised nor discussed in the context of an interrogation and there was no testimony that Pelo's disapproval of employees challenging her authority had anything to do with those employees engaging in protected concerted activity.

For example, during Counsel for the General Counsel's opening statement, the March 2014 issue was only referenced in the context of motivation. Specifically, Counsel for the General Counsel stated,

> The Respondent may argue that Ms. Geaslin's initial suspension was lawful because she refused a direct order to sack groceries. This is just not true. What is true is that Ms. Pelo resented Wendy's questions about her collectively bargained rights. In fact, this was not the first time that Ms. Pelo reacted with animosity towards Wendy's complaint about contractual issues. That event is probably why she reacted so poorly to Wendy's questions on the 9th.

Tr. 22:6-14 (emphasis added). Counsel for the General Counsel's statement regarding previous events, therefore, were raised as evidence of motivation, not of a separate violation of the Act. On direct examination, Geaslin testified regarding her March 2014 complaint to Latrice Jackson that syrups and other products were not prepared when she arrived to work. Tr. 41:22-25; 41:1-9. King Soopers' counsel objected to that testimony as being irrelevant and Counsel for the General Counsel responded,

> The relevance is that this is a prior occasion where Ms. Geaslin asserted an issue of doing another units work and Ms. Pelo approached her about it and asked her about it, to show that she has issue with anybody asking or questioning her authority on what she directs people to do.

Tr. 41:14-19. Thus, based on Counsel for the General Counsel's representations to Judge Tracy, prior to the oral motion to amend, Geaslin's March 2014 testimony only related to evidence of motivation and did not have anything to do with a purported interrogation. King Soopers did not have a full opportunity to litigate the interrogation claim. Amending the Complaint at such a late stage in the proceedings, therefore, is not "just."

ii. The interrogation claim has no merit.

Even if Judge Tracy grants Counsel for the General Counsel's oral motion to amend the Complaint and considers the merits of the interrogation claim, it should still be dismissed. Counsel for the General Counsel has wholly failed to support this claim.

The entire interrogation claim rests on Geaslin's incredible testimony that at some point in March 2014, she complained to her Union Steward, Jackson, about syrups and other products in Starbucks not being prepared when she arrived to work. Tr. 41:22-25; 42:1-7. According to Geaslin, following that complaint, Pelo asked her, "did [you] really complain to the Union about having to do bakery's products?" Tr. 44:5-14. As described above, Geaslin's testimony regarding her response to Pelo's purported question is inconsistent. *See* Argument(A), *supra*, p. 22; *see also* Tr. 79:21-25; 80:1-8. In any event, Pelo allegedly ended the conversation by saying, "[y]ou did complain to them and I don't like that." Tr. 44:19-22.

"Not all interrogations are illegal." *Cannady v. NLRB*, 466 F.2d 583 (10th Cir. 1972). "To violate the Act the interrogation must interfere with, restrain or coerce the employees." *Id.* A violation is established "if the questions asked, when viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to union activities." *Presbyterian/St. Luke's Med. Ctr. v. N.L.R.B.*, 723 F.2d 1468, 1475 (10th Cir. 1983). Isolated, innocuous incidents of interrogation and unrelated conversations lacking the indicia of coercion have been held insufficient to sustain findings of unfair labor practices under Section 8(a)(1). *Groendyke Transp., Inc. v. N.L.R.B.*, 530 F.2d 137, 144 (10th Cir. 1976). "The core of the unfair labor practice lies in the element of coercion and does not extend to a total restriction against argumentative discussion of [union activity], argumentative discussion itself being protected by [Section] 8(c) of the Act." *Id.* (citing *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 702 (10th Cir. 1969); *NLRB v. Automotive Controls Corp.*, 406 F.2d 221, 223-34 (10th Cir. 1969)).

Even if Judge Tracy credits every bit of Geaslin's testimony regarding the alleged "interrogation" by Pelo, it still does not rise to the level of a violation of the Act. Pelo's alleged

question to Geaslin regarding whether she complained to the Union and subsequent statement that she "do[es] not like that" did not coerce or intimidate Geaslin with regard to Union activities. Moreover, Geaslin did not testify, and Counsel for the General Counsel did not present any evidence, that Pelo's alleged comments made Geaslin feel like it was impermissible for her to solicit the Union's help. Rather, Pelo's alleged comments are no more than "[i]solated, innocuous incidents of interrogation," which lack any "indicia of coercion." *See Groendyke Transp.*, 530 F.2d at 144 (10th Cir. 1976). Thus, Geaslin's purported comments do not amount to an unlawful interrogation in violation of the Act.

In addition, Counsel for the General Counsel's interrogation claim was specifically described as being based on *Pelo's* statements in March 2014. Tr. 195:13-16. It was Panzarella, not Pelo, who spoke to Geaslin regarding sampling the King Cakes. Thus, Counsel for the General Counsel cannot satisfy its burden to show *Pelo* interrogated Geaslin in March 2014. The "interrogation" was no more than Counsel for the General Counsel's gasping attempt to revive a flawed and unsupportable complaint. It must be dismissed.

F. The Administrative Law Judge Should Not Have Revoked King Soopers' Subpoena.

On August 7, 2015, King Soopers served on Geaslin a subpoena to obtain information related to Counsel for the General Counsel's Notice of Intent to Amend the Complaint. Ex. 1(ii). King Soopers requested documents relating to Geaslin's fitness for employment and attempts to find employment since being terminated by King Soopers, as well as the expenses Geaslin allegedly incurred as a result of such job search efforts. *Id.* On August 10, 2015, Counsel for the General Counsel filed a Petition to Revoke the Subpoena. Ex. 1(hh). Therein, Counsel for the General Counsel argued the "enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent's actions have

wreaked havoc on an employee's livelihood." *Id.* at pp. 2-3. Counsel for the General Counsel went on to state that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." *Id.* at p. 3.

This transparent attempt by Counsel for the General Counsel to bolster an unsupportable Charge and prejudice Judge Tracy must not be countenanced. Preliminarily, whether King Soopers "wreaked havoc" on Geaslin's life is irrelevant and cannot be remedied by the NLRB. Once this specious claim was presented, however, King Soopers had every right to learn the veracity of these allegations. To determine if an enhanced remedy is appropriate and whether King Soopers "wreaked havoc" on Geaslin's life, King Soopers needed to know the amount of Geaslin's interim earnings and her efforts to seek interim employment. Of course, any havoc that has been wreaked cannot be attributed to King Soopers if Geaslin failed to seek other employment or was unable to seek other employment. Nevertheless, Judge Tracy granted the Petition to Revoke, holding that the requested items related to Geaslin's incurred expenses and her efforts to find work. King Soopers did not receive any of the requested information and it was prohibited from asking Geaslin about her efforts to obtain employment.

Because Judge Tracy revoked King Soopers' subpoena and King Soopers was not able to review Geaslin's documents or question Geaslin regarding her ability and efforts to obtain post-King Soopers employment, Judge Tracy should not find Geaslin is entitled to the enhanced remedy requested by Counsel for the General Counsel. Indeed, as Counsel for the General Counsel admitted in her Petition to Revoke King Soopers' Subpoena, such a remedy is only available if King Soopers "wreaked havoc" on Geaslin's life. Ex. 1(hh), pp. 2-3. Because no evidence was presented regarding whether havoc was actually wreaked on Geaslin's life or

whether such havoc was self-inflicted, there is insufficient evidence to find an enhanced remedy is warranted here.[24]

CONCLUSION

King Soopers did not violate the Act by suspending Geaslin on May 9 and 14, 2014 and terminating her employment on May 21, 2014. Geaslin's insubordinate and opprobrious behavior in violation of the no strike clause on those days caused her to lose protection of the Act. Moreover, Geaslin was not engaged in concerted activity because her insubordination was purely personal and not on behalf of any other bargaining unit employees, and she did not invoke a contract right or have a honest and reasonable belief she was invoking a contract right. King Soopers also did not violate the Act because Counsel for the General Counsel presented no evidence of anti-Union animus, Geaslin engaged in misconduct, and King Soopers would have terminated Geaslin's employment for her misconduct regardless of any alleged protected activity. Judge Tracy also should not permit Counsel for the General Counsel's tardy oral motion to amend the Complaint to add an interrogation claim and, in any event, King Soopers did not interrogate Geaslin in violation of the Act in March 2014. Finally, Judge Tracy should not allow an enhanced remedy, but, rather, should remonstrate Counsel for the General Counsel for her tactics. The Complaint must be dismissed in its entirety.

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[24] At trial, Counsel for the General Counsel insisted the issue of whether King Soopers "wreaked havoc" on Geaslin's life and to what extent is better left for a back pay proceeding. Counsel for the General Counsel misses the point. It is of no solace that the remedy can be explored in a back pay proceeding when this specific allegation was made in a last minute amendment to the Complaint. Such a late amendment severely prejudiced King Soopers and Counsel for the General Counsel's ploy should be sanctioned. Moreover, as Counsel for the General Counsel recognized, Judge Tracy must decide if an enhanced remedy is appropriate in this case. No such determination may be made without evidence as to whether Geaslin caused or contributed to her losses.

WHEREFORE, King Soopers respectfully requests Administrative Law Judge Tracy dismiss the Complaint in its entirety and award such other relief deemed just and proper.

Respectfully submitted this 16th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2015, a true and correct copy of the foregoing **EMPLOYER'S POST-HEARING BRIEF** was electronically filed addressed to the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

KING SOOPERS, INC

and Case 27-CA-129598

WENDY GEASLIN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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I. Statement of the Case

This matter was heard by Administrative Law Judge Amita Baman Tracy (Judge) at Denver, Colorado on August 11, 2015. The charge in Case 27-CA-129598 was filed by Wendy Geaslin (Charging Party) on May 29, 2014 and served on King Soopers, Inc. (Respondent) the next day. (G.C. Ex. 1(a), (c)). An amended charge was filed by the Charging Party on August 18, 2014 and served on Respondent on the next day; it alleges that that the Respondent unlawfully interrogated the Charging Party in March 2014, and the Respondent suspended and terminated the Charging Party for asserting her contractual rights and for her protected activities in a grievance meeting. (G.C. Ex. 1(d), (f)). The Complaint, as amended at the hearing,[1] alleges that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act) by suspending and later terminating the Charging Party for her protected activity. (G.C. Ex. 1(g)).

II. Background

A. Employer's Business

Respondent operates a number of retail grocery stores in the state of Colorado. The store at issue in this case is Respondent's store located at 1331 Spear Blvd. in Denver, Colorado (Store 1).

The Charging Party was employed by the Respondent from approximately August 19, 2009 until May 21, 2014. (Tr. 36:22). Geaslin initially worked at Respondent's Store 29 until approximately May of 2013 when she transferred to Store

[1] Counsel for the General Counsel moved to amend the Respondent's state of incorporation. The motion was granted without objection. (Tr. 12:16). Counsel for the General Counsel moved to add paragraph 9 to the Complaint requesting search for work expenses as part of the remedy sought. The motion was granted over Respondent's objection. (Tr.10). Counsel for the General Counsel moved to add the allegation that Respondent interrogated the Charging Party about her union activity. The motion was granted over Respondent's objection. (Tr. 197:13).

1. (Tr. 37:7, 38:1). During Charging Party's employment at Store 1, the Store Manager was Theresa Pelo and the two Assistant Store Managers were Lisa Panzarella and Ruxandra Barbos. (Tr. 38: 4-6, 153:23, 154:1-3). The store was open 24 hours a day and the Starbucks kiosk was open from 6:00 a.m. until 9:00 p.m. (Tr. 39:21-25). The Respondent employed a security guard to stand at the front entrance of the store. (Tr. 38:15-17, 161:12). Management offices were located at the east side of the building. (Tr. 38: 23-24).

The employees at Store 1 are represented by United Food and Commercial Workers Union, Local 7. (Tr. 152:12). There are two contracts that cover the terms and conditions of employment at that store; both contracts have an identical grievance procedure. (Tr. 152: 14-21; Jt. Ex. 1, 2). At Store 1, Geaslin was employed as a Starbucks barista; her terms and conditions of employment were covered by the Meat unit collective bargaining agreement. (Tr. 39:1-7; 154:10, Jt. Ex. 1). Her duties as a barista included sampling Starbucks brand pastries but not King Soopers brand pastries. (Tr. 155:19-23).

III. Fact Regarding the Events in March 2014

Sometime in early March 2014 Geaslin came to work and the closing duties had not been properly done. Geaslin later found out that the employee who had closed the night before her had been too busy sampling King Soopers brand bakery product to finish the Starbucks closing duties before the end of his shift. (Tr. 43:1-3). Geaslin complained to a coworker in produce, Latrice Jackson, that they did not have time to get their own duties done without having to sample the bakery's products. (Tr. 44:1-2, 75:13-15). About a week later Store Manager Pelo came to Geaslin at the Starbucks

kiosk. (Tr. 44:9-11). Pelo told Geaslin she wasn't going to ask her, but did she really complain to the Union about having to sample bakery's products. (Tr. 44:13-15, 73:21). Geaslin responded that she had not complained to the Union but Pelo accused her of lying. (Tr. 44:16-20, 73:24-25, 74:22). Upon looking into it, Geaslin found out that Jackson, previously unbeknownst to her, was a Union representative for the produce department and that was the reason for the Store Manager's accusation. (Tr. 46:10-21, 74:7-8, 80:12-13, 81:3-4,142:11). Jackson had brought Geaslin's complaint to the attention of Assistant Store Manager Panzarella, who in turn specifically reported Geaslin's complaint to Pelo. (Tr. 81:23, 237: 20-25, 238:1).

IV. Fact Regarding the Events on May 9, 2014

On May 9, 2014, Geaslin was scheduled to work from 5:30 a.m. until 2:00 p.m. (Tr.47:23-25, 47:1). At approximately 1:00 p.m.[2] Geaslin was preparing to take her lunch when she heard Pelo page for a Starbucks employee to help sack;[3] almost simultaneously the line of customers grew and she decided to stay to help serve the line of customers. (48:11-15, 67:25, 106:18-20, 112:10-19, 140:11-12, 141:3, 215).[4] After Geaslin had helped with the remaining customers, she stepped out of the kiosk. (Tr. 48:22). Geaslin heard Pelo yell at her from about 30 feet away behind the self-checkout area, "Where do you think you are going?" (Tr.48:22-23, 49:9, 113:4, 113:23).

Geaslin approached Pelo and said that she was going to take her lunch because

[2] Geaslin clocked out at 12:05pm. It is uncontested that she clocked out after a meeting with Pelo but before taking a lunch. (Resp. Ex. 5). Thus, it appears that the actual time of Pelo's page was closer to 11:30am. Eastburn testified that she witnessed the incident between Pelo and Geaslin starting at 12:00pm. (Tr. 205:16).

[3] The terms "sacking groceries" and "bagging groceries" are used interchangeably throughout this brief to refer to an employee taking products purchased by the customer and placing them into bags/sacks.

[4] Eastburn also testified that the employees at Starbucks priority is to take care of Starbucks customers before helping in other sections. (Tr. 215:11).

she was off at 2:00 p.m. (Tr. 49:12-14, 110:13-16, 111:21-23, 114:2-3, 114:9-12). Pelo told Geaslin not to worry about her lunch and that she would get her lunch. (Tr. 49:17). Geaslin then asked Pelo if technically she should be sacking because she was in a different bargaining unit. (Tr. 49:20-21, 116:18-20). Pelo stated that she was the store manager and that Geaslin needed to go sack groceries. (Tr. 49:23-24). At this point in time both Pelo and Geaslin were raising their voices. (Tr. 50:1-3). Geaslin then turned away from Pelo to go sack groceries and raised her hands and said: "Well all I was doing was asking about my lunch." (Tr. 50:6-7, 67:5, 67:11-13, 111:6,111:11-13, 136:22-25). Pelo told Geaslin that they needed to talk more and Geaslin agreed and suggested that they go to the office to talk. (Tr. 50:9-13, 67:16, 137:1-4, 143:13-15).

On the way to the office Geaslin saw Deli Manager, Angelica Eastburn, and asked her to come to the office with her and Pelo. (Tr. 22-23). The three women went into the management office where Pelo sat at her desk and Geaslin sat across from her. (Tr. 51:11-14). The door was closed. (Tr. 211:11). Once they were in the office, Pelo told Eastburn that Geaslin had refused to sack groceries. (Tr. 51:18-19). Geaslin told Pelo that she had never told Pelo that she would not sack groceries and that she had only been asking about her lunch and her rights in her Union contract. (Tr. 51:23-25, 52:1). Pelo told Geaslin that she had flat out refused to sack groceries. (Tr. 52:3-4). Both Pelo and Geaslin were raising their voices during this conversation. (Tr. 52:7-9, Tr. 212:18). At that time Pelo told Geaslin to clock out because she was suspended for five days. (Tr. 52:11-12). Geaslin got up to leave but as she reached the door, Pelo called her back into the office. (Tr. 52:14-18, 124:1). Geaslin came back into the office, sat back down again and asked Pelo what she wanted from her; Geaslin reiterated that

she was not going to say that she had refused to sack. (Tr. 52:21-24, 124:5-8). Pelo told Geaslin that she had refused to sack groceries and that she needed to understand that Pelo was the manager and had to do whatever Pelo told her to do. (Tr. 53: 1-3). Geaslin reiterated that she had never refused Pelo's order to sack and explained that she knew better than to ignore a manager's order. (Tr. 53: 5-8, 130:1-3). At one point in the discussion Geaslin turned to Eastburn and told her that the employees needed someone to stand up for them because they did not have enough time to do their own work in addition to the work of other departments. (Tr. 53:13-15, 123:3-5). Eastburn did not respond, instead Pelo instructed Geaslin not to talk to Eastburn but to talk to her. (Tr. 53: 20). Geaslin also told Pelo that they should call the Starbucks manager because he could explain the barista duties to her. (Tr.54:3-5). Pelo said she did not want to talk to him because he was not a King Soopers employee. (Tr. 72:13). Throughout the meeting Geaslin was emotional because she was afraid of losing her job but she did not use any profanity or make any physical or verbal threats to anyone in the meeting. (Tr. 54:11-18, 160:13-21, 242:16). Although Pelo continued to say that Geaslin refused to bag, Geaslin continued to argue that she never refused to sack groceries. (Tr. 54:23-24). At the conclusion of the meeting Pelo reiterated that Geaslin would be suspended without pay for five days. (Tr. 54:8-9, 101:21). Geaslin responded by saying "oh wah." (Tr. 54:10). Geaslin clocked out and left the premises on her own, without any escort. (Tr. 55:13-16, 109:9).

Following the meeting, Geaslin called her Union representative Danny Craine and explained what had happened; specifically that Pelo had accused her of refusing to

sack groceries but that she had only been asking questions about her lunch and contract rights. (Tr. 55:24, 56:1-4, 156:6-8).

V. Facts Regarding the Events on May 14, 2014

On May 14, 2014 Geaslin and Union representative Craine met with Pelo and her assistant store managers, Panzarella and Barbos. (Tr. 56:19, 156:16-22). Geaslin and Craine were sitting across from Pelo at her desk and the office door was closed. (Tr. 56:21-23, 25; 157:5-7). At the beginning of the meeting Pelo informed them that she was not going to terminate Geaslin and then proceed to recount her version of events from May 9, 2014. (Tr.56: 2-6). Pelo told Geaslin that while she knew sacking was not in her contract, she needs to do what she is told to do and grieve it later. (Tr. 157:9-11, 186:6-10). Geaslin responded that Pelo did not have to yell about the sacking and that she never refused to bag. (Tr. 157: 13-15). Then Craine told Pelo that having Geaslin do retail bargaining unit work was a violation of the contract. (Tr. 157:23-25). Pelo responded that she knew what Craine was saying but that she had been shorthanded and had no choice. Pelo also told Geaslin that she needs to do what she is told and to respect her as a boss. (Tr. 158: 3-4). Then Geaslin told Pelo that if she wanted respect she should try to show respect. (Tr. 57:24-25, 99:16-17). This angered Pelo and she told Geaslin she did not have to respect her. (Tr. 58:2).

Pelo told Craine that Geaslin had refused to sack groceries. (Tr. 57:5). Geaslin was surprised that Pelo told Craine that she had outright refused to bag. Geaslin made a facial expression of disbelief at what Pelo was saying to both Craine and Pelo. (Tr. 57:12, 120:14, 131:11-15, 132-19). When Pelo saw Geaslin's expression she said "Do you see the disrespect that she shows me? She's making faces at me and being very

disrespectful." (Tr. 57:15-17). Craine responded to Pelo and said that it may have just been Geaslin's facial expression because we all look different. (Tr. 57: 20, 158:22-24). But Pelo did not believe him and continued to call Geaslin disrespectful. (Tr. 57:21, 158:25, 159:1).

Geaslin was emotional during the meeting and was speaking loudly but not yelling. (Tr. 158:11-14). She appeared to become upset because Pelo kept saying that Geaslin refused to bag but Geaslin continued to assert that she had not refused to bag, she was simply asking why she was being asked to sack. (66:3-9,192:1-7). Craine stated that Geaslin cut off Pelo a couple of times during the conversation trying to give her side of the incident but Geaslin was not insubordinate. (Tr. 191:15-19). Craine observed that both Pelo and Geaslin were getting progressively angrier; Geaslin was raising her voice and Pelo's facial expression was getting angry. (Tr. 159:11, 193:1-3). Craine took Geaslin out of the room to talk to her. (Tr. 58:7, 159:15). Once they were in the break room, Craine told Geaslin to calm down, let him do the talking and try to give Pelo more respect. (Tr. 58: 13-14, 159:20-22). When Craine and Geaslin returned to the office Pelo told them that she was going to leave Geaslin on suspension and she wanted to terminate Geaslin. (Tr. 59:2; 160:1-2). Craine asked Pelo why she was being suspended and Pelo told him it was for misconduct. (Tr. 160:5). Craine tried to tell Pelo that Geaslin was just defending herself and Pelo said Geaslin was making faces at her and being rude. (Tr. 160:8-9). Craine said that it was premature to terminate her and that there were steps she needed to take before she could terminate her and that a longer suspension would mean more backpay. (Tr. 59:8-9, 100 :5-6,161:1-3). At no point during the meeting did Geaslin admit she refused to

bag. (Tr. 159:4). Geaslin always maintained she did not refuse to bag. (180:24-25). Geaslin did not use any profanity and she did not make any physical or verbal threats to anyone in the meeting. (Tr. 60:24, 61:1-5, 160:15-21, 191:11, 182:22, 242: 5-16). After the meeting, Geaslin left the building unescorted. (Tr. 22-24, 161:12-14)

After the meeting, when Craine was making his rounds, he spoke with Pelo again about Geaslin. Pelo was upset and informed Craine that she was originally only going to suspend Geaslin but after her actions in the meeting, she was seeking her termination. (Tr. 161:21-24, 162:3, 183:25, 184:1-2, 185:1-2, 192:15-16). Craine told her that termination was harsh and tried to convince her not to seek termination. (Tr. 162:1-4, 193:25, 194:1-10).

VI. Facts Regarding the Events on May 21, 2014

On May 21, 2014 Geaslin met with Crane, Pelo, and Panzarella. (Tr. 62:3-11). At the outset of the meeting Pelo stated that what had transpired at the previous meeting was terrible and she had never been treated like that before and she terminated Geaslin. (Tr. 62:14-15, 162:14-20). Craine asked who made the decision to terminate and Pelo told him it was her decision but she had checked with the "normal people." (Tr. 162: 22-24). Craine asked the reason for termination and Pelo said it was gross misconduct. He asked Pelo to specify the misconduct. She said it was because of Geaslin's behavior on May 14, specifically; talking back to her, making faces, and because of her inappropriate comment about respect. (Tr. 163:5-10). Pelo provided Craine and Geaslin with a Behavioral Notice listing her reasons for terminating Geaslin. (Tr. 63:5; 163:25, 164:1, Jt. Ex. 4). Craine asked Pelo to give Geaslin another chance because he did not see the behavior happening again but she refused. (Tr. 165:4-8)

Geaslin did not say anything during this meeting. (Tr. 62:17,164:7-9). Again, Geaslin left the building unescorted. (Tr. 62:14,165:13-16).

The Union filed a grievance on Geaslin's behalf but ultimately dropped the grievance without considering any Board law. (Tr. 165:17-21).

VII. Credibility Resolutions

A. General Credibility Resolutions

Most of the issues in this case do not turn on the credibility of the witnesses. Indeed, most of the testimony among the witnesses is consistent. Some broad conclusions concerning the overall credibility of each witness can be gleaned from the record as a whole. Geaslin is a generally credible witnesses. She provided testimony that was specific, detailed, and contained a good level of recall. In addition, she testified consistently on direct and on Respondent's lengthy cross examination. There are two areas where credibility is directly at issue: (1) whether Pelo questioned Geaslin about her complaint to the Union, and (2) whether Geaslin ever refused Pelo's directive to sack groceries.

B. Credibility Resolution Concerning Whether Pelo Questioned Geaslin about her Complaint to the Union

Geaslin testified on both direct and cross examination that Pelo said, "she wasn't going to ask me, but did I really complain to the Union about having to do bakery's products." (Tr. 44:13). Pelo denies making the comment. While this is a one-on-one credibility determination, the testimony supports Geaslin's version of events. Geaslin testified that she was bewildered by Pelo's comment because she had only complained to a coworker, Latrice Jackson. Geaslin found out later that Jackson was a Union

steward. When Geaslin confronted Jackson, Jackson told her that she had conveyed her complaint to Panzarella. Panzarella testified that she recalled the timing of the incident, March 2014, and she recalled hearing the complaint from Jackson and reporting it to Pelo. (Tr.226, 237:24). Pelo confirmed that Panzarella brought the complaint to her. (269:19-24). It would be incredible for Geaslin to have created a lie concerning Pelo's questions about her complaint when the surrounding circumstances were precisely corroborated by Panzarella and Pelo. It is more likely that Pelo's denial absent any corroboration is incredible. Therefore, the testimony even of the Respondent's witnesses weighs in favor of crediting Geaslin's version of events.

C. Credibility Resolution Concerning Whether Geaslin Refused to Sack Groceries

Key credibility resolutions must be made about whether Geaslin actually told Pelo she would not sack groceries. Although both witnesses agree about the facts surrounding the incident, their testimony is diametrically opposed.

Pelo testified that Geaslin told her that she was not going to sack groceries. No other witness testified that they heard Geaslin say she would not sack groceries. Geaslin was consistent on both direct and cross examination that she asked whether she should be sacking and then was going to do that work but Pelo called her back to talk. (Tr. 50:9-13, 67:16, 137:1-4, 143:13-15). The overall evidence at trial supports the conclusion that Geaslin's testimony should be credited over Pelo's.

First, Geaslin's physical movements do not to support the idea that Geaslin intended to clock out over Pelo's objection. Geaslin testified that she turned from Pelo and started to go sack groceries. (Tr. 50:6-7, 67:5, 67:11-13, 111:6,111:11-13, 136:22-25). There is no testimony that Geaslin was walking toward the time clock while Pelo

was talking to her. In fact, just the opposite is true; Eastburn testified that she was coming from the time clock when she witnessed Pelo and Geaslin talking. (Tr. 206:4-8). Eastburn did not testify that Geaslin was headed in her direction, ostensibly to clock out for lunch.

More importantly, there was testimony from both Panzarella and Pelo that they had knowledge that Geaslin complained about sampling pastries at least as early as March 2014. (269:19-24). There was evidence that Geaslin had questioned being assigned non-Starbucks duties in the past but there is no evidence that Geaslin ever refused to perform a duty, despite asking questions. In fact, assistant manager Panzarella testified that although Geaslin had questioned sampling non-Starbucks product in the past, Geaslin always did what she was told to do. (Tr. 125:15-18, 224:21-23, 236:17-20). Indeed there was no evidence that Geaslin was ever disciplined for refusing to perform work. (Tr. 236:21-25; 237:1-10). While the evidence does not necessarily show that Pelo had animosity towards Geaslin in general, it does show that she had knowledge that Geaslin was likely to question management when she was asked to do something other than her unit work; a characteristic that Pelo did not like. Pelo's comment to Geaslin in March shows that even though she knew better than to ask, she could not stop herself from asking Geaslin if she had really complained to the Union about sampling non-Starbucks pastries. This supports the conclusion that Pelo had animus towards Geaslin's questions about non-Starbucks work duties.

Further, on the day in question here, Pelo paged for someone from Starbucks to help sack groceries which was rarely, if ever, done. (Tr. 272:1). Both Eastburn and Geaslin testified that they had never been asked to sack when working at Starbucks.

(Tr. 214-215). In sum, the facts support the conclusion that when Geaslin asked two questions in a row about whether she should have to sack, Pelo deemed those questions to be a refusal to sack groceries because in her mind, they were a challenge to her authority. Accordingly, Geaslin should be credited that she never refused to sack groceries.

VIII. Analysis

A. Respondent Interrogated Geaslin in March 2014 in Violation of Section 8(a)(1)

In determining whether an interrogation violates Section (8)(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonable tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide,* 309 NLRB 185, 186 (1992). The standard is objective, meaning that it does not take into account either the motive of the employer or the actual impact on the employee. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (under objective test, employer's motivation for the statement or the act is irrelevant, as is whether or not a particular employee was actually coerced or considered himself to be coerced); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines not whether the employer intended, or the employee perceived, any coercive effect but whether the employer's actions would tend to coerce a reasonable employee).

The facts support the conclusion that Pelo unlawfully interrogated Geaslin. First, Pelo waited to speak to Geaslin when she was alone rather than asking casually in front

of other employees. Pelo's words appear calculated to express her disappointment with Geaslin's decision to complain to the Union. Pelo said: "You did complain to the Union and I don't like that." (Tr. 44:19). The statement directly informs Geaslin that Pelo is unhappy with her complaining about a duty that management wanted her to perform. Then when Pelo denied complaining to the Union, Pelo persisted and let Geaslin know that she knew otherwise. Geaslin was puzzled by the accusation because she was unaware that she had complained to the Union. But once Geaslin discovered what had happened, Pelo's message was clear: if you complain to the Union, I will find out. Pelo's motivation and whether Geaslin was actually coerced is irrelevant because the Pelo's statement tended to restrain and coerce an employee in the exercise of her Section 7 activities.

B. Respondent Suspended Geaslin on May 9, 2014 In Violation of Sections 8(a)(1) and 8(a)(3)

i. Geaslin Was Engaged in Protected Activity When She Asserted Her Contractual Rights

An employee's honest and reasonable invocation of a collectively bargained right, regardless of whether the employee turns out to have been correct in his belief that his right was violated is protected concerted activity. *See, Interboro Contractors, Inc.,* 157 NLRB 1295 (1966); *NLRB v. City Disposal System*, 465 U.S. 822, 840 (1984); and *First Western Building Services*, 309 NLRB 591, 603 (1992). The reasonable assertion of contractual rights, even if asserted on behalf of one employee, is protected concerted activity. *Kingsbury Inc. and Kingsbury Shop Employees' Association AKA the Shop Committee*, 355 NLRB 1195 (2010). This conclusion derives from the fact that when an employee makes an attempt to enforce a collective-bargaining agreement, he

is acting in the interest of all employees covered by the contract. *Tillford Contractors,* 317 NLRB 68, 68-69 (1995). It is also well accepted that defiance and some profanity "must be tolerated during confrontations over contractual rights." *Id. at* 69; *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2nd Cir. 1987) (protection not lost because grievance presented in rude and disrespectful manner). Finally, there is no requirement that remarks about contractual provisions be uttered during a formal meeting, held pursuant to contract provisions, before the conditional immunity provided by the Act comes into play. *Interboro Contractors, Inc.* 157 NLRB 1295 (1996); and *Bunney Brothers Construction* Company, 139 NLRB 1516 (1962). The evidence clearly demonstrates that Geaslin reasonably asserted her contractual rights on May 9 by asking for her lunch break and questioning the basis of Pelo's order to sack groceries.

On May 9 Pelo paged for a Starbucks employee to sack groceries. Shortly after the page, when she saw Geaslin leaving the Starbucks kiosk, Pelo asked Geaslin where she was going. Geaslin responded that she was going to take her lunch because it was getting late in her shift.[5] When Pelo told her not to worry about her lunch Geaslin asked if she should be sacking because it was not part of her Union contract. As explained above, both issues were covered by the two contracts in effect at the store. Geaslin's understanding with respect to being entitled to a lunch break was a reasonable understanding under the contract. The uncontested evidence shows that all employees were entitled to a lunch break pursuant to the contract and to state law. (Jt. Ex. 1: Art. 24). Geaslin's question with respect to whether she should be bagging was also reasonable; the "Clerks" contract states that clerk employees are exclusively

[5] Respondent testified it did not want employees to wait until the end of their shifts to take their lunches. (Tr. 293).

supposed to perform the clerk duties, which include sacking. (Tr. 186:6-10; Jt. Ex. 2: Art. 1). While there is some allowance for a manager to direct employees to cross craft when it is necessary for the store to run smoothly, it does not make Geaslin's question unreasonable. The issue is not whether she was correct, rather was her question reasonable. Furthermore, Geaslin had been told by the Union that her duties under the Meat contract did not include sacking and it cannot be said that it is unreasonable of her to rely on her Union representative's interpretation of the contract. (Tr. 121:23-25). Since Geaslin's interpretation of the contract was reasonable it was accordingly protected for her to ask questions about Pelo's direction.

There is absolutely no evidence that Geaslin was asking questions for any purpose other than to make sure Pelo was complying with the contract. In this respect, Respondent testified that employees had been instructed to take their lunches at the precise middle of their shift and Geaslin was already late taking her lunch by about an hour, so it is only logical that she would try to alert Pelo to the fact that she needed to take her lunch. Therefore, by asserting her contractual right to a lunch break and asking Pelo whether she should be sacking groceries, Geaslin was attempting to assert her contractual rights and thereby engaged in protected concerted activity, entitling her to the protections provided by the Act.

ii. Respondent Suspended Geaslin on May 9, 2014 for Engaging in Protected Activity in violation of Sections 8(a)(1) and (3)

An employer violates both Sections 8(a)(1) and (3) when it disciplines an employee for engaging in the protected concerted activity of enforcing the provision of a collective bargaining agreement. *Tillford Contractors*, 317 NLRB 68, 69 (1995).

As discussed above Geaslin never refused to sack groceries. Instead she asked

questions about her contract rights and denied Pelo's accusation that she was insubordinate. Pelo did not suspend Geaslin until they had a discussion in the office and Geaslin refused to agree to Pelo's characterization of events. While Pelo may have deemed Geaslin's questions a refusal to sack groceries, Geaslin consistently denied that accusation and repeatedly tried to explain she was just asking questions. The evidence supports the conclusion that even if Pelo initially thought Geaslin's questions were really a refusal to sack it was the additional discussion about the contract and Geaslin's repeated refusal to agree with Pelo's assertions that caused Pelo to send Geaslin home. Thus, Geaslin was suspended for asserting her contractual rights; but for asking questions about her lunch and sacking duties Pelo would not have suspended her.[6]

The Respondent will likely argue that Geaslin refused to bag groceries and so she was suspended for insubordination. While the evidence shows that Geaslin did not engage in insubordinate conduct, even if she had refused to sack groceries, her actions were still protected because her alleged refusal to sack is inextricable intertwined with her protected activity of asserting contractual rights.

iii. Geaslin's Actions Did Not Cause Her to Lose Protection of the Act

While the Act protects an employee from repercussions when engaging in protected, concerted activity, the Board and Courts have recognized that the protection is not limitless. Employees are permitted "some leeway for impulsive behavior." *Tampa Tribune*, 351 NLRB 1324, 1324-25 (2007), enf. denied *Media General Operations, Inc.*

[6] Geaslin testified that she said "oh wah" in response to Pelo's decision to suspend her. First, the decision to suspend her was made before this outburst. Further, Geaslin's behavior was provoked by Pelo's statement reminding Geaslin that she could hurt her. *Datwyler Rubber and Plastics*, 350 NLRB 669, 670, 676 (2007) (statement protected where manager provoked employee by threatening termination).

v. N.L.R.B., 560 F.3d 181 (4th Cir. 2009). An employee does not forfeit the protection of the Act unless his misconduct is "so violent" or "of such character as to render [the employee] unfit for further service." *Wolkerstorfer Co.*, 305 NLRB 592, fn. 2 (1991); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980). *See, also Kiewitt Power Constructors Co.*, 355 NLRB No. 150 (2010), and *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007) enfd. 519 F.3d 373 (7 Cir. 2008). The Board will not find that rude or disrespectful behavior is sufficient to lose protection of the Act. *Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (conduct protected even though employee called his manager a "horse's ass"); *Severance Tool Industries*, 301 NLRB 1166, 1169 (1991) (protection not lost because employee raised his voice at respondent's president and called him a "son of a bitch"). *Atlantic Steel Co.*, 245 NLRB 814 (1979), sets forth the factors to be considered in determining whether an employee's conduct loses the protection of the Act: (1) the place of the discussion, (2) subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.

1. Atlantic Steel Factors

a. Place of the Discussion

The discussion here occurred partly on the sales floor and partly in the management offices. With respect to the part of discussion that occurred out on the sales floor it is clear that both parties were raising their voices but not yelling. There is no evidence that the Respondent received any customer complaints or comments from anyone who may have overheard the discussion. In this respect there are two

categories of people that may have overheard the discussion: customers and statutory employees.

There is no direct evidence that either customers or other employees noticed or heard what Geaslin and Pelo were talking about. Indeed, if the bagging area was as busy as many witnesses testified, the area would have been quite chaotic and loud in general. Checking out groceries involves customer conversations, children, checker conversations, baggers sacking groceries and also talking with customers. The discussion did not occur in a library or even in an empty supermarket. Pelo herself testified that the front end was overflowing with people. Also, although Pelo and Geaslin were raising their voices with each other, there is no evidence that either one of them was cussing or using obscene language that might upset a customer. In fact, a customer is unlikely to even identify a discussion about bagging and lunch as an argument. There is no evidence that anyone other than Pelo heard Geaslin refuse to bag. So there is no reason to assume that Geaslin's actions, any more than Pelo's, were disruptive to the Respondent's customers. Because the Board balances the rights of employees with those of an employer to run an orderly business, this factor weighs in favor of protection or neutral at worst. *LaGuardia Assoc., LLP (Crown Plaza),* 357 NLRB No. 95, slip op. at 5 (2011) (citing *Goya Food of Florida,* 347 NLRB 1118, 1134 (2000)(less than a minute of loud shouting inside a supermarket did not warrant loss of protection where there was no apparent disruption to customers); *Starbucks Corporation*, 360 NLRB No. 134 (2014), (9th Circuit directed the Board to find that an employee yelling obscenities in front of a customer loses protection of the Act (the Board only accepted the ruling for that case)). Here, there is no testimony that Pelo or

Geaslin voiced any obscenities in front of customers and the discussion was short in duration.

With respect to any employees that may have overheard the discussion, the Board will weigh this factor against protection where an employee is leveling obscenities at a supervisor in the presence of other employees because that may jeopardize the disciplinary system. *See*, *Datwyler Rubber and Plastics*, 350 NLRB 669, 670 (2007) (employee's comments at group meeting that general manager "was a devil" and that "God would punish him and the Company for making the employees work seven days a week" held protected; Board noted that comments occurred during employee meeting where employees were free to raise work concerns; meeting was held in non-work area and did not disrupt work; outburst occurred during a discussion of employee concerns; outburst was spontaneous, brief, did not contain profanity, and was devoid of threats; and employee's statements were provoked by employer's threat of discharge for engaging in protected activity). However, the facts of this case are distinguishable from those cases where there is clear misconduct because Geaslin did not utter any obscenities or threaten Pelo.

What employees may have heard was Geaslin questioning Pelo about her lunch and her contractual duty to sack groceries under the contract. Those questions are precisely what constitute her protected activity. In cases where the Board finds that the place of discussion weighs against protection, the employee's conduct involves actual misconduct (usually swearing, making threats or calling the supervisor derogatory names in front of other employees). Here, there was no misconduct to overhear because Geaslin never refused an order, she simply asked about her rights. She raised

her voice in response to Pelo's raised voice and demeanor. Geaslin's protected activity cannot be *transformed* into misconduct simply because Pelo disliked her behavior, i.e. that she was asking about her rights. If that was the standard, then every time employees asserted a contractual right that displeased management, they would be subject to discipline and the exception would swallow the protections afforded by the Act. In sum, because the discussion was not particularly egregious and consisted of a somewhat heated exchange regarding contractual rights, the location of the first half of the discussion should weigh in favor of the Act's protection.

The second half of the discussion took place in the management office at the behest of Geaslin. Pelo, Geaslin and deli manager Eastburn were present. The discussion took place away from other employees and customers. The Board has generally held that discussions in the privacy of an office are accorded more protection than ones that takes place on the work floor. Here there is no evidence that a statutory employee heard the discussion in the office. This factor weighs in favor of protection under the Act because Geaslin's activity did not disrupt the workplace and it took place outside the hearing of other statutory employees.

b. Subject Matter of the Discussion

The subject matter of the discussion was initially Geaslin's questioning her rights and duties under the contract. In the office, the discussion about contractual rights continued and became more heated but also got into the issue of whether Geaslin actually refused to sack groceries. All three subjects: the right to lunch, the duties under the Meat contract (and the Starbucks counter), and the discussion with respect to whether Geaslin refused to sack, weigh in favor of protection under the Act. The Board

has long recognized that "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.,* 282 NLRB 130, 132 (1986). As stated above, the assertion of collectively bargained rights is protected concerted activity. With respect to Geaslin denying that she refused an order, the Board allows an employee to question a manager's veracity in the course of defending herself. *See Crown Central Petroleum*, 177 NLRB 322 (1969) (during course of grievance meeting employee said management ordered overtime and management said they requested overtime. Primary issue was the veracity of management so it was protected for employee to imply management was lying). Here, Geaslin did not go as far as to accuse Pelo of lying, she simply denied that she said what Pelo accused her of saying. In conclusion, the subject matter of the conversation weighs strongly in favor of protection under the Act.

c. Nature of the Employee's Outburst

Geaslin questioned Pelo's directive in reference to the contract and she also raised her voice at some point during the exchange with Pelo. A refusal to lower one's voice during protected concerted activity is not insubordinate; this conduct is considered protected. *Farah Manufacturing Company, Inc.*, 202 NLRB 666 (1973); *Plaza Auto Center*, 360 NLRB No. 117 (2014) (employee raised his voice, stood up, pushed a chair, called the manager a "fucking crook," "stupid," "asshole," and said manager would "regret it" if he was fired: actions all held protected); *Severance Tool Industries*, 301 NLRB 1166, 1169 (1991) (protection not lost because employee raised his voice at respondent's president and called him a "son of a bitch").

Here, Geaslin raised her voice and challenged Pelo's assertions with respect to the contract and with respect to Pelo's characterization that she refused to sack groceries. She did not make any obscene gestures, threats, or curse. Her reaction to Pelo's accusations was an honest and immediate response to the statements being leveled at her by Pelo. Geaslin's reference to calling the Starbucks' manager (when they were in private) may have irritated Pelo but cannot seriously be characterized as a threat and Pelo's response ("he's not my boss") shows she did not feel threatened by Geaslin saying they should call him. In sum, Geaslin's actions were emotional and certainly not obsequious but were well within the bounds of the Act's protection. The nature of her behavior weighs heavily in favor of protection under the Act.

d. Whether Geaslin's Outburst Was Provoked by the Employer's Unfair Labor Practices

Geaslin's behavior was provoked by Pelo's refusal to answer her legitimate and reasonable questions about her contractual rights. Board precedent makes clear that outbursts are more likely to be protected when the employer expresses hostility to the employee's very act of complaining than when the employer has indicated a willingness to engage on the merits. *Felix Industries, Inc.*, 339 NLRB 195, 196-197 (2003) (finding it relevant that employer did not merely reject employee's request for contract payments, but expressed astonishment and anger that employee was even making an issue of the matter, and thereby expressed hostility towards employee's choice to exercise his Section 7 rights), adopted by 2004 WL 1498151 (D.C. Cir. 2004) and *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004) (it was only after supervisor had refused to discuss the matter that steward brought up the subject of whether supervisor had committed wartime atrocities).

The record evidence established that Pelo was hostile to Geaslin's questions. There is no evidence that Pelo ever acknowledged Geaslin's questions by attempting to explain that she could ask her to sack groceries despite it not being one of her regular contractual duties. Indeed, there is no evidence that Pelo told Geaslin that she was right but that she needed her help anyway, or that she was within the contract to direct employees to occasionally cross craft. Instead, Pelo immediately raised her voice and became frustrated with Geaslin's refusal to stop asking questions. Pelo was angry with Geaslin for engaging in protected activity, accordingly, this factor weighs heavily in favor of protection under the Act.

In sum, although some of the discussion occurred within the possible hearing of employees or customers, three of the *Atlantic Steel* factors weigh heavily in favor of protection, and this conclusion in favor of protection, strikes a proper balance between an employee's right to engage in Section 7 activity and an employer's right to maintain order and discipline in its establishment.

C. Respondent Suspended Geaslin on May 14, 2014 and Terminated Geaslin on May 21, 2014 in Violation of Sections 8(a)(1) and (3) of the Act

i. Geaslin Was Engaged in Protected Activity on May 14, 2014

The Board has long held that presenting and processing grievances is concerted activity protected by Sections 8(a)(1) and (3) of the Act. *Bowman Transportation, Inc.*, 134 NLRB 1419 (1961); *Atlantic Steel*, 245 NLRB 814, 819 (1979); *Crown Center Petroleum*, 177 NLRB 322 (1969). Affirming and adopting the reasoning of the Fifth Circuit, the Board held:

> It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising

> out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged...a grievance proceeding is not an audience, conditionally granted by a master and his servants but a meeting of equals—advocated of their respective positions...within the confines of a grievance meeting, it would require severe conduct indeed to convince us that the interest of fair give and take between equal parties to bargaining could be justifiably submerged. *Id.*

It is well settled that employees who attempt to persuade their employer to modify or reverse a management decision are engaged in conduct which is protected by Section 7 of the Act. See, generally, *Datapoint Corporation*, 246 NLRB 234 (1979); *Oregon State Employees Association*, 242 NLRB 976 (1979); *Hendricks County Rural Electric Membership Corporation*, 236 NLRB 1616 (1978); *Columbia University*, 236 NLRB 793 (1978); and *Sabine Towing & Transportation Co., Inc.*, 224 NLRB 941 (1976).

The meeting that took place on May 14 was clearly a grievance meeting. The Respondent's store manager called the meeting with her two assistant managers, Union representative, Danny Craine, and Geaslin. It is uncontested that the Union and the Respondent have two collective-bargaining agreements covering the employees at Store 1 and each of those agreements set forth identical grievance procedures. As a result of these bargaining relationships, it was incumbent upon Pelo to discuss her earlier decision to discipline Geaslin with the Union. In the absence of the contract or the grievance procedure there would be no reason for Pelo to meet with Craine to discuss the discipline of an employee. Therefore, even if the meeting was not called a "step" meeting pursuant to the contract, it is a grievance meeting because it was held as a result of the parties' collective-bargaining relationship to discuss employee discipline.

Accordingly, Geaslin was engaged in protected activity and entitled to the Act's conditional immunity when she participated in the meeting.

However, even if the meeting on May 14 was found not to be a grievance meeting, the Board is clear that there is no requirement that the remarks be uttered during a formal grievance meeting held pursuant to contract provisions before conditional immunity comes into play. *Interboro Contractors, Inc.* 157 NLRB 1295 (1966); See, *Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976) (grievance in question does not have to be formally stated or take place under contractual grievance procedure.).

ii. Geaslin Was Suspended and Terminated for Her Protected Activity on May 14, 2014

The Employer's testimony is clear. At the commencement of the meeting on May 14 Pelo intended to let Geaslin continue her employment with a suspension served. (Tr. 242:4-13). It was not until Geaslin's actions in the meeting, which Pelo considered disrespectful, that she decided to terminate Geaslin. (Tr. 242:4-13). Well into the meeting, Craine took Geaslin out of the room when he perceived that Pelo and Geaslin were both becoming increasingly agitated. Once Geaslin and Craine returned to the room Pelo stated that she would seek termination of Geaslin for her behavior that day. Shortly after the meeting, Pelo reiterated to Craine that she had not intended to terminate Geaslin until her actions in the May 14 meeting. This conclusion is further confirmed by the Behavior Notice that Pelo provided to Geaslin and Craine on May 21, 2014.

Pelo wrote on the Behavior Notice that the reason for the meeting on May 14 was to "discuss an incident" (note she says nothing about further investigation or

termination) and then describes Geaslin's "disrespectful" and "obstinate" behavior on May 14 as the reason for her decision to terminate Geaslin. (Jt. Ex. 4). There is absolutely no evidence on the record that Pelo, the person vested with the final authority in this regard, intended to terminate Geaslin before her behavior in the grievance meeting on May 14. While Respondent may try to argue that Geaslin had already engaged in terminable behavior as of May 9, the testimony is clear that Pelo made the decision *not* to terminate Geaslin for her behavior on May 9 despite Manager of Labor and Employee Relations, Stephanie Bouknight's blessing to do so.

The testimony was clear that Bouknight allowed Pelo to make the final decision and she did not override her decision to give Geaslin another chance. (Tr. 309:24-25, 310:1-10). Pelo did not change her mind until sometime during the May 14 meeting. Whether it was because Craine told her she could not terminate Geaslin without permission or because she independently wanted to check with upper management, Pelo suspended Geaslin until she could confer with upper management about termination. Then on May 21 Pelo met with Craine and Pelo again and made good on her threat of termination. At that meeting, Craine questioned Pelo about her reasons for terminating Geaslin. Pelo cited Geaslin's behavior on May 14 and specifically stated that her disrespectful behavior was misconduct. Pelo then documented the behavior she found unacceptable from May 14 on the Behavior Notice that she issued to Geaslin. Accordingly, the evidence supports the conclusion that Geaslin was suspended on May 14 and later terminated on May 21 for her behavior in the grievance meeting on May 14.

The Board has held it an employee's discipline independently violates Section 8(a)(1) of the Act, without regard to the employer's motive, and without regard to a

showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity. *Kingsury Shop,* 355 NLRB No. 195 at 14 (2010). As established above, Geaslin's actions during the May 14 meeting were protected, so her suspension and termination both violate Sections 8(a)(1)and 8(a)(3) of the Act..

iii. Geaslin's Actions on May 14 Did Not Cause Her to Lose Protection of the Act

Board precedent holds that remarks made by employees during the course of a grievance meeting constitute protected activity but they may lose protection if the employee engages in certain conduct that may result in the loss of that protection. *Atlantic Steel*, 245 NLRB 814, 819 (1979).[7] The factors for analyzing cases under Atlantic Steel, as more fully discussed below, do not support a finding that Geaslin lost the protection of the Act during the meeting on May 14.

1. Atlantic Steel Factors

a. Place of the Discussion

An employer's interest in maintaining order and discipline in his establishment is affected less by a private outburst in a manager's office away from other employees

[7] As noted above in analyzing Geaslin's conduct on May 9, the Board has found that obscenities uttered by an employee as part of the *res gestae* of concerted protected activity are generally not so egregious as to remove the protection of the Act and warrant the employee's discipline; see, e.g., *United States Postal Service*, 250 NLRB 4 fn 1 (1980) and cases cited therein; *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991) (calling president "son of a bitch" not so opprobrious as to lose the protection of the Act where no threats of violence, actual insubordination or acts of violence); *Burle Industries*, 300 NLRB 498, 504 (1990); *Felix Industries, Inc.*, 331 NLRB 144 (2000)(remanded by U. S. App. D.C. 2001); *Plaza Auto Center, Inc.,* 355 NLRB No. 85 (2010) (Board overruled ALJ in finding that employee's brief, profane outburst in a private meeting with management did not cause that employee to lose protection under the Act; the Board noted that the employee's outburst was in part provoked by the Employer's unlawful statement that the employee could go work somewhere else if he did not like management's wage policy).

than an outburst on the work floor witnessed by other employees. Accordingly, the Board and Courts have "regularly observed a distinction between outbursts under circumstances where there was little if any risk that other employees heard the obscenities and those where that risk was high." *NLRB v. Starbucks Corp.*, 679 F.3d 70 at 79 (2012). Accord *Media General Operations, Inc. v. NLRB*, 560 F.3d 181 at 187 (March 13, 2009) ("In balancing the *Atlantic Steel* factors, the Board has in general found that remarks made in private are less disruptive to workplace discipline than those that occur in front of fellow employees."); *Noble Metal Processing, Inc.*. 346 NLRB 795, 800 (2006) (place of discussion weighs in favor of protection where outburst occurred during meeting held away from work area).

Here, the discussion occurred in the presence of statutory supervisors Pelo, Panzarella, Barbros,[8] and Union representative Danny Craine. (G. C. Ex. 1(k)). The discussion took place behind closed doors and no employees were present. The location of the discussion weighs heavily in favor of protection.

b. Subject Matter of the Discussion

The subject matter of the discussion was Geaslin's questions about her contractual rights and circumstances of what actually occurred on May 9. These are both subjects that the Board has stated are proper protected subjects for discussion in a grievance meeting. Indeed a grievance meeting is designed for an employee to try to convince its employer that it did not engage in any misconduct and that she did not deserve any discipline. A grievance meeting is also the proper place for the parties to a

[8] Statutory supervisors are not employees under the Act. Further, the Board scrutinizes outbursts that occur in the presence of statutory employees, not other managers, more strictly. *Plaza Auto Ctr., Inc. & Nick Aguirre*, 360 NLRB No. 117, 13 (May 28, 2014).

contract to discuss contract provisions and how they should be properly followed. The subject matter of the discussion on May 14 is exactly the type of subject matter that the Act aims to protect granting conditional immunity to parties in a grievance meeting. It is the very reason that the Board has stated that grievance meetings are meeting of equals, not masters and servants. *Crown Center Petroleum*, 177 NLRB 322 (1969). This factor weighs heavily in favor of protection.

c. Nature of the Employee's Outburst

The Board distinguishes between situations where employees' actions occur in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which misconduct is violent or of such serious character as to render the employee unfit for future service. *J. W. Microelectronic Corp.*, 259 NLRB 327 (1981), enfd. Mem. 688 F.2d 823 (3d Cir. 1982); *Prescott Industrial Products Co.,* 205 NLRB 51, 51-52 (1973).

At the May 14 meeting, Geaslin was upset because she felt that Pelo was fundamentally mischaracterizing her behavior from May 9. She was also upset because she felt that her livelihood was suffering from Pelo's insistence that she had refused a direct order because she had already suffered a 5-day unpaid suspension. Geaslin's reaction to Pelo's accusations was emotional but not threatening or obscene. At most, she was clenching her fists, raising her voice, red faced, and making unpleasant facial expressions: all characteristics of an emotionally distressed individual. She did not swear, berate, make threats or make any physical movements that could be perceived as objectively threatening. Her response was not premeditated or deliberate; it was an immediate physiological response to the accusations that she was not telling the truth.

The Respondent may argue that Geaslin "bared her teeth" and that this was sufficiently violent to lose protection of the Act. This is preposterous. If the Respondent was trying to imply fear of violence it seems incongruous that Pelo would not have called the security officer,[9]or anyone for that matter, to escort Geaslin from the store or escort her back in to the office on May 21. (Tr. 55:14, 161:10, 257:9-11). At the very least is seems logical that any fear of violence would be documented in the termination notice. Despite testifying about the meeting at an unemployment hearing, neither Pelo nor Panzarella mentioned "bared teeth" until this hearing. Certainly, the terms of the Behavior Notice explicitly cite to Geaslin's "disrespectful" and "obstinate" behavior on "5-14-14" as the sole reason for her termination. Moreover, an Employer's testimony about his or her subjective fear is not determinative. *Plaza Auto Center, Inc,* 360 NLRB No. 117 at 5 (2014). Thus, the lack of obscenities, threats or violence weighs heavily in favor of protection.

d. Whether the Outburst Was Provoked in Any Way by the Employer's Unfair Labor Practices

Geaslin's behavior in the meeting was provoked by Pelo's characterization of Geaslin's protected activity on May 9. She had an emotional reaction to Pelo characterizing her questions about the contract as a refusal to bag. This time, Geaslin became upset because Pelo was insisting to Craine that she outright refused to bag. Geaslin had to persist in stating her position that she never said she would not sack, she had simply been asking questions about her contractual rights. Therefore her behavior was provoked in part by Respondent's animosity towards Geaslin for asserting her contractual rights and weighs in favor of protection under the Act.

[9] This particular store has a security guard posted at the door.

D. Wright Line Is Not the Proper Legal Standard in these Cases

The circumstances of the instant case are properly analyzed pursuant to *Atlantic Steel* and its progeny. *Felix Industries, Inc.*, 339 NLRB 195, 196-197 (2003); *Beverly Health & Rehabilitation Center, 346 NLRB 1319(2006); Noble Metal Processing, Inc.* 346 NLRB 795 at fn. 2 (2006); *Datwyler Rubber and Plastics*, 350 NLRB 669 (2007). Respondent may try to argue that the proper standard to apply in this case is *Wright Line* because the General Counsel has not shown that Pelo had sufficient Union animus by suspending and later terminating Geaslin. Although this is a not a *Wright Line* case because Geaslin was suspended for her actual Union and protected activity, even under a *Wright Line* analysis there is no violation.

The record established that Geaslin's questions to Pelo on May 9 was the "motivating factor" in Pelo's decision to suspend her. Geaslin had a clean disciplinary record at Store 1 and the suspension was imposed immediately following her questions. There is no evidence that Geaslin would have been suspended but for her questions about lunch and bagging.

The record also established that Geaslin's conduct during the grievance meeting on May 14 was a "motivating factor" in Pelo's decision to suspend Geaslin on May 14 and to terminate her on May 21. There is no evidence that Pelo would have taken these actions but for Geaslin's participation in and conduct at that grievance meeting. To the contrary, Pelo and Panzarella testified that at the beginning of that meeting Pelo intended to bring Geaslin back to work and there is no evidence of any other intervening misconduct or inappropriate behavior on Geaslin's part. (Tr. 242:4-13; 277-278, 282:19-22).

E. The General Counsel Is Not Precluded From Issuing Complaint

i. The Region is Not Estopped From Issuing Complaint

In its affirmative defenses the Respondent raised the defense that the Region is estopped from litigating the instant unfair labor practices. Although it is not clear why Respondent contends this, it appears the Respondent sets forth this defense based on the Union's decision not to pursue this matter through the parties' privately bargained grievance procedure. Not one case issued by the Board, or the Supreme Court of the United States for that matter, holds that a decision by a Union to drop a grievance preempts the Board's jurisdiction to enforce and vindicate violations of the Act.[10]

It would be absurd for the Board to cede jurisdiction to enforce and protect the rights of employees because a private party would prefer a different forum. The purposes and goals of a Federal agency statutorily charged with the duty to enforce Federal law are quite different from those of a private organization. This distinction is abundantly illustrated in this case.

The testimony showed that the Union committee, comprised of individuals with no affiliation with the Board, failed to consider any of the leading cases in this area of the law. (Tr. 193-194). Presumably the Union evaluated Geaslin's grievance pursuant to the terms of a just cause clause and the mantra "works now, grieve later." While this mantra may be advantageous to a Union, there is no such mantra under the Act. There is nothing in the Act that requires employees to forgo their rights under Federal law. The Act provides employees with their Section 7 rights and they are free to exercise

[10] The issue of coextensive jurisdiction arises in limited circumstances where the Board's jurisdiction overlaps with a Section 301 matter in a United States District Court.

those rights, within some limits, without regard to whether their employer or Union agrees with such exercise.

A Union is further constrained by budgetary considerations that the Board does not have. A Union, in discharging its duty of fair representation, must make calculated decisions to drop grievances that are not clear *contract* violations because arbitration is quite costly. The Board does not have the monetary constraints that a Union faces. While the Region endeavors to settle violations in a fair and efficient manner; the overarching goal is to enforce the Act and redress any violations thereof.

Fortunately, Geaslin came to the Board and filed as an individual. If she had simply relied on the Union her rights would have been squelched without any repercussion to the Employer or any chance to vindicate her rights.

ii. This Charge is Not Appropriate for Deferral Pursuant to Board Policy

The Board has considerable discretion to defer to the parties' contractual grievance-arbitration process when doing so will serve the fundamental aims of the Act. *See Dubo Mfg. Corp*, 142 NLRB 431 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1981)(1971); and *United Technologies Corp*, 268 NLRB 557 (1984). Deferral is appropriate when the following factors are present: (1) the dispute arose within the confines of a long and productive collective bargaining relationship, (2) there is no claim of employer animosity toward employees' exercise of statutory rights, (3) the contract provides for arbitration of a broad range of disputes, (4) the arbitration clause encompasses the dispute at issue, (5) the employer asserted its willingness to utilize the arbitration process to resolve the dispute, and (6) the dispute is well suited to such a resolution. Even after the charge is deferred the Board retains jurisdiction pending

issuance of the arbitrator's decision and the Board's processes can be reinvoked if necessary. *Babcock and Wilcox Construction Co.*, 361 NLRB No. 132 (2014), *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); *See also Hoover Co.*, 307 NLRB 524 (1992); *Dennison National Co.*, 296 NLRB 169 (1989).

This charge is not appropriate for deferral for a number of reasons. First, the charge was filed by an individual charging party; not the Union. Technically, the Union is the party to the bargaining agreement and is the party that may file a grievance on behalf of an employee. Here, the Union refused to process the Charging Party's grievance to arbitration. Therefore, there was no grievance to defer to. Had the charge been filed by the Union, the Region could have deferred the allegations to pursue a remedy under the parties' collective bargaining agreement. Even if the parties' reached a final resolution that they were both happy with, the Region would have jurisdiction to decide whether the violations had been properly remedied, and if not, resume Board processes. *Babcock and Wilcox Construction Co.*, 361 NLRB No. 132 (2014). Thus, to contend that the Region somehow lost jurisdiction because it did not defer to the Union's decision to drop the Charging Party's grievance is absurd and without legal merit.

F. The Respondent's Unlawful Interrogation of Geaslin is not Barred by Section 10(b) of the Act

The Board has clear jurisdiction over the matter in the General Counsel's complaint, including the allegation that the Respondent unlawfully interrogated Geaslin in March of 2014. Section 10(b) of the Act specifically provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Notwithstanding this language, the Board does not bar

complaint allegations that are based on amended charges filed outside the 10(b) period. The Board has allowed an otherwise untimely amendment where the General Counsel moved to amend before the Respondent put on its evidence, the Respondent did not request a continuance and the Respondent cross-examined the General Counsel's witness with respect to the facts of the allegation. *Henry Bierce Co. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348*, 307 NLRB 622, 629 (1992). In fact, the Board has even allowed amendments at trial where the amended allegations were part of a charge that was withdrawn prior to hearing. *Redd-I, Inc.,* 290 NLRB 1115 (1988). The Board has even allowed amendments of complaints to include allegations that were not the subject of a charge. However, where the amendment is actually alleged on the face of a timely filed complaint, there is not much support for a contention of trial by ambush. Instead, the issue is whether the Respondent was given the opportunity to fully litigate the issue and whether the Respondent was prejudiced by the amendment.

Here, the First Amended Charge was filed by the Charging Party on August 18, 2014 (G.C. Exhibit 1(d)). This is within six months of March 2014. Accordingly, there is no issue with the timeliness of when the charge was filed. Indeed as of August 18, 2014, the Respondent was aware, or should have been aware, that the Charging Party had made this allegation. Counsel for the General Counsel moved to amend the complaint after Ms. Geaslin had testified to the events and had been subject to an extensive cross-examination by the Respondent. Respondent fully questioned and tested Geaslin's memory with respect to the alleged interrogation and the events leading up to and following the interrogation. Respondent had a full opportunity during

its case in chief to rebut Geaslin's allegations. In fact, Respondent's counsel questioned both Pelo and Panzarella about the allegations. Finally, Respondent's counsel did not request a continuance but simply asserted that the trial would last even longer than he originally estimated that it would last. While this may have caused some inconvenience to the parties involved, it is not a legal basis for denying the amendment to the charge. Thus, the tribunal has jurisdiction to consider this allegation.

G. The Board Should Award Search-For-Work-Related Expenses Regardless of Whether These Amounts Exceed Interim Earnings

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to continue working for respondent. *Deena Artware, Inc.,* 112 NLRB 371, 374 (1955); *Crossett Lumber Co.,* 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment,[11] the cost of tools or uniforms required by an interim employer;[12] room and board when seeking employment and/or working away from home;[13] contractually required Union dues and/or initiation fees, if not previously required while working for respondent;[14] and/or the cost of moving if required to assume interim employment.[15]

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to

[11] *D.L. Baker, Inc.,* 351 NLRB 515, 537 (2007).
[12] *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees,* 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.,* 151 NLRB 1113, 1114 (1965).
[13] *Aircraft & Helicopter Leasing,* 227 NLRB 644, 650 (1976).
[14] *Rainbow Coaches,* 280 NLRB 166, 190 (1986).
[15] *Coronet Foods, Inc.,* 322 NLRB 837 (1997).

an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities* Co. 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *See also N Slope Mech.,* 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work,[16] but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.,* 356 NLRB No. 8 at 3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj,* 361 NLRB No. 57 at 2 (Sept. 30, 2014) (quoting *Phelps Dodge).* The current

[16] *In Re Midwestern Pers. Servs., Inc.,* 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991,Decision No. 915.002, at 5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby Georgia Power Co.,* 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor,* No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC,* 361 NLRB No. 10 at 3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[17] These expenses should be

[17] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerbocker Plastic Co.,Inc.,* 104 NLRB 514, 516 at *2(1953).

calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.,* 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

IX. Conclusion

For the reasons discussed above, Counsel for the General Counsel respectfully requests that the Judge find that Respondent violated the Act as alleged in the Complaint and that an Order issue requiring Respondent to: (1) cease and desist from engaging in the unfair labor practices established herein; and (2) reinstate Geaslin to her former or substantially equivalent position, and make her whole for any losses suffered, including search for work expenses, as a result of the Respondent's discriminatory suspensions from May 9, 2014 and May 14, 2014 and her termination on May 21, 2014, with compound interest. Attached as Exhibit A is Counsel for the General Counsel's proposed Notice to Employees.

DATED AT Denver, Colorado, this 16th day of September 2015.

Respectfully Submitted,

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EXHIBIT A

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT suspend you because of your Union membership or support.

WE WILL NOT suspend employees because they exercise their right to bring contractual issues and complaints to us on behalf of themselves and other employees.

WE WILL remove from our files all references to the suspensions on May 9, 2014 and May 15, 2014, of Wendy Geaslin and **WE WILL** notify her in writing that this has been done and that the suspensions will not be used against her in any way.

WE WILL pay employee Wendy Geaslin for the wages and other benefits she lost because we suspended her.

WE WILL NOT fire employees because of their Union membership, activity or support.

WE WILL offer Wendy Geaslin immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Wendy Geaslin for the wages and other benefits she lost because we fired her.

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

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

KINGS SOOPERS, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

Case 27-CA-129598

and

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **September 16, 2015,** I served the above-entitled document(s) by **E-File and E-Mail** upon the following persons, addressed to them at the following addresses:

Hon. Amita Baman Tracy
National Labor Relations Board
Division of Judges
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September 16, 2015

Date

Isabel C. Saveland
Counsel for the General Counsel

Name

Signature

JD(SF)-44-15
Denver, Colorado

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

KING SOOPERS, INC.,

and

Case 27-CA-129598

WENDY GEASLIN,
an Individual.

Isabel C. Saveland, Esq.,
Jose Rojas, Esq.,
for the General Counsel.
Raymond M. Deeny, Esq.,
Jonathon Watson, Esq.,
for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

[1] All dates are 2014 unless otherwise indicated.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

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[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if".

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A Union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what

Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her to suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunch break at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunch break "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79).[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was

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occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would

unaware that Jackson was a union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not

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fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manger. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunch break midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's

refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They

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unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunch break. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa", mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

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[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or

[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red [...] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. Discussion and Analysis

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.

Motion to Amend the Complaint: Make-Whole Remedy

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op at 1 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC*, 361 NLRB No. 10 at 3 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Jackson Hospital Corp.*, 356 NLRB No. 8, slip op. at 1 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and questioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly

granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 13 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB No. 129 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance regarding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, a charging party filed grievances over his suspensions in accordance with his collective bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her

behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunch break. Respondent argues that Geaslin's questioning in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

"protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such "we" and "our" when complaining to Jackson, who is a co-worker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 497 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement);

Kingsbury, Inc., 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights – even if … it is incorrect – is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Frances Building Cooperative*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB No. 6 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, slip op. at 3. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br at 48–50).

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB No. 1, slip op. at 1 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB No. 23, slip op. at 28.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the

Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her co-worker about the inability to manage the workload in the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March Geaslin actively questioned the propriety of such duties, and complained to her co-worker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunch break, albeit

later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunch break later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunch break before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunch break, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 4 (2011), citing *Severance Tool*

Industries, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other rounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted … does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 130 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the

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[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB No. 72, slip op. at 3 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Respondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB No. 103 (2006) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunch break). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her,

and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petroleum Corp.*, 177 NLRB No. 29 (1969) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5 (2011); see *Goya Foods*, 356 NLRB No. 73, slip op. at 3. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, slip op.

at 6 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB No. 150, slip op. at 3 (2010), enfd. 652 F.3d 22 (2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *The Mead Corp.*, 331 NLRB No. 66 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *The Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id., slip op. at 3. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1.

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[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014).

Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

CONCLUSIONS OF LAW

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Coercively interrogating an employee about her union activity.

   b. Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

b. Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

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31 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 22, 2015

Amita Baman Tracy
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the two unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the two 5-day suspensions and termination will not be used against her in any way.

JD(SF)-44-15

KING SOOPERS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC. and WENDY GEASLIN an Individual	Case 27-CA-129598

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., October 22, 2015.

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **November 19, 2015.**

NLRB ADR PROGRAM
FOR SETTLING UNFAIR LABOR PRACTICE CASES
PENDING BEFORE THE BOARD

Since December 2005, the National Labor Relations Board's alternative dispute resolution (ADR) program has assisted parties in settling unfair labor practice cases pending before the Board. For parties who have chosen to participate in the ADR program, NLRB-assigned neutrals have assisted parties in reaching settlements in approximately 60% of the cases. The Board approved the parties' settlements in each of those cases.

Participation in the Board's ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. The Board will provide the parties with an experienced neutral to facilitate confidential settlement discussions to explore resolution options that serve the parties' interests. Depending on the parties' preference, the settlement conferences will be held in person, telephonically, or by videoconference.

The Board established the ADR program in response to the success experienced by other federal agencies and the federal courts in settling contested cases through ADR, as well as the success of the NLRB's own settlement judge program at the trial level. In announcing the Board's decision to make the program permanent, the Chairman stated:

> ADR programs provide the parties with several benefits, including savings in time and money, greater control over the outcome of their cases, and more creative, flexible, and customized resolutions of their disputes. Settlement discussions conducted with the assistance of an ADR neutral may broaden resolution options, often by going beyond the legal issues in controversy, and may be particularly useful where traditional settlement negotiations are likely to be unsuccessful or have already been unsuccessful. Our experience with the pilot ADR program demonstrates that participation in the program provides the parties with a process for expeditiously resolving their disputes, which serves to effectuate the purposes of the Act.

Features of the Board's ADR program include:

- The parties may request assignment of an Agency administrative law judge to serve as the neutral. The program director, however, is also available to serve in that capacity. The judge who heard the underlying case will not be appointed.
- The Board will stay further processing of the unfair labor practice case for 30 days from the first meeting with the neutral or until the parties reach a settlement, whichever occurs first. Requests for extension of the stay beyond the 30 days will be granted only with the approval of and in the sole discretion of the neutral and the program director upon a showing that such an extension is supported by good cause. However, no case may be in the program for more than 60 days.

- The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the neutral will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.

- Parties may be represented by counsel at the conferences, but representation by counsel is not required. Each party must have in attendance, however, a representative who has the authority to bind the party to the terms of a settlement agreement.

- The parties may be asked to submit to the neutral a confidential pre-conference memo setting forth what is in dispute between the parties, prior settlement efforts, and anything else that the parties would like to bring to the neutral's attention. The memo will be treated as a confidential submission unless the party that prepared the memo authorizes release to the other parties.

- The neutral has no authority to impose a settlement.

- Discussions between the neutral and the participants will be confidential, and there will be no communication between the program and the Board on specific cases submitted to the ADR program, except for procedural information such as case name, number, and status.

- Nothing in the ADR program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the program.

- Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR program. In the event the case is removed from the program, the time period for filing will begin running again from where it left off.

- Settlements reached are subject to approval in accordance with the Board's existing procedures for approving settlements.

- No party will be charged fees or expenses for using the program.

The Board invites parties who have unfair labor practice cases pending before the Board to consider participating in the ADR program. If you have questions about the program, or if your client would like to participate in the program, please contact the program director, Gary Shinners, at (202) 273-3737, or by email at gary.shinners@NLRB.gov.

NLRB Rules and Regulations
Procedures for Filing Documents

The following information is provided to help you file certain documents after an administrative law judge's decision has issued. The information provided below is not comprehensive. To fully read the Board's Rules and Regulations with respect to the filing of documents after a judge's decision has issued, please see Sections 102.46 through 102.48 and Sections 102.111 through 102.114 of the Board's Rules and Regulations. A complete copy of the Board's Rules and Regulations may be viewed at the NLRB's public website at www.nlrb.gov/reports-guidance/rules-regulations.

Exceptions to Judge's Decision and Briefs in Support of Judge's Decision - Section 102.46 (a) – Within 28 days from the date of the Order Transferring Proceeding to the Board, parties may file exceptions to the administrative law judge's decision, together with a brief in support of the exceptions. Any party may also, within the same time frame, file a brief in support of the judge's decision. Please note that the due date for exceptions is stated at the bottom of the Order Transferring Proceeding to the Board.

- **Example:** If the date of the Order Transferring Proceeding to the Board is October 1, then exceptions are due on October 29.
- **Extensions of Time:** Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Oppositions to Exceptions - Section 102.46 (d)(1) – 14 days after the last due date for exceptions, any party opposing the exceptions may file an answering brief to the exceptions with the Office of the Executive Secretary.

- **Example:** If the last due date for exceptions is October 29, then the answering brief is due on November 12.
- Per Section 102.46 (d)(2), matters discussed in the answering brief are limited to what is raised in the exceptions and the brief in support of exceptions.
- **Extensions of Time:** Requests for an extension of time to file an answering brief must be made in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for the answering brief. In addition, a copy of the extension of time request must be timely served on all parties.

Cross-Exceptions - Section 102.46 (e) – 14 days after the last due date for exceptions, any party that has not yet filed exceptions may file cross-exceptions and a supporting brief to any portion of the administrative law judge's decision.

- **Example:** If the last due date for exceptions is October 29, then cross-exceptions are due on November 12.
- **Extensions of Time:** Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Answering Briefs to Cross-Exceptions - Section 102.46 (f)(1) – 14 days after the last due date for cross-exceptions, any party may file an answering brief to the cross-exceptions.

- **Example:** If the last due date for cross-exceptions is November 12, then the answering brief to the cross-exceptions is due on November 26.
- **Extensions of Time:** Requests for an extension of time to file an answering brief must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Reply Brief to Answering Brief - Section 102.46 (h) – 14 days after the last date on which an answering brief is due, any party may file a reply brief to the answering brief.

- **Example:** If the last due date for answering briefs is November 12, then the reply brief is due on November 26.
- The reply brief shall not exceed 10 pages. Requests for permission to exceed this page length will NOT be granted.
- **No extensions of time are permitted for reply briefs.**

Page Limits and Index Requirement - Section 102.46 (j) – Any brief filed pursuant to Section 102.46 must not be combined with any other brief. In addition, except for reply briefs, briefs filed under this section must not exceed 50 pages in length, unless permission to do so is obtained from the Board by motion. The details for this type of a motion are fully set forth in the Board's Rules and Regulations, Section 102.46 (j). Any brief that exceeds 20 pages in length must contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Automatic Adoption of Judge's Decision in Absence of Exceptions - Section 102.48 – If no party files exceptions to the judges' decision, then the finding, conclusions, and recommendations contained in the judge's decision shall automatically become the decision and order of the Board, and all objections and exceptions shall be waived for all purposes.

Computation of Filing Period - Section 102.111 – In computing any period of time under the Board's Rules and Regulations, the day of the act (for example, issuance of the decision) is not to be counted. The last day on which the document is due is to be counted, *unless* that day is a Saturday, Sunday, or a legal holiday, in which case, the time period continues until the next Agency business day. **For instance**, if the due date for exceptions falls on a Monday that is a holiday (such as Labor Day), then the exceptions will be due the following Tuesday.

- In computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the document was filed prior to that date.

Filing Receipt Rules - Section 102.111 (b) –

- The filing of any document by hard-copy must be **received** before the official closing time of the *receiving office* on the last day of the time limit.
  Example: If a document is filed by hand delivery, the document must be received by the Office of the Executive Secretary prior to 5:00 p.m. ***Eastern time*** on the due date.
- The electronic filing of any document on the NLRB's website must be received before midnight for the time zone of the *receiving office* on the last day of the time limit.

Example: If electronically filing a document with the Office of the Executive Secretary in Washington, D.C., then that document must be filed prior to 11:59 p.m. ***Eastern time*** on the due date.

- Requests for extension of time that are filed within three days of the due date must be based on circumstances not reasonably foreseeable in advance.
- Documents may be hand-delivered to the Board.
- Documents postmarked on the day before (or earlier than) the due date are considered timely even if they are received by the Office of the Executive Secretary after the due date; documents which are postmarked on or after the due date are untimely.

Late Filings - Section 102.111 (c) – A party may file motions, exceptions, requests for review, briefs, and any responses after the due date **only upon good cause shown based on excusable neglect and when no undue prejudice would result.**

- A party that is attempting to file documents after the due date must file, in addition to the documents, a motion that states the reasons for requesting to file in an untimely manner.
- A party must also file an affidavit sworn to by individuals with personal knowledge of the facts relating to the late filing.

Service and Filing Dates - Section 102.112 – The date of service is the day on which the document is placed in the mail, or with a private delivery service, or is delivered in person. If the document is faxed, then the date of service is the date on which the transmission is received.

Service Requirements - Section 102.113 and 102.114 –

- Where the rules require service of documents on other parties, a copy of the documents must also be served on any attorney or other representative who is representing that party. **For example**, if Company ABC is represented by John Doe, an attorney, then John Doe must be served a copy of the documents.
    - ***Please note that exceptions, cross-exceptions, answering briefs, reply briefs, extensions of time, and/or any other motion, must be served on all parties in a case.***
- Service of documents by a party on other parties can be done either personally, by registered mail, certified mail, regular mail, electronic mail (if the document is filed electronically), or by private delivery service. Please note that ***service on all parties must be made in the same manner as the filing of the document***, or in a more expeditious manner.
- Failure to follow the procedures relating to timeliness in Section 102.114, may result in: 1) rejection of the document; or 2) withholding a ruling on the matter until service has been completed.
- Papers that are filed with the Board must be typewritten on 8.5 by 11-inch plain white paper; margins must be no less than one inch on each side; typeface must not be smaller than 12 characters per inch; document must be double-spaced. Documents that do not comply with these requirements may be rejected.
- The person or party serving the papers on other parties must submit a written statement of service. This statement must have the following information: 1) the names of the parties served; the date on which these parties were served; and 3) the method of service.

JD(SF)-44-15ER

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

KING SOOPERS, INC.,

and

Case 27-CA-129598

WENDY GEASLIN,
an Individual.

ERRATA

On October 23, 2015, I issued my decision in the above captioned case.

In the remedy portion of the decision, the decision states at page 26, line: 22-25:

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

Please substitute the decision of *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014) for the citation to *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

Dated: October 27, 2015

Amita Baman Tracy
Administrative Law Judge

JD(SF)-44-15
Denver, Colorado

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

KING SOOPERS, INC.,

and

Case 27-CA-129598

WENDY GEASLIN,
an Individual.

Isabel C. Saveland, Esq.,
Jose Rojas, Esq.,
for the General Counsel.
Raymond M. Deeny, Esq.,
Jonathon Watson, Esq.,
for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

[1] All dates are 2014 unless otherwise indicated.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

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[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if"

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A Union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what

Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her to suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunch break at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunch break "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79).[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was

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occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would

unaware that Jackson was a union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not

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fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manger. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunch break midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's

refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They

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unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunch break. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa", mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

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[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or

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[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red [. .] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. Discussion and Analysis

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.

<u>Motion to Amend the Complaint: Make-Whole Remedy</u>

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op at 1 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC*, 361 NLRB No. 10 at 3 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Jackson Hospital Corp.*, 356 NLRB No. 8, slip op. at 1 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and questioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly

granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 13 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB No. 129 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance regarding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, a charging party filed grievances over his suspensions in accordance with his collective bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her

behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunch break. Respondent argues that Geaslin's questioning in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

"protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such "we" and "our" when complaining to Jackson, who is a co-worker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 497 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement);

Kingsbury, Inc., 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights – even if it is incorrect – is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Frances Building Cooperative*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB No. 6 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, slip op. at 3. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br at 48–50).

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB No. 1, slip op. at 1 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB No. 23, slip op. at 28.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the

Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her co-worker about the inability to manage the workload in the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March Geaslin actively questioned the propriety of such duties, and complained to her co-worker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunch break, albeit

later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunch break later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunch break before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunch break, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 4 (2011), citing *Severance Tool*

Industries, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other rounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 130 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the

[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB No. 72, slip op. at 3 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Respondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion.

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB No. 103 (2006) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunch break). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her,

and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petroleum Corp.*, 177 NLRB No. 29 (1969) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5 (2011); see *Goya Foods*, 356 NLRB No. 73, slip op. at 3. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, slip op.

at 6 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB No. 150, slip op. at 3 (2010), enfd. 652 F.3d 22 (2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *The Mead Corp.*, 331 NLRB No. 66 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *The Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id., slip op. at 3. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1.

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[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014).

Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

CONCLUSIONS OF LAW

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Coercively interrogating an employee about her union activity.

   b. Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

b. Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its

31 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 22, 2015

Amita Baman Tracy
Administrative Law Judge

JD(SF)-44-15

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the two unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the two 5-day suspensions and termination will not be used against her in any way.

JD(SF)-44-15

KING SOOPERS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

RESPONDENT KING SOOPERS' STATEMENT OF EXCEPTIONS

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Respondent King Soopers, Inc. ("King Soopers" or "Respondent") by and through its attorneys, Sherman & Howard L.L.C., pursuant to National Labor Relations Board ("NLRB" or "Board") Rules and Regulations § 102.46, hereby takes the following exceptions to Administrative Law Judge Amita Bama Tracy's Decision and Recommended Order ("Decision"):[1]

1. The Administrative Law Judge's failure to recognize Geaslin's inconsistent testimony. 3 ALJD fn. 6; 13 ALJD 15-47; 14 ALJD 1-20.
2. The Administrative Law Judge's failure to consider multiple omissions from Geaslin's affidavit and insistence that the GC failed to include the information in the affidavit when concluding Geaslin was a credible witness. 3 ALJD fn. 6; Tr. 78:2-21; 116:5-13; 126:3-20.
3. The Administrative Law Judge's failure to consider Geaslin's inappropriate behavior during the August 11, 2015 hearing. Tr. 118:23-25; 119:1-9.
4. The Administrative Law Judge's failure to consider Geaslin's erroneous denial that she made faces at Respondent's counsel or behaved inappropriately during the August 11, 2015 hearing. Tr. 120:4-14.
5. The Administrative Law Judge's failure to consider *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (408 (1962) when determining Geaslin's credibility. 3 ALJD fn. 6.
6. The Administrative Law Judge's decision to credit Geaslin's testimony, in part, due to Respondent's "argumentative" cross-examination. 3 ALJD fn. 6.

[1] Citations in this Statement of Exceptions will be as follows: "Tr. __:__" to indicate the hearing transcript's page and line numbers; "R. Ex. __" to indicate Respondent's exhibits' "GC __" to indicate Counsel for the General Counsel's exhibits; "Jt. Ex. __" to indicate joint exhibits; and "__ ALJD __" to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

7. The Administrative Law Judge's reliance on Geaslin's affidavit to bolster her credibility. 3 ALJD fn. 6.

8. The Administrative Law Judge's denial of King Soopers' due process by relying on Geaslin's Board affidavit, which was not entered into evidence. 3 ALJD fn. 6.

9. The Administrative Law Judge's conclusion to adopt Geaslin's testimony despite her recognition that "there are some inconsistencies in the details of what occurred, and in some instances I cannot credit Geaslin." 3-4 ALJD fn. 6.

10. The Administrative Law Judge's finding that Geaslin's testimony "was corroborated by her Board affidavit." 3 ALJD fn. 6.

11. The Administrative Law Judge's finding that she "cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella, and Barbos." 14 ALJD 11-19.

12. The Administrative Law Judge's contradictory findings that Panzarella and Jackson spoke to Geaslin about the need to follow management instructions and that because "Geaslin completed the assignment from [Panzarella] before she even spoke to Jackson; there was nothing to 'address' by Panzarella and Jackson as claimed by Pelo." 4 ALJD 20-29; fn. 9.

13. The Administrative Law Judge's finding that Pelo spoke to Geaslin about refusing to perform work orders, not Panzarella. 4 ALJD 32.

14. The Administrative Law Judge's failure to credit Eastburn's testimony that Geaslin never raised her hands, never agreed to sack groceries, never attempted to sack groceries, and never sacked groceries. 5 ALJD 28-29; fn. 13.

15. The Administrative Law Judge's decision to discredit Eastburn's testimony because her memory needed to be refreshed with a written statement given contemporaneous with the incident. 6 ALJD fn. 15.

16. The Administrative Law Judge's finding that Geaslin never refused to sack groceries. 5 ALJD 29; 6 ALJD 1.

17. The Administrative Law Judge's finding that Geaslin turned and walked towards the check stands to bag groceries and Pelo stopped her from doing so. 6 ALJD 1-6.

18. The Administrative Law Judge's failure to credit Pelo, Barbos, and Panzarella's consistent testimony that Geaslin aggressively lunged toward Pelo while clenching her fists, bearing her teeth, shaking, and with her face turning red. 9 ALJD fn. 21; 13 ALJD 31-44.

19. The Administrative Law Judge's decision to discredit Pelo's testimony regarding whether she spoke to Geaslin in March 2014 regarding her complaint to the Union. 4 ALJD 20-29; fn. 9.

20. The Administrative Law Judge's holding that the GC was permitted to amend the Complaint to add a request that King Soopers "reimburse the discriminate for all search-for-work and work-related expenses." Tr. 10:1-21.

21. The Administrative Law Judge's failure to consider the GC's explanation for her failure to amend the Complaint prior to immediately prior to the hearing as an "oversight." 10 ALJD 33-37; 11 ALJD 1-35; Tr. 9:23-25; 10:1-6.

22. The Administrative Law Judge's failure to consider any of the necessary elements for amendment with regard to the GC's motion to amend the Complaint to add a request for search-for-work related expenses. 10 ALJD 33-37; 11 ALJD 1-35.

23. The Administrative Law Judge's decision to grant the GC's oral motion at the trial to amend the Complaint and add an interrogation allegation. 11 ALJD 38-46; 12 ALJD 1-2; Tr. 197:6-24.

24. The Administrative Law Judge's finding that King Soopers had a full and fair opportunity to cross examine Geaslin regarding the alleged interrogation when Geaslin left the hearing prior to the GC's oral motion to amend the Complaint. 11 ALJD 42-46.

25. The Administrative Law Judge's conclusion that King Soopers had sufficient notice of the interrogation claim based on a single allegation in the August 18, 2014 Amended Charge. 11 ALJD 38-42.

26. The Administrative Law Judge's failure to consider the Counsel for the GC's lack of an excuse, which caused her delay in moving to amend the Complaint to add the interrogation claim. 11 ALJD 38-46.

27. The Administrative Law Judge's failure to consider that the March 2014 incident, which is the basis for the interrogation claim, was only referenced in the context of motivation, not a separate violation of the Act. 11 ALJD 38-46; Tr. 22:6-14; 41:22-25; 42:1-19.

28. The Administrative Law Judge's reliance on *Amalgamated Transit Local 1498*, 360 NLRB No. 69 (2014). 11 ALJD 45-46; 12 ALJD 1-2.

29. The Administrative Law Judge's revocation of King Soopers' Subpoena, which sought documents concerning Geaslin's fitness for employment and attempts to find employment since being terminated by King Soopers, as well as the expenses Geaslin incurred as a result of such job search efforts. Tr. 17:23-25; 18:1-24.

30. The Administrative Law Judge's refusal to permit King Soopers to question Geaslin regarding her efforts to obtain employment following her termination from King Soopers. Tr. 17:23-25; 18:1-24.

31. The Administrative Law Judge's prohibition on King Soopers' ability to discover information or question Geaslin regarding the merits of the GC's requested enhanced remedy. 11 ALJD 10-21; Tr. 17:23-25; 18:1-24.

32. The Administrative Law Judge's failure to defer to the grievance and arbitration process in the collective bargaining agreement between King Soopers and the United Food and Commercial Workers International Union, Local 7 ("Union"). 12 ALJD 6-9.

33. The Administrative Law Judge's failure to treat the Union's withdrawal of the grievance as a pre-arbitration settlement. 12 ALJD 6-37; 13: 13 ALJD 1-11.

34. The Administrative Law Judge's failure to consider Union Representative Craine's testimony that the Union concluded it could not prevail at arbitration and withdrew Geaslin's grievance. Tr. 173:3-5; 177:2-11.

35. The Administrative Law Judge's failure to defer to the Union's withdrawal of the grievance challenging Geaslin's termination. 12 ALJD 6-37; 13: 13 ALJD 1-11.

36. The Administrative Law Judge's application and consideration of deferral only under *Collyer Insulated Wire*, 192 NLRB 837 (1971). 12 ALJD 6-37; 13: 13 ALJD 1-11.

37. The Administrative Law Judge's failure to apply *General Dynamics Corp.*, 271 NLRB 187 (1984) when determining whether deferral is appropriate. 12 ALJD 6-37; 13: 13 ALJD 1-11.

38. The Administrative Law Judge's conclusion that deferral is not appropriate because Geaslin exhausted the grievance and arbitration process and can neither arbitrate the grievance on her own nor compel the Union to arbitrate the grievance. 12 ALJD 32-24.

39. The Administrative Law Judge's reliance on *U.S. Postal Service*, 324 NLRB No. 129 (1997) in concluding deferral is not appropriate. 12 ALJD 19-24; 13 ALJD 10-11.

40. The Administrative Law Judge's failure to consider the requirements of *Alpha Beta Co.*, 273 NLRB 1546 (1985) and its progeny in considering whether to defer Geaslin's ULP Charge to the Union's withdrawal of the grievance. 12 ALJD 6-37; 13: 13 ALJD 1-11.

41. The Administrative Law Judge's failure to find Geaslin agreed to be bound by the Union's decision to withdraw her grievance and waive her rights under the Act. 12 ALJD 6-37; 13: 13 ALJD 1-11.

42. The Administrative Law Judge's failure to consider undisputed evidence that the grievance challenging Geaslin's termination was withdrawn because she failed to follow a work order and was required to work now, grieve later. 10 ALJD 8-10; Tr. 134:17-22; 137:5-9.

43. The Administrative Law Judge's failure to consider King Soopers and the Union's extensive and mature bargaining relationship. 12 ALJD 5-37; 13 ALJD 1-11.

44. The Administrative Law Judge's conclusion that Geaslin engaged in protected concerted activity in March 2014. 15 ALJD 21-26.

45. The Administrative Law Judge's finding Geaslin engaged in concerted activity in March 2014 because she used such terms as "we" and "our" when describing her complaints at trial. 15 ALJD 28-29.

46. The Administrative Law Judge's conclusion that Geaslin engaged in concerted activity because, unbeknownst to Geaslin, she complained to the Union about her work assignments. 15 ALJD 29-31.

47. The Administrative Law Judge's failure to consider her conclusion that the Union has not filed a grievance challenging King Soopers' assignment of work to an employee that involves the duties of another department when determining whether Geaslin engaged in protected concerted activity in March 2014. 3 ALJD 28; 15 ALJD 21-31.

48. The Administrative Law Judge's finding that the alleged statements by Pelo to Geaslin in March 2014 amount to an unlawful interrogation. 17 ALJD 24-47; 18 ALJD 1-26.

49. The Administrative Law Judge's finding that Pelo's alleged questions to Geaslin in March 2014 would objectively restrain an employee from pursuing her Section 7 rights. 18 ALJD 22-26.

50. The Administrative Law Judge's failure to consider undisputed evidence that no grievance was ever filed alleging Pelo interrogated Geaslin in March 2014 regarding Geaslin's complaints to Jackson regarding being instructed to sample cakes. Tr. 186:22-25.

51. The Administrative Law Judge's conclusion that Geaslin's work stoppage on May 9, 2014 remained protected under the Act. 20 ALJD fn. 27.

52. The Administrative Law Judge's finding Geaslin did not refuse to sack groceries on May 9, 2014. 19 ALJD 21-31

53. The Administrative Law Judge's reliance on Geaslin's behavior in March 2014 to find Geaslin did not refuse Pelo's directive on May 9, 2014. 19 ALJD 25-31.

54. The Administrative Law Judge's conclusion that Geaslin's behavior was not truly insubordinate and, therefore, Geaslin did not lose the Act's protection. 20 ALJD 8-10.

55. The Administrative Law Judge's holding that Geaslin did not lose the protection of the Act on May 9 or 14, 2014. 20 ALJD fn. 27.

56. The Administrative Law Judge's failure to consider Geaslin's self-help in refusing to sack groceries on May 9, 2014. 20 ALJD fn. 27.

57. The Administrative Law Judge's failure to apply the requirement that Geaslin work now, grieve later to her conduct on May 9, 2014. 20 ALJD fn. 27.

58. The Administrative Law Judge's failure to consider whether Geaslin lost protection of the Act by violating the collective bargaining agreement between King Soopers and the Union. 20 ALJD fn. 27.

59. The Administrative Law Judge's failure to consider whether Geaslin's conduct constituted a refusal to sack groceries on May 9, 2014. 5 ALJD 10-29; 6 ALJD 5-17; 19 ALJD 25-30.

60. The Administrative Law Judge's failure to rely on *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2013) in concluding Geaslin lost the protection of the Act by engaging in insubordination.

61. The Administrative Law Judge's finding Geaslin did not lose the protection of the Act under the *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) factors.

62. The Administrative Law Judge's failure to consider that there was no evidence suggesting other employees shared Geaslin's objection to sacking groceries or helping other departments. 14 ALJD 23-42; 15 ALJD 1-47; 16 ALJD 1-41; 17 ALJD 1-20.

63. The Administrative Law Judge's finding that Geaslin engaged in protected concerted activity. 15 ALJD 33-47; 16 ALJD 1-41; 17 ALJD 1-20.

64. The Administrative Law Judge's finding Geaslin engaged in protected concerted activity in May 2014 by asserting her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break. 15 ALJD 43-45.

65. The Administrative Law Judge's failure to consider Jackson's admonition in March 2014 to Geaslin that she is required to follow her supervisors' directives when determining whether Geaslin had a honest and reasonable belief she was asserting a contract right. 4 ALJD 27; 14 ALJD 23-42; 15 ALJD 1-47; 16 ALJD 1-41; 17 ALJD 1-20. Tr. 226:4-17; 243:4-13.

66. The Administrative Law Judge's failure to consider the fact that the Union never filed a grievance challenging a supervisor's assignment of duties in one department to an employee in another department. 16 ALJD 27-29.

67. The Administrative Law Judge's conclusion that Geaslin asserted a contract right by asking Pelo whether she was permitted under the contract to sack groceries. 16 ALJD 9-12.

68. The Administrative Law Judge's reliance on Geaslin's statements in subsequent meetings to find she asserted a contract right on the sales floor on May 9, 2014. 16 ALJD 12-14.

69. The Administrative Law Judge's conclusion that the events of the May 14, 2014 meeting are inextricably intertwined with the events on May 9, 2014. 19 ALJD 41-42.

70. The Administrative Law Judge's conclusion that Geaslin was terminated for questioning whether the contract permitted her to sack groceries. 19 ALJD 38-41.

71. The Administrative Law Judge's conclusion that Geaslin was suspended and terminated for asserting her contractual rights. 19 ALJD 2-3.

72. The Administrative Law Judge's finding that Geaslin continued to assert her contractual rights during the May 14, 2014 meeting when she insisted she agreed to sack groceries and questioned whether such an assignment was appropriate under the contract. 16 ALJD 31-33.

73. The Administrative Law Judge's finding that the May 14, 2014 meeting constituted a "grievance meeting." 16 ALJD 33-37.

74. The Administrative Law Judge's failure to consider *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984) when considering whether Geaslin's conduct was concerted under the *Interboro* doctrine. 14 ALJD 23-42; 15 ALJD 1-47; 16 ALJD 1-41; 17 ALJD 1-20.

75. The Administrative Law Judge's finding that Geaslin had an honest and reasonable belief she was asserting a contract right on May 9, 2014 when she refused to sack groceries pursuant to *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). 14 ALJD 23-42; 15 ALJD 1-47; 16 ALJD 1-41; 17 ALJD 1-20.

76. The Administrative Law Judge's failure to accord any weight to her finding the union did not file a Grievance challenging Pelo's order to Geaslin on May 9, 2014 to sack groceries. 10 ALJD 7-8.

77. The Administrative Law Judge's failure to consider undisputed evidence employees regularly helped other departments, regardless of their position, when the store was busy. Tr. 214:16-21; 215:12-16; 222:9-17; 247:13-15; 248:6-15; 271:14-25; 272:1.

78. The Administrative Law Judge's failure to consider undisputed evidence that Geaslin had previously disciplined employees for failing to follow her work orders. Tr. 129:24-25; 130:1-3.

79. The Administrative Law Judge's failure to apply the Board's holding in *ABF Freight Sys.*, 271 NLRB 35 (1984). 16 ALJD 39-41; 17 ALJD 1-17.

80. The Administrative Law Judge's finding that the May 21, 2014 meeting was considered the first step of the grievance process under the applicable CBA. 16 ALJD 35-37.

81. The Administrative Law Judge's attempt to distinguish and failure to apply *Wright Line*, 251 NLRB 1083 (1980). 21 ALJD fn. 28.

82. The Administrative Law Judge's holding that *Wright Line*, 251 NLRB 1083 (1980) does not apply.

83. The Administrative Law Judge's finding that King Soopers failed to prove other employees have been suspended or terminated for engaging in similar conduct as Geaslin absent protected concerted activity. 21 ALJD fn. 28.

84. The Administrative Law Judge's failure to consider or apply *Burnup & Sims*, 379 U.S. 21 (1964). 18 ALJD 30-47; 19 ALJD 1-47; 20 ALJD 1-36; 21 ALJD 1-6; Tr. 43-45.

85. The Administrative Law Judge's failure to find King Soopers' and Pelo had an honest belief Geaslin engaged in misconduct on May 9 and 14, 2014. 18 ALJD 30-47; 19 ALJD 1-47; 20 ALJD 1-36; 21 ALJD 1-6; Tr. 43-45.

86. The Administrative Law Judge's failure to consider undisputed facts that Geaslin was terminated for misconduct and being disrespectful. 9 ALJD 7-8; Jt. Ex. 4.

87. The Administrative Law Judge's failure to rely on her finding of fact that King Soopers considers insubordination or the failure to follow a management directive to be

misconduct and any words or deeds that are in violation of this policy will subject employees to discipline up to and including termination. 3 ALJD 3-10.

88. The Administrative Law Judge's failure to consider the fact that Craine was forced to remove Geaslin from the May 14, 2014 meeting because of Geaslin's inappropriate and aggressive conduct. 8 ALJD 11-12.

89. The Administrative Law Judge's failure to consider Craine's testimony that he expected Geaslin to be terminated during the May 14, 2014 meeting because of what Geaslin told him regarding her behavior on May 9, 2014. 7 ALJD 13-16.

90. The Administrative Law Judge's failure to consider Craine's request that Pelo give Geaslin another chance as an admission that Geaslin engaged in wrongdoing. Tr. 164:23-25; 165:1-10.

91. The Administrative Law Judge's recommended order that King Soopers offer reinstatement to Charging Party. 26 ALJD 11-16.

92. The Administrative Law Judge's recommended order that King Soopers cease and desist from the alleged discriminatory conduct. 26 ALJD 8-9.

93. The Administrative Law Judge's recommended order that King Soopers make Charging Party whole. 26 ALJD 11-16.

Respectfully submitted this 19th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2015, a true and correct copy of the foregoing **STATEMENT OF EXCEPTIONS** was electronically filed addressed to the following:

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Mary Navrides

Mary Navrides

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

RESPONDENT KING SOOPERS' BRIEF IN SUPPORT OF EXCEPTIONS

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STATEMENT OF THE CASE[1]

This matter was heard before Administrative Law Judge Amita Baman Tracy ("ALJ Tracy") on August 11-12, 2015 at the Regional Office's Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294. The General Counsel ("GC") and Wendy Geaslin ("Geaslin" or "Charging Party") contended King Soopers, Inc. ("King Soopers" or "Respondent") violated the National Labor Relations Act ("Act") by: (1) interrogating Geaslin in March 2014 regarding Union activity; (2) suspending Geaslin on May 9, 2014 for refusing a work order; (3) suspending Geaslin on May 14, 2014 for engaging in inappropriate and aggressive behavior during an investigatory interview; and (4) terminating Geaslin's employment on May 21, 2014.

The ALJ's Decision and Recommended Order ("Decision") must be reversed because ALJ Tracy declined to conduct an orderly review of the record and render a decision on the merits of the case. The administrative trial process promises a fair hearing followed by a reasoned decision applying the prevailing Board law to the evidence. ALJ Tracy seemingly arrived at a result designed to manipulate the record to affect a misapplication of Board law. ALJ Tracy's apparent hostility to King Soopers' case entails a wholesale disregard of the undisputed facts followed by a vigorous defense of her legal miscues cloaked in the Board's deference to an ALJ's credibility findings. ALJ Tracy's credibility determinations exceed the boundaries of protection and must be disregarded. Even if they are adopted, however, ALJ

[1] Citations in this Brief will be as follows: "Tr. __:__" to indicate the hearing transcript's page and line numbers; "R. Ex. __" to indicate Respondent's exhibits' "GC __" to indicate Counsel for the General Counsel's exhibits; "Jt. Ex. __" to indicate joint exhibits; and "__ ALJD __" to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

Tracy's decision cannot stand because she erred in applying the law and, in some cases, completely ignored the governing legal precedent.

ALJ Tracy's result-driven decision was further fueled by multiple procedural errors, which require reversal. For example, ALJ Tracy erred in permitting the GC's last minute motions to amend the complaint to request an award of search-for-work related expenses and to add an interrogation claim. Neither of the GC's motions to amend satisfies the requirements for amendment because King Soopers did not have notice of either amendment, the GC could not provide a valid excuse for her delay in seeking to amend the Complaint, and neither issue was fully litigated. ALJ Tracy's disregard of the appropriate test must be rejected and reversed. ALJ Tracy also erroneously revoked King Soopers' Subpoena and prohibited King Soopers from questioning Geaslin regarding her efforts to find interim employment. The GC's request for search-for-work related expenses only served to prejudice ALJ Tracy and King Soopers was deprived of the ability to mitigate such prejudice by being unable to question Geaslin regarding her search-for-work efforts.

ALJ Tracy's decision should also be reversed because she declined to defer to the negotiated grievance and arbitration process between King Soopers and the United Food and Commercial Workers International Union, Local 7 ("Union"). In deciding deferral was not appropriate, ALJ Tracy plainly misapplied law utilizing *Collyer Insulated Wire*, 192 NLRB 837 (1971) instead of *Alpha Beta Co.*, 273 NLB 1546 (1985). Even considering both *Collyer* and *Alpha Beta*, however, ALJ Tracy erroneously failed to defer to the Union's withdrawal of the grievance in contradiction of the Board's policy in favor of deferral.

ALJ Tracy also incorrectly found King Soopers violated the Act by interrogating Geaslin in March 2014 regarding her alleged complaints to a Union Steward, Latrice Jackson. Geaslin

did not engage in protected concerted activity in March 2014 as a matter of law and ALJ Tracy relied on unsupported assumptions to find otherwise. Further, even if Geaslin was engaged in protected concerted activity in March 2014, Pelo's[2] alleged question to Geaslin regarding her complaints to Jackson did not suggest an element of coercion and, therefore, were "[i]solated, innocuous incidents of interrogation," which did not violate the Act. *See Groendyke Transp., Inc. v. N.L.R.B.*, 530 F.2d 137, 144 (10th Cir. 1976).

Finally, ALJ Tracy's Decision should be reversed because she erred in concluding King Soopers unlawfully disciplined Geaslin for protected concerted activity on May 9 and 14, 2014. Geaslin did not engage in protected concerted activity on either May 9 or 14, 2014. Further, ALJ Tracy disregarded the Board's analysis under *Wright Line*, 251 NLRB 1083 (1980) and *Burnup & Sims*, 379 U.S. 21 (1964). Indeed, ALJ Tracy did not even consider whether Pelo had an honest belief Geaslin engaged in misconduct on May 9 and 14, 2015 under *Burnup & Sims*. ALJ Tracy's Decision must be reversed and the Complaint should be dismissed in its entirety.

QUESTIONS PRESENTED

1. Whether the Administrative Law Judge's credibility determinations are clearly erroneous and should be rejected? (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19).

2. Whether ALJ Tracy erred in granting the GC's motions to amend the Complaint?

    i. Whether ALJ Tracy erred in granting the GC's motion to amend the Complaint to add a request for an enhanced remedy? (Exceptions 20, 21, 22, 31).

    ii. Whether ALJ Tracy erred in granting the GC's mid-trial oral motion to amend the Complaint to add an interrogation claim? (Exceptions 23, 24, 25, 26, 27, 28).

3. Whether ALJ Tracy erred by revoking King Soopers' Subpoena? (Exceptions 29, 30, 31).

4. Whether ALJ Tracy erred by failing to defer Geaslin's Unfair Labor Practice Charge to the grievance and arbitration process in the collective bargaining agreement between King Soopers and the Union? (Exceptions 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43).

[2] Theresa Pelo was the Store Manager at Store 1, the store in which Geaslin was employed. 2 ALJD 26.

5. Whether ALJ Tracy erred in finding Geaslin was unlawfully interrogated?

   i. Whether ALJ Tracy erred in finding Geaslin engaged in protected concerted activity in March 2014? (Exceptions 12, 13, 44, 45, 46, 47).

   ii. Whether ALJ Tracy erred in finding Pelo unlawfully interrogated Geaslin in March 2014 in violation of Section 8(a)(1)? (Exceptions 12, 13, 19, 48, 49, 50)

6. Whether ALJ Tracy erred in finding King Soopers discriminatory twice suspended and terminated Geaslin?

   i. Whether ALJ Tracy erred in finding Geaslin engaged in protected concerted activity on May 9 or 14, 2014? (Exceptions 16, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80).

   ii. Whether ALJ Tracy erred in holding Geaslin was twice suspended and terminated for engaging in protected concerted activity on May 9 and 14, 2014? (Exceptions 16, 70, 71, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90)

ARGUMENT

A. ALJ Tracy's Credibility Determinations Are Fatally Flawed.

ALJ Tracy made multiple credibility findings which are fatally flawed because she ignored undisputed evidence and excluded evidence and testimony based on her personal opinions, rather than the evidence presented. ALJ Tracy's Decision must be reversed.

"[I]t is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect." *S. Florida Hotel & Motel Ass'n*, 245 NLRB 561, 570 (1979); *see also Dillon v. M. S. Oriental Inventor*, 426 F.2d 977, 978 (5th Cir. 1970) (noting that appellate courts defer to the fact finder below on issues of credibility except where the testimony is inherently incredible).

Although an ALJ's findings of fact based on credibility determinations are given deferential treatment by the reviewing body, the findings of fact are not unassailable. *See, e.g.*,

In Re La Gloria Oil & Gas Co., 337 NLRB 1120, 1126 n. 9 (2002) (overturning a judge's finding of fact as "clearly erroneous" and "fatally flawed"); *Salant & Salant, Inc.*, 92 NLRB No. 69 (1950) (overruling numerous credibility findings of the trial examiner – including some based on demeanor – because the evidence as to each credibility issue "clearly preponderate[d]" against the trial examiner's resolution). As the Board has long held, "[i]n all cases, save only where there are no exceptions to the Trial Examiner's proposed Report and Recommended Order, the Act commits to the Board itself, not to the Board's Trial Examiner, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence." *Salant*, 92 NLRB No. 69 at *10. The Board must do so here.

ALJ Tracy erred by finding Geaslin to be a credible witness and crediting nearly all of her testimony. In finding Geaslin credible, ALJ Tracy opined that Geaslin's trial testimony "was corroborated by her Board affidavit" and her opinion that King Soopers' cross examination of Geaslin was "argumentative." 3 ALJD fn. 6. ALJ Tracy's stated reasons for crediting Geaslin are fatally flawed and must be rejected.

First, it is entirely improper for ALJ Tracy to rely on Geaslin's Board affidavit to bolster her testimony. 3 ALJD fn. 6. Geaslin's affidavit was not entered into evidence and, therefore, ALJ Tracy does not have knowledge of Geaslin's entire affidavit. ALJ Tracy may not rely on information not introduced into evidence. *See In Re Observer & Eccentric Newspapers, Inc.*, 340 NLRB 124, 125, n. 1 (2003) (evidence not introduced at trial may not be relied upon at the Board level); *Chicago Tribune Co.*, 304 NLRB 259, 262 (1991) (finding that it would not afford all parties due process to rely on evidence outside the record and not presented during trial). Moreover, because ALJ Tracy did not review Geaslin's entire Board affidavit, her conclusion that Geaslin's trial testimony was "corroborated by her Board affidavit" is entirely speculation.

ALJ Tracy's speculation about a document not entered into evidence also leaves King Soopers unable to challenge ALJ Tracy's finding. King Soopers also does not have a copy of the affidavit. Therefore, King Soopers can only rely on those places in the record where Geaslin's Board affidavit was used to *impeach* her trial testimony, and it does not have the benefit of the affidavit to use on appeal. Thus, ALJ Tracy's speculation regarding Geaslin's Board affidavit denied King Soopers due process and requires reversal.

Further, based on the information introduced at trial, Geaslin's testimony was not corroborated by her Board affidavit. On three separate occasions at trial and when confronted with substantive contradictions between her testimony and Board affidavit, Geaslin alleged the GC failed to include her testimony in the affidavit. For example, Geaslin testified she complained to Jackson in March 2014 about being unable to complete her work in Starbucks and inefficiencies in finishing her Starbucks duties. Tr. 75:8-22. Geaslin's affidavit to the Board, however, made no such reference. When confronted with this inconsistency, Geaslin was unwilling to take any responsibility and insisted she made that specific complaint to the GC, but the GC did not put it in her affidavit. Tr. 78:2-21. Geaslin claimed her affidavit was wrong a second time concerning whether she told Pelo on May 9, 2014 she could not sack because she was going to lunch. In her affidavit, Geaslin stated that she told Pelo she "had to leave at two and needed to have [her] lunch."[3] Tr. 115:14-21. On cross examination, however, Geaslin stated unequivocally that she did not tell Pelo she was going to lunch. Tr. 116:1-4. When confronted with this contradiction, Geaslin again suggested the affidavit was taken down incorrectly. Tr. 116:5-13. On a third occasion, Geaslin claimed there was a mistake in her affidavit because she

[3] ALJ Tracy specifically relied on Geaslin's Board affidavit that she told Pelo she was going to lunch on May 9, 2014 to find Geaslin engaged in protected concerted activity on that date by seeking to enforce her right to a lunch break. *See* 5 ALJD 18-20; 15 ALJD 42-45. Because ALJ Tracy erroneously relied on Geaslin's Board affidavit and ignored the fact that it was directly contradicted by Geaslin's testimony, ALJ Tracy's conclusion that Geaslin asserted her right to a lunch break cannot be sustained.

was "misinformed" when she wrote in her affidavit that "[Craine][4] . . . would not be able to file a grievance on [her] behalf until July." Tr. 126:3-20. Of course, a Grievance was filed on Geaslin's behalf on May 22, 2014. *Id.*; R. Ex. 4. Geaslin had the opportunity to review her affidavit and make any substantive changes to include the above information. She made none.

These are direct and substantive contradictions between Geaslin's Board affidavit and her trial testimony. In deciding to credit Geaslin's trial testimony, however, ALJ Tracy not only failed to consider these inconsistencies but utterly failed to even recognize their existence. Because ALJ Tracy relied on the substance of Geaslin's inconsistent and impeached trial testimony to find King Soopers violated the Act, ALJ Tracy's Decision must be reversed.

Geaslin's insistence she was not to blame for the omissions in the affidavit also undermines her general credibility in this matter because it demonstrates Geaslin's inability to take responsibility for her actions. Like with the above omissions in her Board affidavit, Geaslin failed to take any responsibility for her conduct on May 9 or 14, 2014 and, instead, directed the blame toward Pelo. Similarly, during the trial, Geaslin was caught making faces at King Soopers' attorney during her cross examination, including pursing her face and holding her hands out to her side. Tr. 118:23-25; 119:1-9. Like with the Geaslin's conduct on May 9 and 14, 2014, Geaslin denied making any faces at trial or engaging in any wrongdoing. Tr. 120:4-14. Geaslin's denial that she made faces at Deeny during the hearing, despite the fact that Deeny called her out for doing so, demonstrates Geaslin's pattern of untruthful behavior. Moreover, it is direct evidence that Geaslin is willing to lie in order to deny wrongdoing. Geaslin's inappropriate and untruthful behavior at trial precludes a finding that she is credible. *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (holding that when assessing a witness' credibility, the Board must consider the way in which the witness answers the questions, including

[4] Danny Craine ("Craine") is a Union Representative. 3 ALJD 22.

arrogance and defiance). Like with her deliberate blind-eye to Geaslin's inconsistent testimony and Board affidavit, ALJ Tracy did not even consider Geaslin's refusal to take responsibility for her actions, inappropriate behavior during cross examination, and blatant lies in finding Geaslin credible.

ALJ Tracy's opinion that Geaslin was credible because of what ALJ Tracy found to be "Respondent's argumentative cross-examination" is also entirely inappropriate. 3 ALJD fn. 6. By relying on King Soopers' attorney's demeanor, ALJ Tracy admits she is punishing King Soopers because she did not agree with its attorneys' cross examination questioning and techniques. ALJ Tracy cannot lawfully base her trust in Charging Party's testimony on *Respondent's* demeanor during cross examination. *See In Re Double D. Const. Grp., Inc.*, 339 NLRB 303, 305 (2003) (listing factors to consider when determining witness credibility and not including cross-examining attorney's demeanor).[5]

ALJ Tracy's findings of fact regarding Pelo's alleged involvement in Geaslin's refusal to sample bakery products in March 2014 are also clearly erroneous. ALJ Tracy rejected Pelo's direct testimony on this point and concluded Pelo spoke to Geaslin regarding Geaslin's refusal to sample bakery products and complaint to Jackson in March 2014. 4 ALJD fn. 9. ALJ Tracy rejected Pelo's testimony because,

> In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, 'No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella[6] (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo.

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[5] Numerous other inconsistencies in Geaslin's testimony were outlined in Respondent's Post-Hearing Brief. *See* Respondent's Post-Hearing Brief, pp. 10-13; 18-23. ALJ Tracy completely ignored those inconsistencies when finding Geaslin to be a credible witness. ALJ Tracy's failure to even consider Geaslin's inconsistent testimony was error and her Decision must be reversed.

[6] Lisa Panzarella ("Panzarella") was an Assistant Store Manager at Store 1, the store in which Geaslin was employed. 2 ALJD 26-27.

4 ALJD fn. 9. ALJ Tracy's conclusion is fatally flawed. ALJ Tracy failed to consider Pelo's testimony in full, which clarified that Panzarella and Jackson spoke with Geaslin about how it is not a violation of the contract to help other departments or to sample bakery products. Tr. 269:17-25; 270: 1-3. Thus, despite ALJ Tracy's finding that "there was nothing to 'address' by Panzarella and Jackson as claimed by Pelo," the issue that was "addressed" was Geaslin's need to follow management directives. Because Panzarella and Jackson handled the March 2014 situation with Geaslin and her refusal to sample bakery products, there was no reason for Pelo to discuss the matter with Geaslin. ALJ Tracy's conclusion requires reversal.

ALJ Tracy also found Geaslin's testimony to be credible on this point because "it seems unlikely [Geaslin] would fabricate such an interaction with Pelo." 4 ALJD fn. 9; 5 ALJD fn. 9. ALJ Tracy did not provide any basis whatsoever for her opinion that it is "unlikely" Geaslin would fabricate her version of events.[7] ALJ Tracy cannot simply rely on her own personal opinion without *some* evidence in the record. *See In Re Double D. Const. Grp., Inc.*, 339 NLRB 303, 305 (2003) (finding the judge's credibility determinations to be in error because he failed to make "a true credibility determination, which considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."). ALJ Tracy's blind reliance on Geaslin's testimony on this point is particularly suspect given Geaslin's demonstrated propensity to lie, as outlined above. Thus, ALJ Tracy's finding that Pelo spoke with Geaslin regarding her refusal to sample bakery products and complaint to Jackson in March 2014 is clearly erroneous and must be reversed.

[7] Importantly, King Soopers was unable to test Geaslin's credibility on this point because she left the hearing before King Soopers was aware it was defending against an interrogation claim. Tr. 150:8-18.

ALJ Tracy also erred when she discredited Panzarella, Barbos[8], and Pelo's testimony regarding Geaslin's actions during the May 14, 2014 meeting.[9] While Geaslin, who had every reason to provide self-serving testimony, stated that she did not yell at Pelo or aggressively lunge at Pelo, three independent witnesses (Panzarella, Barbos, and Pelo) *all* testified Geaslin lunged toward Pelo, while shaking and bearing her teeth with clenched fists and a red face. 9 ALJD fn. 21; Tr. 230:18-24; 231:3-24; 251:10-25; 252:1-21; 278:9-17. Geaslin's lunging gestures were so aggressive that they caused Pelo to move back in her chair and retreat from Geaslin. Tr. 231:18-23; 278:20-25. ALJ Tracy even noted,

> Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor.[10]

9 ALJD fn. 21. Panzarella, Barbos and Pelo all participated in the meeting and witnessed Geaslin's behavior. Despite all three witnesses being sequestered during the hearing, each witness's testimony corroborated the others'. Yet, ALJ Tracy rejected all *three* eyewitnesses' testimony that Geaslin lunged toward Pelo in favor of Geaslin's testimony that she did not make any threatening gestures or lunges toward Pelo. 9 ALJD fn. 21. In rejecting the three eyewitnesses' testimony, ALJ Tracy improperly relied upon her own *personal* opinion that, had Geaslin *really* lunged at Pelo, the managers would have called security. *Id.* In other words,

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[8] Ruxandra Barbos ("Barbos") was an Assistant Store Manager at Store 1. 2 ALJD 27.

[9] ALJ Tracy also erroneously concluded she "cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella, and Barbos." 14 ALJD 11-19. ALJ Tracy's effective disqualification of these three witnesses is in error. *See In Re Double D. Const. Grp., Inc.*, 339 NLRB 303, 305 (2003) (reversing the judge's effective disqualification of a witness, "as opposed to making a true credibility determination, which considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.").

[10] Although ALJ Tracy omitted it during this discussion, Union Representative Craine also found Geaslin's behavior concerning and he removed her from the meeting. 8 ALJD 11-13.

according to ALJ Tracy, the appropriate response when an employee lunges at a manager is to call security and if they fail to do so, then it never happened.

ALJ Tracy's decision to discredit the testimony of three eyewitnesses based on their failure to take the course of action ALJ Tracy proposed in hindsight – here, calling security on an aggressive employee – is arbitrary, improper, and clearly erroneous. *Gee Chee On v. Brownell*, 253 F.2d 814, 817 (5th Cir. 1958) ("[A] court may not arbitrarily reject the testimony of a witness whose testimony appears credible."). Moreover, ALJ Tracy ignores the fact that calling security was unnecessary given that, as Geaslin's behavior became more aggressive, Craine stopped the meeting, took her into the hall and calmed her down. 8 ALJD 12-13. When Geaslin and Craine returned to the meeting, Geaslin was more calm and subdued and there was no reason to call security. 8 ALJD 13-14. Thus, the "significant" factor leading ALJ Tracy to reject Panzarella, Barbos, and Pelo's consistent description of the incident is baseless and her credibility finding is clearly erroneous.[11] ALJ Tracy's impermissible credibility determinations are the foundation for her conclusions of law. Because her credibility determinations cannot be sustained, neither can her Decision.[12]

B. ALJ Tracy Erred In Permitting The GC To Amend The Complaint.

Board Rules and Regulations, Section 102.17, permits amendments to the Complaint only if they are "just." *Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006). When considering whether to permit an amendment to the Complaint pursuant to Section 102.17 of the

[11] ALJ Tracy also attempted to support her conclusion to discredit Panzarella's version of Geaslin's behavior during the May 14, 2014 meeting by noting that Panzarella did not mention Geaslin's lunging during the Colorado Department of Labor and Employment unemployment hearing. 9 ALJD fn. 21. Panzarella was never asked at the unemployment hearing whether Geaslin lunged at Pelo. Tr. 239:6-8. It is also inconsistent for ALJ Tracy to find Geaslin credible despite *three* omissions from her affidavit, but simultaneously discredit Pelo's entire testimony because of *one* omission in a previous hearing.

[12] Even if ALJ Tracy's unfounded credibility determinations are upheld, her decision should still be reversed based on her misapplication of the law as described below.

Board Rules and Regulations, the Board evaluates three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for her delay in moving to amend, and (3) whether the matter was fully litigated. *Id.* Neither of the GC's motions to amend the Complaint to add an enhanced remedy nor the GC's mid-trial request to amend the Complaint to add an interrogation claim satisfies these requirements. ALJ Tracy erred in granting the GC's two motions to amend the complaint.

i. ALJ Tracy erred in permitting the GC to amend the Complaint to add a request for an enhanced remedy.

At trial, ALJ Tracy granted the GC's motion to amend the Complaint to add a request for King Soopers to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received the interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period."[13] GC. Ex. 1(ee). In granting the motion to amend, ALJ Tracy overruled King Soopers' objection to the tardiness of the GC's motion to amend. Tr. 10:17-21.

In the Decision, although ALJ Tracy noted the three elements required to permit an amendment, she neglected to address the permissibility of the GC's motion to amend the Complaint to add a request for an enhanced remedy. 10 ALJD 24-37; 11 ALJD 1-34. Instead, ALJ Tracy focused on whether the increased remedy should be awarded and chose to attack

[13] The GC's request to amend the Complaint to add the enhanced remedy was intended to do nothing other than prejudice ALJ Tracy. The GC argued in its Petition to Revoke that King Soopers "wreaked havoc" on Geaslin's life and reiterated in her Post-Hearing Brief the allegedly extensive damage King Soopers caused Geaslin by terminating her employment. GC Ex. 1 (hh) at pp. 2-3; GC's Post-Hearing Brief, pp. 41-44. The GC relied on this purported damage to Geaslin's life to support her request for search-for-work related expenses. *Id.* Such a request and argument is designed to do nothing but prejudice ALJ Tracy with regard to the purported damage King Soopers has allegedly caused Charging Party. This is especially true in light of the fact that an award of search-for-work related expenses are not permitted under Board precedent. *See Casworth Enterprises,* Inc., 362 NLRB No. 131, slip op. at 2, n. 2 (2015) (holding that such relief would involve a change in Board law). The GC's attempt to prejudice ALJ Tracy must not be countenanced.

King Soopers for what she describes as its failure to address whether the increased remedy should be awarded. 11 ALJD 6-21. ALJ Tracy's decision to grant the GC's motion to amend the Complaint, without any analysis whatsoever, requires reversal.

Moreover, applying the three considerations for amendment, the GC's motion to amend the Complaint to add a request for an enhanced remedy fails. King Soopers had absolutely no notice of the GC's intent to seek an enhanced remedy until three business days before trial began. Indeed, the Complaint did not even mention an award of search-for-work related expenses. GC Ex. 1(g). Once King Soopers received notice of the GC's request for an enhanced remedy, King Soopers immediately issued a Subpoena to learn more information about the basis for such a remedy. GC Ex. 1(ii). King Soopers' Subpoena was revoked by ALJ Tracy and King Soopers was not permitted to inquire into the merits of the requested enhanced remedy.[14] Tr. 17:23-25; 18:1-24. Thus, not only did King Soopers not have notice of the GC's intent to seek an enhanced remedy, but King Soopers was severely prejudiced by this lack of notice because it was unable to discover any information or question Geaslin about the merits of such relief.

The GC also did not offer a valid excuse for the delay in seeking to amend the Complaint to add a request for an enhanced remedy. At trial, when ALJ Tracy questioned the GC regarding the delay, the GC simply asserted it was an "oversight." Tr. 9:25; 10:1. The Complaint was filed in October 2014, ten months before trial in this matter. The GC's carelessness in failing to request an enhanced remedy for more than a year is not a valid excuse. *See Essex Valley Visiting Nurses Ass'n & Health Professionals & Allied Employees, Local 5122*, 353 NLRB 1044, 1051 (2009) (rejecting the General Counsel's last-minute request to amend the complaint based on excuse that there was a drafting); *see also Consol. Printers, Inc.*, 305 NLRB 1061, 1064 (1992)

[14] King Soopers Subpoena and the merits of ALJ Tracy's revocation of the Subpoena are discussed more fully below, in Section Argument C.

(finding that the General Counsel's unexplained delay in moving to amend the complaint precludes granting the amendment).

Finally, the enhanced back pay remedy was not fully litigated at trial because ALJ Tracy revoked King Soopers' Subpoena requesting information relating to the enhanced remedy and prohibited King Soopers from questioning Geaslin about her search-for-work efforts and related expenses. Tr. 17:23-25; 18:1-24. None of the factors for amending the Complaint are satisfied here and ALJ Tracy erred in permitting an amendment to add a request for an enhanced remedy.

ii. ALJ Tracy erred in permitting the GC to amend the Complaint to add an interrogation claim.

ALJ Tracy's Decision should also be reversed because she erred in permitting the GC's oral motion midway through trial to amend the Complaint to add an interrogation claim. ALJ Tracy's analysis of the amendment factors was legally deficient and short-circuits the important considerations for amendment.

ALJ Tracy found King Soopers "was put on notice of the alleged interrogation" of Geaslin because the "Amended Charge included this allegation which presumably was investigated." 11 ALJD 38-40. It is undisputed the Complaint did not include an interrogation claim or any reference to interrogation or the events occurring in March 2014 whatsoever. *See* GC Ex. 1(g). Allegations in a charge that are not included in a complaint do not provide notice that the GC intends to pursue those claims or that respondent should be prepared to defend the claims. *See Redd-I, Inc.*, 290 NLRB 1115, 1116-17 (1988) *modified by Carney Hospital*, 350 NLRB 627, 630 (2007) ("It is not the function of the *charge*, however, to give notice to a respondent of the specific claims made against him. Rather, that is the function of the complaint") (emphasis in original); *Hamilton Plastic Products*, 309 NLRB 678, 683 (1992) ("[i]t is well settled that it is the complaint, not the charge, that is supposed to give notice to a

respondent of the specific claims made against it."); *see also Texas Industries v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964) ("[T]he charge is not a formal pleading, and its function is not to give notice to the respondent of the exact nature of the charges against him . . . this is the function of the complaint."). As the Second Circuit has stated,

> The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing. The 'charge' has a lesser function. It is not designed to give notice to the person complained of or to limit the hearing or to restrict the scope of the final order. It serves in the function of drawing the Board's attention to a cause for economic disturbance.

Douds v. Longshoremen, 241 F.2d 278, 283-284 (2d Cir. 1957).[15] Because the interrogation allegations, including any allegations relating to March 2014, were only in the Amended Charge and not the Complaint, King Soopers did not have notice it needed to defend against an interrogation claim.

Moreover, ALJ Tracy's "presumption" that the interrogation claim was investigated is entirely inappropriate. ALJ Tracy was charged with receiving evidence and applying the presented evidence to Board law, not assuming facts to support a predetermined legal conclusion. King Soopers never submitted information to Region 27 relating the alleged interrogation in March 2014 and was never asked to do so. Indeed, King Soopers' position statement was submitted on June 27, 2014, nearly two months before the Amended Charge was filed on August 18, 2014. Therein, King Soopers specifically asked the Region to defer to the grievance and arbitration process. ALJ Tracy's finding that King Soopers had notice of the interrogation claim based on an allegation in the Amended Charge and her presumptions

[15] It should also be noted that the allegations in the Amended Charge regarding the alleged interrogation and the Complaint are not "closely related" under the *Redd-I* analysis because they do not involve the same legal theory, do not arise from the same factual circumstances, and are not subject to the same defenses. *See Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

regarding the Region's investigation do not support ALJ Tracy's permitting the GC to amend the Complaint to add an interrogation claim.

The GC also did not offer any excuse, let alone a reasonable excuse, for her delay in seeking to add the interrogation claim. Nor could she offer a valid excuse because the facts purportedly supporting the interrogation claim were included in Geaslin's affidavit and were known by the GC since May 2014, more than a year before trial in this matter and the GC's oral motion to amend. Further, when arguing for the amendment at trial, the GC claimed an amendment was necessary because of the way Geaslin's testimony unfolded under the GC's questioning. Tr. 195:20-25; 196:1-4. Thus, the GC admitted she had been contemplating an interrogation claim all along and her failure to amend the Complaint sooner was neither inadvertent nor an oversight; but, an intentional attempt to blindside King Soopers with a new claim after Geaslin's testimony had already been presented and she left the trial venue. ALJ Tracy's endorsement of such tactics by permitting the amendment must not be countenanced.

The interrogation claim was also not fully litigated. ALJ Tracy found King Soopers "was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and questioned its witnesses." 11 ALJD 43-45. ALJ Tracy, however, ignores the circumstances of King Soopers questioning Geaslin and the fact that Geaslin left the trial <u>before</u> the GC made her oral motion to amend the Complaint. Prior to the GC's motion to amend, the March 2014 incident was only referred to in the context of motivation and Pelo's alleged disapproval of employees challenging her authority, not an alleged interrogation. For example, during the GC's opening statement, she referred to the March 2014 incident as "probably why [Pelo] reacted so poorly to Wendy's questions on the 9th." Tr. 22:6-14. Further, in response to King Soopers' objection that Geaslin's testimony regarding her March 2014

complaint to Jackson was irrelevant, the GC stated it was relevant because it "show[s] that [Pelo] has issue with anybody asking or questioning her authority on what she directs people to do."[16] Tr. 42:18-19. Neither of the GC's statements regarding the importance of the March 2014 incident relate, in any way, to an alleged interrogation. Moreover, King Soopers' cross examination of Geaslin regarding the March 2014 incident was limited to impeaching Geaslin for inconsistencies between her testimony and Board affidavit. Tr. 77:20-25; 78:1-21; 79:15-25; 80:1-17; 81:1-23. Geaslin was not questioned regarding the substance of an alleged interrogation, as she would have been if King Soopers was aware it was defending against an interrogation claim. Thus, the interrogation claim was not fully litigated.

ALJ Tracy cites *Amalgamated Transit Local 1498*, 360 NLRB No. 96 (2014) for the proposition that "mid-hearing complaint amendment properly granted, as issue 'was fully litigated from that point forward.'" 11 ALJD 45-46; 12 ALJD 1-2. The Board in *Amalgamated Transit* found the amendment was appropriate because it was in response to respondent's defense theory, which was not known to the General Counsel until after respondent's key witnesses testified. 360 NLRB No. 96 at fn. 7. Thus, *Amalgamated Transit* is inapplicable on its face.

Moreover, King Soopers does not contest the general proposition that, under some circumstances, a mid-hearing amendment is appropriate. This, however, is not one of those circumstances. King Soopers had absolutely no opportunity to question Geaslin following the GC's amendment because Geaslin already left the trial. King Soopers similarly did not have an opportunity to question Geaslin regarding the alleged interrogation before she left the trial because it did not have any notice an amendment was forthcoming or that the GC intended to

[16] The fact that King Soopers objected to this testimony as irrelevant is further evidence it did not have notice of the need to defend against an interrogation claim. Had King Soopers known it was required to defend against such a claim, it would not have objected to Geaslin's testimony regarding her complaints to Jackson in March 2014 as irrelevant.

assert an interrogation claim against King Soopers. The need for King Soopers to, at a minimum, cross examine Geaslin regarding the alleged interrogation, with the knowledge that it was defending against an interrogation claim, was especially important considering ALJ Tracy's adoption of Geaslin's *entire* version of events surrounding the March 2014 incident.[17] 4 ALJD 10-33; 5 ALJD 1-2. Accordingly, ALJ Tracy's decision to grant the GC's mid-trial oral motion to amend was an error and her Decision must be reversed.

C. ALJ Tracy Erred By Revoking King Soopers' Subpoena.

On August 7, 2015, King Soopers served on Geaslin a Subpoena to obtain information related to the GC's Notice of Intent to Amend the Complaint to add a request for an enhanced remedy. GC Ex. 1(ii). King Soopers requested documents relating to Geaslin's fitness for employment and attempts to find employment since being terminated by King Soopers, as well as the expenses Geaslin allegedly incurred as a result of such job search efforts. *Id.* On August 10, 2015, the GC filed a Petition to Revoke the Subpoena. GC Ex. 1(hh). At trial, ALJ Tracy granted the Petition to Revoke and even held that King Soopers was prohibited from questioning Geaslin about her search-for-work efforts and related expenses. Tr. 17:23-25; 18:1-24. Not only did ALJ Tracy's revocation of King Soopers' Subpoena prevent the GC's request for an enhanced remedy from being fully litigated and from discovering the impact such information would have on Geaslin's credibility, but ALJ Tracy's ruling was error.

ALJ Tracy's revocation of King Soopers' Subpoena and prevention of King Soopers' ability to question Geaslin regarding the merits of an enhanced remedy deprived King Soopers of a full opportunity to introduce relevant evidence in violation of the NLRB's Statement of Procedures, Section 101.20(c). That section states, in relevant part, that the primary interest in

[17] As described above in Section Argument A, ALJ Tracy's adoption of Geaslin's version of events was clearly erroneous and should be reversed.

the hearing is "to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions." (emphasis added).

Further, even the GC admitted this information was necessary in her Petition to Revoke when she argued that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." GC Ex. 1(hh), at p. 3. To determine if the GC's enhanced remedy request was appropriate, evidence had to be presented as to Geaslin's efforts to seek interim employment. Otherwise, it is impossible to know whether King Soopers' caused the allege damage to Geaslin or if she caused them by failing to seek employment, being unable to seek employment, or any other reason. ALJ Tracy denied King Soopers any opportunity to present or discover evidence regarding the merits of an enhanced remedy award.

In support of her holding, ALJ Tracy claimed King Soopers "misses the point" because, according to ALJ Tracy, "Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are." 11 ALJD 17-19 (emphasis in original). It is ALJ Tracy, however, who misses the point. The relevant inquiry is not how much Geaslin's search-for-work related expenses are, but, rather, the *cause* of such expenses. As noted above and argued extensively in King Soopers' Post-Hearing Brief, it is impossible to determine the merits of an enhanced remedy award without knowing who or what caused Geaslin's losses; King Soopers or Geaslin. Of course, under well-settled Board law, if Geaslin failed or was unable to mitigate her damages, then she is not entitled to any back pay or search-for-work

related expenses.[18] *See EDP Medical Computer Systems*, 302 NLRB 54 (1991) ("It is well settled that to be entitled to back pay a discriminatee must make reasonable efforts to secure interim employment which is substantially equivalent to the position from which he was discharged."). ALJ Tracy's revocation of King Soopers' Subpoena, therefore, was error and must be reversed.

D. ALJ Tracy Erred By Not Deferring To The Grievance And Arbitration Process.

The record is replete with undisputed evidence regarding the long and mature collective bargaining relationship between King Soopers and the Union. Tr. 289:22-25; 290:1-16. ALJ Tracy, however, ignored this relationship, as well as the Board's strong policy in favor of deferral and, instead, relied on her personal preference for finding King Soopers violated the Act.

ALJ Tracy misstated King Soopers' position with regard to deferral. King Soopers does not contend Geaslin and the GC should be precluded from proceeding with this matter "once the Union filed the grievance on behalf of Geaslin," as ALJ Tracy stated. 12 ALJD 36-37. King Soopers merely urges the Board to apply its policy favoring deferral and the cases providing for deferral in these circumstances. As described below, all of the requirements for deferral under *Alpha Beta* are satisfied and ALJ Tracy's failure to defer this case requires reversal.

Following her termination, Geaslin filed a grievance. After exhausting the steps of the grievance and arbitration process in the CBA, according to Union Representative Craine, the Union concluded it could not prevail at arbitration and withdrew the grievance. Tr. 173:3-5; 177:2-11. Geaslin subsequently appealed the withdrawal decision to the full Executive Board,

[18] ALJ Tracy also kept King Soopers from introducing evidence that Geaslin was hospitalized in January 2014, which necessitated rescheduling the original trial date and likely impacted her search-for-work efforts. Tr. 15:2-25; 16:1-25; 17:1-25; 18:1-24. ALJ Tracy's refusal to allow King Soopers to discover this and other information relating to Geaslin's search-for-work efforts insulated the prejudice the GC caused by requesting an unavailable enhanced remedy. Because King Soopers was unable to question Geaslin regarding her ability to seek interim employment, King Soopers was unable to undo the prejudice the GC caused by accusing King Soopers to have "wreaked havoc" on Geaslin's life.

which also affirmed the withdrawal. Tr. 173:13-14; 174:1-16. The Union was fully aware of Geaslin's Charge at the time of its withdrawal and considered the merits of Geaslin's allegations.[19] According to Geaslin, the Executive Committee declined to pursue her grievance because she should have helped sack the groceries and then filed a grievance. Tr. 134:17-22; 137:5-9.

Where the parties have mutually resolved grievances under a collective bargaining agreement, the Board will defer to the resolution based on the strong federal policy favoring arbitration of labor disputes. *See Alpha Beta Co.*, 273 NLB 1546 (1985); *Hammontree v. NLRB*, 925 F.2d 1486, 1505 (D.C. Cir. 1991). Under *Alpha Beta* and its progeny, the Board gives deference to grievance settlements where the grievance procedure and resolution are "fair and regular," all parties agree to be bound, the result reached is not "palpably wrong" under the Act, and the unfair labor practice issue was "considered" by the parties, which means the statutory and contractual issues are factually parallel. *Alpha Beta Co.*, 273 NLB 1546, 1547-48 (1985); *Plumbers & Pipe Fitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 751 (D.C. Cir. 1992).

Pre-arbitration withdrawal of a grievance after an investigation, like grievance settlements, represents a consensual resolution of labor management disputes through the collective bargaining process. *See General Dynamics Corp.*, 271 NLRB 187 (1984) (deferring to the grievance and arbitration process when the employee pursued a grievance over two suspensions through four steps of the grievance process but withdrew the grievance "without prejudice" prior to arbitration).[20] Where the Union withdraws the grievance after properly

[19] The Executive Board denied Geaslin's appeal on October 20, 2014. R. Ex. 10. Thus, because the Charge was filed on May 29, 2014, and King Soopers' Position Statement was filed on June 27, 2014, the Union had a full opportunity to review the merits of Geaslin's statutory allegations during their Executive Grievance Board and Executive Board reviews.

[20] ALJ Tracy's attempt to distinguish *General Dynamics* is unavailing. ALJ Tracy asserted *General Dynamics* does not apply because, in that case, charging party voluntarily withdrew the grievance. 13

investigating the facts underlying the dispute, the grievance process has succeeded and the matter should be deferred.

ALJ Tracy applied a facile analysis of King Soopers' deferral argument by suggesting the principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971) do not apply and without considering whether deferral is appropriate under *Alpha Beta*. 12 ALJD 11-34. In so doing, ALJ Tracy ignored the complexities of this issue in favor of a rigid application of *Collyer* and without regard for the fact that this issue was actually resolved through the grievance and arbitration process in the CBA. ALJ Tracy's utter failure to consider whether deferral is appropriate under the principles of *Alpha Beta* and its progeny alone requires reversal.

Geaslin's grievance satisfies the requirements for deferral under *Alpha Beta*. The Union's investigation and withdrawal of the grievance was pursuant to a fair and regular procedure, the withdrawal is not palpably wrong under the Act, and the unfair labor practice issue was considered by the Union when concluding to withdraw the grievance. *See Alpha Beta Co.*, 273 NLB at 1547-48. It is undisputed the Union regularly files grievances alleging "collective concerted activity" and claiming King Soopers violated the CBA by disciplining an employee for engaging in behavior protected by the Act. Tr. 174:20-25; 175:1-2; 303:3-12. Geaslin should be bound by the Union's decision not to pursue arbitration because she was a bargained-for employee who empowered the Union to make decisions on her behalf, including the authority to waive her rights under the Act. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693 (1983) (The Court has explicitly recognized that, because the Union represents collective interests, it may waive certain rights under the Act of its members). Moreover, the Act

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ALJD 3-5. That is not a meaningful distinction in this circumstance. Geaslin granted the Union authority to waive her rights under the Act and determine how best to handle her grievance. Thus, the Union's voluntary withdrawal of the grievance acts as a voluntary withdrawal by Geaslin. If Geaslin disagreed with this decision, her remedy was to file a duty of fair representation claim against the Union, not pursue a charge against King Soopers. *See* 29 U.S.C. § 8(b)(1)(A); *see also Vaca v. Sipes*, 386 U.S. 171 (1967).

"contemplates that individual rights may be waived by the [Union] so long as the [Union] does not breach its duty of good-faith representation." *Hammontree*, 925 F.2d at 1502. Thus, this matter should have been deferred to the Union's withdrawal of the grievance.

In the Decision, ALJ Tracy found Geaslin should not be bound by the Union's withdrawal because Geaslin did not have an independent right to force arbitration. 12 ALJD 32-24. ALJ Tracy's conclusion is unpersuasive. Because, as a bargained-for employee, Geaslin agreed to be bound by the Union's decision regarding certain matters, including the waiver of rights under the Act and prosecution of a grievance, Geaslin cannot now complain about her inability to independently pursue arbitration of her grievance. Such is the price paid for Union membership. Similarly, the Union's withdrawal of the grievance, just like a grievance settlement, does not give ALJ Tracy authority to award Geaslin two bites at the apple: one through the grievance and arbitration process and a second with the Board.

ALJ Tracy also cited *U.S. Postal Service*, 324 NLRB 794 (1997) for the position that "deferral to arbitration is inappropriate" when a union refuses to process an employee's grievance to arbitration. 12 ALJD 18-24. *U.S. Postal Service*, however, does not support ALJ Tracy's conclusion and is not applicable here. In *U.S. Postal Service*, the Board considered whether *Collyer* deferral applied when an individual requested his employer grieve his assignment to a non-unit, supervisory position, and the union refused. *Id*. Thus, not only did the Board in *U.S. Postal Service* not consider whether deferral was appropriate under the principles outlined in *Alpha Beta*, but the requirements for deferral were not satisfied because the Union never even filed a grievance on behalf of the employee. In contrast, here, all of the requirements for deferral to the pre-arbitration resolution of Geaslin's grievance are satisfied. ALJ Tracy's decision not to defer to the Union's withdrawal of the grievance should be reversed.

E. ALJ Tracy Erred In Concluding King Soopers Unlawfully Interrogated Geaslin.

i. Geaslin did not engage in protected concerted activity in March 2014.

The GC's interrogation claim is based entirely on Geaslin's testimony that, at some point in March 2014, she alone complained to her Union Steward, Jackson, about syrups and other products not being prepared when she arrived to work, as well as her concern that she did not have enough time to complete her Starbucks duties and help display bakery products. Tr. 41:22-25; 42:1-7; 44:1-4.

ALJ Tracy concluded Geaslin engaged in protected concerted activity in March 2014 because "[w]hen Geaslin complained [to Jackson], she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such as "we" and "our" when complaining to Jackson, who is a co-worker, and Panzarella." 15 ALJD 26-29. There was absolutely no evidence presented regarding the language Geaslin used when she spoke with Jackson and Panzarella. Instead, ALJ Tracy's conclusion is based entirely on her assumption that because Geaslin used the terms "we" and "our" during her trial testimony, she also used those terms in March 2014 while speaking to Jackson. There is no basis whatsoever for ALJ Tracy's assumption and because her Decision is based on such assumptions, it must be reversed.

Moreover, even if Geaslin used the terms "we" and "our" while complaining about her work duties, she complained only on her own behalf, not on behalf of any other employees. It is undisputed Geaslin alone complained to Jackson and objected to Panzarella's assignment of work duties. Tr. 41:22-25; 42:1-7 (discussing her individual complaints to Jackson). Geaslin's complaints about her work assignments and her objections to sampling bakery products are purely her own personal interests. Absolutely no evidence was presented that other employees agreed with Geaslin's complaints or that Geaslin was speaking on behalf of other employees when she complained. Individual complaints regarding work assignments do not constitute

concerted activity. *See Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) (activity is concerted if it is "engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself."); *Reynolds Elec., Inc. & Gabriel T. Rice*, 342 NLRB 156, 165 (2004) ("*Meyers* requires, nevertheless, a showing that the individual's actions, although taken alone, were preceded by the individual's interaction with other employees sharing a commonality of interest."); *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999) (explaining that an employee speaking with other employees "to advise them of her [personal] dissatisfaction" does not convert activity into concerted activity). There is no evidence Geaslin complained to Jackson on behalf of other employees or that her complaints were preceded by a discussion with other employees regarding the workloads of employees working at Starbucks. Indeed, the Union did not file a grievance challenging the work assignment, which would be the ultimate indicator of whether other employees supported Geaslin's objection. Thus, even if Geaslin generally used the words "we" and "our," while complaining, ALJ Tracy's conclusion Geaslin was acting on behalf of other employees is error.

To the extent ALJ Tracy's finding is based on the fact that Jackson was a Union Steward when Geaslin made her complaints in March 2014, this reliance is also error. According to Geaslin, she did not know she was complaining to the Union when she expressed her frustration to Jackson in March 2014. Tr. 74:16-24. Moreover, simply complaining to a union steward about personal objections does not constitute protected concerted activity. The defining moment is filing a grievance. Thus, Geaslin did not engage in protected concerted activity when she made individual complaints in March 2014.

ALJ Tracy also concluded, without analysis or citation to the record or legal authority, that Geaslin engaged in protected concerted activity in March by "complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas." 15 ALJD 25-26. First, absolutely no evidence was presented that Geaslin complained to Panzarella regarding completing her work duties at Starbucks. Instead, Geaslin's testimony was limited to alleged complaints to Jackson. Tr. 43:21-25. Thus, here again, ALJ Tracy's conclusion is unsupported by the facts. Further, even if Geaslin complained to one of her managers, her individual and personal complaints do not amount to protected concerted activity. Like with her complaint to Jackson, the undisputed evidence demonstrates that any complaint Geaslin made to Panzarella was done solely on her own personal and individual behalf; there is no evidence whatsoever her complaints were "engaged in, with, or on the authority of other employees." *Meyers I*, 268 NLRB 493.

ALJ Tracy also conclusorily found Geaslin "engaged in protected concerted activity because she sought group action, even if her coworkers were not aware of it, to change working conditions." 15 ALJD 30-31. Again, there is absolutely no evidence Geaslin sought group action. Geaslin neither asked Jackson if she agreed the work assignments were improper nor requested Jackson's support in any way. Geaslin's complaints to Jackson, therefore, are nothing more than individual gripes, and are not concerted. *See e.g.*, *Pelton Casteel, Inc. v. N.L.R.B.*, 627 F.2d 23 (7th Cir. 1980) (holding that employee's general complaints about job rates and overtime constituted unprotected personal griping rather than concerted activity). ALJ Tracy's findings are unsupported by the undisputed facts and well-settled law. ALJ Tracy's Decision must be reversed.[21]

[21] Geaslin's conduct in March 2014 also was not concerted under *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966) because her complaints were grounded in being unable to perform her work duties

ii. Geaslin was not unlawfully interrogated.

"It is well established that interrogation of employees is not illegal per se." *Rossmore House*, 269 NLRB 1176, 1177 (1984). "Section 8(a)(1) of the Act prohibits employers only from activity which in some manner tends to restrain, coerce or interfere with employee rights." *Id.*

According to ALJ Tracy, "Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union." 18 ALJD 9-10. The facts, however, do not support ALJ Tracy's conclusion. Accepting all of Geaslin's allegations as true,[22] she alleged,

Q: And where were you?
A: I was in the Starbucks kiosk.
Q: And what did [Pelo] say to you?
A: She said that she wasn't going to ask me, but did I really complain to the Union about having to do bakery's products.
Q: And what was your response to her?
A: I told her, "That's not true. I did not complain to the Union about that."[23]
Q: And what did she say?
A: She said, "Well, that's not the truth. You did complain to them and I don't like that."
Q: Was that the end of the discussion?
A: It was.

Tr. 44:10-22. Based on Geaslin's own testimony, it is clear Pelo believed Geaslin to be untruthful about her conduct. At trial, Geaslin admitted she did complain to the Union. Tr. 79:21-25; 80:1-5. Thus, Geaslin lied to Pelo when Pelo allegedly questioned her about her

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and her unhappiness with having to help provide samples of bakery department products, not the collective bargaining agreement. No grievance regarding King Soopers' work assignments was filed.

[22] As discussed at length above in Section Argument A, ALJ Tracy's finding that Pelo questioned Geaslin after Geaslin had already been instructed by Panzarella and Jackson that she needed to complete her supervisors' work directives is clearly erroneous. Pelo never spoke to Geaslin regarding her complaint.

[23] This is yet a fourth example of inconsistencies between Geaslin's Board affidavit and her trial testimony. In her affidavit, Geaslin stated that when Pelo allegedly asked her about complaining to the Union in March 2014, Geaslin said she was "blindsided and said no," meaning, she did not complain to the Union. Tr. 80:7-8. At trial, however, Geaslin testified she told Pelo, "yes," she did complain to the Union. Tr. 79:21-25; 80:1-5. Geaslin was unable to explain this contradiction.

conversation with Jackson. *See Fresenius USA Manufacturing, Inc.*, 362 NLRB 130 (2015) (employee's false statements to his employer were not protected activity).

Moreover, Pelo's alleged comment that she did not like Geaslin's behavior could reasonably refer to Pelo's belief Geaslin was being dishonest about her discussions. A supervisor's admonition that she is displeased with an employee's untruthfulness cannot reasonably be construed as an interrogation. Of course, Pelo's intent by the statement and Geaslin's understanding of Pelo's intent of this statement are unknown because the GC did not solicit any evidence on this point. Accordingly, the GC has not met her burden.

Even if Pelo "told Geaslin she was displeased that she went to the Union," as ALJ Tracy states, Pelo's purported statements were no more than "[i]solated, innocuous incidents of interrogation," which lack any "indicia of coercion." *See Groendyke Transp., Inc. v. N.L.R.B.*, 530 F.2d 137, 144 (10th Cir. 1976). Pelo's comments did not suggest she would take action against Geaslin because of her complaints to the Union. Indeed, no action was taken against Geaslin and her complaint to Jackson was never mentioned again. *See Graham Architectural Products Corp. v. N.L.R.B.*, 697 F.2d 534, 537 (3d Cir. 1983) (stating, in the context of an alleged interrogation during a union organizing campaign, that "[a]n employer's questioning becomes coercive and runs afoul of section 8(a)(1) when it 'suggests to the employees that the employer may take action against them because of their pro-Union sympathies.'"). In addition, the exchange occurred in the Starbucks kiosk on the sales floor and Pelo was reasonably attempting to understand the nature of Geaslin's complaints. Tr. 44:10-22. A supervisor's questioning, intended to discover the nature and basis of an employee's complaints, do not create an indicia of coercion. Without indicia of coercion, there can be no interrogation. ALJ Tracy's Decision must be reversed.

F. ALJ Tracy Erred In Concluding King Soopers Discriminatorily Twice Suspended and Terminated Geaslin.

ALJ Tracy concluded Geaslin engaged in protected concerted activity on both May 9, 2014 and May 14, 2014. 15 ALJD 33-47; 16 ALJD 1-41; 17 ALJD 1-20. ALJ Tracy also found Geaslin's suspensions pending investigation on May 9 and 14, 2014 and her May 21, 2014 discharge to be discriminatory. 18 ALJD 30-47; 19 ALJD 1-47; 20 ALJD 1-34. ALJ Tracy ignored undisputed evidence and her conclusions are clearly erroneous as a matter of law. Geaslin did not engage in protected concerted activity on May 9, 2014 because she violated the CBA and did not have an honest and reasonable belief she was asserting a right under the CBA. Further, Geaslin did not engage in protected concerted activity on May 14, 2014 because her conduct was personal and individual and she did not have an honest and reasonable belief she was asserting a right under the CBA. ALJ Tracy's Decision should be reversed.

i. Geaslin lost protection of the Act on May 9 because she violated the CBA.[24]

ALJ Tracy summarily rejected King Soopers' argument that Geaslin lost protection of the Act because she violated the CBA on May 9, 2014. 20 ALJD fn. 27. In so doing, ALJ Tracy diminished Geaslin's conduct by finding it only lasted a short period of time and failed to consider the Board's "long-recognized rule [] that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must 'obey now; grieve later.'" *In Re Mead Corp.*, 331 NLRB 509, 513 (2000) (citing *Specialized Distribution Management*, 318 NLRB 158 (1995)).

National labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). "In

[24] Because of ALJ Tracy's unsupportable credibility determinations discussed above in Section Argument A, her conclusion regarding whether Geaslin lost protection of the Act under *Atlantic Steel* is unfounded.

general, if an employee violates such a provision, his activity is unprotected even though it may be concerted." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984).

Article 44, Section 121 of the CBA prohibits employees from engaging in a "strike, picketing, boycotting, stoppage of work, anti-company publicity or other economic action of whatsoever nature, against the Company." Jt. Ex. 2, Article 44, Section 121. On May 9, 2014, Geaslin refused Pelo's work order and objected to Pelo's requests that she help sack groceries. Her refusal to follow Pelo's work order and insubordination are synonymous with economic action and self-help proscribed by the Act and the CBA. It is well-settled that Geaslin was required to follow Pelo's work order and then file a grievance if she believed Pelo's directive violated the CBA. *See In Re Mead Corp.*, 331 NLRB 509, 513 (2000) (citing *Specialized Distribution Management*, 318 NLRB 158, (1995)). Because Geaslin chose to engage in self-help and insubordination, rather than the process permitted under the CBA, Geaslin's conduct was not protected by the Act and King Soopers did not violate the Act by terminating her employment. *See Hayes Coal Co., Inc.*, 197 NLRB 1162, 1164 (1972) (holding that because the agreement was valid the strikers were obligated to follow the dispute procedure and the company's discharge of the employees did not violate the Act).

ALJ Tracy attempted to avoid the effect of Geaslin's refusal to sack and objection to Pelo's work order by claiming "Geaslin did not refuse to bag groceries." 20 ALJD fn. 27. ALJ Tracy's conclusion is unworthy of any deference. Regardless of which version of events is adopted, Geaslin's conduct amounts to a refusal to sack groceries and an active objection to her supervisor's authority. Even if Geaslin did not specifically say she would not sack groceries, the undisputed facts demonstrate Geaslin refused to sack by virtue of arguing with her supervisor, rather than actually performing the job assignment.

It is undisputed that following Pelo's request for help from Starbucks, Geaslin took off her apron and approached Pelo near the check stands.[25] 5 ALJD 10-16. Geaslin did not enter the check stands or begin sacking groceries after leaving the Starbucks Kiosk. *Id.* When she approached Pelo, Pelo thanked Geaslin for coming to help sack groceries. 5 ALJD 16-17. At that point, Geaslin did not agree to sack or ask in which queue she should help. *Id*. Rather, according to Geaslin's trial Board affidavit – which was contradicted by her trial testimony – Geaslin placed her hand on Pelo's shoulder and told Pelo "she was going to take her lunch since she needed to leave at 2 p.m. that day." 5 ALJD 18-20. Pelo responded that Geaslin would get her lunch break; she just needed to help sack for a few minutes. 5 ALJD 22-24. Still, Geaslin persisted in her objection and did not say she would sack groceries. Geaslin responded by asking Pelo "if technically she should be performing these duties since she belonged to a different bargaining unit or 'different Union?'" 5 ALJD 24-26. Pelo replied "that she was the store manager and Geaslin needed to bag groceries." 5 ALJD 26-27. At the very end of their discussion and after Pelo insisted three (3) different times that Geaslin help sack, Geaslin allegedly "raised her hands in the air and said, 'Well, all I was doing was asking about my lunch.'" 5 ALJD 29. According to ALJ Tracy, after Geaslin raised her hands and began to walk away, Pelo called her back over to her stating, "You get back here. We need to talk." 6 ALJD 5-6. At that point, Geaslin, Pelo, and Eastburn[26] went into the office. 6 ALJD 5-17.

Even assuming all of ALJ Tracy's findings of fact are upheld, it is beyond dispute Geaslin protested and refused to follow her supervisor's *three* work instructions for several minutes. First, Geaslin did not initially enter the check stands to sack groceries despite Pelo's

[25] The only other employee working in Starbucks could not leave the Starbucks' kiosk because Starbucks' rules require one employee in the kiosk at all times. Tr. 106:24-25; 107:1-3.
[26] Angelica Eastburn was an Assistant Deli Manager and a member of the same bargaining unit as Geaslin. 6 ALJD 10-11.

specific request for employee assistance from Starbucks. Then, after Pelo thanked Geaslin for coming to help sack, Geaslin began her verbal objections.[27] Geaslin's ultimate acquiescence, subsequent to her initial objections, does not undermine the fact that she failed to sack groceries and, instead, opted to protest Pelo's request that she do so. Thus, by her actions and failure to actually try and sack until the very end of the several minute discussion, Geaslin refused to sack on May 9, 2014. Because Geaslin refused to "work now, grieve later" and, instead, chose to engage in self-help and insubordination, Geaslin's conduct was neither protected by the Act nor the CBA, and King Soopers did not violate the Act in suspending her pending investigation on May 9 and 14, 2014 or terminating her employment on May 21, 2014.

At another point in the Decision, ALJ Tracy found Geaslin likely behaved on May 9, 2014 in the same way she behaved in March 2014. ALJ Tracy stated, in March 2014,

> Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. <u>Likewise, it is unlikely that Geaslin refused Pelo's directive in May</u>.

19 ALJD 25-30 (emphasis added). Thus, ALJ Tracy attempted to use her finding that Geaslin *did* initially refuse her supervisors' work instruction in March 2014 to conclude she *did not* refuse Pelo's work instruction on May 9, 2014. ALJ Tracy's logic is flawed. The fact that Geaslin initially refused but ultimately relented in March 2014 supports the finding that she behaved exactly that way on May 9, 2014; initially refusing to sack groceries, but after being pressed by Pelo to perform the job assignment, she relented. Geaslin's initial refusal to perform the work assignment is a violation of the CBA's no strike clause. *See* Jt. Ex. 2, Article 44, Section 121; *see also Richmond District Neighborhood Center*, 361 NLRB No. 74 (2013)

[27] According to ALJ Tracy, Geaslin did not ask Pelo if she could go on lunch, but, instead, told Pelo she was taking her lunch, despite Pelo's request that Geaslin help sack groceries. 5 ALJD 18-20.

(holding two employees lost protection of the Act because they advocated for insubordination). Thus, Geaslin did not engage in protected concerted activity on May 9, 2014.

Geaslin also lost protection of the Act on May 9, 2014 because she violated the CBA provision relating to lunch breaks. It is undisputed that, pursuant to the CBA and Colorado State Law, employees are required to take lunch at approximately mid-way through the employees' shift. Tr. 87:4-10; 187:24-25; 288:1-7. It is further undisputed that on May 9, 2014, Geaslin worked more than six and one half hours of an eight hour shift without taking a lunch break. R. Ex. 5; Tr. 47:19-25; 48:1; 87:11-25; 88:1-5. Geaslin had a history of violating the CBA's lunch provisions for which she was repeatedly disciplined. 4 ALJD fn. 7; R. Exs. 1 & 2. Thus, Geaslin's failure to take her lunch at the required time was in violation of the CBA, which caused her to lose the protection of the Act on May 9, 2014. *See Nat'l Labor Relations Bd. v. Furriers Joint Council of New York*, 224 F. 2d 78 (2d Cir. 1955) (finding that conduct which is in violation of valid provisions of a labor-management contract loses protection ordinarily afforded under the NLRA). Ultimately, Geaslin's conduct on May 9, 2014 amounts to an attempt to dictate her work assignments, which is not protected under the Act. ALJ Tracy's Decision must be reversed.

ii. Geaslin's conduct on May 9 and 14, 2014 was individual and personal.

Activity is concerted if it is "engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB 493. ALJ Tracy did not consider the preliminary question of whether Geaslin's conduct on May 9 and 14, 2014 was personal and individual, or on behalf of other employees.[28] 14 ALJD 23-42; 15 ALJD 1-47;

[28] ALJ Tracy's conclusion that Geaslin had an honest and reasonable belief she was asserting a contract right on May 9, 2014, and that the May 14, 2014 meeting was inextricably intertwined with the May 9, 2014 incident that Geaslin engaged in protected concerted activity on both dates is addressed below in section Argument F(iii).

16 ALJD 1-41; 17 ALJD 1-20. Because ALJ Tracy opted not to address this issue, it appears she conceded Geaslin's conduct on May 9 and 14, 2015 was personal and individual, not on behalf of any other employees.

Geaslin's objection to sacking groceries and behavior in the office on May 9, 2014 was not on behalf of any other employees. Likewise, her conduct during the May 14, 2014 meeting had absolutely nothing to do with other employees. Geaslin's objections to Pelo's characterization of Geaslin's behavior, as well as Geaslin's individual conduct on May 14, 2014, were all personal and individual. All of the evidence demonstrates Geaslin spoke on May 9 and 14, 2014 only of her own objection to sacking groceries and her interactions with Pelo. She did not mention any sort of group action or concern whatsoever. Moreover, at no point during the May 9 or 14, 2014 incidents did Geaslin say she was acting on behalf of any other employees. Tr. 275:7-11; 304:25; 305:1-3. Nor did Geaslin suggest or even intimate other employees had the same objection. Accordingly, Geaslin only engaged in individual and personal activity on May 9 and 14, 2014 and she was not acting "with or on the authority of other employees." *Meyers I*, 268 NLRB 493.

iii. Geaslin did not have an honest and reasonable belief she was asserting a contract right on May 9 or 14, 2014.

Relying on the *Interboro* doctrine, ALJ Tracy concluded Geaslin engaged in concerted activity on both May 9 and 14, 2014. 15 ALJD 33-47; 16 ALJD 1-37. The Board's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in her collective-bargaining agreement. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 841 (1984). The employee's statement or action must be "based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement" and must be "reasonably directed

toward the enforcement of a collectively bargained right." *Id.* at 837. The nature of the complaint must be "reasonably clear to the person to whom it is communicated, and . . . in fact[] refer to a reasonably perceived violation of the collective-bargaining agreement." *Id.* at 840. ALJ Tracy discounted undisputed evidence, ignored applicable Board law, and created new standards for determining if activity is concerted. Her Decision must be reversed.

a. *Geaslin's conduct on May 9, 2014.*

ALJ Tracy concluded, "in May[29] Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break,[30] regardless of whether she was correct or incorrect in the basis for her assertion." 15 ALJD 42-45. In support of this conclusion, ALJ Tracy found, "[t]he complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act." 16 ALJD3-5.

Like with several other of ALJ Tracy's findings noted above, ALJ Tracy assumed her conclusion to be true without any evidence supporting such assumption. There is absolutely no basis in the record for ALJ Tracy's theory that an employee's individual complaint regarding her work assignments to a supervisor constitutes "grievances within the contract." As described in the CBA and as ALJ Tracy should know, a "grievance" is a term of art and relates to a formal allegation by the Union that King Soopers' violated the CBA. Jt. Ex. 1, Article 48. ALJ Tracy's

[29] ALJ Tracy's failure to specify that Geaslin's question about sacking groceries and statement that she was taking her lunch break occurred on May 9, 2014 appears to be an attempt to conflate Geaslin's behavior on May 9 and 14, 2014, and bootstrap Geaslin's May 9, 2014 conduct into a finding Geaslin engaged in concerted activity on May 14, 2014.

[30] As noted above in Section Argument A, ALJ Tracy's conclusion that Geaslin told Pelo on May 9, 2014 that "she was going to take her lunch since she needed to leave at 2 p.m. that day" was directly contradicted by Geaslin's trial testimony and, therefore, was clearly erroneous and must be rejected. Tr. 115:14-21; 116:1-4. Thus, ALJ Tracy's reliance on this purported fact precludes a finding that Geaslin engaged in protected concerted activity by asserting a right to take a lunch break.

disregard for the evidence in favor of her own personal opinions in support of her baseless legal conclusions must not be countenanced.

Furthermore, under no interpretation of the facts could Geaslin have a reasonable and honest belief she was asserting a contract right on May 9, 2014 when she refused to sack groceries and allegedly told Pelo she was taking her lunch break. According to ALJ Tracy, during Pelo and Geaslin's discussion on the sales floor on May 9, 2014, Geaslin "*questioned* whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or 'different union' and told Pelo she was going to take her lunch." 16 ALJD 9-12 (emphasis added). Geaslin's "question" regarding the scope of her rights under the CBA does not amount to an honest and reasonable belief she was asserting a right under the CBA.

First, Geaslin's *question* about whether she is permitted under the contract to sack is not the *assertion* of a contract right. Indeed, as a matter of grammatical construction, a question is not an assertion. C*ompare* Merriam-Webster Online Dictionary available at http://www.merriam-webster.com/dictionary/assert (defining "assert" as "to state (something) in a positive and definite way") *with* Merriam-Webster Online Dictionary available at http://www.merriam-webster.com/dictionary/question (defining "question" as "a sentence, phrase, or word that asks for information or is used to test someone's knowledge"). To find otherwise would mean that anytime an employee asks about her job duties under the collective bargaining agreement she is automatically engaged in concerted activity. Such a result is well beyond the intended scope of the *Interboro* doctrine, which is intended to protect only an employee's reasonable and honest belief she is *enforcing* a collectively bargained right. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 837 (1984). Geaslin's question regarding the

propriety of sacking groceries is even less of an assertion of a contract right considering Pelo responded by telling Geaslin it did not violate the contract and, if she believed sacking violated the contract, she could file a grievance. Tr. 273:3-6. Thus, Geaslin did not assert a contract right and the Decision must be reversed.

ALJ Tracy's reliance on Geaslin's statements at subsequent meetings on different days to find Geaslin engaged in concerted activity on May 9, 2014 is similarly unfounded. *See* 16 ALJD 12-14. Geaslin's conduct during conversations with Pelo or in meetings other than on May 9, 2014 cannot be used to convert her questions to Pelo on May 9, 2014 into the assertion of a contract right or concerted activity. Moreover, ALJ Tracy does not even specify what Geaslin said or which specific "subsequent" meetings to which she refers. 16 ALJD 12-14.

Geaslin's comments during the May 9, 2014 meeting with Geaslin, Pelo, and Eastburn similarly do not amount to the assertion of a contract right. As ALJ Tracy concluded, during that meeting, Geaslin and Pelo argued about whether Geaslin refused to sack groceries and Geaslin reiterated that she only "inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties." 6 ALJD 17-22; 7 ALJD 1-3. Geaslin and Pelo's disagreement over who said what on the sales floor cannot reasonably be construed as Geaslin asserting a contract right.

Geaslin's claim that she was going to take her lunch break is similarly not sufficient to constitute concerted activity under the *Interboro* doctrine. It is not enough that the employee assert a contract right; rather, the employee must have a "reasonable and honest belief that he is being, or has been, <u>asked to perform a task that he is not required to perform under his collective-bargaining agreement.</u>" *City Disposal Sys.*, 465 U.S. at 837 (emphasis added). There is no dispute Geaslin was going to receive her lunch break. Indeed, as ALJ Tracy concluded, Pelo told

Geaslin she just needed to help sack for a few minutes and then she would receive her lunch. 5 ALJD 22-24. Thus, Geaslin's claim to a lunch break neither involves a violation of the CBA nor a request to perform a task she is not required to perform under the CBA. Further, although the timing of Geaslin's lunch break violated the CBA because it was not the middle of her shift, Tr. 87:4-10; 187:24-25; 288:1-7, such a violation was of Geaslin's own making. Geaslin could have taken her lunch earlier in the day as she was required to do. Because she failed to do so, she cannot now be heard to complain that she was asserting her right to a lunch break when Pelo asked her to help sack groceries for a few minutes and assured her she would receive her lunch.

ALJ Tracy's conclusion that Geaslin engaged in concerted activity on May 9, 2014 also fails because Geaslin's objections were not "reasonably directed toward the enforcement of a collectively bargained right." *See City Disposal Sys.*, 465 U.S. at 837. Generally, claimants found to have engaged in concerted activity by invoking a collective bargaining agreement have based their complaint on an actual provision in the agreement. *Id.* at 839. Here, however, Geaslin has pointed to no provision in the CBA on which she purports to base her refusal to sack groceries. Geaslin cannot do so because there is nothing in the CBA to lend support to her alleged belief that she was not required to sack groceries when instructed to do so by a manager. Because there is no collectively bargained right Geaslin was attempting to enforce, she could not have been asserting a contract right.

Even assuming, *arguendo*, Geaslin's questions amount to an assertion of a contract right, Geaslin was still not engaged in concerted activity because she did not have an "honest and reasonable belief" she was asserting a contract right. In her analysis of whether Geaslin engaged in concerted conduct, without explanation, ALJ Tracy ignored the fact that Geaslin was admonished, just two months prior, that she needed to follow her supervisor's work order, even

if she disagreed. 4 ALJD 27; 14 ALJD 23-42; 15 ALJD 1-47; 16 ALJD 1-41; 17 ALJD 1-20. Tr. 226:4-17; 243:4-13. It is undisputed that in March 2014, Geaslin initially refused Panzarella's request that Geaslin help sample bakery products. 4 ALJD 14-18; Tr. 225:18-25; 226:1-17; 243:4-13. Geaslin also complained to Jackson that Panzarella's request violated the CBA. *Id*. In response to Geaslin's complaint, Jackson told Geaslin that Panzarella's work order did not violate the contract and, in any event, Geaslin was required to follow her supervisor's instructions. *Id*. The Union did not file a grievance alleging Panzarella's work order violated the CBA.[31] Tr. 226:23-25; 227:1-4. Because Geaslin was told just two months prior that helping other departments did not violate the contract and she was required to follow her supervisor's work orders, she could not have had a "honest and reasonable belief" she was asserting a contract right when she again refused her supervisors' work order on May 9, 2014.

ALJ Tracy also ignored undisputed evidence Geaslin knew she was required to follow Pelo's instructions due to her prior experience as an Assistant Bakery Manager at Jamboree Foods. Tr. 129:24-25; 130:1-3. As Geaslin admitted, in that role, she disciplined and terminated employees for being insubordinate and failing to follow her work orders. *Id.* ALJ Tracy's failure to consider undisputed evidence that Geaslin knew she was required to follow Pelo's work orders requires reversal of the Decision.

Finally, Geaslin gave no reason for her alleged belief that she was not required to sack and it is entirely unsupported by any basis in the CBA. Geaslin's failure to provide *any evidence* whatsoever showing a good faith basis for her opinion she did not have to sack precludes a finding her opinion was honest and reasonable. *See ABF Freight Sys*., 271 NLRB 35, 36

[31] The fact that no grievance was filed regarding Panzarella's allegedly improper work assignment in March 2014 requires the conclusion that Geaslin could not have had an honest and reasonable belief Pelo's assignment on May 9, 2014 violated the CBA. If it was a violation of the contract for Geaslin to help other departments, the Union would have filed a grievance in March 2014. Because they did not, Geaslin was put on notice her complaints had no merit and were not reasonably founded in the CBA.

(1984)[32] ("Obstructively raising petty and/or unfounded complaints" does not meet the "reasonable and honest" belief requirements). Moreover, as a practical matter, employees must have *some* basis for their opinion that the directed action violates the contract. An employee cannot just baldly claim the conduct is precluded by the contract. Otherwise, anytime employees wish to be excused from performing a task, they will just claim it violates their collective bargaining agreement and, if ALJ Tracy's Decision is adopted, those employees will be cloaked in immunity from discipline for refusing to perform the work assignment. Such a conclusion must not be permitted and certainly fails as a matter of law.

Without any basis for her belief in the CBA, and specific and uncontradicted testimony that Geaslin was recently told she had to follow her supervisors' instructions, Geaslin could not have had a honest and reasonable belief she was asserting a contract right. Thus, Geaslin did not engage in concerted activity on May 9, 2014. ALJ Tracy's refusal to confront these factual issues and personal opinion that Geaslin engaged in concerted activity without regard for the evidence requires reversal.

b. *Geaslin's conduct on May 14, 2014.*

ALJ Tracy concluded Geaslin engaged in protected concerted activity on May 14, 2014 in a single paragraph consisting of four sentences. 16 ALJD 31-37. Therein, ALJ Tracy found Geaslin's conduct on May 14, 2014 constituted concerted activity because Geaslin allegedly continued to assert her contractual rights during the May 14, 2014 meeting, and the May 14,

[32] ALJ Tracy attempted to distinguish *ABF Freight Sys.*, 271 NLRB No. 35 (1984) by claiming Geaslin only complained three times and her belief was supported by other employees. 17 ALJD 4-17. ALJ Tracy mischaracterized the testimony. All witnesses other than Geaslin testified it is commonplace for employees to help other departments. Tr. 214:16-21; 215:12-16; 222:9-17; 247:13-15; 248:6-15; 271:14-25; 272:1. Even Geaslin's Union Steward, Jackson, told her she had to help other departments when instructed to do so by her supervisor. Tr. 226:11-17; 243:4-13. According to Geaslin, the Union's Executive Committee also agreed Geaslin was required to follow Pelo's work instruction. Tr. 134:17-22; 137:5-9. This case is analogous to *ABF Freight Sys.* and ALJ Tracy erred in not relying on that case.

2014 meeting constituted a "grievance meeting."[33] Both of ALJ Tracy's bases for finding Geaslin engaged in concerted activity on May 14, 2014 are without merit.

As described above in Section Argument F(iii)(b), Geaslin's conduct during the May 14, 2014 meeting was personal and individual, and not on behalf of any other employees. Moreover, Geaslin's behavior was not concerted because she did not assert any rights under the contract during that meeting. Inexplicably, ALJ Tracy found Geaslin's conduct on May 14, 2014 was concerted because she "continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract." 16 ALJD 31-33. ALJ Tracy appears to base this finding on her conclusion that "[t]he events of the May 14 meeting are inextricably intertwined with the events of May 9." 19 ALJD 41-42.

ALJ Tracy's newly minted legal theory is not viable and her conclusion that Geaslin "continued to assert her contractual rights" on May 14, 2014 is clearly erroneous on its face.[34] While outlining her version of "facts" in this matter, ALJ Tracy stated that during the May 14, 2014 meeting,

> Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In

[33] ALJ Tracy also found Geaslin was engaged in protected concerted activity on May 21, 2014. 16 ALJD 36-37. Whether Geaslin engaged in protected concerted activity during the meeting on May 21, 2014, the date she was terminated, is irrelevant because it is undisputed she was not disciplined for conduct on that date. 19 ALJD 36-37. Rather, Geaslin was terminated for her conduct on May 14, 2014. *Id.*

[34] The Board has recognized an "inextricably intertwined" argument in the context of an employer's discharge of an employee for missing work when the reason the employee missed work was to engage in protected concerted activity. *See Burnup & Sims, Inc.*, 256 NLRB 965 (1981). The present scenario, however, is unlike that recognized in *Burnup & Sims* because, here, ALJ Tracy is attempting to attribute Geaslin's behavior on May 9, 2014 to the May 14, 2014 meeting in order to find Geaslin engaged in concerted activity on May 14, 2014. Indeed, the May 9 and 14, 2014 incidents could not be "inextricably intertwined" because although King Soopers' Manager of Labor Relations, Stephanie Bouknight, recommended Geaslin be terminated for her behavior on May 9, 2014, Pelo refused and opted to give Geaslin another chance. Tr. 277:1-15; 292:8-17. It was not until Geaslin's inappropriate conduct on May 14, 2014 that Pelo decided to terminate Geaslin's employment. Geaslin's behavior on May 9 and 14, 2014 was distinct and, therefore, no such attribution can be made.

> response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."
>
> This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin. Craine felt that Geaslin became more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.
>
> Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break. Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct. Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

7 ALJD 28-32; 8 ALJD 1-17 (internal footnotes omitted). Thus, according to ALJ Tracy, although the May 14, 2014 meeting began with Pelo commenting on Geaslin's May 9, 2014 behavior, it quickly devolved into a heated discussion regarding what Pelo perceived as Geaslin's disrespectful and aggressive demeanor during the *May 14, 2014* meeting. Indeed, in ALJ Tracy's description of the May 14, 2014 meeting, only *one* truncated sentence is devoted to Pelo and Geaslin's discussion of the May 9, 2014 incident. Geaslin could not have "continued to assert her contractual rights" on May 14, 2014 when Geaslin and Pelo did not even discuss whether Geaslin was required to sack groceries during the May 14, 2014 meeting.[35]

[35] Even if ALJ Tracy's fruit of the poisonous tree argument were viable, because Geaslin did not engage in protected concerted activity on May 9, 2014 – as described above – she also did not engage in protected concerted activity during the May 14, 2014 meeting.

Further, to the extent the May 9, 2014 incident was discussed, Geaslin did not reiterate she was not required to sack groceries during the May 14, 2014 meeting. Rather, Geaslin only claimed she never refused to sack groceries on May 9, 2014. 7 ALJD 25-28. Geaslin and Pelo's discussion on May 14, 2014 centered on whether Geaslin refused to sack groceries on May 9, 2014 and her demeanor during the May 14, 2014 meeting, not the substance of the CBA. Stated differently, if Geaslin's questions and initial refusal to sack groceries is the protected concerted activity on May 9, 2014, then on May 14, 2014 Geaslin only argued about what she said on May 9, 2014 and was no longer asserting a contract right. This distinction is subtle, but important. Thus, there was no "continued" assertion of Geaslin's contractual rights, as ALJ Tracy found.

ALJ Tracy's theory that Geaslin's conduct on May 14, 2014 was concerted because that meeting was a "grievance meeting" also does not hold water. *See* 16 ALJD 33-35. It is undisputed that the May 14, 2014 meeting preceded the filing of any grievance, Pelo had no intention of disciplining Geaslin during that meeting, and Geaslin was not actually disciplined during that meeting. Nor was the May 14, 2014 meeting part of the formal grievance process. The Grievance was not even filed until May 22, 2014. R. Ex. 4. There were also no other bargaining unit employees present in the meeting and Geaslin was not acting with or on behalf of other employees during the meeting. Thus, ALJ Tracy's conclusion that the May 14, 2014 meeting was a "grievance meeting" is wrong as a matter of law. *See Am. Fed'n of Gov't Employees, AFL-CIO, Local 3882 v. Fed. Labor Relations Auth.*, 865 F.2d 1283 (D.C. Cir. 1989) (finding that preliminary meeting between employee and supervisors to give employee a chance to contest allegations of sexual harassment did not constitute a grievance meeting).

The presence of Craine, Geaslin's Union Representative, alone also does not convert the May 14, 2014 meeting into a "grievance meeting." Craine testified he attended the meeting at

Geaslin's request and because he expected Geaslin to be terminated for her conduct on May 9, 2014. Tr. 180:4-7. Craine, therefore, did not attend the May 14, 2014 meeting to challenge any discipline or to discuss Geaslin's May 9, 2014 discipline, as ALJ Tracy found. 7 ALJD 20-21. Further, it is undisputed Pelo did not terminate Geaslin during that meeting and only intended to remind Geaslin of the need to follow her supervisors' instructions. Tr. 183:21-25; 184:1-2. Accordingly, the May 14, 2014 meeting was not a grievance meeting.

iv. Geaslin was not disciplined because she engaged in protected concerted activity.

Even if Geaslin engaged in protected concerted activity on May 9 and 14, 2014, which she did not, King Soopers did not violate the Act because it terminated Geaslin on May 21, 2014 for her misconduct, not because of her purported protected concerted activity. ALJ Tracy's disregard for the Board's analysis under *Wright Line*, 251 NLRB 1083 (1980) and *Burnup & Sims*, 379 U.S. 21 (1964) requires that the Decision be reversed.

ALJ Tracy avoids the *Wright Line* analysis by finding "Geaslin's suspensions and terminations are inextricably intertwined with her engagement in protected concerted activity." 21 ALJD fn. 28. As described above, however, Geaslin's conduct on May 14, 2014 was distinct from her May 9, 2014 conduct. Geaslin did not assert a contract right during the May 14, 2014 meeting. Instead, Geaslin and Pelo's discussion during that meeting focused on what Pelo perceived as Geaslin's disrespectful and aggressive demeanor during the May 14, 2014 meeting. Thus, ALJ Tracy cannot avoid considering *Wright Line* because she found Geaslin's conduct on May 9 and 14, 2014 to be "inextricably intertwined."

Moreover, to the extent ALJ Tracy uses the phrase "inextricably intertwined" to suggest this matter is a mixed-motive case and, therefore, *Wright Line* does not apply, such a conclusion is contrary to law. *Wright Line* was specifically created to deal with mixed-motive issues. *See Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 741 (4th Cir. 1998) ("Because an employer's

motives may often be a mix of legitimate and discriminatory reasons, the Board established a procedure in *Wright Line*, 251 N.L.R.B. 1083, 1980 WL 12312 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), to deal with such mixed-motive cases.").

Applying *Wright Line*, it is clear the GC did not meet her burden to show a prima case of discrimination. *See Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004) (identifying requirements for prima facie case). As described above, Geaslin did not engage in protected concerted activity on May 9 or 14, 2014 because Geaslin merely asked Pelo for clarification regarding whether sacking was included within the scope of her duties and said she was going to take her lunch break. The GC also did not prove Geaslin's purported protected concerted activity was a substantial motivating reason for Geaslin's termination. *See Medeco*, 142 F.3d at 742. ALJ Tracy found the motivation requirement satisfied because King Soopers suspended Geaslin on May 9, 2014 for refusing to sack groceries, suspended Geaslin during the May 14, 2014 meeting for her conduct and behavior during that meeting, and subsequently terminated Geaslin for her behavior during the May 14, 2014 meeting. 21 ALJD fn. 28. ALJ Tracy's conclusory restatement of the order of events in this matter does not, in any way, suggest Pelo was motivated to terminate Geaslin by her protected concerted activity.

In an apparent attempt to further justify her conclusion, ALJ Tracy also stated, "Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself." 21 ALJD fn. 28. Again, ALJ Tracy's premise does not support her conclusion. Pelo's lack of appreciation for Geaslin's "vigor and obstinance with which Geaslin defended herself" is <u>not</u> a basis to find Pelo was motivated to discipline Geaslin by her protected activity. To the contrary, it is a finding Pelo was motivated by Geaslin's attitude and demeanor during the May 14, 2014 meeting, not

the purported assertion of contract rights on May 9, 2014.[36] Thus, ALJ Tracy erred in finding Pelo was motivated to discipline Geaslin by her alleged protected activity on May 9 and 14, 2014.

There is also no evidence whatsoever of union animus. Indeed, the only evidence presented on this point was that King Soopers and the Union have a long standing bargaining relationship and have had collective bargaining agreements for more than 40 years. Tr. 289:22-25; 290:1. Moreover, from the outset of this matter, King Soopers has encouraged the Board to defer to King Soopers and UFCW's grievance and arbitration machinery. ALJ Tracy declined to consider King Soopers and the Union's bargaining history or even if King Soopers has anti-union animus.

Even assuming, *arguendo*, the GC satisfied her burden to prove a prima facie case, ALJ Tracy's decision must still be reversed under *Wright Line* because the undisputed evidence proved King Soopers would have terminated Geaslin in the absence of the alleged protected concerted activity. ALJ Tracy disregarded this evidence by stating, "Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected activity." Tr. 21 fn. 28. To reach this conclusion, ALJ Tracy blatantly ignored direct and uncontroverted testimony from both King Soopers' witnesses and the Union Representative, Craine, that employees who engage in the same conduct as Geaslin are terminated, regardless of whether they engaged in protect concerted activity. Tr. 219:1-17; 285:5-16; 180:10-12. On the other hand, the GC presented no evidence rebutting this testimony. ALJ Tracy's personal

[36] ALJ Tracy also stated, "Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate." 21 ALJD fn. 28. Even assuming Pelo spoke to Geaslin in March 2014 regarding her refusal to follow Panzarella's work instruction, such a discussion is entirely irrelevant to the question of whether Geaslin was disciplined because of her alleged protected concerted activity *on May 9 and 14, 2014.*

dissatisfaction with this undisputed evidence is not sufficient to conclude King Soopers failed to prove it would have terminated Geaslin in the absence of the alleged protected concerted activity. ALJ Tracy's decision must be reversed and the Complaint must be dismissed.

Even if *Wright Line* does not apply, ALJ Tracy's failure to apply and consider *Burnup & Sims* requires reversal. If, as ALJ Tracy concluded, Geaslin's termination "arises from protected activity," then ALJ Tracy was required to consider whether Geaslin's termination was lawful under *Burnup & Sims.* 20 ALJD 12-13; *see Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB 122, 124-25 (2009) (applying *Burnup & Sims* because the ALJ found the terminations were motivated by the employees' participation in protected concerted activity). Because she did not do so, ALJ Tracy's Decision must be reversed.

Under *Burnup & Sims*, "[Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 379 U.S. at 23; *see also Akal*, 354 NLRB at 124-25. "It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct." *Akal*, 354 NLRB at 124-25. The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *Id*. (citing *Marshall Engineered Products Co.*, 351 NLRB 767 (2007); *Pepsi-Cola Co.*, 330 NLRB 474, 475 fn. 7 (2000)).

ALJ Tracy utterly failed to address whether Pelo had an honest belief Geaslin engaged in misconduct at the time of her termination. The undisputed evidence, as well as ALJ Tracy's findings in the Decision, demonstrate Pelo had an honest belief Geaslin engaged in misconduct on May 9 and 14, 2014. With regard to Geaslin's conduct on May 9, 2014, as noted above in

Section Argument F(i), regardless of whether Geaslin specifically said she would not sack groceries, her conduct proves she refused to sack groceries. After initially being called to help sack, Geaslin took off her apron and approached Pelo, she did not enter the check stands and begin helping. 5 ALJD 10-29. Then, after Pelo thanked Geaslin for coming to help sack, Geaslin allegedly said "she was going to take her lunch since she needed to leave at 2 p.m. that day." *Id.* Again, Geaslin did not enter the check stands at that point. Geaslin next asked whether sacking was part of her responsibilities under the CBA. *Id.* It was not until after Geaslin's protests and questions that Geaslin actually began moving toward the check stands. *Id.* ALJ Tracy even found Geaslin likely initially refused to sack, but eventually relented. 19 ALJD 25-30. It cannot be disputed that Pelo had an honest belief Geaslin engaged in misconduct by refusing to sack on May 9, 2014 when Geaslin questioned, objected, and initially refused to perform her work order.

ALJ Tracy's findings further require the conclusion that Pelo had an honest belief Geaslin engaged in misconduct on May 9, 2014 because throughout the Decision, ALJ Tracy noted Pelo's repeated insistence during the meetings on May 9 and 14, 2014 that Geaslin refused to sack. 9 ALJD 12-13; 19 ALJD 14-16. Because Pelo repeatedly stated Geaslin engaged in misconduct and, indeed, Pelo and Geaslin argued on May 9 and 14, 2014 over whether Geaslin refused to sack, there can be no doubt Pelo honestly believed Geaslin engaged in misconduct.

There can similarly be no doubt Pelo honestly believed Geaslin engaged in misconduct on May 14, 2014. Pelo testified that she interpreted Geaslin's conduct as aggressive and disrespectful and even during the May 14, 2014 meeting, Pelo repeatedly exclaimed how disrespectful and inappropriate Geaslin's conduct was. 7 ALJD 29-32.

Further, although ALJ Tracy found Pelo, Panzarella, and Barbos' testimony regarding Geaslin's aggressive lunging gestures to be "exaggerated and hyperbolic," ALJ Tracy's other conclusions of fact require the conclusion that some form of misconduct took place on May 14, 2014. 9 ALJD fn. 21. ALJ Tracy found Geaslin raised her voice, argued with Pelo, and interrupted Pelo. 8 ALJD 2-3. Moreover, ALJ Tracy credited Craine's testimony that Geaslin became more agitated and "aggressive" during the meeting. 8 ALJD 5-6. To be sure, Craine, who ALJ Tracy found to be credible, thought Geaslin's behavior was so out of control that he stopped the meeting and took Geaslin into the hallway to calm her down. Tr. 279:6-10. Even Craine stated Geaslin's demeanor was not appropriate and it is why he took her out of the room during that meeting. Tr. 182:1-8; 183:6-8. While out of the meeting, Craine specifically told Geaslin she needed to not raise her voice and she should give Pelo more respect. 8 ALJD 12-13. Thus, Pelo honestly believed Geaslin engaged in misconduct on May 14, 2014.

In contrast, ALJ Tracy did not conclude, and the GC did not prove by a preponderance of the evidence, that Geaslin did not actually engage in misconduct. According to ALJ Tracy, on May 9, 2014, Geaslin initially refused to sack groceries and did not make any effort to follow Pelo's work order until the very end of her discussion with Pelo. 19 ALJD 25-30. Geaslin's initial refusal to perform the work assignment, even if she did ultimately acquiesce to Pelo's directive, is a violation of the CBA. Further, ALJ Tracy found Geaslin engaged in the following misconduct during the May 14, 2014 meeting: Geaslin raised her voice at Pelo, argued with Pelo, interrupted Pelo, became aggressive to the point that Craine had to specifically stop the meeting to tell Geaslin to calm down and respect Pelo. 8 ALJD 2-13. The GC did not present any evidence whatsoever that such behavior is not considered misconduct. Nor could she; Geaslin's conduct during the May 14, 2014 meeting was unacceptable by any standard. ALJ Tracy, in fact,

found an employee's failure to behave in a professional manner violates King Soopers' policies and procedures and constitutes misconduct. 3 ALJD 1-10. Even Craine admitted Geaslin engaged in misconduct when, following her termination on May 21, 2014, he asked Pelo to give Geaslin "another chance" and stated he did not "see any more issues with any type of misconduct coming up in the future." Tr. 164:23-25; 165:1-10. Of course, there would be no reason for "another chance" if Geaslin did not commit any policy violations. Thus, ALJ Tracy's own findings require the conclusion that Geaslin engaged in misconduct on May 9 and 14, 2014. Accordingly, the GC has failed to meet her burden under *Burnup & Sims* and ALJ Tracy's Decision must be reversed.[37]

CONCLUSION

Based on the foregoing, the Board should reverse ALJ Tracy's Decision and dismiss the Complaint.

WHEREFORE, King Soopers respectfully requests the Board reverse ALJ Tracy's Decision and dismiss the Complaint in its entirety.

Respectfully submitted this 19th day of November, 2015.

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[37] It should be noted that in Geaslin's written statement submitted to the GC and created in *May 2014*, Geaslin claimed she was terminated because Pelo used her "management to bully employees!" Co. Ex. 3. Thus, at the time of her termination, Geaslin did not believe her termination had anything to do with purported protected concerted activity. It was not until after working with the GC and appearing for trial that Geaslin decided she was terminated for engaging in protected concerted activity. The Board must not permit the GC's attempt to bootstrap Geaslin's complaints into a violation of the Act and ALJ Tracy's complicity in such conduct.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2015, a true and correct copy of the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS** electronically filed addressed to the following:

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Mary Navrides

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Case 27-CA-129598

Wendy Geaslin, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S
LIMITED EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND RECOMMENDED ORDER

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel files these Limited Exceptions to the Administrative Law Judge's Decision and Recommended Order, issued by Administrative Law Judge Amita Baman Tracy (Judge) on October 22, 2015. General Counsel takes exception to the following:[1]

1. The Administrative Law Judge's finding that a make-whole remedy for a violation of 8(a)(3) and (1) does not include search-for-work and work-related expenses regardless of whether those amounts exceed interim earnings. (ALJD P11:31-33).

DATED at Denver Colorado, this 19th day of November 2015.

[1] References to the Administrative Law Judge's Decision and Recommended Order appear as (ALJD __.__).

Respectfully Submitted:

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC. and WENDY GEASLIN an Individual	**Case** 27-CA-129598 DATE OF SERVICE November 19, 2015

AFFIDAVIT OF SERVICE of

I hereby certify that a copy of the **Counsel for the General Counsel's Limited Exception to the Administrative Law Judge's Decision and Recommended Order**, together with this Certificate of Service was E-filed, mailed or emailed as indicated below, to the following parties on: November 19, 2015.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

RESPONDENT KING SOOPERS' ANSWER TO THE GENERAL COUNSEL'S LIMITED EXCEPTIONS

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INTRODUCTION[1]

This matter was heard before Administrative Law Judge Amita Baman Tracy ("ALJ Tracy") on August 11-12, 2015 at the Regional Office's Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294. The General Counsel ("GC") and Wendy Geaslin ("Geaslin" or "Charging Party") contended King Soopers, Inc. ("King Soopers" or "Respondent") violated the National Labor Relations Act ("Act") by: (1) interrogating Geaslin in March 2014 regarding Union activity; (2) suspending Geaslin on May 9, 2014 for refusing a work order; (3) suspending Geaslin on May 14, 2014 for engaging in inappropriate and aggressive behavior during an investigatory interview; and (4) terminating Geaslin's employment on May 21, 2014.

This matter was originally set for trial on January, 21, 2015. On the eve of trial, the GC sought and was granted a continuance because Geaslin was hospitalized. GC Ex. 1(q). Neither the reason for Geaslin's hospitalization nor the duration of her stay were provided. This matter was subsequently rescheduled for trial in August 2015.

On August 6, 2015, two business days prior to trial, the GC filed a Notice of Intent to Amend in which, for the first time, the GC sought to recover search-for-work related expenses regardless of the amount of Geaslin's interim earnings. *See* GC. Ex. 1(ee). Following receipt of the GC's Notice of Intent to Amend the Complaint, King Soopers immediately issued a subpoena to obtain information related to the new allegations. GC. Ex. 1(ii). In the subpoena, King Soopers requested documents concerning Geaslin's fitness for employment and attempts to

[1] Citations in this Brief will be as follows: "Tr. __:__" to indicate the hearing transcript's page and line numbers; "R. Ex. __" to indicate Respondent's exhibits' "GC __" to indicate Counsel for the General Counsel's exhibits; "Jt. Ex. __" to indicate joint exhibits; and "__ ALJD __" to indicate the page (preceding ALJD) and line numbers (following ALJD) of the decision of the Administrative Law Judge.

find employment since being terminated by King Soopers, as well as the expenses Geaslin incurred as a result of such job search efforts. *Id.*

On August 10, 2015, the GC filed a Petition to Revoke the Subpoena. GC. Ex. 1(hh). Therein, the GC argued an "enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent's actions have wreaked havoc on an employee's livelihood." *Id.* at pp. 2-3. The GC went on to state that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." *Id.* at p. 3. At trial, Judge Tracy granted the Petition to Revoke, finding that the subpoenaed information was better left for a compliance proceeding. Tr. 17:23-25; 18:1-24. King Soopers did not receive any of the requested information and was prohibited from asking Geaslin about her efforts to obtain employment, as well as any search-for-work expenses she may have incurred, following the termination of her employment at King Soopers.

On October 22, 2015, ALJ Tracy issued a Decision and Recommended Order ("Decision"), which found King Soopers violated Sections 8(a)(1) and (3) of the Act by interrogating Geaslin in March 2014, suspending Geaslin on May 9 and 14, 2014, and terminating Geaslin' s employment on May 21, 2014. 26 ALJD 8-12. Among other things, ALJ Tracy also affirmed her decision to grant the GC's Motion to Amend the Complaint to add a request for search-for-work related expenses. 10 ALJD 33-37; 11 ALJD 1-21. The added paragraph stated,

> 9.
>
> As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of

> whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

GC. Ex. 1(ee). Despite permitting this addition to the Complaint, ALJ Tracy denied the GC's request for an enhanced remedy award. In so doing, ALJ Tracy stated, "the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order." 11 ALJD 31-32.

On November 19, 2015, King Soopers filed a Statement of Exceptions and Brief in Support of its Exceptions challenging, among other things, ALJ Tracy's Decision to grant the GC's motion to amend the Complaint. Because King Soopers did not have notice of the GC's requested enhanced remedy prior to her Notice of Intent to Amend, the GC did not have an excuse for her delay in moving to amend the complaint, and the merits of an enhanced remedy award were not fully litigated at trial, ALJ Tracy's decision to grant the GC's motion to Amend should be reversed. *See Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006).

Also on November 19, 2015, the GC filed a Limited Exception to the Administrative Law Judge's Decision and Recommended Order ("Exception") and a Brief in Support of Limited Exceptions to the Administrative Law Judge's Decision and Recommended Order ("Brief"). The GC's only exception challenges ALJ Tracy's decision not to award search-for-work related expenses regardless of whether Geaslin had interim earnings in excess of these expenses. GC's Limited Exception, para. 1. In support of her exception, the GC restates verbatim her argument and citations from her Post-Hearing Brief. *Compare* GC's Brief In Support of Exceptions, pp. 3-6, *with* GC's Post-Hearing Brief, pp. 41-44. Both sections are directly lifted from General Counsel Griffin's January 30, 2015 clarification of Memorandum GC 11-08 and proposed language regarding search-for-work related expenses. *See* Memorandum GC 15-01. The GC's Brief neither specifically addresses ALJ Tracy's Decision nor discusses why her Decision should

be reversed. The GC also does not analyze why search-for-work related expenses should be awarded in this case.

As described below, ALJ Tracy did not error in refusing to award the enhanced remedy sought by the GC because there is no legal authority supporting such an award. Moreover, an award of search-for-work expenses in this matter would violate King Soopers' due process rights. ALJ Tracy's Decision should not be reversed and the Board should not award Geaslin search-for-work related expenses without regard for her interim earnings.[2]

ARGUMENT

A. The Board Should Not Award The GC's Requested Enhanced Remedy.

i. An award of search-for-work related expenses is contrary to well-settled law.

Current Board law does not permit an award of job search and other work related fees independent of interim employment earnings. Under well-established Board law, such search-for-work expenses are calculated as deductions from interim employment earnings as opposed to separate expenses. *See e.g.*, *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006), *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965), *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); *Rainbow Coaches*, 280 NLRB 166, 190 (1986); *Coronet Foods, Inc.*, 322 NLRB 837, 837 (1997); *W. Texas Utilities Co.*, 109 NLRB 936, 939 n. 3 (1954). The GC has not shown any reason to depart from this well-settled law. The purpose of the Act today is the same as it was when the Board initially established it's the rules regarding recovery of search-for-work expenses. Without a change in the Act, the Board's analysis in the

[2] As noted above, on November 19, 2015 King Soopers filed a Statement of Exceptions and Brief in Support of the Statement of Exceptions, which highlights several fatal errors by ALJ Tracy that require reversal of the Decision. If the Board grants King Soopers' exceptions and reverses ALJ Tracy's finding that King Soopers terminated Geaslin in violation of the Act, then the GC's Exception is moot and need not be considered. The GC's Exception is also moot if the Board reverses ALJ Tracy's erroneous decision to grant the GC's last-minute motion to amend the Complaint to add a request for search-for-work related expenses regardless of Geaslin's interim earnings.

above cited cases should continue to apply. If the Board is going to change its precedent, then it must do so for a reason, not just because the GC wants to recover a greater amount of back pay for discriminatees. *See Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 slip op. at 15 (Aug. 27, 2015) (revisiting joint employer standard because of the change in workplace employment relationships and the increase of the "procurement of employees through staffing and subcontracting arrangements"); *Austin Fire Equip., LLC* 360 NLRB No. 131 slip op. at 5 n. 14 (June 25, 2014) (noting that the Board may overrule precedent "to account for changed circumstances or experience applying the law, or to bring the Board's precedent more in line with that of reviewing courts."). The GC has failed to show any change in circumstances or a need to modify Board law regarding search-for-work expenses to align with reviewing courts or experience applying the law. The GC's request to change established law must be denied.

Although search-for-work related expenses without regard for interim earnings have been requested in multiple cases, the Board has yet to award such an enhanced remedy. *See Casworth Enterprises,* Inc., 362 NLRB No. 131, slip op. at 2 n. 2 (2015) (holding that such relief would involve a change in Board law); *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015); *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 n. 5 (2015); *The H.O.P.E. Program*, 362 NLRB No. 128 at 2 n. 1 (2015); *Island Management Partners, Inc.*, 362 NLRB No. 158, slip op. at 3, n. 4 (2015). Thus, the NLRB has had many occasions to change the law and order reimbursement for out-of-pocket or job search expenses, but has chosen not to do so.

The enhanced remedy requested by the GC also undermines the purpose of the Act. As the GC recognized in her Brief, "when evaluating a back pay award the 'primary focus clearly must be on making employees whole.'" Brief, p. 4 (quoting *Jackson Hosp. Corp.*, 356 NLRB No. 8 at 3 (Oct. 22, 2010)). A windfall as part of a remedy award goes beyond making an

employee whole. *See Starcon International v. NLRB*, 450 F. 3d 276, 277-78 (7th Cir. 2006) (Posner, J.) *enforcing Starcon, Inc.*, 344 NLRB 1022 (2005) ("The National Labor Relations Act is not a penal statute, and windfall remedies-remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong-are penal.").

Moreover, the purpose of analyzing search-for-work efforts in a compliance proceeding is to determine whether an employee fulfilled her obligation to mitigate her losses; it is not an opportunity for the employee to receive a windfall of additional expenses in addition to back pay. *See Wright Elec., Inc.*, 334 NLRB 1031, 1032 (2001) ("It is very well-settled that, in compliance proceedings, the General Counsel has the burden to establish the gross amount of backpay owed to the employee. Then, the burden shifts to the employer . . . to produce evidence that would mitigate its liability."). An award of search-for-work related expenses without regard to Geaslin's interim earnings and search-for-work efforts is a windfall and, therefore, must not be permitted.

The GC's citation to EEOC and DOL regulations is unavailing. *See* GC's Brief In Support of Exceptions, p. 5. The Act does not provide for "damages" like Title VII or other EEO statutes. As noted above, the Act is intended only to make discriminatees whole. To provide general damages because King Soopers allegedly "wreaked havoc" on Geaslin's life would undermine the purpose of the Act and is unconstitutional absent a Congressional amendment. Simply stated, the GC's claim that King Soopers "wreaked havoc" on Geaslin's life is not compensable under the Act. Further, to make such an award requires discovery like in Title VII litigation to determine the extent of such damage and cause of the purported damage.

No such discovery was had here. The GC's request for search-for-work related expenses must be rejected.

ii. An award of search-for-work related expenses is speculative

A back pay award must be certain, not speculative. *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984) ("it remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."); *Iron Workers Local Union 377*, 326 NLRB 375, 377 (1998) ("the Board's power to remedy violations of the Act, though broad, does not extend to imposing what amounts to punitive and speculative damages for a violation of the Act."). The GC's requested remedy is punitive and inherently speculative. Before the Board could begin to calculate the amount of these expenses, it would be required to guess as to the time discriminatees spend searching for work, traveling to and from potential places of employment, as well as the time spent and cost of using the internet (or any other search device) to search for work, among other things. Such speculation is not permitted under the Act.

Further, because of the inherently speculative nature of search-for-work expenses, such an award opens the door for myriad of enforcement issues and employees could easily abuse and falsely increase the amount of the award. Indeed, it would be nearly impossible for respondents and the Board to decipher between legitimate expenses and fabricated expenses. For example, discriminatees could submit receipts or a statement of mileage for reimbursement and neither the Board nor respondents would know whether the alleged expenses were actually incurred while searching for work or were incurred for personal non-work search related reasons. The Board cannot sanction a remedy that is statutorily unavailable, would be impossible to police, and is punitive.

iii. Discriminatees should not incur search-for-work related expenses.

Aside from the legal impediments to an award of search-for-work related expenses, there is virtually no need for a discriminatee to incur search-for-work related expenses. As Administrative Law Judge Keltner W. Locke recognized,

> In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method. *Wright Electric, Inc.*, 334 NLRB 1031 (2001).

Int'l Bhd. of Teamsters, Local 71, 2014 WL 4809567 (N.L.R.B. Division of Judges) (Sept. 26, 2014). Because employees can effectively and efficiently search-for-work without incurring any expenses, there is no need to divert from Board precedent regarding these expenses. Moreover, the use of a discriminatee's telephone and internet to search for work and for personal reasons increases the speculative nature of such an award. There is simply no way to divide the cost of telephone and internet services to compensate only for the costs of searching for work. An award of speculative and uncertain damages that are no more than *de minimis* is contrary to the purposes of the Act. The GC's request for an award of search-for-work related expenses without regard for Geaslin's interim earnings is unsupportable and must be denied.

iv. The GC did not present any evidence supporting an award of search-for-work expenses in this matter.

Not only should the Board decline to modify its well-established law regarding search-for-work related expenses, but it should not award such expenses here because there was no evidence supporting such an award and granting the GC's request would violate King Soopers' due process rights.

The GC specifically argued to ALJ Tracy that King Soopers "wreaked havoc" on Geaslin's life and reiterated in her Post-Hearing Brief the allegedly extensive *damage* King Soopers caused Geaslin by terminating her employment. *See* GC Ex. 1 (hh) at pp. 2-3; GC's Post-Hearing Brief, pp. 41-44. The GC's argument and untimely Notice to Amend was made solely to prejudice ALJ Tracy regarding the injury King Soopers allegedly caused Geaslin. The GC's attempt to prejudice ALJ Tracy cannot be countenanced.

Similarly, as noted above, the GC requested a continuance of the original trial date in January 2014 because Geaslin was allegedly hospitalized. The GC ignored Geaslin's incapacity when requesting ALJ Tracy award search-for-work related expenses without regard for her interim earnings. Of course, the reason for Geaslin's incapacity, as well as the duration of such incapacity, goes directly to the merits of an award of back pay, including search-for-work expenses.

King Soopers specifically sought to discover the merits of a search-for-work expenses award by way of a subpoena and questioning Geaslin at trial. ALJ Tracy, however, revoked King Soopers' subpoena and prohibited King Soopers from questioning Geaslin about her search-for-work efforts and related expenses. Tr. 17:23-25; 18:1-24. Absent ALJ Tracy's erroneous ruling, King Soopers would have presented evidence regarding Geaslin's chronic mental instability and drug addiction; both of which demonstrate that her alleged *damage* was self-inflicted and not caused by King Soopers. ALJ Tracy's ruling prevented the GC's request for an enhanced remedy from being fully litigated and the parties from discovering the merits of such an enhanced remedy. Moreover, it kept King Soopers from challenging Geaslin's credibility on this point and deprived King Soopers of the opportunity to mitigate the prejudice

the GC caused by her inappropriate request. Because King Soopers was not permitted to present such information, an award of search-for-work related expenses is impermissible.

Even the GC admitted this information was necessary in her Petition to Revoke when she argued that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." GC Ex. 1(hh), at p. 3. To determine if the GC's enhanced remedy request was appropriate, evidence had to be presented as to Geaslin's ability, let alone effort, to seek interim employment. Otherwise, it is impossible to know whether King Soopers' caused the allege damage to Geaslin or if she caused it by failing to seek employment, being unable to seek employment, or any other reason. ALJ Tracy denied King Soopers <u>any</u> opportunity to present or discover evidence regarding the merits of an enhanced remedy award. An award of search-for-work related expenses under these circumstances, where the parties were precluded from litigating the merits of such award, is improper and obliterates due process for King Soopers. *See e.g., King Manor Care Ctr.*, 308 NLRB 884, 889 (1992) (denying the General Counsel's last minute requested remedy because it was not fully litigated and would deprive respondent of due process); *Chicago Tribune Co.*, 304 NLRB 259, 262 (1991) (finding that it would not afford all parties due process to rely on evidence outside the record and not presented during trial); *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1982) ("Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself") (internal quotation marks

omitted). Here, ALJ Tracy precluded a meaningful opportunity to litigate the merits of the GC's requested enhanced remedy award and, therefore, no such award can be imposed.[3]

The GC will likely argue that the issue of whether back pay and search-for-work expenses should be awarded is better left for a compliance proceeding. This argument is unavailing. It is of no solace that the remedy can be explored in a back pay proceeding when this specific allegation was made in a last minute amendment to the Complaint. Such a late amendment severely prejudiced King Soopers and the GC's ploy should not be permitted. Moreover, *only* the issue of the *amount* of alleged search-for-work related expenses is properly left for a compliance proceeding. The current issue, however, is whether search-for-work related expenses should be awarded at all. *See Starcon*, 450 F.3d at 279 ("There is a difference between entitlement to relief and the amount of relief to which one is entitled."). No such determination can be made without evidence as to whether Geaslin caused or contributed to her losses. Thus, the Board must deny the GC's request.

CONCLUSION

Based on the foregoing, the Board should affirm ALJ Tracy's refusal to award Geaslin search-for-work related expenses.

WHEREFORE, King Soopers respectfully requests the Board deny the GC's Statement of Limited Exceptions.

[3] Not only was King Soopers deprived of the ability to litigate the merits of an enhanced remedy award, but the GC did not present *any* evidence regarding Geaslin's search-for-work efforts or interim earnings. Indeed, there was absolutely no evidence presented that Geaslin even incurred search-for-work expenses. Without evidence regarding the merits of an enhanced remedy, no such award can be made.

Respectfully submitted this 3rd day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2015, a true and correct copy of the foregoing **RESPONDENT'S ANSWER TO THE GENERAL COUNSEL'S LIMITED EXCEPTIONS** was electronically filed addressed to the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

KING SOOPERS, INC

and Case 27-CA-129598

WENDY GEASLIN, an Individual

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

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Answering Brief to Respondent King Sooper's Exceptions to the Administrative Law Judge's Decision and Recommended Order.

I. STATEMENT OF THE CASE[1]

The Regional Director for Region 27 issued a Complaint and Notice of Hearing in this matter on October 31, 2014. (Complaint) (GC Ex. 1(g)). The Complaint, as amended at the hearing, alleges that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act) by unlawfully interrogating, suspending and later terminating employee Wendy Charging Party (Charging Party) for her protected activity. (G.C. Ex. 1(g)).

The trial in this matter was held on August 10-11, 2015 in Denver, Colorado, before The Honorable Amita Baman Tracy, Administrative Law Judge (ALJ). On October 22, 2015, the ALJ issued a Decision and Order. (ALJD 1-31). The ALJ found that Respondent, through store manager Theresa Pelo (Pelo) violated Section 8(a) (1) of the Act, as alleged in the Complaint, by unlawfully interrogating the Charging Party about her complaints to UFCW, Local 7 (Union). The ALJ also found that store manager Pelo unlawfully: (1) suspended the Charging Party on May 9, 2014 for asserting her collectively bargained contractual rights; (2) suspended the Charging Party for her protected activity during a grievance meeting on March 14, 2014; and (3) discharged the Charging Party on May 21, 2014 for her protected activity in the March 14 meeting. (ALJD 25:30-45). The ALJ's Recommended Order requires Respondent to cease and desist from interrogating employees about union activity and suspending and terminating

[1] All references to the Administrative Law Judge's Decision and Recommended Order appear as (ALJD __:__). All references to the transcript of the hearing in this matter appear as (Tr. __). References to Counsel for the General Counsel's exhibits at hearing appear as (GC Ex. __). References to Respondent's exhibits appear as (R Ex.__), and references to Joint exhibits appear as (Jt. Ex. __).

employees for engaging in protected activity. (ALJD 26:5-15). Affirmatively, the Recommended Order requires Respondent to offer the Charging Party reinstatement and make her whole for the losses she suffered as a result of the Respondent's unfair labor practices. Additionally, the Recommended Order explicitly declines to order search-for-work and work-related expenses regardless of whether there are interim earnings as part of the make-whole remedy.[2] (ALJD 26:12-20).

II. ISSUES

On November 19, 2015, Respondent filed 93 exceptions to the ALJ's decision, taking issue with her credibility determinations, factual findings and legal conclusions. Respondent's exceptions present the following issues:

A. Whether the ALJ made legally proper credibility determinations. (Exceptions 1-19)

B. Whether the ALJ properly granted the General Counsel's motions. (Exceptions 20-31)
   a. Motion to amend the complaint to clarify the request for relief
   b. Motion to amend the complaint to add an allegation of unlawful interrogation
   c. Motion to revoke Respondent's subpoena duces tecum

C. Whether the ALJ properly determined that this charge was not legally proper for deferral. (Exceptions 32-43)

D. Whether the ALJ properly determined that Respondent unlawfully interrogated the Charging Party. (Exceptions 12,13,19, 44-50)

E. Whether the ALJ properly determined that Respondent violated Sections 8(a)(1) and (3) of the Act by twice suspending and discharging the Charging Party. (Exceptions 16, 51-90)

[2] The General Counsel took exception to this portion of the Order contending that the ALJ should have ordered the Charging Party's search-for-work and work related expenses as part of the make whole remedy. The exception and supporting brief were filed with the Board on November 19, 2015.

III. FACTS AND ARGUMENT ANSWERING RESPONDENT'S EXCEPTIONS

A. The ALJ properly determined the credibility of witnesses based on a preponderance of the evidence presented at trial and her observations of witness demeanor (Exceptions 1-19)

Respondent's exceptions 1-20 directly take exception to the ALJ's credibility determinations. The Board has long held that a judge's credibility determinations will not be overturned "except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). This standard of reviewing credibility has been routinely applied by the Board when upholding a judge's credibility findings. Contrary to Respondent's assertion, the ALJ's credibility determinations are fully supported by a preponderance of relevant evidence.

The ALJ begins her discussion of witness credibility by setting forth the factors that she considered when making her credibility determinations. (ALJD 13:29). She also cautions the parties that while she provides some citations to the record, her findings and conclusions are based on the entire record, not just the citations to the transcript in her Decision. (ALJD 2: Fn. 3).

i. The ALJ properly determined that the Charging Party was a credible witness

The ALJ observed that the Charging Party testified with a generally calm demeanor, consistently and that despite tough cross-examination her testimony did not waiver. (ALJD 3: Fn. 6). The ALJ found Union business agent Danny Craine (Craine) to be a credible witness and his testimony by and large corroborated the Charging Party's testimony. (ALJD 7: Fn. 17).[3]

[3] The ALJ observed Craine's demeanor as calm, thoughtful, and deliberate. (ALJD 7: Fn. 17).

Respondent excepts to the ALJ's observation that the Charging Party's affidavit corroborates her testimony and contends that this observation means that the ALJ used the Board affidavit to make substantive findings of fact. However, the ALJ is clear that she only considered the affidavit for purposes of evaluating credibility in terms of corroboration. (ALJD 3: Fn.6). Respondent argues that the Charging Party's testimony was "contradicted" by her affidavit because a few of the details in her live testimony were not contained in the affidavit. Respondent equates the absence of a few minor details in the Charging Party's affidavit with a contradiction in testimony. Contrary to Respondent's argument, the record is clear that Charging Party was calm and consistent during cross-examination. (ALJD 3: Fn. 6). Respondent cross examined the Charging Party for two hours over what amounts to a few short events. It logically follows that her 120 pages of testimony at trial has more detail than her three-page affidavit. To argue that the additional detail provided by the Charging Party, in response to copious and repetitive questions from Respondent's counsel, constitutes a "contradiction" is, at best, disingenuous. In this regard, the transcript shows that Respondent kept harping on whether the Charging Party said, "different union" instead of "different unit" when she was questioning whether she should be performing a different unit's duty (sacking groceries). (Tr. 144-145).

While Respondent intended to impeach the Charging Party with her affidavit, Respondent's efforts had the opposite effect of bolstering Charging Party's credibility in the eyes of the ALJ because he was unable to identify any genuine discrepancies between her testimony and her affidavit. Indeed, on re-direct the Charging Party credibly testified that the affidavit was not a transcript of her discussion with the Board agent and she reiterated her testimony with respect to what happened that day. (Tr. 143). The ALJ did not make any substantive factual findings based on the Charging Party's affidavit; she simply observed that the Charging Party's

testimony remained consistent despite Respondent Counsel's best efforts to confuse her and her Board affidavit corroborated her testimony at hearing. (ALJD 5: fn. 13).

Respondent also takes exception to the ALJ's Tracy characterization of his cross-examination as argumentative and contends that the ALJ held Respondent Counsel's demeanor at trial against Respondent. This argument is baseless. The ALJ noted that the Charging Party's consistency and candid demeanor throughout such a vigorous and argumentative cross-examination shows that her testimony was solid despite Counsel's best efforts to confuse and intimidate her. (ALJD 3: Fn. 6). It is entirely appropriate for the ALJ to observe a witness's demeanor in response to difficult questioning under pressure; it is also proper to find testimony particularly reliable when it remains consistent despite vigorous cross examination. *NLRB v Walton Mfg. Co*. 369 US 404,408 (1962); *Double D Construction Group*, 339 NLRB 303,305 (2003). Accordingly, the ALJ properly determined that the Charging Party was a reliable witness and that her testimony should be credited.

ii. The ALJ properly determined that store manager Theresa Pelo unlawfully interrogated the Charging Party

Respondent takes exception to the ALJ's decision to credit the Charging Party's testimony over Pelo's testimony with respect to the unlawful interrogation. The record and the ALJ's decision clearly articulate how the ALJ properly synthesized the entire testimonial evidence and witness demeanor in determining to credit the Charging Party's testimony. The ALJ relied upon the Charging Party's testimony and on assistant store manager Lisa Panzarella (Panzarella) and Pelo's corroboration of all the circumstances surrounding the Charging Party's testimony. (ALJD 13:31-37). The Charging Party testified that sometime in March 2014 she told TITLE Latrice Jackson (Jackson) tht baristas could not complete their own duties in

addition to bakery duties. (Tr. 44, 75). Panzarella confirmed that in March 2014 Jackson told her about the Charging Party's complaint and she reported the Charging Party's complaint to Pelo. (Tr.226, 237:24). Pelo confirmed that Panzarella told her that the Charging Party complained to the Union about sampling bakery product. (269:19-24).

The Charging Party's testimony about the exchange between her and store manager Pelo is also credible because all of the circumstances leading up to the interrogation are precisely corroborated by Respondent's managers Pelo and Panzarella. It is much more likely that Pelo's denial absent any corroboration is incredible. The ALJ further articulates that she did not find Pelo's answer concerning whether she interrogated the Charging Party convincing because she claims the issue had already been addressed by Panzarella and Jackson but Panzarella's testimony was that the Charging Party had completed Panzarella's assignment before the Charging Party ever approached Jackson with her complaint. (ALJD 4: Fn.9). Taking all the circumstances into consideration along with the Charging Party's consistent and credible testimony, the ALJ properly concluded that the Charging Party should be credited over Pelo with respect to the interrogation. (ALJD 4:fn9; 13:31-45).

iii. The ALJ properly determined that Charging Party did not refuse to sack groceries

Respondent excepts to the ALJ's determination that the Charging Party never refused to sack groceries. Despite extensive cross-examination, the Charging Party's testimony does not waiver that she never said she would not sack groceries and that she tried to sack groceries but Respondent's store manager Pelo stopped her. (Tr. 50:6-7, 67:5, 67:11-13, 111:6,111:11-13, 136:22-25). The ALJ notes that the Charging Party's movement toward the check stands shows that she sought to perform the task Pelo asked her to do. (ALJD 19:22-23). The Charging Party testified that she kept trying to explain that she was not supposed to sack under the contract. (Tr.

51:23-25, 52:1; 55:24, 56:1-4, 156:6-8). Deli employee Anjelica Eastburn (Eastburn) was present during the May 9 discussion and she did not hear the Charging Party say she would not sack groceries but she did overhear the Charging Party discussing the contract between the Respondent and the Union. (ALJD 14:9; Tr. 218).

In contrast, the ALJ noted that Pelo's testimony concerning what was discussed on May 9 was contradicted by employee Eastburn's testimony. (ALJD 6: Fn. 15).[4] Pelo's inability to distinguish between the events of May 9 and May 14 support the inference that her recollection about what happened on those days is not accurate. (ALJD 7: Fn. 16). Noting that union agent Craine testified in an accurate, logical and unexaggerated manner, the ALJ also relied on Craine's testimony that on May 14 the Charging Party continued to assert that she never refused to bag. (ALJD 13:46-47; Tr. 192). Other than Pelo, no one else testified that they heard the Charging Party refuse to sack groceries. Accordingly, the ALJ's determination is based upon witness demeanor and a preponderance of the record evidence.

iv. The ALJ properly credited Charging Party's and Craine's description of the Charging Party's behavior at the May 14 meeting

The ALJ properly determined that the Charging Party's behavior, based on Charging Party and Craine's testimony, was appropriate under the circumstances. She determined that Pelo, Panzarella and Barbos' testimony was hyperbolic and found it implausible that Pelo did not call security on May 14 or 21 if she feared for her safety. (ALJD 13: 40-44).

Respondent argues that the ALJ based her findings solely on Pelo's failure to call security. To begin with, the ALJ's decision explained that she found that Craine testified credibly about what happened during that meeting. (ALJD 7: fn. 17, 8:5-25). In this regard,

[4] The ALJ found employee Eastburn's testimony sincere but vague and credited Eastburn on what she was able to recall. (ALJD 6:15).

Craine testified that the Charging Party was not leaning over Pelo's desk or lunging at anyone. (Tr. 190: 20-25; 191: 1-5). He also testified that he tried to explain to Pelo that the Charging Party was not making faces. (Tr. 158). The ALJ notes that Craine does not exaggerate his testimony.

The ALJ further also notes that the witness testimony concerning what the Charging Party said about respect during the meeting is slightly different depending on the witness. She ultimately credits the Charging Party's testimony because her testimony is the only one independently corroborated by a statement created close in time to the event. (ALJD 8:fn18; Resp. Ex. 3, Tr. 92).

In contrast, the ALJ found that Respondent's assistant store manager Panzarella's testimony was undermined by her failure to mention that the Charging Party lunged or bared her teeth when she was describing the Charging Party's behavior at a Colorado Labor and Employment hearing where she was under oath. She found her previous testimony more reliable because that hearing occurred closer in time to the incident. (ALJD 9: fn.21; 14:15-19; Tr. 238-239).

In addition to all the evidence articulated above, the ALJ takes into consideration the likelihood that Respondent's store manager Pelo would have failed to call security if she perceived a threat of harm to her or her managers. (ALJD 9: fn. 21). She elaborates that Panzarella's, Barbos's, and Pelo's description of the Charging Party's behavior on May 14 appeared exaggerated partly because if they were concerned about the Charging Party's behavior "then one would expect an aggressive response such as calling security guards to escort Charging Party from the premises." (ALJD 9: fn.21).[5] The ALJ's consideration of the inherent

[5] The uncontroverted testimony is that Respondent employed a security guard at this location and that the Charging Party was never escorted out by security. (Tr. Tr. 55:14, 161:10, 257:9-11).

probabilities and reasonable inferences drawn from the record about how a reasonable person would react is an entirely proper determination under Board law. *Double D. Construction Grp., Inc.*, 339 NLRB 303, 305 (2003). In *Double D*, the Judge made no mention of demeanor whatsoever, and solely weighed the probabilities of witness accounts. In the present case, the ALJ discussed the witnesses' demeanors, testimonial evidence and logical inferences and probabilities as well. *Id.* Thus, the ALJ based her credibility findings on a preponderance of the record evidence and clearly articulated her reasons for crediting the Charging Party and Craine over Respondent's managers. (ALJD 9: fn 21).

Respondent argues that the Charging Party should have been discredited because she made faces at Respondent's counsel at trial. This type of hyperbole is exactly what the ALJ is describing when she concludes that Pelo, Panzarella and Barbos are incredible with respect to the events of May 14. (ALJD 9: fn. 21). The ALJ was in the room to observe the whole exchange and she did not agree with Respondent's Counsel's self –serving characterization that the Charging Party was making faces at him. Even without the benefit of having been present in the hearing room, the transcript shows that the Charging Party testified that she did not make a face at Pelo and in response to Respondent Counsel's somewhat comical accusations, the Charging Party explained that she has an expressive face and he should not accuse her of "making faces" when it's just her facial expression. (Tr. 118-119).

In conclusion, the ALJ's credibility determinations are based on a preponderance of the evidence and Respondent's exceptions fail to show any reversible error.

B. THE ALJ DID NOT ERR IN GRANTING THE GENERAL COUNSEL'S MOTIONS

i. The ALJ properly granted the General Counsel's motion to amend its request for relief

The ALJ properly granted the General Counsel's motions to amend the complaint: once at the commencement of hearing to reflect the General Counsel's request for relief and once at the end of General Counsel's case in chief to conform to the record evidence. (ALJD 10-12).

Section 102.17 of the Board's Rules and Regulations clearly give an administrative law judge wide discretion to grant motions to amend the complaint once the hearing has begun and until the Board has issued on Order. Thus, there is no question that the ALJ possessed the authority to grant the General Counsel's motions at hearing.

With respect to the General Counsel's motion to amend the complaint to include search-for-work and work related expenses, the ALJ properly granted the amendment at the commencement of the hearing. Prior to hearing, Counsel for the General Counsel notified the parties of its Intent to Amend its request for relief at the opening of hearing and thereby put Respondent on notice that the General Counsel would seek the remedy of search-for-work expenses should she prevail at trial. While Respondent argues that it was improper to allow the amendment, it is unable to cite to any legal precedent to support its contention and it is unable to articulate how Respondent sustained any prejudice by the amendment.

The ALJ repeatedly explained to Respondent that the request for relief was a legal issue that would not require Respondent to present any evidence at trial. She added that the amendment would simply allow Respondent to address the propriety of a make whole remedy that included search –for-work and work related expenses as part of the remedy.[6] (Tr. 10)

[6] It should be noted that despite ALJ's invitation to brief the issue, Respondent has failed to make any argument with respect to whether the search-for-work and work related expenses are part of a make whole remedy. (ALJD 11:8-10; Tr. 18).

Respondent argues that the ALJ's decision to allow the amendment is erroneous, in part, because she failed to consider that the timing of the amendment was an "oversight." However, the ALJ considered the timing of the amendment and determined that it was not a basis for denying the motion in the absence of any showing of prejudice. (Tr. 9-10). The ALJ properly allowed the amendment because it was a legal issue for the parties to brief and there was no prejudice to Respondent by allowing the amendment; indeed, the amendment simply provided Respondent notice to brief the issue if it wished to do so. (ALJD 11:40); *Katch Kan USA*, LLC, 362 NLRB No. 162 (2015). Thus, the ALJ correctly allowed the amendment.

ii. The ALJ properly granted the General Counsel's motion to amend the complaint to add an allegation of unlawful interrogation

Next, Respondent takes issue with the ALJ's decision to grant a mid-hearing amendment to add an allegation of interrogation. Respondent argues that it was an untimely amendment and should have been dismissed because the interrogation allegation was not pled in the Complaint and Notice of Hearing. However, Respondent is unable to articulate any prejudice it sustained because of the amendment.

The ALJ explicitly considered the General Counsel's failure to include the allegation in the original complaint but concludes that while it was not an ideal time to amend the complaint, such an oversight should not preclude an amendment where Respondent had a full opportunity to litigate the allegation. (ALJD 11:41-46). In its exceptions, Respondent mistakenly relies on the Board's analysis in *Redd-I*, 290 NLRB 1115 (1988). Section 10(b) of the Act specifically provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Notwithstanding this language, the Board does not bar complaint allegations that are based on amended charges filed outside the Section 10(b) period. In *Redd-I*, the Board allowed amendments at trial where the amended

allegations were part of a charge that was withdrawn prior to hearing thus allowing an amendment to include allegations that were not the subject of a charge. The *Redd-I* analysis applies when an administrative law judge must determine whether to allow the General Counsel to add complaint allegations outside the 6-month Section 10(b) period; if they are "closely related" to the allegations of a timely filed charge, the amendment is allowed. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). Unlike the facts in *Redd-I*, the General Counsel's interrogation allegation is alleged *on the face of a timely filed charge*, thus there is little support for any contention of trial by ambush. (GC Ex 1(d)).

Respondent further argues that the ALJ improperly relied upon *Amalgamated Transit Local 1498*, 360 NLRB No. 96 fn. 7 (2014). However, the facts of that case are directly on point to the ones in this matter. In *Amalgamated Transit*, the General Counsel was permitted to amend its complaint mid-hearing because, like here, the issue was fully litigated. *Id*. Moreover, the Board has allowed otherwise untimely amendments where the General Counsel moved to amend before the respondent put on its evidence, the respondent did not request a continuance, and the respondent cross-examined the General Counsel's witness with respect to the facts of the allegation. *Henry Bierce Co.*, 307 NLRB 622, 629 (1992). Thus, as properly stated by the ALJ, the issue was whether the Respondent was given the opportunity to fully litigate the issue and whether the Respondent was prejudiced by the amendment.

Here, Counsel for the General Counsel sought to add the allegation of interrogation after the Charging Party had testified on direct and been subjected to extensive cross-examination by the Respondent on the interrogation. (Tr. 80-81). Respondent fully questioned and tested the Charging Party's memory with respect to the alleged interrogation and the events leading up to

and following the interrogation. Moreover, Respondent had a full opportunity, during its case in chief, to rebut the Charging Party's allegations.[7]

Respondent further argues that it was improper for the ALJ to allow the General Counsel to amend the complaint after the Charging Party "left the venue." Respondent is grasping at straws. While it may be true that the Charging Party left the *room* after Respondent's cross-examination, Respondent fails to acknowledge that it extensively cross-examined the Charging Party about the interrogation or that it never requested to examine the Charging Party in his case in chief. It is undisputed that Respondent *never* asked to further examine the Charging Party. Indeed, Respondent is an experienced trial attorney and knows that he could have simply asked Counsel for the General Counsel if Charging Party was available or petitioned the ALJ to order the Charging Party to appear in his case in chief; however, such a request was never made.[8] Therefore, it is irrelevant and immaterial whether the Charging Party was present for Respondent's case in chief because he never called her as a witness.[9]

Additionally, Respondent argues that the amendment should not have been allowed because the interrogation was used to show motive. Respondent fails to appreciate that Respondent's interrogation shows animus while also independently violating the Act. Many actions can prove animus without violating the Act; but, there are situations like the one here where Respondent's actions possess duality because they serve to show Respondent's animus towards Charging Party's protected activity while also violating her Section 7 rights. In light of

[7] In fact, Respondent called Pelo as a witness to deny the allegation but she was not credited by the ALJ concerning the interaction. In making that decision, the ALJ took into account the testimony of the two parties as well as management witness Panzarella's testimony that she told Pelo about Charging Party's complaint to the Union. (ALJD 4: fn. 9).

[8] In fact, Counsel for General Counsel asked the Charging Party to wait in the building's cafeteria in case she needed to be recalled to the stand. Thus, she would have been immediately available to testify had Respondent ever requested, on or off the record, her appearance. To suggest Charging Party "left the building" simply because she was not in the room is misleading.

[9] It should be noted that there is no evidence on the record that Respondent requested to subpoena the Charging Party.

the lack of prejudice to Respondent and the importance of vindicating Charging Party's Section 7 rights, it is clear that the ALJ correctly granted the General Counsel's motion to amend the complaint to allege Respondent's unlawful interrogation of Charging Party.

iii. The ALJ correctly granted the General Counsel's petition to revoke Respondent's subpoena duces tecum

Prior to hearing, Respondent issued a subpoena duces tecum to the Charging Party requiring her to produce documents showing her search-for-work expenses and any work related expenses. On August 10, 2015, Counsel for the General Counsel filed a timely Petition to Revoke Respondent's subpoena. (GC Ex. 1(hh)). At the commencement of the hearing, the ALJ reviewed Respondent's subpoena and General Counsel's petition to revoke. She also elicited and heard oral argument from both parties. (Tr. 9-10). The ALJ correctly concluded that it was proper to grant the General Counsel's motion and revoke the subpoena. *Id.*

Respondent argues that the ALJ erred by revoking the subpoena duces tecum and by not allowing Respondent to question Charging Party about her efforts to find interim employment. Respondent is unable to express the relevance of the requested documents to the issues at hearing. General Counsel filed the petition to revoke contending that the requested documents were irrelevant to any issue at hearing because they were clearly intended to compute backpay liability. Consequently, the ALJ correctly concluded that the documents sought by Respondent related to the amount of backpay as well as any search for work expenses that might be included in that calculation. (Tr. 17: 23-25; 24:1-24; ALJD11:6-21). She informed Respondent that if she ordered backpay, Respondent would have the opportunity to dispute the amount of backpay in any compliance proceeding. *Id.*

The amount of backpay, including search for work expenses, is an issue that was not ripe at the trial. The proper issue at that stage in the proceeding was whether it was proper, *as a matter of law*, for the Judge to order the remedy requested by the General Counsel for the alleged unfair labor practices. The documents that Respondent subpoenaed from the Charging Party are irrelevant to the allegations in the Regional Director's Complaint and Notice of Hearing including the amended remedy; instead they seek to calculate the amount of a remedy.

At hearing and again it its exceptions, Respondent conflates the issues of whether *as a matter of law* search-for work expenses are properly part of a make whole remedy, with the actual computation of search-for work expenses owed as part of the backpay calculation. Respondent's subpoena was seeking to litigate the amount of money Respondent might owe to the Charging Party before the ALJ had even found it committed an unfair labor practice and the ALJ correctly concluded that the amount owed by Respondent should properly be relegated to any compliance proceedings. *Roadway Express*, 254 NLRB 668, fn27 (1981) (Tr. 18). Accordingly, the ALJ's decision to revoke Respondent's subpoena duces tecum should be affirmed.

The ALJ properly prohibited Respondent from questioning the Charging Party about her search-for-work efforts and work related expenses. The issues at trial were whether Respondent violated the Act in March and May 2014 and what remedies should be ordered to cure those violations. Evidence concerning the Charging Party's search-for-work and work related expenses after her termination has nothing to do with whether Respondent violated the Act;[10] such evidence is only relevant to compliance with an order to make Charging Party whole for

[10] Respondent argues that the General Counsel prejudiced the case by alleging in its Motion to Amend Remedy that Respondent "wreaked havoc" on Charging Party's livelihood. It is hard for Respondent to cry foul when Respondent's own questions on cross examination established that the Charging Party became homeless due to Respondent's termination of her employment. (Tr. 83: 17-25; 84:1).

Respondent's (at that time alleged) unlawful conduct. Therefore, it was improper for Respondent to elicit evidence intended to calculate its potential backpay liability and the ALJ's decision should be affirmed.

A. The ALJ correctly applied Board precedent to determine that this charge was not appropriate for deferral

The ALJ correctly determined that this matter is not appropriate for deferral for a number of reasons. First, she correctly set forth the standard for deferral and the fact that the burden of proving those factors rests with Respondent. (ALJD 12:11-17). She goes on to apply the deferral factors and to conclude that Respondent failed to meet its burden for a number of reasons; including the Charging Party's right to arbitral consideration, the fact that the Union would not arbitrate her grievance, and her inability to order the Union to proceed to arbitration. (ALJD 12:18-37). Contrary to Respondent's exceptions, the ALJ considered and distinguished the facts presented in *General Dynamics*, 271 NLRB 187 (1984) ultimately concluding that the case was distinguishable. (ALJD 13:1-11). Instead, she properly relied on *U.S. Postal Service*, 324 NLRB No. 129 (1997) because the union will not arbitrate Charging Party's grievance under the contract despite its merit under the Act. (ALJD 12:18-24).

Respondent further argues that the ALJ failed to apply *Alpha Beta*, 273 NLRB 1546 (1985), and its progeny. Respondent contends that those cases stand for the proposition that the Board should always defer unfair labor practice violations to the parties' contract. Respondent's contention is patently wrong and not supported by *any* Board precedent. *Alpha Beta* and its progeny are inapplicable to this matter because the cases contemplate a good faith attempt to resolve any unfair labor practices. *Id*. Here, there is no settlement or award to even defer to. In fact, it is clear that the Union was not even aware that Charging Party's Section 7 rights were

violated. (Tr. 19: 7-25, 194:1-13). Respondent arbitrarily applies an *Alpha Beta* analysis to the facts in this matter.

Respondent's reliance of *Alpha Beta* is cursory and relies on the assumption that the Union's failure to identify Respondent's unfair labor practices and failure to pursue such unlawful behavior to arbitration is not "palpably wrong." *Id.* (settlement cannot be palpably wrong). To defer to the Union's decision to drop Charging Party's grievance, when Respondent's actions violate the Act, would work an injustice to the Charging Party and can be easily characterized as palpably wrong. For the cited reasons, the ALJ's conclusion that this charge is inappropriate for deferral is legally sound and should be affirmed.

B. The ALJ correctly applied Board precedent to determine that Respondent unlawfully interrogated the Charging Party

In determining whether or not an interrogation violates Section (8)(a)(1) of the Act, the Board looks at whether under all the circumstance 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). The standard is objective, meaning that it does not take into account either the motive of the employer or the actual impact on the employee. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (under objective test, employer's motivation for the statement or the act is irrelevant, as is whether or not a particular employee was actually coerced or considered himself to be coerced); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines not whether the employer intended, or the employee perceived, any coercive effect but whether the employer's action s would tend to coerce a reasonable employee).

The ALJ found that the Charging Party was engaged in protected concerted activity when she complained to her coworker steward Jackson and Respondent's assistant store manager

Panzarella that baristas should not have to perform bakery duties in addition to their own duties. (ALJD 15:22-27). It is well established that complaining about your terms and conditions of employment to your Union is protected by Section 7. *North Vernon Forge*, 278 NLRB 708, 710-711 (1986). Respondent contends that the ALJ's sole basis for finding that the Charging Party engaged in protected activity was her use of the terms "we" and "us" when complaining about sampling the bakery's pastries. While this is certainly strong evidence that she was concerned about general barista's duties, Respondent's claim misstates and oversimplifies the full content of ALJ's decision.

In addition to what is cited immediately above, the ALJ relies upon the Charging Party's complaints to her coworker Jackson[11] and supervisor[12] Panzarella regarding the baristas' contractual duties in relation to the bakery unit duties. (ALJD 15:21-31). While the ALJ does make note that the Charging Party did not know that she was making the complaint about the barista duties to a union steward, that is not the basis for her conclusion; indeed, whether the Charging Party's complaints were made to an employee or a steward would not change the protected nature of her questions. Based on her evaluation of all the evidence, the ALJ rightly concludes that the Charging Party was complaining to her coworker and union about baristas being directed to perform a different unit's duties, thereby engaging in protected concerted activity.

In determining whether the interrogation was unlawful, the ALJ correctly sets forth the Board law that she applied to the facts. (ALJD 17:30-43). The ALJ credits the Charging Party's

[11] Respondent's assistant manager Panzarella corroborated Charging Party's testimony about complaining to Jackson when Panzarella testified that Jackson reported Charging Party's complaint about baristas sampling bakery products to her attention. She further testified that she told Pelo about the complaint because it is part of her job to report Union complaints to Pelo. (237:11-25).

[12] Respondent argues that the Charging Party never complained to her manager. Respondent ignores the fact that Panzarella's uncontested testimony is that the Charging Party complained to her about sampling the bakery's product. (Tr. 125:15-18, 224:21-23, 236:17:17-20).

testimony that Respondent's store manager Pelo came to her and expressed displeasure that the Charging Party complained to the Union and accused the Charging Party of being untruthful. (ALJD 18:3) (Tr. 44:13-20, 73:21-25, 74:22). The ALJ's decision clearly articulates her reasoning for finding this line of questioning coercive. Among other things she notes that Pelo expressed displeasure with the complaints and that her questions to the Charging Party could have no other purpose than to make her think twice before engaging in protected activity. (ALJD 18:9-20). She specifically notes that Pelo's denial about approaching the Charging Party was not credible. (ALJD 18:10-13) (Tr. 269: 19-24).

Respondent cites to the Charging Party's testimony and simply substitutes its own self-serving judgment to declare Pelo's questions and accusations to be lawful. (Resp. Ex. Pg 27). Respondent goes on to blame the Charging Party for Pelo's behavior by arguing that Pelo thought the Charging Party was lying about complaining to the Union so Pelo was justified in accusing her of lying. However, the question is not whether the Charging Party lied (which she did not) about contacting the Union, the question is whether Pelo should have accosted the Charging Party and questioned her about talking to the Union in the first place and whether her statements was coercive. (ALJD 18:1). Thus, the ALJ properly concluded that the Charging Party engaged in protected activity and Respondent interrogated her about her actions in a manner that would reasonably tend to coerce employees. (ALJD 18).

C. The ALJ correctly applied Board precedent to determine that Respondent committed violated Sections 8(a)(1) and (3) of the Act when it twice suspended and later terminated the Charging Party for her protected activity

i. The Charging Party engaged in protected activity

An employee's honest and reasonable invocation of a collectively bargained right, regardless of whether the employee turns out to have been correct in her belief that his right was violated is protected concerted activity. *See, Interboro Contractors, Inc.,* 157 NLRB 1295 (1966); *NLRB v. City Disposal System*, 465 U.S. 822, 840 (1984); and *First Western Building Services*, 309 NLRB 591, 603 (1992). The reasonable assertion of contractual rights, even if asserted on behalf of one employee, is protected concerted activity. *Kingsbury Inc*, 355 NLRB 1195 (2010). This conclusion derives from the fact that when an employee makes an attempt to enforce a collective-bargaining agreement, she is acting in the interest of all employees covered by the contract. *Tillford Contractors*, 317 NLRB 68, 68-69 (1995). An employer violates both Sections 8(a)(1) and (3) when it disciplines an employee for engaging in the protected concerted activity of enforcing the provision of a collective bargaining agreement. *Tillford Contractors*, 317 NLRB 68, 69 (1995).

The ALJ correctly concluded that the Charging Party asserted her contractual rights numerous times between March and May 2014, thereby engaging in concerted activity. (ALJD 15:9-12, 21-22); See also, *Kingsbury Inc.*, 355 NLRB 1195 (2010**Error! Bookmark not defined.**). In this respect the ALJ explained that the Charging Party asserted three contractual grievances:[13] (1) that baristas' contractual duties do not include performing bakery duties, (2) baristas' duties do not include sacking groceries, [14] and (3) that employees are contractually entitled to a lunch break. (ALJD 15:20-47, 16).

[13] Respondent asserts that it is improper for the ALJ to use the word "grievance" when referring to an employee's contractual complaint. However, it provides no legal support for this claim.

[14] Respondent contends that because the Union did not file a grievance over the Charging Party sacking groceries, the Charging Party's interpretation that it was not her duty to bag is unsupported by the evidence. It should be noted that the uncontroverted evidence is that the Charging Party never got the opportunity to bag. Because she never actually performed another unit's work, there can be no violation to grieve.

The ALJ concludes that on May 9 when Respondent's store manager Pelo paged the Charging Party to sack groceries, the Charging Party asserted her right to a lunch break and asked whether she should be doing another unit's duties (sacking). (ALJD 16:7-14). Respondent's exceptions to this conclusion amount to an exercise in semantics. The ALJ properly dismissed Respondent's argument that the Charging Party failed to assert her right because she did not use the terms "contract" or "collective bargaining agreement" when asserting her right because the claim has no basis in Board law. *Id.* The ALJ stated that although she did not use exact terms she was obviously asserting rights protected under the Act. *Id.* She goes on to note that the Charging Party further explained her assertions to Pelo in two subsequent meetings. (ALJD 16:12-14).

In its exceptions, Respondent takes another grammatical run at Charging Party's contractual assertions. Respondent contends that the Charging Party did not assert her contractual rights because the way she spoke to the Charging Party was not in the proper form of an assertion. To support this contention, Respondent cites the dictionary definition of "assertion" and claims that because the Charging Party phrased her assertion in the form of a question; it could not be an assertion. This contention is absurd and divorced from the reality of how people interact. The Board does not hold an employee to the standards of a linguist in terms of how she asserts her rights. It is obvious that the Charging Party was in a subordinate position to Pelo. Phrasing her assertion as a question is a docile way of addressing an issue. Had the Charging Party simply asserted her rights forcefully and directly, Respondent would have surely seized upon it to cry insubordination. Asserting her rights, by asking a question that alerted Pelo to the contractual issues, supports Charging Party's contention that she was not trying to defy

Pelo; she was merely trying to reconcile the propriety of Pelo's order with her understanding of the contract.

Next, Respondent argues that the Charging Party was not asserting her contractual rights because there is no affirmative provision in the parties' contract that states a barista cannot bag groceries.[15] While this may be true, the argument disregards the existence of *the unit description and duties*, the very core of a collective-bargaining agreement. Charging Party's questions went to the very essence of the contract: bargaining unit work. To argue otherwise has no basis in the reality of the bargaining relationship and contract.

Respondent argues that the Charging Party did not engage in protected activity because she did not discuss the contractual provisions with other employees. First, she complained to steward Jackson. Second, to require discussion of contractual terms with co-workers before an employee can assert them would eviscerate the concepts set forth in *Interboro* and *City Disposal*. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *NLRB v. City Disposal System*, 465 U.S. 822, 840 (1984); and *First Western Building Services*, 309 NLRB 591, 603 (1992). Those cases don't require employee discussion prior to the assertion of the right because contractual terms are *inherently concerted*; the contract and its terms inure to all employees regardless of who attempts to police or enforce the terms of the contract. *Tillford Contractors*, 317 NLRB 68, 68-69 (1995).

Respondent further argues that the ALJ "claims" that the Charging Party did not refuse to sack. Respondent has failed to put forth a cogent argument supported by Board law to overrule the ALJ's credibility findings so it attempts to make a circular attack on her legal conclusions by refusing to accept her findings of fact. The ALJ clearly and repeatedly concludes that the Charging Party did not refuse to sack groceries. Thus, Respondent's argument that she was not protected because she was insubordinate and refused to sack groceries is based on a false

[15] With respect to the lunch, there is a provision in the contract that provides for a lunch break (Jt. Ex. 1 pg. 19)

premise and must fail. Charging Party never refused to sack because Pelo stopped her before she could comply with the order to sack. (ALJD 6:5-6).

Respondent argues that the Charging Party was given three orders to help sack before she attempted to sack groceries. Respondent's counsel conveniently substitutes his judgment and declares the behavior insubordinate. However, the ALJ clearly articulates that Board law distinguishes between true insubordination and behavior that is only disrespectful, rude, or defiant. (ALJD 19: 45-47, 20:1-10). She also discusses and analyzes the Charging Party's behavior under Board law concerning work stoppages and concludes that the Charging Party's actions were neither insubordinate nor a work-stoppage. (ALJD 20:1-10; 24:40-43; fn27). The Charging Party's protected activity cannot be *transformed* into misconduct simply because Pelo disliked her behavior, i.e. that she was asking about her rights. If that were the standard, then every time an employee asserted a contractual right that displeased management, they would be subject to discipline and the exception would swallow almost all the protections afforded by the Act. The record and the ALJD abundantly clear, the ALJ did not "ignore" the Charging Party's insubordinate behavior, rather she concluded based on the testimony that the Charging Party *did not engage* in insubordinate behavior.

Respondent cites to a Circuit court case from 1955 where the appeals court denied enforcement of a Board order in the context of *8(b)(1)* of the Act; for the proposition that the Charging Party lost protection of the Act for taking a late lunch break. First, the case does not provide valid precedent because it concerns a Circuit court's refusal to enforce a Board order and the Board does not follow an appeals court decision that is in conflict with Board law unless and until the Supreme Court requires it to do so. Second, even if the concept was applicable in some way to this matter, the Charging Party testified that she took a late lunch break because she was

helping customers at the Starbucks kiosk. (Tr. 48:11-15, 67:25, 106:18-20, 112:10-19, 140:11-12, 141:3, 215). Article 24 of the contract does not require employees to take lunch at exactly the middle of their shift. Moreover, Article 24 does provide that the "parties recognize that it may be necessary to alter the lunch period schedule due to the needs of the business." (Jt. Ex. 1 pg 19 Article 24). There is no contract violation and absolutely no Board precedent to support Respondent's assertion.

Finally, the ALJ determined that the Charging Party's assertions were reasonable under the contract. (ALJD 16:16-19). In making this determination she relied upon the contract, Charging Party's testimony, union representative Craine's testimony and employee Eastburn's testimony. (ALJD 16:16-19). While it appears that the Charging Party was likely correct with respect to her interpretation of the contract[16] that is not the proper standard under Board law; the proper standard is whether the Charging Party's contractual assertions were reasonable. There is ample record evidence that the Charging Party's assertions were reasonable. The uncontested evidence shows that all employees were entitled to a lunch break pursuant to the contract and state law. (Jt. Ex. 1: 19). Thus, her question about being entitled to a lunch break was unquestionably referring to a contractual right. The Charging Party's question with respect to whether she should be bagging was also reasonable; Craine testified that the "Clerks" contract states that clerk employees are exclusively supposed to perform the clerk duties which include sacking. (Tr. 186:6-10; Jt. Ex. 2: Art. 1). While there may be some allowance for a manager to direct employees to cross craft when it is necessary for the store to run smoothly, it does not make the Charging Party's question unreasonable. Moreover, the Charging Party testified that she had been told by the Union that her duties under the Meat contract did not include sacking

[16] The ALJ specifically states that she did not make a decision concerning whether Charging Party's interpretation is correct. (ALJD 3: Fn. 5).

and it is reasonable for her to rely on her Union representative's interpretation of the contract. (Tr. 121:23-25). Thus, the ALJ's conclusion that the Charging Party engaged in protected activity is legally proper and should be affirmed.

Turning to the Charging Party's actions on May 14, the ALJ determined that the Charging Party was engaged in protected activity by continuing to assert her contractual rights and by virtue of being involved in a grievance meeting. (ALJD 16:31-37). Contrary to Respondent's assertions about the ALJ's "newly minted law," the Board has long held that presenting and processing grievances is concerted activity protected by Sections 8(a)(1) and (3) of the Act. *Bowman Transportation, Inc*., 134 NLRB 1419 (1961); *Atlantic Steel*, 245 NLRB 814, 819 (1979); *Crown Center Petroleum*, 177 NLRB 322 (1969). The fact that a grievance meeting is protected is so well established that Respondent has to resort to attacking the ALJ's finding by asserting that the meeting on May 14 was not a grievance meeting. The meeting itself derives from the collective bargaining agreement; the protections afforded to employees in the course of a grievance meeting inure to every employee who may find themselves facing possible discipline. The ALJ properly characterized the meeting as a grievance meeting where the parties discussed their respective positions regarding discipline under the contract.

Moreover, it is well settled that there is no requirement that remarks about contractual provisions be uttered during a formal meeting, held pursuant to contract provisions, before the conditional immunity provided by the Act comes into play. *Interboro Contractors, Inc.* 157 NLRB 1295 (1996); and *Bunney Brothers Construction* Company, 139 NLRB 1516 (1962). Therefore, the Charging Party was engaged in protected activity on May 14 because she was continuing to assert her contractual rights and *participation in the meeting itself* constitutes protected activity because of its contractual genesis.

ii. The ALJ correctly determined that Respondent twice suspended and then terminated Charging Party for her protected activity

The ALJ correctly determined that the Charging Party was suspended on May 9 for questioning Respondent's store manager Pelo about the contract and asserting her contractual rights. (ALJD 19:19-24). The ALJ dismissed Respondent's argument that the Charging Party was sent home for insubordination. In support of her conclusion, the ALJ credits the Charging Party's testimony that she never refused to sack but simply protested performing another unit's duties and not getting to take her lunch break. As established above, the Charging Party's assertions derived from the contract and constitute protected activity. Hence, Respondent's decision to suspend the Charging Party for making those assertions violates the Act.

The ALJ determined that the Charging Party was suspended on May 14 and terminated on May 21 for her behavior at the May 14 meeting. (ALJD 9; 19:35; Tr. 163, Jt. Ex 4). As set forth in the preceding section, the Charging Party continued to assert her contractual rights at that meeting. The Charging Party also continued to defend herself against Pelo's accusations that she refused to sack groceries on May 9. When the Charging Party did not acquiesce to Pelo's version of events she suspended and terminated her. (ALJD 19:33-43). The ALJ's conclusion is firmly supported by the language in the Charging Party's Behavior Notice, Pelo's testimony, and the fact that there is no evidence of intervening misconduct. (Tr. 242:4-13; Jt. Ex. 4)

Accordingly, the ALJ correctly concluded that Respondent suspended and later terminated Charging Party for her protected activity on May 14.

iii. The ALJ applied the correct legal analysis to determine Respondent violated Sections 8(a)(1) and (3) of the Act

The ALJ employed the proper analysis to the Charging Party's activity and the actions Respondent took against her for her activity. There is no question that the Charging Party was

sent home for questioning Pelo about her contractual rights. Likewise, there is no question that the Charging Party was suspended again for her behavior in the May 14 meeting. Respondent's store manager Pelo admitted that at the beginning of the May 14 meeting she did not intend to terminate the Charging Party but changed her mind after the meeting. (242:4-13). Respondent failed to provide any evidence that Pelo considered anything other than the Charging Party's behavior in the May 14 meeting in making her decision to suspend the Charging Party a second time or her decision to terminate Charging Party. Because the record is clear that the Charging Party's protected concerted activity was the reason for both her suspensions and her termination, it follows that Respondent's actions are unlawful. However, while the Act protects an employee from repercussions when engaging in protected, concerted activity, the Board and Courts have recognized that the protection is not limitless. Employees are permitted "some leeway for impulsive behavior." *Tampa Tribune*, 351 NLRB 1324, 1324-25 (2007), *enf. denied Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009). It is well accepted that defiance and some profanity "must be tolerated during confrontations over contractual rights." *Id. at* 69; *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2nd Cir. 1987) (protection not lost because grievance presented in rude and disrespectful manner). An employee does not forfeit the protection of the Act unless his misconduct is "so violent" or "of such character as to render [the employee] unfit for further service." *Wolkerstorfer Co.*, 305 NLRB 592, fn. 2 (1991); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980). *See, also Kiewitt Power Constructors Co.*, 355 NLRB No. 150 (2010), and *St. Margaret Mercy Healthcare*, 350 NLRB 203, 204-205 (2007) enfd. 519 F.3d 373 (7 Cir. 2008). The Board will not find that rude or disrespectful behavior is sufficient to lose protection of the Act. *Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (conduct protected even though employee called his manager a "horse's ass"); *Severance Tool Industries*,

301 NLRB 1166, 1169 (1991) (protection not lost because employee raised his voice at respondent's president and called him a "son of a bitch").

Atlantic Steel Co., 245 NLRB 814 (1979), sets forth the factors to be considered in determining whether an employee's conduct loses the protection of the Act. They include: (1) the place of the discussion, (2) subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice. In concluding that the Charging Party did not lose the protection of the Act, the ALJ properly and methodically applied all the *Atlantic Steel* factors to the Charging Party's protected activities on May 9 and May 14. (ALJD 20-25).

Respondent contends that the ALJ should have applied a *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981, cert. denied 455 U.S. 989 (1982), analysis to determine whether Respondent violated the Act. Respondent is incorrect because, as discussed by the ALJ, there is no evidence of dual motive. (ALJD 21: fn28). There is absolutely no evidence on the record that the Charging Party was fired for anything other than her protected activity. The ALJ considered Respondent's argument and correctly determined that *Wright Line* is inapplicable because there is a direct causal connection between the Charging Party's protected activity and her suspensions and termination. *Id.* She goes on to explain that even if *Wright Line* were applicable, Respondent failed to show that the Charging Party would have been twice suspended or terminated absent her protected concerted activity. *Id.*

Additionally, Respondent argues that under *Burnup & Sims* Respondent did not violate the Act. In *Burnup & Sims* the employer terminated an employee who was engaged in union organizing for allegedly making a threat about bombing the plant. At trial, it was determined that the discharged employee never made the threat and the discharge was found unlawful.

NLRB. v. Burnup & Sims, Inc., 379 U.S. 21 (1964). Likewise, the other cases cited by Respondent to support its proposition are distinguishable from the facts in this matter because they involve an employer's mistaken belief that an employee engaged in bona fide misconduct in the course of otherwise protected activity. See, *AKAL*, 354 NLRB 122 (2009) (Employer terminated employees for neglect of duty, not actions in grievance meeting); *Marshall Engineered Products* Co., 351 NLRB 767 (2007) (employees fired for throwing rocks at cars during strike); *Pepsi –Cola*, 330 NLRB 474 (2000) (employee terminated for calling an unlawful strike in the course of protected activity).

Assuming *arguendo* that *Burnup & Sims* applies here, the ALJ found that the Charging Party did not engage in insubordination or a work stoppage when attempting to assert her contract rights. (ALJD 14-17; 20: fn.27; 21: fn28). "Over and again the Board had ruled that 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." *Id*. at., 379 U.S. 23-24 (1964). Respondent faults the ALJ for not considering whether Pelo suspended and terminated the Charging Party in good faith. What Respondent fails to grasp is that having a good faith belief that an employee engaged in misconduct in the course of engaging in protected activity is not a defense to violating the Act if the misconduct did not occur. *Id*. If Respondent's assertions were true then any time an employee engages in protected concerted activity, she would be at the peril of her supervisor's temperament and whether her word may cause personal offense. As stated by the Supreme Court, "a protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the s 8(a)(1) right that is controlling." *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23-24 (1964). The Board does not

require employees to act nicely when engaging in protected activity and has long recognized that "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

Respondent's store manager Pelo suspended the Charging Party twice and later fired her for her protected activity of asserting her contractual rights and actively participating in a grievance meeting. Pelo does not get a pass because she was genuinely affronted by how Charging Party engaged in her protected activity. This is precisely why the Board applies the *Atlantic Steel* analysis discussed above when an employee is directly punished for engaging in protected activity. Accordingly, the ALJ applied the proper Board precedent to determine that Respondent violated the Act by twice suspending and terminating Charging Party for her protected activity.

IV. CONCLUSION

The record evidence, legal analysis, and conclusion of law, fully support the the ALJ's decision in this case. Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board overrule each of the Exceptions filed by Respondent and affirm the ALJ's decision.

DATED AT Denver, Colorado, this 3rd day of December, 2015.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT KING SOOPER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

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INTRODUCTION

On October 22, 2015, Administrative Law Judge Amita Baman Tracy ("ALJ Tracy") issued a Decision and Recommended Order ("Decision") finding that King Soopers violated the Act by interrogating, suspending, and terminating Wendy Geaslin's employment. On November 19, 2015, King Soopers filed a Statement of Exceptions ("Exceptions") and Brief in Support of Exceptions ("Brief"), which argued the Decision must be reversed because ALJ Tracy made erroneous credibility findings, erred in applying the relevant law, and, in some cases, completely disregarded governing legal precedent.[1]

On December 3, 2015, the GC filed an Answer to King Soopers' Exceptions ("Answer"). Throughout her Answer, the GC fails to address King Soopers' arguments and the errors in ALJ Tracy's Decision. The GC simply summarizes ALJ Tracy's conclusions and reasoning, and then conclusorily states that her Decision should not be reversed. The GC's parroting of ALJ Tracy's holdings and conclusory statements do nothing to salvage the errors in ALJ Tracy's Decision or the need to reverse the Decision. ALJ Tracy's Decision must be reversed.

ARGUMENT

A. ALJ Tracy's Credibility Determinations Are Fatally Flawed.

The GC's Answer to King Soopers' objections relating to ALJ Tracy's credibility findings primarily consists of the GC's restatement of ALJ Tracy's findings and conclusory statements that Geaslin was a credible witness.

[1] Also on November 19, 2015, Counsel for the General Counsel ("GC") filed a Statement of Exceptions and Brief in Support, which urged the Board to reverse ALJ Tracy's decision not to award Geaslin search-for-work related expenses without regard for her interim earnings. As noted in King Soopers' Answer to the GC's Exception, the Board should reject the GC's Exception because the enhanced remedy sought by the GC is contradictory to well-settled Board law and such an award in this matter would deprive King Soopers of due process. If the Board grants King Soopers' Exceptions and reverses ALJ Tracy's finding that King Soopers terminated Geaslin in violation of the Act, then the GC's Exception is moot and need not be considered. The GC's Exception is also moot if the Board reverses ALJ Tracy's erroneous decision to grant the GC's belated motion to amend the Complaint to add its request for search-for-work related expenses regardless of Geaslin's interim earnings.

ALJ Tracy's credibility determinations are fatally flawed and must be overruled because the preponderance of the evidence demonstrates her resolutions are incorrect. *See S. Florida Hotel & Motel Ass'n*, 245 NLRB 561, 570 (1979). Where, as here, the Administrative Law Judge ignored relevant and directly contradictory evidence, considered facts not in evidence, and relied on her personal opinions, the credibility findings are clearly erroneous. *See, e.g.*, *In Re La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1126 n. 9 (2002) (overturning a judge's finding of fact as "clearly erroneous" and "fatally flawed").

The GC attempts to salvage ALJ Tracy's findings and conclusions by arguing they are based on the entire record, not just her citations to the evidence. Answer, p. 6 (citing 2 ALJD fn. 3). ALJ Tracy's assertion that she based her findings on the entire record, without providing any specific citation to record evidence, cannot save her credibility determinations from reversal. ALJ Tracy is required to make "true credibility" determinations, not just couch her findings in a vague and unchallengeable statement that her conclusions incorporate the evidence. *See In Re Double D. Const. Grp., Inc.*, 339 NLRB 303, 305 (2003) (finding the judge's credibility determinations to be in error because he failed to make "a true credibility determination").

The GC also cites to ALJ Tracy's reliance on Geaslin's affidavit to affirm her holding that Geaslin is a credible witness and to credit all of Geaslin's testimony.[2] Answer, p. 7. The GC argues that "the absence of a few minor details in the Charging Party's affidavit [does not amount to] a contradiction in testimony." *Id.* The contradictions between Geaslin's affidavit and her trial testimony are not an "absence of a few minor details." They are substantive and material inconsistencies. Geaslin's Board affidavit did not contain an allegation that she complained to Jackson in March 2014 about being unable to complete her work in Starbucks,

[2] The GC's repeated insistence that Geaslin's testimony and Board affidavit were consistent is disingenuous, entirely unsupported by the record, and false.

which is an essential allegation underlying the GC's interrogation claim. *See* Brief, pp. 5-7. Similarly, Geaslin's testimony and affidavit were contradictory relating to whether Geaslin mentioned her lunch while objecting to Pelo about sacking groceries on May 9, 2014. *Id.* ALJ Tracy and the GC relied on Geaslin's affidavit, in part, to find Geaslin engaged in protected concerted activity by asserting her right to a lunch break. Answer, p. 24 (citing 16 ALJS 7-14). However, the GC and ALJ Tracy completely ignore the direct contradiction in Geaslin's affidavit and trial testimony regarding whether she even mentioned her lunch on May 9, 2014. This substantial and material contradiction not only precludes a finding Geaslin was credible, but entirely undermines the finding that Geaslin was engaged in protected concerted activity.

The GC also urges the Board to uphold ALJ Tracy's conclusion that Geaslin was not aggressive during the May 14, 2014 meeting because King Soopers did not call security to escort Geaslin out of the store. Answer, p. 11. The GC's argument is a complete non-sequitur. There was no need for King Soopers to call security on May 14, 2014 because Craine calmed Geaslin down and by the end of the conversation, Geaslin was "subdued." *See* Brief, p. 11. The GC only parrots ALJ Tracy's finding, but provides no argument as to why ALJ Tracy's speculation regarding King Soopers' appropriate response to Geaslin's behavior should be upheld. Craine's testimony also does not support ALJ Tracy's finding that Geaslin was not aggressive during the meeting, as the GC alleges. Craine specifically testified Geaslin <u>was</u> aggressive during the April 14, 2014 meeting.[3] Tr. 181:16-25.

Finally, the GC disregards Geaslin's inappropriate face-making at trial by claiming it was "Respondent's self-serving characterization," which ALJ Tracy rejected. Answer, p. 12. It is entirely unclear what ALJ Tracy's impression of Geaslin's face making was, however, because ALJ Tracy did not mention Geaslin's conduct at trial in her Decision, let alone consider it, when

[3] Craine also testified he could not see the faces Geaslin was making toward Pelo. Tr. 182:13-15.

finding Geaslin credible. Because ALJ Tracy turned a blind-eye to Geaslin's refusal to take responsibility for her actions, inappropriate behavior during cross examination, and blatant lies in finding Geaslin credible, ALJ Tracy's credibility findings are fatally flawed and require reversal.

B. ALJ Tracy Erred In Permitting The GC To Amend The Complaint.

The GC, like ALJ Tracy does not analyze, or even consider, the elements required for amendment. Answer, pp. 13-17. Rather than actually address the elements for amendment, the GC insists amending the Complaint was appropriate because King Soopers "is unable to articulate any prejudice it sustained because of the amendment." Answer, p. 14. Of course, the degree of prejudice caused by amendment is not the standard for amendment. *See Stagehands Referral Serv., LLC*, 347 NLRB 1167, 1171 (2006) (listing three elements for amendment). Nonetheless, King Soopers was severely prejudiced by being unable to cross examine Geaslin with knowledge it was defending against an interrogation claim.

With regard to the interrogation claim amendment, King Soopers cross-examined Geaslin and Craine with the understanding that the evidence relating to the March 2014 incident was only introduced to show Pelo's motivation. *See* Tr. 187:13-16 (questioning Craine regarding Pelo's alleged "resentment" toward Geaslin because of the March 2014 incident). Indeed, the GC specifically claimed motive was the purpose of the information. Tr. 22:6-14; 41:22-25; 41:1-9. Thus, not only did King Soopers not have notice of this claim, but the GC actively worked to keep King Soopers from defending against it until after Geaslin and Craine testified and Geaslin left the proceedings.

Ultimately, ALJ Tracy failed to analyze the elements for amendment. None of the elements are satisfied in this case, and ALJ Tracy errored when granting the GC's two motions to amend the Complaint. *See Oncor Elec. Delivery Co.*, 2014 WL 5682508 (N.L.R.B. Div. of Judges) (Nov. 4, 2014) ("A review of the cases indicates that the motion [to amend the

complaint] should not be granted if any of the three factors are decided against the General Counsel.").[4]

The GC also argues that because of the "importance of vindicating Charging Party's Section 7 rights," the two amendments to the Complaint should stand. Answer, pp. 16-17. The GC is, therefore, asking the Board to elevate Geaslin's rights above King Soopers' and uphold the amendments even though the requirements for amendment are not satisfied here. The GC's imperious approach is a fundamental denial of King Soopers' due process rights under the Act. It is not enough that Geaslin has "important" rights. For the GC's amendments to be upheld, they must satisfy the Board's established precedent. Because none of the required elements for amendment are satisfied here, ALJ Tracy's Decision must be reversed.

C. ALJ Tracy Erred By Revoking King Soopers' Subpoena.

The GC's Answer regarding ALJ Tracy's revocation of King Soopers' subpoena blatantly misrepresents King Soopers' argument. The GC Answered, "Respondent is unable to express the relevance of the requested documents to the issues at hearing." Answer, p. 17. Moreover, King Soopers does not "conflate" the issue of whether search-for-work related expenses are *properly* awardable with the *amount* of search-for-work related expenses to award. That distinction is precisely why ALJ Tracy's Decision was in error. *See Starcon International v. NLRB*, 450 F. 3d 276, 279 (7th Cir. 2006) (Posner, J.) ("There is a difference between entitlement to relief and the amount of relief to which one is entitled."). As described in the Brief, the subpoenaed information and documents were relevant to determine whether King Soopers or Geaslin was responsible for the alleged damage to Geaslin. If Geaslin was incapable

[4] The GC attacks King Soopers' citation to *Redd-I*, 290 NLRB 1115 (1988). King Soopers' citation to *Redd-I*, however, has nothing to do with the Section 10(b) statute of limitations as the GC claims. Answer, p. 14. Instead, *Redd-I* was cited for its holding that only a complaint, not a charge, provides notice to respondents of the need to defend against a claim. *See* Brief, p. 14.

or unwilling to search-for-work, then King Soopers cannot be liable for any damage she may have suffered. Because King Soopers was unable to discover this information at trial, ALJ Tracy's Decision must be reversed.

D. ALJ Tracy Erred By Not Deferring To The Grievance And Arbitration Process.

The GC defends ALJ Tracy's failure to defer this matter to King Soopers and the Union's grievance and arbitration process, by parroting ALJ Tracy's Decision, but ignoring the errors in ALJ Tracy's analysis. Answer, pp. 19-20. It is immaterial that Geaslin cannot compel the Union to arbitrate her grievance.[5] By agreeing to be a Union member, Geaslin gave the Union the authority to resolve her grievances and waive her rights under the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693 (1983) (The Court has explicitly recognized that, because the Union represents collective interests, it may waive certain rights under the Act of its members). The Union was in the best position to analyze the merits of Geaslin's allegations under the CBA and Act. Geaslin and the GC's unhappiness with the Union's resolution of the grievance does not warrant their disregard of the Board's strong policy favoring deferral and the fact that deferral is appropriate in this matter under *Alpha Beta Co.*, 273 NLB 1546 (1985). If the ALJ Tracy and the GC's position were adopted, then there would be a per se rule forbidding deferral when an employee's grievance is resolved against her. Such a rule is unsupported by Board law.

As the Board recently stated, "[a]lthough the Board has been reluctant to defer under circumstances that raise concerns about the fairness or availability of the grievance procedure, there is no per se rule regarding deferral of such cases." *Babcock & Wilcox, Nuclear Operations*

[5] The GC also argues Geaslin's rights must be elevated above King Soopers' and the Board's failure to do so would be "palpably wrong." Answer, p. 20. It is entirely impermissible to disregard the Board's deferral policy simply because the GC thinks it would be "palpably wrong" to defer to the Union's withdrawal of the grievance "when Respondent's actions violate the Act." The Board cannot elevate Geaslin's rights above King Soopers'. The GC's invitation for the Board to do so must be rejected.

Grp., Inc., 363 NLRB No. 50 slip op. at *3 (Dec. 3, 2015). In that case, the Board rejected the General Counsel's objection to deferral because of the parties' long-term bargaining relationship, which encompassed a wide range of disputes. *Id.* Here, it is undisputed King Soopers and the Union have a long and mature bargaining relationship and that Geaslin's grievance was resolved fairly. Indeed, Geaslin was accorded full due process in the resolution of her grievance. The GC's disagreement with the Union's resolution of the grievance does not make it unfair. ALJ Tracy's failure to defer to the Union's withdrawal of Geaslin's grievance must be reversed.

E. ALJ Tracy Erred In Concluding King Soopers Unlawfully Interrogated Geaslin.

Geaslin did not engage in concerted activity in March 2014. The GC claims Geaslin complained to Jackson and, therefore, automatically engaged in concerted activity because an employee's complaint to a union is protected under the Act. Answer, pp. 20-21. The GC also claims, *without citation*, that "whether the Charging Party's complaints were made to an employee or a steward would not change the protected nature of the questions." Answer, p. 21. The GC cannot have it both ways. To engage in concerted activity under the Act, the employee must know she is complaining to the union. Because Geaslin did not know she was talking to a Union representative in March 2014, her complaints were not protected under the Act. Tr. 74:16-24. Moreover, Geaslin did not seek group action and her complaints amounted to nothing more than unprotected, individual gripes. *See e.g., Pelton Casteel, Inc. v. N.L.R.B.*, 627 F.2d 23 (7th Cir. 1980) (employee's general complaints about job rates and overtime constituted unprotected personal griping rather than concerted activity).

King Soopers also did not unlawfully interrogate Geaslin in March 2014 and the GC's assertion that Pelo's alleged conversation with Geaslin in March 2014 amounted to an unlawful interrogation is unavailing. The GC argues that ALJ Tracy's Decision should be affirmed because ALJ Tracy "clearly articulates her reasoning for finding this line of questioning

coercive." Answer, pp. 22. The GC, however, fails to address why it was appropriate for ALJ Tracy to find Pelo interrogated Geaslin in March 2014. Moreover, contrary to the GC's assertion that King Soopers "simply substitutes its own self-serving judgment to declare Pelo's questions and accusations to be lawful," King Soopers' analysis in the Brief is based on established Board precedent considering this issue. *See* Brief, pp. 27-28. As described in the Brief, accepting all of Geaslin's testimony as true, Pelo's purported statements were no more than "[i]solated, innocuous incidents of interrogation," which lack any "indicia of coercion." *See Groendyke Transp., Inc. v. N.L.R.B.*, 530 F.2d 137, 144 (10th Cir. 1976). ALJ Tracy's finding that King Soopers interrogated Geaslin in March 2014 is unsupported in the record and must be reversed.

F. ALJ Tracy Erred In Concluding King Soopers Discriminated Against Geaslin.

i. Geaslin did not engage in protected concerted activity.

The GC objects to King Soopers' distinction between the assertion of a contract right and a question about the contract when determining whether an employee is engaged in concerted activity under the *Interboro* doctrine. Answer, p. 24. The GC's argument highlights the slippery slope associated with extending the *Interboro* doctrine into the realm of questions and not requiring employees to actually assert a contract right. The *Interboro* doctrine case law clearly requires an employee to *assert* a contract right with reasonable clarity to the person to whom it is communicated and "in fact refer to a reasonably perceived violation of the collective-bargaining agreement." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 840 (1984). To hold that an employee can satisfy this burden by simply asking about her job duties under a CBA would undermine the Board's precedent and impermissibly broaden the *Interboro* doctrine. Moreover, as a matter of fact, there can be no "reasonably perceived violation of the [CBA]" when Geaslin

only questioned the scope of her duties. The GC's attempt to diminish the distinction between an assertion and a question must be rejected.[6]

The GC also restates ALJ Tracy's conclusion that Geaslin did not refuse to sack and does not address King Soopers' argument as to why this conclusion was wrong. Answer, pp. 25-26. The undisputed fact is that for multiple minutes Geaslin argued with Pelo and failed to follow her direct and repeated requests that Geaslin sack groceries. *See* Brief, pp. 30-32 (describing Geaslin's tacit refusal to sack groceries). It is not at all relevant that Geaslin attempted to sack following Pelo's three separate instructions that she do so and at the very end of their discussion. Thus, Geaslin's choice to engage in self-help rather than "work now, grieve later," caused her to violate the CBA and lose the protection of the Act. Ultimately, the GC's Answer completely ignores all of the direct and substantive evidence demonstrating that Geaslin knew she was required to follow Pelo's instruction and sack groceries. *See* Brief, pp. 38-40 (describing reasons Geaslin could not have had an "honest and reasonable belief" she was asserting a contract right).[7]

Like ALJ Tracy, the GC argues Geaslin's conduct during the May 14, 2014 meeting was also protected concerted activity because Geaslin continued to assert her contractual rights. Answer, p. 28. First, as described in the Brief, Geaslin did not "*continue* to assert her contractual rights" on May 14, 2014 because Geaslin and Pelo did not discuss whether Geaslin was required to sack groceries during the May 14, 2014 meeting. *See* Brief, pp. 40-43. Further, there was no

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[6] The GC also relies on Geaslin's statement at trial that she asserted her right to a lunch break to support a conclusion that she engaged in protected concerted activity. Answer, pp. 24 & 25, fn. 15. As noted above on pages 3-4, Geaslin's Board affidavit directly contradicts Geaslin's testimony on this point.

[7] The GC states Geaslin "had been told by the Union that her duties under the Meat contract did not include sacking groceries and it is reasonable for her to rely on her Union representative's interpretation of the contract." Answer, pp. 27-28 (citing Tr. 121:23-25). The GC severely overstates Geaslin's testimony on this point. *See* Tr. 121:23-25 ("He told me that I should have done what she said first, and then grieve, because, yes, we're under different contracts and normally we do not cross over."). In any event, by relying on Craine's alleged statement to Geaslin, the GC utterly ignores Union Steward Jackson's specific admonition to Geaslin in March 2014 that helping other departments does not violate the CBA and, regardless, Geaslin is required to follow her supervisor's directives. *See* Brief, pp. 38-39.

grievance pending and it is undisputed that the May 14, 2014 was not used to "present and process" a grievance. Finally, the May 14, 2014 meeting was not a grievance meeting. *See* Brief, pp. 43-44. The meeting did not derive from the CBA, discipline was not discussed, and there was no grievance pending. Thus, Geaslin did not engage in protected concerted conduct on May 9 and 14, 2014 and ALJ Tracy's Decision must be reversed.

ii. Geaslin was not terminated because of her alleged protected concerted activity.

In the Answer, the GC argues *Wright Line,* 251 N.L.R.B. 1083 (1980) is inapplicable because this case does not involve a dual motive. Answer, p. 31. ALJ Tracy, however, did not clearly find there was no dual motive here. *See* Brief, pp. 44-45 (noting that ALJ Tracy's use of the phrase "inextricably intertwined" suggests dual motive). The GC utterly fails to address the substance of a *Wright Line* analysis in this case. Answer, p. 31. The GC did not meet her burden to prove a prima facie case of discrimination under *Wright Line*. Brief, pp. 45-47. Geaslin did not engage in protected concerted activity on May 9 or 14, 2014, such activity was not a substantial motivating reason for Geaslin's termination, and there is no evidence whatsoever of Union animus in this case. *Id.* Moreover, it is undisputed King Soopers would have terminated Geaslin in the absence of the alleged protected concerted activity and has terminated other employees for such behavior in the past. *Id.* Indeed, Geaslin has terminated employees in the past for failing to follow work orders. Tr. 129:24-25; 130:1-3.

The GC also attempts to distinguish *Burnup & Sims*, 379 U.S. 21 (1964) on the facts of the case. Answer, pp. 32-33. The GC's argument is unavailing. ALJ Tracy conducted no analysis under *Burnup & Sims* and, on that basis alone, ALJ Tracy's Decision must be reversed. Moreover, it is undisputed King Soopers had an honest belief Geaslin engaged in misconduct, and the GC failed to meet her burden to show Geaslin did not engage in misconduct on May 9 and 14, 2014. *See* Brief, pp. 47-50.

Respectfully submitted this 17th day of December, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2015, a true and correct copy of the foregoing **RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS** electronically filed addressed to the following:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN

NOTICE AND INVITATION TO FILE BRIEFS

The following issue has been raised in this case:[1] At compliance, the Board has long treated a discriminatee's reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings subtracted from gross backpay. See, e.g., English Mica Co., 101 NLRB 1061, 1062 (1952); F. W. Woolworth Co., 90 NLRB 289, 293 fn. 8 (1950); Crossett Lumber Co., 8 NLRB 440, 497-498 (1938). The General Counsel asks the Board to change this practice and award such expenses regardless of whether the discriminatee received interim earnings. He contends that (a) where interim earnings are nonexistent or less than these expenses, the failure to award these expenses means the discriminatee will receive less than make-whole relief, (b) the Board's traditional treatment of these expenses is inequitable and contrary to general Board remedial principles, and (c) these expenses are awarded to employees under statutes other than the National Labor Relations Act. The General Counsel also requests that these expenses be calculated separately from taxable net backpay, with interest.

The parties and interested *amici* are invited to address the following questions:

1. Should the Board adopt the change requested by the General Counsel?
2. What considerations warrant retaining the Board's traditional treatment of search-for-

[1] For the purposes of this notice and invitation to file briefs, we assume, without deciding at this time, that a backpay remedy is warranted in this case.

work and interim employment expenses?

3. What considerations warrant making the requested change?

Supplemental briefs by the parties not exceeding 25 pages in length and briefs by *amici* not exceeding 15 pages shall be filed with the Board in Washington, D.C., on or before March 18, 2016. The parties may file responsive briefs on or before April 1, 2016, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "E-File Documents." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at https://www.nlrb.gov/case/27-CA-129598 under the heading "Service Documents." If assistance is needed in E-Filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or the undersigned at 202-273-3737.

Dated, Washington, D.C., February 19, 2016.

By direction of the Board:

Gary Shinners
Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC., Employer

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

RESPONDENT KING SOOPERS' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS

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INTRODUCTION

The Board requested supplemental briefing on the General Counsel's attempt to recover search-for-work related expenses without regard to interim earnings. The GC's request represents a gross expansion of the Act's remedies to include general compensatory and punitive damages. Only Congress, not the Board, has jurisdiction to expand the Act's remedies. Further, because the Act does not provide for compensatory damages like the current version of Title VII or other EEO or DOL statutes, those statutes cannot justify the Counsel for the General Counsel's ("CGC") requested expansion of the Act's remedies. If Congress intended the Act to provide discharged employees the relief the CGC now requests, then it would have included specific language in the Act contemplating such relief.

Further, this is exactly the wrong case to expand the Act's remedies. Despite the CGC's attempt to prejudice ALJ Tracy by claiming King Soopers "wreaked havoc" on Geaslin's life, King Soopers was prohibited from discovering the veracity of that claim and mitigating the damage the CGC's statement had on ALJ Tracy's ability to be unbiased. Moreover, King Soopers was prohibited from discovering the merits of an award of search-for-work related expenses to Geaslin.

The CGC's requested expansion of the Act's remedies also provides discriminatees a windfall and is punitive to the Respondent; neither of which is afforded by the Act. A discharged employee's search-for-work and other work-related expenses are directly related to his or her mitigation efforts. Extricating an employee's search-for-work efforts from his or her search-for-work expenses would eliminate employees' incentive to seek legitimate and realistic employment opportunities. Moreover, it would be subject to widespread abuse and would be nearly impossible to police. Ultimately, the CGC has provided absolutely no compelling reason

to depart from this eight decades-old law. The Board must retain its traditional treatment of search-for-work expenses absent a change in the Act.

FACTUAL AND PROCEDURAL HISTORY[1]

A. General Background.

This case involves 8(a)(1) and (3) charges filed against King Soopers, Inc. ("King Soopers," "Employer," or "Respondent") by a former employee, Wendy Geaslin ("Geaslin" or "Charging Party"). Geaslin was employed by King Soopers as a Coffee Clerk at the Starbucks located inside King Soopers' Store No. 1 in Denver, Colorado. During the course of her employment at King Soopers, Geaslin was represented by the United Food and Commercial Workers International Union, Local 7 ("Union").

On May 9, 2014, Geaslin was involved in an altercation with Store Manager, Theresa Pelo that, ultimately, led to her being suspended pending an investigation. On May 14, 2014, Geaslin returned to King Soopers with her Union Representative, Danny Craine, to meet with Pelo. During that meeting, Geaslin was again agitated, disrespectful, and argumentative with Pelo and, at the conclusion of that meeting, Geaslin was suspended pending investigation a second time. On May 21, 2014, Geaslin was terminated because of her insubordinate, inappropriate, and disrespectful behavior on May 9 and 14, 2014.

On May 29, 2014, Geaslin filed an Unfair Labor Practice Charge ("Charge") and on August 18, 2014, Geaslin filed an Amended Charge ("Amended Charge"). On October 31, 2014, the Region issued a Complaint and Notice of Hearing. In the Complaint, the CGC alleged King Soopers violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act") by suspending Geaslin on May 9 and 14, 2014, and terminating her employment on May 21, 2014.

[1] The factual history is more fully discussed in King Soopers' September 9, 2015 Post-Hearing Brief, November 19, 2015 Brief in Support of Exceptions, and December 17, 2015 Reply in Support of Exceptions. A brief statement of the factual and procedural history is provided herein for context.

The CGC did not request an award of search-for-work related expenses without regard for interim earnings in the Complaint.

This matter was originally set for trial on January 21, 2015. On the eve of trial, the CGC sought and was granted a continuance because Geaslin was allegedly hospitalized. CGC Ex. 1(q). Neither the reason for Geaslin's hospitalization nor the duration of her stay have ever been disclosed. The CGC did not amend the Complaint following the continuance to request an award of search-for-work related expenses without regard for interim earnings.

This matter was subsequently rescheduled for trial and was heard before Administrative Law Judge Amita Baman Tracy ("ALJ Tracy") on August 11-12, 2015 at the Regional Office's Hearing Room, Byron Rogers United States Courthouse, 1929 Stout Street, Denver, CO 80294.

B. The GC's Position On Expanding The Act's Remedies.

On March 11, 2011, Acting General Counsel Solomon first announced the shift in the CGC's approach to calculating search-for-work and interim work-related expenses. *See* March 11, 2011 Memorandum GC 11-08, pp. 2-3. Acting General Counsel Solomon declared that "effective with the issuance of this memorandum, search-for-work and work-related expenses will be calculated separately from backpay and will be charged to Respondent regardless of whether the discriminatee received interim earnings during the period." *Id.* at p. 3. Acting General Counsel Solomon's 2011 memorandum single-handedly attempted to revise the Act, as well as decades-old Board law regarding the scope of remedies available under the Act.[2]

[2] Multiple courts have held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act. *See e.g., SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 74 (D.C. Cir. 2015); *Hooks v. Remington Lodging & Hospitality, LLC,* 8 F. Supp. 3d 1178, 1187–89 (D. Alaska 2014); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 2013 WL 4094344 at *2 (W.D. Wash. Aug. 13, 2013). Like the underlying actions by Acting General Counsel Solomon in those cases, Acting General Counsel's unilateral attempt to expand the Act's remedies in Memorandum GC 11-08 was unauthorized and cannot support the Board's expansion of the Act's remedies here.

On January 30, 2015, General Counsel Griffin issued a second memorandum intended as a "[c]larification of GC 11-08." *See* January 30, 2015 Memorandum GC 15-01. In General Counsel Griffin's memorandum, he recognized that the previous "memo failed to ask Regions to plead a new remedy, but instead, merely directed them to ensure that search-for-work and work-related expenses be calculated separately from backpay and charged to a respondent regardless of whether the discriminatee received interim earnings during the period." *Id.* at p. 1. In an effort to "help effectuate a change in the current Board law as contemplated in GC 11-08," General Counsel Griffin provided "proposed language for briefing." *Id.* at pp. 1-2. Regional Director Griffin's proposed language relies heavily on Acting General Counsel Solomon's reasoning in the prior memorandum; both define search-for-work expenses broadly and both analogize to damages available under Equal Employment Opportunity Commission ("EEOC") and Department of Labor ("DOL") regulations. *Id.* at pp. 3-5.

C. The CGC's Request For Search-For-Work Expenses In This Matter.

On August 6, 2015, two business days before the trial was scheduled to commence, CGC filed a Notice of Intent to Amend the Complaint. Ex. 1(ee). Therein, the CGC stated that she will move to amend the Complaint to add the following language:

> As part of the remedy for the unfair labor practices alleged above in paragraphs 5 and 6 the General Counsel seeks an order requiring <u>that the Respondent reimburse the discriminatee for all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses,</u> or at all, during any given quarter, or during the overall backpay period.

Ex. 1(ee) (emphasis added).

Following receipt of the CGC's Notice of Intent to Amend the Complaint, King Soopers immediately issued a subpoena to obtain information related to the new allegations. Ex. 1(ii). In the subpoena, King Soopers requested documents concerning Geaslin's fitness for employment

and attempts to find employment since being terminated by King Soopers, as well as the expenses Geaslin incurred as a result of such job search efforts. *Id.* On August 10, 2015, the CGC filed a Petition to Revoke the Subpoena. Ex. 1(hh). Therein, the CGC argued an "enhanced remedy is appropriate in response to unfair labor practices, such as the ones alleged in the Complaint, where the Respondent's actions have *wreaked havoc* on an employee's livelihood." *Id.* at pp. 2-3 (emphasis added). The CGC went on to state that "[t]he proper issue at this stage in the proceedings is whether it is proper, as a matter of law, for the Administrative Law Judge to order the enhanced remedy requested by the General Counsel for the alleged unfair labor practices." *Id.* at p. 3.

At trial, the only explanation provided by CGC for the late amendment is that it was an "oversight" and "wasn't pled originally." Tr. 9:23-25; 10:1-6. Other than her negligence, the CGC never offered a justifiable excuse for her delay and did not deny that she intended to seek this enhanced remedy since the filing of the Complaint, eight months prior.

Also at trial, ALJ Tracy granted the CGC's Petition to Revoke, holding that the requested items relate to Geaslin's incurred expenses and her efforts to find work. King Soopers did not receive any of the requested information and was prohibited from asking Geaslin about her efforts to obtain employment, as well as any search-for-work expenses she may have incurred following the termination of her employment at King Soopers.[3]

D. ALJ Tracy's Decision And The CGC's Exceptions.

On October 22, 2015, ALJ Tracy issued a Decision and Recommended Order ("Decision"), which found King Soopers violated Sections 8(a)(1) and (3) of the Act by

[3] At the close of the CGC's case and after Geaslin left the trial venue, the CGC made an oral motion to amend the Complaint to add a claim that Geaslin was unlawfully interrogated in March 2014. ALJ Tracy granted the oral amendment at the hearing and affirmed her conclusion in her Decision. The CGC did not offer any excuse for her delay in seeking to add the interrogation claim.

interrogating Geaslin in March 2014, suspending Geaslin on May 9 and 14, 2014, and terminating Geaslin' s employment on May 21, 2014. 26 ALJD 8-12. Among other things, ALJ Tracy also affirmed her decision to grant the CGC's Motion to Amend the Complaint to add a request for search-for-work related expenses. 10 ALJD 33-37; 11 ALJD 1-21. Despite permitting this addition to the Complaint, ALJ Tracy denied the CGC's request for an enhanced remedy award, stating "the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order." 11 ALJD 31-32.

On November 19, 2015, the CGC filed a Limited Exception to the Administrative Law Judge's Decision and Recommended Order ("Exception") and a Brief in Support of Limited Exceptions to the Administrative Law Judge's Decision and Recommended Order ("Brief"). The CGC's only exception challenged ALJ Tracy's decision not to award search-for-work related expenses regardless of whether Geaslin had interim earnings in excess of those expenses. CGC's Exception, para. 1. The CGC restated verbatim her argument and citations from her Post-Hearing Brief, which was copied and pasted from General Counsel Griffin's January 30, 2015 proposed language regarding search-for-work related expenses. *See* Memorandum GC 15-01. On December 3, 2015, King Soopers filed an Answer in Opposition to the General Counsel's Limited Exceptions. The CGC did not file a reply brief.

E. The Board's Request For Supplemental And Amici Briefing.

On February 19, 2016, the Board issued a Notice and Invitation to File Briefs ("Notice") regarding the CGC's request that the Board modify long-standing precedent regarding the award of search-for-work and interim employment expenses. The Board requested that the parties and interested amici brief the following three questions, which King Soopers analyzes below:[4]

[4] King Soopers does not agree to the statement of the issues to be addressed. Such a process either should be left to Congressional hearings or legitimate statutorily approve rulemaking procedures.

1. Should the Board adopt the change requested by the General Counsel?

2. What considerations warrant retaining the Board's traditional treatment of search-for-work and interim employment expenses?

3. What considerations warrant making the requested changes?

ARGUMENT

A. Whether The Board Should Adopt The Change Requested By The General Counsel.

The CGC's request to expand the Act and extend the Board's remedies to include search-for-work and work-related expenses without regard for interim earnings should not be adopted. The CGC's requested change would unlawfully expand the scope of the Act. Only Congress, not the Board, has jurisdiction to amend the Act. The CGC's arguments, including her analogy to EEOC and DOL regulations, also do not support the CGC's proposed change. Not only is the CGC's requested relief improper, but expansion of the Act's remedies in this case is especially inappropriate and would result in the denial of King Soopers' right to due process.

i. The CGC's request for an award of search-for-work and work-related expenses regardless of interim earnings would unlawfully expand the scope of the Act.

The CGC's request for an award of search-for-work and work-related expenses without regard for interim earnings requires the Board to unlawfully expand the scope of the Act's remedies. With regard to remedies, the Act states:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . .

29 U.S.C. § 160(c) (underlining added, italics in original) ("Section 10(c)").

The Act does not refer to *damages* of any kind, including compensatory, consequential, or punitive damages; nor does the Act mention attorney fees, costs, or front pay. Thus, Congress did not intend for those types of damages to be awarded. Instead, according to the plain language of the Act, reinstatement and back pay are the only available remedies. *See e.g., Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795, 804 (D.C. Cir. 1997) (holding that the Board may not extend the Act's remedies to include attorney fees); *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192, 196 (6th Cir. 1978) (noting that neither punitive damages nor compensatory damages are allowed under the Act); *Int'l Union of Operating Engineers, Local 513*, 145 NLRB 554, 563 (1963) ("The Board's power to award affirmative relief under Section 10(c) is merely incidental to the primary purpose of the Act to prevent unfair labor practices, and is certainly not intended to award full compensatory damages for injuries caused by wrongful conduct."); *Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 645 (1958) (compensatory and punitive damages not available under the Act).

Search-for-work and other work-related expenses are compensatory damages. *See e.g., Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *2 (D. Conn. 2007) (defining compensatory damages as pecuniary losses, including moving expenses and job search expenses, among other things); BLACK'S LAW DICTIONARY 445 (9th ed. 2009) (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered."). As Administrative Law Judge Kenneth Chu noted when considering the General Counsel's request for an award of search-for-work and other work-related expenses without regard to interim earnings in another matter,

> Compensatory damages consist of a wide variety of relief including pecuniary and nonpecuniary damages. Pecuniary damages are intended compensation for out-of-pocket expenses incurred as a result of the employer's unlawful action and may

> include job-hunting, stationary and postage, telephone expenses, resume services, costs of transportation interviewing for jobs, and other job search fees.

Long Island Ass'n for AIDS Care, 2015 WL 5047526 at *2 n. 9 (N.L.R.B. Div. of Judges) (Aug. 26, 2015). Even the EEOC defines compensatory damages to include search-for-work and other work-related expenses.[5] *See* Office of Legal Counsel, EEOC, Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, Decision No. 915.002 (July 14, 1992), *available at* 1992 WL 189089 at *4 ("Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm)" and defining pecuniary losses to include "moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct."). Accordingly, the CGC's request that the Board extend the Act's remedies to include search-for-work and other work-related expenses without regard for interim earnings is essentially a request for compensatory damages and is not supported by the Act. The CGC's request may only be accomplished by a Congressional amendment to the Act. *See Gourmet Foods*, 270 NLRB 578, 588 (1984) (citing *H. K. Porter Co. v. N. L. R. B.*, 397 U.S. 99 (1970)).

Courts have previously rejected the Board's attempts to expand the Act's remedies to those not specifically identified in Section 10(c). In *Unbelievable, Inc. v. N.L.R.B.*, 118 F.3d 795 (D.C. Cir. 1997), the District of Columbia Circuit rejected the Board's expansion of the Act regarding "attorney fee shifting," stating:

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[5] As described below, the GC's reliance on EEOC and DOL regulations in support of the requested expansion of the Act's remedies is misplaced. Even applying the GC's analogy to EEOC regulations, however, the Board should not extend the remedies under the Act to include search-for-work expenses regardless of interim earnings because there is not statutory authority to do so.

> According to the Board, however, because the NLRA 'refrains from particularizing the scope of the Board's remedial powers,' and because it 'contemplates the exercise of broad discretion by the Board in fashioning a range of remedies suitable to remedy various unfair labor practices,' the award of attorney's fees is not inconsistent with the statute. 318 N.L.R.B. at 863. The absence of a prohibition is not, however, equivalent to an authorization, much less 'clear support' therefor.

Unbelievable, 118 F.3d at 804. Similarly, here, the absence of a prohibition in the Act on awards of search-for-work and other work-related expenses without regard for interim earnings is not equivalent to a Congressional authorization for such an award. If Congress intended the Act to provide discriminatees the relief the CGC now requests, then it would have included language in Section 10(c) regarding such relief. Because Section 10(c) does not contemplate an award of *damages*, the CGC's request for damages must be denied.

ii. The CGC's arguments for expanding the Act's remedies are unavailing.

In support of her argument, the CGC claims an award of search-for-work and other work-related expenses without regard for interim earnings will bring the remedies available under the Act in line with the remedies available under EEOC and DOL regulations. Exception, p. 5. The CGC also argues that an "[a]ward of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions." Exception Brief, p. 5, n. 7 (citing *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953)). The CGC's arguments are unavailing.

The CGC's citation to the remedies available under EEOC regulations is disingenuous. The CGC relies on the remedies available under EEOC regulations *following* the 1991 amendments to Title VII. Exception Brief, p. 5 (citing Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, Decision No. 915.002 (July 14, 1992), available at 1992 WL 189089) (emphasis added). It has long been recognized that the *original* remedy provisions of the Civil Rights Act of 1964 were modeled on

the backpay provisions of the Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) (Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act."); *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192, 196 (6th Cir. 1978) ("The provisions of § 2000e-5(g) of Title VII are modeled closely upon the National Labor Relations Act, 29 U.S.C. §§ 160(b) and 160(c)."); *see also* 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey) (noting that Congress was using the Act as a model for the remedy provisions of the Civil Rights Act of 1964).

Under both the Civil Rights Act of 1964 and the NLRA, compensatory damages, including search-for-work and other work-related expenses were not available. *See Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-53 (10th Cir. 1976); *see also Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063, 1078 (D. Me. 1977) (collecting cases and stating that "[w]hile there is a split of authority on the issue, the clear majority of federal courts, upon an analysis of the language and statutory history of Title VII, have concluded that neither compensatory nor punitive damages are available in a Title VII case . . . ."). As the Sixth Circuit stated,

> Although not conclusive, the similarity of [the Civil Rights Act of 1964 and the NLRA] and the fact that Congress was aware that neither punitive nor compensatory damages were allowed under the National Labor Relations Act leads to the firm belief that Congress did not intend that any money damages other than back-pay would be granted under the present statute . . . . No reference has been made in either the Title VII or the Title VIII statutes to compensatory damages."

Harrington v. Vandalia-Butler Bd. of Ed., 585 F.2d 192, 196 (6th Cir. 1978). To be sure, it required a Congressional amendment to Title VII in 1991 before search-for-work related expenses and other damages were recoverable under that statute. *See Landgraf v. USI Film Products*, 511 U.S. 244, 247 (1994) ("The Civil Rights Act of 1991 [] creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of

1964."); *see also Long Island Ass'n for AIDS Care,* 2015 WL 5047526, at *2 n. 9 (N.L.R.B. Div. of Judges) (Aug. 26, 2015) ("The 1991 Civil Rights Act made available compensatory damages in employment discrimination cases and such damages are intended to compensate a victim of discrimination for losses or suffering caused by the discriminatory act.").

The Act, on the other hand, has not received a similar Congressional expansion of remedies. The CGC's citation to the 1991 amended version of Title VII in support of her expanded interpretation of the Act is unpersuasive and does not support the argument that the Act's remedies should be expanded to include search-for-work and other work-related expenses regardless of interim earnings. In short, because the Act does not provide for compensatory damages like the current version of Title VII or other EEO statutes, those statutes cannot justify the CGC's requested expansion of the Act's remedies.

Further, the Act does not provide for discovery like Title VII or other EEO statutes. In response to claims brought under Title VII and other EEO statutes, defendant employers are able to conduct extensive discovery regarding the extent of the former employee's damages and search-for-work expenses, as well as the cause of the purported damages. *Ewing v. Direct Sec. Servs.*, 2008 WL 906297 at *2 (D. Kan. Apr. 2, 2008) (noting that defendant is able to conduct discovery regarding Plaintiff's claimed damages); *see also* Fed. R. Civ. P. 26(a)(1)(A)(iii) (A party must, without awaiting a discovery request, provide to the other parties . . . a computation of each category of damages claimed by the disclosing party."). No such discovery is permitted under the Act. Indeed, ALJ Tracy rejected King Soopers' request for information regarding Geaslin's search-for-work efforts and expenses and precluded King Soopers from questioning Geaslin regarding these issues at trial. This is true even though the CGC tried her best to prejudice ALJ Tracy by claiming these damages were necessary because King Soopers allegedly

"wreaked havoc" on Geaslin's life. Without discovery there is no basis upon which to make the award requested by the CGC and, on this record, such an award constitutes a fundamental denial of due process and inexorably prejudices Respondent. *See* Argument A(iii), *infra*,

The CGC's citation to the remedies available under DOL regulations is similarly unavailing. In her Exception, the CGC relies exclusively on *Hobby Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001) in support of her request in this matter.[6] In *Hobby*, the DOL Administrative Review Board considered an administrative law judge's damages award. Therein, the DOL recounted that the employee protection provision, under which the administrative law judge based his damages award, states:

> If, in response to a complaint filed under . . . [the ERA whistleblower provision], the Secretary determines that a violation . . . has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, <u>and the Secretary may order such person to provide compensatory damages to the complainant</u>.

Hobby Georgia Power Co., 2001 WL 168898 at *29 (Feb. 2001) (quoting 42 U.S.C. § 5851(b)(2)(B)) (emphasis added). Thus, the DOL regulations relied on by the CGC to support her request in this matter <u>specifically provide for compensatory damages</u>. There is no such provision in the Act and, therefore, *Hobby* provides no basis to expand the Act's remedies.

The Administrative Review Board in *Hobby* also relied on the remedies available to Title VII plaintiffs to determine the scope of remedies available under DOL regulations. Accordingly, for the same reasons described above that the Civil Rights Act does not support the CGC's request for the Board to expand the Act's remedies, neither do the DOL regulations.

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[6] The General Counsel similarly only relied on *Hobby* in support of his conclusory statement that the Board's current scheme "runs counter to the approach taken by the [EEOC] and [DOL]" in Memorandum GC 15-01.

Finally, the CGC's citation to *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953) is misplaced. In *Knickerbocker*, the Board's remedial order required that the respondent-employer reimburse unlawfully discharged strikers for any medical and hospitalization expenses they incurred which would have been covered by respondent's health benefit plans. *Id.* Unlike search-for-work expenses, the medical expenses involved in *Knickerbocker* were not incurred as a result of the employees' search-for-work efforts. Instead, they were due to the employer's discriminatorily motivated cancellation of health benefits coverage. Because there was no link between these health benefit expenses and the generation of interim earnings, these expenses were properly included in the gross backpay amount and not deducted from interim earnings. In contrast, in situations involving awards of search-for-work expenses, there is a direct causal connection between a discharged employee's interim earnings and her search-for-work expenses.

Further, medical expenses and health fund contributions are not subject to the same abuse and policing obstacles as search-for-work expenses.[7] Medical expenses are definitive, objective, and verifiable. Thus, by their very nature they are dissimilar from search-for-work and other work-related expenses, which are varied and unverifiable. Accordingly, *Knickerbocker* does not support the CGC's argument and the Act should not be expanded to award search-for-work and other work-related expenses without regard for interim earnings.

iii. <u>This matter is an especially inappropriate case for extending the Act's remedies as requested by the CGC.</u>

As described above, the CGC waited until two days before trial to move to amend the Complaint to add a request for search-for-work expenses without regard for Geaslin's interim earnings. In support of the CGC's untimely request to amend the Complaint, the CGC argued that King Soopers "wreaked havoc" on Geaslin's life and caused her extensive damage. The

[7] The danger of uncoupling an employee's search-for-work expenses and interim earnings, as well as the potential abuse of this expanded scheme, is discussed in more detail in Section Argument B(ii)(a).

CGC's tardy request was intended only to prejudice ALJ Tracy regarding the "injury" King Soopers allegedly caused Geaslin.

Upon receipt of the CGC's Notice of Intent to Amend Complaint, King Soopers immediately issued a subpoena and requested information regarding the merits of the CGC's enhanced remedy request. In particular, King Soopers sought to discover information regarding Geaslin's ability to obtain and keep interim employment, her search-for-work efforts, and her search-for-work expenses, if any existed. Because Geaslin was allegedly hospitalized in January 2015, it is unclear whether Geaslin was even able to work following her termination. Without information relating to Geaslin's search-for-work efforts, ability to work, and damages, there was no basis for the CGC's motion other than to prejudice ALJ Tracy with her amendment and request for search-for-work related expenses without regard for interim earnings. Moreover, discovery of Geaslin's search-for-work efforts was necessary to mitigate the prejudice caused by the CGC's allegations regarding the damage King Soopers allegedly caused Geaslin.

Based on the CGC's arguments, ALJ Tracy revoked King Soopers' subpoena and denied King Soopers any opportunity to present or discover evidence regarding the merits of the CGC's claimed causation for the enhanced damages award.[8] Absent ALJ Tracy's erroneous ruling, King Soopers would have presented evidence regarding Geaslin's chronic mental instability and drug addiction; both of which demonstrate that her alleged *damage* was self-inflicted and not caused by King Soopers. ALJ Tracy's ruling prevented the CGC's request for an enhanced remedy from being fully litigated and the parties from discovering the merits of such an enhanced remedy. Moreover, it kept King Soopers from challenging Geaslin's credibility on this point and deprived King Soopers of the opportunity to mitigate the prejudice the CGC caused by

[8] As argued in King Soopers' November 19, 2015 Brief in Support of Exceptions and December 17, 2015 Reply in Support of Exceptions, ALJ Tracy's decision to permit the GC's untimely amendment must be reversed.

her inappropriate assertion that King Soopers "wreaked havoc" on Geaslin. Because King Soopers was not permitted to present such information, an award of search-for-work related expenses is especially impermissible in this case.

Not only did ALJ Tracy prohibit King Soopers from discovering information relating to Geaslin's search-for-work efforts and expenses, but she also barred King Soopers from rebutting CGC's allegation that King Soopers "wreaked havoc" on Geaslin's life. King Soopers was not permitted to question Geaslin regarding all of the benefits King Soopers gave to Geaslin and personal support Pelo provided Geaslin. ALJ Tracy's prohibition on the introduction of this information further prejudiced King Soopers and kept the GC's request for damages from being fully litigated.

Thus, an expansion of the Act's remedies to include an award of search-for-work expenses without regard for interim earnings under these circumstances, where the parties were precluded from litigating the merits of such an inflammatory declaration, is improper and deprives King Soopers of due process. *See e.g., King Manor Care Ctr.*, 308 NLRB 884, 889 (1992) (denying the General Counsel's last minute requested remedy because it was not fully litigated and would deprive respondent of due process); *Chicago Tribune Co.*, 304 NLRB 259, 262 (1991) (finding that it would not afford all parties due process to rely on evidence outside the record and not presented during trial); *George Banta Co., Banta Div. v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1982) ("Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself") (internal quotation marks omitted). Here, ALJ Tracy precluded a meaningful opportunity to litigate the

merits of the CGC's requested expanded remedy award and, therefore, no such award can be imposed in this case.

B. Whether The Board's Traditional Treatment Of Search-For-Work And Interim Employment Expenses Should Be Changed.

i. There is no change in circumstances warranting a departure from the Board's well-established precedent.

For nearly eight decades the Board has declined to award search-for-work and other work-related expenses independent from interim earnings. *See e.g., D.L. Baker, Inc.* 351 NLRB 515, 537, 351 (2007); *In Re Bauer Grp., Inc.*, 337 NLRB 395, 400 (2002); *Aircraft & Helicopter Leasing*, 227 NLRB 644, 645 (1976) ("The law is settled that transportation expenses incurred by discriminatees in connection with obtaining or holding interim employment, which would not have been incurred but for the discrimination, and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings.") (citing *Crossett Lumber Company,* 8 NLRB 440, 479-480 (1938); and *Hoosier Veneer Co. a Corporation,* 21 NLRB 907, 938, fn. 26 (1940)); *W. Texas Utilities Co.*, 109 NLRB 936, 939 n. 3 (1954) ("We find it unnecessary to consider the deductibility of [charging party's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."). Instead, those expenses are deducted from interim earnings as opposed to being added to a discriminatee's gross backpay amount or awarded as stand-alone damages. *Id.*

The CGC has failed to provide any reason to depart from this well-settled law. The purpose of the Act today is the same as it was when the Board initially established the law regarding recovery of search-for-work expenses. Indeed, the Act continues to provide a "make-whole remedy" to discriminatees. The language of the Act is also the same as it was nearly eight decades ago when the Board first held that search-for-work and other work-related expenses are

to be tied to a discriminatee's interim earnings. Without a change in the Act, there is no legitimate reason to change the Board's well-established law on this issue. The Board may overrule precedent "to account for changed circumstances or experience applying the law, or to bring the Board's precedent more in line with that of reviewing courts." *Austin Fire Equip., LLC* 360 NLRB No. 131 slip op. at 5 n. 14 (June 25, 2014); *see also Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 slip op. at 15 (Aug. 27, 2015) (revisiting joint employer standard because of the change in workplace employment relationships and the increase of the "procurement of employees through staffing and subcontracting arrangements"). None of those circumstances exist with regard to the Board's policy on awarding search-for-work expenses. The CGC has neither pointed to changed circumstances applying the Act nor any criticism of reviewing courts that would justify her proposed departure from settled law. The CGC's request to change established law, therefore, must be denied. In her Exceptions, the CGC argued that, in the past, where a remedial structure failed to achieve its objective, the Board has revised and updated its remedial policies. Exception Brief, p. 5. The CGC, however, is not requesting an "update" to the Board's remedial policies. Rather, it is asking that the Board overturn nearly eight decades of law and expand the remedies available under the Act to include general compensatory damages. The Board made a policy decision nearly eight decades ago regarding the award of compensatory damages in the form of search-for-work expenses. Absent a statutory basis to overturn those decisions, the Board's well-settled refusal to award these damages cannot be disturbed. The CGC's entire basis for adding a request for search-for-work related expenses without regard for interim earnings – at least as it was described in her Notice of Intent to Amend – is that this enhanced remedy was necessary because King Soopers purportedly "wreaked havoc" on Geaslin's life. Ex. 1(ii) at p. 2-3. An award of search-for-work related expenses

without regard for interim earnings because an employer "wreaks havoc" on an employee's life is nothing more than an award of compensatory and punitive damages. As fully described above, neither compensatory nor punitive damages are available under the Act. Accordingly, the CGC's basis for expanding the Act's remedies and awarding search-for-work expenses without regard for interim earnings fails.

ii. Deviation from the Board's traditional treatment of search-for-work and interim employment expenses undermines the purpose of the Act's remedial provisions.

The CGC's requested expansion of the Act's remedies provides discriminatees a windfall and is punitive to the Respondent; neither of which is afforded by the Act. Further, an award of search-for-work and other work-related expenses without regard for a discriminatee's interim earnings is subject to abuse and would be impossible to police. Thus, an expansion of the Act's remedies to include search-for-work and other work-related expenses undermines the purposes of the Act.

a. An award of search-for-work expenses regardless of interim earnings is punitive and provides discharged employees a windfall.

It has long been held that the Board's power is remedial, not penal or punitive. *See e.g., N. L. R. B. v. Douglas & Lomason Co.*, 443 F.2d 291, 295 (8th Cir. 1971) (Board's remedy "should not smack of punitive action against the employer."); *Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 235-36 (1938) (the Board's authority under Section 10(c) "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."). The Board's "order must be designed to effectuate the policies of the Act. An order that is punitive rather than remedial is impermissible, *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 61 (1940), and the

Board therefore may not 'apply a remedy it has worked out on the basis of experience, without regard to circumstances which may make its application to a particular situation oppressive.'" *Komatz Const., Inc. v. N.L.R.B.*, 458 F.2d 317, 324-25 (8th Cir. 1972) (quoting *N.L.R.B. v. Seven-Up Bottling Co., Inc.*, 344 U.S. 344, 349 (1953)) (emphasis added).

Similarly, an award that grants employees a windfall is not an appropriate remedial order. *See Starcon International v. NLRB*, 450 F. 3d 276, 277-78 (7th Cir. 2006) (Posner, J.) *enforcing Starcon, Inc.*, 344 NLRB 1022 (2005) ("The National Labor Relations Act is not a penal statute, and windfall remedies-remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong-are penal."). As the Fifth Circuit has said when discussing the distinction between remedial orders and punitive orders,

> The Board thus adverts to two different, though not mutually exclusive aspects of a remedial order: the order may be designed to make someone whole who has been deprived of a recognized interest by acts that constitute a violation of the Act and/or the order may be designed to prevent the violator from benefitting by his misdeed. If neither of those aspects is present it is hard to see how an order may be considered 'remedial' as distinct from merely punitive; every punishment made to 'fit the crime' is not necessarily remedial, especially if its purpose is more to provide 'a source of innocent merriment,' i.e. serve as an example, rather than to restore to someone a right he is entitled to or to deprive a malfeasor of an advantage unjustly seized.

N. L. R. B. v. Coats & Clark, Inc., 241 F.2d 556, 561 (5th Cir. 1957).

A discharged employee's search-for-work and other work-related expenses are directly related to his or her mitigation efforts. Nevertheless, the CGC requests that these damages be extracted from a discharged employee's mitigation efforts and be awarded regardless of the employee's interim earnings. The CGC's unlawful expansion of the Act's remedial scheme is illogical and would punish employers, while providing discharged employees a windfall. Both of these outcomes have been rejected by courts for very sound policy reasons and to encourage legitimate mitigation efforts.

If an employee's recovery of search-for-work expenses is analyzed without regard for the employee's search-for-work efforts and interim earnings, then employees have no incentive to seek legitimate and realistic employment opportunities. By extracting an employee's search-for-work efforts from his or her earnings, the CGC is asking the Board to hold employers liable for discharged employee's "search-for-work" efforts, regardless of how outlandish and unlikely those efforts are to lead to interim employment. Indeed, if the Act were expanded as the CGC requests, there would be nothing to prevent a discharged employee from traveling across the country to apply for positions he or she has no reasonable likelihood of getting, and then recover an award for these "search-for-work" expenses. There would similarly be nothing to prevent a discharged employee from accepting interim employment in a high-priced housing market and claiming the increased housing costs are work-related expenses.[9] The CGC's proposed expansion of the Act's remedies, thus, provides employees the potential windfall of recovering expenditures that were neither legitimate nor good faith search-for-work expenses. This expansion is bad policy.

On the other hand, if the current remedial structure continues and an employee's recovery of search-for-work expenses is linked to his or her interim earnings to mitigate losses, then the employee is more likely to focus his or her job search efforts on locations and jobs in which the

[9] Other examples of a discharged employee's potential abuse may entail the submission of over stated receipts or statements of mileage for reimbursement for the costs associated with traveling to apply for interim employment. Employees may also falsely increase the amount of their award by seeking reimbursement for costs associated with interim employment that were not actually required by the interim employer, including the costs of tools and uniforms. Discharged employees could also seek reimbursement for the costs of trips and vacations under the auspices that those expenses were incurred as part of their "search-for-work" efforts. Ultimately, it would be nearly impossible for employers and the Board to decipher between legitimate and fabricated expenses and policy discharged employees' "search-for-work" efforts.

employee is qualified. Offsetting a discharged employee's search-for-work expenses against his or her interim earnings is fair and entirely consistent with the Act's remedial provisions.[10]

In a parallel analysis, both the Board and the District of Columbia Circuit rejected the CGC's request that the Board expand the Act's remedies to include "gross back pay," which is a back pay award not offset by a discriminatee's interim earnings, in lieu of the Board's standard "net back pay" award, which is offset by interim earnings at other employment. *See Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. N. L. R. B.*, 445 F.2d 237, 245-246 (D.C. Cir. 1971). In that case, the Union challenged the Board's determination that only net back pay can be awarded by arguing that only gross back pay would effectuate the purposes of the Act because (1) net back pay fails to make employees whole by not accounting for inflation, humiliation of being fired, frustration of searching for another job, or loss of a discriminatee's credit, and (2) a net back pay award fails to fully compensate discharged employees and, therefore discourages them from exercising their statutory rights. *Id.* The District of Columbia Circuit rejected these arguments and affirmed the Board's holding that only net back pay could be awarded under the Act. In refusing to expand the Act's remedies to include a gross back pay award, the court said,

> [F]ull back pay is no more directly responsive to the sorts of collateral and intangible harms suffered by discharged employees than is net back pay; [the union's] claim is that the former provides 'more complete compensation' for the employees' losses. While the union persistently asserts that its proposed remedy falls well on the permissible side of the thin line between compensation and punishment, it makes no effort to place a dollar figure on the inadequacies of net back pay. Nor does it attempt to quantify the difference, as to these discharged employees, between net and gross . . . . the full back pay alternative, at least based on the union's showing here, [i]s essentially punitive. Contrarily, the net back pay order entered in this case cannot, on this record, be said to be a 'patent

[10] Had ALJ Tracy not prohibited evidence rebutting CGC's allegation that King Soopers "wreaked havoc" on Geaslin's life, King Soopers would have introduced evidence that in the retail grocery industry in Denver employees can effectively mitigate because they often switch employment among competitors. Employees terminated from King Soopers immediately go to work for competitors like Safeway, Whole Foods, and Sam's Club, among others. The fact that King Soopers was unable to present this evidence is another example that this is an inappropriate case to expand the Act's remedies.

> attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'

Id. at 246 (emphasis added). The parallel is true here. An award of search-for-work related expenses without regard for an employee's interim earnings is no more likely to make employees whole than the Board's current scheme. Instead, extracting an employee's search-for-work expenses from his or her search-for-work efforts would only grant the employee a windfall and penalize employers in violation of the policy underpinnings of the Act's remedial scheme.

b. An award of search-for-work expenses without regard for an employee's interim earnings is speculative and would be impossible to police.

A back pay award must be certain, not speculative. *See Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984) ("it remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."); *Iron Workers Local Union 377*, 326 NLRB 375, 377 (1998) ("the Board's power to remedy violations of the Act, though broad, does not extend to imposing what amounts to punitive and speculative damages for a violation of the Act."). The CGC's requested expansion of the Act's remedies is inherently speculative. Before the Board could calculate the amount of a discharged employee's search-for-work expenses, it would be required to guess as to the time the employee spent searching for work, traveling to and from potential places of employment, as well as the time spent and cost of using the internet (or any other search device) to search for work, among other things. Such speculation is not permitted under the Act.

Finally, an award of search-for-work and other work-related expenses without regard for interim earnings is unnecessary. In today's job-search environment, there is virtually no need for

discriminatees to incur search-for-work related expenses. As Administrative Law Judge Keltner W. Locke recognized,

> In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method. *Wright Electric, Inc.*, 334 NLRB 1031 (2001).

Int'l Bhd. of Teamsters, Local 71, 2014 WL 4809567 (N.L.R.B. Division of Judges) (Sept. 26, 2014). Because employees can effectively and efficiently search-for-work without incurring any expense, there is no need to divert from Board precedent regarding these expenses.

The fact that most employees search-for-work by telephone, computer, and internet only increases the speculative nature of an award of search-for-work related expenses without regard for interim earnings. There is simply no way to divide the cost of telephone, computer, and internet services to compensate only for the costs of searching for work. An award of speculative and uncertain damages that is subject to widespread abuse is contrary to the purposes of the Act.

C. What Considerations Warrant Making The Requested Changes?

For all of the reasons described above, the Board should not expand the Act's remedies to include search-for-work and other work-related expenses without regard for a discharged employee's interim earnings. As a policy matter, it is no salvation to await a compliance proceeding. That process is also devoid of any discovery of the causation of damages and is not any better equipped to address these claimed damages. Further, a compliance officer is likely to accept all of these job search expenses on face value, which only exacerbates employee windfalls and punishment to the employer. Thus, employers would be completely deprived of their

opportunity to fully litigate the matter and there would never be sufficient evidence to determine the efficacy of such damages awards.

CONCLUSION

The Board must deny the CGC's request to expand the Act's remedies to include search-for-work and other work-related expenses without regard for interim earnings.

Respectfully submitted this 18th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2015, a true and correct copy of the foregoing **RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS** was electronically filed addressed to the following:

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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 27

KING SOOPERS, Employer And WENDY GEASLIN An Individual.	No. 27-CA-129598 **BRIEF OF AMICUS CURIAE**

A. INTRODUCTION

This brief is submitted on behalf of the law firm Weinberg, Roger and Rosenfeld. The firm exclusively represents trade unions and their institutions and workers. We are one of the largest union side law firms in the country. The law firm of Weinberg, Roger and Rosenfeld is celebrating its 50th year of existence. The firm has more than 40 attorneys and we have had a long history of representing unions before this agency as well as other agencies. We have been involved in many questions before this agency as well as other fora with respect to back pay issues and interim expense pay issues. We submit this argument on behalf of the firm to support our labor union clients and their efforts to organize.

This brief is submitted in support of the position taken by the General Counsel. Amicus supports a change in the Board's practice so that expenses incurred in a search for work and other interim employment expenses should be awarded regardless of whether the worker earned interim earnings. Additionally, those expenses should be separately paid and separately reported.

The General Counsel is correct that the rule which as been applied since 1938 is antiquated and is contrary to the principles of the Act. We add the following additional points:

B. THE WORKPLACE HAS DRAMATICALLY CHANGED SINCE 1935 AND THE EARLY CASES DEALING WITH THE INTERIM EARNINGS ISSUE.

Worker victims increasingly find it difficult to find comparable jobs. This is a result of the economic inequality that has been created in this country. Workers must look longer and harder for comparable jobs. Often worker victims are unable to find jobs, and they must take jobs at lower wage rates without any or comparable benefits. The rule that is under consideration by the Board was adopted at a time when there were more middle class jobs. Thus, there is a heavier burden imposed upon workers who have been illegally fired to find comparable employment.

C. ALTHOUGH THE BOARD HAS RECOGNIZED VARIOUS FORMS OF EXPENSES IN SEEKING INTERIM EMPLOYMENT, THERE ARE NEW KINDS OF EXPENSES THAT ARE INCURRED BY WORKER VICTIMS.

One type of expense that workers now incur is child care expenses and other family related expenses. Many workers are required to provide child care in ways that were not contemplated when the Act was adopted. Many workers must pay for childcare because both

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members of the family are working. Both parents must work to make ends meet. These childcare expenses often occur when workers are looking for work.

Additionally, employees now have many family responsibilities, including taking care of elder parents. They often incur expense in helping their elders. This is another expense that will be incurred by workers who are seeking work after being unlawfully terminated.

Employees often have to borrow from savings or family members to survive. Retirement plans such as 401(k) plans, which allow loans, are a means of survival. Those expenses must be reimbursed.

Some workers sell houses at a loss or lose the opportunity cost to sell the house at a higher price

Although the Board does not have to immediately rule on these issues, the Board should take this into consideration in recognizing the need to alter its past practice.

There are other expenses that may be incurred, such as paying the expenses for job consultants, resume writers, therapist and so on who may assist workers in finding other jobs or adjusting to the unlawful discrimination or termination by employers. The Board's decision in this case will impact these issues.

D. THE JOB SEARCH PROCESS HAS CHANGED, REDUCING SOME OF THE COSTS.

The job search process has substantially changed. Much of the search process is now done online.[1] That search does not involve driving from location to location looking for jobs, which was the method envisioned when these doctrines were developed. Many states that administer unemployment claims have websites to register and look for work.[2] This will minimize the potential expense. The Department of Labor has recognized this dramatic change. See, e.g., http://www.doors.dol.gov/ and https://www.doleta.gov/jobseekers/find_job.cfm. So

[1] More than ten years ago, the Department of Labor reported this development. See http://www.bls.gov/opub/ted/2005/aug/wk1/art05.htm.

[2] Most unemployment claims are now submitted online or by phone. In person submission of such claims is rare in most states. See http://workforcesecurity.doleta.gov/unemploy/filingmethods.asp.

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have the states. See, e.g., https://dol.georgia.gov/documents/internet-job-search-strategies and https://www.caljobs.ca.gov/vosnet/Default.aspx.

Job searches and employer hiring are now conducted through various websites maintained by third parties or employers. E.g., https://www.ziprecruiter.com/; http://www.forcerecruitllc.com/. Many employers conduct hiring through internet applications. https://jobs.kroger.com/king-soopers/go/King-Soopers/571400/.[3]

Government contractors are required to keep records of internet applicants. http://www.dol.gov/ofccp/regs/compliance/faqs/iappfaqs.htm.

The Board has taken into account recently the availability of email and the internet. See *Purple Communications* Inc., 361 NLRB No. 126 (2014), and *J. Picini Flooring*, 356 NLRB 11, 13 (2010), *enforced*, 656 F.3d 860 (9th Cir. 2011). The Board should recognize the fact that the expense of seeking interim work may well be lessened because of the use of the internet in the job search and application process.[4]

On the other hand, employees will be entitled to seek reimbursement expenses to the extent that they incur the use computers, phones or other devices to seek work electronically.[5] This will include reimbursing any fees charged by internet search providers or websites.

E. THE BOARD'S CURRENT RULE SOMETIMES CREATES THE RESULT THAT EMPLOYEES RECEIVE LESS THAN MINIMUM WAGE FOR ANY PAYROLL PERIOD.

Because employees have to bear the costs of expenses looking for interim work during periods when they are not working, they are receiving less than zero income and thus less than the Federal and applicable state minimum wages. Although when they are not working, they are

[3] The apparent discrimination between union and non-union jobs by this employer warrants another charge.

[4] Employers in back pay proceedings are already asking employees for copies of internet applications. The Board can check the websites of most employers who have an online application system.

[5] California requires reimbursement for phone expenses used for business purposes. See *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal.App.4th 1137 (2014).

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already receiving less than minimum wage. This is contrary to the underlying principle of the federal and state minimum wages.

F. THE PROPOSED NEW RULE WILL REDUCE THE LIABILITY OF EMPLOYERS WHO ILLEGALLY FIRE WORKERS.

The proposed new rule will encourage employees to look for work knowing that those expenses will be reimbursed whether or not they are successful. The current approach discourages employees in looking for work wherever there is some expense involved.

G. THE NEW RULE SHOULD MAKE IT CLEAR THAT EXPENSES ARE TO BE PAID SEPARATELY AND TREATED SEPARATELY.

There are tax and other consequences to both the workers who have been discriminated against as well as the employers who have acted illegally. Lumping the amounts together with back pay awards causes these tax consequences. For example, an employer might benefit from being able to deduct the entire expense and will not be required potentially to pay additional payroll taxes. Likewise, the employee may be able to treat the expenses differently. The obligation to repay unemployment insurance may be affected. The entitlement to pension credit may be affected. This is a more accurate reporting of the income as well as a more accurate reflection of the payment by the employer to the worker who was illegally terminated.

H. THE BOARD'S DECISION SHOULD BE RETROACTIVE TO ALL PENDING CASES.

Because the Board has announced its consideration of this rule and because the change in the rule is so warranted, any decision should be made retroactive and prospective only. Moreover, no employer will admit that its behavior was changed or affected by this rule. Here, the employer contends it did not act illegally. It does not contend its decision was in any way influenced by the extant Board rule on interim employment expenses. Retroactivity will not be an injustice.

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I. CONCLUSION

For these reasons, the Law Firm of Weinberg, Roger and Rosenfeld, supports a change in the Board's practice regarding expenses incurred in seeking interim earnings.

Dated: March 18, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /S/ DAVID A. ROSENFELD
DAVID A. ROSENFELD
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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 18, 2016, I served the following documents in the manner described below:

BRIEF OF AMICUS CURIAE

☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 18, 2016, at Alameda, California.

/s/ Katrina Shaw

Katrina Shaw

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.

and Case 27-CA-129598

WENDY GEASLIN, an Individual

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

In *King Soopers, Inc.*, Case 27-CA-129598, the National Labor Relations Board's scope of authority to award backpay has been raised. At compliance, the Board has long treated a discriminatee's reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings subtracted from gross backpay. See, e.g., *English Mica Co.*, 101 NLRB 1061, 1062 (1952); *F. W. Woolworth Co.*, 90 NLRB 289, 293 fn. 8 (1950); *Crossett Lumber Co.*, 8 NLRB 440, 497-498 (1938). The General Counsel has asked the Board to change this practice and award such expenses regardless of whether the discriminatee received interim earnings. In response to the Board's February 19, 2016 Notice and Invitation to File Briefs, the Service Employees International Union (SEIU) submits this brief in support of the General Counsel's position.

Section 10(c) of the National Labor Relations Act charges the Board with the task of devising remedies to effectuate the policies of the Act. In awarding backpay, the Board operates under a further limitation: remedies must take into consideration the mitigation of damages. It must heed "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). Further, the Board is guided by the principle that remedial orders should "restore the situation, as

nearly as possible, to that which would have obtained but for [the unfair labor practice] ." *Die Supply Corp.,* 160 NLRB 1326, 1344 (1966) (quoting *Royal Plating and Polishing Co.*, 148 NLRB 545, 548-549 (1964), supplemented 152 NLRB 619 (1965)).

But the Board's current policy does not provide a full make-whole remedy when a worker is not compensated for search-for-work expenses. A worker terminated unfairly who must spend extra money on gas to travel to job interviews will not be restored to the same position had the unfair labor practice never occurred if he is awarded backpay but not the cost of fuel used in his search for work. For a worker who has not yet found employment, the need to be reimbursed for such expenses is even greater than for a worker who has found interim work.

In cases of low wage workers, where the costs associated with the reasonable search for interim employment can quickly outweigh the interim pay received, if any, the employee is, in essence, subsidizing the employer's violation. For these reasons, SEIU urges the Board to adopt all the changes requested by the General Counsel, as set forth fully in the Notice and Invitation to File Briefs.

Dated: March 18, 2016

Respectfully submitted,

/s/ Judith A. Scott

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.,

and Case 27-CA-129598

WENDY GEASLIN

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits this *amicus curiae* brief in response to the Board's Notice and Invitation for Briefs. The question presented is whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees. The Board should do so in the manner suggested by the General Counsel.

The Board's current treatment of search-for-work expenses is insufficient to effectuate the remedial and deterrent purposes of the Act and forces those who are most detrimentally affected by a respondent's discriminatory actions to incur additional costs that are never reimbursed. Not only does the current rule lead to inequitable results, the Board has not identified any policy reason for calculating the search-for-work expenses as an offset to interim earnings. The current rule is inequitable, contrary to the Board's remedial principles, and inconsistent with practical job-search considerations.

1. **The Board should adopt the change requested by the General Counsel.**

Under the Board's current rule, a discriminatee is entitled to search-for work expenses only as an offset to his or her interim earnings. *See Casworth Enters., Inc.*, 362 NLRB No. 131 (2015); *D.L. Baker, Inc*., 351 NLRB 515, 537-38 (2007). The General Counsel, in his Brief in

Support of Limited Exceptions to the Administrative Law Judge's Decision and Recommended Order, argues that this rule is "inequitable" and "contrary to general Board remedial principles." General Counsel's Brief 4. For these reasons, the General Counsel requests the Board hold that "search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts." General Counsel's Brief 5-6. The Board should adopt the change requested by the General Counsel.

a. The Board's current rule is inequitable

As part of its remedial authority, the Board is empowered to grant reinstatement and backpay in unfair labor practice cases where the respondent has fired or refused to hire a worker due to his or her protected activity. *See* 29 U.S.C. § 160(c). "The powers of the Board as well as restrictions upon it must be drawn from § 10 (c), which directs the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.'" *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-88 (1941). These remedies are intended to make the affected employees whole again—to compensate the employees for the losses and expenses they incurred as a result of the employer's discriminatory and unlawful actions. Those damages would not have been suffered but for the unlawful actions of the employer, and therefore, the employee should not be required to absorb them.

Under current Board law, however, search-for-work costs are only awarded to employees as an offset of his or her interim earnings. *See Casworth Enters., Inc.*, 362 NLRB No. 131 (2015); *D.L. Baker, Inc*., 351 NLRB 515, 537-38 (2007). For those employees who find interim employment and earn more than their search-for-work expenses, that is fair because the offset

will fully compensate them for those expenses. Those who do not find work or whose interim earnings do not exceed his or her search-for-work expenses are forced to absorb those costs, because their earnings are less than the expenses or nonexistent. These discriminatees, who have already suffered significant economic harm due to their inability to find work or, at least, work paying more than their search expenses, are, in addition, required to absorb those search-for-work expenses. This policy inevitably and irrationally leads to those who have been most significantly economically harmed by the discriminatory actions of their employer (enduring lengthy unemployment and/or low wages) suffering even more as a result of having to pay out of pocket costs for job search expenses with no way of recouping those costs from the employer.

Notably, discriminatees are, as a practical matter, compelled to incur those costs as part of their duty to make a reasonable search for employment in order to mitigate their damages. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Midwestern Pers. Servs., Inc.,* 346 NLRB 624, 625 (2006). In order to recover any backpay, the discriminatee must undertake reasonable efforts to find comparable employment. *American Bottling Co.*, 116 NLRB 1303, 1307 (1956) ("a condition precedent to any award of back pay is due diligence on the part of the discharged employee to find work"); *Arduini Mfg. Corp.*, 162 NLRB 972, 975, 977 (1967), *enf'd* 394 F.2d 420 (1st Cir. 1968). Thus, a discriminatee may be completely denied backpay unless he incurs the search-for-work expenses that are typically required to obtain interim employment.

Yet, discriminatees who seek to satisfy their legal duty to mitigate damages by expending reasonable efforts to find comparable employment, risk paying out-of-pocket expenses to satisfy that duty that may never be reimbursed if no comparable employment can be found or when their interim earnings are less than their expenses. This discourages discriminatees from making an aggressive job search, which runs contrary to the remedial policy encouraging employees to seek

interim employment. As the General Counsel has argued, this defies logic and creates clearly inequitable results.

b. The current rule is contrary to the Act's general remedial principles

Section 10(c) of the Act gives the Board broad remedial powers to effectuate the Act's policies in unfair labor cases. This explicitly includes the authority to award backpay. 29 U.S.C. § 160(c) ("the Board shall. . . take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act"). When an employer intentionally discriminates in regard to hire or tenure of employment, the traditional remedy is reinstatement, or instatement, and an order that the discriminatee be "made whole." *Ferguson Electric, Inc.*, 330 NLRB 514, 515 (2000), *enfd* 242 F.3d 426 (2d Cir. 2001). This combination of reinstatement and a make-whole remedy is meant to create "a restoration of the situation, as nearly as possible, to that which would have been obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *F.W. Woolworth Co.*, 90 NLRB 289, 292 (1950).

Federal courts have consistently ruled that holding the wrongdoing respondent liable for backpay has two purposes: (1) reimbursing the discriminatee for losses he or she suffered as a direct result of the respondent's unlawful actions; (2) furthering the public policy interest advanced by the deterrence of those illegal actions. *See, e.g., NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 431 (2d Cir. 2001); *Kraszewski v. State Farm Insurance Co.,* 912 F.2d 1182, 1186 (9th Cir. 1990); *Hedstrom Co. v. NLRB,* 629 F.2d 305, 317 (3d Cir. 1980) (en banc); and *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972). Thus, while a backpay award is not intended to punish the law-breaking respondent, it may be calculated in a way that also deters

violations of the Act, and makes a timely job offer more likely. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

The Board has long recognized a discriminatee's right to reimbursement for expenses incurred while seeking interim employment as well as the additional costs incurred as a result of interim employment, *see Crossett Lumber Co.*, 8 NLRB 440, 498 (1938); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955), but has never explained why that reimbursement should take the form of an offset against interim wages rather than an additional element of the overall backpay award.

The Board's policy has its origin in *Crossett Lumber*, in which some of the employees incurred costs for "transportation, room, and board, which they would not have incurred had they continued to work for the respondent and not been forced, by virtue of the respondent's unfair labor practices, to leave their homes." 8 NLRB at 498. The Board awarded those expenses "to the extent that all such expenses diminished the earnings of the employees" by offsetting those expenses against the discriminatees' interim earnings. The award of search-for-work expenses is contained in one paragraph of a sixty-two page decision. *Id.* The decision to award those expenses as an offset is not explained or even discussed in the decision or supported by any form of policy statement.[1] It appears that treating the expenses as an offset was a matter of administrative convenience in calculating the backpay award, but never was intended as a limit on when such expenses may be awarded. This historic practice, however, neither adequately reimburses discriminatees for the losses they have suffered nor furthers public policy by

[1] Subsequent cases do not elaborate on this decision to treatment of search-for-work expenses as a deduction from interim earnings. *See, e.g., Southport Petroleum Co.*, 8 NLRB 792, 805 n. 4 (1938); *Hoosier Veneer*, 21 NLRB 907, 938 n. 26 (1940); *New Era Die Co.*, 19 NLRB 227, 244 n. 19 (1940); *Brown Garment Mfg. Co.*, 62 NLRB 857, 876 n. 44 (1945); *McCann Steel Co.*, 106 NLRB 41, 48 n. 31 (1953); *Gerbes Super Markets, Inc.*, 176 NLRB 11, 18 (1969); *Nelson Metal Fabricating*, 259 NLRB 1023, 1023-24 (1982); *Mimbres Memorial Hosp.*, 361 NLRB No. 25, slip op. 9-10 n. 8 (2014).

deterring future illegal actions. As discussed *supra*, those who do not find interim employment or do not earn enough to offset all of their search-for-work expenses cannot recover the costs they incurred while fulfilling their duty to mitigate their losses. At the same time, the employer—the entity that committed the unlawful, discriminatory act that set in motion the search-for-work—is not held liable for the full financial injury its actions caused. That employer, who has successfully avoided complete liability, has not been adequately deterred from engaging in discriminatory actions in the future.

When the Board's remedies are insufficient to effectuate the policies of the Act, the Board "must draw on enlightenment gained from experience" to fashion remedies that will serve this dual purpose of making discriminatees whole and deterring future violations. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Even where there is "a substantial body of Board decisions" upholding a customary Board rule, when the Board is convinced that a customary rule does not effectuate the policies of the Act, that rule should be abandoned. *A.P.W. Prods. Co.*, 137 NLRB 25 (1962), *enf'd* 316 F.2d 899 (2d Cir. 1963).

The Board has continued to "draw on enlightenment gained from experience" to modify backpay orders when those orders no longer effectively carry out the purpose of the Act. *Seven-Up Bottling Co.*, 344 U.S. at 346. The Board's first published order awarded backpay as the amount the discriminatees "would normally have earned as wages during the period from the date of his discharge to the date of such offer of reinstatement. . .less the amount each earned subsequent to discharge. . . ." *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935). Fifteen years later, the Board changed its practice to calculating backpay quarterly because "[t]he cumulative experience of many years discloses that this form of remedial provision falls short of effectuating the basic purposes and policies of the Act." *F.W. Woolworth Co.*, 90 NLRB at 291.

When it became clear that lost wages alone were not enough to make the worker whole, the Board included in its award amounts equal to the value of lost vacation benefits, bonuses, employee-owned housing, employee discounts on purchases, car allowances, and tips. *See Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits); *United Shoe Mach. Corp*., 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employee-owned housing); *Central Ill. Pub. Serv. Co.*, 139 NLRB 1407 (1962) (employee discounts on purchases); *Garment Workers*, 300 NLRB 507 (1990) (car allowances); *Ji Shiang, Inc.*, 357 NLRB 1292 (2011) (tips). "Accordingly, the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . . ." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2-3 (2014) (revising Board policies to require respondents file reports with the SSA allocating backpay awards to the appropriate calendar quarter and adding a tax compensation remedy).

The Board should, drawing on those developments in its remedial jurisprudence and its experience remedying violations of the Act, recognize that the current practice is contrary to the Act's remedial principles and insufficient to further the public policy of the Act.

2. **There are no significant considerations that warrant retaining the Board's traditional treatment of search-for-work and interim employment expenses.**

Respondent argues that the General Counsel has not shown any reason to depart from the Board's traditional treatment of search-for-work expenses, and therefore, the General Counsel's requested change must be denied. Resp.'s Answer to General Counsel's Limited Exceptions 5-6. This argument, however, is unavailing particularly because the Board has never offered any rationale for treating job search expenses as an offset against interim wages rather than as an additional element of the overall backpay award and because the basis for the Board's practice appears to be administrative convenience rather than an effort to most fully effectuate the

remedial purposes of the Act. Under the Act, the Board has the ability to take actions that will effectuate the purposes of the Act, including the backpay grant. The Supreme Court in *Seven-Up Bottling Co.* acknowledged that the Board can and has modified its remedies to better effectuate those purposes. When the Board's experiences suggest that the current remedy is inadequate, the Board has the "broad discretionary" authority to fashion a suitable remedy to "undo the effects of violations of the Act[.]" *Seven-Up Bottling Co.*, 344 U.S. at 346.

Respondent also argues that awarding search-for-work expenses separately from interim employment earnings would create a "windfall" for the discriminatee. As an initial matter, reimbursement of search-for-work expenses that the discriminatee *actually* incurred – and was required to only because of the employer's violation of the Act – is by no means a windfall to the employee. In *Starcon Int'l v. NLRB*, the Seventh Circuit defined windfall remedies as those that "give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong." 450 F.3d 276, 277-78 (7th Cir. 2006). In *Starcon*, the Seventh Circuit addressed the issue of whether "salts" could be given backpay as a remedy for discriminatory non-hiring when the individual had no intention of accepting the job and working for the employer—individuals who, had the employer not discriminated against them, would not have accepted the employment and thus, would not have earned wages from that employer. Respondent's reliance on that case is inapposite. A discriminatee's search-for-work expenses are directly and inherently tied to the respondent's discriminatory action. Absent the discriminatory action by the employer, the search-for-work expenses would not have been incurred. The Respondent's categorization of search-for-work expenses as a windfall is simply incorrect.

Indeed, if any party receives a windfall, it is employers like the Respondent. This is because discriminatees are required to mitigate their financial losses by seeking interim

employment and earnings that are then deducted from their backpay award. As a result of the discriminatee's duty to mitigate, respondents are often relieved of all but a portion of their backpay liability.

In 1980, Professor Paul Weiler calculated the average net backpay award as approximately $2000, largely attributed to a combination of net loss and mitigation doctrines. Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1789 (1983). In three typical compliance cases with backpay calculations, the respondents received discounts of 79%, 66%, and 46%.[2] In a particularly astounding case, the employer in *Contractor Services, Inc.* received a 95% discount on its backpay obligations, with one discriminatee mitigating his entire backpay award down to zero. 351 NLRB 33 (2007).[3]

In cases like *Contractors Services, Inc.* the second purpose of Board remedies—deterring discriminatory actions—is completely undermined. The employer has discriminated against union supporters via termination and chilled employees' free choice of a bargaining representative,[4] but owes little or nothing to the discriminatee.

[2] *See Ernst & Young*, 304 NLRB 178 (1991); *Woodline Motor Freight*, 305 NLRB 6 (1991); *Heavy & Highway Construction Workers Local 158*, 301 NLRB 35 (1991). Employer discount is calculated as the percentage difference between the gross backpay owed discriminatees and the net backpay ordered as a remedy.

[3] Gross backpay was calculated for the two non-paid organizer discriminatees totaling $238,452.81, but after interim earnings were deducted, the net backpay owed was $11,738.03.

[4] Discriminating against union supporters undoubtedly chills support for the union amongst other employees. *See* Wieler, *Promises to Keep* at 1778 ("the dismissal of key union adherents gives a chilling edge to the warning that union representation is likely to be more trouble for the employees than it is worth"). See *ADB Utility Contractors*, 355 NLRB 1020, 1021 (2010); *Intersweet*, 321 NLRB 1, 19 (1996), *enfd*. 125 F.3d 1064, 1070 (7th Cir. 1997); *California Gas Transport*, 347 NLRB 1314, 1326 (2006), *enfd*. 507 F.3d 847 (5th Cir. 2007).To support this assertion, Professor Weiler later cites to an unpublished Ph.D. dissertation which estimates that in an average union election campaign the number of prounion votes is reduced by 15% when the employer committed a ULP by specific threats or actions against union supporters. *Id.* at 1784 (citing W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology).

Deducting search-for-work expenses independently of interim earnings does not entirely eliminate the possibility of an employer receiving a windfall through mitigation, but it does prevent an employee from suffering additional economic harm in the form of uncompensated expenses as a result of the employer's discriminatory actions.

3. Additional practical considerations also warrant making the requested change.

The current treatment of search-for-work expenses is out of touch with the realities of the modern labor market. Although the internet has changed the way people look for jobs, it has not made the job search a cost-free endeavor. In a recent survey of job seekers in Maine, 38% of those surveyed said a job search should always be free, but only 16% actually avoided spending money during their last job search. Margaret Hansen, *Cost of Finding a Job*, JobsinME.com, http://jobsinme.com/misc/page.aspx?pagenum=cost-of-finding-a-job (last visited Mar. 11, 2016). Those expenses included travel, lodging, and costs to produce and distribute application materials. *Id.* The IRS has recognized the costs associated with finding new employment and permits deductions for resume preparation, delivery costs, employment and outplacement agency fees, advertising, purchase of newspaper and periodical help-wanted ads, legal fees paid to attorneys to review employment contracts, and travel expenses (including food and lodging). Internal Revenue Service, Publication 529, Miscellaneous Deductions for Use in Preparing 2015 Returns 2-3 (Dec. 21, 2015).

The job search is not a quick process, either. In 2014, the average duration of unemployment was 33.7 weeks. Bureau of Labor Statistics, *Unemployed total and full-time workers by duration of unemployment*, Current Population Survey (2015). In 2015, the average duration of unemployment was down to 29.2 weeks. *Id.* Career advisors suggest that it takes a single employer 3-4 months to make a hiring decision. *See* Alison Green, *What's Different About*

Job Searching in 2015, US News & World Report (Feb. 9, 2015), http://money.usnews.com/money/blogs/outside-voices-careers/2015/02/09/whats-different-about-job-searching-in-2015; Marc Miller, *How Long Will Your Job Search Take? Longer Than You Think* (Nov. 10, 2014), https://www.linkedin.com/pulse/20141110011040-4524580-how-long-will-your-job-search-take-longer-than-you-think. Thus, even if a discriminatee immediately identifies an opening for a comparable position, he may not be hired for that position for months. In the meantime, that discriminatee may reasonably continue to incur search-for-work expenses until the initially identified position is secured.

Respondent has argued that a discriminatee should not incur any expenses in the search for interim employment. Resp.'s Answer to General Counsel's Limited Exceptions 9. Not only is this factually inaccurate as discussed *supra*, it assumes that all discriminatees regularly utilize the internet and telephone as their sole methods of finding work. "In seeking interim employment, a discriminatee need only follow his or her regular method for obtaining work." *SRC Painting, LLC*, 357 NLRB 27, 28 (2011). If a discriminatee's regular method for obtaining work involves some expense—like mass mailing resumes or driving to an office for an interview—those are reasonably incurred search-for-work expenses.

If an employee does not have any search-for-work expenses, the Board will not award any as a remedy. The Board's remedies must be congruent with the facts of the case. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938) ("the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"); *Diamond Walnut Growers*, 340 NLRB 1129, 1132 (2003). If no search-for-work expenses are incurred, then the Board need not grant search-for-work expenses in that case.

Respondent also argues that calculating the discriminatee's search-for-work expenses is inherently speculative. There is a difference, however, between the word "speculative" and the word "certain." While "speculative" awards are disfavored, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (backpay award must expunge "only the actual, not merely the speculative, consequences"), "uncertainty" is sometimes unavoidable in the determination of backpay awards, *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998). In those cases, "the Board will determine which is the 'most accurate method' of calculating backpay, in view of all the facts adduced by the parties." *Ibid*. Uncertainty is resolved against the respondent "whose wrongdoing created the uncertainty." *Id. See also Alfred M. Lewis, Inc. v. NLRB*, 681 F.2d 1154, 1157 (9th Cir. 1982) ("the employer should not be allowed to benefit from the uncertainty caused by its discrimination"). Awards of search-for-work expenses will not be based on mere conjecture about what costs the discriminatee might incur but on the actual expenses the discriminatee incurred while searching for employment. To the extent that there would be any doubt or uncertainty concerning the amount of search-for-employment expenses, the Board and its judges are certainly capable of weighing conflicting evidence.

4. Conclusion

For the reasons stated above, the AFL-CIO urges this Board to adopt the entirely appropriate remedy requested by the General Counsel.

Respectfully Submitted,

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.,

Employer,

and **Case No. 27-CA-129598**

WENDY GEASLIN,

An Individual.

AMICUS BRIEF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 304

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INTEREST OF THE *AMICUS*

The International Brotherhood of Electrical Workers, Local 304, is located in Topeka, Kansas and represents approximately 2,100 members across twenty-one contracts. This local also represents approximately 415 non-dues paying covered employees. The more than 2,500 employees that the *Amicus* represents across the state of Kansas work in the utility industry in power plants, rural electric cooperatives, municipalities and line construction. In each of the twenty-one agreements that this local administers, there is a grievance and arbitration process which the 140 Union Stewards, Assistant Business Managers and Business Manager utilize to handle discipline, including termination, of covered employees. The *Amicus* has also used the Board's unfair labor practice proceedings to protect the rights of employees under the Act.

Unfortunately, there are many terminations in the utility industry. Some are unjust. Some are unlawful. Terminated employees, especially in states like Kansas, have to travel long distances in order to find other employment. This sometimes includes giving up their current home to travel out of state for temporary employment while waiting for an unfair labor practice proceeding or arbitration to come to a conclusion. They also may not be able to work in the same industry which requires obtaining training in a different position or classifications. Such training is not always easily obtainable and usually requires out-of-pocket expenses at a time when there is little to no income for the terminated employee. This hardship is compounded in Kansas where the unemployment insurance laws are among the most restrictive in the nation leaving discriminatees in difficult financial conditions.

The *Amicus* has witnessed these situations first hand and understands the financial hardship imposed upon individuals in these situations. The Board's has a well-established principle of making employees whole, as nearly as possible, to the position the employee would have been in but for the illegal discrimination. In order to give this principle full force and effect, the Board must adopt the General Counsel's request. The search-for-work and interim employment expenses would not have

been expended by the discriminatee but for the unlawful conduct of the Employer. Thus, those expenses should be paid to the discriminatee regardless of the interim employment earnings.

INTRODUCTION AND SUMMARY OF ARGUMENT

On October 31, 2014, the Regional Director for Region 27 issued a Complaint and Notice of Hearing alleging that the Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act) by unlawfully interrogating, suspending and later terminating the Charging Party for her protected activity. The trial in this matter was held on August 10-11, 2015, in Denver, Colorado, before The Honorable Amita Baman Tracy, Administrative Law Judge (Judge). On September 16, 2015, Counsel for the General Counsel requested Judge Tracy award search-for-work-related expenses regardless of whether such amounts exceed interim earnings.

Judge Tracy issued a Decision and Order on October 22, 2015, finding that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully interrogating, suspending and terminating the Charging Party and ordered Respondent to reinstate the Charging Party and make her whole for the losses she suffered as a result of the Respondent's unfair labor practices. However, Judge Tracy explicitly found that search-for-work and work-related expenses, regardless of whether there are interim earnings are not part of the make-whole remedy. On November 19, 2015, Counsel for the General Counsel filed limited exceptions to Judge Tracy's Decision and Recommended Order regarding the search-for-work-related expenses finding.

On February 19, 2016, the Board issued a Notice and Invitation to File Briefs inviting interested parties to submit Amicus Briefs regarding this issue. The Board noted that it has long treated a discriminatee's reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings subtracted from gross backpay. *See, e.g., English Mica Co.*, 101 NLRB 1061, 1062 (1952); *F. W. Wollworth Co.*, 90 NLRB 289, 293 fn. 8 (1950); *Crossett Lumber Co.*, 8 NLRB 440, 497-498 (1938). The General Counsel asks the Board to change this practice and award

such expenses regardless of whether the discriminate received interim earnings. He contends that (a) where interim earnings are nonexistent or less than these expenses, the failure to award these expenses means the discriminate will receive less than make-whole relief, (b) the Board's traditional treatment of these expenses is inequitable and contrary to general Board remedial principles, and (c) these expenses are awarded to employees under statutes other than the National Labor Relations Act. The General Counsel also requests that these expenses be calculated separately from taxable net backpay, with interest.

The Board has asked parties and interested *amici* to address three questions:

(1) Should the Board adopt the change requested by the General Counsel?

(2) What considerations warrant retaining the Board's traditional treatment of search-for-work and interim employment expenses?

(3) What considerations warrant making the requested change?

The International Brotherhood of Electrical Workers, Local Union 304 ("*Amicus*"), for the reasons stated below, advocates for the Board's adoption of the General Counsel's request for primarily three reasons. First, many of the jobs are unique to their area meaning that a terminated worker will have to go to great lengths, including extended travel and re-training, to find other employment. Second, the expense of seeking new employment and getting retrained typically comes out-of-pocket at a time when the disriminatee has no or little income and lack of inclusion in a make-whole remedy leaves the discriminatee less than whole. Third, resolution of the unfair labor practice proceedings take a long time which causes search-for-work and interim employment expenses to be substantial causing financial harm to the discriminatee.

ARGUMENT AND AUTHORITIES

The Board requires that discriminatees make reasonable efforts to secure interim employment in order to be entitled to backpay in unfair labor practice proceedings. *In Re Midwestern Pers. Servs., Inc.,*

346 NLRB 624, 625 (2006). However, under current Board case law, a discriminatee who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, an discriminatee who expends funds searching for work and ultimately obtains a job at a lower wage rate or for a period of time such that his or her interim earnings fail to exceed search-for-work or work-related expenses for that quarter is left uncompensated for his or her full expenses. *See W. Texas Utilities Co.*, 109 NLRB 936, 939 n. 3 (1954); *N Slope Mech.*, 286 NLRB 633, 641 n. 19 (1987).

The Board's well-established general remedial principles hold that when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8 at 3 (Oct. 22, 2010). The goal in a backpay remedy is to restore the discriminatee to "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57 at 2 (Sept. 30, 2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses essentially punishes discriminatees who meet their statutory obligation to be entitled to backpay but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. This leaves discriminatees less than whole for expenses he or she were required to expend and would not have been required to expend but for the employer's unlawful conduct.

The Board's current case law also runs counter to the approach by the Equal Employment Opportunity Commission ("EEOC") and the United States Department of Labor ("USDOL"). The EEOC provides for both compensatory and punitive damages in cases involving intentional discrimination. Compensatory damages include out-of-pocket expenses caused by the discrimination such as costs associated with job searches and/or medical expenses. These are awarded regardless of interim earnings. The Board already treats non-employment expenses incurred by discriminatee, such

as medical expenses and fund contributions similarly to the EEOC. *See Knickerbocker Plastics Co., Inc.*, 104 NLRB 514, 516 at *2 (1953). Thus, adopting the General Counsel's request regarding search-for-work and interim employment expenses would bring the Board in line with the EEOC and eliminate its inconsistency in regards to medical expenses and search-for-work expenses. The USDOL treats search-for-work expenses similarly to the EEOC.

The inequity in the current Board law needs to be addressed and the General Counsel's request provides the Board the opportunity to make sure that discriminatees are truly made whole for the financial hardship they experience when an employer unlawfully discriminates against them. It also allows the Board to come in line with the EEOC and USDOL who award search-for-work expenses and interim employment expenses regardless of interim earnings. It is an unfortunate truth that unlawful discrimination occurs in the labor and employment world. While such discrimination cannot be prevented, discriminatees can be truly made whole for their financial hardship due to such unlawful discrimination with the awarding of these expenses regardless of interim earnings.

CONCLUSION

For the reasons discussed above, *Amicus* respectfully requests that the Board adopt the General Counsel's request to change how the Board handles search-for-work and interim employment expenses for backpay for discriminatees.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The *Amicus* certifies that on March 18, 2016, a copy of the above and foregoing was electronically served on the parties and their counsel of record to this case via the Clerk of the National Labor Relations Board.

/s/William R. Lawrence IV
William R. Lawrence IV
Counsel for Amicus

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Case 27-CA-129598

Wendy Geaslin, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT KING SOOPERS' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS

I. Introduction

The Regional Director for Region 27 issued a Complaint and Notice of Hearing in this matter on October 31, 2014. (Complaint) (G.C. Ex. 1(g)). The Complaint, as amended at the hearing, alleges that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act) by unlawfully interrogating, suspending and later terminating the Charging Party for her protected activity. (G.C. Ex. 1(g)). The trial in this matter was held on August 10-11, 2015 in Denver, Colorado, before The Honorable Amita Baman Tracy, Administrative Law Judge (Judge). On October 22, 2015, Judge Tracy issued a Decision and Order. (ALJD P1-31). Judge Tracy found that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully interrogating Wendy Geaslin (Charging Party), suspending Charging Party

on May 9 and 14, 2015 and terminating the Charging Party on May 21, 2014. (ALJD P25 L30-45). The Judge's Recommended Order requires Respondent to cease and desist from interrogating employees about union activity and suspending and terminating employees for unlawful reasons. (ALJD P26 L5-15). Affirmatively, the Recommended Order requires Respondent to offer the Charging Party reinstatement and make her whole for the losses she suffered as a result of the Respondent's unfair labor practices, however, she explicitly finds that search-for-work and work-related expenses regardless of whether there are interim earnings are not part of the make-whole remedy. (ALJD P26 L12-20).

On November 19, 2015, Counsel for the General Counsel filed limited exceptions to Judge Tracy's Decision and Recommended Order regarding her finding regarding search-for-work and work related expenses and urging the Board to change the practice of denying recovery of a discriminatee's reasonable search-for-work and interim employment expenses if that amount exceeds interim earnings .

On February 19, 2016, the Board issued a Notice and Invitation to File Briefs inviting interested parties to submit Amicus Briefs regarding the search-for-work and work-related expenses issue.

On March 18, 2016 four *amici curiae* filed briefs in response to the Board's February 19, 2016 invitation. All four briefs filed by *amici curiae* support the General Counsel's request to modify the Board's practice regarding the inclusion of search-for-work and work related expenses regardless of interim earnings in back pay calculations. The only brief filed opposing the General Counsel's request for relief was filed by the Respondent in this matter.

II. Respondent's Brief Fails to Raise Any Persuasive Arguments to Deny the General Counsel's Request to Include Search-For-Work and Work Related Expenses Regardless of Interim Earnings as Part of a Make Whole Remedy

Respondent fails to raise any persuasive arguments with respect to why it would be inappropriate for the Board to change its practice concerning the calculation of backpay as part of a make whole remedy.

Respondent argues that the Board cannot order a change to its past practice with respect to how it calculates backpay without a Congressional amendment. This argument is legally incorrect. The General Counsel is not requesting an additional or punitive remedy in cases where an Employer violates the Act and puts a discriminatee in the position of job seeker. Rather, the General Counsel is asking the Board to correct the resulting inequity when calculating a make whole remedy where search-for-work and work-related expenses exceed interim earnings. Because the Board would simply be revising its past practice in this regard, and not creating a new or additional remedy, Congressional action is unnecessary. As a number of the *amici curiae* indicate, the Board's practice in this regard should be updated to reflect the equities of the situation (a discriminatee is only seeking employment due to the Employer's unlawful behavior) as well as the realities of the modern job market. Therefore, Respondent's argument that the Board cannot act without an amendment to the Act is inapposite and unpersuasive.

From the date that Counsel for General Counsel notified the Respondent of her intent to amend the remedy portion of the Complaint in this matter, the Respondent has argued that the amendment entitles Respondent to litigate the amount of backpay

owed to the Charging Party during the unfair labor practice phase of the proceedings. Judge Tracy correctly allowed the amendment to the Complaint and quashed the Respondent's Subpoena Duces Tecum. As correctly concluded by Judge Tracy, all documents requested in Respondent's *subpoena duces tecum* were irrelevant to the Complaint, including its amended request for a make whole remedy, and were irrelevant to the Respondent's defenses against the allegations that it violated the Act. Similarly, Respondent asserts that it was denied due process because it was barred from litigating the Charging Party's activities after she was unlawfully discharged. Again, at the hearing Judge Tracy correctly forbid Counsel for the Respondent from questioning the Charging Party concerning events that occurred after the alleged unfair labor practices occurred. In its most recent brief Respondent raises this issue again. What is particularly troubling about Respondent's most recent assertion of this defense is that Counsel has resorted to making offensive and untrue assertions about the Charging Party's character that have absolutely no support in the record. Counsel for Respondent asserts that if he had the chance to question Charging Party about her post-ULP search for work, the evidence would have shown that Charging Party had a history of "mental instability and drug addiction."[1] First, there is absolutely no evidence on the record that Charging Party had a drug problem or mental instability. Further, there is no evidence that Charging Party's behavior, other than her protected behavior in March and May 2015, caused the Respondent to commit unfair labor

[1] RESPONDENT KING SOOPERS' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS at pg. 15;

practices against her. Counsel's assertions are unprofessional and serve to illustrate the personal contempt this particular Respondent has for Charging Party and her protected activity. The record speaks for itself; this case is not about Charging Party engaging in any pattern of unacceptable behavior that resulted in her ultimate termination. Indeed the record shows Respondent's sustained refusal to accept Charging Party's lawful exercise of her Section 7 rights and Respondent's concomitant decision to discharge Charging Party for engaging in that activity are the reason the Respondent finds itself the subject of this litigation. Respondent's unlawful actions caused Charging Party to lose her home and wreaked havoc on her life.[2] Whatever Respondent's motivations for making these unfounded assertions, they are patently irrelevant to the unfair labor practice hearing and to the question of whether the Board should adopt the General Counsel's request to change its practice of allowing an employee to recover search-for-work and work-related expenses only up to the amount of any interim earnings.

II. Conclusion

For the reasons stated above and based on all briefs previously submitted by the Counsel for the General Counsel in this matter, Counsel for the General Counsel respectfully requests that the Board modify the Judge's Remedy and Order to award search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings.

[2] The evidence regarding Charging Party becoming homeless after her discharge was elicited by the Respondent on cross examination. (Tr. 83: 17-25; 84:1). Respondent takes umbrage to the term "wreak havoc" but it is safe to assume that becoming homeless due to unlawfully losing a job would wreak havoc on one's life.

DATED at Denver, Colorado, this 1st day of April 2016.

Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 27

KING SOOPERS, INC.

and **Cases 27-CA-129598**

WENDY GEASLIN, AN INDIVIDUAL

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT KING SOOPERS' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER

EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 1, 2016,** I served the above-entitled document(s) by **first class mail** and **email** upon the following persons, addressed to them at the following addresses:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.,

AND **Case 27-CA-129598**

WENDY GEASLIN, AN INDIVIDUAL

RESPONSIVE BRIEF OF THE GENERAL COUNSEL

The General Counsel files this brief in response to arguments made by Respondent-King Soopers in its supplemental brief ("Br.") filed on March 18, 2016. Contrary to King Soopers' arguments, awarding discriminatees search-for-work and interim-employment expenses regardless of their interim earnings is necessary to effectuate the Act's make-whole remedial objective for all discriminatees. Moreover, there is no merit to King Soopers' argument that the Act limits the Board's remedial authority to reinstatement and backpay orders and does not permit it to award discriminatees such expenses absent interim earnings. Finally, the policy considerations that King Soopers raises provide no support for continuing to link search-for-work and interim-employment expenses to interim earnings. Rather, as initially set forth in the General Counsel's Brief in Support of Limited Exceptions, the Board should update and revise its current remedial policy to award search-for-work and interim-employment expenses regardless of interim earnings to restore the pre-discrimination status quo as nearly as possible.

I. Awarding Search-for-Work and Interim-Employment Expenses Regardless of Interim Earnings is Necessary to Effectuate the Act's Make-Whole Remedial Objective for All Discriminatees.

The Act grants the Board "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361

NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954); *Kentucky River Medical Center*, 356 NLRB 6, 8 (2010). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act). Indeed, employees would be reluctant to exercise their Section 7 rights knowing that the Board could not provide them with make-whole relief in the event of an employer's discriminatory response.

In light of these basic remedial premises underlying the Act, reimbursing discriminatees for search-for-work and interim-employment expenses regardless of interim earnings is the only manner by which to make them whole for their losses. Such expenses are only necessary because of a respondent's unlawful actions, which leave the employee out of work and searching for new employment. Reimbursement is therefore necessary to place an employee in the financial position he or she was in prior to the discrimination. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. The Board's current remedial policy fails in this regard by forcing discriminatees to bear work-related expenses directly caused by a respondent's unlawful action, and conditioning repayment on uncertain interim earnings. As recognized by amicus AFL-CIO (Brief of AFL-CIO at 3), discriminatees who are unable to obtain interim employment are those "most

significantly harmed" by their employer's discrimination and they should not be discouraged from engaging in future Section 7 activity because they are never made whole for their losses.

Nevertheless, King Soopers' primary contention (Br. 7-9) is that the Board is precluded from awarding search-for-work and interim-employment expenses regardless of interim earnings because it is not specifically authorized to do so under the Act. In making this argument, King Soopers does not contest that the Act authorizes the Board to grant these expenses as part of a remedial order to the extent that they are less than or equal to interim earnings. *See, e.g.*, *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). The only dispute is whether such expenses are outside the Board's remedial authority when treated as a separate reimbursement, rather than as a deduction to interim earnings. When viewed in this manner, it simply does not follow that the Board lacks the statutory authority to grant such expenses absent interim earnings. King Soopers is simply wrong to suggest that the proposed change would create a new Board remedy. Rather, the proposed policy change would merely adjust how the Board reimburses discriminatees for these expenses to ensure that its remedial principles are equally applied to all discriminatees.

King Soopers' argument (Br. 17-19) that the current rule should remain based on its historic application is also without merit. As recognized by amicus AFL-CIO (Brief of AFL-CIO at 5), the Board has never offered an explanation for awarding search-for-work and interim-employment expenses only as a deduction to interim earnings. Further, the Board has never reconciled the current rule with its method of computing backpay on a quarterly basis, which was a change to the Board's remedial policy that postdated implementation of the current rule. *See F.W. Woolworth Co.*, 90 NLRB 289, 292 (1950). Under the quarterly calculation of backpay, the current rule is particularly harsh because reimbursement is contingent upon a discriminatee

incurring search-for-work and interim-employment expenses in the same quarter as interim earnings—substantially decreasing the discriminatee's likelihood of being made whole for those expenses. The proposed policy change would cure this incongruity in Board law by altering the make-whole calculation without imposing any new remedies on respondents.

Finally, there is no merit to King Soopers' argument (Br. 18) that the current rule should remain in place because there are no changed circumstances or adverse circuit court decisions that would justify the Board revisiting this remedial policy. The Board routinely has "revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole (and for other reasons)." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2-3 & n.9. Adopting the proposed remedial policy here would be consistent with this well-established Board practice. *See, e.g., id.*, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for social security purposes); *Kentucky River Medical Center*, 356 NLRB at 8-9 (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make-whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB at 292-93 (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress").

II. King Soopers Incorrectly Asserts that the Act Limits the Board's Broad Discretionary Authority to Remedy Unfair Labor Practices to Only Reinstatement and Backpay Orders.

King Soopers' most far-reaching argument (Br. 8) is its attempt to reduce the Board's remedial authority to "only" "reinstatement and back pay." This sweeping position ignores the clear command of Section 10(c), which grants the Board authority to "take such affirmative action *including* reinstatement of employees with or without backpay." 29 U.S.C. § 160(c) (emphasis added). As the Supreme Court has held, Congress's inclusion of reinstatement and backpay in Section 10(c) did not limit the Board's ability to impose other remedies for violations of the Act. *Phelps Dodge Corp.*, 313 U.S. at 188-89; *see also Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) ("the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay"). The Board has ordered, often with court approval, a variety of remedies beyond reinstatement and backpay to make a discriminatee whole, including: [1] reimbursement for medical, dental, and other out-of-pocket expenses caused by an employer's discrimination or refusal to pay benefits, *Hansen Bros. Enterprises*, 313 NLRB 599, 599-600 (1993), *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, 891 n.2 (1980), *enf'd mem.*, 661 F.2d 940 (9th Cir. 1981); [2] reimbursement of unlawfully withheld union dues, *Virginia Elec.*, 319 U.S. at 539-41; and, [3] compensation for lost stock option opportunities, *Sav-On Drugs*, 300 NLRB 691, 692 (1990). In light of this precedent, King Soopers' effort to cabin the Board's authority to two narrow remedial options is fraught with error, and ignores the Board's longstanding policy of structuring its remedies to return to the pre-violation status quo.

Second, King Soopers improperly attempts (Br. 8) to equate search-for-work and interim-employment expenses incurred absent interim earnings with the types of "compensatory

damages" awarded in personal injury tort cases, and asserts that the Act currently does not authorize the Board to award such damages. While it is true that the Board does not have the general authority to award employees damages for non-pecuniary injuries suffered as a result of discrimination in response to their Section 7 activities, it does have authority to order make-whole relief for a "definite loss" suffered by employees as a result of unfair labor practices. *Virginia Elec.*, 319 U.S. at 543.[1] Significantly, in none of the cases that King Soopers cites (Br. 8) to support its argument were search-for-work and interim-employment expenses held to be the types of damages unavailable to discriminatees under the Act.

In *UAW v. Russell*, the Supreme Court upheld a state court's tort remedy for lost wages, mental anguish, and punitive damages to an employee prevented from working by union agents. 356 U.S. 634, 636 (1958). In considering whether the Act preempted the award, the Court recognized that the Board does not grant general tort relief, such as damages for pain and suffering or punitive damages. *Id.* at 643, 645-46. Accordingly, the state court tort suit was not preempted because the damages sought general tort relief beyond Board remedies (namely for mental anguish and punitive damages). *Id*. at 645-46. However, the Court did not—as King Soopers would have it—hold that the Board is prohibited from awarding employees their full economic losses resulting directly from an unfair labor practice. To the contrary, the Court went

[1] The courts and the Board sometimes refer to a make-whole remedy under the Act as "compensatory damages." *See, e.g.*, *NLRB v. Warehousemen's Union Local 17*, 451 F.2d 1240, 1243 (9th Cir. 1971) (affirming Board's order "awarding compensatory damages"); *Steelworkers (Warrior & Gulf Navigation Co.)*, 280 NLRB 1401, 1406 (1986) (describing Board remedy as "compensatory damages"); *cf. Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994) (noting that Title VII of the Civil Rights Act of 1964, like the National Labor Relations Act, includes "a 'make-whole' remedy that resembles compensatory damages in some respects"). Although the Board more consistently uses the term make-whole relief to describe its remedies, King Soopers clearly overreaches in suggesting that the Board is prohibited from awarding any relief that could otherwise be characterized as compensating a discriminatee for pecuniary losses he or she has suffered due to employer discrimination under the Act.

on to note in *Russell* that the Board is free to award relief, beyond backpay, to "restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Id.* at 643 (quoting *Virginia Elec.*, 319 U.S. at 543).

Similarly, in *Operating Engineers Local 513*, the Board exercised its broad discretion and determined that it would not effectuate the policies of the Act to award damages for bodily injury suffered by employees in a labor dispute. 145 NLRB 554, 555 (1963). The Board specifically noted that such remedies were available under state tort law, and thus the lack of Board remedies would "not leave such employees without redress against those responsible for their injuries." *Id*. at 556. Moreover, such traditional tort claims "fall within the special competence of judge and jury" not "within the Board's special expertise," making the requested relief improper. *Id*. The Board has acknowledged on other occasions that it does not award personal injury tort remedies, but only remedies unlawful conduct to vindicate the public rights established by the Act. *See, e.g.*, *Freeman Decorating Co.*, 288 NLRB 1235, 1235 n.2 (1988) (limiting discriminatee's recovery to medical expenses incurred due to lack of insurance coverage resulting from unlawful discharge, and noting other forums were available for him to seek recovery for personal injuries suffered when employer's security guards physically removed him from worksite).

Unlike the remedies sought in *Russell* and *Local 513*, search-for-work and interim-employment expenses are not remedies for pain and suffering that are available only in state tort actions. Indeed, it is likely that a state court action seeking such work-related expenses, incurred because of an unlawful discharge, is preempted by the Act. Therefore, failure to award search-for-work and interim-employment expenses as a Board remedy will "leave such employees

without redress against those responsible for their injuries." *Operating Engineers Local 513*, 145 NLRB at 556. This result is inconsistent with the Board's remedial practice.

Third, King Soopers' reliance on cases (Br. 11-12) brought under Title VII of the Civil Rights Act of 1964 similarly fail to establish that the Board lacks the statutory authority to order reimbursement for search-for-work and interim-employment expenses absent interim earnings. The original Civil Rights Act and the National Labor Relations Act provide for a similar make-whole remedy. *Landgraf v. USI Film Products*, 511 U.S. at 253. King Soopers attempts to argue (Br. 11) that courts could not award search-for-work and interim-employment expenses to Title VII discriminatees under this make-whole principle, but required the 1991 Amendments to the Civil Rights Act to explicitly provide for "compensatory damages." However, the pre-1991 cases that King Soopers cites involve courts refusing to award Title VII discriminatees non-pecuniary damages for pain and suffering, punitive relief, or other non-economic damages. *See Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192, 197 (6th Cir. 1978) (holding monetary judgment as compensation for discriminatory working conditions improper); *Pearson v. W. Elec. Co., W. Elec. Installation Org. Dist. Office*, 542 F.2d 1150, 1153 (10th Cir. 1976) (affirming denial of compensatory and punitive damages for humiliation, loss of good credit standing, and damage to character); *Curran v. Portland Superintending Sch. Comm., City of Portland, Me.*, 435 F. Supp. 1063, 1078 (D. Me. 1977) (dismissing claim for non-specific compensatory and punitive damages as a remedy for sex discrimination). The 1991 Amendments to the Civil Rights Act responded to these cases by authorizing "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Landgraf* , 511 U.S. at 253 (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)).

Although the 1991 Amendments were a necessary prerequisite for allowing compensation for damages associated with personal injury tort claims, such as pain and suffering or emotional distress, they were not a necessary prerequisite for allowing courts to make Title VII discriminatees whole for search-for-work and interim-employment expenses. "Even before *additional compensatory relief* was made available by the 1991 Amendments, courts frequently awarded damages" for interim-employment expenses, including travel, moving, and increased commuting expenses associated with post-discrimination employment. *Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) (emphasis added) (citing cases where courts awarded interim-employment expenses incurred by Title VII discriminatees who found new work); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y.) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in a search for work), *aff'd mem.*, 862 F.2d 304 (2d Cir. 1988). Just as Title VII did not need a statutory amendment to provide for such make-whole remedies, neither does the Act. Accordingly, King Soopers' attempt to suggest that the Act must be amended to explicitly provide for "compensatory damages" before the Board can award the remedies requested here falls flat.[2]

[2] King Soopers also incorrectly reads *Hobby v. Georgia Power Co.*, 2001 WL 168898 (DOL Admin. Rev. Bd. Feb. 8, 2001) (involving employee whistleblower protection under Energy Reorganization Act of 1974), as holding that the Department of Labor ("DOL") awards search-for-work and interim-employment expenses only where the governing statute explicitly provides for "compensatory damages." To the contrary, in *Hobby* the DOL Administrative Review Board awarded $250,000 in what it referred to as "compensatory damages" for "emotional distress, humiliation, and loss of reputation." *Id*. at *24-*26, *31. It also awarded the discriminatee an additional $3,605.31 in job search expenses, which the Administrative Review Board specifically listed separately from compensatory damages. *Id*. at *29. In light of how the Administrative Review Board parsed out the remedy in *Hobby*, that case does not suggest that the award of job search expenses was contingent on the governing statute explicitly allowing for compensatory damages.

III. The Policy Considerations that King Soopers Raises Provide No Support for Linking Search-for-Work and Interim-Employment Expenses to Interim Earnings.

The policy considerations that King Soopers raises for maintaining the Board's current remedial policy are easily dismissed. Initially, there is simply no basis for its argument (Br. 21) that awarding search-for-work and interim-employment expenses regardless of interim earnings would result in employees having "no incentive to seek legitimate and realistic employment opportunities." Employees who have lost their jobs and sources of income due to unlawful discrimination have no reason to incur unnecessary out-of-pocket costs in the hope that they may one day receive a favorable ruling and reimbursement of those expenses in an unfair labor practice proceeding, possibly years after their discharge. To the extent that a respondent challenges the reasonableness of the job search expenses a discriminatee incurred, those challenges are appropriately handled in the compliance proceeding, where respondents have access to any supporting evidence obtained or prepared by the Region and are permitted to contest the expenses claimed. *See generally* NLRB Casehandling Manual (Part Three) Compliance Sec. 10650.5 (Nov. 2015) ("It is Board policy to make available to the respondent, on request, and after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement."). Indeed, the Board currently assesses whether expenses incurred in seeking and maintaining out-of-town work were reasonable in light of the employment opportunities available to a discriminatee. *See, e.g.*, *Baker Electric*, 351 NLRB 515, 537 (2007) (finding discriminatee in the construction industry, which is nomadic in nature, was entitled to recover reasonable expenses for seeking and maintaining out-of-town work

"when he could not find work in the area or when he thought better or higher paying work was available outside the area").

Second, there is no merit to King Soopers' argument (Br. 23-24) that search-for-work and interim-employment expenses regardless of interim earnings would be "inherently speculative." This position ignores that it is "the General Counsel's burden to establish expenses incurred by the discriminatees in seeking or maintaining interim employment." NLRB Casehandling Manual (Part Three) Compliance Secs. 10648.4 & 10660.4. *See also Baker Electric*, 351 NLRB at 537-38 ("we agree that the burden of proof is on the General Counsel to prove expenses"). In light of the General Counsel's evidentiary burden, and a respondent's opportunity to contest any claimed expenses in a compliance proceeding, it is difficult to see how a discriminatee could recover for purely speculative expenses.

Finally, a Board order reimbursing discriminatees for these expenses regardless of interim earnings would neither be punitive nor a windfall for the discriminatees (Br. 19-20). Rather, consistent with the purposes of a backpay award, it would simply make the discriminatees whole for the definite losses they incurred due to their employer's unlawful conduct towards them. In short, awarding discriminatees these expenses would be restorative and no more punitive or a windfall than a traditional backpay award.

CONCLUSION

For the reasons set forth above and in the General Counsel's Brief in Support of Limited Exceptions, the Board should hold that search-for-work and interim-employment expenses will be awarded regardless of whether a discriminatee had interim earnings.

Respectfully submitted,

s/ Michael Ellement
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Dated: April 1, 2016

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING SOOPERS, INC.,

AND **Case 27-CA-129598**

WENDY GEASLIN, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, the foregoing Responsive Brief of the General Counsel in Case 27-CA-129598 was served by electronic mail on the following counsel of record and case participants:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

King Soopers, Inc.,

and Case 27-CA-129598

Wendy Geaslin, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S REQUEST TO WITHDRAW ITS RESPONSE TO RESPONDENT KING SOOPERS' SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARNINGS

COMES NOW Isabel C. Saveland, Counsel for the General Counsel, and hereby requests the withdrawal of the brief entitled Counsel for the General Counsel's Response to Respondent King Sooper's Supplemental Brief Regarding the CGC's Request for an Award of Search-for-Work and Other Employment Expenses Without Regard for Interim Earnings, filed on April 1, 2016.

DATED at Denver, Colorado, this 4th day of April 2016.

Respectfully submitted,

Isabel C. Saveland
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

KING SOOPERS, INC.

and **Case 27-CA-129598**

WENDY GEASLIN, an Individual

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S REQUEST TO WITHDRAW ITS RESPONSE TO RESPONDENT KING SOOPER'S SUPPLEMENTAL BRIEF REGARDING THE CGC'S REQUEST FOR AN AWARD OF SEARCH-FOR-WORK AND OTHER EMPLOYMENT EXPENSES WITHOUT REGARD FOR INTERIM EARINGS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 4, 2016,** I served the above-entitled document(s) by E-FILE, E-MAIL, and **REGULAR MAIL** upon the following persons, addressed to them at the following addresses:

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
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April 5, 2016

Re: King Soopers, Inc.
Case 27-CA-129598

Isabel C. Saveland
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Dear Ms. Saveland:

This is in response to Counsel for the General Counsel's request to withdraw its response to Respondent's supplemental brief, filed with the Board on April 4, 2016. The request to withdraw is approved, and the response brief will not be forwarded to the Board for consideration.

Very truly yours,

/s/ Farah Z. Qureshi
Associate Executive Secretary

cc: Parties
Region 27

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

King Soopers, Inc. *and* Wendy Geaslin. Case 27–CA–129598

August 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The primary issue in this case is whether the Board should modify the current make-whole remedy to require respondents to fully compensate discriminatees for search-for-work expenses and expenses incurred in connection with interim employment. The General Counsel urges the Board to discontinue its traditional practice of treating discriminatees' reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings deducted from gross backpay, arguing that this approach unfairly forces discriminatees to bear work-related expenses that result directly from a respondent's unlawful action. The General Counsel instead proposes that these expenses be calculated and paid separately from backpay, regardless of whether the discriminatee received interim earnings.

Before considering the General Counsel's remedial request, we must first decide the merits of the case. For the reasons stated by the judge,[1] we find that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employee Wendy Geaslin about her protected, concerted activity.[2] Additionally, as discussed below, we affirm the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. Although our dissenting colleague would find that Geaslin's first suspension was lawful, the dissent ultimately agrees with all of our other unfair labor practice findings.

I. GEASLIN'S SUSPENSIONS AND DISCHARGE

Facts

Geaslin worked as a barista at the Starbucks kiosk in the Respondent's Denver, Colorado grocery store. She was covered by the meat contract between the Respondent and the Union pursuant to the parties' Letter of Agreement #26, Coffee Shops. The parties have additional contracts, such as the retail contract which covers, among others, clerks whose duties involve "bagging . . . sold merchandise." Article 1 of the meat contract and Article 2 of the retail contract describe the work to be performed by employees covered by each agreement.

On May 9, 2014, store manager Theresa Pelo called for employees, and specifically baristas, to assist with bagging in the front of the store. Geaslin was surprised because she had never been asked to bag groceries. Geaslin walked to the front of the store and attempted to tell Pelo that she needed to take her lunchbreak since she would be leaving at 2 p.m.[3] Pelo stated that Geaslin needed to do as directed and not worry about her lunch. Geaslin asked whether she should be performing these duties because she belonged to a different bargaining unit or union. Pelo repeated her directive. Geaslin turned to bag,[4] raising her hands in the air and stating that she was just asking about her lunch. Geaslin then walked toward the check stands to bag groceries but Pelo called her back, saying they needed to talk. Pelo accused Geaslin of refusing to bag groceries. Geaslin replied that she did not refuse, and had only inquired about her lunch break and whether the Union's contract permitted her to per-

[1] On October 22, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief. The General Counsel filed a limited exception, a supporting brief, and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions; to modify the recommended remedy; and to adopt the recommended Order as modified.

We affirm the judge's decision to grant the General Counsel's motion to amend the complaint to add an interrogation allegation. In doing so, we note that the Respondent had the opportunity to fully litigate this allegation because the amendment was made mid-trial, giving the Respondent the opportunity to call Geaslin as a witness.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

[2] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) when its manager Theresa Pelo interrogated Wendy Geaslin, we do not rely on *Century Restaurant & Buffet, Inc.*, 358 NLRB 143 (2012), cited by the judge. See *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014).

[3] Article 24 of the meat contract requires employees to take a lunch break at approximately the middle of their shift. Geaslin had completed approximately 6 hours of her 8.5 hour shift.

[4] Our dissenting colleague explains that he finds it unnecessary to resolve the parties' disagreement as to whether Geaslin refused Pelo's order to bag groceries. We note, however, that the judge fully credited Geaslin's testimony that she attempted to bag groceries and discredited Pelo's contrary testimony. The dissent does not present any reason to disturb the judge's credibility findings.

form bagging work. Pelo disagreed and placed her on a 5-day suspension.

On May 14, 2014, Geaslin, Union representative Danny Craine, Pelo, and two other managers met to discuss Geaslin's suspension. The meeting grew tense as the parties disputed whether Geaslin refused to bag groceries or whether she simply questioned the propriety of the task. Ultimately, Pelo placed Geaslin on a second 5-day suspension. During the meeting, Pelo admitted that Geaslin's duties do not include bagging groceries. Subsequently, on May 21, 2014, Pelo terminated Geaslin for alleged gross misconduct during the May 14, 2014 meeting.

Craine testified that he interprets both the meat and retail contracts to prevent employees from performing work outside of their assigned department. Assistant deli manager Angelica Eastburn testified that it was unusual for employees other than produce, bakery, and grocery employees – who are all in the retail unit – to bag groceries.

Discussion

Pursuant to the Board's *Interboro* doctrine, an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity. 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). As the Supreme Court explained in *NLRB v. City Disposal Systems, Inc.*, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated." 465 U.S. 822, 840 (1984).

We agree with the judge that Geaslin engaged in protected, concerted activity when she questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union. In particular, we agree that Geaslin's interpretation of the contract was honest and reasonable; indeed, it was consistent with her union representative's interpretation of the agreements, the assistant deli manager's testimony that it was unusual for employees outside the retail unit to bag groceries, and Pelo's own admission that Geaslin's duties did not include bagging groceries.

The Respondent and our dissenting colleague contend that the Respondent's suspension of Geaslin on May 9, 2014 was lawful because she did not engage in protected, concerted activity.[5] Our colleague argues that when questioning the directive to bag groceries, Geaslin was not invoking "a right grounded in the 'meat' agreement." He contends that "the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* . . ., and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right." In support, he cites *City Disposal.* However, the Supreme Court neither adopted nor suggested such a limited interpretation of the *Interboro* doctrine. In fact, the Court noted that the employee's conduct is concerted so long as "the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement." Id. at 839–840.

Further, the Board and the courts have interpreted the *Interboro* doctrine to cover mistakes about contractual rights. For example, in *Tillford Contractors*, the Board found that an employee engaged in protected, concerted activity when he argued that the presence of another employee on the jobsite violated the contract, even though his contractual claim was incorrect. 317 NLRB 68, 69 and fn. 5 (1995).[6] In *NLRB v. H.C. Smith Construction Co.*, the Ninth Circuit agreed with the Board's finding that an employee engaged in protected, concerted activity under the *Interboro* doctrine even though he was incorrect in believing that the contract contained a provision regarding the chain of command on the job. 439 F.2d 1064 (9th Cir. 1971). The court explained that an "employee does not lose the protection of the Act as a matter of law simply because his understanding of the contract turns out to be mistaken." Id. The Seventh Circuit has likewise agreed that "[t]hough incorrect . . . an employee's understanding of the collective bargaining agreement may nevertheless be reasonable." *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991) (finding that the employee's refusal of an assignment based on his honest and reasonable understanding of an oral agreement, rather than a contract, was protected, concerted activity).

The dissent's narrow interpretation of the *Interboro* doctrine is contrary to precedent and the Supreme Court's observation that "[i]n the context of a workplace dispute, . . . the participants are likely to be unsophisticated in collective-bargaining matters." *City Disposal*, 465 U.S. at 840. Were the *Interboro* doctrine limited to mistakes about facts, as urged by our colleague, employees would need to be virtual legal experts regarding their

[5] The Respondent cites *ABF Freight Systems,* 271 NLRB 35 (1984), in support. For the reasons stated by the judge, we agree that this case is distinguishable.

[6] See also *K-Mechanical Services, Inc.*, 299 NLRB 114, 118 (1990) (finding employee's assertion that he had a contractual right to preferential weekend overtime work was protected, concerted activity even though he was not actually covered by the portion of the agreement that formed the basis for his assertion); *Peerless Plating Co.*, 263 NLRB 1025, 1028 (1982) ("Employee attempts to enforce provisions of an existing collective bargaining agreement are protected, regardless of the employer's or the Board's appraisal of the validity of the employee's interpretation of the contract.").

contractual rights in order to enforce those rights in the workplace. Holding employees to such a high standard is unreasonable and would certainly chill employees' exercise of their Section 7 rights. Indeed, the Seventh Circuit has recognized that "the exercise of rights protected under the Act would be severely hampered if employees could face retaliation for good faith interpretations of collective bargaining agreements." *NLRB v. P*I*E Nationwide*, 923 F.2d at 515.

Contrary to the dissent, we find that Geaslin's question whether she should perform bagging work was sufficiently grounded in the contract to be covered by the *Interboro* doctrine. Article 1 of the meat contract covering Geaslin and article 2 of the retail contract describe the work to be performed by the employees covered by each contract. Article 2 of the retail contract specifically states that "[a]ll work and services performed in the bargaining unit connected with the handling or selling of merchandise to the public shall be performed exclusively by bargaining unit members except as provided below."[7] Based on these contract provisions alone, Geaslin could honestly and reasonably believe that she should not bag groceries. Moreover, we find that article 7, Section 26, on which the dissent relies, reasonably tends to support Geaslin's understanding of the contract. Article 7 lists the meat unit classifications and their respective duties and restrictions. Section 26, the last provision of the article, states, "It is understood that employees may perform incidental work in another classification without violating this agreement." Section 26 could reasonably be interpreted to permit incidental work among the enumerated meat classifications rather than the exchange of incidental work between the meat unit and the retail unit. In any event, even if it turns out that Geaslin's belief that only retail unit employees should perform retail unit bagging work is incorrect, there is no basis to find on this record that her belief was not honest and reasonable.

Finally, we agree with the judge that Geaslin engaged in protected activity at the grievance meetings on May 14 and 21, 2014, and that her conduct during the May 9 and 14, 2014 meetings did not cause her to lose the protection of the Act. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). Therefore, we affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. We note that our dissenting colleague joins us in finding that Geaslin's second suspension and discharge were unlawful based on an alternative rationale.

II. REMEDIAL CHANGES

Having found the suspension and discharge violations, we next consider the remedial changes urged by the General Counsel.[8] We find, for the reasons discussed below, that the requested remedial changes are clearly warranted in order to satisfy the Board's statutory obligation to provide meaningful, make-whole relief for losses incurred by discriminatees as a result of a respondent's unlawful conduct.

Analysis

Section 10(c) of the Act grants to the Board "broad, discretionary" authority to order remedies that will "effectuate the policies" of the Act. *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Because Congress could not "define the whole gamut of remedies to effectuate [the policies of the Act] in an infinite variety of specific situations[,]" it vested the Board with the authority to develop appropriate remedies based on administrative experience. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." Id. "From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach. . . . The Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme." *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011).

In providing make-whole relief, the Board serves the dual purposes of reimbursing discriminatees for losses suffered as a direct result of the unlawful conduct and furthering the policy interest of deterring illegal actions. *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 175 (2d Cir. 1965). The Supreme Court and the Board have recognized that "'[a] backpay order is a reparation order designed to vindicate the public policy of the statute by

[7] Contrary to our dissenting colleague's assertion, it is appropriate to consider this provision from the retail contract in assessing whether Geaslin's question is covered by the *Interboro* doctrine. See, e.g., *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3-4 (2016); *K-Mechanical Services, Inc.*, 299 NLRB at 118.

[8] On February 19, 2016, the Board invited all interested parties to file briefs regarding whether the Board should make the changes requested by the General Counsel. In addition to the supplemental and responsive briefs filed by the Respondent and the General Counsel, amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations, the Service Employees International Union, the International Brotherhood of Electrical Workers, Local 304, and the law firm Weinberg, Roger & Rosenfeld. The amici support the General Counsel's requested changes, and the Respondent opposes them. No individual or association other than the Respondent filed a brief in support of retaining the Board's traditional approach regarding search-for-work and interim employment expenses.

making employees whole for losses suffered on account of an unfair labor practice." *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (quoting *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263). See also *Kentucky River Medical Center*, 356 NLRB 6, 9 (2010) (Board recomputed interest on backpay owed discriminatees from simple to compounded daily interest, stating "[w]e believe that daily compounding . . . will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy"). Stated differently, backpay is to be computed in such a way as to restore, as nearly as possible, that which the discriminatee would have obtained but for the unlawful act while also serving as a deterrent to future unfair labor practices. *NLRB v. Mastro Plastics Corp.,* 354 F.2d at 175; see also *Phelps Dodge Corp. v. NLRB,* 313 U.S. at 194; *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (2014). Where the Board has found that its remedial structure fails to fulfill its make-whole objective, "[it] has revised and updated its remedial policies . . . to ensure that victims of unlawful conduct are actually made whole." *Don Chavas*, 361 NLRB No. 10, slip op. at 2–3.

For example, in *F.W. Woolworth Co.*, the Board modified its computation of make-whole relief to award backpay on a quarterly basis. 90 NLRB 289 (1950).[9] The Board made this modification because "[t]he cumulative experience of many years" demonstrated that the Board's traditional approach "f[e]ll short of effectuating the basic purposes and policies of the Act." Id. at 291. As the Board explained, if a discriminatee received higher wages from an interim employer, the traditional backpay computation "resulted in the progressive reduction or complete liquidation of back pay due." Id. at 292. The traditional computation also had the two-fold deleterious effect of incentivizing employers to "deliberately refrain[] from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability" and encouraging discriminatees to "waiv[e] their right to reinstatement in order to toll the running of back pay and preserve the amount then owing." Id. For these reasons, the Board found it appropriate to adopt a new backpay computation method.

The Supreme Court expressly approved the Board's new remedial approach as consistent with the Board's "broad discretionary" authority in *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-347 (1953). Quoting *Phelps Dodge v. NLRB*, 313 U.S. at 200, the Court emphasized that "'the relation of remedy to policy is peculiarly a matter for administrative competence'" and held that the "Board [has] the discretionary power to mould remedies suited to practical needs." 344 U.S. 349, 352. The Court rejected the argument that the Board's new approach would result in greater than make-whole relief for discriminatees and would penalize employers. 344 U.S. at 348. Additionally, the Court declined to debate whether the *Woolworth* formula was remedial or punitive, explaining that the Court "prefer[red] to deal with these realities and avoid entering into the bog of logomachy." Id.[10]

Today, we assess whether the current remedial framework properly awards make-whole relief, or fails to truly make whole the aggrieved victims of unlawful conduct. Discriminatees who have lost their jobs are some of the most seriously aggrieved victims of unlawful conduct. As the Board and courts have recognized, loss of employment is "'the industrial equivalent of capital punishment.'" *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 8 (2014) (quoting *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1209 (7th Cir. 1987)). Discharging an employee for engaging in protected, concerted activity sharply demonstrates an employer's power over its employees and has a long-lasting coercive impact on the workforce. See *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988). Further, the individual most harmed by an employer's unlawful discharge is the discriminatee, who is deprived of his or her job, causing a loss of income and employment benefits. Under the duty to mitigate, the discriminatee is then required to find and maintain interim employment, potentially causing the discriminatee to endure additional, significant financial hardship—hardship that is traceable to the employee's activity protected by the statute that we are charged to enforce. Therefore, we believe it is vitally important that the Board ensure that the make-whole remedy fully compensates unlawfully discharged employees for the losses they incurred and "deter[s] further encroachments on the labor laws." *Goya Foods of Florida*, 356 NLRB at 1464 (quoting *Hedstrom Co. v. NLRB*, 629 F.2d 305, 317 (3d Cir. 1980) (en banc)). We find the Board's current treatment of search-for-work and interim employment

[9] Until this point, the Board had calculated backpay by tabulating the difference between the money the discriminatee should have been paid by the respondent and the discriminatee's actual earnings over the entire backpay period.

[10] Similarly, in *Mimbres Memorial Hospital & Nursing Home*, where the Board explained its rationale for finding that, under *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), a discriminatee's interim earnings would not be deducted from backpay where there was no cessation of employment, the Board drew support from the Court's reasoning in *Seven-Up*. See 361 NLRB No. 25, slip op. at 4 (2014) ("The Court [held] … that it was sufficient that the Board had relied on its cumulative experience" and that "[i]t is the business of the Board to give coordinated effect to the policies of the Act."), enfd. 812 F.3d 768 (10th Cir. 2016).

expenses fails to fully compensate discriminatees for losses incurred as victims of unlawful conduct.

Pursuant to our "broad, discretionary" authority under Section 10(c), the Board has awarded search-for-work and interim employment expenses as part of our standard make-whole remedy for nearly eight decades. As the Board first recognized in *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938), enfd. 102 F.2d 1003 (8th Cir. 1938), discriminatees may incur significant expenses as they search for and maintain interim employment, such as increased transportation costs in seeking or commuting to interim employment, room and board while seeking employment and/or working away from home, and the cost of moving if required to assume interim employment. In *Crossett Lumber*, the Board found it appropriate to compensate discriminatees for these additional expenses, but treated them as an offset to interim earnings, rather than as a separate element of the backpay award. Id.

However, as argued by the General Counsel and amicus AFL–CIO, the Board has never provided an explanation or reasoned policy rationale for its treatment of search-for-work and interim employment expenses as an offset to interim earnings. The Board did not provide any rationale for its approach in *Crossett Lumber.* See id. In a handful of subsequent cases, the Board stated that it would not award search-for-work and interim employment expenses that exceeded a discriminatee's interim earnings, but again the Board did not explain or justify its approach. See *English Mica Co.*, 101 NLRB 1061, 1062, 1064 fn. 8 (1952); *West Texas Utilities Co.*, 109 NLRB 936, 937 fn. 3 (1954); *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962); *North Slope Mechanical*, 286 NLRB 633, 638 fn. 19 (1987).

The practical result of the Board's traditional approach has been less than make-whole relief for the most seriously aggrieved victims of unlawful conduct, contrary to the central remedial principle underlying the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194; *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Because the Board's traditional approach treats search-for-work and interim employment expenses as an offset to interim earnings, discriminatees who are unable to find interim employment do not receive any compensation for their search-for-work expenses. Similarly, discriminatees who find jobs that pay wages lower than the amount of their expenses will not receive full compensation for the search-for-work and interim employment expenses. As expressed by amicus SEIU, "In cases of low wage workers, where the costs associated with the reasonable search for interim employment can quickly outweigh the interim pay received, if any, the employee is, in essence, subsidizing the employer's violation." An example illustrates the shortcomings of the Board's traditional approach. Juana Perez worked at a remote location earning $1,000 per month prior to her unlawful discharge. During the month following her discharge, Perez spent $500 travelling to different locations looking for work. Perez could only find interim employment in another state that paid $750 per month. Perez moved to the new state to be closer to her new job and was also required to obtain training for her new position, costing her $5000 and $500, respectively. Under the Board's traditional approach, Perez would receive compensation for only $1500 of her $6000 total expenses, far less than make-whole relief.[11] Thus, the Board's traditional approach fails to fully reimburse losses incurred by those discriminatees who have already been the most economically injured by unlawful actions.

The Board's traditional approach not only fails to make victims of unlawful discrimination whole, but may also discourage discriminatees in their job search efforts. The Board imposes a duty on discriminatees to mitigate by engaging in reasonable efforts to seek and to hold interim employment. See, e.g., *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007). Discriminatees do not receive backpay for any periods during which they fail to mitigate. See id.; NLRB Casehandling Manual (Part Three) Compliance (CHM), Sec. 10558.1. Yet, under the Board's traditional approach, discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed.

Modifying the Board's treatment of search-for-work and interim employment expenses to eliminate the offset will bring these payments in line with the Board's treatment of similar expenses incurred by discriminatees. When a respondent unlawfully discharges an employee, the respondent not only deprives the employee of his or her wages, but may also cause the employee to lose benefits and to incur additional expenses. See *Knickerbocker Plastic Co.*, 104 NLRB 514, 538 (1953), enfd. 218

[11] During the first quarter after her unlawful discharge, Perez's gross backpay would be $3000 ($1000 x 3 months), her interim earnings would be $1500 ($750 x 2 months), and her search-for-work and interim employment expenses would be $6000 ($500 travel expenses + $5000 moving expenses + $500 training expenses). Under the Board's traditional approach, Perez could only receive compensation for $1500 of her expenses because such payment cannot exceed the amount of her interim earnings.

In its amicus brief, IBEW, Local 304 stated that, based on its first-hand experience representing utility workers in Kansas, discriminatees may face significant financial hardship when seeking interim employment, such as the costs described in the example above.

F.2d 917 (9th Cir. 1955). The Board compensates discriminatees for the inequity of lost wages through backpay. However, in order to make discriminatees whole, the Board also compensates discriminatees for the separate inequity of additional expenses, such as medical expenses and retirement fund contributions.[12] The Board awards compensation for these expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. See CHM Sections 10544.2, 10544.3. Like medical expenses and retirement fund contributions, search-for-work and interim employment expenses are a direct result of a respondent's unlawful actions. No other expense incurred by discriminatees as a result of a respondent's unlawful conduct is treated as an offset to interim earnings. Thus, in order to fully compensate discriminatees for their losses, we shall treat search-for-work and interim employment expenses in a manner consistent with our treatment of other losses suffered by the discriminatee. See *Goya Foods of Florida*, 356 NLRB at 1463.

Additionally, awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest, will avoid potential tax complications caused by the Board's traditional approach. The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay taxable wages in the year received. See *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3–4. Despite search-for-work and interim employment expenses being nonwage components of backpay, not subject to payroll or social security taxes (see CHM Sec. 10578.1), the Board's traditional approach has resulted in mixing these expenses with wages. The remedial changes urged by the General Counsel will avoid the potential complications engendered by this approach, resulting in a clearer accounting for the discriminatee, the IRS, and the SSA.

In reaching our decision, we have given careful consideration to the arguments raised by the Respondent and the dissent. The Respondent contends that search-for-work and interim employment expenses are compensatory damages, which are not permitted by the Act. Contrary to the Respondent, the Act does not prohibit the Board from awarding damages because they could be characterized under the broad umbrella of "compensatory damages." Search-for-work and interim employment expenses are clearly not disallowed under the Act, as they have been granted for years. The cases cited by the Respondent simply stand for the proposition that the Board is not permitted to award general tort remedies. See, e.g., *UAW v. Russell*, 356 U.S. 634, 644–645 (1958) (finding that Act did not preempt a state court's tort remedy, including mental anguish and punitive damages); *Operating Engineers Local 513 (Long Construction Co.)*, 145 NLRB 554, 555 (1963) (declining to award damages for bodily injury suffered during labor dispute). In fact, *UAW v. Russell* recognized that the Board is authorized to "restore to the employees in some measure what was taken from them because of [a respondent's] unfair labor practices," and thus, backpay awards "may incident[al]ly provide some compensatory relief to victims of unfair labor practices." 356 U.S. at 643, 645. Moreover, the Supreme Court has held that "the Board has wide discretion in ordering affirmative action; its power is not limited to . . . reinstatement with or without backpay." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539, 543 (1943). As we explained in *Pacific Beach Hotel,* there are many remedies the Board has properly imposed that are not explicitly provided in the Act. 361 NLRB No. 65, slip op. at 5 fn. 18 (2014). "Congress did not expressly authorize notice mailing or posting, orders to unions and employers alike to engage in bargaining, granting of access rights, or indeed many of the other remedies we order as part of our mandate under Sec[tion] 10(c) to effectuate the policies of the Act." Id.

In any event, the Board has been awarding search-for-work and interim employment expenses for 80 years. The changes we make today only affect how the Board calculates search-for-work and interim employment expenses, not whether these expenses are a permissible remedy. Moreover, these changes are consistent with the Board's broad, discretionary authority under Section 10(c) to revise our remedial policies to ensure that discriminatees are made whole. See *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 2–3; *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2. "When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up*

[12] The Board compensates discriminatees for a wide variety of additional expenses. See, e.g., *Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits), enfd. 227 F.2d 190 (8th Cir. 1955); *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employer-owned housing), enfd. in part 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962); *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962) (employee discounts on purchases), enfd. 324 F.2d 916 (7th Cir. 1963); *Garment Workers*, 300 NLRB 507 (1990) (car allowances); *Ji Shiang, Inc.*, 357 NLRB 1292 (2011) (tips). See also CHM Sec. 10544.7 (listing numerous examples of "other forms of compensation" that may be included in backpay awards).

Bottling Co., supra, 344 U.S. at 346–347 (internal quotations omitted).[13]

The dissent agrees that the Board's traditional treatment of search-for-work and interim employment expenses as an offset to interim earnings has resulted in less than make-whole relief for discriminatees whose interim earnings are less than their expenses. Despite recognizing this injustice, however, our dissenting colleague would not adopt the changes requested by the General Counsel because he perceives them as providing a windfall for certain other discriminatees whose interim earnings equal or exceed the sum of their lost earnings and their search-for-work and interim employment expenses.

Contrary to the dissent, discriminatees will not receive more than make-whole relief under the General Counsel's request, because incurring search-for-work and interim employment expenses represent a different injury than losing wages. Thus, reimbursement of these expenses compensates discriminatees for a separate injury than lost pay. As discussed above, the Board has recognized this distinction by awarding other expenses incurred by discriminatees regardless of interim earnings and separately from taxable net backpay, with interest.

Further, even if the Board's revised remedial policy might result in a limited number of discriminatees with unusually high interim earnings receiving additional reimbursement, this fact would not cause us to reject it. In our view, such a circumstance would constitute "a permissible remedial outcome if it bears 'an appropriate relation to the policies of the Act.'" See *Mimbres Memorial Hospital & Nursing Home*, 361 NLRB No. 25, slip op. at 6 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348). In *NLRB v. Seven-Up Bottling Co.*, the Supreme Court found that "[i]t is the business of the Board to give coordinated effect to the policies of the Act[,]" and stated that "[w]e prefer to deal with these realities and to avoid entering into . . . debate about what is 'remedial' and what is 'punitive.'" 344 U.S. at 348. Fully compensating discriminatees for search-for-work and interim employment expenses even when a discriminatee's interim earnings equal or exceed his or her lost earnings and expenses appropriately relates to the policies of the Act because this approach will deter unfair labor practices and encourage robust job search efforts.[14]

Additionally, we disagree with the dissent that our revised remedial policy will create a substantial risk of protracted litigation. As a preliminary matter, contrary to the dissent's suggestion, the vast majority of Board cases do not involve years of litigation.[15] Moreover, as the dissent recognizes, Board proceedings have rarely involved litigation over search-for-work and interim employment expenses. The changes we make today will not affect the underlying considerations that have led to the Board's current and historic high settlement rate or the Board's ability to resolve the majority of cases in less than 1 year. To accept the dissent's position would be to presume that the current treatment of job search and interim employment expenses operates as a substantial driver of settlement efforts. We make no such presumption and find it extraordinarily unlikely that changed treatment of such expenses would outweigh the more pressing issues of the relative risk, cost, and delay in choosing litigation over settlement. Thus, we do not share the dissent's speculative concern that our revised remedial policy will lead to an increase in protracted litigation. Furthermore, in the unlikely event that the revised remedial policy has any effect on our high settlement rate or ability to expeditiously resolve cases, we would give priority to redressing the admitted injustice to

[13] We note that the Board has not previously ruled against the General Counsel's requested changes based on the merits of the General Counsel's arguments. See, e.g., *Island Management Partners, Inc.*, 362 NLRB No. 158, slip op. at 3 fn. 4 (2015) (declining to rule on this issue because it had not been fully briefed by the parties).

[14] The dissent criticizes this rationale as at odds with *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938), where the Supreme Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Contrary to the dissent, and as noted above, our revised treatment of search-for-work and interim employment expenses serves a remedial purpose by fully compensating discriminatees for the separate injury of these expenses. Furthermore, it is entirely appropriate to consider whether our revised remedial policy "bear[s] appropriate relation to the policies of the Act." See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348. As the Supreme Court and the Board have recognized, it is the Board's duty to "'adapt [our] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly' in ways that best effectuate the purposes of the Act, provided they are not purely punitive." *Pacific Beach Hotel*, 361 NLRB No. 65, slip op at 11 (quoting *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194)). Our revised treatment of search-for-work and interim employment expenses ensures that "the victims of discrimination [are] treated fairly," "effectuates the purposes of the Act," and is not "purely punitive." See id. Thus, there is no merit to the dissent's criticism of this rationale.

[15] See the Board's Performance and Accountability Reports ("PAR") at https://www.nlrb.gov/reports-guidance/reports/performance-and-accountability. Indeed, in fiscal year 2015, 92.4 percent of meritorious unfair labor practice cases were settled. PAR 2015 at 36. Furthermore, 70.6 percent of all unfair labor practice charges were resolved within 120 days, and 80.4 percent of meritorious charges were resolved within 1 year. PAR 2015 at 25–26. The Board's performance in these areas has been consistent over time. See, e.g., PAR 2014 at 24-25, 41 (95.7 percent settlement rate, 72.3 percent of all charges resolved within 120 days, and 83.9 percent of meritorious charges resolved within 1 year); PAR 2013 at 19, 38 (92.8 percent settlement rate, 73.3 percent of all charges resolved within 120 days, and 82.4 percent of meritorious charges resolved within 1 year).

discriminatees who are deprived of make-whole relief under the Board's current policy.

We also disagree with the Respondent and the dissent that our revised remedial policy will discourage discriminatees from seeking "legitimate and realistic employment opportunities." As recognized by the General Counsel, employees who have lost their livelihood due to unlawful discharges have "no reason to incur unnecessary out-of-pocket costs in the hope that they may one day receive a favorable ruling and reimbursement of those expenses in an unfair labor practice proceeding," long after those expenses were incurred.

Furthermore, we do not agree with the Respondent and the dissent that our revised remedial policy will lead to the award of speculative expenses or otherwise open the door to abuse. The General Counsel bears the burden of establishing those expenses incurred by discriminatees, and the Board only awards expenses that are both reasonable and actually incurred. The Board is experienced in making these determinations and respondents retain their rights to challenge them in compliance proceedings.[16]

Contrary to the dissent, we find it immaterial whether other federal agencies follow the Board's traditional or new approach regarding search-for-work and interim employment expenses. The dissent cites three sources in support of his assertion that other agencies follow the Board's traditional approach—a decision from the Equal Employment Opportunity Commission, a regulation from the Office of Personnel Management, and a whistleblower investigation manual from the Department of Labor, Occupational Safety and Health Administration—[17] but also acknowledges, a decision from the Administrative Review Board of the Department of Labor that follows the Board's revised remedial policy.[18] What matters, however, is that (as discussed above) our new remedial policy is consistent with the Board's treatment of other expenses incurred by discriminatees, effectuates the policies of the Act, and avoids potential tax complications.

Finally, the Respondent's due process rights have not been denied because the judge revoked the Respondent's subpoena seeking documents regarding Geaslin's search-for-work and work-related efforts and expenses. These documents are relevant only in compliance proceedings. Thus, the Respondent had no need for the subpoenaed documents at the merits stage of the proceedings, and the judge's revocation will not prevent the Respondent from examining such documents in a later compliance proceeding. Indeed, the Board's policy is "to make available to the respondent, on request, after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement." CHM Sec, 10650.5.

Accordingly, for the reasons set forth above, we adopt a new policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest.[19] We will apply this policy retroactively in this case and in "all pending cases in whatever stage" given the absence of any "manifest injustice" in doing so. See *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)); *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 6 (finding no manifest injustice in applying a remedial change retroactively). In determining whether retroactive application would be unjust, we consider "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises*, supra at 673. We find no manifest injustice here. This case involves a remedial issue, and thus, reliance on preexisting law is not an issue. Furthermore, we see no "particular injustice" to the Respondent from retroactivity. The General Counsel's notice of intent to amend the complaint put the Respondent on notice that the General Counsel sought to change the Board's method of awarding search-for-work and interim employment expenses, and the Respondent had a full opportunity to litigate this issue. Finally, retroactive

[16] See, e.g., *Baker Electric*, 351 NLRB 515, 537–538 (2007) (finding that the discriminatee was entitled to reasonable search-for-work and interim employment expenses, but remanding discriminatee's claim for mileage expenses and directing that these expenses only reflect the costs over and above what the discriminatee would have incurred working for, and commuting to and from, the respondent); CHM Sec. 10660.4 ("The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment. . . . [T]he respondent has the overall burden to establish, based on a preponderance of the evidence, that a discriminatee failed to make a reasonable search for work.").

The dissent asserts that claims for search-for-work and interim employment expenses should "receive close scrutiny as to reasonableness." In light of the existing safeguards and limitations discussed above, we see no need to implement a heightened standard of review.

[17] See *Carmon-Coleman v. Rumsfeld*, EEOC Appeal No. 04A30030, 2004 WL 2423454 (October 20, 2004); 5 C.F.R. § 550.805(b), (e)(1); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigation Manual* (January 28, 2016).

[18] See *Hobby v. Georgia Power Co.*, Case Nos. 98–166, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table).

[19] *Crossett Lumber*, 8 NLRB 440, *English Mica Co.*, 101 NLRB 1061, and their progeny are overruled to the extent they are inconsistent with today's decision.

application of our new approach significantly promotes the purposes of the Act.

AMENDED REMEDY

In addition to the remedies ordered by the judge, we shall order the Respondent to compensate Geaslin for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision, as amended in this decision."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 24, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, I agree with some of the Board majority's conclusions and disagree with others. I respectfully dissent from the majority's finding that the Respondent violated the Act when it suspended employee Wendy Geaslin on May 9. As explained in Part A below, the conduct for which Geaslin was suspended on May 9 was not protected by Section 7 of the Act. However, I join my colleagues in finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) when Store Manager Theresa Pelo questioned Geaslin about a protected conversation Geaslin had engaged in with her union steward. I also agree, for the reasons explained in Part B of this opinion, that the Respondent violated the Act when it suspended Geaslin on May 14, 2014,[1] and when it discharged her a week later on May 21.

Based on three considerations, I also respectfully dissent from the changes adopted by my colleagues regarding the remedial treatment of search-for-work and interim employment expenses. First, as explained in Part C below, the Board's traditional approach to compensating claimants for these expenses makes claimants whole in most cases, and the change adopted by my colleagues will result in greater than make-whole relief in other cases. This would exceed the Board's statutory authority, which is limited to relief that is remedial.[2] Second, I believe the new standard does not adequately safeguard against the risk that awarding search-for-work and interim employment expenses, divorced from interim earnings, will tend to produce more protracted Board litigation over such expenses, particularly when such expenses are disproportionately high in comparison to the claimants' lost earnings or interim earnings; in turn, more protracted litigation over these issues would substantially delay the time when *any* Board-ordered remedies would be available to the claimants. Third, the Board's traditional approach—treating search-for-work and interim employment expenses as an offset against interim earnings, which in turn are deducted from gross backpay—is consistent with other statutes that deal with such expenses as a component of backpay.

Accordingly, I concur in part and dissent in part from the majority's decision.

[1] All dates herein refer to 2014 unless otherwise stated.

[2] See fn. **Error! Bookmark not defined.** and accompanying text, infra.

DISCUSSION

A. The May 9 Suspension

May 9, the Friday before Mother's Day, was an extremely busy day at the King Soopers Store #1 in Denver. Wendy Geaslin was working her scheduled 5:30 a.m. to 2 p.m. shift at the store's Starbucks kiosk. Sometime between 11:30 a.m. and 11:45 a.m., Store Manager Pelo asked for assistance bagging groceries, and she specifically asked for assistance from the employees assigned to the Starbucks kiosk. Geaslin finished with her customers, walked over to Pelo, and started to tell Pelo that she needed to take her lunch break because she had to leave work by 2 p.m. Pelo responded that she was the store manager and Geaslin needed to do what she said. Pelo also told Geaslin that she would get her lunch break, but now she needed to bag groceries. Geaslin asked if she should be bagging groceries since she belonged to a "different union."[3] Article 7, Section 26 of the collective-bargaining agreement covering Geaslin (the "meat" agreement or CBA) states: "It is understood that employees may perform incidental work in another classification without violating this agreement." Pelo repeated that Geaslin needed to bag groceries. Geaslin turned away from Pelo, raised her hands in the air and said, "Well, all I was doing was asking about my lunch." Pelo called Geaslin back, further discussion ensued in Pelo's office, and at the end of that discussion, Pelo gave Geaslin a 5-day suspension.

The parties disagree whether Geaslin insubordinately refused to obey Pelo's order to bag groceries. Pelo believed she did, but according to Geaslin, when she turned away from Pelo she did so to move toward bagging groceries in compliance with Pelo's order. It is unnecessary, however, to resolve this disagreement. The issue here is whether the Respondent violated Section 8(a)(1) of the Act when it suspended Geaslin on May 9. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act, which includes the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." The judge found that Geaslin was suspended because she challenged Pelo's right to order her to bag groceries. Assuming that finding is correct, the issue here is whether Geaslin was engaged in "concerted activities for the purpose of . . . mutual aid or protection" when she challenged Pelo's order. It is undisputed that Geaslin acted alone.

To determine whether an activity is concerted, the Board applies the standards set forth in its decisions in *Meyers Industries*.[4] Under these standards, activity is usually deemed concerted only if engaged in by two or more employees.[5] However, actions of a single employee may sometimes constitute "concerted activity," provided they are sufficiently linked in some way to group action.[6] The Board and the courts have held that one such circumstance is when an employee invokes "a right grounded in his collective-bargaining agreement." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 832 (1984). Thus, under the Board's longstanding *Interboro*[7] doctrine, approved by the Supreme Court in *NLRB v. City Disposal*, an employee who invokes a right grounded in his or her collective-bargaining agreement is engaged in concerted activity, provided the invocation of that collectively bargained right is "honest and reasonable."[8]

My colleagues adopt the judge's finding that Geaslin engaged in protected concerted activity under the *Interboro* doctrine when she challenged Pelo's right to order her to bag groceries. Contrary to my colleagues, I believe the judge's finding is erroneous. Geaslin did not invoke a right grounded in the "meat" agreement. That agreement contains no provision that would preclude Geaslin from bagging groceries. While some job descriptions in the CBA include work restrictions—for example, "wrappers" are not allowed to use the band saw, and (in some stores) deli clerks cannot prepare certain specialty meat items—there is nothing in the CBA that would prevent a Starbucks barista from performing incidental bagging duties. To the contrary, Article 7, Section 26 of the CBA provides that "employees may perform incidental work in another classification without

[3] Geaslin did not belong to a "different union" than the union that represents baggers. Rather, she was covered by a different collective-bargaining agreement—the "meat" agreement—while baggers are covered by the "retail" agreement.

[4] *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[5] "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497.

[6] For example, an individual employee engages in concerted activity when he or she seeks "to initiate or to induce or to prepare for group action" or brings "group complaints to the attention of management." *Meyers II*, 281 NLRB at 887.

[7] *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[8] *City Disposal*, 465 U.S. at 840 ("The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.").

violating this agreement." Accordingly, Geaslin could not have *reasonably* believed that she was invoking a collectively bargained right when she challenged Pelo's order to bag groceries. Not only does the CBA not provide Starbucks' baristas a right to refuse to perform work in another classification, it affirmatively states that the performance of incidental work in another classification does *not* violate the agreement. Accordingly, Geaslin's conduct during her encounter with Pelo on May 9 was not "concerted activity" under the *Interboro* doctrine, and therefore the Respondent did not violate Section 8(a)(1) when it suspended her for that conduct.

It is possible, under *City Disposal*, that an employee may be mistaken and still remain within the scope of the *Interboro* doctrine so long as he or she acts reasonably and in good faith. However, the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* (i.e., whether relevant events actually violate the contract), and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right. The Supreme Court made this clear in *City Disposal* itself. In that case, the collective-bargaining agreement gave unit employees the right to refuse to drive unsafe trucks. Employee James Brown was discharged after he refused to drive a truck he reasonably and honestly believed had faulty brakes, and the issue was whether that refusal was concerted activity. Approving and applying the *Interboro* doctrine, the Court found that Brown's refusal *was* concerted activity even if Brown was reasonably mistaken about the facts (whether the truck was objectively unsafe). The Supreme Court reasoned that "[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement":

> That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

465 U.S. at 831–832.

As indicated in the above quotation, when the Supreme Court approved the *Interboro* doctrine, the Supreme Court's premise was the actual existence of the "right grounded in the collective-bargaining agreement." Id. The Supreme Court only extended protection to the possibility that Brown might have been mistaken about the relevant facts—specifically, whether the truck he was ordered to drive was actually unsafe. That supporting rationale would vanish were the *Interboro* doctrine extended to situations where the contract right relied upon by the employee does not actually exist. If the contract does not contain the right, an employee mistakenly invoking that nonexistent right would not be "reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise" from that employer to honor that right, id., since there was no promise and there is no right.[9]

My colleagues cite a provision in the Respondent's retail agreement as a basis for finding Geaslin protected under the *Interboro* doctrine. However Geaslin was not covered by the retail agreement, and an employee cannot be protected under *Interboro* by invoking rights in someone else's collective-bargaining agreement. See *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 8 fn. 10 (2016) (Member Miscimarra, dissenting). Because the meat agreement did not give Geaslin the right to challenge an order to bag groceries, and because the meat agreement affirmatively provided that the performance of incidental work outside Geaslin's classification did not violate the agreement, I believe the conduct for which Geaslin was suspended on May 9 was not concerted activity under the *Interboro* doctrine, and the Re-

[9] I am aware that there is precedent contrary to my position. I believe this precedent is ungrounded in the rationale the Court relied on when it upheld the *Interboro* doctrine.

spondent did not violate Section 8(a)(1) when it suspended Geaslin on that date.

B. The May 14 Suspension and the May 21 Discharge

On May 14, Geaslin and her union representative met to discuss the May 9 suspension with Pelo. As discussed in more detail by the judge, things got heated between Pelo and Geaslin, and rather than resolve the issues from the first suspension, Geaslin left the meeting with another suspension. Subsequently, on May 21, Geaslin's employment was terminated for "gross misconduct" during the May 14 meeting.

Article 48 of the CBA outlines the grievance procedures to be followed by the Union and the Respondent. The first step in those procedures is for the Respondent and the Union to meet, with the employee optionally present as well, to try to settle the dispute. If the grievance cannot be resolved through that meeting, it is submitted in writing to the Respondent. It is well settled that grievance processing is protected concerted activity. In *City Disposal*, the Court stated: "To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7." 465 U.S. at 836. Similarly, the Board has long recognized that the processing of a grievance is protected concerted activity. See, e.g., *Exxon Mobil Corp.*, 343 NLRB 287, 287 (2004), revd. on other grounds sub nom. *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005); *Roadmaster Corp.* 288 NLRB 1195, 1197 (1988).

I believe that Geaslin's May 14 meeting with Pelo, accompanied by her union representative, was sufficiently grounded in Article 48 of the CBA to constitute a grievance meeting under the CBA and thus protected concerted activity under the Act. Therefore, I believe the judge was correct to apply *Atlantic Steel*, 245 NLRB 814, 816 (1979), to determine whether Geaslin's behavior during the May 14 meeting lost her the protection of the Act, and I agree with the judge, for the reasons she states, that Geaslin did not lose the Act's protection. On this basis, I concur with my colleagues' finding that the Respondent violated the Act when it suspended Geaslin on May 14 and discharged her on May 21.

C. Search-for-Work and Interim Employment Expenses

The Board has consistently compensated employees for their search-for-work and interim employment expenses ("employment/search expenses"): the Board has awarded employment/search expenses as a setoff from interim earnings, which in turn are subtracted from gross backpay.[10] However, the General Counsel and other parties have presented arguments for changing the way the Board treats these expenses, and the Respondent has argued in favor of maintaining the current, traditional approach.

The Board's traditional approach is illustrated by the following two examples:

- *Example 1 – No Employment/Search Expenses*. If an unlawfully discharged claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings with no employment/search expenses, the Board would award *$4,000* in net backpay ($5,000 in gross backpay minus the $1,000 in interim earnings). The claimant's combined Board recovery and interim earnings would total *$5,000* (equal to the gross amount of lost earnings resulting from the unlawful discrimination).
- *Example 2 – $250 in Employment/Search Expenses*. If the same claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings but also incurred $250 in employment/search expenses, the Board would award *$4,250* in net backpay ($5,000 in gross backpay minus interim earnings *reduced* by the $250 in employment/search expenses, so that the calculation would be $5,000 gross backpay minus $750 in net interim earnings for a net award of $4,250). In this example, the claimant incurred $250 in employment/search expenses, for which the claimant was compensated in full, and the claimant's combined backpay award plus interim earnings—taking into account employment/search expenses—would again total *$5,000* (equal to the gross amount of lost earnings resulting from the unlawful discrimination).

As my colleagues recognize, there is one circumstance in which the Board's traditional approach does not compensate a claimant's employment/search expenses in full: where there are insufficient interim earnings to be offset by those expenses. This is illustrated by the following example:

- *Example 3 – Employment/Search Expenses with No Interim Earnings*. If the same claimant lost $5,000 in gross earnings from the respondent employer, and he incurred $250 in employment/search expenses *without* securing another job

[10] Interim earnings reduce the amount of backpay an employee receives. Therefore, when the Board sets off or deducts employment/search expenses from interim earnings, this increases the amount of backpay the employee receives and thus compensates him or her for the employment/search expenses.

(so the claimant had no interim earnings), the Board would award $5,000 in backpay. There would be no recovery of the $250 in employment/search expenses because, under the Board's traditional approach, this amount is *only* awarded as an offset against interim earnings. Accordingly, had the claimant remained employed, he would have received *$5,000* from the employer; but if one takes into account the $250 in uncompensated employment/search expenses, the claimant's actual net recovery only totals *$4,750* ($5,000 in Board-ordered backpay, reduced by $250 in unrecovered employment/search expenses).[11]

Based on the above examples—in particular, Example 3—I might be inclined to support changing the Board's handling of employment/search expenses. The Board should provide remedies for unfair labor practices that are effective and complete, provided that we remain within the limits of our statutory authority. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65 (2014) (ordering broad range of remedies, including numerous extraordinary remedies, based on substantial unfair labor practices committed by the respondent).

However, I dissent from the approach that has been adopted by my colleagues because of three considerations, which are addressed in turn below.

1. *The Change Adopted by the Board Majority Will Produce a Windfall in Certain Cases, and Therefore Exceeds the Board's Remedial Authority*. It is well established that the Board has broad remedial authority, but our authority is limited to relief that is remedial. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938).[12] Accordingly, it is incumbent on the Board to consider the impact of our remedial measures on a *range* of cases and not limit our evaluation to scenarios that, when viewed selectively, suggest the existence of deficiencies in the Board's remedial scheme.

In Example 3 above—where an employee has $250 in employment/search expenses and no interim earnings—the Board's traditional treatment of employment/search expenses does not provide a recovery of those expenses because there are no interim earnings against which employment/search expenses can be offset.[13] However, the change adopted by my colleagues will produce a financial windfall in certain other cases—specifically, where claimants have interim earnings that equal or exceed the sum of their lost earnings and their employment/search expenses. In this situation, the claimants are already in an equivalent or more favorable financial position than would have resulted from uninterrupted employment with the respondent employer. Consequently, the claimants have experienced no financial loss—even taking into account their employment/search expenses—which means there is no reasonable argument that a remedial purpose is served by a Board-ordered award of employment/search expenses.[14] This is evident from the following illustration:

Example 4 – Higher Interim Earnings; New Backpay Calculation Provides Greater Than Make-Whole Relief.

[11] In addition, the Board's traditional approach results in an incomplete recovery of employment/search expenses where a claimant has *some* interim earnings, but less than the amount of the employment/search expenses. For example, taking our claimant who has lost $5,000 in gross earnings, assume that he incurred $1250 in employment/search expenses and earned $1000 in interim earnings. Under the traditional approach, the Board would award *$5000* in net backpay ($5000 in gross backpay *unreduced* by interim earnings because the $1250 in employment/search expenses completely offsets the $1000 in interim earnings). In this example, the claimant incurred $1250 in employment/search expenses, but only $1000 of that amount was compensated (limited by the fact that the claimant earned only $1,000 in interim earnings). Based on the claimant's $1000 interim earnings and his $5000 Board-ordered backpay, the claimant receives a total of $6,000 (which is $1000 more than his lost wages), but this does not fully compensate the claimant for his out-of-pocket losses, which totaled $6250, consisting of his lost income ($5000) plus employment/search expenses ($1250) because $250 of the claimant's $1250 employment/search expenses are not recovered.

[12] The Supreme Court has stated that the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel*, 311 U.S. at 12. And the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 235–236. See also *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 7 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[13] Similarly, the Board's traditional treatment of employment/search expenses does not provide a *full* recovery of those expenses where employment/search expenses exceed interim earnings. In this situation, there are insufficient interim earnings against which employment/search expenses can be offset. See fn. **Error! Bookmark not defined.**, supra.

[14] My colleagues acknowledge that their new method of calculating employment/search expenses may result in employees "with unusually high interim earnings receiving additional reimbursement," but they defend this result in part on the basis that it will "deter unfair labor practices." This rationale is at odds with Supreme Court precedent, where the Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose, "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 236. See supra fn. 12. My colleagues also say their approach will "encourage robust job search efforts." Board law already *requires* job search efforts, and that is the strongest possible encouragement.

If the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses, the Board's traditional approach would result in no Board-ordered backpay because (i) the claimant's $6000 in interim earnings are greater than his $5000 in lost earnings; (ii) his $250 in employment/search expenses are treated as an offset against his $6000 in interim earnings, producing net interim earnings of $5750; and (iii) the $5750 in net interim earnings is still greater than the claimant's $5000 in lost earnings, so the backpay award would equal zero (because the $5000 gross backpay amount would be completely offset by the $5750 in net interim earnings, even taking into account the $250 in employment/search expenses). However, based on the change adopted by my colleagues, the Board will now directly award $250 in employment/search expenses, even though the employee has incurred *no financial loss* when one takes into account (as the Board must) the employee's lost earnings, his interim earnings, and the $250 in employment/search expenses.

I do not discount the fact that parties and claimants experience substantial, often oppressive non-monetary consequences as the result of unfair labor practices. Nonetheless, the Act only permits the Board to award relief that is remedial. *Republic Steel Corp. v. NLRB*, 311 U.S. at 11-12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235-236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267-268; accord *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (Board-ordered remedies should secure "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."). See also fns. **Error! Bookmark not defined.** & 14, supra.

I am also persuaded that my colleagues' approach is ill-advised because the problem identified above could be easily addressed, *even if* the Board otherwise changes its treatment of employment/search expenses. For example, my colleagues could specify that employment/search expenses—even if they were otherwise recoverable—would not be awarded to the extent that a claimant's interim earnings during the applicable time period[15] equaled or exceeded the sum of (i) his or her lost earnings plus (ii) his or her employment/search expenses.[16] In this respect, it is a significant omission for the Board *not* to restrict the recovery of employment/search expenses in circumstances where such a recovery would constitute greater than make-whole relief.

Accordingly, because the change adopted by my colleagues will result in relief that is more than remedial in certain cases, I believe that in this respect, my colleagues' new method for calculating backpay exceeds our statutory authority. See *Republic Steel Corp. v. NLRB*, 311 U.S. at 11–12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235–236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267–268.

2. *Awarding Employment/Search Expenses Separately Creates a Substantial Risk of Protracted Litigation That Will Delay the Availability of Backpay Awards*. Unfortunately, the nature of Board litigation entails substantial delay in getting unfair labor practices resolved. Our procedures require the filing of a charge that is investigated by one of the Board's regional offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with post-hearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the

[15] Under *F. W. Woolworth Co.*, 90 NLRB 289 (1950), the Board computes backpay for employees unlawfully separated from their employment on a quarterly basis.

[16] If this restriction were in effect, then claimants could be awarded employment/search expenses in all cases in which they experienced a financial loss, but they would be denied a separate recovery of employment/search expenses when they did *not* experience a financial loss.

This can be illustrated using Example 4 (set forth in the text), where the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses. Here, the claimant finds himself in a more favorable financial position—even taking into account his employment/search expenses—than if he had not been discharged because his $6000 in interim earnings, when reduced by his $250 in employment/search expenses, totaled $5,750 in net interim earnings, which is still greater than his $5000 in lost wages. In this situation, awarding $250 in employment/search expenses would constitute a recovery in the absence of any financial loss (again, even taking the $250 employment/search expenses into account).

If my colleagues awarded a direct recovery for employment/search expenses, but with the limitation that such expenses would not be awarded to the extent that interim earnings during the applicable time period equaled or exceeded the sum of lost earnings plus employment/search expenses, then claimants could recover employment/search expenses whenever they experienced an overall financial loss, but they would be denied such a recovery if they did not experience an overall financial loss. In the above example, even if the claimant might otherwise be awarded $250 in employment/search expenses, such a recovery would *not* be awarded because his $6000 in interim earnings were greater than $5250, which is the sum of his lost wages ($5,000) plus his employment/search expenses ($250). If the same claimant had $5000 in lost wages and $250 in employment/search expenses, with interim earnings that were less than $5250, the above limitation would permit a recovery of employment/search expenses, but only up to the claimant's actual overall financial loss (i.e., the extent to which the claimant's interim earnings were less than the sum of his lost earnings and employment/search expenses). Using the same example (claimant had $5000 in lost wages and $250 in employment/search expenses), if the claimant had no interim earnings, the direct recovery of employment/search expenses would be $250 (on top of Board-ordered backpay); if the claimant had $5249 in interim earnings, the recovery of employment/search expenses would be $1.

Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional post-hearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts.

In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Many cases involve years of Board litigation, and often dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB No. 47 (2014)—involving approximately 300 employee-claimants—required 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal. Another example, in the early stages of Board litigation, involves consolidated claims being pursued against McDonald's USA, LLC and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB No. 91 (2016).

Given the substantial delays that, unfortunately, can be associated with Board proceedings, backpay issues—and, in particular, questions regarding an employee-claimant's efforts to mitigate damages and the reasonableness of employment/search expenses—present onerous challenges: employee-claimants often have difficulty reconstructing job-search efforts, locating and retaining relevant documentation, and recalling details regarding what expenses were undertaken and why. Unions and employers have similar difficulties dealing with these issues: Board cases do not allow pre-hearing discovery, and claimants often present extremely general testimony regarding job-search efforts and relevant expenses. In a single-employee discharge case involving accrued backpay over a period of years, the litigation of these details may require substantial time. When there are dozens or hundreds of employee-claimants, the other substantive legal issues may be overwhelmed by litigation over backpay, mitigation and the reasonableness of employment/search expenses.

In this context, the Board's traditional treatment of employment/search expenses has some positive features. First, as noted above, the Board's traditional approach has generally provided for the recovery of employment/search expenses, even though they have been awarded as a setoff from interim earnings (which, in turn, are subtracted from gross backpay). Second, awarding employment/search expenses as a setoff from interim earnings provides an incentive for such expenses to bear a reasonable relation to the potential interim earnings available to employee-claimants and to the prior earnings provided by the respondent employer. Third, to the extent that employment/search expenses have tended to be reasonable in relation to interim earnings and lost wages, Board proceedings have rarely involved protracted litigation over employment/search expenses. Finally, the handling of employment/search expenses as an offset to interim earnings is consistent with a recognition that, in most if not all cases, it is much more important for the Board to address the question of unfair labor practice liability and the Board's more substantial remedies: backpay, reinstatement, and potential injunctive relief.

The Board's traditional approach does not permit a full recovery of employment/search expenses in the one circumstance noted previously: where there are insufficient interim earnings to be offset by those expenses. I am troubled by this aspect of the Board's traditional approach. However, the changes adopted by my colleagues affect *all* cases—including those where the Board's traditional approach already provides a full recovery of employment/search expenses—and I am also troubled by the fact that the Board's new approach will award employment/search expenses in cases where the employee-claimants have experienced no financial loss (specifically, where interim earnings are greater than the sum of the employee's lost earnings and employment/search expenses), which in my view exceeds the Board's remedial authority. See subpart 1, above. Additionally, I believe that awarding employment/search expenses directly, without any connection to interim earnings or lost wages, will eliminate the positive features of the Board's traditional approach. In *all* cases, therefore, I believe the changes adopted by my colleagues may produce a substantial increase in contentious disputes over employment/search expenses, and these disputes, in *all* cases, are likely to delay the availability of *any* monetary remedies for employee-claimants who have been adversely affected by unlawful conduct.

The changes adopted by my colleagues would be more defensible if the Board acknowledged that detaching employment/search expenses from interim earnings creates the risk of producing more frequent claims for employment/search expenses that are disproportionate to both lost earnings and potential interim earnings. Likewise, the Board could indicate that—in addition to the conventional requirements that they be non-speculative

and proven based on a preponderance of the evidence—such claims will receive close scrutiny as to reasonableness because more protracted litigation over employment/search expenses operates to the detriment of all parties, including employee-claimants themselves. I believe the absence of these qualifications undermines the rationale for abandoning the Board's traditional treatment of employment/search expenses.

3. *The Board's Traditional Treatment of Employment/Search Expenses Is Consistent with the Practice of Other Agencies under Other Employment Statutes*. As a final matter, the Board does not stand alone in its traditional treatment of employment/search expenses. For example, similar to the constraint placed on the Board not to exceed remedial relief (see subpart 1, above), the Equal Employment Opportunity Commission (EEOC) has indicated that backpay awards should not place claimants in a more favorable financial position than would have resulted from their continued employment, and the EEOC has likewise treated employment/search expenses as a setoff from interim earnings. To this effect, in *Carmon-Coleman v. Rumsfeld*, EEOC Appeal No. 04A30030, 2004 WL 2423454 (October 20, 2004), the EEOC stated:

> The purpose of a back pay award is to restore to petitioner the income she would have otherwise earned, but for the discrimination. . . . The agency is required to make *certain deductions from back pay awards to ensure that the employee does not receive more in total benefits than she would have received in the absence of the personnel action*. The person who has been discriminated against must receive a sum of money equal to what would have been earned by that person in the employment lost through discrimination (gross back pay) *less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted* (net interim earnings). The difference between gross back pay and net interim earnings is net back pay due.[17]

See also 5 C.F.R. § 550.805(b), (e)(1) (Office of Personnel Management regulation states that "[n]o employee shall be granted more pay . . . than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred," and describes "offsets and deductions" from backpay as including "outside earnings" minus "ordinary and necessary business expenses . . . undertaken to replace the employment from which the employee was separated"); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigations Manual* (January 28, 2016), at 6–3 ("Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job.").[18]

[17] Emphasis added; citations omitted.

CONCLUSION

For these reasons, as to the above issues, I respectfully dissent in part and concur in part.

Dated, Washington, D.C. August 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[18] Separate from the potential award of backpay (as to which the EEOC treats employment/search expenses as an offset against interim earnings), in 1991 Congress amended the Civil Rights Act of 1964 to permit the EEOC to award "compensatory damages," which the EEOC has defined as including "pecuniary losses" such as "moving expenses" and "job search" expenses. See EEOC Enforcement Guidance, Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, 1992 WL 189089 (1992). However, as noted previously, the National Labor Relations Act only permits the Board to award remedial relief, which does not include compensatory damages. See *UAW v. Russell*, 356 U.S. 634, 643 (1958) ("Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."). Similarly, although the Administrative Review Board in a Department of Labor proceeding awarded "employment search expenditures" to an employee-claimant in a case cited by the General Counsel, *Hobby v. Georgia Power Co.*, Case Nos. 98-166, 98-169, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table), this was a whistleblower claim under the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1988), which permits the recovery of "compensatory" damages, and neither party contested the award of employment search expenditures. Id. See also 42 U.S.C. §5851(b)(2)(B) (stating that, in the event of a violation, the Secretary of Labor may award reinstatement with backpay, plus "compensatory damages to the complainant").

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your protected concerted activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspensions and termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

KING SOOPERS, INC.

The Board's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Isabel C. Saveland, Esq., and *Jose Rojas, Esq.,* for the General Counsel.

Raymond M. Deeny, Esq., and *Jonathon Watson, Esq.,* for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

[1] All dates are 2014 unless otherwise indicated.

[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if".

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective-bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A Union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her to suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunch break at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunch break "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79).[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was unaware that Jackson was a union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manger. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunch break midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunch break. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa", mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what

more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the

Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red [. . .] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. DISCUSSION AND ANALYSIS

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.

Motion to Amend the Complaint: Make-Whole Remedy

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op at 1 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 slip op. at 3 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Kentucky River Medical Center*, 356 NLRB 6, 6 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and ques-

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

tioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 13 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB 794 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance regarding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, 271 NLRB 187 (1984), a charging party filed grievances over his suspensions in accordance with his collective bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunch break. Respondent argues that Geaslin's questioning in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986), enfd. 833 F.2d 1012 (6th Cir. 1987); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *Plumbers Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, *Inc.,* 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such "we" and "our" when complaining to Jackson, who is a coworker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement); *Kingsbury, Inc.*, 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights—even if . . . it is incorrect—is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Francis Building Corp.*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB 35 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, slip op. at 3. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br at 48–50).

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB 18, 18 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB No. 23, slip op. at 28.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her coworker about the inability to manage the workload in the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March Geaslin actively questioned the propriety of such duties, and complained to her coworker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunch break, albeit later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunch break later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunch break before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunch break, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her

back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB at 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Re-

[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB 476, 478 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*,

spondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her, and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petro-*

338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunch break). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

leum Corp., 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101; see *Goya Foods*, 356 NLRB 476, 478. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, slip op. at 5 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act), adopted in 355 NLRB 636 (2010) enf. denied in part, and remanded on other grounds 679 F.3d 70 (2d Cir. 2012) decision on remand *Starbucks Coffee* Co., 360 NLRB No. 134 (2014).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *Mead Corp.*, 331 NLRB 509 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a

[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014).

private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id., slip op. at 3. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1. Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act.

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

Conclusions of Law

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating an employee about her union activity.

(b) Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 22, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the two unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the two 5-day suspensions and termination will not be used against her in any way.

KING SOOPERS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249

Agent's Direct Dial: (720)598-7398

August 30, 2016

Raymond M. Deeny, Esq.
Sherman & Howard, LLC
90 S. Cascade Ave.
Ste. 1500
Colorado Springs, CO 80903-1639

Re: King Soopers, Inc.
Case 27-CA-129598

Dear Mr. Deeny:

Enclosed is a copy of the Board Decision and Order in the above matter that issued on August 24, 2016. Please let me know whether or not King Soopers, Inc., hereinafter referred to as Respondent, intends to comply with the Board's order. If Respondent does not intend to comply with the Board's order, this matter will be referred for enforcement proceedings in the appropriate United States Court of Appeals.

In anticipation of Respondent's willingness to comply, this letter discusses what Respondent needs to do to comply with the Board's order.

Post Notice: Enclosed are ten copies of the Notice to Employees. A responsible official of the Respondent, not Respondent's attorney, must sign and date the Notices before posting them. The Notices should be conspicuously displayed where notices to employees are customarily posted for a period of 60 consecutive days at Respondent's Store # 1 in Denver, CO. Respondent must take reasonable steps to ensure that the Notices are not altered, defaced or covered by other material. If additional Notices are required, please let me know. During the posting period, a member of the Regional Office staff may visit Respondent's facility to inspect the Notices.

Electronic Posting: The Board's order provides that Respondent will also post the Notice electronically, such as posting on an intranet or internet site, if Respondent customarily communicates with its employees by such means and keep it continuously posted there for 60 consecutive days. Respondent will furnish the Regional Office with a paper copy of the intranet or website posting along with the attached completed Certification of Compliance, Part One. In the event Respondent's intranet is password protected, I will contact you if it is necessary to obtain the password for the intranet site.

Electronic Mailing: The Board's order further provides that Respondent will distribute the Notice electronically, such as by email, if Respondent customarily communicates with its employees by such means. Respondent should forward a copy of that electronic mailing, at the time that it is sent, transmitting the Notice to Employees, with all of the recipients' electronic addresses to the Compliance Officer at Erika.Bailey@nlrb.gov. If Respondent does not customarily communicate with its employees by electronic means such as by email, posting on an intranet or internet site, it should so advise the undersigned, in writing.

Remedial Actions:

Production of Documents: The Board's order provides that Respondent will make Wendy Geaslin whole and provide the necessary records, in electronic form, if available, to enable the Regional office to analyze the amount due pursuant to the Board's order. In this regard, it is requested that Respondent provide copies of the following documents to the undersigned by September 14, 2016:

- All payroll records covering the time between January 1, 2014 to the present of baristas who are or who were employed on a full-time (or almost full-time) basis at Store # 1 in Denver, Colorado. (Please include the payroll records for Wendy Geaslin, and include all baristas' hiring dates).
- An electronic copy of the records (referred to above) if stored in electronic form.
- All employee handbooks and collective bargaining agreements (in effect as of January 1, 2014 to the present) that show what benefits the baristas were entitled to receive.

The Regional Office reserves its right to request additional records if the documents provided by the Respondent are insufficient to calculate the discriminatee's loss of earnings and other benefits.

Report Allocating Backpay: As provided in the Board's order, Respondent will file with the Regional Director, at the address listed below, the completed Report of Backpay Paid Under the National Labor Relations Act, which is enclosed for your convenience:

National Labor Relations Board, Region 27
Attn: Compliance Officer Erika K. Bailey
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

This report will not have to be completed until the backpay amount has been determined and the backpay paid.

Reinstatement: The Board's order provides that Respondent will offer Wendy Geaslin immediate and full reinstatement to her former job or, if that job no longer exists, to a

substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed. A copy of the letter offering her reinstatement should be furnished to the undersigned by September 7, 2016.

Other Remedies: The Board's order also provides that Respondent will by September 7, 2016, remove from its files any reference to the unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

Certification of Compliance: Certification of Compliance forms are enclosed. Certification of Compliance, Part One, addresses all communication means by which Respondent has complied with the Board's requirement to inform employees of the signed Notice to Employees and should be completed and returned with one signed and dated Notice by September 15, 2016. The Certification of Compliance, Part Two addresses affirmative actions Respondent is required to take pursuant to the Board's order and should be completed and returned by not later than September 21, 2016. If the Certification of Compliance and signed Notice are returned via e-file or e-mail, no hard copies of the Certifications of Compliance or Notice are required.

Closing the Case: When all of the affirmative provisions of the Board's order have been fully complied with and there are no reported violations of its negative provisions, you will be notified that the case has been closed on compliance. Timely receipt of the signed and dated Notice and required sworn Certification of Compliance forms will assist the Region in closing the case in a timely manner.

Your cooperation in this matter will be appreciated.

Very truly yours,

Erika K. Bailey
Compliance Officer

Enclosures: Board Decision and Order
Notices to Employees
Certification of Compliance Form, Part One
Certification of Compliance Form, Part Two
Report of Backpay Paid Under the National Labor Relations Act

cc: Wendy Geaslin
416 W. 15th St.
Hays, KS 67601-3722

Jonathon M. Watson, Esq.
Sherman & Howard, LLC
633 17th St.
Ste. 3000
Denver, CO 80202

CERTIFICATION OF COMPLIANCE
(PART ONE)

RE: King Soopers, Inc.
Case 27-CA-129598

As required by the Board's order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's order.

Physical Posting

The signed and dated Notice to Employees in the above matter was posted on (date)_____ at the following locations: (List specific places of posting, i. e. lunch room bulletin board, next to time clock)

_____

_____

_____

A copy of the signed Notice is attached.

Intranet Posting

The signed and dated Notice to Employees in the above matter was posted on the Respondent's intranet/website on (date)_____. A copy of the intranet/website posting is attached.

Electronic Mailing

The signed and dated Notice to Employees in the above-captioned matter was e-mailed on (date)_____ to all current employees. The electronic mailing transmitting the Notice to Employees was sent to the Compliance Officer at the same time on _____.

I have completed this Certification of Compliance, Part One and state under penalty of perjury that it is true and correct.

RESPONDENT

By: _____

Title: _____

Date: _____

This form should be returned to the Compliance Officer. If the Certification of Compliance Part One is returned via e-file or e-mail, no hard copy of the Certification of Compliance Part One and signed and dated Notice is required.

CERTIFICATION OF COMPLIANCE
(PART TWO)

RE: King Soopers, Inc.
Case 27-CA-129598

As required by the Board's order in this matter, this document is a sworn certification of the steps that Respondent has taken to comply with the Board's order.

Reinstatement

On (date)_____, the Employer offered reinstatement to the employee named in the Board order and Notice to Employees. A copy of the offer of reinstatement is attached.

Removal of Records

On (date)_____, Respondent removed from its records any reference to the unlawful 5-day suspensions and termination and on (date) _____ notified the employee that those disciplinary actions will not be used against her in any way. A copy of the letter of removal of record is attached.

I have completed this Certification of Compliance, Part Two and state under penalty of perjury that it is true and correct.

RESPONDENT

By: _____

Title: _____

Date: _____

This form should be returned to the Compliance Officer. If the Certification of Compliance Part Two is returned via e-file or e-mail, no hard copy of the Certification of Compliance Part Two is required.

Rev: 3/16

Report of Backpay Paid Under the National Labor Relations Act

(See IRS Publication 957: Reporting Back Pay and Special Wage Payments to the Social Security Administration)

Employer Name and Address	King Soopers, Inc. 65 Tejon St., Denver, CO 80223-1221					
Employer's EIN:		Tax Year in Which Award Payment Was Paid:				**2016**
(1) SSN and Employee Name	(2)*Award Amount and Period(s)	(3)**Other Soc. Sec./ Med. Wages Paid in Award Year		(4)***Allocation		
		Soc. Sec.	Med./MQGE	Year	Soc. Sec.	Med./MQGE

*Exclude amounts specifically designated as damages, penalties, etc.

**Exclude the amount of backpay, if any, included in that amount.

***For periods before January, 1978 (and for state and local government (Section 218) employees before January 1, 1981), show the wage amounts by calendar quarters. The social security and/or Medicare Qualified Government Employment (MQGE) wages (where applicable) must be shown separately FOR ALL YEARS. (Wages subject ONLY to MQGE would be shown in the Medicare/MQCE column; no wages would be shown in the Soc. Sec. column.) For tax years 1991 and later, the social security and Medicare wages must be listed separately.

I certify that the payments set forth above were made pursuant to the National Labor Relations Act.

(Sign Name) (Date)

Contact Person (for questions or additional information):

(Name of Contact) (Contact Telephone Number)

Send Form to: National Labor Relations Board, Region 27
Attn: Compliance Officer Erika K. Bailey
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

SAMPLE:

Employer Name and Address	ABC Manufacturing Co. 123 Main Street City, State, Zip					
Employer's EIN:	XX-XXXX-XXXX	Tax Year in Which Award Payment Was Paid:				2016
(1) SSN and Employee Name	(2)*Award Amount and Periods(s)	(3)**Other Soc. Sec./Med.Wages Paid in Award Year		(4)***Allocation		
		Soc. Sec.	Med./MQGE	Year	Soc.Sec	Med./MQGE
xxx-xx-xxxx HELEN T. SMITH	$100,000 1/2009 - 12/2012	$40,000	$40,000	2009 2010 2011 2012	$20,000 $25,000 $27,000 $28,000	$20,000 $25,000 $27,000 $28,000

Form NLRB-4727
(1-02)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your protected concerted activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspensions and termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

KING SOOPERS, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The Board's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code above. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service by visiting its website at http://www.federalrelay.us/tty, calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-866-667-NLRB.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1961 Stout Street, Suite 13-103
Denver, CO 80294
Hours of Operation: 8:30 a.m. to 5:00 p.m.

Telephone: 303-844-3551
Board Agent: 720-598-7398
Toll free: 1-866-667-NLRB(6572)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED SEP - 9 2016
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KING SOOPERS, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No. 16-1316

PETITION FOR REVIEW

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
SEP - 9 2016
RECEIVED

ORIGINAL

Petitioner King Soopers ("Petitioner" or "King Soopers"), pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, et seq. ("the Act"), and Fed. R. App. P. 15, hereby petitions the Court for review of the Order of the National Labor Relations Board ("Board") entered on August 24, 2016. As grounds therefore, Petitioner states as follows:

1. On August 24, 2016, the Board stated its findings of fact and conclusions of law and issued an Order in Case No. 27-CA-129598.

2. King Soopers petitions this Court to review, modify, and set aside the Board's final order in Case No. 27-CA-129598. 29 U.S.C. § 160(f).

3. This Court has jurisdiction over this Petition pursuant to Section 10(f) of the NLRA. 29 U.S.C. § 160(f).

WHEREFORE, pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Fed. R. App. P. 15, Petitioner respectfully requests that this Honorable Court cause notice of the filing of this Petition for Review to be served on the Board, and that this

Court take jurisdiction of the proceeding and enter a judgment modifying or setting aside the Board's August 24, 2016 Order.

Respectfully submitted this 9th day of September, 2016.

SHERMAN & HOWARD L.L.C.

Thomas J. Kennedy
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254-2080
Telephone: (480) 624-2710
Facsimile: (480) 624-2029
Email: tkennedy@shermanhoward.com

Raymond M. Deeny *(admission pending)*
Jonathon M. Watson *(admission pending)*
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202
Telephone: (303) 297-2900
Facsimile: (303) 298-0940
Email: rdeeny@shermanhoward.com
Email: jwatson@shermanhoward.com

Attorneys for Petitioner King Soopers

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 9th day of September, 2016, I electronically filed the foregoing **PETITION FOR REVIEW** with the Clerk of the Court using the CM/ECF system.

I further certify that on this 9th day of September, 2016, a true and correct copy of the foregoing **PETITION FOR REVIEW** was served on the following individuals addressed to them at the following addresses:

Gary Shinners (E-File)
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Paula Sawyer (E-File)
Regional Director
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Isabel Saveland (Via Email at Isabel.Saveland@nlrb.gov)
Counsel for the General Counsel
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Wendy Geaslin (via U.S. Mail)
416 West 15th St.
Hays, KS 67601

Mary Navrides

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED SEP - 9 2016
CLERK

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COURT OF APPEALS
D.C. CIRCUIT
2016 SEP -2 PM 6:10

16-1316

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

King Soopers, Inc. *and* Wendy Geaslin. Case 27–CA–129598

August 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The primary issue in this case is whether the Board should modify the current make-whole remedy to require respondents to fully compensate discriminatees for search-for-work expenses and expenses incurred in connection with interim employment. The General Counsel urges the Board to discontinue its traditional practice of treating discriminatees' reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings deducted from gross backpay, arguing that this approach unfairly forces discriminatees to bear work-related expenses that result directly from a respondent's unlawful action. The General Counsel instead proposes that these expenses be calculated and paid separately from backpay, regardless of whether the discriminatee received interim earnings.

Before considering the General Counsel's remedial request, we must first decide the merits of the case. For the reasons stated by the judge,[1] we find that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employee Wendy Geaslin about her protected, concerted activity.[2] Additionally, as discussed below, we affirm the judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. Although our dissenting colleague would find that Geaslin's first suspension was lawful, the dissent ultimately agrees with all of our other unfair labor practice findings.

I. GEASLIN'S SUSPENSIONS AND DISCHARGE

Facts

Geaslin worked as a barista at the Starbucks kiosk in the Respondent's Denver, Colorado grocery store. She was covered by the meat contract between the Respondent and the Union pursuant to the parties' Letter of Agreement #26, Coffee Shops. The parties have additional contracts, such as the retail contract which covers, among others, clerks whose duties involve "bagging . . . sold merchandise." Article 1 of the meat contract and Article 2 of the retail contract describe the work to be performed by employees covered by each agreement.

On May 9, 2014, store manager Theresa Pelo called for employees, and specifically baristas, to assist with bagging in the front of the store. Geaslin was surprised because she had never been asked to bag groceries. Geaslin walked to the front of the store and attempted to tell Pelo that she needed to take her lunchbreak since she would be leaving at 2 p.m.[3] Pelo stated that Geaslin needed to do as directed and not worry about her lunch. Geaslin asked whether she should be performing these duties because she belonged to a different bargaining unit or union. Pelo repeated her directive. Geaslin turned to bag,[4] raising her hands in the air and stating that she was just asking about her lunch. Geaslin then walked toward the check stands to bag groceries but Pelo called her back, saying they needed to talk. Pelo accused Geaslin of refusing to bag groceries. Geaslin replied that she did not refuse, and had only inquired about her lunch break and whether the Union's contract permitted her to per-

[1] On October 22, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief. The General Counsel filed a limited exception, a supporting brief, and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions; to modify the recommended remedy; and to adopt the recommended Order as modified.

We affirm the judge's decision to grant the General Counsel's motion to amend the complaint to add an interrogation allegation. In doing so, we note that the Respondent had the opportunity to fully litigate this allegation because the amendment was made mid-trial, giving the Respondent the opportunity to call Geaslin as a witness.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

[2] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) when its manager Theresa Pelo interrogated Wendy Geaslin, we do not rely on *Century Restaurant & Buffet, Inc.*, 358 NLRB 143 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[3] Article 24 of the meat contract requires employees to take a lunch break at approximately the middle of their shift. Geaslin had completed approximately 6 hours of her 8.5 hour shift.

[4] Our dissenting colleague explains that he finds it unnecessary to resolve the parties' disagreement as to whether Geaslin refused Pelo's order to bag groceries. We note, however, that the judge fully credited Geaslin's testimony that she attempted to bag groceries and discredited Pelo's contrary testimony. The dissent does not present any reason to disturb the judge's credibility findings.

ORIGINAL

form bagging work. Pelo disagreed and placed her on a 5-day suspension.

On May 14, 2014, Geaslin, Union representative Danny Craine, Pelo, and two other managers met to discuss Geaslin's suspension. The meeting grew tense as the parties disputed whether Geaslin refused to bag groceries or whether she simply questioned the propriety of the task. Ultimately, Pelo placed Geaslin on a second 5-day suspension. During the meeting, Pelo admitted that Geaslin's duties do not include bagging groceries. Subsequently, on May 21, 2014, Pelo terminated Geaslin for alleged gross misconduct during the May 14, 2014 meeting.

Craine testified that he interprets both the meat and retail contracts to prevent employees from performing work outside of their assigned department. Assistant deli manager Angelica Eastburn testified that it was unusual for employees other than produce, bakery, and grocery employees – who are all in the retail unit – to bag groceries.

Discussion

Pursuant to the Board's *Interboro* doctrine, an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity. 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). As the Supreme Court explained in *NLRB v. City Disposal Systems, Inc.*, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated." 465 U.S. 822, 840 (1984).

We agree with the judge that Geaslin engaged in protected, concerted activity when she questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union. In particular, we agree that Geaslin's interpretation of the contract was honest and reasonable; indeed, it was consistent with her union representative's interpretation of the agreements, the assistant deli manager's testimony that it was unusual for employees outside the retail unit to bag groceries, and Pelo's own admission that Geaslin's duties did not include bagging groceries.

The Respondent and our dissenting colleague contend that the Respondent's suspension of Geaslin on May 9, 2014 was lawful because she did not engage in protected, concerted activity.[5] Our colleague argues that when questioning the directive to bag groceries, Geaslin was not invoking "a right grounded in the 'meat' agreement." He contends that "the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* . . ., and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right." In support, he cites *City Disposal.* However, the Supreme Court neither adopted nor suggested such a limited interpretation of the *Interboro* doctrine. In fact, the Court noted that the employee's conduct is concerted so long as "the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement." Id. at 839–840.

Further, the Board and the courts have interpreted the *Interboro* doctrine to cover mistakes about contractual rights. For example, in *Tillford Contractors*, the Board found that an employee engaged in protected, concerted activity when he argued that the presence of another employee on the jobsite violated the contract, even though his contractual claim was incorrect. 317 NLRB 68, 69 and fn. 5 (1995).[6] In *NLRB v. H.C. Smith Construction Co.*, the Ninth Circuit agreed with the Board's finding that an employee engaged in protected, concerted activity under the *Interboro* doctrine even though he was incorrect in believing that the contract contained a provision regarding the chain of command on the job. 439 F.2d 1064 (9th Cir. 1971). The court explained that an "employee does not lose the protection of the Act as a matter of law simply because his understanding of the contract turns out to be mistaken." Id. The Seventh Circuit has likewise agreed that "[t]hough incorrect . . . an employee's understanding of the collective bargaining agreement may nevertheless be reasonable." *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991) (finding that the employee's refusal of an assignment based on his honest and reasonable understanding of an oral agreement, rather than a contract, was protected, concerted activity).

The dissent's narrow interpretation of the *Interboro* doctrine is contrary to precedent and the Supreme Court's observation that "[i]n the context of a workplace dispute, . . . the participants are likely to be unsophisticated in collective-bargaining matters." *City Disposal*, 465 U.S. at 840. Were the *Interboro* doctrine limited to mistakes about facts, as urged by our colleague, employees would need to be virtual legal experts regarding their

[5] The Respondent cites *ABF Freight Systems,* 271 NLRB 35 (1984), in support. For the reasons stated by the judge, we agree that this case is distinguishable.

[6] See also *K-Mechanical Services, Inc.*, 299 NLRB 114, 118 (1990) (finding employee's assertion that he had a contractual right to preferential weekend overtime work was protected, concerted activity even though he was not actually covered by the portion of the agreement that formed the basis for his assertion); *Peerless Plating Co.*, 263 NLRB 1025, 1028 (1982) ("Employee attempts to enforce provisions of an existing collective bargaining agreement are protected, regardless of the employer's or the Board's appraisal of the validity of the employee's interpretation of the contract.").

contractual rights in order to enforce those rights in the workplace. Holding employees to such a high standard is unreasonable and would certainly chill employees' exercise of their Section 7 rights. Indeed, the Seventh Circuit has recognized that "the exercise of rights protected under the Act would be severely hampered if employees could face retaliation for good faith interpretations of collective bargaining agreements." *NLRB v. P*I*E Nationwide*, 923 F.2d at 515.

Contrary to the dissent, we find that Geaslin's question whether she should perform bagging work was sufficiently grounded in the contract to be covered by the *Interboro* doctrine. Article 1 of the meat contract covering Geaslin and article 2 of the retail contract describe the work to be performed by the employees covered by each contract. Article 2 of the retail contract specifically states that "[a]ll work and services performed in the bargaining unit connected with the handling or selling of merchandise to the public shall be performed exclusively by bargaining unit members except as provided below."[7] Based on these contract provisions alone, Geaslin could honestly and reasonably believe that she should not bag groceries. Moreover, we find that article 7, Section 26, on which the dissent relies, reasonably tends to support Geaslin's understanding of the contract. Article 7 lists the meat unit classifications and their respective duties and restrictions. Section 26, the last provision of the article, states, "It is understood that employees may perform incidental work in another classification without violating this agreement." Section 26 could reasonably be interpreted to permit incidental work among the enumerated meat classifications rather than the exchange of incidental work between the meat unit and the retail unit. In any event, even if it turns out that Geaslin's belief that only retail unit employees should perform retail unit bagging work is incorrect, there is no basis to find on this record that her belief was not honest and reasonable.

Finally, we agree with the judge that Geaslin engaged in protected activity at the grievance meetings on May 14 and 21, 2014, and that her conduct during the May 9 and 14, 2014 meetings did not cause her to lose the protection of the Act. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). Therefore, we affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) by twice suspending and discharging Geaslin for engaging in protected, concerted activity. We note that our dissenting colleague joins us in finding that Geaslin's second suspension and discharge were unlawful based on an alternative rationale.

II. REMEDIAL CHANGES

Having found the suspension and discharge violations, we next consider the remedial changes urged by the General Counsel.[8] We find, for the reasons discussed below, that the requested remedial changes are clearly warranted in order to satisfy the Board's statutory obligation to provide meaningful, make-whole relief for losses incurred by discriminatees as a result of a respondent's unlawful conduct.

Analysis

Section 10(c) of the Act grants to the Board "broad, discretionary" authority to order remedies that will "effectuate the policies" of the Act. *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). Because Congress could not "define the whole gamut of remedies to effectuate [the policies of the Act] in an infinite variety of specific situations[,]" it vested the Board with the authority to develop appropriate remedies based on administrative experience. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The underlying policy of Section 10(c) is "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." Id. "From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach. . . . The Supreme Court has repeatedly underscored the essential role of make-whole relief in the statutory scheme." *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011).

In providing make-whole relief, the Board serves the dual purposes of reimbursing discriminatees for losses suffered as a direct result of the unlawful conduct and furthering the policy interest of deterring illegal actions. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). The Supreme Court and the Board have recognized that "'[a] backpay order is a reparation order designed to vindicate the public policy of the statute by

[7] Contrary to our dissenting colleague's assertion, it is appropriate to consider this provision from the retail contract in assessing whether Geaslin's question is covered by the *Interboro* doctrine. See, e.g., *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 3-4 (2016); *K-Mechanical Services, Inc.*, 299 NLRB at 118.

[8] On February 19, 2016, the Board invited all interested parties to file briefs regarding whether the Board should make the changes requested by the General Counsel. In addition to the supplemental and responsive briefs filed by the Respondent and the General Counsel, amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations, the Service Employees International Union, the International Brotherhood of Electrical Workers, Local 304, and the law firm Weinberg, Roger & Rosenfeld. The amici support the General Counsel's requested changes, and the Respondent opposes them. No individual or association other than the Respondent filed a brief in support of retaining the Board's traditional approach regarding search-for-work and interim employment expenses.

making employees whole for losses suffered on account of an unfair labor practice." *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (quoting *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263). See also *Kentucky River Medical Center*, 356 NLRB 6, 9 (2010) (Board recomputed interest on backpay owed discriminatees from simple to compounded daily interest, stating "[w]e believe that daily compounding . . . will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy"). Stated differently, backpay is to be computed in such a way as to restore, as nearly as possible, that which the discriminatee would have obtained but for the unlawful act while also serving as a deterrent to future unfair labor practices. *NLRB v. Mastro Plastics Corp.*, 354 F.2d at 175; see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194; *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (2014). Where the Board has found that its remedial structure fails to fulfill its make-whole objective, "[it] has revised and updated its remedial policies . . . to ensure that victims of unlawful conduct are actually made whole." *Don Chavas*, 361 NLRB No. 10, slip op. at 2–3.

For example, in *F.W. Woolworth Co.*, the Board modified its computation of make-whole relief to award backpay on a quarterly basis. 90 NLRB 289 (1950).[9] The Board made this modification because "[t]he cumulative experience of many years" demonstrated that the Board's traditional approach "f[e]ll short of effectuating the basic purposes and policies of the Act." Id. at 291. As the Board explained, if a discriminatee received higher wages from an interim employer, the traditional backpay computation "resulted in the progressive reduction or complete liquidation of back pay due." Id. at 292. The traditional computation also had the two-fold deleterious effect of incentivizing employers to "deliberately refrain[] from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability" and encouraging discriminatees to "waiv[e] their right to reinstatement in order to toll the running of back pay and preserve the amount then owing." Id. For these reasons, the Board found it appropriate to adopt a new backpay computation method.

The Supreme Court expressly approved the Board's new remedial approach as consistent with the Board's "broad discretionary" authority in *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-347 (1953). Quoting *Phelps Dodge v. NLRB*, 313 U.S. at 200, the Court emphasized that "'the relation of remedy to policy is peculiarly a matter for administrative competence'" and held that the "Board [has] the discretionary power to mould remedies suited to practical needs." 344 U.S. 349, 352. The Court rejected the argument that the Board's new approach would result in greater than make-whole relief for discriminatees and would penalize employers. 344 U.S. at 348. Additionally, the Court declined to debate whether the *Woolworth* formula was remedial or punitive, explaining that the Court "prefer[red] to deal with these realities and avoid entering into the bog of logomachy." Id.[10]

Today, we assess whether the current remedial framework properly awards make-whole relief, or fails to truly make whole the aggrieved victims of unlawful conduct. Discriminatees who have lost their jobs are some of the most seriously aggrieved victims of unlawful conduct. As the Board and courts have recognized, loss of employment is "'the industrial equivalent of capital punishment.'" *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 8 (2014) (quoting *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1209 (7th Cir. 1987)). Discharging an employee for engaging in protected, concerted activity sharply demonstrates an employer's power over its employees and has a long-lasting coercive impact on the workforce. See *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988). Further, the individual most harmed by an employer's unlawful discharge is the discriminatee, who is deprived of his or her job, causing a loss of income and employment benefits. Under the duty to mitigate, the discriminatee is then required to find and maintain interim employment, potentially causing the discriminatee to endure additional, significant financial hardship—hardship that is traceable to the employee's activity protected by the statute that we are charged to enforce. Therefore, we believe it is vitally important that the Board ensure that the make-whole remedy fully compensates unlawfully discharged employees for the losses they incurred and "deter[s] further encroachments on the labor laws." *Goya Foods of Florida*, 356 NLRB at 1464 (quoting *Hedstrom Co. v. NLRB*, 629 F.2d 305, 317 (3d Cir. 1980) (en banc)). We find the Board's current treatment of search-for-work and interim employment

[9] Until this point, the Board had calculated backpay by tabulating the difference between the money the discriminatee should have been paid by the respondent and the discriminatee's actual earnings over the entire backpay period.

[10] Similarly, in *Mimbres Memorial Hospital & Nursing Home*, where the Board explained its rationale for finding that, under *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), a discriminatee's interim earnings would not be deducted from backpay where there was no cessation of employment, the Board drew support from the Court's reasoning in *Seven-Up*. See 361 NLRB No. 25, slip op. at 4 (2014) ("The Court [held] … that it was sufficient that the Board had relied on its cumulative experience" and that "[i]t is the business of the Board to give coordinated effect to the policies of the Act."), enfd. 812 F.3d 768 (10th Cir. 2016).

expenses fails to fully compensate discriminatees for losses incurred as victims of unlawful conduct.

Pursuant to our "broad, discretionary" authority under Section 10(c), the Board has awarded search-for-work and interim employment expenses as part of our standard make-whole remedy for nearly eight decades. As the Board first recognized in *Crossett Lumber Co.*, 8 NLRB 440, 497–498 (1938), enfd. 102 F.2d 1003 (8th Cir. 1938), discriminatees may incur significant expenses as they search for and maintain interim employment, such as increased transportation costs in seeking or commuting to interim employment, room and board while seeking employment and/or working away from home, and the cost of moving if required to assume interim employment. In *Crossett Lumber*, the Board found it appropriate to compensate discriminatees for these additional expenses, but treated them as an offset to interim earnings, rather than as a separate element of the backpay award. Id.

However, as argued by the General Counsel and amicus AFL–CIO, the Board has never provided an explanation or reasoned policy rationale for its treatment of search-for-work and interim employment expenses as an offset to interim earnings. The Board did not provide any rationale for its approach in *Crossett Lumber*. See id. In a handful of subsequent cases, the Board stated that it would not award search-for-work and interim employment expenses that exceeded a discriminatee's interim earnings, but again the Board did not explain or justify its approach. See *English Mica Co.*, 101 NLRB 1061, 1062, 1064 fn. 8 (1952); *West Texas Utilities Co.*, 109 NLRB 936, 937 fn. 3 (1954); *Mastro Plastics Corp.*, 136 NLRB 1342, 1348 (1962); *North Slope Mechanical*, 286 NLRB 633, 638 fn. 19 (1987).

The practical result of the Board's traditional approach has been less than make-whole relief for the most seriously aggrieved victims of unlawful conduct, contrary to the central remedial principle underlying the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194; *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Because the Board's traditional approach treats search-for-work and interim employment expenses as an offset to interim earnings, discriminatees who are unable to find interim employment do not receive any compensation for their search-for-work expenses. Similarly, discriminatees who find jobs that pay wages lower than the amount of their expenses will not receive full compensation for the search-for-work and interim employment expenses. As expressed by amicus SEIU, "In cases of low wage workers, where the costs associated with the reasonable search for interim employment can quickly outweigh the interim pay received, if any, the employee is, in essence, subsidizing the employer's violation." An example illustrates the shortcomings of the Board's traditional approach. Juana Perez worked at a remote location earning $1,000 per month prior to her unlawful discharge. During the month following her discharge, Perez spent $500 travelling to different locations looking for work. Perez could only find interim employment in another state that paid $750 per month. Perez moved to the new state to be closer to her new job and was also required to obtain training for her new position, costing her $5000 and $500, respectively. Under the Board's traditional approach, Perez would receive compensation for only $1500 of her $6000 total expenses, far less than make-whole relief.[11] Thus, the Board's traditional approach fails to fully reimburse losses incurred by those discriminatees who have already been the most economically injured by unlawful actions.

The Board's traditional approach not only fails to make victims of unlawful discrimination whole, but may also discourage discriminatees in their job search efforts. The Board imposes a duty on discriminatees to mitigate by engaging in reasonable efforts to seek and to hold interim employment. See, e.g., *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006), enfd. 508 F.3d 418 (7th Cir. 2007). Discriminatees do not receive backpay for any periods during which they fail to mitigate. See id.; NLRB Casehandling Manual (Part Three) Compliance (CHM), Sec. 10558.1. Yet, under the Board's traditional approach, discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed.

Modifying the Board's treatment of search-for-work and interim employment expenses to eliminate the offset will bring these payments in line with the Board's treatment of similar expenses incurred by discriminatees. When a respondent unlawfully discharges an employee, the respondent not only deprives the employee of his or her wages, but may also cause the employee to lose benefits and to incur additional expenses. See *Knickerbocker Plastic Co.*, 104 NLRB 514, 538 (1953), enfd. 218

[11] During the first quarter after her unlawful discharge, Perez's gross backpay would be $3000 ($1000 x 3 months), her interim earnings would be $1500 ($750 x 2 months), and her search-for-work and interim employment expenses would be $6000 ($500 travel expenses + $5000 moving expenses + $500 training expenses). Under the Board's traditional approach, Perez could only receive compensation for $1500 of her expenses because such payment cannot exceed the amount of her interim earnings.

In its amicus brief, IBEW, Local 304 stated that, based on its first-hand experience representing utility workers in Kansas, discriminatees may face significant financial hardship when seeking interim employment, such as the costs described in the example above.

F.2d 917 (9th Cir. 1955). The Board compensates discriminatees for the inequity of lost wages through backpay. However, in order to make discriminatees whole, the Board also compensates discriminatees for the separate inequity of additional expenses, such as medical expenses and retirement fund contributions.[12] The Board awards compensation for these expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. See CHM Sections 10544.2, 10544.3. Like medical expenses and retirement fund contributions, search-for-work and interim employment expenses are a direct result of a respondent's unlawful actions. No other expense incurred by discriminatees as a result of a respondent's unlawful conduct is treated as an offset to interim earnings. Thus, in order to fully compensate discriminatees for their losses, we shall treat search-for-work and interim employment expenses in a manner consistent with our treatment of other losses suffered by the discriminatee. See *Goya Foods of Florida*, 356 NLRB at 1463.

Additionally, awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest, will avoid potential tax complications caused by the Board's traditional approach. The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay taxable wages in the year received. See *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 3–4. Despite search-for-work and interim employment expenses being nonwage components of backpay, not subject to payroll or social security taxes (see CHM Sec. 10578.1), the Board's traditional approach has resulted in mixing these expenses with wages. The remedial changes urged by the General Counsel will avoid the potential complications engendered by this approach, resulting in a clearer accounting for the discriminatee, the IRS, and the SSA.

In reaching our decision, we have given careful consideration to the arguments raised by the Respondent and the dissent. The Respondent contends that search-for-work and interim employment expenses are compensatory damages, which are not permitted by the Act. Contrary to the Respondent, the Act does not prohibit the Board from awarding damages because they could be characterized under the broad umbrella of "compensatory damages." Search-for-work and interim employment expenses are clearly not disallowed under the Act, as they have been granted for years. The cases cited by the Respondent simply stand for the proposition that the Board is not permitted to award general tort remedies. See, e.g., *UAW v. Russell*, 356 U.S. 634, 644–645 (1958) (finding that Act did not preempt a state court's tort remedy, including mental anguish and punitive damages); *Operating Engineers Local 513 (Long Construction Co.)*, 145 NLRB 554, 555 (1963) (declining to award damages for bodily injury suffered during labor dispute). In fact, *UAW v. Russell* recognized that the Board is authorized to "restore to the employees in some measure what was taken from them because of [a respondent's] unfair labor practices," and thus, backpay awards "may incident[al]ly provide some compensatory relief to victims of unfair labor practices." 356 U.S. at 643, 645. Moreover, the Supreme Court has held that "the Board has wide discretion in ordering affirmative action; its power is not limited to . . . reinstatement with or without backpay." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539, 543 (1943). As we explained in *Pacific Beach Hotel*, there are many remedies the Board has properly imposed that are not explicitly provided in the Act. 361 NLRB No. 65, slip op. at 5 fn. 18 (2014). "Congress did not expressly authorize notice mailing or posting, orders to unions and employers alike to engage in bargaining, granting of access rights, or indeed many of the other remedies we order as part of our mandate under Sec[tion] 10(c) to effectuate the policies of the Act." Id.

In any event, the Board has been awarding search-for-work and interim employment expenses for 80 years. The changes we make today only affect how the Board calculates search-for-work and interim employment expenses, not whether these expenses are a permissible remedy. Moreover, these changes are consistent with the Board's broad, discretionary authority under Section 10(c) to revise our remedial policies to ensure that discriminatees are made whole. See *Don Chavas, LLC*, 361 NLRB No. 10, slip op. at 2–3; *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2. "When the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Seven-Up*

[12] The Board compensates discriminatees for a wide variety of additional expenses. See, e.g., *Kartarik, Inc.*, 111 NLRB 630 (1955) (vacation benefits), enfd. 227 F.2d 190 (8th Cir. 1955); *United Shoe Machinery Corp.*, 96 NLRB 1309 (1951) (bonuses); *Kohler Co.*, 128 NLRB 1062 (1960) (employer-owned housing), enfd. in part 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962); *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962) (employee discounts on purchases), enfd. 324 F.2d 916 (7th Cir. 1963); *Garment Workers*, 300 NLRB 507 (1990) (car allowances); *Ji Shiang, Inc.*, 357 NLRB 1292 (2011) (tips). See also CHM Sec. 10544.7 (listing numerous examples of "other forms of compensation" that may be included in backpay awards).

Bottling Co., supra, 344 U.S. at 346–347 (internal quotations omitted).[13]

The dissent agrees that the Board's traditional treatment of search-for-work and interim employment expenses as an offset to interim earnings has resulted in less than make-whole relief for discriminatees whose interim earnings are less than their expenses. Despite recognizing this injustice, however, our dissenting colleague would not adopt the changes requested by the General Counsel because he perceives them as providing a windfall for certain other discriminatees whose interim earnings equal or exceed the sum of their lost earnings and their search-for-work and interim employment expenses.

Contrary to the dissent, discriminatees will not receive more than make-whole relief under the General Counsel's request, because incurring search-for-work and interim employment expenses represent a different injury than losing wages. Thus, reimbursement of these expenses compensates discriminatees for a separate injury than lost pay. As discussed above, the Board has recognized this distinction by awarding other expenses incurred by discriminatees regardless of interim earnings and separately from taxable net backpay, with interest.

Further, even if the Board's revised remedial policy might result in a limited number of discriminatees with unusually high interim earnings receiving additional reimbursement, this fact would not cause us to reject it. In our view, such a circumstance would constitute "a permissible remedial outcome if it bears 'an appropriate relation to the policies of the Act.'" See *Mimbres Memorial Hospital & Nursing Home*, 361 NLRB No. 25, slip op. at 6 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348). In *NLRB v. Seven-Up Bottling Co.*, the Supreme Court found that "[i]t is the business of the Board to give coordinated effect to the policies of the Act[,]" and stated that "[w]e prefer to deal with these realities and to avoid entering into . . . debate about what is 'remedial' and what is 'punitive.'" 344 U.S. at 348. Fully compensating discriminatees for search-for-work and interim employment expenses even when a discriminatee's interim earnings equal or exceed his or her lost earnings and expenses appropriately relates to the policies of the Act because this approach will deter unfair labor practices and encourage robust job search efforts.[14]

Additionally, we disagree with the dissent that our revised remedial policy will create a substantial risk of protracted litigation. As a preliminary matter, contrary to the dissent's suggestion, the vast majority of Board cases do not involve years of litigation.[15] Moreover, as the dissent recognizes, Board proceedings have rarely involved litigation over search-for-work and interim employment expenses. The changes we make today will not affect the underlying considerations that have led to the Board's current and historic high settlement rate or the Board's ability to resolve the majority of cases in less than 1 year. To accept the dissent's position would be to presume that the current treatment of job search and interim employment expenses operates as a substantial driver of settlement efforts. We make no such presumption and find it extraordinarily unlikely that changed treatment of such expenses would outweigh the more pressing issues of the relative risk, cost, and delay in choosing litigation over settlement. Thus, we do not share the dissent's speculative concern that our revised remedial policy will lead to an increase in protracted litigation. Furthermore, in the unlikely event that the revised remedial policy has any effect on our high settlement rate or ability to expeditiously resolve cases, we would give priority to redressing the admitted injustice to

[13] We note that the Board has not previously ruled against the General Counsel's requested changes based on the merits of the General Counsel's arguments. See, e.g., *Island Management Partners, Inc.*, 362 NLRB No. 158, slip op. at 3 fn. 4 (2015) (declining to rule on this issue because it had not been fully briefed by the parties).

[14] The dissent criticizes this rationale as at odds with *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938), where the Supreme Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." Contrary to the dissent, and as noted above, our revised treatment of search-for-work and interim employment expenses serves a remedial purpose by fully compensating discriminatees for the separate injury of these expenses. Furthermore, it is entirely appropriate to consider whether our revised remedial policy "bear[s] appropriate relation to the policies of the Act." See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. at 348. As the Supreme Court and the Board have recognized, it is the Board's duty to "'adapt [our] remedies to the needs of particular situations so that 'the victims of discrimination' may be treated fairly' in ways that best effectuate the purposes of the Act, provided they are not purely punitive." *Pacific Beach Hotel*, 361 NLRB No. 65, slip op at 11 (quoting *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194)). Our revised treatment of search-for-work and interim employment expenses ensures that "the victims of discrimination [are] treated fairly," "effectuates the purposes of the Act," and is not "purely punitive." See id. Thus, there is no merit to the dissent's criticism of this rationale.

[15] See the Board's Performance and Accountability Reports ("PAR") at https://www.nlrb.gov/reports-guidance/reports/performance-and-accountability. Indeed, in fiscal year 2015, 92.4 percent of meritorious unfair labor practice cases were settled. PAR 2015 at 36. Furthermore, 70.6 percent of all unfair labor practice charges were resolved within 120 days, and 80.4 percent of meritorious charges were resolved within 1 year. PAR 2015 at 25–26. The Board's performance in these areas has been consistent over time. See, e.g., PAR 2014 at 24-25, 41 (95.7 percent settlement rate, 72.3 percent of all charges resolved within 120 days, and 83.9 percent of meritorious charges resolved within 1 year); PAR 2013 at 19, 38 (92.8 percent settlement rate, 73.3 percent of all charges resolved within 120 days, and 82.4 percent of meritorious charges resolved within 1 year).

discriminatees who are deprived of make-whole relief under the Board's current policy.

We also disagree with the Respondent and the dissent that our revised remedial policy will discourage discriminatees from seeking "legitimate and realistic employment opportunities." As recognized by the General Counsel, employees who have lost their livelihood due to unlawful discharges have "no reason to incur unnecessary out-of-pocket costs in the hope that they may one day receive a favorable ruling and reimbursement of those expenses in an unfair labor practice proceeding," long after those expenses were incurred.

Furthermore, we do not agree with the Respondent and the dissent that our revised remedial policy will lead to the award of speculative expenses or otherwise open the door to abuse. The General Counsel bears the burden of establishing those expenses incurred by discriminatees, and the Board only awards expenses that are both reasonable and actually incurred. The Board is experienced in making these determinations and respondents retain their rights to challenge them in compliance proceedings.[16]

Contrary to the dissent, we find it immaterial whether other federal agencies follow the Board's traditional or new approach regarding search-for-work and interim employment expenses. The dissent cites three sources in support of his assertion that other agencies follow the Board's traditional approach—a decision from the Equal Employment Opportunity Commission, a regulation from the Office of Personnel Management, and a whistleblower investigation manual from the Department of Labor, Occupational Safety and Health Administration—[17] but also acknowledges, a decision from the Administrative Review Board of the Department of Labor that follows the Board's revised remedial policy.[18] What matters, however, is that (as discussed above) our new remedial policy is consistent with the Board's treatment of other expenses incurred by discriminatees, effectuates the policies of the Act, and avoids potential tax complications.

Finally, the Respondent's due process rights have not been denied because the judge revoked the Respondent's subpoena seeking documents regarding Geaslin's search-for-work and work-related efforts and expenses. These documents are relevant only in compliance proceedings. Thus, the Respondent had no need for the subpoenaed documents at the merits stage of the proceedings, and the judge's revocation will not prevent the Respondent from examining such documents in a later compliance proceeding. Indeed, the Board's policy is "to make available to the respondent, on request, after issuance of the compliance specification, all factual information or documents obtained or prepared by the Region that are relevant to the computation of net backpay, restitution, or reimbursement." CHM Sec, 10650.5.

Accordingly, for the reasons set forth above, we adopt a new policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest.[19] We will apply this policy retroactively in this case and in "all pending cases in whatever stage" given the absence of any "manifest injustice" in doing so. See *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)); *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 6 (finding no manifest injustice in applying a remedial change retroactively). In determining whether retroactive application would be unjust, we consider "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises*, supra at 673. We find no manifest injustice here. This case involves a remedial issue, and thus, reliance on preexisting law is not an issue. Furthermore, we see no "particular injustice" to the Respondent from retroactivity. The General Counsel's notice of intent to amend the complaint put the Respondent on notice that the General Counsel sought to change the Board's method of awarding search-for-work and interim employment expenses, and the Respondent had a full opportunity to litigate this issue. Finally, retroactive

[16] See, e.g., *Baker Electric*, 351 NLRB 515, 537–538 (2007) (finding that the discriminatee was entitled to reasonable search-for-work and interim employment expenses, but remanding discriminatee's claim for mileage expenses and directing that these expenses only reflect the costs over and above what the discriminatee would have incurred working for, and commuting to and from, the respondent); CHM Sec. 10660.4 ("The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment. . . . [T]he respondent has the overall burden to establish, based on a preponderance of the evidence, that a discriminatee failed to make a reasonable search for work.").

The dissent asserts that claims for search-for-work and interim employment expenses should "receive close scrutiny as to reasonableness." In light of the existing safeguards and limitations discussed above, we see no need to implement a heightened standard of review.

[17] See *Carmon-Coleman v. Rumsfeld*, EEOC Appeal No. 04A30030, 2004 WL 2423454 (October 20, 2004); 5 C.F.R. § 550.805(b), (e)(1); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigation Manual* (January 28, 2016).

[18] See *Hobby v. Georgia Power Co.*, Case Nos. 98–166, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table).

[19] *Crossett Lumber*, 8 NLRB 440, *English Mica Co.*, 101 NLRB 1061, and their progeny are overruled to the extent they are inconsistent with today's decision.

application of our new approach significantly promotes the purposes of the Act.

AMENDED REMEDY

In addition to the remedies ordered by the judge, we shall order the Respondent to compensate Geaslin for her search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision, as amended in this decision."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 24, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, I agree with some of the Board majority's conclusions and disagree with others. I respectfully dissent from the majority's finding that the Respondent violated the Act when it suspended employee Wendy Geaslin on May 9. As explained in Part A below, the conduct for which Geaslin was suspended on May 9 was not protected by Section 7 of the Act. However, I join my colleagues in finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) when Store Manager Theresa Pelo questioned Geaslin about a protected conversation Geaslin had engaged in with her union steward. I also agree, for the reasons explained in Part B of this opinion, that the Respondent violated the Act when it suspended Geaslin on May 14, 2014,[1] and when it discharged her a week later on May 21.

Based on three considerations, I also respectfully dissent from the changes adopted by my colleagues regarding the remedial treatment of search-for-work and interim employment expenses. First, as explained in Part C below, the Board's traditional approach to compensating claimants for these expenses makes claimants whole in most cases, and the change adopted by my colleagues will result in greater than make-whole relief in other cases. This would exceed the Board's statutory authority, which is limited to relief that is remedial.[2] Second, I believe the new standard does not adequately safeguard against the risk that awarding search-for-work and interim employment expenses, divorced from interim earnings, will tend to produce more protracted Board litigation over such expenses, particularly when such expenses are disproportionately high in comparison to the claimants' lost earnings or interim earnings; in turn, more protracted litigation over these issues would substantially delay the time when *any* Board-ordered remedies would be available to the claimants. Third, the Board's traditional approach—treating search-for-work and interim employment expenses as an offset against interim earnings, which in turn are deducted from gross backpay—is consistent with other statutes that deal with such expenses as a component of backpay.

Accordingly, I concur in part and dissent in part from the majority's decision.

[1] All dates herein refer to 2014 unless otherwise stated.

[2] See fn. **Error! Bookmark not defined.** and accompanying text, infra.

DISCUSSION

A. The May 9 Suspension

May 9, the Friday before Mother's Day, was an extremely busy day at the King Soopers Store #1 in Denver. Wendy Geaslin was working her scheduled 5:30 a.m. to 2 p.m. shift at the store's Starbucks kiosk. Sometime between 11:30 a.m. and 11:45 a.m., Store Manager Pelo asked for assistance bagging groceries, and she specifically asked for assistance from the employees assigned to the Starbucks kiosk. Geaslin finished with her customers, walked over to Pelo, and started to tell Pelo that she needed to take her lunch break because she had to leave work by 2 p.m. Pelo responded that she was the store manager and Geaslin needed to do what she said. Pelo also told Geaslin that she would get her lunch break, but now she needed to bag groceries. Geaslin asked if she should be bagging groceries since she belonged to a "different union."[3] Article 7, Section 26 of the collective-bargaining agreement covering Geaslin (the "meat" agreement or CBA) states: "It is understood that employees may perform incidental work in another classification without violating this agreement." Pelo repeated that Geaslin needed to bag groceries. Geaslin turned away from Pelo, raised her hands in the air and said, "Well, all I was doing was asking about my lunch." Pelo called Geaslin back, further discussion ensued in Pelo's office, and at the end of that discussion, Pelo gave Geaslin a 5-day suspension.

The parties disagree whether Geaslin insubordinately refused to obey Pelo's order to bag groceries. Pelo believed she did, but according to Geaslin, when she turned away from Pelo she did so to move toward bagging groceries in compliance with Pelo's order. It is unnecessary, however, to resolve this disagreement. The issue here is whether the Respondent violated Section 8(a)(1) of the Act when it suspended Geaslin on May 9. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act, which includes the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." The judge found that Geaslin was suspended because she challenged Pelo's right to order her to bag groceries. Assuming that finding is correct, the issue here is whether Geaslin was engaged in "concerted activities for the purpose of . . . mutual aid or protection" when she challenged Pelo's order. It is undisputed that Geaslin acted alone.

To determine whether an activity is concerted, the Board applies the standards set forth in its decisions in *Meyers Industries*.[4] Under these standards, activity is usually deemed concerted only if engaged in by two or more employees.[5] However, actions of a single employee may sometimes constitute "concerted activity," provided they are sufficiently linked in some way to group action.[6] The Board and the courts have held that one such circumstance is when an employee invokes "a right grounded in his collective-bargaining agreement." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 832 (1984). Thus, under the Board's longstanding *Interboro*[7] doctrine, approved by the Supreme Court in *NLRB v. City Disposal*, an employee who invokes a right grounded in his or her collective-bargaining agreement is engaged in concerted activity, provided the invocation of that collectively bargained right is "honest and reasonable."[8]

My colleagues adopt the judge's finding that Geaslin engaged in protected concerted activity under the *Interboro* doctrine when she challenged Pelo's right to order her to bag groceries. Contrary to my colleagues, I believe the judge's finding is erroneous. Geaslin did not invoke a right grounded in the "meat" agreement. That agreement contains no provision that would preclude Geaslin from bagging groceries. While some job descriptions in the CBA include work restrictions—for example, "wrappers" are not allowed to use the band saw, and (in some stores) deli clerks cannot prepare certain specialty meat items—there is nothing in the CBA that would prevent a Starbucks barista from performing incidental bagging duties. To the contrary, Article 7, Section 26 of the CBA provides that "employees may perform incidental work in another classification without

[3] Geaslin did not belong to a "different union" than the union that represents baggers. Rather, she was covered by a different collective-bargaining agreement—the "meat" agreement—while baggers are covered by the "retail" agreement.

[4] *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[5] "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497.

[6] For example, an individual employee engages in concerted activity when he or she seeks "to initiate or to induce or to prepare for group action" or brings "group complaints to the attention of management." *Meyers II*, 281 NLRB at 887.

[7] *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[8] *City Disposal*, 465 U.S. at 840 ("The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated.").

violating this agreement." Accordingly, Geaslin could not have *reasonably* believed that she was invoking a collectively bargained right when she challenged Pelo's order to bag groceries. Not only does the CBA not provide Starbucks' baristas a right to refuse to perform work in another classification, it affirmatively states that the performance of incidental work in another classification does *not* violate the agreement. Accordingly, Geaslin's conduct during her encounter with Pelo on May 9 was not "concerted activity" under the *Interboro* doctrine, and therefore the Respondent did not violate Section 8(a)(1) when it suspended her for that conduct.

It is possible, under *City Disposal*, that an employee may be mistaken and still remain within the scope of the *Interboro* doctrine so long as he or she acts reasonably and in good faith. However, the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* (i.e., whether relevant events actually violate the contract), and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right. The Supreme Court made this clear in *City Disposal* itself. In that case, the collective-bargaining agreement gave unit employees the right to refuse to drive unsafe trucks. Employee James Brown was discharged after he refused to drive a truck he reasonably and honestly believed had faulty brakes, and the issue was whether that refusal was concerted activity. Approving and applying the *Interboro* doctrine, the Court found that Brown's refusal *was* concerted activity even if Brown was reasonably mistaken about the facts (whether the truck was objectively unsafe). The Supreme Court reasoned that "[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement":

> That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

465 U.S. at 831–832.

As indicated in the above quotation, when the Supreme Court approved the *Interboro* doctrine, the Supreme Court's premise was the actual existence of the "right grounded in the collective-bargaining agreement." Id. The Supreme Court only extended protection to the possibility that Brown might have been mistaken about the relevant facts—specifically, whether the truck he was ordered to drive was actually unsafe. That supporting rationale would vanish were the *Interboro* doctrine extended to situations where the contract right relied upon by the employee does not actually exist. If the contract does not contain the right, an employee mistakenly invoking that nonexistent right would not be "reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise" from that employer to honor that right, id., since there was no promise and there is no right.[9]

My colleagues cite a provision in the Respondent's retail agreement as a basis for finding Geaslin protected under the *Interboro* doctrine. However Geaslin was not covered by the retail agreement, and an employee cannot be protected under *Interboro* by invoking rights in someone else's collective-bargaining agreement. See *Omni Commercial Lighting, Inc.*, 364 NLRB No. 54, slip op. at 8 fn. 10 (2016) (Member Miscimarra, dissenting). Because the meat agreement did not give Geaslin the right to challenge an order to bag groceries, and because the meat agreement affirmatively provided that the performance of incidental work outside Geaslin's classification did not violate the agreement, I believe the conduct for which Geaslin was suspended on May 9 was not concerted activity under the *Interboro* doctrine, and the Re-

[9] I am aware that there is precedent contrary to my position. I believe this precedent is ungrounded in the rationale the Court relied on when it upheld the *Interboro* doctrine.

spondent did not violate Section 8(a)(1) when it suspended Geaslin on that date.

B. The May 14 Suspension and the May 21 Discharge

On May 14, Geaslin and her union representative met to discuss the May 9 suspension with Pelo. As discussed in more detail by the judge, things got heated between Pelo and Geaslin, and rather than resolve the issues from the first suspension, Geaslin left the meeting with another suspension. Subsequently, on May 21, Geaslin's employment was terminated for "gross misconduct" during the May 14 meeting.

Article 48 of the CBA outlines the grievance procedures to be followed by the Union and the Respondent. The first step in those procedures is for the Respondent and the Union to meet, with the employee optionally present as well, to try to settle the dispute. If the grievance cannot be resolved through that meeting, it is submitted in writing to the Respondent. It is well settled that grievance processing is protected concerted activity. In *City Disposal*, the Court stated: "To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7." 465 U.S. at 836. Similarly, the Board has long recognized that the processing of a grievance is protected concerted activity. See, e.g., *Exxon Mobil Corp.*, 343 NLRB 287, 287 (2004), revd. on other grounds sub nom. *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005); *Roadmaster Corp.* 288 NLRB 1195, 1197 (1988).

I believe that Geaslin's May 14 meeting with Pelo, accompanied by her union representative, was sufficiently grounded in Article 48 of the CBA to constitute a grievance meeting under the CBA and thus protected concerted activity under the Act. Therefore, I believe the judge was correct to apply *Atlantic Steel*, 245 NLRB 814, 816 (1979), to determine whether Geaslin's behavior during the May 14 meeting lost her the protection of the Act, and I agree with the judge, for the reasons she states, that Geaslin did not lose the Act's protection. On this basis, I concur with my colleagues' finding that the Respondent violated the Act when it suspended Geaslin on May 14 and discharged her on May 21.

C. Search-for-Work and Interim Employment Expenses

The Board has consistently compensated employees for their search-for-work and interim employment expenses ("employment/search expenses"): the Board has awarded employment/search expenses as a setoff from interim earnings, which in turn are subtracted from gross backpay.[10] However, the General Counsel and other parties have presented arguments for changing the way the Board treats these expenses, and the Respondent has argued in favor of maintaining the current, traditional approach.

The Board's traditional approach is illustrated by the following two examples:

- *Example 1 – No Employment/Search Expenses.* If an unlawfully discharged claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings with no employment/search expenses, the Board would award *$4,000* in net backpay ($5,000 in gross backpay minus the $1,000 in interim earnings). The claimant's combined Board recovery and interim earnings would total *$5,000* (equal to the gross amount of lost earnings resulting from the unlawful discrimination).
- *Example 2 – $250 in Employment/Search Expenses.* If the same claimant lost $5,000 in gross earnings from the respondent employer, and he earned $1,000 in interim earnings but also incurred $250 in employment/search expenses, the Board would award *$4,250* in net backpay ($5,000 in gross backpay minus interim earnings *reduced* by the $250 in employment/search expenses, so that the calculation would be $5,000 gross backpay minus $750 in net interim earnings for a net award of $4,250). In this example, the claimant incurred $250 in employment/search expenses, for which the claimant was compensated in full, and the claimant's combined backpay award plus interim earnings—taking into account employment/search expenses—would again total *$5,000* (equal to the gross amount of lost earnings resulting from the unlawful discrimination).

As my colleagues recognize, there is one circumstance in which the Board's traditional approach does not compensate a claimant's employment/search expenses in full: where there are insufficient interim earnings to be offset by those expenses. This is illustrated by the following example:

- *Example 3 – Employment/Search Expenses with No Interim Earnings.* If the same claimant lost $5,000 in gross earnings from the respondent employer, and he incurred $250 in employment/search expenses *without* securing another job

[10] Interim earnings reduce the amount of backpay an employee receives. Therefore, when the Board sets off or deducts employment/search expenses from interim earnings, this increases the amount of backpay the employee receives and thus compensates him or her for the employment/search expenses.

(so the claimant had no interim earnings), the Board would award $5,000 in backpay. There would be no recovery of the $250 in employment/search expenses because, under the Board's traditional approach, this amount is *only* awarded as an offset against interim earnings. Accordingly, had the claimant remained employed, he would have received *$5,000* from the employer; but if one takes into account the $250 in uncompensated employment/search expenses, the claimant's actual net recovery only totals *$4,750* ($5,000 in Board-ordered backpay, reduced by $250 in unrecovered employment/search expenses).[11]

Based on the above examples—in particular, Example 3—I might be inclined to support changing the Board's handling of employment/search expenses. The Board should provide remedies for unfair labor practices that are effective and complete, provided that we remain within the limits of our statutory authority. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65 (2014) (ordering broad range of remedies, including numerous extraordinary remedies, based on substantial unfair labor practices committed by the respondent).

However, I dissent from the approach that has been adopted by my colleagues because of three considerations, which are addressed in turn below.

1. *The Change Adopted by the Board Majority Will Produce a Windfall in Certain Cases, and Therefore Exceeds the Board's Remedial Authority.* It is well established that the Board has broad remedial authority, but our authority is limited to relief that is remedial. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938)); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267–268 (1938).[12] Accordingly, it is incumbent on the Board to consider the impact of our remedial measures on a *range* of cases and not limit our evaluation to scenarios that, when viewed selectively, suggest the existence of deficiencies in the Board's remedial scheme.

In Example 3 above—where an employee has $250 in employment/search expenses and no interim earnings—the Board's traditional treatment of employment/search expenses does not provide a recovery of those expenses because there are no interim earnings against which employment/search expenses can be offset.[13] However, the change adopted by my colleagues will produce a financial windfall in certain other cases—specifically, where claimants have interim earnings that equal or exceed the sum of their lost earnings and their employment/search expenses. In this situation, the claimants are already in an equivalent or more favorable financial position than would have resulted from uninterrupted employment with the respondent employer. Consequently, the claimants have experienced no financial loss—even taking into account their employment/search expenses—which means there is no reasonable argument that a remedial purpose is served by a Board-ordered award of employment/search expenses.[14] This is evident from the following illustration:

Example 4 – Higher Interim Earnings; New Backpay Calculation Provides Greater Than Make-Whole Relief.

[11] In addition, the Board's traditional approach results in an incomplete recovery of employment/search expenses where a claimant has *some* interim earnings, but less than the amount of the employment/search expenses. For example, taking our claimant who has lost $5,000 in gross earnings, assume that he incurred $1250 in employment/search expenses and earned $1000 in interim earnings. Under the traditional approach, the Board would award *$5000* in net backpay ($5000 in gross backpay *unreduced* by interim earnings because the $1250 in employment/search expenses completely offsets the $1000 in interim earnings). In this example, the claimant incurred $1250 in employment/search expenses, but only $1000 of that amount was compensated (limited by the fact that the claimant earned only $1,000 in interim earnings). Based on the claimant's $1000 interim earnings and his $5000 Board-ordered backpay, the claimant receives a total of $6,000 (which is $1000 more than his lost wages), but this does not fully compensate the claimant for his out-of-pocket losses, which totaled $6250, consisting of his lost income ($5000) plus employment/search expenses ($1250) because $250 of the claimant's $1250 employment/search expenses are not recovered.

[12] The Supreme Court has stated that the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel*, 311 U.S. at 12. And the Board's authority to devise remedies "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 235–236. See also *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 7 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[13] Similarly, the Board's traditional treatment of employment/search expenses does not provide a *full* recovery of those expenses where employment/search expenses exceed interim earnings. In this situation, there are insufficient interim earnings against which employment/search expenses can be offset. See fn. **Error! Bookmark not defined.**, supra.

[14] My colleagues acknowledge that their new method of calculating employment/search expenses may result in employees "with unusually high interim earnings receiving additional reimbursement," but they defend this result in part on the basis that it will "deter unfair labor practices." This rationale is at odds with Supreme Court precedent, where the Court held that the Board lacks the authority to impose remedies that do not serve a remedial purpose, "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison*, 305 U.S. at 236. See supra fn. 12. My colleagues also say their approach will "encourage robust job search efforts." Board law already *requires* job search efforts, and that is the strongest possible encouragement.

If the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses, the Board's traditional approach would result in no Board-ordered backpay because (i) the claimant's $6000 in interim earnings are greater than his $5000 in lost earnings; (ii) his $250 in employment/search expenses are treated as an offset against his $6000 in interim earnings, producing net interim earnings of $5750; and (iii) the $5750 in net interim earnings is still greater than the claimant's $5000 in lost earnings, so the backpay award would equal zero (because the $5000 gross backpay amount would be completely offset by the $5750 in net interim earnings, even taking into account the $250 in employment/search expenses). However, based on the change adopted by my colleagues, the Board will now directly award $250 in employment/search expenses, even though the employee has incurred *no financial loss* when one takes into account (as the Board must) the employee's lost earnings, his interim earnings, and the $250 in employment/search expenses.

I do not discount the fact that parties and claimants experience substantial, often oppressive non-monetary consequences as the result of unfair labor practices. Nonetheless, the Act only permits the Board to award relief that is remedial. *Republic Steel Corp. v. NLRB*, 311 U.S. at 11-12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235-236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267-268; accord *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (Board-ordered remedies should secure "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."). See also fns. **Error! Bookmark not defined.** & 14, supra.

I am also persuaded that my colleagues' approach is ill-advised because the problem identified above could be easily addressed, *even if* the Board otherwise changes its treatment of employment/search expenses. For example, my colleagues could specify that employment/search expenses—even if they were otherwise recoverable—would not be awarded to the extent that a claimant's interim earnings during the applicable time period[15] equaled or exceeded the sum of (i) his or her lost earnings plus (ii) his or her employment/search expenses.[16] In this respect, it is a significant omission for the Board *not* to restrict the recovery of employment/search expenses in circumstances where such a recovery would constitute greater than make-whole relief.

Accordingly, because the change adopted by my colleagues will result in relief that is more than remedial in certain cases, I believe that in this respect, my colleagues' new method for calculating backpay exceeds our statutory authority. See *Republic Steel Corp. v. NLRB*, 311 U.S. at 11–12; *Consolidated Edison Co. v. NLRB*, 305 U. S. at 235–236; *NLRB v. Pennsylvania Greyhound Lines*, 303 U. S. at 267–268.

2. *Awarding Employment/Search Expenses Separately Creates a Substantial Risk of Protracted Litigation That Will Delay the Availability of Backpay Awards.* Unfortunately, the nature of Board litigation entails substantial delay in getting unfair labor practices resolved. Our procedures require the filing of a charge that is investigated by one of the Board's regional offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with post-hearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the

[15] Under *F. W. Woolworth Co.*, 90 NLRB 289 (1950), the Board computes backpay for employees unlawfully separated from their employment on a quarterly basis.

[16] If this restriction were in effect, then claimants could be awarded employment/search expenses in all cases in which they experienced a financial loss, but they would be denied a separate recovery of employment/search expenses when they did *not* experience a financial loss.

This can be illustrated using Example 4 (set forth in the text), where the claimant lost $5000 in gross earnings from the respondent employer, obtained a higher-paying job that produced interim earnings of $6000, and incurred $250 in employment/search expenses. Here, the claimant finds himself in a more favorable financial position—even taking into account his employment/search expenses—than if he had not been discharged because his $6000 in interim earnings, when reduced by his $250 in employment/search expenses, totaled $5,750 in net interim earnings, which is still greater than his $5000 in lost wages. In this situation, awarding $250 in employment/search expenses would constitute a recovery in the absence of any financial loss (again, even taking the $250 employment/search expenses into account).

If my colleagues awarded a direct recovery for employment/search expenses, but with the limitation that such expenses would not be awarded to the extent that interim earnings during the applicable time period equaled or exceeded the sum of lost earnings plus employment/search expenses, then claimants could recover employment/search expenses whenever they experienced an overall financial loss, but they would be denied such a recovery if they did not experience an overall financial loss. In the above example, even if the claimant might otherwise be awarded $250 in employment/search expenses, such a recovery would *not* be awarded because his $6000 in interim earnings were greater than $5250, which is the sum of his lost wages ($5,000) plus his employment/search expenses ($250). If the same claimant had $5000 in lost wages and $250 in employment/search expenses, with interim earnings that were less than $5250, the above limitation would permit a recovery of employment/search expenses, but only up to the claimant's actual overall financial loss (i.e., the extent to which the claimant's interim earnings were less than the sum of his lost earnings and employment/search expenses). Using the same example (claimant had $5000 in lost wages and $250 in employment/search expenses), if the claimant had no interim earnings, the direct recovery of employment/search expenses would be $250 (on top of Board-ordered backpay); if the claimant had $5249 in interim earnings, the recovery of employment/search expenses would be $1.

Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional post-hearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts.

In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Many cases involve years of Board litigation, and often dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB No. 47 (2014)—involving approximately 300 employee-claimants—required 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal. Another example, in the early stages of Board litigation, involves consolidated claims being pursued against McDonald's USA, LLC and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB No. 91 (2016).

Given the substantial delays that, unfortunately, can be associated with Board proceedings, backpay issues—and, in particular, questions regarding an employee-claimant's efforts to mitigate damages and the reasonableness of employment/search expenses—present onerous challenges: employee-claimants often have difficulty reconstructing job-search efforts, locating and retaining relevant documentation, and recalling details regarding what expenses were undertaken and why. Unions and employers have similar difficulties dealing with these issues: Board cases do not allow pre-hearing discovery, and claimants often present extremely general testimony regarding job-search efforts and relevant expenses. In a single-employee discharge case involving accrued backpay over a period of years, the litigation of these details may require substantial time. When there are dozens or hundreds of employee-claimants, the other substantive legal issues may be overwhelmed by litigation over backpay, mitigation and the reasonableness of employment/search expenses.

In this context, the Board's traditional treatment of employment/search expenses has some positive features. First, as noted above, the Board's traditional approach has generally provided for the recovery of employment/search expenses, even though they have been awarded as a setoff from interim earnings (which, in turn, are subtracted from gross backpay). Second, awarding employment/search expenses as a setoff from interim earnings provides an incentive for such expenses to bear a reasonable relation to the potential interim earnings available to employee-claimants and to the prior earnings provided by the respondent employer. Third, to the extent that employment/search expenses have tended to be reasonable in relation to interim earnings and lost wages, Board proceedings have rarely involved protracted litigation over employment/search expenses. Finally, the handling of employment/search expenses as an offset to interim earnings is consistent with a recognition that, in most if not all cases, it is much more important for the Board to address the question of unfair labor practice liability and the Board's more substantial remedies: backpay, reinstatement, and potential injunctive relief.

The Board's traditional approach does not permit a full recovery of employment/search expenses in the one circumstance noted previously: where there are insufficient interim earnings to be offset by those expenses. I am troubled by this aspect of the Board's traditional approach. However, the changes adopted by my colleagues affect *all* cases—including those where the Board's traditional approach already provides a full recovery of employment/search expenses—and I am also troubled by the fact that the Board's new approach will award employment/search expenses in cases where the employee-claimants have experienced no financial loss (specifically, where interim earnings are greater than the sum of the employee's lost earnings and employment/search expenses), which in my view exceeds the Board's remedial authority. See subpart 1, above. Additionally, I believe that awarding employment/search expenses directly, without any connection to interim earnings or lost wages, will eliminate the positive features of the Board's traditional approach. In *all* cases, therefore, I believe the changes adopted by my colleagues may produce a substantial increase in contentious disputes over employment/search expenses, and these disputes, in *all* cases, are likely to delay the availability of *any* monetary remedies for employee-claimants who have been adversely affected by unlawful conduct.

The changes adopted by my colleagues would be more defensible if the Board acknowledged that detaching employment/search expenses from interim earnings creates the risk of producing more frequent claims for employment/search expenses that are disproportionate to both lost earnings and potential interim earnings. Likewise, the Board could indicate that—in addition to the conventional requirements that they be non-speculative

and proven based on a preponderance of the evidence—such claims will receive close scrutiny as to reasonableness because more protracted litigation over employment/search expenses operates to the detriment of all parties, including employee-claimants themselves. I believe the absence of these qualifications undermines the rationale for abandoning the Board's traditional treatment of employment/search expenses.

3. *The Board's Traditional Treatment of Employment/Search Expenses Is Consistent with the Practice of Other Agencies under Other Employment Statutes.* As a final matter, the Board does not stand alone in its traditional treatment of employment/search expenses. For example, similar to the constraint placed on the Board not to exceed remedial relief (see subpart 1, above), the Equal Employment Opportunity Commission (EEOC) has indicated that backpay awards should not place claimants in a more favorable financial position than would have resulted from their continued employment, and the EEOC has likewise treated employment/search expenses as a setoff from interim earnings. To this effect, in *Carmon-Coleman v. Rumsfeld*, EEOC Appeal No. 04A30030, 2004 WL 2423454 (October 20, 2004), the EEOC stated:

> The purpose of a back pay award is to restore to petitioner the income she would have otherwise earned, but for the discrimination. . . . The agency is required to make *certain deductions from back pay awards to ensure that the employee does not receive more in total benefits than she would have received in the absence of the personnel action.* The person who has been discriminated against must receive a sum of money equal to what would have been earned by that person in the employment lost through discrimination (gross back pay) *less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted* (net interim earnings). The difference between gross back pay and net interim earnings is net back pay due.[17]

See also 5 C.F.R. § 550.805(b), (e)(1) (Office of Personnel Management regulation states that "[n]o employee shall be granted more pay . . . than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred," and describes "offsets and deductions" from backpay as including "outside earnings" minus "ordinary and necessary business expenses . . . undertaken to replace the employment from which the employee was separated"); Department of Labor, Occupational Safety and Health Administration, *Whistleblower Investigations Manual* (January 28, 2016), at 6–3 ("Interim earnings should be reduced by expenses incurred as a result of accepting and retaining an interim job.").[18]

[17] Emphasis added; citations omitted.

CONCLUSION

For these reasons, as to the above issues, I respectfully dissent in part and concur in part.

Dated, Washington, D.C. August 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[18] Separate from the potential award of backpay (as to which the EEOC treats employment/search expenses as an offset against interim earnings), in 1991 Congress amended the Civil Rights Act of 1964 to permit the EEOC to award "compensatory damages," which the EEOC has defined as including "pecuniary losses" such as "moving expenses" and "job search" expenses. See EEOC Enforcement Guidance, Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, 1992 WL 189089 (1992). However, as noted previously, the National Labor Relations Act only permits the Board to award remedial relief, which does not include compensatory damages. See *UAW v. Russell*, 356 U.S. 634, 643 (1958) ("Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."). Similarly, although the Administrative Review Board in a Department of Labor proceeding awarded "employment search expenditures" to an employee-claimant in a case cited by the General Counsel, *Hobby v. Georgia Power Co.*, Case Nos. 98-166, 98-169, 2001 WL 168898, at *29 (Feb. 9, 2001), affd. *Georgia Power Co. v. U.S. Department of Labor*, 52 Fed. Appx. 490 (11th Cir. 2002) (Table), this was a whistleblower claim under the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1988), which permits the recovery of "compensatory" damages, and neither party contested the award of employment search expenditures. Id. See also 42 U.S.C. §5851(b)(2)(B) (stating that, in the event of a violation, the Secretary of Labor may award reinstatement with backpay, plus "compensatory damages to the complainant").

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your protected concerted activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspensions and termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

KING SOOPERS, INC.

The Board's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Isabel C. Saveland, Esq., and *Jose Rojas, Esq.*, for the General Counsel.

Raymond M. Deeny, Esq., and *Jonathon Watson, Esq.*, for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

[1] All dates are 2014 unless otherwise indicated.

[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if".

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective-bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A Union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her to suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunch break at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunch break "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79).[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was unaware that Jackson was a union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manger. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunch break midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunch break. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa", mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what

more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the

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Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red [. . .] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. DISCUSSION AND ANALYSIS

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.

Motion to Amend the Complaint: Make-Whole Remedy

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op at 1 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 slip op. at 3 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Kentucky River Medical Center*, 356 NLRB 6, 6 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and ques-

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

tioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 13 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB 794 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance regarding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, 271 NLRB 187 (1984), a charging party filed grievances over his suspensions in accordance with his collective bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunch break. Respondent argues that Geaslin's questioning in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986), enfd. 833 F.2d 1012 (6th Cir. 1987); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *Plumbers Local 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations, Inc.*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such "we" and "our" when complaining to Jackson, who is a coworker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement); *Kingsbury, Inc.*, 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights—even if . . . it is incorrect—is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Francis Building Corp.*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB 35 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, slip op. at 3. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br at 48–50).

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB 18, 18 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB No. 23, slip op. at 28.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her coworker about the inability to manage the workload in the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March Geaslin actively questioned the propriety of such duties, and complained to her coworker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford Hotel, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunch break, albeit later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunch break later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunch break before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunch break, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her

back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB 476, 478 (2011), citing *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other grounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB at 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Re-

[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB 476, 478 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*,

spondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB 1118 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her, and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petro-*

338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunch break). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

leum Corp., 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1101; see *Goya Foods*, 356 NLRB 476, 478. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, slip op. at 5 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act), adopted in 355 NLRB 636 (2010) enf. denied in part, and remanded on other grounds 679 F.3d 70 (2d Cir. 2012) decision on remand *Starbucks Coffee* Co., 360 NLRB No. 134 (2014).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *Mead Corp.*, 331 NLRB 509 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a

[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014).

private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id., slip op. at 3. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1. Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act.

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

Conclusions of Law

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

Order

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating an employee about her union activity.

(b) Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 22, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the two unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the two 5-day suspensions and termination will not be used against her in any way.

KING SOOPERS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ORIGINAL

16-1367 **UNITED STATES COURT OF APPEALS**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED OCT 25 2016
CLERK

KING SOOPERS, INC.	)	
	)	
Petitioner	)	No. 16-1316
	)	
v.	)	Board Case No.
	)	27-CA-129598
NATIONAL LABOR RELATIONS BOARD	)	
	)	16-1367
Respondent	)	

CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby cross-applies to the Court for enforcement of its Order issued against King Soopers, Inc. on August 24, 2016, in Board Case No. 27-CA-129598, reported at 364 NLRB No. 93. On September 12, 2016, the Petitioner, King Soopers, Inc. filed a petition with this Court to review the same Board Order. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this cross-application pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e) and (f)), because the Petitioner is aggrieved by the Board's Order. Venue is proper in this Circuit under Section 10(e) and (f) of the Act.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, D.C.
October 25, 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KING SOOPERS, INC.	)	
	)	
Petitioner	)	No. 16-1316
	)	
v.	)	Board Case No.
	)	27-CA-129598
NATIONAL LABOR RELATIONS BOARD	)	
	)	16-1367
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia via hand-delivery. I certify that the foregoing document is being served today by first-class mail upon the following counsel:

Thomas J. Kennedy, Esq.
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7033 E Greenway Parkway
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Raymond M. Deeny, Esq.
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Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Dated at Washington, D.C.
October 25, 2016

United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
OCT 25 2016
RECEIVED

October 25, 2016

16-1367

Mark J. Langer
Clerk of the Court
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW, Rm. 5423
Washington, DC 20001-2866

Re: *King Soopers, Inc.v. NLRB*
D.C. Circuit No. 16-1316
Board Case Nos. 27-CA-129598

Dear Mr. Langer:

I am enclosing the original and four copies of the National Labor Relations Board's cross-application for enforcement of its order in this case.

Please serve a copy of the cross-application on the Petitioner, King Soopers, Inc., whose address appears on the service list. I have served a copy of the cross-application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case. The Board attorneys

directly responsible for this case are Robert Englehart (202) 273-2978 and Micah Jost (202)273-0264.

Very truly yours,

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Enclosure(s)

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

OCT 25 2016

RECEIVED

SERVICE LIST
King Soopers, Inc. v. NLRB
Board Case No. 27-CA-129598

Thomas J. Kennedy, Esq. Sherman & Howard 7033 E Greenway Pkwy Ste 250 Scottsdale, AZ 85254-2080	Petitioner's Counsel
Raymond M. Deeny, Esq. Jonathon M. Watson, Esq. Sherman & Howard, LLC 633 17th Street, Suite 300 Denver, CO 80202	Petitioner's Counsel
Stephanie Bouknight King Soopers, Inc. 65 Tejon Street Denver, CO 80223-1221	Petitioner
Wendy Geaslin 416 W. 15th St. Hays, KS 67601-3722	Charging Party
Paula S. Sawyer NLRB Region 27 Byron Rogers Federal Office Bldg. 1961 Stout Street, Suite 13-103 Denver, CO 80294	Regional Director

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1316 **September Term, 2016**

NLRB-27CA129598

Filed On: October 26, 2016 [1642930]

King Soopers, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 16-1367

O R D E R

It is **ORDERED**, on the court's own motion, that these cases be consolidated as cross-appeals.

The Clerk is directed to transmit to respondent a certified copy of this order and a copy of the cross-application for enforcement.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk